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ALL INDIA REPORTER

1923

PATNA SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF THE **PATNA HIGH COURT** REPORTED IN

(1) I. L. R. 2 PATNA
(2) 1923 PATNA HIGH COURT CASES
(3) 4 PATNA LAW TIMES
(4) 1 PATNA LAW REPORTER
(5) 69 TO 74 INDIAN CASES

WITH

MANY MORE EXTRA JUDGMENTS

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1923

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IN GRATEFUL RECOGNITION OF

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PATNA HIGH COURT

1923

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Puisne Judges.

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ALL INDIA REPORTER

1923

PATNA HIGH COURT

NOMINAL INDEX

[228 CASES]

Absence of Star denotes Cases of Provincial or Small Importance.
*** Indicates Cases of Great Importance.**
**** Indicate Cases of Very Great Importance.**

A

Abdul Hamid v. Hasan Raza 366
Abdur Rahman (Sheikh) v. Sheikh Wali Mahamad 72
Ajodha Tewari v. King-Emperor 131
Anand Ram Pramhans v. Ramgulam Sahu 150
Arjun Sahu v. Kelai Rath 436
Audhi Rai v. Emperor 89
* Aulad Ali v. Abdul Hamid 490
* Ayodhya Kuar, Mt. v. Durga Prasad 331

8 B

*Badri Das v. The East Indian Railway Co. 325
* Bahadur Singh (Maharaja) v. Seth Hukum Chand 209
* Baidyanath v. Bholanath Roy 337
Baijnath Sahay v. King-Emperor 292
Balgobind Kumar v. Rai Behari Lal Mitter 96 (2)
Bansidhar Dhar v. Tikait Harnarayan Singh 85
* Bansidhar Marwari v. Indar Narain Singh 438
* Barclay T. v. Mt. Dhandei 322
Bas Deo Narain Singh v. Harakh Narain Singh 156
* Basant Kumari Dasi v. Balma kund Marwari 371
Beni v. King-Emperor 536
Bhagjogni Mt. v. Sakhi Mahton 575
Bhagwan Das v. The East Indian Railway Company 487
Bhagwandas v. Keshwarlal 36
Bhagawan Das v. Keshwar Lal 49
*Bhagwan Lal v. Rajendra Prasad Sahi 564
Bhangi Dubey v. Emperor 519
Bhikhu Mandal v. Bhikehakar Dutta 275
Bhola Pandey v. Ram Bilas Pandey 391
Bhuneshwari Prasad Singh v. Kishen Dayal Bhagat 600
*Bibi Khozaima Mt. v. Official Liquidator of the Kayestha Trading and Banking Corporation Ltd. 417
*Binanand Sawase v. Thuroo Mahto 592
Bishun Prashad Pathak v. Sashi Bhusan Misra 133
*Brij Raj Krishna (Rai) etc. v. Chathu Singh 226
Brij Ratan Das v. Raghunandan Gir 203
Budhan Teli v. Madanmohan Lal 111

34 C

Chandrika Ray v. Ram Kuer Thakur 88
Chatter Kumari Debi v. Pratabhuj Singh 176
*Chattrapat Pratab Bahadur Sahai v. C. G. Lees 558
Chaturgun Bind v. Tilakdhari Singh 402
Chote Lal Modi v. King-Emperor 542

Chintamani Mahapatra v. Satyabadi Kar 71

40 D

* Dalpheroo Mian v. Bangali Mali 481
Damodar Das v. Emperor 56
* Damodar Prasad v. Ram Sarup Kumar 327
* Damrupat Singh v. Rameswar Singh 445
* Dasi Chamar v. Ram Autar Singh 404
Dasrath Singh v. Emperor 158
Dey S. C. v. Mt. Rajwanti Kuer 140
Dhirakshan Singh v. Triloki Prashad Singh 217
Dhobi Roy v. Mahadeo Singh 355
Dukhit Ojha v. Janki Singh 443

50 E

Emperor v. Abdul Hamid 1
Emperor v. Ali Hyder 474
Emperor v. Dewan Kahar 13
Emperor v. Kunja Dusadh 119

54 F

Foujdar Sahu v. Nema Bhogta 135
Fulbati Kumari v. Moheshwari Prasad Singh 453

56 G

Gajadhar Mull Marwari v. Thakur Singh 545
Gajadhar Singh v. King-Emperor 299
* Gajo Chaudhry v. Debi Chaudhry 532
* Gajo Singh v. Emperor 238
*Ganesh Narain Sahi Deo v. Manik Lal Chandra 562
*Gansa Oraon v. King Emperor 550
Ghura Manjhi v. Prabodh Chandra Mazumdar 55
*Gobind Swain v. King-Emperor 228
Goud Chundra Ray v. Janardan Prasad Thakur 180
Govind Mahton v. Emperor 121
*Great Indian Peninsular Railway Company, The v. Jitan Ram Nirmal Ram 285

67 H

Harendra Krishna Bagchi v. Balkumar 57
Hari Bux Ram v. Chhedi Pande 155
Hari Prasad Chowdhury v. Harihar Prasad Chowdhury 205
Harnaraian Pandey v. Nand Keshwar Pandey 406
Henry Hill and Co. v. Sheoraj Rai 58
Hiralal Mahton v. Lila Mahton 104(2)

73 I

*Ishan Chandra Kundu v. Nilratiar Adikari 375

74 J

Jagarnath Chaubey v. King-Emperor 297(1)
Jagdeo Singh v. Emperor 62
Jagdhari Rai v. Langat Gope 572
*Jagdip Prasad Sahi v. Mt. Rajo Kuer 464
Jagernath Das (Mahanth) v. Jang Bahadur Rai 218(2)
Jagnarain Dubey v. Bidapet Dubey 344
* Jaibhadar Jha v. Matukdari Jha 525
Jaideb Thakur v. Jamahir Misser 206
* Jai Krishna v. Mt. Saghra 446
* Jailal Jha v. King-Emperor 537
Jainarain Ramjash (Firm of) v. Sitaram Marwari 520
*Jai Pragash Singh v. Rupmanjari 199
Jairam Sahu v. King-Emperor 338
Jai Rao v. Emperor 104
* Jaldhari Rai v. Muhammad Abdul Kabir 470
Jamil Ahmad v. Kesho Das 407
Janki Ray v. Raja Kalanand Singh 381
* Jantra Koer v. Ali Jan Darji 401
* Jatadhari Singh v. Dukhi Singh 197
Jnanendra Nath Ghosh v. Kumar Jogendra Narain Sinha 384
Jharu Lal v. Mahanath Madan Das 410
* Jhobali Bai v. Sakhi Bai 585
Jhumak Singh v. Tota Mahto 84
Jiblal Teli v. Gena Sahu 229
* Jugal Kishore Narayan Singh v. Bhatu Modi 517

99 K

Kabir Shah v. King-Emperor 297 (2)
Kali Kumar v. Mt. Munabati Kumari 96 (1)
Kali Prasad Singh v. Mathura Singh 28
** Kanhai Lal Khemka v. Thakur Prasad Singh 268
Kaniz Zohra v. Syed Muztaba Hussain 576
Karoo (Sheik) v. Rameshwar Sao 143
Karshan Bhaban Chatalia v. Indra Narain Chandra 597
Kartar Rai v. Taley Chowdhury 218 (1)
Kedar Nath Chaubey v. Jaleswar Ram Tewari 364

Kesho Prasad Singh Bahadur v. Babu Parmeshri Prasad Singh 276
Kesho Prasad Singh v. Lakhu Rai 581
King-Emperor v. Bhola Bhagat 547
Kuldip Singh v. Ram Sewak Singh 183
Kumar Madav Surendra Sahi v. Awadh Missir 86
Kunja Singh v. Barho Ray 353
* Kunj Lal v. Kanhai Mahto 305

115 L

Lachmi Narain Agarwala v. Mukhram Marwari 31
Lakhpat Gope v. Emperor 588
Lakshmi Prasad v. Emperor 307
Lakurka Coal Co., Ltd. v. Biseswar Chatterji 296
* Lal Bihari Singh v. Gur Prasad Singh 290
Lal Nilmony Nath Sahi Deo v. Maharaj Pratap Udai Nath Sahi Deo 29
Lish (Adelaide Christiana) v. (David) Lish 301

122 M

**Madhava Singh, Vakil, *In the matter of* 185 (2)
Madodar Ram v. Emperor 142
Mahabir Misser v. Mt. Aso Kuer 154
Mahabir Ram v. Rambahadur Dubey 435
Maharaj Bhagat v. Hari Har Bhagat 115
Maharaja Bahadur Kesho Prasad Singh v. Bhagwat Saran Pande 174
Maharaja Kesho Prasad Singh Bahadur v. Chandrika Prasad Singh 122
Maharaja Bahadur Kesho Prasad Singh v. Ramjas Pande 324
Maharaja Kesho Prasad Singh v. Ramdeni Singh 397
Maharaja Pratap Udai Nath Sahi Deo v. Sunderbans Koer 76
Maharaja Sir Rameshwar Singh Bahadur v. Basudeva Singh 95
Mahodra Koer Mt. v. Khban Panday 363
*Mahomed Yakub v. Abdul Quddus 187
Mahomed Waheb Hussain v. Syed Abbas Hussain 420
Makbulunnissa, Mt. Bibi v. Mt. Bibi Umatunnissa 33
**Man Singh (Rao Bahadur) v. (Maharani) Nawalakhbati 492
Manik, Mt. v. Ranjas Agarwalla 152
** Manzur-ul-Haq (Mukhtar) v. King-Emperor 185 (1)
*Maulvi Muhammad Fahimal Haq v. Jagat Ballav Ghosh 475
Medni Prasad Singh v. Nand Keshwar Prasad Singh 451
Midnapur Zemindar Co., Ltd. v. Madan Marwari 215
Mohammad Ishaq v. Emperor 157
Mohammed Moinuddin Asharaf (Maulvi Syed) v. (Moulvi) Muhammad Ishaq Ashraf 529
Mohant Ramkishun Das v. Beni Prosad 90
Mohit Narayan Jha v. Kamal Nath Jha 236
Moore, E. A. v. Rai Babu Gulab Chand Saheb 213
Moti Singh v. Dhanukdhari Singh 53
**Musammat Inderbasi Kuer v. Satnaram Singh 521

150 N

Nabijan v. Mt. Sahifan 153(2)
Nagendra Nath Ghosh v. Sambhu Nath Pande 114
*Najmunnissa Mt. v. Jagmohan Lal 433
Nand Kishore Missir v. Kalika Missir 539
Nand Kishore Missir v. Kalika Missir 546
Nandkeshwar Misra v. Sudarshan Ram Tewari 162
Narshingh Thakur v. Bishun Pargash Singh 441
Newa Lal Rai v. King-Emperor 368

158 P

Panchu Chowdhry v. Emperor 91
*Pandit Ramashivendra Narayan Ojha v. Babu Awadh Behari Saran 488
** Pande Satdeo Narain v. Ramayan Tewari 242 (2)
Patait Dinanath Sahi v. Patait Malhiji Baid 149

162 R

Rachhya Raut v. Mt. Chandoo 113
*Radha Gopal Lalji (Sri Thakur) v. Lakshmi Narayan 385
Raghubir Singh v. Jethu Mahton 130
* Raghunath Das v. Sheo Kumar Missir 309
Rai Saheb Sarju Lal v. Baijnath Prashad Singh 44
* Raja Makund Deb v. Sri Jagannath Jenamoni 423
Raja Wazir Narain Singh v. Bhikari Ram 45
Rajgiri Singh v. Jadunath Ray 41
* Rambarai Rai v. Sagina Rai 437
* Ramcharan Singh v. Sheo Dutta Singh 380

Ram Das Sah v. Damodar Prasad 346
Ramdheyan Ram v. Mt. Ram Dularia 153 (1)
Ramdulari Kuer v. Jang Bahadur Singh 589
Rameshwar Dass Mali Ram v. The East Indian Railway Company, Ltd. 298
* Rameshwardhari Singh v. Sadhu Saran 354
* Rameshwar Narain Singh v. Rani Reknath Koeri 165
Rameshwar Singh Bahadur v. Younus Momin 101
Rameshwar Singh Bahadur of Darbhanga v. Narendra Nath Das 259
Ramjas Agarwala v. Linton Molesworth and Co. 411
Ramjatan Rai v. Baliram Prasad 25
*Ramjharia v. Piar Koeri 369
Ramjit Ahir v. King-Emperor 413
Ram Narayan Rai v. Ram Deni Rai 98
Ram Lochan Baid v. Kumar Kamakhya Narain Singh 201
Ramparichan Singh v. Biranji Prasad Singh 295
Rampati Raut v. Mahanth Hanuman Saran 303
Ram Prasad Singh v. King-Emperor 50
Ram Sekhar Prasad Singh v. Sheonandan Dubay 137
Ramshivendra Narayan Ojha v. Awadh Bihary Saran 159
**Ram Sumran Prasad v. Ram Bahadur 224
Ram Sunder v. Amrit Pajiyar, etc. 242 (1)
Ramyad Singh (Kumar) v. Chhedia Barhi 64
Ranji Sah v. B. & N.—W. Railway Co. 540
* Ranjit Sahi v. Maulava Qasim 342
Rasik Behari Prasad Chaudhuri v. Hirdenaram Chaudhuri 30

197 S

** Sadho Saran Rai v. Anant Rai 483
Sadhu Saran v. Ambika Lal 163
Sagarmal Marwari v. Lachmisaran Misir 129
Sarabjit Pande v. Raj Kumar Pande 87
Sarban, Mt. v. Phudo Sahu 65
* Saroj Kumar Mukherjee v. King-Emperor 348 (1)
Satyataran Chowdhury v. Raja Sri Sri Jyoti Prasad Sinha Deo 386
* Shah Mahomed Maudood (Syed) v. Maharaja Sir Rameshwar Singh Bahadur 530
Shahdeo Shukul v. Jageshar Prasad Shukul 293
Shan Sundar Singh v. Munshi Mushaheb Lal 418
**Sheonandan Chowdhury v. Debi Lal Chowdhury 239
* Sheo Prasad Singh v. Sukhu Mohto 518
Shivadhin Singh v. King-Emperor 116
Shyam Sunder Rai v. Jagar Nath Misra 590
Sita Ram Tewari v. Gya Prashad 37
*Stonewigg v. Kameshwar Narayan Singh 340
* Stoney, Miss C. K. H. v. Miss Myrite Stoney 348 (2)
Sukhari Nonia v. Ramkhelawan Thakur 528
Sukhraj Bahadur v. Debi Bukhsh 102 (1)
Sumeshwar Jha v. Emperor 103
* Surajdeo Narain Singh v. Partap Rai 514
Syed Baker Hussain v. Mirza Hussain Mirza 223

219 T

Tanak Chaudhary v. King-Emperor 361
* Thakur Tajeswar Dutt v. Lakhan Prashad Singh 231
Thibu Bhogta v. King-Emperor 356
Tikait Ganesh Narayan Sahi Deo v. Chandu Mistri 83
Triloke Nath Jha v. Bansman Jha 22

224 U

Ugramohan Chowdhri v. Lachmi Prasad Chowdhri 100

225 W

Wahari Mander v. King-Emperor 527
Wajihunnissa Begum v. Fakira Mahton 94
William Maling Grant v. Suraj Mal Marwari 134

THE

ALL INDIA REPORTER

1923

PATNA HIGH COURT

SUBJECT INDEX

Absence of Star denotes Cases of Provincial or Small Importance.
*** Indicates Cases of Great Importance.**
*** * Indicate Cases of Very Great Importance.**

Additional Evidence
——*See* CIVIL P. C., O. 41, R. 27.

Adverse Possession
——Joint collection of rent proved—Failure to pay shares does not amount to asserting adverse claim 193
——Landlord and Tenant — Mere non-payment of rent does not amount to asserting hostile title 201(c)
*——Mortgagee in possession — Trespass against mortgagor's interest should be known to mortgagor 592
——Redemption by one co-mortgagor—His possession is not adverse *ipso facto* to the other co-mortgagors—Record-of-rights 98 (b)

Amendment of Pleadings
——*See* CIVIL P. C., O. 6, R. 17.

Appeal
*——One defendant not made party in appeal—His rights will stand unaffected by appeal 404(a)
——Question of fact—High Court refused to go into it 29 (c)

Arbitration
*——Award partly bad—Court cannot declare it valid in part, or remit it for amendment 470

Behar and Orissa Court Fees Act (1922)
——Memo. of appeal presented to wrong officer before, and received by proper officer after the new Act — Court-fee under the new Act must be paid—Act has no retrospective effect 150 (c)

Benami
——Intention to gift was presumed 187(b)
——Onus lies on party setting up the plea 303(a)

Bengal Court of Wards Act (9 of 1879, B.C.)
**——S. 60—Widow can relinquish without sanction if it is really surrender, but cannot if it is really an alienation which is valid by analogy of surrender 492 (b)

Bengal Estates Partition Act
——S. 25—Declaratory suit that private partition has taken place—Section does not apply 441(b)
——S. 57—Evidence of partition—Enjoyment of separate shares from time immemorial is sufficient to establish partition 441(a)

Bengal Survey Act
——S. 41—Assistant Settlement Officer—Decision of, will have the force of a Civil Court decree 96 (2) (b)

Bengal Tenancy Act
——Sale of Tenure — Only one tenant recorded—Representation by such recording, on behalf of all explained 206
——S. 3 (3)—Payment of rent is not necessary to create tenancy of waste land 176
——Ss. 19, 20 and 21—Occupancy rights are inherent and not the right of landlord to grant 276(d)

Bengal Tenancy Act—(*Contd.*)
——S. 44—Homestead land, let for cultivation—Non-occupancy raiyat, cannot be ejected except on grounds in section 94
——S. 48—*Raiyat* executing *zarpeshgi* lease and then taking land from *zarpeshgidar* under *kabuliat* is an under-*raiyat*—Rent recoverable from him is governed by S. 48 of B. T. Act. 402(b)
——Ss. 50 (2), 115—Scope—Payment of fixed rate for even 25 to 33 years—No presumption of fixity from permanent settlement arises 324 (a)
——S. 52 (1) (b)—Abatement, claim for—All landlords not parties—Suit will not fail by reason thereof 397 (a)
——S. 105—Question as to—Maintainability of suit—Second appeal lies 86 (b)
——Ss. 105 and 109—Rent fixed by compromise under S. 105—Subsequent decision fixing different rate is without jurisdiction 101
——S. 106—Powers of a Revenue Officer are to decide about possession only but he can decide question of landlord and tenant except in case of neighbouring estates 213
——Ss. 109 and 105—Constructive *res judicata*—Doctrine of, does not apply to proceedings under Ss. 105-10, B. T. Act—Civil P. C., S. 11 174 (b)
——S. 120—Proprietor must prove cultivation as *zerait* for 12 years or village usage—Evidence of assertions of title before 2nd March 1883 is conclusive 276 (a)
——S. 148-A—Suit by co-sharer for his share of rent or in the alternative for whole rent—Co-sharers made parties—Suit is properly framed 41 (b)
——S. 153—Decision as to amount of rent—Second appeal lies 41 (c)
——S. 158—Application under, is not a suit—Civil P. C., O. 9, R. 9 does not apply 381
——S. 170 (2)—Application under, may be oral and may be made to the Nazir but must be before tenure is knocked down to purchaser—*Bona fides* need not be gone into—Civil P. C., O. 21, R. 69 does not apply 572
——S. 188—Rent suit—Co-sharers—One can sue for whole rent after making others parties 41 (a)
——S. 188—Section does not apply to tenants 397 (b)

Bengal Tenancy Act—(*Concld.*)
——Ss. 188 and 105—Suit for rent by co-sharer landlords—Receiver appointed to collect rents in respect of one co-sharer's share not made party—Suit will not fail 86 (a)

Cattle Trespass Act
——S. 22—Loss not proved—Compensation not asked for in petition—Compensation order is illegal 292 (b)

Chota Nagpur Encumbered Estates Act
——Ss. 3, 21-B, 2-A—Suit pending—Estate taken over under the Act—Suit cannot proceed 85

Chota Nagpur Tenancy Act (6 of 1908)
——Rent decree—Execution—Court cannot exempt any portion of holding from sale 64 (a)
——S. 14—Resumption of Jagir tenure annuls all sub-tenures—Lands on which mines are sunk are excepted 76 (b)
——Ss. 87, 224 (2)—Decision under S. 87—Second Appeal does not lie to High Court 135
——S. 177—Claim to receive rent on behalf of third person cannot be made by the tenant himself 55
——S. 213—Execution Sale—Suit to set aside is not barred 64 (b)
——Ss. 270 and 211—Landlord recognising transfer—Finding of Dy. Collector that registration was not necessary—Finding is not *ultra vires* 83

Civil P. C. (5 of 1908)
——S. 11—Doctrine of constructive *res-judicata* does not apply to proceedings under B. T. Act, Ss. 109 and 105 174 (b)
——S. 11—Issues not same in the two suits—Section does not bar subsequent suit 65 (a)
——S. 11—*Res judicata*, principle of, applies to execution 180 (b)
——S. 11—Same parties—Prior mortgagee impleaded by puisne mortgagee asserting himself to be prior—Deft. filing written statement only—Decree operates as *res judicata* 290
——S. 11, O. 21, R 66—Settlement of sale proclamation after notice—Court cannot go behind, in subsequent proceedings 134 (b)
——S. 24 (4)—Transfer of Small Cause suit to Munsif's Court—Trial as ordinary suit—No appeal lies from decree 49

Civil P. C.—(*Contd.*)
——S. 35—Decree for costs without indicating proportions can be executed against any judgment-debtor 215 (a)
——S. 35—Discretion—Suit rendered inevitable by consent of party—Costs are rightly awarded against him 420 (b)
——S. 46—Concurrent execution in transferee Court is permissible 224 (b)
——S. 47—Decree against Hindu father—Execution against sons as Legal Representatives—Question of executability of decree on ground of immorality of debts is one within S. 47 143 (b)
——S. 47—Objection to liability of legal representative must be decided under S. 47 149
——S. 47—Petition that properties should not be sold subject to incumbrances as notified in sale proclamation is one under S. 47 134 (a)
——S. 51—Sale without attachment is not void 45 (a)
——S. 53 — Mortgage-decree against Hindu father—Execution can be levied against sons as Legal Representatives 143 (a)
——S. 64—Transfer of attached property—Attachment released and property attached afresh—Transfer is not void 564 (a)
——S. 65—Execution—Sale of land—Crops go along with the land 355
**——S. 73—Judgment-debtors against whom execution is taken, common to all decrees—Distribution allowed—Provisions mandatory—Enquiry under, though summary, must be made where necessary 521
*——S. 92—Claim based on plaintiff's personal right of possession, mingled with a claim based on breach of trust—S. 92 does not apply 309 (d)
——S. 92—Court has power to disregard arrangement in *Wakfnamah* but should not do so as a general rule—Decree, form of—Liberty should be reserved for parties to apply for directions from time to time 420 (a)
*——S. 96—'An appeal'—'An' does not mean 'one' 514 (b)
——S. 100—Judgment of reversal must show that the evidence and reasons of Trial Court are considered 275
——S. 100—Misreading of documents not of title is no point of law 154

Civil P. C.— (*Contd.*)
——S. 100—New Plea—Existence of custom not challenged in lower Court cannot be challenged in appeal 309 (b)
——S. 105—Reasons for remand for further findings on issue not decided are not binding on same Court but are binding when remand lays down the law to be followed by lower Court 226
——S. 105 (2)—Point not taken at time of Remand order cannot be taken in appeal from judgment on remand 45 (c)
——S. 115—Appeal open, but not availed of—Revison does not lie 223
——S. 115—Interlocutory order—No revision lies 411 (b)
——S. 115—Order dismissing execution proceedings without notice to decree-holder is without jurisdiction 180 (d)
**—— S. 115—Refusal to accept deposit under O. 21, R. 89, C. P. C., is refusal to exercise jurisdiction 490 (c)
*——S. 115—Refusal to frame the necessary issue is good ground for interference in revision 518
*——S. 115—Refusal to receive evidence in application for restoration is refusal to exercise jurisdiction 530 (b)
——S. 115—Suit by co-sharer for his share of rent or in alternative for whole rent—Court declining to consider if plaintiff entitled to decree for whole rent—Revision lies 41 (d)
——S. 115—Wrong order as to pleader's fees is not revisable 90 (b)
——S. 115—Wrong view as to burden of proof—No opportunity to discharge it—Revision lies 295 (a)
——S. 141—Execution proceedings—O. 9, R. 4 and cognate proceedings do not apply 239 (a)
——S. 141, and O. 43, R. 1—Execution proceedings—Dismissal for default—No appeal lies 180 (c)
*——S. 144, Art. 182—Limitation Act, applies to applications under S. 144 371 (b)
**——S. 151—Consent decree obtained by practising fraud on Court—Total absence of consent of one party pleaded—Court can set aside decree on application and no suit is necessary 483
——S. 151—Court can grant a certificate for refund of Court-fees on appeal which was returned, on ground of being insufficiently stamped 600
*——S. 151, O. 7, R. 11 (c)—Suit dismissed under O. 7, R. 11 (c) cannot be

Civil P. C.—(*Contd.*)
restored under inherent powers 354 (a)
— S. 152—Clerical error was corrected even after dismissal of appeal 218 (1)
—O. 1, R. 1—Suit for partition—Co-sharer vendor is not necessary party 162 (a)
—O. 1, R. 3—Claim of easement against several proprietors—One only obstructing—Suit against him—Joinder of other proprietors is not necessary 65 (e)
*—O. 1, R. 8—Beneficiary in a Mahomedan Waqf—Can sue to set aside alienations by Mutwalli without recourse to O. 1, R. 8 475 (a)
—O. 2, R. 2—First suit for compulsory registration—Second suit for possession not barred 575
—O. 2, R. 3—Two plaintiffs—Two causes of actions—Defendants same—Joinder cannot be allowed 411 (a)
—O. 5, R. 10—Service of summons on defendant—Identifier of defendant need not be one supplied by party 114 (b)
*—O. 5, R. 17—*Pardanashin lady*—No adult member of family or agent to receive summons—Affixture to outer door is enough 433
—O. 5, Rr. 18 and 19—Presumption as to service is that summons is served as stated in the peon's report 327 (c)
—O. 6, R. 17—Amendment involving change of case cannot be allowed 590 (b)
—O. 6, R. 17—Claim under gift cannot be changed into one under inheritance 481 (b)
—O. 9, R. 8—Dismissal was held to be under R. 8, for default 156
—O. 9, R. 9—Application under B. T. Act, S. 158 is not a suit—O. 9, R. 9 does not apply—B. T. Act, S. 158 381
—O. 9, R. 9, O. 21, R. 100—O. 9, R. 9 applies to proceeding under O. 21, R. 100, by force of S. 141 239 (c)
*—O. 9, R. 13—Both appeal and application—Appeal disposed of—Hearing of application is incompetent 331 (a)
—O. 9, R. 13—Compromise—Filing of amended deed—Court cannot pass decree beyond compromise without notice to defendants 293

Civil P. C.—(*Contd.*)
—O. 9, R. 13—Suit to set aside *ex parte* decree lies not for want of or irregularity in service but if the whole suit was a fraud 242 (2) (a)
—O. 11, R. 14—Production of documents—Order for, must follow one under O. 11, R. 12 337
*—O. 14, R. 2—Issue requiring evidence is not a preliminary issue 344 (b)
*—O. 17, Rr. 2 and 3—Pleader for plaintiff appearing but without instructions—Dismissal is one under R. 2 and not under R. 3 530 (a)
—O. 20, Rr. 1, 7—Pronouncing judgment in open Court—Rule should be complied with in all cases 129 (b)
—O. 21, R. 11—Rule is no bar to simultaneous executions 224 (c)
—O. 21, R. 17—Simultaneous execution being permissible amendment by adding properties during execution should be permitted 224 (d)
—O. 21, R. 35—*Ex parte* order for delivery of possession is not to be made 597 (b)
—O. 21, Rr. 35 and 36—Large tract of land including several villages—Delivery can only be under R. 36—Symbolical possession will operate against judgment-debtor as one under R. 35 (1) 76 (d)
—O. 21, R. 36—Erroneous delivery under, will operate as actual possession against judgment-debtor 76 (e)
—O. 21, R. 57—Decree-holder agreeing to give time to debtor on part satisfaction—Dismissal thereon by Court is one for default, and attachment ceases 456 (a)
—O. 21, R. 64—Sale without attachment is not void 45 (a)
—O. 21, R. 66—Date fixed for valuation on Sale proclamation—Fixing Valuation before that date is without jurisdiction 102 (1)
—O. 21, Rr. 66, 90—Decree-holder's valuation also inserted in proclamation—Proclamation is bad 445
—O. 21, R. 68—Sale within 30 days of attachment—Is not nullity 45 (b)
*—O. 21, R. 84—Sale when complete—Acceptance of bid and declaring the purchaser are necessary 525
—O. 21, R. 89—Application under—Notice must be given to judgment-creditor 353

Civil P. C.—(*Contd.*)
——O. 21, R. 89—Deposit with condition to withhold money—Condition withdrawn—Sale can be set aside 159
——O. 21, R. 89—Mortgagee who has become part-owner can make a deposit 490 (b)
—O. 21, R. 90—Compromise of petition under—Deposit to be made by petitioner—Deposit made with condition but condition withdrawn—Deposit is valid 418
—O. 21, R. 90—Joint owner not made party to suit, need not apply under the rule to set aside the sale of his interest also, but may bring a suit 451 (a)
—O. 21, R. 90—Setting aside sale—Fraud need not be alleged against auction-purchaser 435 (a)
—O. 21, R. 100—O. 9, R. 9—Applies to application under O. 21, R. 100 as it is not execution proceeding 239 (b)
—O. 21, Rr. 100 and 101—'Judgment-debtor' includes all persons bound by decree 76 (c)
—O. 29, R. 1—Where dispossession was caused by a manager of a factory, Held that the suit for ejectment should be against the manager in his personal capacity and not against the factory 558 (a)
——O. 32, R. 3 (3)—Mother not proposed but brother proposed and appointed—Decree is not thereby a nullity 385 (b)
——O. 32, R. 3 (4)—Notice to minor after appointment is not necessary 385 (a)
—O. 32, R. 3 (4)—Representation of minor in Court—Where qualified guardian appears for minor irregularity in his appointment does not justify setting aside decree in another suit unless merits are affected but disqualified guardian renders decree void 242 (2)(h)
—O. 32, R. 4 (3)—C. P. C. (1882), S. 443 did not contain provision of R. 4—Certificated guardian not objecting will be deemed to have accepted guardianship though he might have absented—Breach of rule in S. 443, C. P. C. (1882) is not necessarily fatal 231 (a)
——O. 32, R. 7—Permission, mode of granting—No special form is necessary—Though leave of Court is not expressly recorded, decree is not nullity and cannot be objected to in execution 375 (a)
*——O. 32, R. 11—Notice to minor is not necessary 385 (c)
——O. 34, R. 1—Suit on mortgage—Contribution between puisne mortgages is irrelevant 199 (b)
*——O. 34, R. 5—Mortgage-suit compromised and final decree passed by consent without a preliminary decree—Decrees valid 375 (b)
——O. 39, R. 1—Case where permanent injunction cannot be given—Temporary injunction also cannot be given 133
——O. 39, R. 1—*Prima facie* existence of right and its infringement are first requisites of injunction 209 (b)
——O. 41, R. 1—Memorandum of appeal can be received by proper officer even on holidays 150 (a)
——O. 41, R. 5—Conflicting allegations—Balance of convenience to be looked to 597 (a)
——O. 41, R. 17—Senior pleader absent—Junior pleader expressing inability to argue—Order for dismissal is right 520
——O. 41, R. 19—Notice to respondent not served—Failure of appellant to supply identifier is no ground for dismissal of appeal 114(a)
*——O. 41, R. 19—One appeal dismissed for default—Fresh one is entertainable, if not time-barred—C. P. C., S. 11—Dismissal for default is not a decree 514 (a)
——O. 41, R. 23—Remand can be made where the decision of lower Court is based on pleadings and not on evidence 174 (a)
——O. 41, R. 27—No inherent defect or *lacuna*—Additional evidence cannot be allowed 456 (b)
——O. 45, R. 4—Consolidation of appeals—Appeals from one appeal and the parties must be treated as parties in one suit 215 (b)
*——O. 47, R. 1—Order of rejection of plaint, under O. 7, R. 11 (c) is open to review 354 (b)
——Sch. II, Para. 8—Day fixed for award—Award not filed—Court immediately calling on suit and dismissing it—Order was held to be wrong—Procedure indicated 115

Contract
——Construction—Exception and proviso—Mode of proof laid down 285 (c)

Contract Act
——S. 12—Weakness of mind is not sufficient—Incapacity to understand business and to form rational judgment is the test of unsoundness 187 (a)
——S. 16—Evidence—Undue influence was held not proved 187 (c)
*——S. 38 - Section is not applicable to agent's liability to account to principal 464 (a)
*——Ss. 60, 61—Instalment decree—Payment is to be appropriated first towards interest 322 (b)
——S. 62—Suit on mortgage—Compromise decree does not create new contract 375 (c)
——S. 74—Prior to 1899 increased future interest on default was not penal 231 (b)
——S. 107—Sale of Masoor—Defendant neither paying price nor taking delivery—Plaintiff is entitled to re-sell and claim the difference in prices as damages 36
——Ss. 151 and 152—Railway Act, S. 72—A suit by consignor for compensation for non-delivery is not a suit *in tort*, it is a suit in contract 285 (a)

Court-fee
——Interest "*pendente lite*," is not liable for Court-fee 28
——Question of Court-fee—Depends upon nature of suit 152 (b)

Court Fees Act
——S. 5—Decision of Taxing Officer as to Court-fee payable is final 137 (a)
*——S. 7 (iv) — Partition suits — No question of plaintiff's title or share involved—Valuation for purposes of jurisdiction must be of the whole of the properties and not only of plaintiff's share 342 (b)
——S. 7 (iv) (c)—Plaintiff's valuation can be corrected by Court 137 (b)
*——S. 7, Cl. (iv) (c)—Prayer for confirmation of possession includes prayer for recovery of possession—Such relief is consequential relief 137 (c
——S. 7 (iv) (c)—Suit for declaration as adopted son and for possession is within S. 7 (iv) (c) 100 (a)
*——S. 7 (xxi) (cc) Tenant holding against landlord's will—Suit to eject is governed by section 380
——Sch. II, Art. 17 (1)—Declaratory suit under O. 21, R. 63, C. P. C.—Court-fee payable on, is Rs. 10 though the property is sold before suit is brought 152 (a)
——Sch. II, Art. 17 (6)—Declaration of title claimed under guise of partition suit—Suit must be valued as a title suit 113

Criminal P. C. (5 of 1898)
*——S. 2 (h)—Application to continue proceedings is not complaint 532 (d)
——S. 4 (p)—Writer Head Constable may investigate when officer-in-charge 547 (b)
——S. 54—Complaint recorded by Magistrate is sufficient information to police 547 (c)
——S. 107 (3) and (4)—Bail can be refused only in the special circumstances of clauses (3) and (4) 527
——Ss. 117 (4) and 110—Association of accused not proved—Joint trial is illegal 104 (a)
——S. 133 - Railway land not a public place—Finding as to public way must be specific, in order to apply section 540 (a)
——S. 137—Finding as to the *bona fides* of claimant is necessary 540 (b)
——S. 141—Failure of Jury to return verdict without any fault of a party entitles him to alternative remedy under S. 135, Cr. P. C. 229
——S. 141—Jury not returning verdict in time—Magistrate must make inquiry before he passes order 131 (b)
——S. 145—Decree of Civil Court—Possession delivered in execution—Magistrate is bound to uphold it 76 (a)
*——S. 145—Non-filing of written statement does not take away jurisdiction of Magistrate to try case—Case ready for trial can be transferred—Parties claiming exclusive plots—Proceedings are maintainable 369
*——S. 145—No presumption against loser will be drawn, in Civil proceedings 401
*——S. 145—Order of Magistrate regarding more land than included in the proceeding is illegal 528
——S. 145—Possession and title of first party proved—No other proof is wanted 31 (a)
——S. 145—Procedure—Decree of Civil Court—Value of, must depend upon circumstances of each case 364
——S. 145—Trial of numerous claims held together is not illegal, if the

Criminal P. C.—(*Contd.*)
subject-matters are linked together 545
——S. 145—Title questions and validity of decrees are beyond scope of inquiry —Recent delivery of possession by Civil Court—Magistrate should normally give effect to it 437
——S. 145—Trial under—Procedure for warrant case should not be adopted—Acting on evidence in chief without opportunity of cross-examination is illegal 53 (a)
——Ss. 145 and 146—Where property is in joint possession, order under S. 145 and 146 cannot be made 546
——S. 146—First party and her mortgagee in possession but not second party—Subject of dispute could not be attached 363
——S. 148—Local inspection—Note and plan of disputed area prepared—Everything placed on record—Magistrate acts properly in doing so 31 (b)
——Ss. 148 (3) and 145—Order for costs —Application for recovery of—Magistrate has no discretion to refuse on ground of delay 57 (a)
——Ss. 148 and 147—Local inspection—Investigation by Magistrate himself is within his powers provided he notes down what he saw and does not take action on hearsay evidence 366 (b)
——Ss. 154 and 162—Where first information is vague and the police make enquiry—Statements made to police during this enquiry is not first information 550 (a)
——S. 164 (3)—No question as to detention—Confession should not be ignored —Magistrate should not peruse Police records before recording confession—He should question accused closely as to motive for confession 13 (d)
——S. 164 (3)—Power to record confession—No rule as to form of questions can be laid down—If accused confesses, Court must see if it can be relied upon 356
——S. 190 (c)—'Information received' —Answer by petitioners in proceeding against them under S. 144—Statement in, is not "information received" 532 (b)
——Ss. 192 and 528—Transfer of cases under Ss. 145 and 147 is within Magistrate's powers 366 (a)

Criminal P. C.—(*Contd.*)
——S. 195—Different views of Courts—Sanction should not be granted 102 (2)
——S. 195—Public Demands Recovery Act—Officer directing refund of surplus is not a Court—Forgery in proceedings before such officer—No sanction is necessary 410
——S. 195 (a)—Proper investigation is necessary before granting sanction 542 (b)
——Ss. 202 and 54—Trial by Magistrate and investigation by Police conducted simultaneously—Order under S. 202 does not affect the power of police to arrest and investigate 547 (a)
——S. 203—Dismissal of complaint—Complainant not examined on oath—Dismissal is improper 539
——Ss. 232 and 221—Unlawful assembly —Charge not mentioning common object—Evidence also unsatisfactory—Accused cannot be convicted 1 (d)
——Ss. 236 and 237—Commission of any offence itself doubtful—Section does not apply 121 (b)
——S. 260 (2)—Sub-S. (2) was held not to apply to the case 157 (a)
——S. 263—Summary Trial—Reasons justifying conviction must be given by the Magistrate 56 (a)
——S. 284—Objection to assessors—Assessors selected should be above suspicion 116 (c)
——S. 288—Statements before committing Magistrate are good evidence 550(b)
——S. 297—Charge to Jury—Failure to refer to inadmissible evidence heard by jury—Vitiates verdict 103
——S. 298—Circumstances to be considered indicated 238 (a)
——S. 298—Reference to statement not on record amounts to misdirection 158
——S. 303—Reasons should not be asked of the Jury for their verdict 474
——S 342—Accused defended by counsel —Lengthy examination is unnecessary 91 (b)
——S. 342—Failure to examine vitiates trial 292 (a)
——S. 345—Several accused—Compounding with one—Whole case will be deemed compounded 348 (1)
——S 355—Summary trial—Evidence need not be read to witnesses 157 (b)
——S. 364—Statement of accused not read over to accused—Statement is inadmissible in evidence 13 (a)

Criminal P. C.—(*Contd.*)
*——S. 369—Final Order—Entry "Enter false: mistake of law" is a final disposal and cannot be altered or reviewed by the magistrate 532 (c)
——S. 386—Discretion in recovering fine —Only exercisable when there is sentence of fine and in default, imprisonment 57 (b)
——S. 403—Charge for minor offence only triable by Magistrate—Discharge under S. 352, I.P.C. does not bar charge under S. 384, I.P.C. 228 (c)
——S. 417—Appeal from acquittal—High Court will not interfere except where the lower Court has seriously blundered so as to produce result mischievous at once to administration of justice and the interests of the public 119 (a)
——S. 423—Appellate Court cannot dispose of appeal summarily without writing a judgment 368
——S 439—Compromise after conviction —High Court in Revision has no power to sanction 89
——S. 439—In revision against appellate judgment of Sessions Judge applicant can only show how Sessions Judge decided wrongly 233 (b)
——S. 439—Possession delivered by Civil Court — Failure to maintain, by Magistrate is an error of jurisdiction 76 (g)
——S. 439—Series of errors committed by lower Courts—Orders were set aside 438
——Ss. 439, 146—Order under S. 146—General remarks that evidence is unreliable is not a proper disposal and the order is revisable 588
——S. 476 - Penal Code, S. 182—A non-judicial and irregular enquiry—Improper basis to decide that an information given to the Magistrate was false 542(a)
——S. 488—Effect of decree on previous order under the section considered 153 (1)
——S. 509—Medical witness — Cross-examination reserved for Sessions Court—Latter Court not summoning him but admitting previous deposition —Procedure is wrong 116 (a)
——S. 517—Property out of the Court's custody—Section does not apply 84
——S. 528—It is not the object that a case should be transferred merely because it goes against particular party 228 (b)

Criminal P. C.—(*Concld.*)
——S. 528—Notice should be issued but non issue is not by itself fatal 228 (a)
——S. 562—Section does not apply in a case under I. P. C., S. 411 297 (2) (b)

Criminal Trial
——Appeal— Appellant absent — Judgment is signed before pleader appeared, nothing can be done 297 (2) (a)
——Conduct of accused—Care should be taken that it may not have an exaggerated effect 13 (e)
——Inadmissible evidence on record—Conviction not necessarily bad 119 (b)
——New offence under special law—Accused cannot be proceeded against under general law 1 (f)
*——No evidence except that of complainant—Enmity between complainant and accused—Conviction is unsafe 519
——Suggestions of Public Prosecutor —Court should not brush aside 104 (b)

Custom
——Party setting up, not proving it—General law applies 95 (b)

Deed
——Construction— *Zarpeshgi* lease by *raiyati*—Transferee to hold directly under landlord—Transferor ceases to be a *raiyat* for the period of the transferee's occupancy 402 (a)
——Construction—Grant as 'Malik' to wife but saying that she should utilise income and that property is to go to son if born—Grant is only that of life estate 87

Decree
——Compromise decree—Part-payment accepted by decree-holder—Right to interest is not lost 322 (a)
——*Ex parte* decree—Court finding in later suit that summons was not served on defendant in former suit — No fraud is established thereby 406
——Form of—Relief not asked for C. P. C., O. 7, R. 7—But facts pleaded in plaint which would cover the relief — Court can grant the relief though not prayed for 386(b)
——Fraudulent decree—No re-hearing is allowed at the instance of decree holder 327(a)
——Setting aside—Fraud — Absence of service by itself does not indicate fraud

Decree—(*Concld.*)
but absence of foundation for suit or presence of fair defence indicate fraud 242 (2) (b)
——Setting aside—Fraud—Decree obtained by false evidence cannot be set aside by suit 226
——Setting aside—Fraud — Onus is on party alleging fraud to show that there was no foundation for the suit 327 (b)

Easements
——Owner of land can use water falling thereon or allow it to flow naturally on to his neighbour's land 65 (b)
——Right to flow of water — Easement right can be claimed only in respect of water flowing in defined channel 65 (d)
——Servient owner cannot compel exercise of easement right 65 (c)

Easements Act
——S. 18—Custom of using another's land for performing Ramlilas for putting up marriage processions, for keeping *Khathans* and tying cattle during rainy season is not invalid—A declaration of such right can be given 346

Ejectment suit
——Adverse possession— Plaintiff must prove title and possession within 12 years from suit 558 (b)
——Suit for possession—Plaintiff having better title than defendant must succeed 72 (c)

Estoppel
——*See* EVIDENCE ACT, S. 115.

Evidence
——Acting on evidence on chief without opportunity for cross-examination is illegal 53 (a)
*——Application of—Injury said to be caused by brick—Absence of external mark does not disprove case 413 (c)
——Document not given effect to—Is not admissible to prove matters mentioned therein 37 (a)
*——Fraud—Evidence consistent with plaintiff's and defendant's story — Fraud cannot be said to be established 327 (d)
——Practice—Document produced alleged to be forgery—Party alleging must prove it before asking Court to reject it 31 (c)
——Witness—Interested —Toddy shopkeepers will be interested in saying nothing against their own customers 413 (a)

Evidence Act
——S. 13 — *Batwara Khasra* was held admissible 163 (b)
——S. 18—Admission by Mukhtear — Party not bound unless *mukhtearnama* authorises it 37 (b)
—— S. 18—Minor—Admission necessary to the case though made by minors is binding 276 (c)
——S. 18—Suggestion is not admission 303 (b)
——S. 21—Road Cess—Return is admissible against landlord who signed it 163 (c)
——Ss. 24, 80—Conflict between—None exists—"Appears" means appears on evidence not on conjecture 13 (b)
*——S. 32 (5)—Geneological tree merely copied by the dead person from an old one is not admissible 585
——S. 35—*Batwara Khasra* is not a 'record' within S. 35 163 (a)
——Ss. 36 and 87—*Thak* map is no evidence of prescriptive titles 558 (c)
——Ss. 61 and 65—Admission of secondary proof—Objection as to mode of proof cannot be taken after Court has admitted the document 276 (b)
——S. 70—Admission of executant is not sufficient as against strangers 436
——S. 91—Party in possession of document cannot let in secondary evidence 111 (a)
——S. 101—Effect of Admission of execution is laid down 205 (a)
——S. 101—Proof of relationship is to be given by him who sets it up 309 (c)
——Ss. 101, 102, 103—Transfer by tenure-holder—Knowledge of grantor, question as to—Onus cannot be laid upon him to prove negative 76 (h)
——Ss. 101-103—Evidence consistent with allegation of plaintiff and denial of defendant—Plaintiff must fail 165 (c)
——S. 114—Failure to call all witnesses is no ground for disbelieving the witnesses produced or for drawing adverse inference against prosecution 413 (b)
——S. 114—Inability to get third persons to produce account-books—Suit cannot fail 71 (b)
——S. 114—Non-production of documents affords presumption against defaulting party 218 (2) (a)
——S. 114—Official acts will be presumed to be done within jurisdiction 96 (2) (c)

Evidence Act—(*Concld.*)
——S. 114—Party not producing document—Presumption is against him 111 (b)
——S. 115—Lessees not producing the deed in their possession to show under what terms they had the right to build on the land—Mere fact that landlord stood by, while tenants built on the land will not estop the landlord from pleading that lease was a temporary one 111 (c)
——S. 115—No estoppel applies when truth is known 461 (d)
——S. 118—Witnesses of tender age—Capacity to give evidence—Record of opinion as to, is not obligatory 91 (a)
——S. 138—No opportunity to cross-examine witnesses—Evidence is not admissible 53 (b)
——S. 138—Prosecution is not entitled to examine-in-chief on the substantive case after cross-examination by accused 116 (b)
——S. 141—Prosecution witness—Leading question without declaring witness hostile is illegal 62

Execution
——An application to set aside sale is not one in execution 29 (b)
——Award of damages for a future uncertain event is illegal and cannot be executed—Even if executable, subsequent orders of Court without application by decree-holder cannot save limitation 407
——Ceases when sale is confirmed 22 (b)
*——Decree for rent—Sale in execution of, subject to liabilities under another decree — Decree-holder himself purchasing properties—Execution against other properties of debtor in respect of the other decree is not barred 517
*——Mortgagee auction-purchaser stands in no better position against strangers than his mortgagors 371 (a)
——Order dismissing execution proceedings without notice to decree-holder is without jurisdiction 180 (d)
——Simultaneous execution was recognized under all the Codes including that of 1882 224 (a)

Execution sale
——Failure to attach—Sale not void 45 (a)
——What passes under—D. Register and Khatian not reconcilable—Sale certificate should be looked into 30

Ex-parte decree, setting aside of
See CIVIL P. C., O. 9, R. 13.

Fishery
*——Exclusive right of, is an interest in immoveable property— But if mere right to fish along with others it is an easement 58

Government of India Act
——S. 107—Refusal to frame the necessary issue is good ground for interference in revision 518

Guardian and Ward
——Suit by minor for partition against father – Father cannot thereafter act as guardian and dispose of property 25 (b)

Hindu Law
*——Adoption—Age of adoptee—Adoption of boy over 5 years is valid—Kalika Purana passage cannot be relied upon 423 (b)
*——Adoption — Bribe to adopter — Motive of adopter will not invalidate adoption—Public policy does not concern itself with motives of persons 423 (e)
*——Adoption — Ceremonies — *Putreshti Jag* or sitting upon the *bedi* is not absolutely necessary for validity of adoption 423 (c)
*——Adoption — Giving by widowed mother—Husband's consent need not have been obtained 423 (d)
——Alienation by one co-parcener—Suit by another co-parcener for his share only in the alienated property on ground of no necessity does not lie 590 (a)
——Alienation—Co-parcener—Purchaser of co-parcener's share cannot enter into possession but must bring a suit to ascertain his share 451 (b)
——Alienation—Recitals are not proofs of necessity 143 (e)
——Alienation—Widow—Gift by widow cannot be challenged by persons other than reversioners 122 (a)
——Debt—Plea of Hindu son that debt of father was immoral—Onus of proving it is on son 143 (d)
——Debt—Sons' liability is a personal one for debts not incurred for immoral purposes 143 (c)
——Debts—Necessity—Long series of transactions—Details of necessity need not be proved—Debt borrowed to pay a decree-debt is *prima facie* for necessity 443

Hindu Law—(*Concld.*)
——Gifts—Oral gifts must be established by satisfactory oral evidence 165(b)
**——Inheritance—Daughter's sons succeeding to grand-father get ancestral estate in which their sons have interest 492 (e)
——Joint family — Alienation — Legal necessity — Mere representation not sufficient—Purchaser must prove that on a *bona fide* enquiry he satisfied himself as to its truth 197
——Joint family—Contract in favour of manager personally —Not enforceable by other members of his family after his death 589
——Joint family—Debt by one member —All members are liable if creditor proves necessity or *bona fide* inquiry by himself 71 (a)
——Joint family — To save properties from sale at execution is legal necessity 268 (b)
——Partition by mother in favour of daughters—Daughter's son is bound by deed if he does not claim as reversioner 242 (2) (c)
——Partition—Clear declaration of intention will effect 25 (a)
——Religious Endowments—Marriage of mohunt does not necessarily entail forfeiture of office 309 (f)
——Religious Endowments — Sallakha Asthan in Behar—Succession devolves upon chief disciple 218 (2) (b)
*——Religious Endowment—Succession —Custom, as to, not proved—Practice maintained for 300 years should not be departed from 309 (a)
——Reversioner—Tenancy beyond lifetime by limited owner terminates on death of limited owner and reversioner can sue for possession 130
*——Widow—Maintenance grant — Accumulation goes to her heirs 165 (d)
**——Widow—Relinquishment—Nature of—Conveyance for consideration to next heir is not relinquishment—A relinquishment is made by some act justifying inference that she is civilly dead 492 (c)

Impartible Estates
——Ghatwali tenures — Succession — Hindu Law (Mitakshara)—Devolution is under Hindu Law subject to incident of impartibility—Males exclude females—Estate is not *ipso facto* the separate property of the owner 453 (b)

Income Tax Act (1922)
——Ss. 46 (3) and (4)—Distress warrant by Collector to Police Officer is illegal —Penal Code, S. 353 338

Interpretation of Statutes
——"Deemed"—The thing to be "deemed" as something else is treated by a statutory fiction as that other thing, for the purpose of the statute 88 (b)
——'Law,' meaning of—Rule framed under section of Act is not 'Law' unless Act itself says so—Power to regulate does not imply power to prohibit 1 (e)

Jurisdiction
——Consent cannot give 76 (f)
——Jurisdiction as to person, if it exists, is not ousted by mode of bringing the person before Court 242 (2) (g)
——Kinds indicated 242 (2) (f)
——Submission to—No inherent lack of jurisdiction—Absence of formality is immaterial 562
——Voluntary submission by foreigner vests jurisdiction and then foreigner can be restrained from executing decree in another Court 209 (a)

Jury
——Trial by—Inadmissible confession read out—Verdict is vitiated 142

Landlord and Tenant
——Rights of tenant—*Gair mazruka* lands and *rastas* belong to proprietors 37 (c)
——Trees—Property in trees or that which is likely to become timber is in the landlord and the property in bushes is in tenant 95 (a)
——Trees, right to—Evidence produced by tenant—Burden shifted on landlord 295 (b)

Land Tenure
——Ghatwali Tenure in Taluka Damri —Distinction between Kharagpur and Birbhum Tenure—Former are alienable with consent of zamindar but latter only with consent of Government 453 (a)

Lease
——Construction — *Zarpeshgi* lease or mortgage—Interest to continue after termination of lease—Transaction is a mortgage 122 (b)
——Specific performance—Lessee entitled to renewal, being in possession is entitled to specific performance compelling lessor to grant renewal 236

Legal Practitioner
——What amounts to negligence—Damages cannot be awarded unless negligence is proved 259 (c)
Legal Practitioners Act
——S. 13—Warning is not sufficient punishment for defying law—Duties of a Vakil discussed 185 (2)
——S. 14—Inquiry by superior Court is invalid 185 (1)
Letters Patent (Patna)
——Cl. 27—Suit for declaration that marriage was valid, does not lie 301
Limitation Act
——S. 5—Sufficient cause — Mistake of pleader may amount to 140
*——Ss. 5 and 14—Sufficient cause — Court holding that defendant was dead —Plaintiff instead of setting aside abatement—Appealing against order, and after its dismissal, applying for substitution of Legal Representatives—No sufficient cause 417
——S. 12—Day of pronouncing judgment is day of judgment 129 (a)
——S. 12—Decree not prepared in time —Time between judgment and signing of decree must be excluded 529
——S. 18—Onus of proof that continuing effects of fraud had been removed, is on the party guilty of fraud 435 (b)
——S. 22 — Application under C. P. C., O. 9, R. 13—Section does not apply 88 (a)
*——S. 23—Applicability— Declaratory suit—Section does not apply 475 (d)
——Art. 30 —Loss of portion of consignment—Time runs from loss 298
——Art. 62 and S. 2 — Art. 62 would include claim against legal representatives for money received for plaintiffs, used by them or their father through whom they derived their liability to be sued 259(b)
——Art. 85—Price of goods was to be paid from time to time—Vendor debited to vendee price on various dates—Occasionally balance was in favour of vendee—This is not mutual account 242 (1)
——Art. 89—Joint principals—Time will run only from date of joint demand 464 (c)
——Arts. 89 and 90—Articles do not apply to suit against legal representative of agent—Time runs from refusal to account 259 (a)
Limitation Act—(*Concld.*)
*——Art. 120—Suit to set aside alienation by mutwali is within the article 475 (c)
——Art. 139—Tenant by sufferance becomes a tenant from year to year by consent to continuance of tenancy 201 (a)
——Art. 141—Time runs from death of widow 72 (b)
——Art. 144—Suit for possession—Plaintiff not in possession 12 years back — He cannot succeed unless he proves dispossession of defendants since that date 96 (2) (a)
——Arts. 148 and 144—One mortgagor redeeming mortgage—Suit for possession by co-mortgagor is governed not by Art. 148 but by Art. 144 98 (a)
——Art. 176—Application under Chota Nagpur Tenancy Act, to substitute Legal Representatives of plaintiff—Is within the article—Civil P. C., O. 22 applies—Chota Nagpur Tenancy Act, S. 265 29 (a)
——Art. 182—Application for issue of notice to judgment-debtor is step-in-aid 180 (a)
*——Art. 182—Prior application for sale of properties—Later application for arrest—Latter cannot be regarded as continuation of former 488
——Art. 182—Step in-aid—Application to Court which transferred a decree is not a step-in-aid 384
——Art. 182 (5)—Application for confirmation of sale or for delivery of possession—Applications do not constitute step-in-aid 22 (a)
Mahomedan Law
——Alienation by widow in possession for dower debt—No transfer of dower debt—Alienee cannot retain possession after widow's death as against heirs of widow 72 (a)
——Dower—Transfer by widow in possession of property of her husband in lieu of dower, is valid until the dower is paid 153 (2)
——Dower—Widow in possession for dower debt—Has no proprietary title —Transfer by widow—Transferee can retain possession until dower debt is satisfied 33 (a)
——Gift—Delivery of possession is necessary—Intention to transfer, must be unequivocally expressed 481 (a)

Mahomedan Law—(*Concld.*)
——Waqf—Sajjadanashin—Females cannot be sajjadanashins and minor cannot be appointed as mutawalli 576
Malicious Prosecution
——Conviction in first Court and acquittal in appeal—Presumption is against the absence of reasonable and probable cause 344 (a)
Mines and Minerals
——Mining lease—Damages, measure of—Neither 20 times annual rent nor one year's rent is the measure of damages for letting out the surface for cultivation purposes 296
Minor
——Doctrine—Legal necessity to be involved only to protect a minor's estate—Lender's duty—He is to enquire only as to the particular transaction—He is not affected by precedent mismanagement unless he is a party to the same 269 (a)
Mortgage
*——Adverse possession—Mortgagee not entitled to possession is not affected by acquisition of title by adverse possession against mortgagor 305
——Mortgagee-auction-purchaser stands in no better position against strangers than his mortgagors 371 (a)
*——Mortgagee becoming a part owner—Can sell other portions for proportionate amount of mortgage-money 490 (a)
——Mortgagor though trustee is estopped from setting up trust 203 (b)
——Rights of mortgagee — Mortgagee can enforce whole security against any property he likes—Equities, if any of purchasers of equity of redemption can be gone into only in separate suit 44
Mortgage suit
——Question of paramount title should not be considered 203 (a)
——Suit on—Contribution between puisne mortgagees is irrelevant 199 (b)
Occupancy Holding
*——Non-transferable—Holding can be sold in execution of money-decree 514 (c)
Pardanashin lady
*——Execution of document—Principles—Persons claiming under document must show that she knew what she was doing—Principles enunciated in books are only rules of prudence and depend upon facts of each case 492 (f)
Partition
——Suit for—Unity of title and possession—Both are necessary 162 (b)
Part Performance
**——Theory is applicable only on subsequent actings and conduct 492 (d)
Patna High Court Rules
——R. 37 (b)—'Dismissed for default'—Withdrawal after witnesses have been examined does not operate as dismissal for default 90 (a)
——Chap. I, R. 14—Notice of appeal to respondent—No identifier is necessary 114 (c)
——Chap. II, Rr. 16, 14 and 13—Memorandum presented to Assistant Registrar is not a valid presentation 150 (b)
Penal Code
——Ss. 141, 145—Order under S. 30, Police Act, prohibiting procession—Non-compliance—Unlawful assembly—Evidence of common object unsatisfactory—Accused cannot be convicted 1 (c)
——S. 147—First party in possession—Second party dismantling disputed house—Second party is guilty of offence under S. 147 361
——S. 147—Possession of the accused—Accused can enforce their right to crops and so cannot be guilty 299
——S. 149 — Principal offender guilty under S. 302, Penal Code—Other members cannot be convicted under S. 304 read with S. 149 50
——S. 188—Order to remove obstruction—Disobedience—Order to show cause against prosecution—Petitioner coming and saying that he has removed obstruction—Order for prosecution was held to be bad 131 (a)
*——S. 297—Local inspection — Magistrate's own opinion is not evidence 537
*——S. 379—Accused, declared to be in possession in a previous case, removing crops—Removal by accused before the prior case is decided against him in appeal is not theft 532 (a)
——Ss. 379 and 108— Accused standing by the thief—No other evidence—Accused is not guilty 121 (a)
——S. 411—Reformatory Schools Act, S. 31—A boy of 14½ years, convicted under Penal Code, S. 411 cannot be let off after mere admonition 297 (1)
——Ss. 417 and 477 (a)—Books wherein entries were changed by accused not having left accused's hands—Act of ac-

Penal Code—(*Concld.*)
cused does not amount to attempt but only to preparation—Difference between attempt and preparation pointed out 307

——S. 447—Intention to annoy or insult or commit any offience is necessary 56 (b)

——S. 511—Difference between attempt and preparation pointed out 307

Police Act
——S. 30—Notification under, prohibiting procession—Non-compliance with —Offence is committed 1 (a)

——S. 30-A—Conditions of license not violated—Section does not apply 1 (b)

Practice
——Case sent back from High Court—Parties must be given notice of receipt of record 597 (c)

——Courts' duty — Inroad upon the liberty of subject, will not be tolerated by Courts 1 (g)

——Criminal Trial—Retracted confession is not acted upon unless corroborated—Confession cannot be admitted in part 13 (c)

*——Dismissal of suit after preliminary decree for partition is bad 342 (a)

——English rules—Summary remedies of plaintiff on default of pleading by defendant—Do not apply in India 386 (a)

——Erroneous judgment cannot, but irregular judgment can be ignored in collateral proceeding if merits are affected, while void judgment is nullity and voidable judgment can be set aside by the Court itself or by a superior Court 242 (2) (e)

——Judgment—Based on conjecture and inadmissible evidence is invalid 37 (e)

——Local inspection—Magistrate's own opinion is not evidence 537

*——New plea—Question of law requiring no further evidence can be heard in second appeal 423 (a)

**——Person under disability—Change of plea on ceasing of disability allowed 492 (a)

*——Pleadings—Prayer for confirmation of possession includes prayer for recovery of possession—Court Fees Act, S. 7, Cl. (iv) (c) 137 (c)

Practice—(*Concld.*)
——Procedure—*Ex parte* order for delivery of possession not to be made—Civil P. C., O. 2, R. 35 597 (b)

——(Criminal)—Procedure—Summoning of witnesses—Two different applications on same day—Trifling delay in applying not to be considered, very material 536

Pre-emption
——Subject of pre-emption, mokurari land is not—Strict limits must be recognized as right is opposed to public interest 217 (a)

——Unless proprietary possession is transferred, the right of pre-emption does not accrue 217 (b)

Pre-emptor
——Ownership (not necessarily possession) is necessary for pre-emptor—Perpetual lease is not sufficient 217 (c)

Principal and Agent
*——Co-principals — Discharge by one is not valid as against the others 464 (b)

Probate and Administration Act
——Claimant by survivorship is not entitled to get Letters of Administration to estate of deceased for in that case deceased leaves no estate 96 (1)

Property
——Person in possession of property as security for dower debt — Right of, is itself property which is transferable 33 (b)

Railways Act
——S. 72—Risk-note — Package means both covering and contents 487

——S. 72—Risk-note B—Compensation for non-delivery—Question of *onus* discussed 285 (b)

*——S. 72—Risk-note B signed—Consignor must prove wilful neglect or theft by Railway servants — Owner cannot allege want of authority to his servant or agent who delivers goods to railway to sign the risk-note 325

Record-of-Rights
——Estates Partition Act and B. T. Act —Difference—Presumption is that it is accurate and that rent payable by tenant to proprietor is that entered in Batwara papers—But presumption is rebuttable 391

*——Presumption as to correctness of entry exists and no further evidence to prove the same is necessary 340 (b)

Record-of-Rights—(*Concld.*)
——Presumption in favour of is not rebutted by Batwara maps 37 (d)
Registration Act
——S. 82 (a)—Revision—Registrar not a Criminal Court—High Court cannot interfere with his order 155
Res Judicata
——*See* CIVIL P.C., S. 11.
Specific Relief Act
——S. 42—Challenge thrown on title—Suit for declaration to meet the challenge is one under S. 42 100 (b)
——S. 42—Further relief not prayed for—Suit is not maintainable — Transfer void in law — Transferor himself can question it—No equity exists between transferor and transferee—Trust 475 (b)
——S. 42, Proviso—Not applicable to suits under O. 21, R. 63, Civil P. C. 564 (b)
Stamp Act
*——S. 36—Document admitted—Objection on the ground of insufficiency of stamp should not be entertained subsequently 404 (b)
Subrogation
——Intention is necessary 199 (a)
Succession Act
*——Joint and sole administration—Persons equally entitled to administration quarrelling with each other—One only can be appointed—Court prefers sole administrator 348 (2) (b)
——S. 204 — Joint administration—Persons equally entitled to administration need not be jointly appointed 348 (2) (c)
——S. 246—Petition not giving details but materials otherwise present before Court—Section is sufficiently complied with 348 (2) (a)
——S. 11—Objection to jurisdiction not taken in Courts below—No prejudice proved—Decree is valid 581
Suits Valuation Act
——Partition suits — No question of plaintiff's title or share involved—Valuation for purposes of jurisdiction must be of the whole of the properties and not only of plaintiff's share 342 (b)
Temporary Injunction
——*See* CIVIL P. C., O. 39, R. 1.
Transfer of Property Act
——S. 8—Execution sale of land—Crops go along with the land 355
——S. 55 (4)—Lien gives no title to possession 205 (b)
——S. 60—Integrity — Redemption of a portion, mortgagee receiving half amount from half owner does not break integrity of mortgage 242 (2) (d)
*——S. 106 — Tenant holding over—Assent of proprietor—Tenancy can be put an end to only by notice to quit 340 (a)
——Ss. 107, 116 — Holding over upon payment of rent to landlord — Tenant becomes tenant from year to year 201 (b)
——Ss. 122-123—Gift — Delivery in the case of gift of moveables is as described in Contract Act, S. 90 165 (e)
——S. 130—Transfer of rent due — Oral transfer is not valid 165 (a)
——S. 130 — Transfer of security for dower debt—Transferee takes subject to equities 33 (c)
Trust
——Transfer void in law — Transferor himself can question it — No equity exists between transferor and transferee 475 (b)
Words
——"Birakt Bairagi" may not necessarily mean non-marriageable state 309 (e)
——Power to regulate does not imply power to prohibit 1 (e)
Words and Phrases
——Timber means trees fit for building—Bamboos if so used are timber 95 (c)

THE

ALL INDIA REPORTER

1923 PATNA

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 1923 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 1923 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, 1923 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 1923 with corresponding references of the ALL INDIA REPORTER.

N.B.—Column No. 1 *denotes pages of* I. L. R. 2 PATNA.

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

I. L. R. 2 Patna=All India Reporter.

ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.		
1	1922	*P*	432	207	1923	*P*	45	386	1923	*P*	451	607	1923	*P*	492	793	1924	*P*	46
7	„	„	448	217	„	„	122	391	„	„	475	676	„	*PC*	128	796	„	„	262
10	„	*PC*	269	230	„	*PC*	21	403	1924	„	187	685	„	*P*	453	800	„	„	37
18	„	*P*	588	243	„	*P*	29	414	1923	„	276	708	1924	„	283	805	„	„	234
38	„	*PC*	272	247	„	„	384	432	„	„	342	712	„	„	160	809	„	„	23
52	„	*P*	514	249	„	„	22	435	„	„	290	715	1923	„	490	814	„	„	248
65	„	„	507	257	„	„	410	442	„	„	285	720	„	„	517	819	1923	„	576
74	„	„	562	260	„	„	380	452	1924	„	88	724	1924	„	259	829	1924	„	273
75	1923	„	72	264	„	„	150	459	„	„	128	731	1923	„	483	833	„	„	238
84	„	„	33	273	„	„	385	466	„	„	164	739	„	„	514	839	„	„	213
92	„	„	324	277	„	„	371	469	1923	„	423	746	1924	„	267	874	„	„	77
94	1922	„	435	285	„	*PC*	37	488	1924	„	71	749	„	„	231	879	„	„	27
110	1923	„	65	296	„	*P*	231	504	1923	„	354	754	„	„	118	890	„	„	235
125	1922	„	615	309	„	„	413	508	„	„	348	759	„	„	122	898	„	„	100
134	1923	„	1	317	„	„	436	517	„	„	550	765	„	„	258	906	„	„	387
168	„	„	417	319	„	*PC*	59	534	„	„	418	768	„	„	258	909	„	„	120
171	„	„	130	328	„	*P*	224	538	„	„	375	771	„	„	265	913	„	„	207
175	1922	„	651	333	„	„	228	548	„	„	525	777	„	„	33	916	„	„	111
183	1923	„	397	335	„	„	242	554	1924	„	49	784	„	„	271	919	„	„	310
192	„	„	381	372	„	„	239	585	1923	„	464	787	„	„	20	925	1923	„	590
198	„	„	137	379	„	„	547	595	1924	„	388								

TABLE No. II.

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS of the year 1923 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.

1923 Patna High Court Cases = All India Reporter.

PHCC	A. I. R		PHCC	A. I. R		PHCC	A. I. R		PHCC	A. I. R		PHCC	A. I. R.		
1	1923	*P*	371	65	1923	*P*	276	153	1923	*P*	380	229	1924	*P*	23	284	1924	*P*	98
5	1922	„	566	76	„	„	134	159	„	„	385	234	1923	„	575	290	„	„	69
6	1923	„	44	78	„	„	239	161	„	„	453	235	1924	„	113	293	„	„	77
8	„	„	104	82	„	„	285	175	„	„	520	237	1923	„	297	298	„	„	67
17	„	„	215	88	„	„	231	177	„	„	464	239	1924	„	46	300	1923	„	22
19	1921	„	509	96	„	„	292	184	„	„	375	241	1923	„	576	305	1924	„	1
20	1923	„	205	97	„	„	423	190	„	„	525	247	„	„	589	329	„	„	131
22	„	„	217	109	„	„	238	194	„	„	322	249	„	„	592	332	„	„	336
23	„	„	236	111	„	„	338	197	„	„	483	256	1924	„	41	336	„	„	241
26	1922	„	535	113	1922	„	429	202	„	„	407	258	1923	„	581	339	„	„	245
33	1923	„	218	118	1923	„	290	205	„	„	517	263	„	„	590	342	„	„	273
42	„	„	185	122	„	„	340	207	1922	„	606	266	„	„	585	345	„	„	326
45	„	„	185	125	1922	„	488	208	1923	„	445	269	„	„	295	353	„	„	235
46	„	„	218	127	1923	„	301	209	1924	„	20	271	1924	„	40	357	„	„	280
47	„	„	228	130	„	„	348	213	1923	„	514	273	„	„	104	361	„	„	250
49	„	„	203	137	„	„	327	216	„	„	521	276	„	„	65	369	„	„	174
54	„	„	201	142	„	„	303	220	1924	„	42	280	„	„	120	372	„	„	269
57	„	„	206	143	„	„	337	225	„	„	33	283	„	„	111	374	„	„	339
61	„	„	224	145	„	„	331												

1 Patna Law Reporter (Civil) = All India Reporter.

PLR	A. I. R		PLR	A. I. R		PLR	A. I. R.		PLR	A. I. R		PLR	A. I. R.		
1	1922	*P*	615	80	1924	*P*	359	179	1922	*P*	511	273	1922	*PC*	366	358	1924	*P*	273
6	1923	„	22	86	1923	„	385	186	1923	„	49	281	1923	*P*	530	361	„	„	37
12	„	„	150	89	„	„	518	190	1924	„	88	285	1924	„	183	366	„	„	91
16	„	„	28	91	1922	„	429	196	1922	„	546	288	1923	„	242	370	„	„	134
18	1922	„	507	99	1923	„	340	199	1924	„	354	289	1924	„	147	373	1923	„	590
24	„	„	607	103	1922	„	606	201	1923	„	423	311	1923	„	517	377	1924	„	226
25	1923	„	137	109	1924	„	371	217	„	„	375	314	1924	„	271	386	„	„	211
32	1924	„	373	111	1923	„	276	225	„	„	203	316	„	„	185	390	„	„	233
34	1923	„	58	127	„	„	406	233	„	„	337	318	1923	„	562	393	1923	„	597
43	1924	„	374	129	„	„	301	235	„	„	303	322	„	„	558	398	1924	„	240
47	1923	„	206	134	„	„	239	238	„	„	290	328	1924	„	191	402	„	„	1
51	„	„	152	139	1924	„	367	244	„	„	470	332	1923	„	344	434	1923	*PC*	105
53	„	„	134	145	„	„	362	252	„	„	327	336	1924	„	39	445	„	„	37
55	„	„	29	157	1923	„	213	258	„	„	441	338	1923	„	371	453	1924	*P*	23
59	„	„	231	161	1922	„	577	263	1922	„	402	345	„	*PC*	128	459	1923	„	529
69	„	„	236	167	1924	„	372	269	1923	„	355	356	1924	*P*	160	467	1924	„	342
73	1924	„	355	169	1923	„	285	270	1924	„	529								

1 Patna Law Reporter (Criminal) = All India Reporter.

PLR	A. I. R.		PLR	A. I. R		PLR	A. I. R		PLR	A. I. R.		PLR	A. I. R.		
1	1922	*P*	554	35	1922	*P*	388	93	1923	*P*	438	154	1923	*P*	540	192	1923	*P*	158
2	„	„	435	36	1923	„	185	97	„	„	532	158	„	„	153	195	„	„	366
15	„	„	564	41	„	„	185	109	„	„	228	159	„	„	157	199	„	„	1
17	1924	„	381	42	1922	*PC*	351	117	„	„	536	161	1924	„	47	223	1924	„	145
22	1923	„	131	45	1924	*P*	377	130	1922	„	77	164	1923	„	229	229	„	„	42
25	„	„	238	50	„	„	379	135	1923	„	545	166	„	„	364	236	1923	„	413
28	1921	„	465	53	1921	„	468	137	„	„	542	171	„	„	142	242	„	„	361
29	1924	„	376	55	1924	„	380	142	1924	„	276	174	„	„	297	248	„	„	547
31	1922	*PC*	162	57	1922	„	608	151	1923	„	519	177	„	„	297	255	„	„	528
32	1921	*P*	232	68	1923	„	338	152	„	„	588	178	„	„	550	256	„	„	537
34	1923	„	292	77	1922	„	535												

4 Patna Law Times=All India Reporter.

P L T	A. I R.	P L T	A I R	P L T	A I R	P L T	A I R	P L T	A I R
1 1922 *PC* 304	147 1923 *P*	212	292 1924 *P*	528	443 1924 *P*	25	609 1923 *PC*	189
6 „ *P* 529	170 1922 „	606	295 1923 „	159	447 1923 *PC*	128	613 „ *P*	576
10 „ „ 34	171 1923 „	328	297 „ „	366	157 „ *P*	203	619 1924 .	113
13 1923 „ 131	173 „ „	285	301 1922 „	654	462 „ „	550	622 „ „	42
15 „ „ 229	185 „ „	325	303 „ „	604	173 „ „	453	627 1923 *PC*	187
17 „ „ 187	186 „ „	1	306 1923 „	435	7 „ „	558	629 1924 *P*	209
29 „ *PC* 37	199 1922 *PC*	349	308 „ „	369	491 1924 „	37	633 „ „	211
35 „ *P* 226	202 1923 *P*	348	311 „ „	375	495 1923 „	572	638 „ „	161
39 „ „ 41	204 „ „	180	318 „ „	355	498 „ „	525	640 1923 „	517
44 1922 „ 586	209 1922 „	585	319 „ *PC*	59	502 1924 „	380	642 1924 „	256
46 1923 „ 224	210 „ „	577	322 1922 *P*	569	503 1923 „	519	647 „ „	274
48 „ „ 209	213 1923 „	503	326 1923 „	420	504 „ „	600	648 „ „	46
54 1924 „ 333	217 „ *PC*	21	329 „ „	385	505 1921 „	347	650 „ „	233
58 1922 „ 369	223 „ *P*	316	331 „ „	298	508 1923 „	597	652 „ „	200
60 „ „ 388	226 1922 „	310	333 „ „	43	512 1924 „	181	657 „ „	244
61 „ *PC* 269	229 „ „	60	335 „ „	49	513 „ „	23	659 1923 „	592
64 1923 *P* 197	231 1923 „	292	367 „ „	29	516 „ „	94	666 „ „	380
68 „ „ 213	232 „ „	62	370 1922 „	52	521 1923 „	547	669 „ „	470
71 „ „ 137	235 1922 „	605	372 1923 „	528	525 „ „	581	675 „ „	475
76 1922 „ 582	239 „ „	511	373 „ „	521	531 „ „	464	683 1924 „	276
81 1923 „ 65	215 1923 „	295	377 „ „	413	538 1924 „	27	689 1923 „	397
89 „ „ 433	247 „ „	354	392 „ „	487	544 „ „	76	694 1924 „	263
91 „ „ 199	248 „ „	364	393 „ „	48	545 „ „	36	696 1921 „	463
93 „ „ 239	251 „ „	348	396 „ „	100	546 „ „	77	698 1922 „	651
97 „ „ 185	257 „ „	342	397 „ „	481	552 1923 „	368	703 1924 „	379
98 1922 „ 587	259 „ „	49	401 „ „	518	553 1924 „	81	705 1923 „	381
99 1923 „ 224	261 „ „	354	402 „ „	540	562 „ „	100	707 1924 „	71
102 „ „ 327	263 1922 „	597	405 „ „	514	567 „ „	126	718 „ „	134
107 „ „ 348	265 1923 „	238	409 „ „	564	571 „ „	107	720 „ „	41
108 „ „ 290	267 „ „	72	414 1924 „	88	575 1922 „	448	721 „ „	111
112 „ „ 322	272 „ „	33	418 1923 „	446	577 1924 „	96	723 1922 „	77
115 „ „ 331	277 1922 „	601	424 „ „	24	579 1923 „	588	727 1924 „	128
123 „ „ 201	278 1923 „	153	425 „ „	474	581 1924 „	1	730 „ „	203
127 „ „ 231	279 „ „	356	427 „ „	423	606 „ „	135	731 „ „	343
134 1922 „ 656	285 „ „	218	439 „ „	61	608 „ „	125	735 „ „	346
135 1923 „ 276	290 1922 „	580	441 1924 „	47				

24 Cr. L. J. & 69 to 74 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. 1923 Lahore.

TABLE No. III.

Showing seriatim the pages of the ALL INDIA REPORTER, 1923, 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, 1923 PATNA.

Column No. 2 *denotes corresponding references of other* REPORTS, JOURNALS and PERIODICALS.

A. I. R. 1923 Patna=Other Journals.

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals.
1 S B	3 *P L T* 585	13	4 *P L T* 186	22	1923 *P H C C* 300	29	1922 *P H C C* 363
	1922 *P C C* 274		72 *I C* 961		5 *P L T* 30		1 *Pat L R* 55
	68 *I C* 945		24 *Cr L J* 497	25	70 *I C* 846		69 *I C* 613
	2 *P* 131	22	1 *Pat L R* 6	28	3 *P L T* 813		2 *P* 243
	23 *Cr L J* 625		2 *P* 249		1 *Pat L R* 16		4 *P L T* 367
	1 *Pat L R Cr* 199		72 *I C* 938		77 *I C* 1054	31	72 *I C* 971

A. I. R. 1923 Patna=Other Journals—*(Contd.)*

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
31	24 *Cr L J* 507	87	1922 *P H C C* 74	130	70 *I C* 290	185 (1)	71 *I C* 703
33	1922 *P H C C* 348		69 *I C* 957		4 *P L T* 396	S B	24 *Cr L J* 239
	2 *P* 84	88	1922 *P H C C* 75	131	4 *P L T* 13		1 *Pat L R Cr* 41
	70 *I C* 312		6 *P L J* 463		1 *Pat L R Cr* 22	185 (2)	1923 *P H C C* 42
	4 *P L T* 272		2 *P L T* 771		73 *I C* 327	S B	1 *Pat L R Cr* 36
36	70 *I C* 843		62 *I C* 536		24 *Cr L J* 583		72 *I C* 875
41	4 *P L T* 39	89	65 *I C* 432	133	73 *I C* 294	187	4 *P L T* 17
	1922 *P H C C* 355		23 *Cr L J* 80		2 *Pat L R* 17		68 *I C* 372
44	1923 *P H C C* 6		3 *P L T* 458	134	1923 *P H C C* 76	197	4 *P L T* 64
	71 *I C* 26	90	3 *P L T* 314		1 *Pat L R* 53		72 *I C* 1053
	3 *Pat L R Civ* 245		65 *I C* 355		72 *I C* 860	199	4 *P L T* 91
	6 *P L T* 390	91	3 *P L T* 649	135	1922 *P H C C* 109		71 *I C* 940
45	3 *P L T* 765		66 *I C* 73		65 *I C* 285	201	4 *P L T* 123
	1922 *P H C C* 321		23 *Cr L J* 233		6 *P L J* 634		1923 *P H C C* 54
	68 *I C* 363	94	3 *P L T* 621	137	2 *P* 198		71 *I C* 570
	2 *P* 207	95	3 *P L T* 90		1922 *P H C C* 337	20 3	1923 *P H C C* 49
49	1 *P* 696		6 *P L J* 127		4 *P L T* 71		71 *I C* 944
	4 *P L T* 259		60 *I C* 521		1 *Pat L R* 25		1 *Pat L R* 225
	69 *I C* 681	96 (1)	1922 *P H C C* 240		68 *I C* 316		4 *P L T* 457
	1 *Pat L R* 186		70 *I C* 155		73 *I C* 43	205	70 *I C* 804
50	1 *P* 753	96 (2)	1922 *P H C C* 114	140	3 *P L T* 96		1923 *P H C C* 20
	4 *P L T* 213		3 *P L T* 617		6 *P L J* 237	206	1923 *P H C C* 57
	71 *I C* 113		66 *I C* 471		63 *I C* 278		1 *Pat L R* 47
	24 *Cr L J* 65	98	1922 *P H C C* 129	142	3 *P L T* 52		69 *I C* 565
53	73 *I C* 339		6 *P L J* 680		23 *Cr L J* 141	209	4 *P L T* 48
	24 *Cr L J* 595		63 *I C* 282		65 *I C* 573		71 *I C* 11
55	3 *P L T* 131	100	1922 *P H C C* 6		1 *Pat L R Cr* 171	213	4 *P L T* 68
	1922 *P H C C* 54	101	1922 *P H C C* 68	143	3 *P L T* 43		1 *Pat L R* 157
	64 *I C* 1003		3 *P L T* 130		6 *P L J* 451		73 *I C* 5
	6 *P L T* 603		65 *I C* 474		62 *I C* 905	215	1923 *P H C C* 17
56	3 *P L T* 499		6 *P L J* 583	149	3 *P L T* 106		70 *I C* 782
	65 *I C* 446	102 (1)	3 *P L T* 342		1921 *P H C C* 293	217	1923 *P H C C* 22
	23 *Cr L J* 94		65 *I C* 360		82 *I C* 803		71 *I C* 318
57	3 *P L T* 762	102 (2)	3 *P L T* 60	150	3 *P L T* 820	218 (1)	1923 *P H C C* 46
	71 *I C* 254		64 *I C* 276		1922 *P H C C* 365		81 *I C* 295
	24 *Cr L J* 126	103	3 *P L T* 101		1 *Pat L R* 12	218 (2)	4 *P L T* 285
58	1 *P* 674		23 *Cr L J* 91		71 *I C* 426		1923 *P H C C* 33
	3 *P L T* 477		65 *I C* 413		2 *P* 264		71 *I C* 887
	67 *I C* 954	104	3 *P L T* 538	152	3 *P L T* 832	223	4 *P L T* 46
	1 *Pat L R* 34		1923 *P H C C* 8		1 *Pat L R* 51		73 *I C* 373
62	1 *P* 758		23 *Cr L J* 100		70 *I C* 332	224	2 *P* 328
	4 *P L T* 232		65 *I C* 481	153 (1)	3 *P L T* 51		4 *P L T* 99
	71 *I C* 117	111	3 *P L T* 485		23 *Cr L J* 144		1923 *P H C C* 61
	24 *Cr L J* 69		68 *I C* 653		65 *I C* 576		71 *I C* 741
64	1 *P* 750	113	3 *P L T* 293		1 *Pat L R Cr* 158	226	4 *P L T* 35
	71 *I C* 345		1922 *P H C C* 65	153 (2)	4 *P L T* 278		76 *I C* 136
	4 *P L T* 439		65 *I C* 294		67 *I C* 635	228	2 *P* 333
65	4 *P L T* 81		6 *P L J* 662	154	67 *I C* 435		1923 *P H C C* 47
	1922 *P H C C* 305	114	3 *P L T* 498	155	67 *I C* 511		1 *Pat L R Cr* 109
	2 *P* 110		65 *I C* 49		23 *Cr L J* 415		83 *I C* 345
	69 *I C* 947	115	3 *P L T* 346	156	68 *I C* 942		25 *Cr L J* 1385
71	1 *P* 715		65 *I C* 144	157	65 *I C* 552	229	4 *P L T* 15
	70 *I C* 226	116	3 *P L T* 32		23 *Cr L J* 120		72 *I C* 956
72	1922 *P H C C* 313		60 *I C* 662		1 *Pat L R Cr* 159		1 *Pat L R Cr* 164
	68 *I C* 601	119	3 *P L T* 396	158	67 *I C* 502		24 *Cr L J* 492
	2 *P* 75		67 *I C* 506		23 *Cr L J* 406	231	2 *P* 296
	4 *P L T* 267		23 *Cr L J* 410		1 *Pat L R Cr* 192		4 *P L T* 127
76	3 *P L T* 628	121	3 *P L T* 127	159	68 *I C* 629		1 *Pat L R* 59
	71 *I C* 999		64 *I C* 510		4 *P L T* 295		1923 *P H C C* 88
	24 *Cr L J* 279		66 *I C* 334	162	68 *I C* 804		83 *I C* 290
83	1922 *P H C C* 3		23 *Cr L J* 30		1924 *P H C C* 272	236	1 *Pat L R* 69
84	3 *P L T* 228		23 *Cr L J* 270	163	68 *I C* 676		1923 *P H C C* 23
	65 *I C* 494		1921 *P H C C* 96	165	67 *I C* 451		84 *I C* 536
	23 *Cr L J* 110	122	3 *P L T* 797	174	67 *I C* 710	238	4 *P L T* 265
	1921 *P H C C* 128		68 *I C* 394	176	67 *I C* 859		1923 *P H C C* 109
85	1922 *P H C C* 112		2 *P* 217	180	4 *P L T* 201		1 *Pat L R Cr* 25
	65 *I C* 283	129	1 *P* 771		68 *I C* 337		72 *I C* 959
	6 *P L J* 685		75 *I C* 879	183	67 *I C* 795		24 *Cr L J* 495
86	3 *P L T* 316	130	2 *P* 171	185 (1)	4 *P L T* 97	239	2 *P* 372
	65 *I C* 349		1922 *P H C C* 353	S B	1923 *P H C C* 45		4 *P L T* 93

A. I. R. 1923 Patna=Other Journals—(Contd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals.
239	1923 *P H C C* 78	327	1 *Pat L R* 252	380	2 *P* 260	451	6 *P L T* 742
	1 *Pat L R* 134		71 *I C* 843		4 *P L T* 666		85 *I C* 1014
	71 *I C* 484	331	4 *P L T* 115		74 *I C* 619	453	4 *P L T* 473
242 (1)	72 *I C* 135		1923 *P H C C* 145	381	2 *P* 192		1923 *P H C C* 161
	1 *Pat L R* 288		71 *I C* 383		4 *P L T* 705		2 *P* 685
	4 *P L T* 424	337	1923 *P H C C* 143		74 *I C* 464		74 *I C* 668
242 (2)	2 *P* 335		1 *Pat L R* 233	384	2 *P* 247	464	4 *P L T* 531
	4 *P L T* 147		76 *I C* 991		74 *I C* 608		1923 *P H C C* 177
	71 *I C* 705		5 *P L T* 413		1924 *P H C C* 362		2 *P* 585
259	71 *I C* 916	338	4 *P L T* 171	385	2 *P* 273		75 *I C* 1022
	5 *P L T* 355		1923 *P H C C* 111		4 *P L T* 329	470	1 *Pat L R* 244
	2 *Pat LR Civ* 205		1 *Pat L R Cr* 68		1 *Pat L R* 86		4 *P L T* 669
268	2 *Pat LR Civ* 285		72 *I C* 954		1923 *P H C C* 159		74 *I C* 649
	79 *I C* 9		24 *Cr L J* 490		71 *I C* 341	474	4 *P L T* 425
	5 *P L T* 594	340	1923 *P H C C* 122	386	1923 *P H C C* 153		26 *Cr L J* 852
275	2 *Pat L R* 32		71 *I C* 1022		5 *P L T* 330		86 *I C* 712
	75 *I C* 780		1 *Pat L R* 99		76 *I C* 910	475	2 *P* 391
276	4 *P L T* 135	342	2 *P* 432	391	71 *I C* 395		4 *P L T* 675
	1923 *P H C C* 65		4 *P L T* 257	397	2 *P* 183		74 *I C* 403
	1 *Pat L R* 111		72 *I C* 916		4 *P L T* 689	481	4 *P L T* 397
	71 *I C* 902	344	4 *P L T* 202		74 *I C* 454		71 *I C* 897
	2 *P* 414		72 *I C* 409	401	71 *I C* 478	483	1923 *P H C C* 197
285	4 *P L T* 173		1 *Pat L R* 332	402	71 *I C* 470		2 *P* 731
	1923 *P H C C* 82	346	4 *P L T* 223	404	71 *I C* 475		77 *I C* 14
	1 *Pat L R* 169		72 *I C* 218	406	1 *Pat L R* 127	487	4 *P L T* 392
	2 *P* 442	348 (1)	4 *P L T* 107		71 *I C* 573		72 *I C* 133
	72 *I C* 440		67 *I C* 592	407	1923 *P H C C* 202	488	4 *P L T* 393
290	4 *P L T* 108	348 (2)	4 *P L T* 251		72 *I C* 1035		71 *I C* 332
	1923 *P H C C* 118		1923 *P H C C* 130	410	2 *P* 257	490	2 *P* 715
	71 *I C* 948		2 *P* 508		74 *I C* 713		74 *I C* 102
	1 *Pat L R* 238		72 *I C* 811		24 *Cr L J* 809	492	2 *P* 607
	2 *P* 435	353	4 *P L T* 247	411	73 *I C* 71		4 *P L T* 335
292	4 *P L T* 231		73 *I C* 12	413	2 *P* 309		73 *I C* 822
	1923 *P H C C* 96	354	4 *P L T* 261		1 *Pat L R Cr* 236	514	4 *P L T* 405
	1 *Pat L R Cr* 34		72 *I C* 629		24 *Cr L J* 801		1923 *P H C C* 213
	72 *I C* 71		2 *P* 504		74 *I C* 705		2 *P* 739
	24 *Cr L J* 311	355	4 *P L T* 318	417	2 *P* 168		75 *I C* 284
295	4 *P L T* 245		73 *I C* 451		84 *I C* 1001	517	1923 *P H C C* 205
	72 *I C* 157		1 *Pat L R* 269	418	72 *I C* 907		1 *Pat L R* 311
	1923 *P H C C* 269	356	4 *P L T* 279		2 *P* 534		2 *P* 720
297 (1)	1 *Pat L R Cr* 177		73 *I C* 569	420	4 *P L T* 326		4 *P L T* 640
	6 *P L T* 294		2 *Pat L R Cr* 52		71 *I C* 280		80 *I C* 377
	25 *Cr L J* 1312		24 *Cr L J* 649	423	2 *P* 469	518	4 *P L T* 401
	82 *I C* 480	361	73 *I C* 158		4 *P L T* 427		72 *I C* 148
297 (2)	1923 *P H C C* 237		1 *Pat L R Cr* 242		1 *Pat L R* 201		1 *Pat L R* 89
	1 *Pat L R Cr* 174		24 *Cr L J* 542		1923 *P H C C* 97	519	4 *P L T* 503
	26 *Cr L J* 419	364	4 *P L T* 248		72 *I C* 230		1 *Pat L R Cr* 151
	85 *I C* 35		1 *Pat L R Cr* 166	433	4 *P L T* 89		72 *I C* 360
298	4 *P L T* 331		72 *I C* 883		72 *I C* 910		24 *Cr L J* 360
	71 *I C* 565		24 *Cr L J* 467	435	4 *P L T* 306	520	1923 *P H C C* 175
301	1923 *P H C C* 127	366	4 *P L T* 297		72 *I C* 625		74 *I C* 941
	1 *Pat L R* 129		72 *I C* 951	436	2 *P* 317	521	4 *P L T* 373
	72 *I C* 657		1 *Pat L R Cr* 195		74 *I C* 150		1923 *P H C C* 216
303	1923 *P H C C* 142		24 *Cr L J* 487	437	4 *P L T* 333		74 *I C* 626
	1 *Pat L R* 235	368	72 *I C* 613		24 *Cr L J* 939	525	2 *P* 548
	76 *I C* 1049		4 *P L T* 552		75 *I C* 363		4 *P L T* 498
	5 *P L T* 347		24 *Cr L J* 453	438	1 *Pat L R Cr* 93		1923 *P H C C* 190
305	68 *I C* 641	369	4 *P L T* 308		73 *I C* 161		76 *I C* 113
307	23 *Cr L J* 108		73 *I C* 173		24 *Cr L J* 545	527	2 *Pat L R Cr* 77
	65 *I C* 492		2 *Pat L R Cr* 6		24 *Cr L J* 865		5 *P L T* 109
309	67 *I C* 464		24 *Cr L J* 557		75 *I C* 65		24 *Cr L J* 825
322	4 *P L T* 112	371	1923 *P H C C* 1	441	1 *Pat L R* 258		74 *I C* 857
	1923 *P H C C* 194		2 *P* 277		74 *I C* 642	528	4 *P L T* 372
	71 *I C* 937		1 *Pat L R* 338	443	4 *P L T* 377		72 *I C* 69
324	2 *P* 92		72 *I C* 912		71 *I C* 489		1 *Pat L R Cr* 255
	79 *I C* 199	375	4 *P L T* 311	445	1923 *P H C C* 208		24 *Cr L J* 309
325	4 *P L T* 185		1 *Pat L R* 217		73 *I C* 317	529	1 *Pat L R* 459
	79 *I C* 571		1923 *P H C C* 184	446	4 *P L T* 418		75 *I C* 265
327	4 *P L T* 102		72 *I C* 1049		71 *I C* 881	530	1 *Pat L R* 281
	1923 *P H C C* 137		2 *P* 538	451	2 *P* 386		74 *I C* 693

A. I. R. 1923 Patna = Other Journals—(*Concld.*)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals.
532	1 *Pat L R Cr* 97	545	1 *Pat L R Cr* 135	562	1 *Pat L R* 318	588	4 *P L T* 579
	72 *I C* 945		85 *I C* 40		76 *I C* 194		72 *I C* 544
	24 *Cr L J* 481		26 *Cr L J* 424		5 *P L T* 342		24 *Cr L J* 432
536	1 *Pat L R Cr* 117	546	24 *Cr L J* 869	564	4 *P L T* 409	589	1923 *P H C C* 247
	74 *I C* 947		75 *I C* 69		77 *I C* 1		77 *I C* 378
	24 *Cr L J* 835		5 *P L T* 45	572	4 *P L T* 495	590	2 *P* 925
	5 *P L T* 46	547	2 *P* 379		75 *I C* 676		1923 *P H C C* 263
537	1 *Pat L R Cr* 256		4 *P L T* 521	575	1923 *P H C C* 234		1 *Pat L R* 373
	25 *Cr L J* 954		72 *I C* 375		77 *I C* 500		5 *P L T* 193
	81 *I C* 602		1 *Pat L R Cr* 248	576	2 *P* 819		74 *I C* 758
539	24 *Cr L J* 845		24 *Cr L J* 375		1923 *P H C C* 241	592	4 *P L T* 659
	74 *I C* 957	550	2 *P* 517		4 *P L T* 613		1923 *P H C C* 249
540	4 *P L T* 402		4 *P L T* 462		77 *I C* 209		76 *I C* 277
	1 *Pat L R Cr* 154		1 *Pat L R Cr* 178	581	1923 *P H C C* 258	597	4 *P L T* 508
	24 *Cr L J* 855		73 *I C* 561		4 *P L T* 525		1 *Pat L R* 393
	74 *I C* 1047		24 *Cr L J* 641		75 *I C* 305		76 *I C* 49
542	1 *Pat L R Cr* 137	558	1 *Pat L R* 322	585	1923 *P H C C* 266		79 *I C* 188
	24 *Cr L J* 806		4 *P L T* 487		79 *I C* 335	600	4 *P L T* 504
	74 *I C* 710		72 *I C* 648	588	1 *Pat L R Cr* 152		72 *I C* 405

THE

ALL INDIA REPORTER

1923 PATNA

I. L. R. ALPHABETICAL INDEX

OF CASES REPORTED IN

I. L. R. 2 Patna

WITH REFERENCES TO THE PAGES OF

THE ALL INDIA REPORTER

[103 CASES]

Names of Parties	I. L. R.	pp.	A. I. R.		pp.
Abdul Hamid v. Emperor	...	793	1924	P	46
Anand Ram Pramhans v. Ramghulam Sahu	...	264	1923	P	150
Arjun Sahu v. Kelai Rath	...	317	„	„	436
Aulad Ali v. Abdul Hamid	...	715	„	„	490
Baijnath Singh v. Mussammat Biraj Koer	...	52	1922	P	514
Basanta Kumari Dasi v. Balmukund Marwari	...	277	1923	P	371
Basdeo Prasad v. Dwarika Pandey	...	805	1924	P	234
Bhagwat Prashad Singh v. Dwarka Prasad Singh	...	809	„	„	23
Bishunath Sahay v. Nanku Prashad Singh	...	466	„	„	164
Chand Ray v. Bhagwati Charan Goswami	...	814	1924	P	248
Chaurasi Mahasarick v. Bhagan Sahu	...	787	„	„	20
Cheta Mahto v. King-Emperor	...	459	„	„	128
Dutt, K. B. v. Taraprasanna Roy Chaudhury	...	909	1924	P	120
Forbes v. Hanuman Bhagat	...	452	1924	P	88
Gansa Oraon v. King-Emperor	...	517	1923	P	550
Gobinda Swain v. King-Emperor	...	333	„	„	228
Great Indian Peninsular Ry. Co. v. Jitan Ram	...	442	„	„	285
Gulli Bhagat v. Narain Singh	...	708	1924	P	283
Indrajit Pratap Sahi v. Amar Singh	...	PC 676	1923	P C	128
Ishan Chandra Kundu v. Nilratan Adhikari	...	538	„	P	375
Jagannath Sao v. Debi Prasad Dhandhania	...	768	1924	P	258
Jagdeo Narain Singh v. Baldeo Singh	...	PC 38	1922	P C	272
Jagdip Prasad Sahi v. Mussammat Rajo Kuer	...	585	1923	P	464
Jago Mahton v. Khirodhar Ram	...	759	1924	P	122
Jaibahadar Jha v. Matukdhari Jha	...	548	1923	P	525
Jai Berhma v. Kedar Nath Marwari	...	PC 10	1922	P C	269
Janki Ray v. Raja Kalanand Singh	...	192	1923	P	381
Jharu Lal v. Mahanth Madan Das	...	257	„	„	410
Jnanendra Nath Ghosh v. Kumar Jogendra Narain Sinha	...	247	„	„	384

Names of Parties	I. L. R.	pp.	A. I. R.		pp.
Jugal Kishore Narayan Singh v. Bhatu Modi	...	720	1923	P	517
Kaniz Zohra v. Saiyid Muztaba Husain	...	819	1923	P	576
Khabi Mahton v. Mahanth Lachmi Das	...F B	18	1922	P	588
King Emperor v. Abdul Hamid	..S B	134	1923	P	1
——————v. Bhola Bhagat	...	379	,,	,,	547
Lachmi Singh v. King-Emperor	...	74	1922	P	562
Lal Behari Singh v. Gur Prasad Singh	...	435	1923	P	290
Mahadeo Prasad v. Bissessar Prasad	...	488	1924	P	71
Mahadeo Singh v. Dhobi Singh	...	916	,,	,,	111
Mahanth Ramrup Goshain v. Mahabir Shah	...	833	,,	,,	238
Maharaja Bahadur Kesho Prasad Singh v. Ramjas Pande	...	92	1923	P	324
Maharaja Kesho Prasad Singh v. Chandrika Prasad Singh	...	217	,,	,,	122
Maharaja Kesho Prasad Singh v. Parmeshri Prasad Singh	...	414	,,	,,	276
Maharaja Kesho Prasad Singh v. Ramdeni Singh	...	183	,,	,,	397
Matuk Singh v. Tian Sahu	...	1	1922	P	432
Maulavi Muhammad Fahimul Huq v. Jagat Ballav Ghosh	...	391	1923	P	475
Medni Prasad Singh v. Nand Keshwar Prasad Singh	...	386	,,	,,	451
Mussammat Bibi Khozaima v. The Official Liquidator of the Kayestha Trading and Banking Corporation, Ltd.	...	168	,,	,,	417
——————Bibi Makbulunissa v. Mussammat Bibi Umatunissa	...	84	,,	,,	33
——————Bibi Zainub v. Paras Nath	...	800	1924	P	37
——————Jageshwar Kuer v. Tilakdhari Singh	...	746	,,	,,	267
——————Nand Rani Kuer v. Durga Dass Narain	...	906	,,	,,	387
——————Sarban v. Phudo Sahu	...	110	1923	P	65
Naresh Singh v. King-Emperor	...	595	1924	P	388
Nawaba Wazir Begum v. Shashi Bhushan Rai	...	874	,,	,,	77
Pancho Bania v. Anand Thakur	...	712	1924	P	160
Pande Satdeo Narain v. Ramayan Tewari	...	335	1923	P	242
Radhakanto Parhi v. Mathura Mohan Parhi	...	403	1924	P	187
Radha Kishun Lal v. Kashi Lal	...	829	,,	,,	273
Raghubir Singh v. Jethu Mahton	...	171	1923	P	130
Raghunath Sukul v. Ramrup Raut	...	777	1924	P	33
Raghu Singh v. Mahant Krishna Deyal Gir	...	765	,,	,,	258
Rai Bahadur Ram Sumran Prasad v. Ram Bahadur	...	328	1923	P	224
Raja Makund Deb v. Sri Jagannath Jenamoni	...	469	,,	,,	423
Raja Wazir Narain Singh v. Bhikhari Ram	...	207	,,	,,	45
Ram Bahadur Sen v. Mahanth Ganesh Bhagat	...	554	1924	P	49
Rambhanjan Singh v. Pashupat Rai	...	784	,,	,,	271
Ram Bujhawan Prasad Singh v. Nathu Ram	... PC	285	1923	P C	37
Ramcharan Singh v. Sheo Dutta Singh	...	260	,,	P	380
Ramdhuri Chowdhari v. Deonandan Prasad Singh	...	65	1922	P	507
Rameshwerdhari Singh v. Sadhu Saran Singh	...	564	1923	P	354
Ramjit Ahir v. King-Emperor	...	309	,,	,,	413
Ramlal Malikand v. Deodhari Rai	...	771	1924	P	265
Ramnandan Sahay v. Jaigovind Pandey	...	839	,,	,,	213
Ram Sekhar Prasad Singh v. Sheonandan Dubey	...	198	1923	P	137
Ram Sumran Prasad v. Gobind Das	.. F B	125	1922	P	615
Ram Utaon v. Doman Kalal	...	898	1924	P	100
Ranglal Sahu v. Kali Shanker Sahai	...	890	,,	,,	235

Names of Parties	I. L. R.	pp.	A. I. R.		pp.
Rani Jagadamba Kumari v. Wazir Narain Singh	...P C	319	1923	P C	59
Ranjit Sahi v. Maulavi Muhammad Qasim	...	432	„	P	342
Rao Bahadur Man Singh v. Maharani Nawlakhbati	...	607	„	„	492
Sadho Saran Rai v. Anant Rai	...	731	1923	P	483
Sahdeo Narain Deo v. Kusum Kumari	... PC	230	„	PC	21
Sant Prasad Singh v. Sheodut Singh	...	724	1924	P	259
Shaikh Sajjad Hussain v. Sakal Rai	...	7	1922	P	448
Sham Sundar Singh v. Munshi Mushaheb Lal	...	534	1923	P	418
Shebalak v. Kamaruddin Mandal	... FB	94	1922	P	435
Sheikh Abdur Rahman v. Sheikh Wali Mahammad	...	75	1923	P	72
Sheogobind Ram Sahu v. Mahipat Dusadh	...	913	1924	P	207
Sheonandan Chowdhury v. Debi Lal Chowdhury	...	372	1923	P	239
Sheopujan Rai v. Maharaja Bahadur Kesho Prasad Singh	...	919	1924	P	310
Shyam Sundar Rai v. Jagarnath Misra	...	925	1923	P	590
Sia Sha Chari Peari v. Ram Kishori Kuer	...	796	1924	P	262
Sital Prasad Ray v. Asho Singh	...	175	1922	P	651
Smith, C. J. v. A. Kinney, Official Trustee of Bengal	...	749	1924	P	231
Srimoti Savitri Thakurain v. Secretary of State for India	...	879	„	„	27
Sri Thakur Radha Krishna Gopal Lalji v. Lakshmi Narayan	...	273	1923	P	385
Stoney v. Stoney	...	508	„	„	348
Surajdeo Narayan Singh v. Partap Rai	...	739	„	„	514
Tata Iron and Steel Co., Ltd., v. Baidayanath Laik	...	754	1924	P	118
Thakurain Fulbati Kumari v. Maharaj Kumar Rao Maheshvari Prasad Singh	...	685	1923	P	453
Thakur Gobind Nath Sahi Deo v. Maharaja Pratap Udai Nath Sahi Deo	...	243	„	„	29
Thakur Tajeswar Dutt v. Lakhan Prasad Singh	...	296	„	„	231
Triloke Nath Jha v. Bansman Jha	...	249	„	„	22

[103 Cases]

THE
ALL INDIA REPORTER
1923

PATNA HIGH COURT.

A.I.R. 1923 Patna 1.
(SPECIAL BENCH).

MULLICK, COUTTS AND DAS, JJ.

Emperor—Appellant
v.
Abdul Hamid—Accused-Respondent.

Government Appeal No. 4 of 1922, decided on 3rd August, 1922, against an order of J. C., Ranchi, dated 20th March, 1922.

(a) *Police Act, S. 30—Notification under, prohibiting procession—Non-compliance with— No offence is committed.*

Where the Superintendent of Police issued the following notice under S. 30 of the Act.

"I prohibit any procession formed by any person within the municipal area of this district other than under license granted by me, for a period of 3 months as I consider such prohibition to be necessary for the preservation of the public peace and safety."

Held per *Mullick, J.*—

(1) that S. 30 only means that the S.P. has to be satisfied that the procession is, in the judgment of the Dt. Magistrate likely to cause a breach of the peace; [P. 3, C. 1.]

(2) that the notification of prohibition though general is within the powers of the S. P. to issue; [P. 3, C. 1.]

(3) that the order is a 'law'; [P. 3, C. 1 and P. 4, C. 2] and

(4) that though it did not follow the exact language of cl. (1) of S. 30 the notification was on the whole a substantial compliance and the public were in no error or doubt as to its purport. [P. 4, C. 1.]

Per *Das, J.*—(1) A notification under S. 30 of the Act cannot be regarded as the 'law' for any purpose as there is no provision in that Act giving such a notification the same effect as if they were contained in an Act. [P. 7, C. 2.]

(2) The notification, even if it is a 'law' is not enforceable as such for the following reasons:—

First, the police have no power under the Act to *prohibit* a procession where the promoters thereof decline to apply for a license. [P. 8, C. 1.]

Secondly there is no power to issue an order to have operation for 3 months. The language of the section is perfectly clear that the police have the power to deal with each case as it arises and that the District Magistrate has to exercise his discretion on each occasion. Cr. Ref. 32 of 1917, Foll. [P. 10, C. 2.]

Thirdly, Assuming the police have the power to prohibit, they have no power to prohibit a procession *anywhere* within the municipal area. Such a prohibition will be *ultra vires* as it cover even meetings in private houses for a lawful purpose. [P. 10, C. 2.]

Lastly, The Act requires that the judgment shall be exercised by Dt. Magistrate and the order shows that instead of that, the S. P. has exercised his judgment and has thereby arrogated to himself a power not conferred by the Statute. [P. 10, C. 2.]

(3) The only way by which the order under S. 30 could be executed (assuming they could be executed at all) is only by proceeding against the persons opposing such order, under S. 32 of the Act, and not by an order for disposal as such a power is not given by the section. [P. 11, C. 1.]

(b) *Police Act, S. 30-A—Conditions of license not violated—Section does not apply.*

S. 30-A of the Act does not apply unless a license has been got and there is a violation of the conditions thereof. [P. 5, C. 1, and P. 8, C. 1.]

(c) *Penal Code, Ss. 141, 145—Order under S. 30, Police Act, prohibiting procession—Non-compliance—Unlawful assembly—Evidence of common object unsatisfactory—Accused cannot be convicted.*

Where a general notification was issued by the S.P. under S. 30 of the Police Act prohibiting processions without a license, and in spite of it a procession without license was formed and on its being ordered to disperse did not disperse, *held*

Per *Mullick, J.*, (1) that 'Resistance' connotes some overt act and mere words, when there is no intention of carrying them into effect will not be sufficient to prove an intention to resist. But a refusal to disperse at the command of the Police clearly constitutes an overt act; [P. 3, C. 2.]

(2) that if a person persists in remaining with a procession after becoming aware of the fact that the convenor has failed to take out a license as required by law he must be taken to share in the common object of the convenor to resist the execution of the order. [P. 3, C. 2.]

Held per *Das, J.*, (1) that in order to succeed in proving resistance to the execution of the law, the prosecution must establish first that there was

a law which could be executed, secondly that there was execution of that law and thirdly, that there was resistance to it ; [P. 5, C. 2.]

(2) that the order of the S.P. was not a ' law ' and was not executable as it was beyond the powers of the S.P. to issue; [P. 10, C. 2 and P. 11, C. 1.]

(3) the order for disposal was not a lawful execution of the order under S. 30 of the Police Act and non-submission thereto does not amount to ' resistance ' ; [P. 11, Cs. 1 and 2.]

(4) that therefore the accused were not guilty under S. 141 or 145 of the Code.

Where persons submit to their being arrested in execution of the law, it is a submission to the execution of the law and not a resistance to it. [P. 12, C. 1.]

(d) *Crim. P.C., Ss. 232 and 221—Charge not mentioning common object — Evidence also unsatisfactory—Accused cannot be convicted.*

Where no sufficient evidence had been given to prove a common object to resist the execution of a lawful order, and the charge framed did not even set out the common object of the unlawful assembly, *held* it is impossible to say that the accused had notice of the precise case which the prosecution were making against them. [P. 4, C. 1.]

(e) *Interpretation of statutes—' Law,' meaning of—Rule framed under section of Act is not 'Law' unless Act itself says so—Power to regulate does not imply power to prohibit.*

Per *Das, J.*—' Law ' is one thing and an act done or order issued under the law is another thing. When we speak of ' law ' we mean some thing which is enforceable and which is not capable of being rejected by the Courts as uncertain, unreasonable or as repugnant to the law of the land. Where a statute under the authority of which rules are promulgated itself declares that they shall have the same effect as if enacted in the statute, the validity of the rules cannot be canvassed by Courts of law. Nor can any Court reject them as uncertain and unenforceable.

But where the statute does not so provide their validity can be canvassed and the Court can reject them as unenforceable on the ground of unreasonableness or uncertainty. They do not constitute 'law'. The essence of the law is that it is enforceable as law, and though the Courts may construe it they cannot reject or quash it. [P. 6, Cs. 1 and 2 and P. 7, C. 2.]

A power to regulate does not involve a power to prohibit. [P 10, C. 2.]

Per *Mullick, J.*—A notification issued in exercise of a power conferred by Statute is as much a part of the law as if it had been incorporated in the statute. The command is, in every sense a command by the appropriate Legislative authority. [P. 3, C. 2 and P. 4, C. 1.]

(f) *Criminal Trial—New offence under special law—Accused cannot be proceeded with under general law.*

Per *Das, J.* :—Where a statute creates a new offence which was not an offence at common law and imposes a penalty in respect of such offence a person committing such an offence can only be proceeded against under the statute which creates the offence and cannot be indicted under the general law. [P. 12, C. 1.]

(g) *Practice—Courts' duty—Inroad upon the liberty of subject, will not be tolerated by Courts.*

Where there are breaches of law and order it is the duty of the High Court to relentlessly apply the law and to look neither to the position nor the motive of the persons committing or encouraging breaches of law and order. But while this is so it is equally the duty of the Court to assert from time to time and as often as it may be necessary that the subject has his rights as well as his duties and to assert further that the High Court as the guardian of the rights and the liberties of the subject will sternly repress any attempt on the part of the executive government to tamper with such rights and liberties ; and that an order in the garb of an order for the maintenance of law and order will not be allowed to stand, if its object is not to maintain law and order but to make a very serious inroad upon the liberty of the subject. [P. 13, C. 2].

H. L. Nandkeolyar—for the Crown.

Athar Hussain and *D. P. Sinha*—for Respondent.

Mullick, J..—This is an appeal preferred by the Local Government against the acquittal of Sheikh Abdul Hamid who was sentenced by the Deputy Magistrate of Palamau to 6 months' rigorous imprisonment for an offence under Section 145, I.P.C., but was acquitted on appeal by the Judicial Commissioner of Chota Nagpur. The learned Judge set aside the conviction under Section 145, I. P. C., but sentenced the accused to a fine of Re. 1 for an offence under Section 32 read with Section 30-A of the Indian Police Act. It is admitted that the learned Judicial Commissioner has misconceived the facts and that Section 30-A has no application to this case. There is no question here of the disobedience of the conditions of any license issued by the Superintendent of Police.

What appears to have happened is this. On the 3rd January, 1922, the Officiating Superintendent of Police issued a notice in the following terms :—

"Notice under Section 30 of Act V of 1861",

" In pursuance of the powers vested under Section 30 of Act V of 1861, I do hereby prohibit any processions, associations or assemblies started or formed by any person or any class of persons within the Municipal and Union area of this district (Palamau) other

than under license granted by me, for a period of three months as I consider such prohibition to be necessary for the preservation of the public safety."

That notice was duly served by proclamation and beat of drum, but on the 21st of January some 250 persons formed a procession through one of the streets of Daltonganj, which is the head-quarters of the Palamau District, carrying flags and singing songs in disregard of the order of the Superintendent. A Sub-Inspector of Police directed the crowd to disperse and upon refusal to do so he arrested 24 persons of whom the accused was one.

The Deputy Magistrate, who tried the case, framed a charge under Section 145, I. P. C., but did not set out the common object of the unlawful assembly of which the accused was alleged to be a member.

The learned Assistant Government Advocate who appears on behalf of the Crown contends that notwithstanding this omission the accused had full notice at the trial of the common object upon which the charge was based and that the facts proved establish a clear case under Section 145, I.P.C. He contends that the common object was to resist the execution of a law or legal process which is one of the common objects enumerated in Section 141, I.P.C. Now, Section 30 of the Police Act though not very happily worded appears to mean this. The Superintendent of Police has to be satisfied that an assembly or a procession is in the judgment of the District Magistrate likely to cause a breach of the peace. He may then issue a notice upon the person convening or collecting the assembly or directing or promoting the procession to apply for a license.

It is contended that the Superintendent is not authorised to issue a general order but must call upon the convenor or promoter of the assembly or procession to take out a license for each occasion. In my opinion the words are sufficiently general to enable the Superintendent to issue a general notification containing a prohibition against convening or collecting assemblies or directing or promoting processions without a license. The terms of the Section are also wide enough to cover a prohibition without any limit of time. If the person or persons against whom the notice is directed convenes or collects an assembly or promotes or directs a procession without license, he or they will be punishable under Section 32 of the Act. There is nothing in the Act which renders a person liable to punishment for joining an assembly or procession which has already been convened or collected if he has no notice that the convenor or promoter has omitted to take out a license; but if, after becoming aware that the person whose duty it was to take out a license has failed to do so, he persists in remaining with the assembly or procession then it may, I think, be said that he shares the common object of such person to resist the execution of the Superintendent's order.

In the present case the evidence shows that the accused Abdul Hamid joined the procession after it had been directed to disperse; there is no evidence that he was aware that any breach of the notification had been committed; but if it could have been shown that he and 4 others of the assembly or procession were acting together with the common object that the person who had convened or collected the assembly, or directed or promoted the procession, should resist the execution of the Superintendent's order, then I think he would have come under the operation of Section 141, I.P.C. In my opinion this aspect of the case was not presented to the Deputy Magistrate at the trial and we cannot under the circumstances convict upon the evidence on the record.

But apart from this defect in the evidence three objections have been taken to the application of Section 141, I.P.C., which call for notice.

The first objection is that resistance implies something more than disobedience and that a mere intention to disobey will not suffice. I agree that resistance connotes some overt act and that mere words, when there is no intention of carrying them into effect, will not be sufficient to prove an intention to resist; but in the present case the conduct of the mob and their refusal to disperse at the command of the Police clearly constitute overt acts and establish a common object to resist the orders within the meaning of clause (2) of Section 141, I.P.C.

The next objection is, that the order of the Superintendent of Police cannot be called a law or legal process. The reply is that when a notification is issued by an executive authority in exercise of a power conferred by statute that notification is as much a part of the law as if it had been incorporated within the body of the statute at the time of its enactment. The command is in every

respect a command by the appropriated Legislative authority. In the present case if the notification was in compliance with Section 30 of the Police Act, then, in my opinion, it was a law and certainly a legal process.

This leads me to the third objection which is that the notification did not comply with Section 30 of the Police Act. In my judgment although the wording of the notification did not follow the exact language of Clause (1) of Section 30 there was on the whole a substantial compliance and the public of Daltonganj were in no error or doubt as to its purport.

In these circumstances I do not doubt that the accused might have been convicted under Section 145, I.P.C., if sufficient evidence had been given to prove a common object to resist the execution of the order; but there was no evidence on this point and the charge framed against him by the trial Court did not even set out the common object of the unlawful assembly; and it is impossible to say that the accused had notice of the precise case which the prosecution were making against him.

Our attention has finally been drawn to Section 127, Cr.P.C., and we have been asked to infer that the procession was likely to create a disturbance and to find that on refusal to disperse, it became an unlawful assembly. Here again some formal evidence should have been given and the accused should have had an opportunity of meeting this case in the trial Court.

We asked the learned Counsel for the Crown whether there was any evidence upon which it could be held that the common object of the unlawful assembly was to disobey such a lawful order as is contemplated by Section 188 of the Indian Penal Code, but the learned Counsel's reply was in the negative.

The result is that owing to the irregular and defective manner in which the prosecution was conducted in the trial Court, I must decline to restore the conviction under Section 145, I.P.C., nor do I think that having regard to the circumstances I ought to order a retrial. The appeal will, therefore, be dismissed.

Coutts, J.:—I agree with the judgment which has just been delivered by my learned brother.

Das, J.:—The material facts are these: On the 3rd January last the Officiating Superintendent of Police of Palamau issued the following notice under Section 30 of the Police Act (Act V of 1861):—

"In pursuance of the powers vested under Section 30 of Act V of 1861 I do hereby prohibit any processions, associations or assemblies started or formed by any person or any class of persons within the Municipal and Union area of this district (Palamau) other than under license granted by me, for a period of three months as I consider such prohibition to be necessary for the preservation of the public peace and public safety." On the 21st January, a large number of persons, of whom the respondent was one, formed a procession without having taken out a license for the same, and refused to disperse though the police repeatedly ordered them to disperse. The police thereupon arrested a large number of persons including the respondent, and the learned Magistrate in due course convicted them under Section 145, I.P.C., and sentenced them to various terms of imprisonment. He sentenced the respondent to undergo rigorous imprisonment for six months and to pay a fine of Rs. 50 and further required him to execute a bond for Rs. 100 with two sureties, and in default to undergo simple imprisonment for six months. The respondent appealed to the Court of the Judicial Commissioner of Chota Nagpur, and that learned Judge set aside the conviction under Section 145, I.P.C., and the order under Section 106, Criminal Procedure Code, but convicted the respondent under Section 32 of the Police Act and sentenced him to pay a fine of Re. 1. The Local Government being dissatisfied with the order of the learned Judicial Commissioner has appealed to this Court.

The learned Judicial Commissioner, before whom the Crown was not represented, was obviously in difficulty in understanding how the respondent could be convicted under the Code for an offence committed under the Police Act. He assumed that the position of the Crown was that the procession having neglected or refused to obey the order to disperse given by the Police, became an unlawful assembly under Section 30-A (2) of the Act and could be proceeded against under the Code for being, or continuing to be, members of an unlawful assembly. Assuming that to be the position of the Crown the learned Judge came to the conclusion that though the procession might be "deemed" to be

unlawful assembly, the persons forming the procession could not be punished under the Code as members of an unlawful assembly. The learned Judicial Commissioner had probably in his mind that class of cases which has decided that where a person or a thing in a statute is "deemed" to be something else he or the thing can only be regarded as that something else by a statutory fiction, but that in truth and in reality he is not that something else and consequently you can have recourse to the fiction for the purpose of the statute which creates the fiction and for no other statute. I confess that there is much to be said for the view of the learned Judicial Commissioner; but, in truth, the question does not arise; Section 30-A (2) of the Police Act only applies where there is violation of conditions of a license granted under Section 30 (3), not where the procession was formed without a license. The learned Assistant Government Advocate accepts the position that Section 30-A (2) of the Police Act has no application whatever, and it is therefore unnecessary to discuss whether the view of the learned Judicial Commissioner is right.

But it was insisted by the learned Assistant Government Advocate that the conviction under Section 145 of the Indian Penal Code was nevertheless right, and that the respondent was a member of an unlawful assembly of five or more persons whose common object was, first, to resist the execution of a law, and secondly, to commit an offence. The form of the argument addressed to us by the learned Assistant Government Advocate raises a question of grave public importance; for no less a claim than this is put forward on behalf of the Crown, that a District Superintendent of Police or an Assistant District Superintendent may, by purporting to act under Section 30 of the Police Act, prohibit an assembly or a procession if the assembly declines to take out a license for such collection or procession and that the members of the procession by refusing to disperse, if ordered to disperse by the police, make themselves liable not only under the Police Act for which the maximum sentence is a fine of Rs. 200, but also under Section 145 of the Indian Penal Code, for which the maximum sentence is rigorous imprisonment for two years with a fine. So far as I know, the claim has never yet been put forward in any case that a person can be convicted under the Code for an offence under the Police Act; and before I accede to the argument which involves the personal liberty of the subject, I must be satisfied that the argument is well-founded and that it rests on principle or is covered by authorities.

It was argued, in the first place, that the common object of the assembly was to resist the execution of the law. In order to succeed, the prosecution must establish, first, that there was a law which could be executed, secondly, that there was execution of that law, and thirdly, that there was resistance to the execution of that law. Now what was the law that was being executed? By "law", I understand "a rule of civil conduct prescribed by the supreme power in a State, commanding what is right prohibiting what is wrong, and regulating matters in themselves indifferent"—(Blackstone). Now is there any law, that is to say, a rule of civil conduct prescribed by the supreme power in the State, prohibiting a procession on the public roads, or in the public streets or thoroughfares? According to the learned Assistant Government Advocate there is, and he contends that it is to be found in Section 30 of the Police Act. Section 30 of the Police Act is in these terms:—

"(1) The District Superintendent or Assistant District Superintendent of Police may, as occasion requires, direct the conduct of all assemblies and processions on the public roads, or in the public streets or thoroughfares, and prescribe the routes by which, and the times at which, such processions may pass."

"(2) He may also, on being satisfied that it is intended by any person or class of persons to convene or collect an assembly in any such road, street or thoroughfare, or to form a procession which would, in the judgment of the Magistrate of the District, or of the sub-division of a district, if uncontrolled, be likely to cause a breach of the peace, require by general or special notice that the persons convening or collecting such assembly or directing or promoting such procession shall apply for a license."

Now I fail to see how Section 30 of the Police Act can be read as constituting a prohibition of the common rights of the subjects to form a procession on the public roads or in the public streets or thoroughfares. No doubt it vests discretion in the District Superintendent or the Assistant Superintendent to require the persons convening or

collecting an assembly or directing or promoting a procession to apply for a license, though, at the same time, it imposes as a condition precedent for the use of the discretion the exercise of the judgment of the Magistrate of the District or of the sub-division of the District that the procession, if uncontrolled is likely to cause a breach of the peace. But it is one thing to say that the Act itself constitutes a prohibition; it is another thing to say that the Act gives a limited and a conditional discretion to the Superintendent of Police, not to prohibit an assembly or a procession without a license—for that there is no authority in the Act, as I shall presently show—but to require the persons convening or collecting such assembly or directing or promoting such procession to apply for a license. In my opinion, "law" is one thing, and an act done or an order issued under the law, is another thing. One is the result of the discretion exercised by the legislature; the other is the result of the discretion exercised by the Superintendent of Police; and in construing the term "law" in the first clause of Section 141 of the Indian Penal Code, I cannot substitute the discretion exercisable by the Superintendent of Police for the discretion exercisable by the Legislature.

It was then argued that there is nothing to prevent the Legislature from reposing confidence in a particular person or a body of persons, and any order issued by such a person or body of persons, if authorized by the Legislature, has the character of law and, is, in fact, law. We were indeed invited to treat the order of the Superintendent of Police as a by-law or a regulation, sanctioned and authorised by the Police Act. The argument is a weighty one, and it is necessary to deal with the subject with some care.

Now whether "law" means the expression of the exercise of the discretion by the Legislature or whether it includes the expression of the exercise of the discretion by a person or body of persons under the sanction and the authority of the Legislature, this, at any rate is clear that when we speak of law, we mean something which is enforceable and which is not capable of being rejected by the Courts as uncertain, as unreasonable, or as repugnant to the law of the land. The Courts may construe any particular provision of law; but the Courts cannot quash any provision of law nor treat it as unenforceable. Now there are rules, regulations, and by-laws, enacted, not by the Legislature, but by some authority by delegation, which to appropriate an expression used by Lord Herschell, cannot be canvassed in the Courts of law on any of the grounds which I have mentioned. In my opinion, these rules, regulations and by-laws have the character of law and are, in fact, law. But there are other rules, regulations and by-laws which may be rejected by the Courts of law as unenforceable on various grounds. They cannot, in my opinion, be called law, for the essence of the law is that it is enforceable, provided circumstances exist which would make it enforceable. But where the Court is not bound to enforce it, though circumstances may exist which would make it enforceable, it has not the character of law, and cannot be called law.

Now "delegated" legislation falls under two main heads; first, rules, regulations, and by-laws under the statute which provides that they shall have the same effect as if enacted therein, and secondly, rules, regulations and by-laws made under the statute which does not in terms provide that they shall have the same effect as if enacted therein. The first usually consists of statutory rules, by-laws and regulations made by responsible authorities concerned with local Government; the second usually consists of by-laws and regulations made by persons, societies or corporations who are conducting commercial or other enterprises, whether of a public character or not. Now the distinction between the two is this that where the statute, under the authority of which the rules, regulations or by-laws are promulgated, itself declares that they shall have the same effect as if enacted in the statute, the validity of the rules, regulations or by-laws cannot be questioned in any Courts of law, nor can the Courts quash them or reject them on the ground that they are uncertain or unreasonable. But where the statute does not so provide, their validity can be canvassed in the Courts of law, and the Courts can reject them as unenforceable on the ground that they are uncertain or unreasonable.

The distinction is pointed out in the case of *Institute of Patent Agents* v. *Lockwood* (1). The first section of the Patents Designs and Trade Marks Act of 1888 provided that a person should not be entitled to describe himself as a Patent Agent unless registered as such in pursuance of the Act, and that the Board of Trade should from time to time make such rules as were, in the opinion of the

(1) (1894) A.C. 347.

Board of Trades required for giving effect to the section. The Act also provided that the rules to be framed by the Board of Trade were to be dealt in the same manner, and subject to the provision contained in the 101st section of the previous Act, the Act of 1883, of which the Act of 1888, in many particulars was an amendment. Now Section 101 of the previous Act provided that the rules were to be laid before Parliament and remain before Parliament for consideration for forty days, and, during these forty days, they might be annulled by a resolution of either House, and that "they shall be of the same effect as if they were contained in the Act and shall be judicially noticed." The question arose whether many of the rules were not unreasonable and invalid. Lord Herschell, in the course of his speech, drew attention to the terms of Section 101 of the previous Act, and then said as follows:—"My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts. The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule if validly made is precisely the same that every person must conform himself to its provisions and, if in such case a penalty be imposed, any person who does not comply with the provisions whether of the enactment or the rule becomes equally subject to the penalty. But there is this difference between a rule and an enactment, that whereas *apart from some such provision as we are considering*, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament." This is a clear authority for the view that, though there is no difference between a rule and an enactment where there is a provision in the enactment that the rules shall be of the same effect as if they were contained in the Act, there is a wide difference between the two when there is no such provision; and the difference is this, that though you may not canvass an Act of Parliament, you may canvass a rule.

By-laws which are not made part of the Act by the express provision of the Act may be attacked in England on five different grounds; first, on the ground that they are not made, sanctioned and published in the manner prescribed by the statute which authorises the making; secondly, on the ground that they are repugnant to the laws of England; thirdly, on the ground that they are repugnant to the statute under which they are made; fourthly, on the ground that they are uncertain; and lastly, on the ground that they are unreasonable—(See Craieson Statute Law—page 290). Can it be said for a moment that a by-law which, unlike the law, may be attacked on various grounds and which the Court may refuse to enforce, stands on the same footing as the law? I think not, for the essence of the law is that it is enforceable as law, and that, though the Courts may construe the law, the Courts cannot reject it nor quash it.

If I am right in my view as to the distinction that exists between the law, and a by-law framed under a statute but not made part of the statute by the express provision of the statute, it must follow that an order issued by the Superintendent of Police under Section 30 of the Police Act, cannot be claimed as the law. That order may be a valid order or an invalid order; but, as there is no provision in the Police Act giving to the orders issued by the Police under Section 30 of the Police Act the same effect as if they were contained in the Act, they cannot be regarded as the law for any purpose whatsoever.

But I am quite willing to assume that the order of the Superintendent of Police is "law" within the meaning of the first clause of Section 141 of the Indian Penal Code; I have still to enquire whether it is enforceable as the law; that is to say, whether it is sanctioned and authorised by the Police Act or whether it does not constitute an undue interference with the liberty of the subject in the garb of an order under the Police Act. In order to determine this question, it is necessary to examine the provisions of Sections 30 and 30-A of the Police Act. The first clause of Section 30 gives to the District Superintendent or the Assistant District Superintendent the power to direct the conduct of all assemblies and processions on the public roads or in the public streets or thoroughfares, and prescribe the routes by which, and the times at which, such processions may pass. This is a power to regulate public assemblies and processions, not a power to prohibit such assemblies and processions. The second clause gives him power to require by general

or special notice that the persons convening or collecting such assembly or directing or promoting such procession shall apply for a license, provided he is satisfied that it is intended by any persons or class of persons to convene or collect an assembly in any such road, street or thoroughfare or to form a procession which would in the judgment of the Magistrate, if uncontrolled, be likely to cause a breach of the peace. A power of licensing is a power to regulate, not a power to prohibit and it is necessary to point out that there is nothing in Section 30, either in the first or in the second clause, which gives the police an express power to prohibit an assembly or procession if the persons convening or collecting such assembly or directing or promoting such procession decline to apply for a license. I shall presently discuss the question whether a power to prohibit is incident to a power to regulate and license; it is sufficient here to point out that there is no express power to prohibit given in Section 30 of the Act. Section 30-A of the Act however gives a power to the police to order an assembly or procession to disperse, but, Section 30-A applies and applies only where there is a violation of the conditions of a license. Section 30-A therefore has no application to this case; for it is admitted that the persons directing or promoting the procession did not apply for a license. On an interpretation of Sections 30 and 30-A of the Police Act, it would appear that there is no power in the police to prohibit a procession where the persons directing and promoting such procession decline to apply for a license although there is such power where such persons take out a license but violate the conditions of such license.

It may be urged, however, that a power to prohibit is incident to a power to regulate; for, without such power, it may be difficult, if not impossible for the police to regulate the public assemblies and processions. The argument overlooks the provisions of Section 32 of the Act which imposes a penalty upon every person for opposing or not obeying the orders issued under Section 30, Section 30-A and Section 31 of the Act. It is at least significant that the Act, though it expressly vests in the Magistrate or in the Police the power to stop any procession which violates the conditions of a license and to order it to disperse, gives no such power to the police, at least expressly, where the persons convening or collecting an assembly, or directing or promoting a procession decline to apply for a license. The power is expressly given in Section 30-A of the Act, and is expressly withheld in Section 30 of the Act. It must follow that there is no power by implication to prohibit an assembly or a procession in the event of the persons in charge of the same declining to apply for a license.

But it may be urged that the power to regulate a public assembly or a procession would be a barren power, if the police have not by implication a power to prohibit such assembly or procession, and that the true rule is that, if the Legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is absolutely indispensable for the purpose of carrying out the purpose in view. I entirely accept the validity of the rule, but I wholly deny that it is indispensable for the purpose of carrying out the purpose in view to prohibit an assembly or procession. Where the Act imposes a penalty upon every person for opposing or not obeying the orders issued under the Act, it seems to me that the purpose in view is carried out by enforcing the provision of the Act against such persons. At any rate the question has been discussed in England whether a power to prohibit is incident to a power to regulate and license, and a clear and decisive answer has been given. In *Rossi* v. *Lord Provost etc., of Edinburgh* (2) the question was whether the conditions of a license granted by the Corporation were or were not *ultra vires*. By Section 80 of the Edinburgh Corporation Act, 1900, as amended by Edinburgh Corporation Order Confirmation Act, 1901, any person selling ice-cream (except in a duly licensed hotel) without a license from the Magistrates, who were, by that section, empowered to grant the same, for the house, building or premises, where such ice-cream was kept for sale was liable to a penalty; provided, as the statute declared "that such licenses shall run from the date of issue until the 15th day of May next ensuing, and upon renewal from the date of expiry of the license so renewed to the 15th day of May succeeding such expiry, unless the same shall be sooner forfeited, revoked or suspended". The statute also provided that "every person licensed to sell ice-cream under the provisions of this Act who shall sell ice-cream, except during the hours between eight of the clock in the

(2) (1905) A.C. 21.

morning and eleven of the clock at night on any lawful day...shall be liable to the penalties in the Act provided." No form of license was annexed to the statute. In pursuance of the statute, the Magistrates drew up a license on the following terms, to be issued to the ice-cream vendors licensed by them, *viz.*,

1. That the said licensee shall not keep open the said premises or sell or permit the sale of ice-cream therein on Sunday or on any other day set apart for public worship by lawful authority.

2. That the said licensee shall not keep open the said premises or sell or permit the sale of ice cream therein before eight o'clock in the morning or after eleven o'clock at night.

3. That the said Magistrate, or any of them, may at any time suspend or revoke this license.

It will be noticed that though the Act, while enabling the Magistrate to issue licenses for the purpose of regulating the sale of ice-cream and assuming that they had the power to forfeit, revoke or suspend the license, gave them no power either to forfeit, revoke or suspend the license or to prohibit the carrying on of the trade, the Magistrates, purporting to act in pursuance of the statute, prohibited the carrying on of the trade except on the terms of the license and reserved to themselves the liberty of suspending or revoking the license. The House of Lords came to the conclusion that each of the conditions of the license was bad and that the license was wholly *ultra vires*. The Lord Chancellor, dealing with the argument that the Magistrates had the implied power to do everything for the purpose of carrying out the purpose of the Act, made these pregnant observations: "but when it is argued that because they are given the power to restrict, within certain hours, the sale of ice-cream, therefore they have implied power to do all that might be desirable or expedient with reference to the times and circumstances under which ice-cream shall be sold, it seems to me, the argument entirely fails. What is sought to be done, whether directly by by-laws, or indirectly by the language of the license that is issued, is something that can only be done by the Legislature. It is a restriction of a common right which all His Majesty's subjects have, the right to open their shops and to sell what they please subject to legislative restriction and, if there is no legislative restriction which is appropriate to the particular thing in dispute, it seems to me it would be a very serious inroad upon the liberty of the subject if it could be supposed that a mere single restriction which the Legislature has imposed could be enlarged and applied to things and circumstances other than that which the Legislature has contemplated." Lord Davey in the course of his judgment, dealing with the power reserved by the Magistrates to suspend or revoke the license, observed as follows:—"Now I confess that I have not heard from the learned Counsel and I took the liberty, of pressing the learned Counsel on this point, on any power in the Magistrates either to revoke or to suspend this license. It is said that the words which I have read, 'unless the same be sooner forfeited, revoked or suspended' give the power. My Lords, that construction of the Act of Parliament seems to me to be entirely contrary to principle. The utmost that you can say is that the words seem to assume that the Corporation either have already, or may at some future time, acquire a power to forfeit, revoke or suspend the license. That it does not give the power seems to me plain from a consideration of the words, because the words, are, as your Lordships will observe, 'forfeited, revoked, or suspended.' Now 'forfeited' has a clear and definite meaning when you are speaking of licenses of this description. It means that if the licensee does or omits certain acts, his license will be forfeited. That is the plain meaning of it. Well, My Lords, you will look in vain in this statute or in this provisional order for anything that defines the conditions upon which the license is to become forfeited. It is plain, then, that this clause does not make any provision for the licensee forfeiting his license, and it is equally plain to my mind that it does not contain any power either to revoke or suspend the license."

The point established in the other case to which I propose to refer, *viz.*, the case of *Municipal Corporation of the City of Toronto* v. *Virgo* (3) is this: that a statutory power conferred upon a Municipal Council to make by-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner. The statute gave power to the council to pass by-laws for licensing, regulating and governing hawkers or petty chapmen and other persons carrying on petty

(3) (1896) A.C. 88.

trades. Stopping here for a moment, it will be noticed that Section 30 of the Police Act gives power to the police, as the marginal note shows, to regulate public assemblies and processions and license the same. There is no prohibition on the face of the Police Act just as there is no prohibition on the face of the statute which I am now considering. The by-laws framed by the Council prohibited the hawkers from prosecuting their calling or trade in certain streets in the city of Toronto. The Privy Council held that the by-law complained of was *ultra vires*. Lord Davey, in delivering the judgment of the Board, conceded that the regulation and governance of a trade might involve the imposition of restrictions on its exercise both as to time and, to a certain extent, as to place, but he pointed out that there was a marked distinction to be drawn between the prohibition of a thing and the regulation or governance of it, for, as His Lordship made clear, "a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." And the conclusion at which His Lordship arrived may be stated in his own words "a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorise the making it unlawful to carry on a lawful trade in a lawful manner." The point is put very clearly and forcibly in Halsbury's Laws of England: "generally speaking the function of a by-law is to regulate and not prohibit" (Volume 27, page 124, footnote K). It will now be convenient to turn to the actual order issued by the Superintendent of Police on the 3rd of January, 1922. The order on the face of it is a prohibition. It prohibits all processions, associations or assemblies for a period of three months except under a license, and it prohibits such processions, associations or assemblies not only in a public road, street, or thoroughfare, but anywhere within the municipal or union area of Palamau. A more absolute prohibition it is difficult to imagine; and the reason for this extraordinary order constituting, as it does, a very serious inroad upon the liberty of the subject is that the officiating Superintendent of Police considers such prohibition to be necessary for the preservation of the public peace and public safety. It is, in my opinion, only necessary to state the terms of the order to reject it as utterly beyond the power of the officiating Superintendent of Police. In the first place, the order is on the face of it a prohibition; and, if Lord Davey is right in his view, a power to prohibit is not incident to a power to regulate and license. In the second place, there is no power to issue an order to have operation for three months. The language of the section makes it perfectly clear to my mind that the police have to deal with each case as it arises, and that the District Magistrate has to exercise his judgment on each occasion. This was the view which was taken of Section 30 of the Police Act in this Court in the case of *Emperor* v. *Shama Kandu* (4).

That view seems to me to be the right view, and the only view which can be taken of the section. In the third place, the police have no power whatever to prohibit association or assembly anywhere within the municipal and union area of Palamau, assuming that they have a power to prohibit at all. Under the order as issued, a number of people could not meet together in a private house for a lawful purpose; and it has been held that you cannot reject that which on the face of it is *ultra vires* and support the order on the ground that any Court can construe it so as not to infringe the liberty of the subject. In the last place, the order is bad in so far as the officiating Superintendent of Police arrogates to himself a power not conferred by the Police Act on him. The Act requires that the judgment shall be exercised by the Magistrate of the District or of the sub-division of a district. The order not only does not show that any judgment has been exercised by the Magistrate of the district, but it shows that such judgment has been exercised by the officiating Superintendent of Police. If the order is to be regarded as a by-law, then it is well-established that a Court of law will not give effect to it, unless it is satisfied that all the conditions precedent to the validity of the by-law have been fulfilled. If the legislature has given a power to the Superintendent of Police to legislate in the matter, it has for the safety of the public imposed as a condition precedent that the Magistrate shall be satisfied that there is necessity for the legislation. It is a power conditional upon an event, and the exercise of the power will not be upheld unless it is established that the condition has been fulfilled. I hold that the order of the officiating Superintendent of Police cannot be regarded as the law within the meaning of the term as used in Section 141 of the Indian Penal Code. I hold further

(4) (Cr. Ref. 32 of 1917) decided on the 15th June, 1917 [unreported].

that, if it be so regarded, we are bound to deny its validity for the reasons which I have already given.

I now come to the next branch of the argument, namely, whether there was any execution of the law. Execution means enforcing, carrying into effect. Now it is well-established that execution, to be lawful, must follow the procedure laid down in the Act. The law in this case is the order of the officiating Superintendent of Police prohibiting all assemblies, associations and processions except under a license. I will assume that the order was a lawful one and that it could be executed. I will assume that there was a violation of that order by the persons who formed the procession. But assuming all these, how could the law, that is to say, the order of the officiating Superintendent of Police be executed? The learned Assistant Government Advocate contends that it could be executed only by ordering the procession to disperse. In my opinion, on an interpretation of Sections 30, 30-A and 32, the contention is an impossible one. Section 30-A which does not apply to this case does give the police a right to stop a procession and to order it to disperse. Section 30 which does apply to this case gives no such power to the police. Section 32 provides a penalty for opposing or not obeying the orders that may be issued either under Section 30 or Section 30-A. In my opinion, the orders under Section 30 could be executed only by proceeding against the persons opposing or not obeying such orders under Section 32 of the Act, whereas, where Section 30 A applies the orders could be executed, first by stopping the procession and ordering it to disperse and secondly, by proceeding against the persons opposing or not obeying such orders under Section 32 of the Act. It is not suggested that the assembly was in itself an unlawful assembly. In my opinion, the police had no power, either under the Criminal Procedure Code or under the Police Act to stop the procession or order it to disperse. It follows therefore that they were not executing the order of the officiating Superintendent of Police in a lawful manner.

The last point in connection with this argument is whether there was resistance on the part of the persons forming the procession. Resistance, we were informed is to withstand, or stand against or make opposition to; and it was argued that in so far as the persons forming the procession refused to disperse when they were ordered to disperse by the police, there was clear resistance on their part. Now it must be remembered that the resistance must be not to the law, but to the execution of the law; in other words, the prosecution must establish that the persons forming the procession withstood or stood against or made opposition to the carrying into effect of the law, that is to say the order issued by the officiating District Superintendent. Now in the first place if there was no power in the police to stop the procession or to order it to disperse, there was clearly a right in the accused persons to withstand or stand against or make opposition to the order of the dispersal. In the next place resistance means something more than defiance or disobedience. One does not, in my opinion, withstand or stand against or make opposition to an execution by merely not submitting to the order. Resistance is something more than non-submission. It consists of an overt act showing an intention to make opposition to the execution of the law.

This undoubtedly has been the view of the Bombay High Court. In the case of *Queen Empress* v. *Allibhai* (5) it was held that the mere refusal by the accused person to hand over to a bailiff money alleged to be in his pocket is not a resistance to the taking of that money within the meaning of Section 183 of the Indian Penal Code. In that case the bailiff was not legally entitled to take the money and the accused replied that the bailiff was not legally entitled to take the money and that he would not give it to him. It was held that there was nothing more than a refusal to submit and that there was no resistance within the meaning of Section 183, Indian Penal Code. The same view was taken in the case of *Queen-Empress* v. *Husain* (6). In this case the bailiff went to attach two tonga tops belonging to the judgment-debtor. Thereupon the accused said that the tonga tops were his and that he would not let the bailiff take them away unless, he entered them as his property. It was held that a mere verbal direction to the plaintiff not to remove the property could not be regarded as a resistance. I cannot distinguish these cases from the present case. The accused persons in the present case did nothing more than refuse to obey the order of dispersal given by the police. When the police laid their hands on the accused persons and arrested them they did not in any way make any attempt to resist the arrest. They

(5) Rat. Un. Cr. C. 412.
(6) (1890) 15 Bom. 564.

submitted to the arrest and in so doing submitted to the execution of the law however illegal the execution might have been. I hold that there was no resistance on the part of the accused persons to the alleged execution of the alleged law. It follows therefore that the case does not fall within the second clause of Section 141 of the Indian Penal Code.

It was faintly argued by the learned Assistant Government Advocate that the common object of the procession might have been to commit an offence under Section 151 of the Indian Penal Code. It is sufficient to say that there is no evidence that the accused persons were likely to cause a disturbance of the public peace. Such evidence is essential for an offence under Section 151 of the Indian Penal Code. The argument was not a serious one and I do not think it necessary to deal with it at greater length.

I now turn to another aspect of the case and it is this: whether a person can be indicted under the general law for an offence committed under the Police Act? Now in order to understand the point it is necessary to state that it is no offence under the general law for any persons or class of persons to convene or collect an assembly in any road, street or thoroughfare or to form a procession in such road, street or thoroughfare. Under the general law it is not necessary to apply for a license in order to enable persons to convene or collect an assembly in a road, street or thoroughfare or to form a procession in such road, street or thoroughfare. Nor is it an offence under the general law not to apply for a license if such persons are directed by an executive order to apply for such license. The offence is created for the first time by the Police Act which imposes a penalty upon every person opposing or not obeying the orders issued under Sections 30, 30-A and 31 of the Police Act. It is a new offence, not an offence under the general law. It has been held in numerous cases that where a statute creates a new offence, which was not an offence at common law and imposes a penalty in respect of such offence, a person committing such an offence can only be proceeded against under the statute which creates the offence and cannot be indicted under the general law. The principle is stated with clearness and precision in Hawkins' Pleas of the Crown, Book II, Ch. 25, Section 4 and is as follows :—

Also where a statute makes a new offence which was in no way prohibited by the common law, and appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt, or information, etc., without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because mentioning the other methods of proceedings seems impliedly to exclude that of indictment." This passage was regarded in the case of *Queen* v. *Hall* (7) as a full statement of the principle which should guide the Courts in regard to the decisions of the cases. That was a case where the defendant was charged in the seventeen counts of the indictment with crimes which might be classified into three divisions; first, he was charged with the wilful omission of the names of qualified persons from the electoral lists. Secondly, he was charged with the wilful insertion of the names of unqualified persons in the electoral lists. Thirdly, he was charged with an attempt to prevent the course of justice by taking steps to place false evidence before the Revising Barrister who was in a certain sense a judicial tribunal. He was also charged with tampering with the lists of voters and also with tampering with the register itself. These charges were made against him as an Overseer of the poor and the offences were alleged to have been committed by him in the course of the duty which was imposed upon him by the Parliamentary Registration Act of 1843. It is necessary to point out that the Parliamentary Registration Act of 1843 provided a penalty for violation of the duties imposed upon him by that Act.

It was contended on his behalf that there was no remedy by indictment as the Act which created the offences provided a penalty for such offences. The Court gave effect to the argument advanced on behalf of the defendant and quashed the indictment. This is the view which has been taken in numerous cases in England. See *Institute of Patent Agents* v. *Joseph Lockwood* (1) *Saunders* v. *The Halborn District Board of Works* (8) and *Clegg, Parkinson & Co.* v. *Early Gas Company* (9). I do not propose to discuss all these cases, but the observations of the Lord Chancellor in the first mentioned case are so appropriate to the present proceedings that I think it desirable to set them out. "You have here," said His

(7) (1891) 1 Q.B. 747.
(8) (1895) 1 Q.B. 64.
(9) (1896) 1 Q.B. 592.

Lordship, "for the first time, a new offence created--the offence of practising as a patent agent without being on the register. But for the enactment creating that offence, the defender has done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature, having created that new offence, has prescribed the punishment for it, namely, a penalty of £ 20. Can it possibly, under these circumstances, be open to bring the individual, not before the summary Court at small expense to determine the question of his liability to a £ 20 penalty, but to bring him before the Court of Session with its attendant expense and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the Legislature has said subjects him to a penalty, and, then having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure and the £20 penalty, but would be liable to imprisonment for breach of the interdict? My Lords, it seems to me, I confess, scarcely necessary to do more than state the contention to show that it is impossible that it can be supported. If that be the law, the number of cases must have been almost innumerable in which such a proceeding would have been competent, and yet it is absolutely unheard of. I will not dwell upon the grave inconveniences which would result from sanctioning a procedure of that description. The mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that the party committing a breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description which might result in a committal to prison." As I have said, the passage cited is most appropriate to the question which has been debated in this Court. Here also, for the first time a new offence has been created. But for the enactment creating that offence, the respondent has done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature having created that new offence, has prescribed the punishment for it, namely, a penalty of Rs. 200. If, as the Lord Chancellor pointed out, the mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, can it be doubted for a single moment that the proper procedure was to proceed under the Act and not by an indictment under the general law? In my opinion, the respondent could not be convicted under the Indian Penal Code for an offence committed under the Police Act.

I have thought it necessary to deal with the case at some length for the reason that the issue raised by the Crown in this appeal goes far beyond the actual facts of the case, and, indeed affects the liberty of the subject in relation to what he may lawfully do in a lawful manner. I must not be understood, however, as sanctioning any breaches of law and order. Where there are breaches of law and order, it is the duty of this Court to relentlessly apply the law and to look neither to the position nor the motive of the persons committing or encouraging breaches of law and order. But while this is so, it is equally our duty to assert from time to time and as often as it may be necessary that the subject has his rights as well as his duties and to assert further that this Court, as the guardian of the rights and the liberties of the subject will sternly repress any attempt on the part of the executive government to tamper with such rights and liberties, and that an order, in the garb of an order for the maintenance of law and order, will not be allowed to stand, if its object is not to maintain law and order but to make, to quote the memorable words of Lord Halsbury, "a very serious inroad upon the liberty of the subject."

I would dismiss this appeal.

Appeal dismissed.

A I R. 1923 Patna 13.

DAS AND ADAMI, JJ.

Emperor—Prosecutor

v.

Dewan Kahar—Accused.

Death Reference No. 13 of 1922 and Cr. A. 146 of 1922, decided on 23rd October, 1922.

(a) *Crim. Pro. Code, S. 364—Statement of accused not read over to accused—Statement is inadmissible in evidence.*

It is obligatory on the Court to show or read the record of an accused person under the section, to him and in the absence of proof thereof the statement is inadmissible in evidence. [P. 15, C. 2 and P. 16, C. 1.]

(b) *Evidence Act, Ss. 24, 80—Conflict between—None exists—"Appears" means appears on evidence not on conjecture.*

There is no conflict between S. 24 and S. 80 of the Act. Where the conditions specified in S. 80

or complied with it must be presumed that the document is genuine and the confession duly taken but nevertheless the Court is bound to treat it irrelevant if it should appear to the Court that the confession was procured by inducement, threat or promise. A Court cannot say except on evidence that a confession 'appears' to it to have been caused by inducement, etc. Such a conclusion cannot be reached on surmise or conjecture. [P. 16, C. 2.]

(c) *Practice—Criminal Trial—Retracted confession is not acted upon unless corroborated—Confession cannot be admitted in part.*

It is the universal practice of the Patna High Court not to rely or act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true.

This procedure will practically effect the same results as a rule requiring proof of the voluntary character of a confession, inasmuch as the truth of voluntariness may not unreasonably, though not necessarily, be inferred where the truth of the confession is established.

There is no rule of law which compels the Court to raise an inference of improper inducement from the mere fact that a confession is retracted; but as a rule of prudence, the Courts in this country have consistently declined to act on a retracted confession, unless the confession is corroborated by credible independent evidence. In the case of admission or confession, Courts cannot ignore a portion of such admission or confession and act upon what remains of that admission or confession. It is settled law that an admission or confession must be taken and considered as a whole. [P. 16, C 2; P. 18, C. 1 and P. 19, C.1.]

(d) *Criminal P.C., S.* 164 (3)—*No question as to detention—Confession should not be ignored—Magistrate should not peruse Police records before recording confession—He should question accused closely as to motive for confession.*

Where accused person was actually produced before the Magistrate as soon as he was arrested and was produced before him the next day for recording the confession, *Held* that the confession should not be ignored on the ground that the Magistrate did not ask him how long he was in Police custody. It is highly irregular for the Magistrate to peruse the alleged statements of the accused made to and recorded by the Police officer before proceeding to question the prisoner. A Magistrate should generally "question the accused closely as to his motives in making a confession"; but, there is nothing in law which lays down that a Magistrate cannot satisfy himself as to the voluntariness of the confession by putting a single question to the accused person. [P. 17, C. 1; P. 18, C. 1.]

(e) *Criminal Trial—Conduct of accused.*

The evidence of conduct of an accused person, unless it is incompatible with his innocence, is, in fact a make weight and nothing more, and care should be taken that it may not have an exaggerated effect. It depends upon temperament, surroundings, and other circumstances as to how a man would act in a particular situation, and all these combine to form a most fallacious basis for assured conclusions. [P. 21, C. 1.]

Government Pleader—for the Crown.

D. P. Sinha—for Appellant.

Das, J.:—This is a reference by the Judicial Commissioner of Chota Nagpur for confirmation of a sentence of death passed on one Dewan Kahar who was charged with having murdered his wife on the afternoon of Monday the 15th of June, 1922. There is also an appeal by Dewan Kahar against the conviction and sentence passed on him.

The admitted facts are very few and may be stated as follows:—

Dewan, the appellant, and Bhawan are two brothers, and they lived near each other in separate houses in the same Mohalla. On the day of the alleged occurrence, Dewan's daughter and the younger sister of Bhawan's wife were both married, and it appears that the ceremony took place in the house of Bhawan who had more accommodation in his house, and whose wife is very much attached to Dewan's children. Dewan and Bhawan each contributed Rs. 125 for the expenses in connection with the wedding ceremony. The wedding took place between 6 a.m. and 8 a.m. and the Barat parties left at about 11 a.m., before the parties left, Bhawan asked Dewan for Rs.20, as he wanted to give each girl a present of Rs. 20, at the time of their going away; but Dewan said that he had no more money. The parties left, as I have said, at about 11 a.m. and Dewan and his wife stayed on in Bhawan's house, and it appears that the two brothers lay down to rest. At about 2 p.m. Bhawan got up and he saw Dewan still reposing, and Dewan's wife sitting near Dewan. Shortly after, Dewan's wife got up, took the key of the house from Dewan and went off, leaving her husband in Bhawan's house. At about 4-30 p.m. Dewan himself got up and left his brother's house, taking with him his little child. He returned in about fifteen or twenty minutes with his child, and it is the prosecution case that the occurrence took place between the time he left his brother's house and the time he returned to it. Dewan returned to Bhawan's house, as I have said, in fifteen or twenty minutes, and asked for a glass of water. Bhawan saw marks of blood on his Dhoti and asked him how those marks came on his Dhoti. He gave no answer, but put his boy on the ground and threw down Rs. 40-8 which he had with him. Bhawan again asked him what had happened, and he said "We shall meet in Hell": and then he added: "Some one has killed my wife" and then, he went off in the direction of the thana. At the thana he made a statement which the Police took down as the First Information Report in the case, but which the learned

Judicial Commissioner very properly excluded from his consideration on the ground that it was in the nature of a confession. The appellant was then sent by the Police to a Deputy Magistrate, in order to enable him to make a confession to the Deputy Magistrate. The Deputy Magistrate, Babu Baijnath Sahay, for some reason which has not been made clear, did not record the confession that day. The appellant remained in the Hajat that night, and was again sent to the Deputy Magistrate the next morning. The Deputy Magistrate then recorded a confession under Section 164 of the Criminal Procedure Code. The Inquiring Magistrate examined the appellant under Section 364 of the Criminal Procedure Code, and it appears that the appellant made another statement before the Committing Magistrate which was in the nature of a confession. In the Sessions Court, however, the appellant retracted his confession, and said that some one came to him at midnight while he was in the Hajat and asked him to admit the murder and said that if he admitted it he would be discharged by the Magistrate. His case before the Sessions Judge was that he followed the instructions given to him by this unknown person or persons as he thought that the Magistrate would discharge him if he admitted the murder.

The whole case of the prosecution rests on the confessions alleged to have been made by the appellant; first before Babu Baijnath Sahay, and secondly before the Committing Magistrate. Apart from these confessions, there is no evidence whatever to connect the appellant with the murder of his wife except, perhaps, certain statements alleged to have been made by him to certain persons as he was proceeding to the thana after the alleged occurrence. It has not been argued before us that there is sufficient evidence to support the conviction if for any reason we are unable to act upon the confessions. It, therefore, becomes very material to consider first as to whether the confessions were properly admitted in evidence, and secondly whether they or any of them, can be acted upon in the present case.

The argument in regard to the confession recorded by the Committing Magistrate is a short one, and it will be convenient to dispose of it at once. The argument is that there is no evidence that the confession, as recorded by the Committing Magistrate, was shown or read to the appellant or that he had any opportunity to explain or add to his answers. The argument is founded upon the express provision of Section 364 of the Criminal Procedure Code which provides as follows:—"Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter, or the Chief Court of Punjab, or the Chief Court of the Lower Burma, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English; and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers." It will be noticed that the legislature makes it obligatory on the Court to show or read the record to the accused persons; and the reason is that he is at liberty to explain or add to his answers until he puts his signature to the record. Now, there is nothing in the record itself to show that it was shown or read to the accused person; but the learned Sessions Judge has taken the view that there is no law requiring the Magistrate to record any formal note in excess of what is prescribed by the form. We are not for the moment concerned with the question whether there is anything in the law which requires the Magistrate to record a note to the effect that the record was shown or read to the accused person. It may be pointed out that there is nothing in Section 360 of the Criminal Procedure Code for instance which requires a Magistrate or Sessions Judge to record any formal note to the effect that the evidence of a witness has been read over and explained to a witness; but we find that the learned Sessions Judge has been very careful to add that formal note to the evidence of each of the witnesses examined by him. The question is not whether there is any obligation on a Magistrate or a Sessions Judge to record any formal note to the effect that the record was read over to the accused person, but whether there is any evidence that the record was in fact read over to the accused person. The point was taken before him before the evidence was concluded, and the learned Sessions Judge should certainly have examined the Committing Magistrate on the point. As it happens, there is no evidence whatever that the record was shown or read to the

accused person, and I must hold that the statement made by the accused person, to the Committing Magistrate cannot be used as evidence against him.

I now come to the confession recorded under Section 164 of the Criminal Procedure Code. There is an endorsement of the Deputy Magistrate to the effect, that the confession was voluntarily taken and that it was taken in his presence and hearing and was read over to the person making it who admitted it to be correct, and that it contained a full and true account of the statement made by him. The learned Deputy Magistrate who recorded the confession has been examined in the case and he says that he "judged that Dewan accused was taking quite voluntarily and without pressure." The learned Vakil for the appellant has argued before us that notwithstanding the certificate of the Magistrate, it has still to be proved by the prosecution that the confession was a voluntary one, and in support of his argument he relied upon section 24 of the Evidence Act That Section runs as follows: "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by an inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain an advantage or avoid any evil of a temporal nature in reference to the proceedings against him." It was argued that the use of the word "appears" shows that the section does not require positive proof of improper inducement to justify the rejection of the confession ; such word indicating a lesser degree of probability than would be necessary if " proof " had been required. The argument, in my opinion is not correct, for section 80 of the Evidence Act provides in distinct terms that whenever any document is produced before any Court purporting to be a statement or confesion by any prisoner or accused person taken in accordance with law, purporting to be signed by any Judge or Magistrate, the Court shall presume that the document is genuine; that statements as to the circumstances under which it was taken, purporting to be made by the person signing it are true, and that such statement or confession was duly taken. In my opinion, there is no real conflict between section 24 of the Evidence Act and section 80 of that Act. Whenever the conditions specified in section 80 are complied with, it must be presumed that the document is genuine, and that the confession was duly taken; but nevertheless the Court is bound, to treat it as irrelevant if it should appear to the Court that the confession was procured by any inducement, threat, or promise. Now I do not see how it is possible for a Court to say that the making of the confession "appears " to it to have been caused by any inducement, threat, or promise, except upon evidence which is before the Court. The inference may be suggested by the confession itself, or by the evidence of the prosecution or by the evidence adduced by the accused person, or by the surrounding circumstances which the Court is always bound to take into consideration , but the conclusion cannot be reached on surmise or conjecture, The question, however, is of academical interest in this case for, as I have pointed out, the confession has been retracted, and it is the universal practice of this Court not to rely or act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true. As it has been pointed out, this procedure will practically effect the same results as a rule requiring proof of the voluntary character of a confession, inasmuch as though these decisions require evidence of the truth of the confession and not of its voluntary character, the truth of voluntariness may not unreasonably, though not necessarily be inferred where the truth of the confession is established. I hold on the argument which has been advanced before us that the confession was properly admitted in evidence by the learned Sessions Judge.

It was next argued that the learned Magistrate in recording the confession acted so irregularly that we ought not to give effect to the confession. It was said that the learned Magistrate did not ask the accused person how long he was in custody. I quite understand that where an accused person has been in the custody of the Police for a very considerable time, that circumstance itself ought to put the Magistrate on his guard in recording the confession of an accused person ; but in this case the learned Magistrate was aware of the fact that the accused person was in the custody of the Police, if at all, for one night. I myself think that the learned

Deputy Magistrate should have recorded the confession of the accused person as soon as he was produced before him. If he had done so, it would not have been open to the accused person to put forward the story that while he was in the Hajat after his arrest he was tutored to make a confession by some body or other. It is greatly to be deplored that the learned Deputy Magistrate waited till the next morning to record the confession of the accused person but that is entirely a different matter. The question which we have to decide now, is, is the confession to be excluded because the Magistrate did not ask the question how long the accused person had been in Police custody? In the case of *Queen-Empress* v. *Narayan* (1) upon which reliance was placed, the Court found that although the accused person was in fact arrested on the 11th of June, the Police records showed, and falsely showed, that he had been arrested on the 21st of June, on which date he made the confession. The Bombay High Court thought that in a case where the confessing accused had been for ten days in detention by the Police, obviously the first question which a Magistrate should put, in order to satisfy himself that the confession will be a voluntary one, is, how long has the accused been in custody of the Police. Each case must be decided on its own facts, and I can see no resemblance whatever between the case of *Queen-Empress* v. *Narayan* (1) and this case. Section 164 (3) of the Criminal Procedure Code forbids a Magistrate to record a confession, unless upon questioning the person making it he has reason to believe that it was made voluntarily. The form of questions is not indicated in the Code, for the obvious reason that each case has its own peculiarities. In the present case the accused person was actually produced before the Magistrate as soon as he was arrested and was produced before him the next day. I am unable to hold that the confession should be ignored on the ground that the Magistrate did not ask him how long he was in Police custody. I do desire to point out, however, that it was highly irregular for the Magistrate to have perused the alleged statements of the accused made to and recorded by the Police Officer before proceeding to question the prisoner. This was pointed out in *Emperor* v. *Radhe Halwai* (2) and was repeated in *Jogiban* v. *Emperor* (3). It is a matter of considerable surprise to us that these decisions were ignored by the Deputy Magistrate in question.

It was next argued that the learned Magistrate should have asked the accused person his motive for making the confession. In support of this argument a dictum of Roe, J. in the case of *Jiubodhan* v. *King Emperor* (4) was relied upon. In that case the Court found, first, that the confessions were made in response to an inducement by the Police to the effect that nothing would happen to the persons making the confession if they gave information, secondly that they were recorded in the presence of Police Officer by a Magistrate who failed to comply with the provisions of Section 164 of the Criminal Procedure Code, and thirdly, that the confessions were inconsistent with each other and with the evidence recorded in the case. On these findings the Court refused to take the confessions into its consideration. Mr. Justice Roe in the course of his judgment said as follows: "In the second place, as I understand Section 164 (3), a Magistrate is bound to question the accused closely as to his motives in making a confession, and if he fails to do so, he has no jurisdiction to say that he is satisfied that the confession is voluntarily made." If Mr. Justice Roe intended to lay down the proposition which he in fact did, as a proposition of law, then I respectfully dissent from it. If, on the other hand, he laid down the rule as a rule of prudence then I entirely endorse it. As I have pointed out, the Criminal Procedure Code lays down very emphatically that no Magistrate shall record any confession unless upon questioning the persons making it he has reason to believe that it was made voluntarily. Now, each case depends on its own facts and just as there are cases which on the face of them attract the suspicion of a Magistrate, there are others which do not attract the suspicion of the Magistrate. It is quite impossible to lay down any hard and fast rule on the subject. The Court must in each case satisfy itself that the Magistrate honestly believed that the confession is a voluntary one. If a Court is so satisfied, then the failure on the part of the Magistrate to put any particular question to the accused person would not involve the rejection of the confession The rules laid down in the various cases to which we have been referred are rules of prudence rather than rules of

(1) (1901) 25 Bom. 543.
(2) (1903) 7 C. W. N. 220.
(3) (1908) 13 C. W. N. 861
(4) (1917) 1 Pat. L. W. 388.

law, and though it is very necessary that the Magistrates in this country should, in recording the confessions, observe these rules, it must be remembered that these rules have been formulated in order to enable the Magistrate to decide whether the confession is a voluntary one or not, and where the Court is satisfied that there was nothing in the circumstances connected with the making of the confession to attract the suspicion of the Magistrate, the confession will stand, though the rules were not strictly observed.

It was next argued that a comprehensive question, such as was put by the Magistrate in this case, is not sufficient. It is, I think, desirable that a Magistrate in recording the confession should put various questions to an accused to enable him to decide whether the confession is a voluntary one or not; but, as I have said before, there is nothing in law which lays down that a Magistrate cannot satisfy himself as to the voluntariness of the confession by putting a single question to the accused person. In my opinion, if the accused person had not retracted his confession, there would be no ground whatever for not acting on the confession made by him.

But, as I have pointed out, the confession has been retracted; and, the question which we have to decide is whether we ought to convict the accused person on the confession which he has retracted. Now, there is no rule or law which compels us to raise an inference of improper inducement from the mere fact that a confession is retracted; but, as a rule of prudence, the Courts in this country have consistently declined to act on a retracted confession, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true, that is to say usually unless the confession is corroborated by credible independent evidence.

I propose then to consider whether we are in a position to come to the unhesitating conclusion that the confession upon which the prosecution relies is true. The learned Sessions Judge has come to the conclusion from the evidence in the record and from the surrounding circumstances that the confession is true. I have come to the opposite conclusion. It is, therefore, necessary to deal with this subject with some care, and I propose to deal with the whole confession in order to see whether the confession has received corroboration from independent evidence.

The confession runs as follows:—"I had in my house Rs. 500 (in cash) tied in a piece of cloth in an earthen jar (Chukka) which was put underneath the ground below the hearth. Out of the sum I paid Rs. 260 to one creditor named Haricharan he is a Munshi in the coolie depot." There is no evidence whatever to show that he did in fact conceal Rs. 500 underneath the ground or, that he paid Rs. 260 to one creditor named Haricharan. It may be urged that with the appellant in the dock and his wife dead it is impossible for the prosecution to prove that he did in fact conceal Rs 500 underneath the ground; that is undoubtedly so. But, it was possible for the prosecution to prove that he did in fact pay Rs. 260 to a creditor named Haricharan. I lay particular stress on this point because the burying of the money underground, as will presently appear, is an important part in the confession. The confession goes on as follows:—

"I had taken out of it Rs. 100 for the celebration of the marriage ceremony, Rs 140 was left as balance. It is two months since I last concealed it underground. I had settled the marriage of my daughter with the Rs. 100 which I had taken out, besides I had an extra sum of Rs. 100 which I had kept for the marriage." Stopping here for a moment, it is sufficient to point out that he gave his brother Rs. 125 and not Rs. 100 as is alleged by him in the confession; but the point is a small one and may be ignored. The confession then goes on as follows:—"The Barat party came to my place the day before yesterday at 8 p. m. There was a dancing party in the Barat. A large number of persons were witnessing the dance, I was working inside the house, I felt thirsty and asked my wife to give me water to drink. After fifteen minutes she said that she would give me water on her coming back, and she went away towards the place where the boy was dancing. But I felt very thirsty and so I followed her. She went into the courtyard of Mistiri. I remained standing there. The Mistiri whose name was Mangar Kahar, was also witnessing the dance. He left the place and went into the house. Suspicion arose in my mind, I went into the house and then I found Mangar Mistiri having sexual intercourse with my wife in the verandah. I did not raise any alarm

and came back silently." This is an important part of the story and undoubtedly constitutes, so far as the confession is concerned, one of the motives for the murder Now, there is not only no corroboration of the incident to which the confession refers, but the learned Sessions Judge has recorded a distinct finding to the effect that this portion of the story is untrue, and was probably introduced by him to save himself The view of the learned Sessions Judge is that some friend with superficial knowledge of law must have advised the accused that he would be acquitted of murder, if he showed that his wife had been unfaithful. The conclusion of the learned Sessions Judge is, in my opinion, a remarkable one. There was no obligation whatever on the accused person to make any confession to the Magistrate. It is only when a person is seized with remorse after committing a crime that he at all thinks of making a confession of his crime, unless indeed any inducement is offered to him We will assume in this case that no inducement whatever was offered to the accused person. Why then should he make, any confession at all to the Magistrate if at the same time he thought it necessary to invent a story in order to escape the penalty of law? I know of no authority which enables a Court of law in the case of admission or confession to ignore a portion of such admission or confession and act upon what remains of that admission or confession. It is settled law that an admission or confession must be taken and considered as a whole. It is, however, sufficient to say at this stage that this portion of the confession which undoubtedly according to the confessing accused person constituted one of the motives for the crime, has not only not received any corroboration from the evidence in the case, but has been distinctly found to be false by the learned Sessions Judge The confession then goes on as follows —I had to send back the Barat party the following morning I then asked my wife to come with me and point out the money as I had to send back the marriage party Then my wife and I went to the spot where the money was buried" This again is at variance with the evidence of Bhawan Kahar. Bhawan Kahar's evidence is that he wanted Rs. 20 from his brother as he wanted to give each of the girls Rs. 20 at the time of the going away of the brides, and that his brother told him that he had no money with him. The evidence of Bhawan Kahar establishes beyond a shadow of doubt that the accused person stayed in his house after the Barat parties had gone, and did not leave his house till about 4 or 4-30 P M, his wife having preceded him shortly after 2 P M. The confession suggests that he went to his house with his wife before the Barat parties actually left Bhawan's house and that he went to his house in order to get the money which he might give to his daughter at the time of the going away The confession is, therefore, in material respects at variance with the evidence for the prosecution. In the next place as the confession later on makes it clear, he had some money with him. According to the evidence of Bhawan Kahar, he had Rs. 40-8 in his pocket at that time His brother asked him for Rs. 20 It is unlikely that he shoud have gone to his house to fetch Rs 20 buried under the Chulha when he had Rs. 40-8 in his pocket. The confession then runs as follows, —"I found the spot where the money was buried dug out and there was no money" So far as this portion of the confession is concerned, the prosecution claims that there is corroboration in the circumstance that the Police found that there was disturbed earth on the floor under the Chulha. I can hardly regard it as corroboration, although this is a circumstance on which the prosecution is entitled to rely. "Then I asked my wife what had become of the money. She said that she did not know it." I said that "None but you and me have got an entrance into the house, who else will then take the money? I asked her twice but she said that she knew nothing about the money." She then said "that she would tell the truth. She then said that with the money she had purchased a pair of Goraon of silver, as pair of Angutha and Haikal all made of silver from his maternal uncle Rangi Kahar. But she further said that she was tutored by her uncle not to confess it at first, but that when she would be vexed much, she should say so "Now, it was open to the prosecution to examine Rangi Kahar on this point. Rangi Kahar, the maternal uncle of the deceased, was in fact examined on behalf of the prosecution. He was in no way friendly to the accused person, and would most certainly have taken to heart the fact that his niece had been murdered by the appellant If in point of fact, the deceased had purchased the jewelleries through her uncle Rangi Kahar, it is incredible that the prosecution while examining Rangi Kahar, should have missed the point that his

evidence could have corroborated the confession on a material point; but there is nothing in the evidence of Rangi Kahar which lends any support to the confession. The inference is irresistible that Rangi Kahar, if he had been asked, would have failed to support this portion of the confession. The confession then runs as follows :—"I was much annoyed at this— Why had she spent the money without my permission. Thereupon my wife laid down upon the Charpoy, but she was awake. I then went to cut her throat with a knife. She then got up and began to raise an alarm. I then took up a Tabal (axe) that was kept on the Patwat of the room." Stopping here for a moment, it may be pointed out that the axe which was produced in Court, and which was alleged to be the instrument with which the accused person killed his wife has not been identified as the property of the accused person. There is absolutely no evidence on the record on this point, and it is impossible to hold that the axe with which the murder is alleged to have been committed is the property of the accused person. It may also be pointed out that the Police made no attempt to find out whether any one heard the cries of the deceased. The confession then proceeds as follows :— "I struck her with it and she fell down on the Khatia. I dealt her several blows with the axe on the neck and then she died. I then started for the Police station to lodge information. I locked up the room in which was the corpse of my wife, and shut the door of the verandah. I started with my son. I met an old Dusadhin in my way, I said to her, 'Look here, I have killed my wife. I am now going for good. You will please take care of my son.' Thence I went to my brother. He having seen my Dhoti stained with blood, enquired of me what the matter was, I said to him 'I have killed my wife. Here is my son, keep him in your custody." I gave him what I had left with me out of Rs. 200, and told him that I was then leaving the place for good, that there was no hope of my escape and that he would take care of my son. In my way I met one Chhatu Telis wife to whom also I said that I had killed my wife and that I was going to the Police Station. Thus I proceeded raising an alarm and telling similar things to lots of persons. I met Laloo constable as well. I told him the same thing. Thence I went to Mangtu Seth. I purchased cloth from his shop and owed some money to him. I asked him for my account. He replied that some pice was due from me. I told him that I had paid the pice. Then he replied that it would be due from my brother then, and that it would be realized from him. I did not speak to him about my killing my wife. I then went direct to the Police Station and having arrived there myself lodged the information. I shall not make any further statement." The learned Sessions Judge strongly relies upon the statements which he did make to various persons on the way from his house to the Police Station and he comes to the conclusion that there is strong corroboration in the evidence of the persons, whose names are mentioned by him in the confession, of the truth of the confession. It is necessary then to see whether the view of the learned Sessions Judge can be supported. The first person mentioned by the accused person is an old Dusadhin to whom he is alleged to have said " Look here, I have killed my wife I am now going for good. You will please take care of my son." The old Dusadhin is Kalpha Dusadhin the fifth witness examined on behalf of the prosecution. Her evidence is as follows :— About 4 p.m. on the day of occurrence I came home and saw Dewan pass with his infant child and I greeted him. After we had passed he turned and said he was going away and asked me to look after his son and daughter. He went in the direction of his brother's house. At 5 P. M. a crowd collected at Dewan's house and I heard that Koili had been killed". It is quite clear from the evidence of Kalpha Dusadhin that she never knew anything about the occurrence until 5 P. M. when she heard that Koili, that is to say, the wife of the accused person had been killed. It was one thing to say that he was going away, and quite another thing to say that he had killed his wife, and that the Dusadhin would have to take care of his son. It is quite clear that the Dusadhin did not infer from what the accused person stated to her that he had killed his wife. Next, he is alleged to have admitted to his brother that he had killed his wife. The evidence of Bhawan Kahar and Sheo Lochan does not support the confession on this point. Bhawan distinctly says that the accused told him that some one had killed his wife. It is quite true he also said this. " We shall meet in Hell," but it is impossible to come to an inference of guilt from the expression used by him. Sheolochan, it may be pointed out, is a friend of his brother, and was present in the house of Bhawan when Dewan came to

was interpreted by them in two different ways. He is, however, the only witness who supports the prosecution, and when all the circumstances connected with the confession are considered and critically considered, it is impossible to rely upon the evidence of a single witness, and to hold that the confession has received corroboration in material parts.

In my opinion, the confession is in material respects at variance with the evidence for the prosecution, and it is quite impossible to say that the truth of the confession has been established. It is admitted that if the confession be excluded from our consideration there is not sufficient evidence on the record on which we can support the decision of the learned Sessions Judge It may be that the whole conduct of the accused person is very suspicious, but then, as has been pointed out, more than once, "suspicion" however strong can never take the place of "legal proof." In my opinion, the evidence in the case falls far short of the proof which we would require in a case of this nature. I would allow this appeal, set aside the conviction and the sentence passed on the appellant, and direct that he be set at liberty forthwith. The reference will stand discharged.

Adami, J.—I agree.

Conviction set aside.

A.I.R. 1923 Patna 22.

DAS AND ADAMI, JJ.

Triloke Nath Jha and others—Appellants

v.

Bansman Jha and others—Respondents.

Appeal No. 224 of 1921, decided on 30th October, 1922.

(a) *Limitation Act, Art. 182 (5)—Application for confirmation of sale or for delivery of possession—Do not constitute step in-aid.*

Neither an application for confirmation of sale nor an application by a decree-holder to be put in possession of the property is an application to take some step in aid of execution.

(b) *Execution—Ceases when sale is confirmed.*

Though the decree-holder-purchaser is unable to obtain possession that would not entitle him to take out further execution for that portion of his purchase money which is represented by the property purchased by him. Execution comes to an end with the sale of the property and whether or not the auction purchaser obtains possession of the property sold is wholly immaterial for the purpose of the decree and it does not in any way affect it. [P. 25, C. 1.]

Case law discussed.

S. P. Sen and *C. S. Banerji*—for Appellants.

B. N. Mitter—for Respondents.

Das, J.:—The question involved in this appeal is whether the execution of the decree is barred by limitation. On the 20th July, 1917, the plaintiffs sought to execute the decree which they had obtained on the 29th March, 1917. On the 21st February, 1918, certain properties belonging to the judgment debtors were sold and the decree-holders themselves purchased those properties. The sale proceeds not being sufficient to satisfy the decree, the decree-holders presented another application for execution of the decree on the 29th March, 1921. The Lower Court has come to the conclusion that the application of the 29th March, 1921, is barred by limitation.

The application of the 29th March, 1921, is apparently barred by limitation; but it is pointed out on behalf of the appellants that there was an application on their behalf on the 25th March, 1918, for confirmation of the sale which, as I have said, took place on the 21st February, 1918, and that there was a further application on their behalf on the 8th July, 1918 for delivery of possession. It is urged on behalf of the appellants that each of these applications was an application to take some step in-aid of execution and that in this view the application of the 29th March 1921, is not barred by limitation. So far as the application of the 25th March, 1918, is concerned, I am clearly of opinion that that application does not save limitation. No doubt it was held in the case of *Gobind Pershad* v. *Ranglal* (1) that an application for confirmation of sale is an application to take some step-in-aid of execution; but, so far as I am aware, that case has never been followed in the Calcutta High Court. The case of *Gobind Pershad* v. *Ranglal* (1) was decided on the 22nd of June, 1893, but on the 7th April, 1893, it was held by Ameer Ali, J. in the case of *Panchanan Chowdhury* v. *Narasingh Pershad Ray* (2) that an application for confirmation of sale is not an application to take some step-in-aid of execution. The case of *Panchanan Chowdhury* v *Narsingh Pershad Ray* (2) was not brought to the notice of the learned Judges who heard the case of *Gobind Pershad* v. *Ranglal* (1). In the later case of *Umesh Chandra Dass* v. *Shib Narain Mandal* (3) it was held by the Calcutta High

(1) (1894) 21 Cal. 23.
(2) (1910) 11 C.L.J. 356.
(3) (1904) 31 Cal. 1011.

Court that such an application is not an application to take some step-in aid of execution. It was pointed out in the last mentioned case that such an application, not being made by a decree-holder as such but by an auction-purchaser can in no sense be regarded as an application by the decree-holder. It was also pointed out that no application is as a matter of fact required for the purpose of having the sale confirmed. The decisions of the Calcutta High Court do not support the contention of Mr. Sen and I hold that the application of the 25th March, 1918, was not an application to take some step-in-aid of execution.

I now come to the application of the 8th July, 1918, which was an application for delivery of possession. There is some difficulty in deciding this point, not because there is any difficulty inherent in the point itself, but because the cases actually deciding this particular point are all in favour of Mr. Sen's contention So far as I know the point has been discussed by the Calcutta High Court on three different occasions and on each occasion the Calcutta High Court came to the conclusion that an application by a decree-holder to be put in possession is an application to take some step-in-aid of execution. *Sariatoolla Molla* v. *Raj Kumar Ray* (4) is the earliest of these cases. The learned Judges thought that such an application was an application to make the execution final and complete and they followed the decision of the Allahabad High Court, in the case of *Moti Lal* v. *Makund Singh* (5) It is useful to point out that the decision of the Allahabad High Court, in *Moti Lal* v. *Makund Singh* (5) has been reversed by the Full Bench of the Allahabad High Court in the case of *Bhagwati* v. *Banwari Lal* (6) The case of *Sariatoolla Molla* v. *Raj Kumar Ray* 4) was followed by Holmwood and Sharfuddin, JJ, in *Pran Krishna Dhur* v. *Juramoni Chowkidar* (7) It is somewhat difficult to appreciate the reasoning of the learned Judges deciding the case of *Pran Krishna Dhur* v. *Juramoni Chowkidar* (7) but they appear to have thought that the order under section 319 of the Civil Procedure Code being a judicial order, the application which resulted in that order must be considered to be an application to take some step-in-aid of execution. The point was again debated in *Annoda Prosanna Sen* v. *Somoruddi Mridha* (8). Newbould, J. thought that he was conclusively bound by the decisions of the Court and he accordingly came to the conclusion that an application by a decree-holder to be put in possession is an application to take some step-in-aid of execution. Cuming, J. arrived at the opposite conclusion and he thought that such application could not be regarded as an application to take some step in-aid of execution. The decisions of the Calcutta High Court undoubtedly support the view that an application by a decree-holder to be put in possession is an application to take some step-in-aid of execution. In Bombay and in Madras a similar view has prevailed. See *Sadasiva* v. *Narayan Vithal Mawal* (9), *Lakshmanan Chettiar* v. *Kannammal* (10), although eminent Judges in Madras have thought that if the matter were *res integra* they might have decided the point adversely to the decree-holder. See *Kattayat Pathumayi* v. *Raman Menon* (11), *Sandhu Taragamar* v. *Hussain Sahib* (12). In Allahabad the view at one time found favour that an application by a decree-holder to be put in possession of the property purchased by him is an application to take some step in aid of execution—see *Moti Lal* v. *Makund Singh* (5) but the Full Bench decision of that Court in the case of *Bhagwati* v. *Banwari Lal* (6) has undoubtedly overruled the case of *Moti Lal* v. *Makund Singh* (5) and other cases based on that case. If we had to decide the case merely on the authorities which were placed before us we would be obliged to hold that the application of the 8th July, 1918, was an application by the decree holder to take some step-in-aid of execution and that it consequently saved limitation.

But it seems to me that there are numerous decisions of the Calcutta High Court which cannot be reconciled with the three decisions to which I have referred and upon which Mr. Sen relied. It was held in the case of *Ananda Mohan Ray* v. *Hara Sundri* (13) that neither an application by a decree-holder to receive poundage fee from him in respect of the judgment-debtor's property purchased by himself nor an application by him to be allowed to set off the purchase

(4) (1900) 27 Cal. 709.
(5) (1897) 19 All. 477.
(6) (1909) 31 All. 89.
(7) (1909) 13 C.W.N. 694.
(8) (1919) 30 C.L.J. 135.
(9) (1911) 35 Bom. 452.
(10) (1901) 24 Mad. 185.
(11) (1903) 26 Mad. 740.
(12) (1905) 28 Mad. 87.
(13) (1896) 23 Cal 196.

money against the decree instead of paying it into Court is an application to take some step-in-aid of execution. It may be pointed out that a poundage fee is a fee calculated upon the price for which the property sells and is payable by the decree-holder after the sale and before taking delivery of the property. Now if an application by the decree-holder asking the Court to receive a poundage fee is not regarded as an application to take some step in-aid of execution, it is difficult to understand how an application to be put in possession of the property purchased by him can be regarded as an application to take some step-in-aid of execution. It was pointed out in that case by the late Chief Justice of the Calcutta High Court that when the sale of the property attached in execution has been completed and the purchased money has been paid into Court, nothing more remains to be done in respect of the execution of the decree as against that property. In the case of *Bhimal Das* v. *M Ganesh Kuer* (14) it was held that no appeal lies from an order refusing the application of the decree-holder to be put in possession under Section 318, the question not falling under Section 244. Now in order to establish that an application by the decree holder to be put in possession of the property purchased by him is an application to take some step-in-aid of execution, it must be established first, that the application is in fact by a decree-holder; and secondly, that the application relates to the execution of the decree. If these facts are established then the question involved in the decision of such an application would undoubtedly be a question between the parties to the suit and relating to the execution of the decree and would consequently fall under Section 47 of the Code of Civil Procedure. The decision in *Bhimal Das* v. *Mussammat Ganesh Kuer* (14) accordingly denies the validity of the arguments upon which we are invited to hold that an application by a decree-holder to be put in possession of the property is an application to take some step in-aid of execution Indeed if the arguments of Mr. Sen be right then the case of *Bhimal Das* v. *Mussammat Ganesh Kuer* (14) was wrongly decided, and it may be pointed out that that case was decided on the view that the execution was at an end with the sale of the property, and that no question relating to execution was involved in an application to be put in possession of the purchased property by the decree-holder. The case of *Bhimal Das* v. *Mt. Ganesh Kuer* (14) was followed by Brett and Mookerji, JJ., in *Mohammad Mooraf* v. *Habol Mia* (15) and this is the view which has been accepted by the Full Bench of this Court in *Heji Abdul Gani* v. *Raja Ram* (16). No doubt it was not decided by this Court in the case cited that an application by a decree-holder to be put in possession of the purchased property is not an application to take some step-in-aid of execution but it seems to me that such a decision is involved in a decision that no appeal lies from an order under Rule 95 of Order 21 of the Code of Civil Procedure.

It is necessary to deal with an argument which was advanced to us by Mr. Sen on behalf of the decree holder. He argued that a proceeding in execution cannot be said to be completed in a case of sale until he has obtained the proceeds and the benefit of the sale held in execution of the decree: and just as an application by a decree holder who is not the auction-purchaser to obtain payment of purchase money is an application for taking some step in-aid of execution, so also an application, to be put in possession of that which represents the money where the decree-holder himself purchases and con-equently no money passes, ought to be regarded as an application to take some step-in-aid of execution. Now the point to be decided is whether an application by a decree-holder, when he is not the auction purchaser to obtain payment of purchase money is an application for taking some step in-aid of execution. So far as the Calcutta High Court is concerned it has invariably held that such an application is not an application to take some step-in-aid of execution. See *Hem Chandra Choudhury* v. *Brojo Sundari Debee* (17), *Fazal Imam* v. *Metta Singh* (18), *Gunga Pershad* v. *Debi Sundari* (19). A useful test to apply would be this, supposing the decree-holder purchaser is unable to obtain possession, would it entitle him to take out further execution for that portion of the money which is represented by the property purchased by him of which he is unable to obtain possession? If the fact that he is unable to obtain possession would re open the execution proceedings then there might be something to be said in favour of the view that execution is not complete until

(14) (1896) 1 C.W.N. 658.

(15) (1907) 6 C L J 749.
(16) (1915) 1 P.L J. 232 (F.B.)
(17) (1882) 8 Cal. 89.
(18) (1884) 10 Cal. 549.
(19) (1885) 11 Cal. 227.

he obtains possession of the property; but it is well established that though the decree-holder-purchaser is unable to obtain possession, that would not entitle him to take out further execution for that portion of his purchase money which is represented by the property purchased by him. It seems to me that execution comes to an end with the sale of the property and that whether or not the auction-purchaser obtains possession of the property sold is wholly immaterial for the purpose of the decree and it does not in any way affect it. Mr. Justice Banerji pointed out in the case of *Bhagwati* v. *Banwari Lal* 6) that if the decree holder purchases the property but does not obtain possession that circumstance would not entitle him to take out execution of the decree which has already been satisfied. It seems to me that the argument advanced before us by Mr. Baikuntha Nath Mitra on behalf of the judgment-debtors must prevail. The argument is founded on principle and is covered by the decision of this Court in *Maji Abdul Gani* v. *Raja Ram*(16) which is binding on us.

I would dismiss this appeal with costs.

Adami, J. :—I agree.

Appeal dismissed.

A.I.R. 1923 Patna 25.

JWALA PRASAD AND ADAMI, JJ.

Ramjatan Rai and others—Appellants

v.

Baliram Prasad and others—Respondents.

F.A. No. 44 of 1919, decided on 10th July, 1922.

(a) *Hindu Law—Partition—Clear declaration of intention will effect.*

Unequivocal and manifest declaration of an intention to become divided in estate amounts to a valid separation and a disruption of the joint family. 8 W R. 82; 35 All. 80; 843 Cal. 1031, Foll. [P. 27, C. 1.]

(b) *Guardian and Ward — Suit by minor for partition against father—Father cannot thereafter act as guardian and dispose of property*

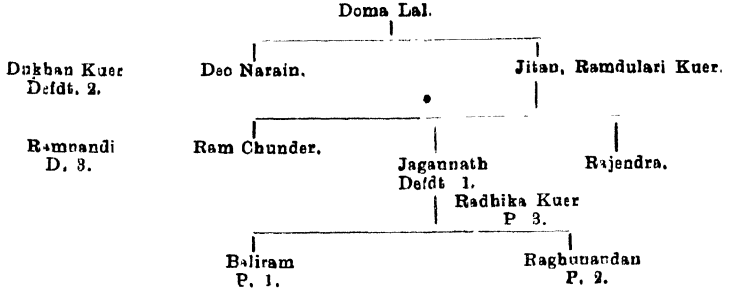
Where a minor files a suit for partition against his father, the latter's interest is, from that date, adverse to the interest of the minor and he cannot therefore as the natural guardian of the minor seek to bind the minor's property by any alienation. [P. 27, C. 1.]

L. N. Singh, Hurnarayan Prasad and *Sambhu Saran*—for Appellants.

Parmeshwar Dayal and *T. N. Sahai*—for Respondents.

Adami, J. :—The plaintiffs in this suit were the two minor sons and the wife of Jagan Nath Prasad, defendant No. 1; they sought for a declaration of their exclusive title to three villages, Agarsanda, Pipra and Rampur, and for an adjudication that two sale deeds executed by Jagannath and defendants 2 and 3, Mussammat Dukhan Kuer and Ram Nandi Kuer, represented a collusive and fraudulent transaction, and were null and void. They asked for recovery of possession of the villages and for mesne profits.

The following genealogical table will explain the relationship of the parties :—



In 1888 Deo Narain and Jitan obtained a usufructuary-mortgage (Ex 7) of Pipra and Rampur from one Lala Tulsi Prasad, and subsequently, under the sale deed Ex. 6 dated the 17th February, 1909, the said Lala Tulsi Prasad sold Rampur Pipra and Agrasanda to Jagannath Prasad and Rajendra Prasad, the surviving male heirs of Jitan and Deo Narain, and to Mussammat Dukhan Kuer and Ram Nandi Kuer, the widows of Deo Narayan and Jitan, for Rs. 8,625. It is clear that thereafter the property was held by the purchasers as joint family property. Rajendra Prasad died, and Jagannath as the head of the family, according to the plaintiffs, became an immoral spendthrift so that in 1914 Madho Prasad, the maternal grandfather of his sons, Plaintiffs 1 and 2, determined that in the interest of those sons, their share ought to be separated to save them from ruin. Accordingly on the 17th Nov. 1914, a demand was made on their behalf that the family properties should be partitioned, Jagannath Prasad did not agree, so on

the 8th December, 1914, a plaint was filed on behalf of the minors asking for partition by suit. It seems that the minors were not shown in the plaint to be properly represented by a guardian, so the plaint was returned. It was filed again on the 21st December, and in the end the present plaintiffs obtained a decree (Ex. 1 dated 30th August, 1915), in the partition suit and were awarded three shares out of the six into which the family property was divided, after excluding certain property in Champaran as share of one of the widows.

Meanwhile, after coming to know of the demand for partition, Jagannath, in order to pay off debts he had contracted, entered into negotiations with Raghunandan Singh, Gaya Singh and Harnandan Singh for the sale of the entire family properties, and on the 18th December, 1914, Jagannath styling himself as sole surviving member of the joint family, executed jointly with Mussammats Ram Dulari, Dukhan and Ramnandan, who were living with and being supported by him, a deed of sale (Ex. B) conveying the entire properties to the above-mentioned three persons. The deed stated that the money (Rs. 7,000) to be paid for the property was necessary for paying off debts aggregating Rs. 5,231-7-3, and also Rs. 1,768 8-9 was wanted to pay rent and to meet other legal and necessary expenses. The deed of sale was executed by Jagannath and the three ladies but, when it was sought to register it, the three ladies refused to admit execution and Jagannath alone made the admission, so on 21st December, 1914, the District Sub-Registrar endorsed on the deed "Kept pending for admission of execution of some executants"

Completion of this transaction having failed, Jagannath tried again, and on the 19th February, 1915, he and the three ladies transferred the properties by two sale deeds (Exs. A and A-1) to Ramjatan Singh, brother of Raghunandan Singh, Shivanandan Singh, brother of Gaya Singh and Harinandan Singh. In these deeds it was stated that Jagannath and the three ladies were the surviving members of the family and were living separately from one another, and had divided all the properties. The consideration for the sale was Rs. 7,000 but as there was difficulty in obtaining one stamp paper for so large an amount, two separate deeds were drawn up identical in their terms each for a consideration of Rs. 3,500; but these two deeds stated that the aggregate of debts to be paid off was Rs. 3,490 7-3, and the enumeration of the debts does not altogether tally with the enumeration in the former sale-deed, Ex. B. The deeds were duly executed, and were taken to the registration office to be registered. Meanwhile the partition suit had been filed by the plaintiffs, who hearing of the sale-deeds, petitioned the Court to stop further steps in the sale transaction. The application was made on the 22nd February, 1915, and on that date the Court issued an injunction on the defendants, but the notice reached the defendants at the Registration Office after registration had commenced and the Sub-Registrar held that he must complete the registration, and the sale-deeds Exs. A and A-1 were duly registered.

Then the plaintiffs instituted the suit out of which this appeal arises. They joined Ramjatan, Shivanandan and Harnandan, the purchasers under Ex. A and Ex. A-1 as defendants 4, 5 and 6, and they or their heirs alone contested the suit. Jagannath died after institution of the suit and the two ladies, defendants 2 and 3, did not contest it.

It is to be noted that the sale under Ex. A and Ex. A 1 is attacked in the suit and that relief is not asked for in the plaint with regard to the sale in Dec. 1914 under Ex. B.

The Subordinate Judge has found that the family was joint up to the time of the partition suit and that the property in fact was joint family property up to the disruption caused by the filing of the partition suit; he held that there was a necessity for partition because Jagannath was a spendthrift, and that the sale deeds Ex. A and Ex. A-1 were executed in a hurry because of the suit. He doubted whether the purchase was a *bona fide* one, and made after due inquiry. He decided that the sales under Ex. A and Ex. A-1 must be held to be inoperative as against the plaintiffs since they were executed after the institution of the partition suit, when there had already been a disruption in the family, and the executants had no right to alienate the shares of the other members of the family who were not joint at the time Mesne profits were refused. The plaintiffs' right to an eight anna share in the properties covered by the sale deeds Ex. A and Ex. A 1 was declared and their right to recover possession of the property to the extent of their share.

I have no doubt in my mind that the decision of the Lower Court is correct. It is contended by Mr. Lachmi Narain Sinha on behalf of the appellants, defendants 4, 5 and 6, that at the time Ex. B. was executed Jagannath Prasad was the *karta* of the family and the sole surviving adult male member, and as such he had every right to alienate the family property for legal and antecedent debts. He pointed out that the Kobala Ex. B was executed before the plaint in the partition suit was filed. He did not press the contention that the sale under Ex. A and Ex. A 1 was valid, for he admits that the doctrine of *lis pendens* would apply to it.

Now it was the sale under Ex. A and A-1 that was attacked in the suit, and of the present appellants, only one Harinandan was a party to the sale under Ex. B.

It is shown by the plaint in the partition suit that a demand for partition was made on behalf of the plaintiffs to Jagannath in November, and further it appears from the evidence of P. W 4 that the plaint in the partition suit was first filed on December 8th, 1914, whereas Ex B. was executed on the 18th December. It is quite settled that unequivocal and manifest declaration of an intention to become divided in estate amounts to a valid separation and a disruption of the joint family. I need only refer to the case of *Mt Valo Kuer* v. *Rowshun Singh* (1) and the decisions of their Lordships of the Privy Council in *Suraj Narain* v. *Iqbal Narain* (2) and *Girja Bai* v. *Sadashiv Dhundiraj* (3).

The intention of the plaintiffs to separate had clearly and unequivocally been expressed to Jagannath before the document Ex. B. was executed, both by the demand in November and by the plaint filed on December 8th, and therefore Jagannath could not by execution of Ex B. on December 18th bind the plaintiffs. It is argued that Jagannath was the natural guardian of the minor plaintiffs and so his transaction would bind them, but after the demand for partition in November, it is clear that Jagannath could not hold the position of their guardian since from that time his interest was adverse to theirs.

It is in evidence too that Madho Prasad, the maternal uncle of the minors, was called in during the negotiations leading up to the execution of Ex. B. but he refused to recognise the transaction, acting for the minors.

It is quite clear too that Ex. B. was ineffectual otherwise; from Ex. A and Ex. A-1 it is shown that no consideration passed, and in fact it was only through subsequent suits that the sums which were to be paid as consideration to clear debts were extracted from the appellants.

A comparison of the contents of the documents Ex. B. on the one side and Ex. A and Ex. A 1 on the other shows, I think, that there was a want of *bona fides*; the purchasers are different, except Harnandan, and the enumerations of debts and of the total amount required vary so much as to throw doubt on both transactions. It is evident that, hearing of the intention of the plaintiffs to bring about a partition, Jagannath was in a hurry to bring it about so that their shares would have to bear a portion of the burden of his debts. Madho was acting as guardian of the minors and was contesting Jagannath's right to deal with their property, and squander it. Madho had put in a petition to be appointed guardian and was afterwards appointed.

Lastly Mr. Lachmi Narain Singh contends that the appellants have paid good money in good faith for the property, and that the minors have benefited by the payment of their father's debts, and so ought to refund a proportionate amount before they can recover possession.

The question whether the sons are liable for their father's debts as being antecedent debts, or debts contracted for legal necessity does not arise in this case and need not be discussed, nor is it necessary to consider whether the plaintiffs are bound to refund any part of the consideration money to the appellants. It is enough to say that the appellants purchased at about half its value a property worth Rs. 12,000, and thus if in the end they get only half the property they will not be losers.

It is quite clear that the sale under Ex. A and Ex. A 1 was invalid, and this is practically admitted by the learned Vakil, that being so, the decision of the Subordinate Judge was correct and the plaintiffs are entitled to recover possession of the share of the joint family property awarded to them on partition.

I would dismiss the appeal with costs.

Jwala Prasad, J. :—I agree.

Appeal dismissed.

(1) 8 W.R. 82.
(2) (1919) 35 All. 80=40 I.A. 40 (P.C)
(3) (1916) 43 Cal. 1031=43 I.A. 151 (P.C.)

A.I.R 1923 Patna 28.

JWALA PRASAD, J.

Kali Prasad Singh and others—Appellants

v.

Mathura Singh and others—Respondents.

F. A. No. 226 of 1922, decided on 30th October, 1922

Court-fee—Interest "pendente lite," is not liable for Court-fee.

When a suit is dismissed, the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realization, or to pay any court fee thereon But if any future interest is determined by the Trial Court and is entered in the decree then the plaintiff, on appeal by the defendant, is bound to pay additional court fee on the sum of interest so added in the decree as having accrued from the date of the suit up to the date of the preparation of the decree in the Lower Court (Case-law discussed.) 50 I C. 789, Diss ; 6 Pat. L J. 676, Foll. [P. 28, C. 2]

Brij Kishore Prasad—for Appellants.

Jwala Prasad, J. :—This is a reference to me as Taxing Judge. The plaintiffs' suit for recovery of a debt due under a mortgage was dismissed by the Subordinate Judge of Shahabad. The plaintiffs have appealed to this Court and have valued their appeal at the same amount (Rs. 8,072 10 6) as the plaint. The question referred to me is as to whether the court-fee paid by the appellants on the aforesaid valuation is sufficient, or, whether, it is incumbent upon them to pay court-fee upon the interest calculated at bond rate from the date of the suit to the date of the presentation of their appeal to this Court.

There is a great conflict of opinion on this point The learned Vakil on behalf of the appellants has relied upon the following cases :—*Vithal Hari* v. *Govind Vasudeo* (1), *Ram Bujhawan Prasad* v *Natho Ram* (2), *Bhagwati Prashad Singh* v *Bishnu Pragash Narain* (3), and *Bhawani Prasad* v. *Kutubun-nissa* (4). The contrary view was taken by the late Taxing Judge, Mr. Justice Coutts, in the case of *Mahanth Janki Saran Das* v. *Harbans Deo* (5) His view is supported by the decision of the Judicial Commissioner of Oudh in *Gobardhan Das* v. *Narendra Bahadur Singh* (6). The Madras Court decision in the case of *Srinivasa Row* v *Ramaswami Chetti* (7) favours the contention of the appellants. No decision of the Calcutta High Court exactly applicable to the case has been placed before me. The view taken in *Percival* v. *Collector of Chittagong* (8) seems to be that an Appellate Court cannot pass a decree for a larger amount than that claimed in the memo of appeal, unless, before the judgment is pronounced, an amendment of the memo of appeal is allowed and the additional Court-fee is paid in.

On a consideration of all these cases, it appears to me that when a suit is dismissed the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realization, or to pay any court-fee thereon. But if any future interest is determined by the Trial Court and is entered in the decree then the plaintiff, on appeal by the defendant, is bound to pay additional court-fee on the sum of interest so added in the decree as having accrued from the date of the suit up to the date of the preparation of the decree in the Lower Court Now if the plaintiff, filing an appeal on the valuation stated by him in the Court below obtains a decree in this Court for a higher sum than that actually claimed by him in the Court below, he is bound to pay court-fee on such additional sum and when future interest is added in the decree of this Appellate Court he would not be able to execute his decree unless he pays court-fee on future interest. This view seems to be in accordance with that expressed in *Jamuna Rai* v. *Ramtahal Raut* (9) as well as in agreement with the views of the Bombay, Madras and Allahabad High Courts. The decision of a Division Bench of this Court dated the 25th July, 1922, in the case of *Bhagwati Prashad Singh* v. *Bishnu Pragash Narain* (3) virtually overrides the view taken by the late Taxing Judge in the earlier case of *Mahanth Janki Saran Das* v. *Harbans Deo* (5).

I, therefore, direct that the valuation given by the appellants be accepted as sufficient.

Reference answered.

(1) (1893) 17 Bom. 41.
(2) A.I R. 1922 Patna 59.
(3) A.I R. 1922 Patna 386.
(4) (1905) 27 All. 559
(5) S A. No. 489 of 1920.
(6) (1919) 50 I. C. 793
(7) (1900) 10 M L.J 144.
(8) (1903) 30 Cal. 516.
(9) A.I.R. 1922 Patna 387.

A.I.R. 1923 Patna 29.

DAS AND ADAMI, JJ.

Lal Nilmony Nath Sahi Deo and others—Appellants

v.

Maharaj Pratap Udai Nath Sahi Deo and others—Respondents.

A. F. O. O. Nos 39, 46, 47 and 48 of 1921, decided on 30th October, 1922.

(a) *Limitation Act, Art. 176—Application under Chota Nag. Ten. Act, to substitute L Rs. of plff.—is within the article—C. P. C., O. 22, R. 3.*

The provisions of Order 22 apply to a case before the Deputy Collector under the Chota Nagpur Tenancy Act and an application under that Act to bring the L Rs. of the plaintiff on record is governed by Art. 176 of the Limitation Act. [P. 29, C. 2]

(b) *Execution—An application to set aside sale is not one in execution.*

An application for setting aside a sale cannot be regarded as an application in a proceeding in execution of a decree or order because when the sale of the property attached in execution has been completed, and the purchase money has been paid into Court, nothing more remains to be done in respect of the execution of the decree as against that property. [P. 29, C. 2.]

(c) *Appeal - Question of fact—Cannot be gone into in appeal* [P. 30, C. 1].

K. N. Chowdhury and *Rai Guru Saran Prasad*—for Appellants.

Hasan Imam, P. K. Sen, S. M. Mullick, S. N. Palit and *B. C. Deo*—for Respondents.

Das, J:—These analogous appeals come before us from the judgment of the Deputy Collector of Ranchi, dated the 24th November, 1920 and arise out of certain applications made by the appellant in each of these appeals for setting aside a sale under Section 213, Chota Nagpur Tenancy Act The facts are these:—The Maharaja of Chota Nagpur obtained a decree for recovery of arrears of rent against one Madan Mohan Sahi Deo in respect of a tenure, and, in execution of that decree, caused the tenure to be sold, and it was in fact sold to certain persons who may, for convenience, be called the Birla Brothers. Thereupon Madan Mohan and certain other persons, who are the appellants in appeals other than Appeal No. 48 of 1921, presented separate applications under the provisions of Section 213 of the Chota Nagpur Tenancy Act for setting aside the sale held in execution of the rent decree. Pending the disposal of his application, Madan Mohan died in April, 1919. On the 12th October, 1920, Gobinda Nath Sahib Deo, the appellant in Appeal No. 48 of 1921, applied for substitution of his name and for continuing the proceedings commenced by Madan Mohan for setting aside the sale. The question raised in Appeal No. 48 of 1921 is, whether the application has not abated by reason of the fact that steps were not taken to have substitution effected within the time allowed by law. The learned Deputy Collector has come to the conclusion that the application presented by Madan Mohan has abated and that no further order can be recorded in that application. I am of opinion that the order of the learned Deputy Collector is right and must be affirmed.

By the express direction of Section 265 of the Chota Nagpur Tenancy Act, the provisions of the Code of Civil Procedure relating to substitution and addition of parties apply to the cases before the Deputy Commissioner. Order 22, Rule 3 of the Code is then a part of the Chota Nagpur Tenancy Act, and an application for substitution in a case before the Deputy Collector must be regarded as an application under the Chota Nagpur Tenancy Act. Section 230 of the Chota Nagpur Tenancy Act provides that the provisions of the Indian Limitation Act shall, so far as they are not inconsistent with the Act, apply to all suits, appeals and applications under the Chota Nagpur Tenancy Act. If we apply the provisions of the Limitation Act to the application made by the applicant for substitution there is no doubt that application was made considerably out of time. But it is urged that, if the provisions of Order 22 apply to a case before the Deputy Collector, the provision of Rule 12 of that Order equally applies and that consequently the question of substitution does not apply to proceedings in execution of a decree or order. It may be conceded that the question of substitution does not arise in proceedings for execution of a decree or order; but the question still remains whether an application for setting aside a sale held in pursuance of an application for execution of a decree is an application for execution of a decree or order.

In the case of *Jagadish Missir* v. *Sureswar Missir* (1). I expressed the opinion that an application for setting aside a sale cannot be regarded as an application in a proceeding in execution of a decree or order. My conclusion was based on the view that when the sale of the property attached in execution has been completed, and the purchase money has been paid into Court, nothing more remains to be done in respect of the execution of the decree as against that property.

(1) (1921) 2 P.L.T. 278.

I adhere to the view which I expressed in the case to which I have referred; and I must hold that the application presented by Madan Mohan Sahi Deo abated before the application for substitution was presented by the appellant. I must accordingly dismiss Appeal No. 48 of 1921 with costs.

The question raised in the appeals other than Appeal No. 48 of 1921 is this, whether Section 213 of the Chota Nagpur Tenancy Act gives the appellants or any of them the right to apply for setting aside the sale. Mr. Chaudhury appearing on behalf of the appellants, contends that his clients applied as persons "who owned such property immediately before the sale," and came within the class of persons recognized by Section 213 as having the right to apply. It is pointed out that Nilmoni, appellant in Appeal No. 39, claimed as a co-sharer of the judgment-debtor, that Paras Nath, appellant in Appeal No. 47, claimed two villages in his own right and that Ghasi Ram, appellant in Appeal No. 46, claimed under his father who, it is alleged, purchased some of the villages sold under the decree. I do not think that the claim as made by Mr. Chaudhury was, or could have been, put forward before the learned Deputy Collector. The judgment of the learned Deputy Collector shows that it was contended before him that as Khoreposhdars or under-tenure holders, they had the right to apply under Section 213 of the Act. Mr. Imam, appearing on behalf of the auction purchasers, points out that Nilmoni could not possibly have claimed as a co-sharer before the Deputy Collector. It appears that in rent suits brought by Madan Mohan against Nilmoni, it used to be contended by Nilmoni that he was a co-sharer of Madan Mohan and could not be sued for rent There are certainly two decisions in the record which establish that Nilmoni is not the co-sharer of Madan Mohan. I am clearly of opinion that the question was not and could not have been raised before the Deputy Collector and, as the question is a question of fact, I decline to go into it in appeal. Appeal No. 39 of 1921 must accordingly be dismissed with costs

In regard to the point made on behalf of Paras Nath, it is pointed out by Mr. Imam that the allegations in the petition on which Mr. Chaudhury relies establish conclusively that his claim is on the basis that he is an under tenure holder. He says in his petition that two of the villages belong to him and that the judgment-debtor has no interest in them except that of receiving rent from him. This is a clear admission that he was in possession of these villages as an under-tenure holder. The Appeal No. 47 of 1921 must be dismissed with costs.

In regard to the claim put forward on behalf of Ghasi Ram, there is nothing in the allegations made by him which suggest the case that his father purchased the villages in question from one who was in possession of the villages in his own right. The grounds of appeal clearly suggest that his interest was a subordinate one. I have no doubt at all that the only question argued on his behalf before the Deputy Collector was this, that as an under-tenure holder, he was competent to apply under Section 213 of the Act. I must dismiss Appeal No. 46 of 1921 with costs.

There will be two sets of costs in each of these appeals one payable to the decree-holder and one to the auction-purchaser. We assess the hearing fee payable to each of these respondents at 2 gold mohurs in each of these appeals.

Adami, J .—I agree.

Appeals dismissed.

A.I.R. 1923 Patna 30.

COUTTS AND ADAMI, JJ

Rasik Behari Prasad Chaudhuri and others—Appellants

v.

Hirdenaraim Chaudhuri and others—Respondents.

F. A. No. 264 of 1921, decided on 20th June, 1922.

Execution sale—What passes under—D Register & Khatian not reconcilable—Sale certificate should be looked into.

Where the D. Register could not be reconciled with the *Khatian* and *Khewat* and where the words "Pach Gunda Minjumle das gunda Pokhta" were used in execution proceedings, *held* that the only guide to the solution of the doubt as to what actually passed under the sale, is to look into the inventory of the properties attached to the application for execution, the sale certificate and the writ for delivery of possession [P. 31, Cs. 1 & 2.]

Janak Kishore—for Appellants.

Sambhu Saran—for Respondents.

Adami, J:—The present respondents having obtained a money-decree against the appellants applied for execution by sale of a five gundas out of 10 gundas share belonging to the judgment-debtors out of the entire 16 annas of Mauza Damodarpur Nandan. The sale of the share as above described was held on the 7th September, 1908, and the sale was confirmed, the sale certificate also containing the above description of the property sold.

Possession was delivered in due course The appellants instituted a suit in 1917 for a

declaration that the sale was fraudulent and void, they asserted that the respondents had taken possession of a ten gundas share and prayed for recovery of that share or at least of five gundas out of the ten gundas.

The Subordinate Judge found that there was no fraud in connection with the sale, but that, while entitled to take possession of only 5 gundas out of the judgment-debtors' share in the village, possession had been taken of a 10 gundas share. He therefore decreed the suit in favour of the appellants for recovery of 5 gundas out of the 10 gundas.

On appeal the learned District Judge pointed out that there was a discrepancy between the khatian and khewats on the one side and the entries in Register D on the other as to the extent of the present appellants' share. He held that the expression "Panch gunda Minjumle das gunda pokhta bad robast soleh anna", used in the application for execution and the other documents connected with the sale and its confirmation and the delivery of possession meant that the appellants held 10 gundas share in the village or patti which was equivalent to 5 gundas share in the Mahal, and that what the respondents had purchased was the whole share of the appellants in the village and Mahal. He decreed the appeal and dismissed the suit.

The khatian and khewat of 1899 show that the appellants had 5 gundas share in Damodarpur, with an area of about 5 bighas, Register D however shows 10 gundas share in Nandanpur and no share in the other villages of the Mahal, and the Register also shows that the respondents held a 5 gundas share in Nandanpur by virtue of purchase. The Subordinate Judge came to the conclusion that if the appellants had 10 gundas share, and 5 gundas were sold to the respondent, then the appellants are entitled to the remaining 5 gundas share.

It is impossible to reconcile the register with the khatian and khewat, and it is equally impossible to construe the words "Panch gunda Minjumle Das gunda Pokhta" as meaning a ten gunda share in the village equivalent to a five gunda share in the Mahal. The application for execution shows that before the sale the respondent was relying on the entries in Register D. There is only one guide for solution of the difficulty. The inventory of properties attached to the application for execution, the sale certificate and the writ for delivery of possession describe the 5 gundas out of 10 gundas share to be five bighas in area, and it is to be taken that this is the area of which the respondents were entitled to take possession under the decree, and of which possession was given by the Court on the 13th May, 1909. No objection was made then by the judgment-debtors and no steps were taken by them till 1917 when they sought to prove that the sale was obtained by fraud and failed.

What was sold to the respondents was a share in the village, and it was of a share that they received possession, there is nothing to show that they received possession of more than a 5 gundas share, nor have the appellants shown, as far as appears from the record before the Court now, that the respondents are in possession of lands which exceed in area the equivalent of a 5 gundas share; in order to succeed it was necessary for the plaintiffs in the suit to show that the defendants were in possession of land exceeding a 5 gundas share. On the finding of fact they cannot contend that the defendants were not entitled to a 5 gundas share by virtue of their purchase.

Having in view the discrepancy between the khewat and khatian on the one side and the Register D on the other and the failure to prove that the defendants-respondents are in possession of a share in excess of that which they purchased I am of opinion that the suit and the appeal must fail. I would, therefore, dismiss the appeal with costs.

Coutts, J.:—I agree.

Appeal dismissed.

A.I.R. 1923 Patna 31.

COUTTS AND DAS, JJ.

Lachmi Narain Agarwala—Petitioner

v.

Mukhram Marwari—Opposite Party.

Cr. Rev. No. 353 of 1922, decided on 19th July, 1922.

(a) *Criminal P.C., S. 145—Possession and title of first party proved—No other proof is wanted.*

If the first party shows that the land in dispute is within the boundaries of the land leased to him and if on the oral evidence he establishes possession, it is immaterial that the land was subsequently leased to the second party. Moreover the Magistrate is bound to decide on a consideration of the lease of the first party itself, whether the disputed land was within the land leased to the first party; he is not entitled to go outside the document in order to interpret its terms. [P. 32, C. 2],

(b) *Criminal P. C., S. 148—Local inspection—Note and plan of disputed area prepared—Everything placed on record—Magistrate acts properly in doing so.*

Before a Magistrate began to take evidence, he went to the place in order to see the exact land in dispute and the features of the disputed property.

He restricted his inquiry very closely to those points and it did not appear that he directed his inquiry to any matter which could be proved by oral evidence. No evidence was taken at the local enquiry and all that was done was to inspect the locality, make a note of what the disputed area was and prepare a plan. Everything was placed on the record. *Held*, in holding a local inspection of this sort the Deputy Magistrate did not in any way act outside the jurisdiction vested in him by law. [P. 32, C. 2].

(c) *Practice—Document produced alleged to be forgery—Party alleging must prove it before asking Court to reject it.*

Where a certain document filed by one party is alleged to be a forgery, the Court is not bound to enquire into the details but the party alleging that it is a forgery must *prima facie* make out a case of forgery before asking the Court to reject the document as a forgery. [P. 33, C, 1.]

P.K. Sen, G.C. Pal and *S. C. Majumdar*—for the Petitioner.

The Govt. Advocate and *B. N Mitter*—for the Opposite Party.

Coutts, J.:—This is an application in revision against an order passed in favour of the first party in a proceeding under Section 145 of the Criminal Procedure Code. The dispute relates to some 100 bighas of land situated in Mauza Barmeshia. The first party obtained a lease from Thakur Ran Bahadur Singh of some 700 bighas of coal land covering the whole of the northern portion of the mauza. Subsequently the second party obtained a lease of 100 bighas of land which they allege was excluded from the lease of 700 bighas which had been granted to the first party. The dispute is with regard to this 100 bighas the first party claiming that it is within their 700 bighas and that they have been in possession, the second party claiming that it is not within the 700 bighas and that the first party have not been in possession.

The learned Deputy Magistrate who heard the matter decided in favour of the 1st party and the second party made this application in revision.

The first point urged is, that the learned Deputy Magistrate has approached the case from a wrong point of view inasmuch as he has considered the document of title of the first party and has not considered the document of title of the second party. What, in fact, the learned Deputy Magistrate has done is that he has considered the lease of the first party, on a consideration of the terms of the lease and the boundaries, he has come to the conclusion that the disputed land is within the area leased to the first party, and on a consideration of the oral evidence he has found that the first party is in possession. He has then said that even if the disputed land is within the area which was leased to the second party it would not affect the matter. In taking this view of the case not only has he not approached the case from a wrong standpoint but, in my opinion, he has approached it from the only proper standpoint, for it is perfectly clear that if the first party shows that the land in dispute is within the boundaries of the land leased to him and if on the oral evidence he establishes possession, it is immaterial that the land was subsequently leased to the second party. Moreover the learned Magistrate was bound to decide on a consideration of the lease of the first party itself whether the disputed land was within the land leased to the first party, he was not entitled to go outside that document in order to interpret its terms.

The next point which is urged is that the Deputy Magistrate had no jurisdiction to hold the local inspection, which was held by him, before he began to hear the case. What happened was that before he began to take evidence the Deputy Magistrate went to the place in order to see the exact land in dispute and the features of the disputed property. He restricted his inquiry very closely to these points and it does not appear that he directed his inquiry to any matter which could be proved by oral evidence. No evidence was taken at the local enquiry and all that was done was to inspect the locality make a note of what the disputed area was and prepare a plan. Everything was placed on the record. I am unable to see how in holding a local inspection of this sort the Deputy Magistrate in any way acted outside the jurisdiction vested in him by law.

We have been referred to the case of *Babbon Sheik* v. *Emperor* (1) for authority as to what a Magistrate may do by way of local inspection. That case, however has no bearing on the present case, because in that case the Magistrate did not merely view the place of occurrence for the purpose of following or understanding the evidence, but he imported into his judgment matters of opinion and inference based on circumstances not on the record and did not place the results of his local inspection on the record. That case and the many other cases which are to the same effect have no bearing on the case now before us.

(1) (1910) 37 Cal. 340.

The last point which has been urged is in regard to a certain plan (Ex. 14) which has been used by the learned Deputy Magistrate in coming to his conclusion, and which, it is contended, he was not entitled to use. The reason why it is said that he is not entitled to use this document is that it purports to have been sent with a covering letter, which is Exhibit 15, to the first party in 1918. It is a plan of the land which was leased to the first party and it is contended that the covering letter was written on paper which from the water mark on it appears not to have been made before the year 1920. If this is so, it is suggested that the letter and the plan are both forgeries and it is clear that, if they were, this would certainly materially affect the result of the case. During the hearing it was suggested by the second party that the letter was a forgery and a petition asking the Magistrate to send the letter to the Controller of Stamps and Stationery was filed. The Magistrate declined to pass such an order and said he would deal with the matter later. He did so in his judgment and what he says is that he declined to hold an enquiry into the matter because the signature on the letter had been proved to be the signature of Thakur Ram Bahadur Singh by his agent. He was entitled to deal with the matter in this way and in my opinion he dealt with it in the right way. If the second party had desired to pursue the matter, they should have summoned some one from the department of Stamps and Stationery. They however, did not choose to take this course and the learned Magistrate, as I have said, not only acted within his jurisdiction in not taking up the matter himself but I think he acted properly in not doing so.

In the result then I see no reason to interfere with the order of the learned Magistrate and I would dismiss this application.

Das, J.:—I agree.

Application dismissed.

A.I.R. 1923 Patna 33.

COUTTS AND DAS, JJ.

Mt Bibi Makbulunnissa and another—Defendants—Appellants.

v.

Mt. Bibi Umatunnissa and another—Plaintiffs Respondents.

Appeal No. 271 of 1921, decided on 18th July, 1922 from Appellate Decree of Dist. J. Patna, dated the 14th December, 1920.

(a) *Mahomedan Law—Dower— Widow in possession for Dower debt—Has no proprietary title—Transfer by widow—Transferee can retain possession until dower debt is satisfied.*

A widow in possession of her husband's properties in lieu of her dower debt has no proprietary title in the property except to the extent of her share therein. She can transfer her security in which case the transferee can retain possession until the dower debt is paid. Where she *sells* such property the sale is utterly ineffectual for conferring any title in the vendee, but he is entitled to remain in possession as long as her claim to dower remain unsatisfied. But the moment her claim is satisfied either by payment to her or her heirs, the heirs of the husband are entitled to recover possession of the property from the transferee and the same result follows where the heirs of the widow happen to be the heirs of the husband also, for in such an event the right to receive the dower debt and the liability to pay it unite in the same persons and there is consequent extinction both of its debt and the security and therefore of the right to retain possession of the property as security for the debt. 43 M. 214; 69 I C 344 Ref. [P. 34, C. 2, P. 35, C. 2].

(b) *Property—Person in possession of property as security for dower debt—Right of, is itself property which is transferable.*

The right to hold the property as a security for the dower debt and to continue in possession thereof until the dower debt is satisfied is property and is both heritable and transferable. [P. 35, C. 1.]

(c) *T P. Act, S. 130—Transfer of security for dower debt—Transferee takes subject to equities.*

Where a Mahomedan widow in possession of property in lieu of her dower debt transfers the security the transferee takes the security subject to the state of account between the widow and the persons bound to pay the dower debt at the date of the transfer, and any payment made by them to the widow after, but without notice of, the transfer must, in the absence of collusion, be allowed to the transferee. [P. 34, C. 2].

Akbari, A. N. Das for B. C. Mitter—for Appellants.

Sultan Ahmed, Nurul Hasan and *Md. Hasan Jan*—for Respondents.

Das, J.—On the death of one Amzad Ali, his widow Musammat Hafizan took possession of the disputed properties which admittedly belonged to Amzad Ali. The plaintiffs are two of the daughters of Amzad Ali. The defendant No. 1 is the only other daughter of Amzad Ali, and defendant No. 2 is the husband of defendant No. 1. In September 1915, Musammat Hafizan conveyed the properties in suit by two several deeds to the defendants, the deed in favour of defendant No. 1 being a deed of gift, and the deed in favour of defendant No. 2 being a deed of sale. Musammat Hafizan died on the 1st

March, 1918, and on the 22nd March, 1918, the plaintiffs commenced the present action for setting aside the deeds executed by Musammat Hafizan in favour of the defendants and for recovery of possession of the properties covered by the deeds. The case of the plaintiff is that the deeds were procured by the defendants from Musammat Hafizan by fraud and undue influence and that they did not operate so as to convey any interest in the properties dealt with, to the defendants and that, in any event Musammat Hafizan, who took the properties as a security for her dower debt and entered into possession as a mortgagee, was wholly incompetent to convey the properties to the defendants. The defendants met the case of the plaintiffs with an assertion that Amzad Ali made over the properties in dispute to Musammat Hafizan, in satisfaction of her dower debt, and that Musammat Hafizan, as the sole and absolute owner of the properties, was competent to, and did, in fact, convey the properties to the defendants, and that there was no fraud or undue influence in the matter of the execution of the deeds challenged by the plaintiffs.

The learned District Judge, in the Court of Appeal below, has recorded the following findings of facts which are binding on us in second appeal, first, that Musammat Hafizan entered into possession of the properties on the death of Amzad Ali as security for her dower debt, and that Amzad Ali did not make over the properties to her during his lifetime in satisfaction of the dower debt, and secondly that Musammat Hafizan fully understood the nature of the deeds which she was executing and that they were not obtained by the defendants by undue influence. On these findings the learned District Judge had to consider the question whether any interest passed to the defendants, and he answered the question in the negative. In his view, Musammat Hafizan could not transfer the security itself, though she could transfer the dower debt together with the security. As, in the judgment of the learned District Judge, Musammat Hafizan did not purport to transfer the dower debt itself, he came to the conclusion that the deeds, upon which the defendants rely, did not operate to confer any title on the defendants. In the result he passed a decree in favour of the plaintiffs to the extent of their shares in the properties.

I am not prepared to assent to the view of the learned Judge that a transfer of the security without an assignment of the debt itself does not operate to create any title in the transferee. The case as put raises the presumption that the debt itself was assigned, for the transfer of the security carries with it the right to enforce the security, and, as a consequence thereof, to receive payment of the debt. That is the view of the Full Bench of the Madras High Court. See *Beeju Bee* v. *Syed Moorthiya Saheb* (1) and notwithstanding the decision of the Allahabad High Court in *Bindeshri Pershad* v. *B. Afzal Khan* (2), I am of opinion that the view presented by the Officiating Chief Justice of the Madras High Court is right in principle and is covered by authorities. It is worthy of note that, even in Allahabad, it has been held that it is competent to a Muhammadan widow in possession of property belonging to her deceased husband "in lieu of dower" to sell it without necessarily selling her right to receive the dower: See *Abdulla Shamsul-Haq* (3). There is a passage in the judgment of the Officiating Chief Justice of the Madras High Court which may give rise to some misconception. The passage is this:— "She, however, could transfer her right to possession along with the dower debt, and in my opinion, the alienation must be upheld to that extent." But when the whole judgment is carefully read, there is no room for doubt that, in the opinion of the learned Judge, the assignment of the dower debt is incident to the assignment of the security itself In my opinion where a Muhammadan widow in possession of her husband's property "in lieu of dower" transfers the security, either with or without the dower debt, the transferee is entitled to retain possession of the property until the dower debt is paid, though, where the transfer is without the privity of the persons bound to discharge the dower debt, the transferee takes the security subject to the state of account between the widow and the persons bound to discharge the dower debt at the date of the transfer, and any payment made by these persons to the widow after, but without notice of, the transfer must, in the absence of collusion, be allowed to these persons as against the transferee. This is a view of equity which is of general application; See *Mathews* v. *Lallwyn* (4), *Williams*

(1) (1920) 43 Mad. 214.
(2) (1921) 19 A.L.J. 706.
(3) (1921) 43 All. 127.
(4) (1798) 4 Ves. 118.

v. *Sorrell* (5), *Noorish* v. *Marshall* (6), in re *Lord Southampton's Estate* (7), *Dixon* v. *Winch* (8), *Turner* v. *Smith* (9) and there is no reason why we should not apply the principle in a case of a transfer of the security by a Muhammadan widow holding possession of her husband's estate as security for the dower debt due to her.

But the case is different where there is a sale of the property, and not an assignment of the security. The distinction has not always been kept in view in the numerous cases which have been decided on the point. but the distinction is an important one and cannot be ignored The right to hold the property as a security for the dower debt and to continue in possession thereof until the dower debt is satisfied is property, and is both heritable and transferable. *Ali Bakhsh* v. *Allahdad Khan* (10). But the widow has no proprietary title in the property, except to the extent of her share therein; and, where she purports to sell the property and not the security only, the sale is utterly ineffectual so as to confer any title on the vendee. But though the vendee takes no title to the property by virtue of the sale, he is entitled to retain possession of the property, if he is put in possession thereof, not indeed by virtue of the deed of sale, but because, so long as the debt remains unsatisfied, the heirs-at-law could not claim to be put in possession of the property, and the widow herself would be bound to make good her representation to the vendee to the extent of such interest as she could lawfully transfer. The widow is entitled to retain possession of the property so long as her claim is not satisfied. There is nothing to prevent her from putting some one else in possession of the property, and conferring on him the same right which she could exercise over the property. Having done so, she could not maintain ejectment against him, if she has received consideration for the transaction, and it follows that, though the sale does not operate to confer any title on the vendee, he is still entitled to retain possession of the property as against the widow and all persons claiming through the widow, so long as there is a debt due to the widow. He is also entitled to maintain his possession as against the heirs-at-law, so long as they do not discharge the dower debt; for it is well settled that a person in juridical possession of the property has an interest which he can maintain against every one except the rightful owner entitled to possession of the property, and it is an interest which is capable of being inherited, devised or conveyed. See *Beeju Bee* v. *Syed Moorthiya Saheb* (1) and the cases cited therein. The position, then, is this, where a Muhammadan widow in possession of her husband's property as a security for her dower debt, purports to sell the property and puts the vendee in possession of the property, the vendee is entitled to retain possession of the property so long as her claim to the dower remains unsatisfied. But the moment the dower debt is satisfied either by payment to the widow or to her heirs, the heirs of the husband are entitled to recover possession of the property from the transferee, and the same result follows where the heirs of the widow happen to be the heirs of her husband, for, in such an event, the right to receive the dower debt and the liability to pay the dower debt unite in the same persons, and there is a consequent extinction both of the debt and the security and therefore of the right to retain possession of the property as a security for the debt.

The critical question then is was the transfer to the defendants in this case a transfer of the property itself or a transfer of the security? The learned District Judge has assumed that the transfer was a transfer of the security, but with this view I am unable to agree. No doubt the document recites that the widow entered into possession of the property left by her husband with the consent of the other heirs of her husband and because her dower debt had not been paid, but the whole document shows that she considered her possession as that of an absolute proprietress. She recites in the document that she had her name recorded in the Land Registration department as the absolute proprietress of the property and she undoubtedly conveyed the property as an absolute proprietress. I have no doubt whatever that she purported to convey to the defendants an absolute interest in the properties. As such, the document is wholly inoperative. The defendants were nevertheless entitled to retain possession of the

(5) (1799) 4 Ves. 389.
6 (1882) 5 Mad. 475.
(7) (1881) 16 Ch. D, 178.
(8) (1900) 1 Ch. D 736.
(9) (1901) 1 Ch. 213.
(10) (1910) 32 All. 551.

property not only as against the widow but as against her heirs so long as the security was outstanding. The widow is now dead and it is conceded that her heirs are also the heirs of her deceased husband. There is thus a merger of the security in the ownership, and the plaintiffs, not indeed as heirs of Bibi Hafizan, for as such they are bound by the representation made by Bibi Hafizan but as heirs of Amzad Ali, are entitled to recover possession of the properties to the extent of their shares therein from the defendants. Although I am unable to agree with the reasonings which have been employed by the learned District Judge, I am of opinion that the conclusion at which he has arrived is right.

I would accordingly dismiss this appeal with costs.

Coutts, J.:—I agree.

Appeal dismissed.

A.I.R. 1923 Patna 36.

COUTTS AND ADAMI, JJ.

Bhagwandas and another—Plaintiffs-Appellants

v.

Keshwarlal—Defendant-Respondent.

S. A. No. 244 of 1921, decided on 12th June, 1922.

Contract Act, S. 107—Sale of Masoor—Defendant neither paying price nor taking delivery—Plaintiff is entitled to resell and claim the difference in prices as damages.

The plaintiff sold *Masoor* to the defendant who did not pay the price nor did he take delivery. The plaintiff therefore after giving him notice sold the grain. The price at which he sold was a lower price than that at which he had originally sold to the defendant and he claimed the difference as damages. *Held* the case is clearly one under S. 107 and the plaintiff is certainly entitled to the damages. [P. 36, C. 2]

S. N. Mullick and *A. N. Das*.—for Appellants.

Kulwant Sahai and *B. C. Sinha*—for Respondent.

Coutts, J.:—This appeal arises out of a suit brought by one Keshwar Lal against Bhagwan Das for recovery of Rs. 1,994 0 3 as damages on account of loss caused by the sale of grain, price of cloth and price of certain gunny bags. The suit was partially decreed in the Court of first instance but on appeal the suit has been dismissed except in respect of a sum of Rs. 80-10 0 the price of gunny bags which the learned Subordinate Judge has directed to be deducted out of a sum decreed in a connected suit. In this appeal the plaintiff has challenged the whole decree including that part of it which has directed that Rs. 80-10 0 shall be deducted out of the sum decreed in the connected suit. In regard to this last matter it is admitted that the plaintiff is entitled to succeed so that it is not necessary to discuss this portion of the case further.

I shall next deal with the question of damages. This claim arises in the following way The plaintiff sold *Masoor* to the defendant who did not pay the price nor did he take delivery. The plaintiff therefore after giving him notice sold the grain. The price at which he sold was a lower price than that at which he had originally sold to the defendant and he claims the difference as damages. The case is clearly one under section 107 of the Contract Act and the plaintiff is certainly entitled to the damages which were decreed to him in the Court of first instance.

The last point is the claim in respect of the price of cloth. In regard to this matter I am unable to understand the judgment of the learned Subordinate Judge and the learned Vakil for the respondent has admitted that he also is unable to understand it The learned Subordinate Judge has dismissed the claim apparently because a certain *Farkhati Bahi* in which, he says, the entry in regard to the price of cloth should find place, has not been produced. He has, however, in an earlier portion of his judgment, referred to the *Farkhati Bahi* which apparently he had examined. I am unable to reconcile these two statements and as I have already said the learned Vakil for the respondent has frankly admitted that he himself is unable to understand the judgment on this point. So far then as this item is concerned the matter must be reheard and decided in accordance with law.

I would therefore decree this appeal in so far as it relates to damages to the extent indicated in the body of the judgment, and also for the price of gunny bags and I would remand the appeal for rehearing and for decision in accordance with law in regard to the price of cloth which has been claimed. Costs in proportion to the success of the parties.

Adami, J.:—I agree.

Case remanded.

A.I.R. 1923 Patna 37.

JWALA PRASAD AND ADAMI, JJ

Sita Ram Tewari and others—Defendants-Appellants

v.

Gya Prashad and others—Plaintiffs-Respondents.

S. A. No. 803 of 1920 decided on 3rd August, 1922.

(a) *Evidence—Document not given effect to—Is not admissible to prove matters mentioned therein.*

A document is obviously inadmissible, if it is not given effect to and the object for which it was executed, namely, the proposed compromise in a suit, fell through, as then the document has not the force of a decree. [P. 39, C. 1].

(b) *Evidence Act, S. 18—Admission by Mukhtear—Party not bound unless mukhtearnama authorises it.*

A party is not bound by the statement or admission made by his *Muktear A am*, unless it is shown to have been made within the scope of the authority conferred by the Mukhtearnamah. [P. 39, C, 1]

(c) *Landlord and Tenant—Rights of tenant—*Gair majruha *lands* and *rastas belong to proprietors.*

The *gair majruha lands* and *rastas prima facie* belong to the proprietors unless the tenants prove positively that they are part and parcel of their tenure [P. 39, C. 1.]

(d) *Record of rights—Presumption in favour of is not rebutted by Batwara maps.*

The presumption in favour of survey record of rights cannot be displaced by Batwara or irrigation maps. [P. 39, C. 1.]

(e) *Practice - Judgment—Based on conjecture and inadmissible evidence, is invalid*

A judgment is liable to set aside where it is conjectural and based on inadmissible evidence. [P 39, C. 1].

Kulwant Sahay and *P. Dayal*—for Appellants.

Rai Guru Saran Prasad—for Respondents

Jwala Prasad, J.:—This appeal arises out of a suit, as stated in the judgment of the lower appellate Court, for the establishment of the plaintiffs' title and for confirmation of possession in, or in the alternative for recovery of possession of, survey plots Nos. 694, 690 and the northern portion of plot No. 698; for a declaration that these areas and the other plots specified in the plaint belong to the plaintiffs in *Mafi Mokadami* right and that the entries in the record-of-rights of the village to the contrary are incorrect, and nally for closing the door at Z and removal of the eaves along the line H, H1 and GG 1 and of the Posta (wall support) along GG1 of the plaint map. The cause of action is alleged to have arisen on the 23rd of November, 1911, the date of the final publication of the record-of-rights, on the 15th Jaith, 1324 Fasli, the date when the "wall and the Olti" at HH1 and GG1, the Posta at GG1 and the door at Z were constructed, as well as on various dates not specified in the plaint when the plaintiffs' possession over the disputed land was interfered with. The suit was instituted on the 17th of September, 1917.

The defendant No. 3 is the present proprietress of the Touzi in which the lands in dispute are situate. Defendants Nos. 1 and 2 are related to defendant No 3 Defendants Nos. 4 to 7 are certain deities represented by defendant No. 3 as Mutwalli.

The defendants resisted the plaintiffs' suit and disputed their right to the reliefs claimed in the plaint. They asserted that the record-of-rights was correct.

The Munsif by his judgment, dated the 16th April, 1919, dismissed the plaintiffs' suit. On appeal, the learned Subordinate Judge reversing the decision of the Munsif decreed the plaintiffs' suit in part. He has declared that the plots Nos. 623, 625, 697, 746, 699 and 696 belong to the plaintiffs in *Mafi Mokadami*, and not in *be lagan right*. Nearly half the judgment of the learned Subordinate Judge is devoted to this question. The defendants do not dispute this portion of the decree and therefore we are no longer concerned with it.

The learned Subordinate Judge has declared that plot No. 690 with pucca well therein and the portion A B C D E F being the northern part of plot No. 694 and G1 H1 as being the northern part of plot No 698 belong to the plaintiffs as their *Mafi Mohadami*, and has confirmed their possession therein. The learned Subordinate Judge has further directed that the eaves along the wall G H1, H1H and the Posta along the wall GG1, be removed and that the defendants will have no right to pass through their door at Z on the plaintiffs' land to the north thereof. The defendants have appealed against the aforesaid decree of the learned Subordinate Judge.

As regards the southern portion of plot No. 694, namely, the portion to the south of line FG and also the southern portion of G1, H1, PM of the portion M N O P in the plaint-map, the plaintiffs' claim has been dismissed. The plaintiffs have filed a cross-objection against this part of the decree whereby a portion of their claim has been dismissed.

The finding of the learned Subordinate Judge that plot No. 690 with the pucca well therein belongs to the plaintiffs has been challenged on the ground that the learned Subordinate Judge has based his judgment largely upon Exhibit 10, which was an

inadmissible and irrelevant piece of evidence. This document is a deed of exchange of the year 1891 executed by one Pershad Narain as *Mukhtear Aam* of the defendant's husband and the plaintiffs' father with a view to compromise a suit then pending between the plaintiff's father and the defendant's husband. In that case (*vide* plaint, Exhibit 27) plot No. 690 was not the plot in dispute; but the first plot in the deed of exchange, which is the house of Soban Kandu, is said to have been described as being bounded on the east by the house of Harcharan Kahar and on the west by the *Indara* (well) of the defendant in that suit, that is, the plaintiffs' father, Parti, Samadh, and after that *makan* (house) of Jai Parkash Lal, the plaintiff in that case, who is the husband of defendant No. 3 in the present case. The learned Subordinate Judge has, for the reasons given by him, come to the conclusion that the *indara* referred to therein is the *indara* in question in plot No. 690. The reasons given by him for this inference have been disputed by the learned Vakil on behalf of the defendants-appellants in the present case. We are not concerned with those reasons for the document in question was obviously inadmissible, inasmuch as it was not given effect to and the object for which it was executed, namely, the proposed compromise in that suit, fell through. Therefore the document in question has not the force of a decree. The boundary in question mentioned therein is at best a statement of the *Mukhtear Aam* of the plaintiff in that case and the defendant's husband in the present case. It has not been shown and, no Mukhtearnama has been filed, that the *Mukhtear Aam* had a right to make such a statement on behalf of his principal, the husband of defendant No. 3, and therefore the defendant No. 3, is not bound by the statement or admission made by the *Mukhtear Aam*, unless it is shown to have been made within the scope of the authority conferred by the Mukhtearnama. The document in question was therefore inadmissible in evidence. It is also no proof of the admission of the husband of defendant No. 3 and is not binding upon defendant No. 3. But the inadmissibility of this document does not in itself vitiate the finding of the learned Subordinate Judge inasmuch as he has referred to the other evidence in the case, such as the deposition of the plaintiffs' witnesses to the effect that the well in question with the land belongs to the plaintiffs. He has disbelieved the defendant's evidence and has accepted that of the plaintiffs. Upon the evidence in the case he has recorded a finding of fact in favour of the plaintiffs, holding that the presumption of correctness of the survey record-of-rights with respect to plot No. 690 has been rebutted. His finding on this point therefore is not liable to be set aside in second appeal.

Now, as to the portion of survey plot No. 698 marked M.N O P. in the plaint map, the learned Subordinate Judge holds that "the space covered by G 1, H 1, PM only is a part of a *rasta* running east and west and towards south on the spot". As regards the portion north of this, that is, G 1, H 1, the learned Subordinate Judge holds that "it is not a *rasta* but forms a part and parcel of plots Nos. 696 and 699 belonging to the plaintiffs" and accordingly he has decreed the same in favour of the plaintiffs. Now, the reason given by the learned Subordinate Judge is that inasmuch as plots Nos. 696 and 699 to the east and west of that portion and plots Nos. 623 and 697 to the north and north-east of that portion belong to the plaintiffs, therefore "there could never have arisen any necessity for any persons other than the plaintiffs of having any *rasta* there". This is only a surmise. The *rasta* No. 698 on the survey map could very well exist in spite of the plaintiffs having lands on the north, east and west of it.

Then the learned Subordinate Judge refers to the Batwara map (Exhibit 4) of 1864 and irrigation survey map (Exhibit 2) of 1874, 1875 and Exhibit 11, a map filed in the suit of 1890 brought by the husband of the defendant No. 3 against the plaintiffs' father, and says that in those maps the *rasta* in question has not been shown. But those maps are too ancient to rebut the existence of the *rasta* in question in the year 1910 11 as shown in the cadastral survey. As regards the map Exhibit (11) of the suit of 1890, the two Courts have differed. The Munsif says that in that map "a *rasta* is shown on the same side as M. N. O. P". The learned Subordinate Judge says that the said map does not show "the existence of any *rasta* along the eastern side of the said plot No. 699" Again, the map referred to in Exhibit 11 was filed by the plaintiffs' father in the suit of 1890 and is therefore no evidence against the defendants in the present case.

Be that as it may, these documents are not sufficient to rebut the existence of the *rasta*

found and recorded in the survey record-of-rights of 1910-11 ; yet in consideration of these documents the learned Subordinate Judge says :— " I am inclined to rely upon the evidence of the plaintiffs' witnesses that the portion G 1, H 1, O N of the plaint map is not a *rasta* to form a part and parcel of plots Nos. 696 and 699 belonging to the plaintiffs". The learned Subordinate Judge does not say that the presumption as to the correctness of the record-of-rights has been rebutted. He does not, while discussing the question of the *rasta*, refer in any way to the entry in the record-of-rights which is in favour of the defendants. It does not appear that he had in his mind, while dealing with this question, the presumptive evidence of the record-of-rights in favour of the defendants. He has relied upon the evidence of the plaintiffs' witnesses because it is supported by the ancient maps of the Batwara, the irrigation map and the suit of 1890. The Batwara map, to say the least, is only *nazri*, and not to a scale as the learned Subordinate Judge himself observes in another part of the judgment The irrigation map was prepared to show blocks for irrigation purposes and need not necessarily have shown the details, such as the *rasta*, etc. Therefore the finding of the Subordinate Judge in the plaintiffs' favour with respect to the *rasta* in question being a part of their survey plot No. 699 is not sufficient to rebut the record-of-rights ; nor, as stated above, has he expressly said that the record-of rights has been rebutted. His decision is, therefore, illegal.

The learned Subordinate Judge has also not met another reason given by the Munsiff in his judgment on the point, namely, the situation of the grave of the *Sadhu* as shown in Exhibit 11 and on a portion of the plaintiffs' garden in the present case. Therefore the decision of the learned Subordinate Judge is liable to be set aside as being conjectural, and not based upon valid evidence and not having displaced the presumption of the record-of-rights which must stand unless so rebutted. There is yet another presumption in favour of the defendants. They being proprietors of the village, the *gair majruha* lands and *rastas prima facie* belong to them unless the plaintiffs prove positively that they are part and parcel of their tenure.

Therefore the decision of the Munsiff on the point must stand, according to which the portion G 1, H 1, O N of the plaint-map is a part of the *rasta* which extends to the south of it ; in other words, the entire plot No. 698 is a *gair majruha rasta* as shown in the survey map.

Now, as to plot No. 694 in dispute, the learned Subordinate Judge has arbitrarily fixed the northern boundary of this plot. In doing so, he has not accepted the report of the Civil Court Commissioner. He has tacitly held that the Amin has correctly shown in the cadastral survey map the boundary of the plot, when he says—the Amin " only followed the natural zigzag boundary as he found on the spot." This was exactly what the Amin was required to do and this is exactly the object why the present cadastral survey took place. It had to show the existing boundary in the map as found on the spot. On account of the ditch or *gaddha* in plot No. 694 the existing boundary was as the Amin " found on the spot." He has simply tried to make the boundary of plot No. 694 run in straight line with the *rasta* west of the line G 1 G. He has prolonged G 1 G which is the northern boundary line of plot No 695 towards the east up to eastern boundary line of plot No. 694 and thus he has located an imaginary line G F as the northern boundary line of plot No. 694, thereby dividing the plot as shown in the survey into two halves, giving the northern half to the plaintiffs and the southern half to the defendants. Perhaps the learned Subordinate Judge did not like the zigzag boundary as shown by the survey or the configuration of plot No. 694 and he says that the course adopted by him is most equitable inasmuch as it follows the configuration of the southern boundary on the spot as shown in the Batwara and in the irrigation. As to the ancient maps of irrigation, survey and Batwara, I have already shown that it is not a safe and certain guide in a case of this kind. One might perhaps yield to a consideration of symmetry in a partition suit, but not in a suit for a declaration of title ; nor can such a consideration, which is more or less conjectural, overrule the presumption of the survey record-of-rights in favour of the defendants. In fixing the boundary of plot No. 694, the learned Subordinate Judge has not given effect to the presumption in favour of the defendants, nor has directly or indirectly referred to it.

Now, the learned Munsiff has relied upon the plaintiffs' witnesses for holding that A B

C D E F, that is, the northern portion of survey plot No. 694 has been a *gaddha* (ditch) from the *hosh* of the plaintiffs. The learned Subordinate Judge does not dispose of the reference by the Munsiff to the aforesaid evidence. Here also the defendants as zemindars have *prima facie* title to the entire plot No. 694 as shown in the survey inasmuch as it is a *gaddha* (ditch), and the learned Subordinate Judge does not refer to this presumption. Therefore the finding of the learned Subordinate Judge with respect to plot No. 694 is liable to be set aside and is accordingly set aside, and that of the Munsiff is restored.

Here it may be pertinent to dispose of the cross-objection of the plaintiffs with respect to the southern portion of plot No 694 The learned Subordinate Judge has disbelieved the plaintiffs' evidence on the point. After disposing of that evidence, the learned Subordinate Judge says "accordingly I am constrained to say that the plaintiffs' father hopelessly failed to make out the truth of their claim in respect of the *gaddha* to the south of the line F G in the plaint-map and thus that portion of their claim must fail." The learned Vakil on behalf of the plaintiffs has not been able to successfully attack the aforesaid finding of the learned Sudordinate Judge. The finding is supported by the record-of-rights and accordingly it is confirmed, and the cross-objection of the plaintiffs is dismissed.

Now, as regards the *olti* (eaves) and the *posta* (wall support), north of the defendants' wall H H 1 and G G 1 the learned Subordinate Judge holds that the walls are on the defendants' land and that the eaves of the wall H H 1 G G 1, and the *posta* of the wall G G 1 are outside the defendants' land and within the plaintiffs' land to the north. He also holds that the said eaves and the *posta* have come into existence recently during or since the survey proceedings

Now, a portion of G G 1, namely, E G has been held to be within the boundary of plot No. 694 belonging to the defendants. Therefore the eaves and the *posta* (support) of the wall north of E G will be on the defendants land and cannot, according to our finding in the present case, be removed but the finding of the learned Subordinate Judge with respect to portion of E G 1 remains, and the eaves and the *posta* to the north of it (E G 1) if it happens to be on the defendants' land, must be removed. The eaves on the wall H H 1, if any, projecting beyond the surved boundary to the plaintiffs' land must also be removed This can easily be done by deputing a commissioner to find out whether and how far the encroachment, as stated above, in the shape of eaves and *posta* on the wall H H 1 and G 1 E exists in accordance with the survey boundary. That much the plaintiffs are bound to remove

Now, as to the door at point Z, the learned Subordinate Judge has held that it is in the defendants' wall and therefore cannot be closed, but that the "defendants cannot have any right to use the same so as to enter there through upon the plaintiffs' land adjoining to the north" The learned Subordinate Judge has given no reason for this order. Apparently it is based upon the fact that plots Nos. 696 and 699 to the north of the door are the plaintiffs' garden. These plots have been shown in the survey as *Khalihans* where grain is stored. The Munsiff has referred to the evidence on behalf of the plaintiffs as showing that 15 to 20 tenants of the village stored their grains on these plots and used the same as their *Khalihans* This finding of the Munsiff has not been displaced by the learned Subordinate Judge. Therefore there is no reason why the door at point Z should not be used for that purpose The defendants, however, have no right to use the door for any other purpose. The direction of the learned Subordinate Judge with respect to the door at point Z is accordingly modified.

In conclusion, the appeal is partially decreed. The suit of the plaintiffs with regard to the portions A B C D E F being the northern part of plot No. 694 and G 1, H1, O N being the northern part of plot No. 698 is dismissed. The cross appeal of the plaintiffs with respect to the southern portion of plot No. 694 is also dismissed.

The result is that the entries in the survey record-of-rights with respect to the entire plots Nos. 698 and 694 are confirmed, and the northern boundaries of those plots will be those as shown in the survey record-of-rights. The defendants' appeal with respect to plot No. 690 and the well therein is dismissed, and the entry in the survey record-of-rights with respect thereto is set aside as being incorrect. The claim of the plaintiffs with respect to the *posta* and the *olti* on the wall E G is dismissed ; so also with regard to H1, G1 as the *posta* and the eaves to the north of the plaintiffs' wall H1 G1 and E G happens to be on the plaintiffs'

land in plots Nos. 698 and 694. As regards the *posta* and eaves on the portion of the plaintiffs' wall G1 E, as well as the eaves on the portion of the Wall H1 H, a Commissioner will be deputed to find out how far the eaves and the *posta* have encroached upon the plaintiffs' land and so much as is found by the Commissioner will be removed The cost of the commission will be borne by the defendants.

The decree of the Court below is modified in accordance with the aforesaid findings and the appeal is partially decreed. The cross-objection is dismissed.

There will be no order as to costs in the circumstances of the case and each party will bear its own costs throughout.

Adami, J.—I agree.

Decree varied.

A.I.R. 1923 Patna 41.

DAWSON MILLER, C J AND MULLICK, J.

Rajgiri Singh and others—Plaintiffs-Appellants

v.

Jadunath Ray and another—Defendants-Respondents.

S. A. Nos. 1078 and 1079 of 1920, decided on 1st August, 1922.

(a) *B. T. Act, S 188—Rent suit—Co-sharers—One can sue for whole rent after making others parties.*

There is nothing in S. 188 of the act to prevent one co sharer from bringing a suit for the whole rent after making the co sharers, who refuse to join as plaintiffs-defendants in the suit If a co-sharer can prove that there is a contract express or implied by which tenant is liable to pay his share of the rent separately, then he may bring a suit for that part of the rent without joining his co-sharers as defendants, but the decree obtained by him is to be executed as a money and not a rent decree. On the other hand, notwithstanding such arrangement for separate collection, all the co-sharers may sue jointly for the wole rent. 35 Cal. 331 P C. Foll. [P. 42, C. 1].

(b) *B. T. Act, S. 148 A—Suit by co-sharer for his share of rent or in the alternative for whole rent—Co sharers made parties—Suit is properly framed.*

In a case under S 148 A. the plaintiff co-sharer will be entitled to proceed with the suit for his share only of the rent and a decree obtained in a suit so framed shall be as effectual as a decree obtained by the sole landlord in a suit brought for the rent due to all the landlords. If in the suit it is found that the co-sharer defendants have realised rent in excess of their shares, then they will be liable to reimburse the plaintiff to the extent of the excess realised by them. Where, plaintiffs sued, for their share of rent or in the alternative claimed a joint decree in favour of all the co-sharers, on payment of additional court-fee, *Held*, though the contract for separate collection was not proved the plaint conformed to provisions of S. 148 A and plaintiff was entitled to a decree, 4 P.L.J. 500 Foll.; 27 C.L.J. 101 Dist. [P. 42, C. 2].

(c) *B. T. Act, S. 153—Decision as to amount of rent—Second appeal lies.*

Where Judge has decided the question of the amount of rent annually payable, a second appeal is competent. 1 C. W. N. 687 Foll. [P. 43, C 1].

(d) *Civil P. C.S. 115—Suit by co-sharer for his share of rent or in alternative for whole rent—Court declining to consider if plaintiff entitled to decree for whole rent—Revision lies.*

Where in a suit by a co-sharer landlord for his share of the rent or in the alternative for the whole rent, the court declined to consider whether the plaintiff was entitled to a decree for the whole rent, *held*, that the Court refused to exercise a jurisdiction vested in it and that, that a revision lies. [P. 43, C. 2.]

Shambhu Saran—for Appellants.

B. N. Mitter—for Respondents.

Mullick, J.:—These two second appeals arise out of two suits Nos. 608 and 611 of 1918 in each of which the plaintiff a co-sharer landlord sued the tenants defendants Nos. 1 and 2 for his share of the arrears of rent for the years 1322 to 1325. Defendants 3 to 37 were the remaining co-sharer landlords and were impleaded because they were not willing to join as plaintiffs.

There was a third suit No 590 of 1918 which was instituted by another co sharer named Kunj Behari against the same tenants but which after being remanded on appeal was compromised. In suits Nos. 608 and 611 the plaintiffs Rajballam Singh and Rajgiri Singh got a decree for the full amount of their claim in the Court of the Munsiff but for some reason unexplained, the Munsiff directed that these decrees should be executed as money decrees, while in suit No. 590 the direction was that the decree should be executed as a decree in a rent suit framed under section 148 A of the Bengal Tenancy Act.

The tenants appealed in each case and the Subordinate Judge arrived at the following findings :—

(1) that the rent of the holding was Rs 150 11-6 as stated by the plaintiff ,

(2) that it was not necessary to determine the area ;

(3) that the defendants had failed to prove any diluvion during the years in suit;

(4) that the plea of payment could not be accepted ; and

(5) that the respective plaintiffs were not entitled to sue for their shares of the rent separately.

The Subordinate Judge accordingly by his decree in appeals Nos. 212 and 213 dismissed the suits to which they related, namely, Nos. 608 and 611, but he remanded Appeal No. 214 which arose out of Suit, No. 590 with a

direction that the Munsiff should pass a decree for the entire rent in favour of the *pro forma* defendants on receiving the necessary court fees from the plaintiff. Evidently the learned Subordinate Judge meant that the decree should be made in favour of the plaintiff and the *pro forma* defendants jointly for such amount of the arrears as was due. When the case went back to the trial Court on remand, the tenants compromised with Kunj Behari Singh with the result that the suit was decreed in terms of the compromise and the plaintiffs in Suits Nos. 608 and 611 were left without any relief,

They accordingly prefer the present second appeals Nos. 1078 and 1079.

Now, where a tenant makes a contract by which he is liable to pay rent to several co-sharers jointly, it is obvious that one co-sharer cannot maintain a suit for the whole rent. It is also true that section 188 of the Bengal Tenancy Act demands that landlords shall do jointly anything which they are under the Act required or authorised to do, but there is nothing to prevent one co-sharer from bringing a suit for the whole rent after making the co-sharers, who refuse to join as plaintiffs, defendants in the suit. See *Pramada Nath Roy* v. *Ramini Kanta Roy* (1) Again if a co-sharer can prove that there is a contract express or implied by which a tenant is liable to pay him his share of the rent separately, then he may bring a suit for that part of the rent without joining his co-sharers as defendants, but the decree obtained by him is to be executed as money and not a rent decree. On the other hand, notwithstanding such arrangement for separate collection, all the co-sharers may sue jointly for the whole rent.

In order to further facilitate the recovery of the arrears of the rent due to a co-sharer who is in dispute with his tenants or with his fellow landlords, the Legislature enacted section 148-A of the Bengal Tenancy Act in 1907. This section requires, firstly that the co-sharer shall sue to recover the rent due to all the co-sharer landlords in respect of the entire tenure or holding, secondly that he must make all the remaining co-sharers parties to the suit, and thirdly that he must state that he is unable to ascertain what rent is due for the whole tenure or holding or whether the rent due to other co-sharer landlords has been paid owing to the refusal or neglect of the tenant or of the co-sharer landlords defendants in the suit to furnish him with direct information on these points or on either of them. In such a case the plaintiff co-sharer will be entitled to proceed with the suit for his share only of the rent and a decree obtained in a suit so framed shall be as effectual as a decree obtained by the sole landlord in a suit brought for the rent due to all the landlords. If in the suit it is found that the co sharer defendants, have realised rent in excess of their shares, then they will be liable to reimburse the plaintiff to the extent of the excess realised by them. In this Court the case of *Ram Dhyan Singh* v. *Pardip Singh* (2) contains a clear and instructive exposition of these propositions.

The learned Vakil for the respondents relies upon *Rai Baikuntha Nath Sen Bahadur* v. *Ramapati Chatterjee* (3) but in that case the frame of the plaint was different and the case has been distinguished on that ground in *Ram Dhyan's* case mentioned above and also in the Calcutta High Court in *Profulla Chandra Ghosh* v. *Baburam Mandal* (4). In the plaints now before us the material relief clauses run thus :—

(1) "A decree may be passed in the plaintiffs' favour against the defendants awarding Rs. 74-9-9, arrears with damages."

(2) "If the defendants raise an objection as to the payment of rent separately to the plaintiff as alleged by him (the plaintiff) and the plaintiff be not deemed entitled by the Court to receive separately the amount of rent which has been claimed according to the aforesaid partition, in that case a joint decree may be passed in favour of the plaintiff and of the remaining Maliks on taking the deficit court-fees."

The learned Subordinate Judge having found as a fact that there is no contract for the separate collection of rent, the only question which we have to decide is whether the plaints conform to the provisions of Section 148 A, B.T. Act. My answer to the question is in the affirmative inasmuch as the plaintiffs are claiming in the alternative the whole rent of Rs. 150-11 6 per year for the years in suit on behalf of themselves and their co-sharers. This too was the view of the learned Subordinate Judge when he remanded Suit No. 590 for trial upon payment of the necessary court-fees by the plaintiff. The

(1) (1908) 35 Cal. 831=35 I. A. 71 (P. C.).

(2) (1919) 4 P. L. J. 500.
(3) (1918) 27 C. L. J. 101.
(4) (1921) 34 C. L. J. 462.

learned Subordinate Judge, however, should also have remanded Suits Nos. 608 and 611 with a direction that these suits should remain pending till the disposal of Suit No. 590 and that if the claim for the whole rent was satisfied in any of the three suits, the other two should be dismissed. Such a procedure would have avoided the result which has followed the compromise of Suit No. 590.

The learned Vakil for the appellant has furnished an account before us showing that the precise sum claimed by him in each suit is Rs. 618 2 0 and we order that the second relief clause in the plaints be amplified and amended as follows:—

"If the defendants raise an objection to the payment of rent separately to the plaintiff and the plaintiff be not deemed entitled by the Court to receive separately the amount of rent which has been claimed according to the aforesaid partition, in that case a joint decree may be passed in favour of the plaintiff and of the remaining co-sharer landlords who have all been made parties to the suit for a sum of Rs. 618-2 0 which the plaintiff believes to be the entire amount of arrears of rent due as shown in the schedule attached hereto on taking the deficit court-fee from the plaintiff.

SCHEDULE.

	Rs.	A.	P.
Rent for 1322, 1323, 1324 and 1325 F. S. ...	602	14	0
Damages at the rate of 25%	150	11	6
Total ...	753	9	6
Deduct the amount realised by Babu Kunj Behari Singh, Plaintiff in Suit No. 590 of 1918 ...	135	7	6
Balance ...	618	2	0"

A point was taken by the learned Vakil for the respondents that by reason of the provisions of section 153, Bengal Tenancy Act no second appeal lies in these cases. It is contended that as the claim is for less than Rs. 100 in each case the judgment of the learned Subordinate Judge is final. In reply to this it is urged that the Subordinate Judge having decided the question of the amount of rent annually payable, a second appeal is competent. In this case the plaintiff claimed the whole rent to be Rs. 150-11-6 and the defendant admitted it and the Court on the admission of both parties decided that the rent was this sum. In my opinion it could not have been said that there had been a decision as to a question of the amount of rent if the defendant had not admitted the plaintiff's claim but had alleged some other amount to be the rent annually payable, and the Court without deciding the point had upon the defendants' admission given the plaintiff a decree for a lump sum of money. That was the basis of the decision in *Neke Jate* v. *Nanda Dulal Bamkeja* (5).

But in the present suit there was clearly a decision and it is at least open to argument whether section 153 contemplates that the party in whose favour a decree has been made on a question of the amount of rent annually payable can take advantage of that part of the decree so as to appeal against another part of it. If the matter had been *res integra* I should have been inclined to hold that the section means that the subject matter of the appeal must be the decree or part of the decree which has decided a question as to the amount of rent annually payable. The authorities, however, so far seem to be unanimous in favour of the contrary view and it is unnecessary in these appeals to decide the point. See *Rai Churn Ghosh* v. *Kumud Mohon Duti* (6) and *Sripati Bhattacharya* v. *Kala Chand Ghose* (7).

I think, however, that the appellants may claim relief on a much surer ground. The learned Subordinate Judge refused to exercise jurisdiction in suits 608 and 611 by declining to consider in those suits whether the plaintiff was entitled to a decree for the whole rent due. The suits ought not to have been dismissed without any adjudication upon this point and if an appeal does not lie, I think the plaintiffs would be entitled to ask us to interfere in revision.

We also have to notice that the Subordinate Judge, although the parties were at issue as to the area of the holding, has without any reason whatsoever declined to come to a finding on that point. The plaintiffs set up a private partition which the defendants denied They contended that the area of the holding was 42 bighas 7 kathas 11 dhurs and the Munsiff found that this was the correct area. I fail to understand why the Subordinate Judge declined to decide the point.

(5) (1897) 1 C W N. 711.
(6) (1896) 1 C.W.N. 887.
(7) 1 C.W.N. (N) Cl. XXXVII.

The order therefore that we shall pass is that the appeals be decreed and that the cases be remanded to the Subordinate Judge who will, in the first instance, come to a finding upon the area of the holding; he will then remand the cases to the Court of the Munsiff who will allow the plaints to be amended in the manner we have indicated and after taking the necessary court-fees will decide how much of the rent claimed is due from the tenant defendants.

He will then give the plaintiff and his co-sharers a decree for their respective shares in the arrears found due.

Both parties will be entitled to adduce evidence to prove what is the amount of the arrears due to the landlords. No further evidence will be allowed upon any other matter in the suit.

The appellants are entitled to their costs in this Court and in the Court of the Subordinate Judge

Dawson Miller, C. J :—I concur.

Case remanded.

A.I.R. 1923 Patna 44.

DAS AND ADAMI, JJ.

Rai Saheb Saryu Lal and others—Decree-holders-Appellants

v.

Baijnath Prashad Singh and others—Judgment-debtors-Respondents.

Appeal Nos. 120 and 121 of 1921 decided on 17th November, 1922, against an order of Sub-J., Gaya, dated 17th June 1921.

Mortgage—Rights of mortgagee—Mortgagee can enforce whole security against any property he likes—Equities, if any of purchasers of equity of redemption can be gone into only in separate suit—T. P. Act, S. 67.

The decree-holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases, and if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties or in any of them may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. It is quite true that each parcel of the mortgaged properties is liable rateably to its value and that the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security but an enquiry as to rateable distribution of the mortgage debt cannot be made in execution proceedings without serious complications. [P. 44, C. 2 & P. 45, C. 1.]

S. M. Mullick and *Kailaspatti*—for Appellants.

Kulwant Sahai and *R. G. Saran Prasad*—for Respondents.

Das, J.—This appeal is directed against an order of the learned Subordinate Judge of Gaya dated the 17th June, 1921.

The appellants are the decree-holders and they obtained a mortgage-decree against the respondents, the contesting respondents being the subsequent purchasers or subsequent mortgagees in respect of some of the properties comprised in the mortgage.

The appellants obtained the preliminary decree on the 8th of April, 1915, and the final decree on the 31st June, 1918. In the present execution case the decree-holders sought to have the properties which are entered as properties 9 and 10 in the mortgage decree sold in the first instance. Now these properties, that is to say, the properties 9 and 10, were purchased subsequent to the execution of the mortgage by the respondents who are represented before us by Mr. Kulwant Sahai. It appears that some of the decree-holders have purchased properties Nos 1, 2 and 3 from the mortgagors for the sum of Rs. 14,000, they have given credit in the account for Rs. 11,000 and it is their case that they have paid Rs. 3,000 to the mortgagors. Mr. Kulwant Sahai's clients contended before the learned Subordinate Judge that the course adopted by the decree-holders in purchasing some of the properties clearly prejudiced them and they asked the Court to direct that the properties should be sold in the order in which they are named in the mortgage decree The learned Subordinate Judge acceded to the argument advanced before him on behalf of Mr. Kulwant Sahai's clients and the decree-holders' appeal to this Court.

Numerous authorities were cited on behalf of the parties before us. It is unnecessary to discuss all those authorities, it is sufficient to say that though here and there a discordant note has been struck, still the balance of authorities is clearly in favour of the view that the decree-holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases, and that, if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties or in any of them may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. It is quite true that each parcel of the mortgaged properties is liable rateably to its value and that the

principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security but I do not think that an enquiry as to rateable distribution of the mortgage debt can be made in execution proceedings without serious complications To take the present case, the respondents assert that the decree-holders have purchased property No. 1 at a price much below the market price and that they are now attempting to throw the burden of the entire debt on them. The decree-holders retort by saying that the respondents interested in properties 9 and 10 have purchased these properties for a nominal sum and on an express undertaking to pay the entire mortgage debt, an undertaking which they never attempted to carry out. The learned Subordinate Judge has not entered into an investigation as to the valuation of the different properties comprised in the mortgage but he thought that the action of the decree-holders in purchasing some of the properties clearly prejudiced the rights of the respondents, and that he was entitled to use his discretion in directing in what order the properties should be sold. For myself I do not understand how the act of the decree-holders could possibly have prejudiced the subsequent purchasers The learned Subordinate Judge admits that the decree-holders have not released any of the mortgaged properties so as to throw the entire burden of the mortgage debt on the others. As purchasers of some of the mortgaged properties, they must themselves contribute to the mortgage debt, but the problem is not solved by compelling the decree-holders to sell the properties which they have themselves purchased. The course adopted by the learned Subordinate Judge has unduly favoured the respondents : and for that there is no warrant either in law or in equity. As I have said before, the equities arising as a result of the transactions that have taken place since the mortgage was executed cannot without serious inconvenience be worked out in the execution proceedings, and I must prefer the rule which gives the decree-holders complete dominion over the sale leaving the equities to be worked out in a properly constituted suit between the parties.

I would allow the appeal, set aside the order of the learned Subordinate Judge, and direct that the properties be sold in the order mentioned in the petition of the decree-holders.

The decree-holders are entitled to the costs of this appeal.

M. A. No. 121.

This appeal will be governed by our decision in Appeal No. 120 of 1921. There will, however, be no separate order for costs.

Adami, J.—I agree.

Appeal allowed.

A.I.R. 1923 Patna 45.

DAWSON MILLER, C.J., AND MULLICK, J.

Raja Wazir Narain Singh—Decree-holder-Appellant

v.

Bhikari Ram—Judgment-debtor-Respondent.

L. P. A. No. 11 of 1922 decided on 3rd August, 1922, against a Judgment of Das, J., in S. A. No. 60 of 1920.

(a) *Execution sale—Failure to attach—Sale not void—Civil Pro. Code, S. 51, O 21, r. 64.*

The failure to attach the property before sale does not render the sale null and void. It may amount to material irregularity but is not sufficient unless substantial injury is caused thereby, to vitiate the sale. A Court has jurisdiction to sell without attachment under S. 51 of the Civil Procedure Code. [P. 47, C. 1 and P. 48, C. 1]

(b) *Civil P.C., O 21, r. 68—Sale within 30 days of attachment—Is not nullity.*

Where a sale is held within 30 days of the attachment it is an irregularity but not one which would make the sale a nullity without proof of substantial injury. [P. 48, C. 1.]

(c) *Civil P.C., S. 105 (2)—Point not taken at time of Remand order cannot be taken in appeal from judgment on remand.*

Where a point which goes to the root of the suit is not argued before an appellate court it must be taken to have been abandoned and if an appeal is preferable and no appeal is preferred the party who abandoned the point should not be allowed to re open it subsequently. [P. 47, C. 2.]

J. Prasad and *A. Upadhya*—for Appellant.

N. C. Sinha and *B. Prasad*—for Respondent.

Dawson Miller, C.J.:—This is an appeal under clause 10 of the Letters Patent from a decision of Mr. Justice Das. It arises out of an application made by the respondents

under Section 213 of the Chota Nagpur Tenancy Act to set aside a sale of their tenure in execution of a rent decree obtained by the appellants, their landlords.

The decree was obtained in the year 1915. After one unsuccessful application to obtain execution the decree-holders made a fresh application in July 1918 asking for realisation of the decretal amount by attachment and sale of the judgment-debtor's moveable property and in case the decree still remained unsatisfied by attachment and sale of their immoveable property, namely, an 8 annas interest in village Mohanpur. This was not the tenure or holding in respect of which the rent decree was obtained. It appears that an application was made under section 210 (2) to the Deputy Collector who had the powers of a Deputy Commissioner for permission to sell the property in question in this appeal without first making an application for the sale of the tenure or holding in respect of which the arrears of rent had accrued. Permission was granted but it does not appear that the Deputy Collector's reasons were recorded. Section 210 (3) of the Act provides that property referred to in cl. 2 may be brought to sale, if immoveable, in the manner provided in the sections therein named of the Code of Civil Procedure of 1882 including section 284 which corresponds to Order 21, Rule 64 of the present Code which gives the executing Court power to order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold and the proceeds or a sufficient portion thereof paid to the party entitled under the decree to receive the same. No preliminary attachment of the property was in fact made but the judgment-debtors were served with notice of the sale and were aware of the date thereof. The sale having been advertised took place, on the 9th May, 1919. Two of the judgment-debtors, the respondents in the present appeal, filed an objection under section 213. Their grounds of objection were (1) that the property sold belonged to them only and not to the other judgment-debtors and (2) that there had been a material irregularity in publishing the sale. The first ground of objection was given up and we are no longer concerned with it. In support of the second ground they contended that there had been no preliminary attachment as required by the Civil Procedure Code and further that the sale was held within less than 30 days from the date of notification. The Sub-divisional Officer held that these irregularities were not material and further that the judgment-debtors had sustained no substantial injury by reason of the irregularities.

On appeal by the judgment-debtors to the Judicial Commissioner it was held that the failure of the Deputy Collector to record his reasons for permitting the sale and the failure to attach the property under the provisions of the Civil Procedure Code as well as the fact of holding the sale within 30 days of the sale proclamation under Order 21, Rule 68 of the Civil Procedure Code were material irregularities and rendered the sale void. The learned Judicial Commissioner further found that there was substantial injury to the appellants adding "Although, in the view I take, such a finding is unnecessary. This injury resulted from the prejudice to their rights which to my mind must of necessity follow from the adoption of the shortened procedure".

A second appeal was preferred by the decree-holders to the High Court and was heard before Mr. Justice Das who held that mere non-compliance with the provisions of Order 21, Rule 68 of the Civil Procedure Code does not *ipso facto* make the sale a nullity and that the sale should not be set aside without proof of substantial injury to the judgment-debtors. He further considered that the finding of the learned Judicial Commissioner as to substantial injury was not a proper finding in law as it was based upon the view that non-compliance with the rule mentioned necessarily prejudiced the rights of the judgment-debtors. He accordingly set aside the order of the learned Judicial Commissioner and remanded the case to him for a decision according to law with directions to come to a definite finding as to whether the judgment-debtors sustained substantial injury and if so whether such injury was sustained by reason of the admitted irregularity. It would appear from this judgment that no point was taken before the learned Judge on behalf of the judgment-debtors that the sale was void either by reason of the non-attachment of the property or by failure of the Deputy Collector to record his reasons for permitting the sale under section 210 of the Chota Nagpur Tenancy Act and it is not suggested before us now that these points were argued before him.

When the case went back on remand Mr. Foster had succeeded Mr. Reid as Judicial Commissioner, Chota Nagpur. Mr. Foster found that the irregularities complained of were material, as the sale was held 28 days instead of 30 days after the notice published in Court. The price fetched at the sale was considerably below the value set upon the property by the judgment-debtors but there is no finding as to what the value of the property was. No evidence was produced to show that the low price was directly due to the irregularity, the judgment-debtors were present at the time of the sale and the learned Judicial Commissioner considered that if the property were worth Rs. 6,000, as they stated, it was very unlikely that they could not have raised a loan of under Rs. 500 to save the property by depositing the decretal amount. He also considered that the absence of attachment and the fact that the sale was held within 30 days of the notice did not cause any substantial injury to the judgment-debtors. He accordingly dismissed the appeal. Again it should be pointed out that it was nowhere argued before Mr. Foster that the sale was void by reason of any irregularity which had taken place.

From this order the judgment-debtors preferred a second appeal to the High Court which again came before Mr. Justice Das. The learned Judge did not differ from the conclusions of fact arrived at by the learned Judicial Commissioner but it was argued before him that the failure to attach the property before sale rendered the sale a nullity. The learned Judge acceded to this view and set aside the judgment of the learned Judicial Commissioner and declared that the sale was inoperative and ought to be set aside, but as the point had not been argued before him on the previous occasion when he made the order of remand he ordered the judgment-debtors, the appellants before him, to pay the costs of that appeal and of the hearing before the Judicial Commissioner on remand.

From this decision the present appeal is brought by the decree-holders. Two points have been argued before us in support of the appeal (1) that the learned Judge, whose decision is now under appeal, ought not to have allowed the point, upon which his decision was based, to be taken, as it had not been argued before him on the previous occasion, and (2) that the failure to attach the property although irregular does not render the sale void. In support of the first point it is argued that the order of remand which set aside the decree of the Judicial Commissioner was a final order from which an appeal would lie to a Division Bench and that, no appeal having been preferred from that decision on behalf of the judgment-debtors, the learned Judge ought to have considered the point raised before him as precluded by his previous judgment under the provisions of section 105 of the Civil Procedure Code. Assuming that an appeal lay from Mr. Justice Das I think that there is much force in the argument that where a point which goes to the root of the suit is not argued before an appellate Court it must be taken to have been abandoned and if an appeal is permissible and no appeal is preferred the party who abandoned the point should not be allowed to reopen it subsequently in the same case. See *Hansraj* v. *Bijai Ram Singh* (1). It is unnecessary however to decide this question as in the view I take of the second point the appellants must succeed.

In my opinion the failure to attach the property before sale, although an irregularity under the Civil Procedure Code, does not render the sale null and void. In *Kishory Mohan Roy* v. *Mahommed Mujaffar Hossein* (2), it was held that a sale is not to be considered a nullity merely by reason of the absence of any attachment. In that case the sale had been confirmed and a sale certificate granted before the question arose. In my opinion this fact does not distinguish that decision from the present case because if the sale was in fact a nullity by reason of the absence of attachment its subsequent confirmation could not make it valid. That case followed the earlier decision of Jackson, J. in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee* (3) which also held that an attachment was not an essential preliminary to an execution sale. The case of *Kishory Mohun Roy* v. *Mahommed Muzaffar Hossein* (2) was referred to with approval and followed by Woodroffe, J. in *Hari Charan Singh* v. *Chandra Kumar Dey* (4). The High Court at Allahabad has also held in *Sheodhyan* v. *Bholanath* (5) that the absence of an attachment prior to the sale of immoveable property in execution of a decree

(1) (1917) 40 I.C. 621.
(2) (1890) 18 Cal. 188.
(3) (1867) 8 W.R. 9.
(4) (1907) 34 Cal. 787.
(5) 1899) 21 All. 311.

amounts to no more than a material irregularity and is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. The object of the attachment is, as stated in that case, to bring the property under the control of the Court with a view to preventing the judgment-debtor from alienating it, and the requirement that the order of attachment should be publicly proclaimed is merely one of the requirements of law for perfecting the attachment. The main object of the proclamation of the order is to give publicity to the fact that the sale of the particular property attached is in contemplation and to warn all persons against taking a transfer of it from the judgment-debtor to the prejudice of the rights of the decree holder. It is difficult to see why the absence of attachment which is primarily in the interests of the decree-holder can prejudice the rights of the judgment-debtor who has due notice of the sale.

It was contended, however, that the Court has no power to sell property not ordered to be sold by the decree unless such property has first been attached, and Order 21, Rule 64 was relied upon in support of this argument. That rule no doubt gives the Court executing the decree power to order that any property attached by it and liable to sale shall be sold or only such portion thereof as may seem necessary to satisfy the decree. The object of this rule would appear to be to give the Court a discretion to sell the whole or a part of the attached property as it thinks fit, but under section 51 of the Code, which relates to procedure in execution, the general powers of a Court executing decrees enable it to order execution by attachment and sale or by sale without attachment of any property. It seems clear therefore that the jurisdiction of the Court to sell without attachment exists. Again the irregularity arising by reason of the sale within 30 days of the proclamation although clearly an irregularity has not the effect of making the sale a nullity without proof of substantial injury thereby to the judgment-debtor. It was so decided by their Lordships of the Judicial Committee in *Tasadduk Rasal Khan* v. *Ahmad Hussain* 6).

The case of *Thakur Barmha* v. *Jiban Ram Marwari* (7) was relied on by the respondents for the proposition that nothing could be sold at a Court sale except the property attached. The effect of that decision, however, as I read it, merely is that where property is in fact attached and sold under the description mentioned in the schedule what is in fact sold is the property comprised within the description and not some other property which was not in fact attached and sold. In that case a six annas share in a certain mahal, described as subject to a mortgage in the schedule to which the attachment referred, was attached in execution and advertised for sale and eventually sold. Some months later the purchasers applied for a certificate of sale alleging that there had been a mistake in the schedule which ought to have described the property as a six annas unencumbered share. Ten annas were subject to the mortgage and six annas were free and no doubt a mistake had been made. A sale certificate was granted by the Subordinate Judge with the altered description of the property and a notification was issued in the Calcutta Gazette describing the property as unencumbered. This procedure was approved by the High Court but on appeal to His Majesty-in-Council their Lordships held that that which is sold in a judicial sale of this kind can be nothing but the property attached and that property is conclusively described in and by the schedule to which the attachment refers and that the effect of the certificate was to make the sale that of a property not attached which could not be sold in such proceedings. It was held that it was not a matter of mere misdescription which could be treated as an irregularity but one of identity and that an existing property accurately described in the schedule had been sold, whereas the order of the Subordinate Judge granted a sale certificate which stated that another and different property had been purchased at the sale, and that what was done could not validate a sale of property which had not in fact taken place. The certificate was accordingly set aside. The decision is no authority for the proposition that if no attachment is in fact made the Court has no power to sell property at all.

It is true that in spite of the decisions already referred to of the Calcutta High Court that Court in the more recent case of *Panchanan Das Majumdar* v. *Kunja Behari Mal* (8) decided in 1917, held that the Court has no jurisdiction to sell property in execution which has not been duly attached. In

(6) (1898) 21 Cal. 66=20 I A. 176 (P.C.)
(7) (1913) 41 Cal. 590=41 I.A. 38 (P.C).
(8) (1917) 42 I.C. 269.

that case the decision of their Lordships of the Judicial Committee in *Thakur Barhma* v. *Jiban Ram Marwari* (7) was relied upon in support of the decision but, as already stated, in my opinion, the decision of the Judicial Committee does not support the proposition there laid down. The High Court of Bombay in the case of *Sorabji Coovarji* v. *Kala Raghunath* (9) has also expressed the view that no sale can take place without attachment. In that case before the sale actually took place an appeal against the order for sale made by the executing Court was preferred to the District Judge. Pending that appeal the property was sold. The District Judge dismissed the appeal but on second appeal to the High Court that Court set aside the sale considering that property could only be brought to sale after it had been duly attached and whilst it remained under attachment. That case however, was complicated by the fact that before sale the decretal amount of the attaching decree-holders had been paid into Court and the property released from attachment but it was ordered nevertheless to be sold at the instance of other judgment-creditors who applied for rateable distribution of the money paid into Court and a further sale of the property which had been released but not re-attached. In so far as that case and the later decision of the Calcutta High Court in *Panchanan Das Majumdar* v. *Kunja Behari Mal* (8) differ from the earlier decisions of the Calcutta High Court and the decisions of the Allahabad High Court already referred to. I prefer to follow the latter which, in my view, express the correct principle. In my opinion this appeal should be allowed with costs here and in each of the Courts below and the order of the Sub-divisional Officer rejecting the judgment-debtors' objection and affirming the sale should be restored.

Appeal allowed.

(9) (1911) 36 Bom 156=12 I. C. 911=13 Bom. L. R. 1193.

A. I. R. 1923 Patna 49.

COUTTS AND ADAMI, JJ.

Bhagawan Das—Defendant-Applicant.

v.

Keshwar Lal—Plaintiff-Respondent.

Civil Rev. No. 25 of 1921 decided on 12th June 1922 against a decision of Sub. J. Patna dated 7th October 1920.

Civil P C S. 24 (4)—Transfer of Small Cause suit to Munsif's Court—Trial as ordinary suit—No appeal lies from decree.

Where a suit is instituted in the Court of Small Causes but is transferred by D J for disposal to a Munsif's Court and there tried by the ordinary procedure no appeal lies from the decision of the latter Court. [P. 49, C. 2, P. 50, C. 2.]

S. M. Mullick and *A. N. Das* for *B. C. Mitter*—for Applicant.

Kulwant Sahay and *B. C. Sinha*—for Respondents.

Coutts, J.—This application in revision arises out of a suit brought by the petitioner, Bhagwan Das, for the price of cloth and gunny bags, and for damages for non-delivery of grain which he had purchased from the opposite party, Keshwar Lal. The whole claim with interest amounted to Rs. 575. The petitioner obtained a decree in the Court of first instance but on appeal the decision was set aside by the Subordinate Judge and it is in respect of the Subordinate Judge's decision that this application in revision has been made.

We are not concerned in this application with the facts of the case, the only point urged being that no appeal from the decision of the trial Court lay and that the Subordinate Judge's decision is therefore without jurisdiction.

It appears that this suit was originally instituted as a Small Cause Court suit before the Subordinate Judge of the Second Court at Patna who had jurisdiction to try it as a Small Cause Court suit. There was however, a connected case which had been brought by the defendants in this suit against Bhagwan Das and the District Judge directed that the suit with which we are now concerned should be transferred to the Munsif and be tried along with the connected suit. This was done, both suits were tried by the ordinary procedure and this suit was decided in favour of the petitioner. On appeal this decision was reversed.

What is now contended is that the suit having been once instituted in a Court of Small Causes and having been transferred it remains liable to all the incidents of a Small Cause Court suit and no appeal lies

from the decision of the Court to which it was transferred. I can find no decision of this Court on the point ; but the matter has been considered in the High Courts of Allahabad, Madras, Bombay and Calcutta, and in all these Courts it has now been decided that in such a case no appeal lies. The question was very fully discussed in the case of *Sukha* v. *Roghunath Das* (1), and I, may also refer to the cases of *Madhusudhan Gope* v. *Behari Lal Gope* (2), *Sankararama Iyer* v. *Padmanabha Iyer* (3), and *Narayan Sitaram Mulay* v. *Bhagu bin Ganga Ghanekar* (4). The latter case is not directly in point but the principle therein discussed was the same, and the decision in *Ramchandra* v. *Ganesh* (5), which expressed a contrary view was expressly dissented from.

The decision of the matter depends on the interpretation of section 24 (4) which runs as follows :

"The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall for the purposes of such suit be deemed to be a Court of Small Causes."

The contention of the learned Vakil for the opposite party is that "Court of Small Causes" in this section refers only to Courts of Small Causes constituted under the provisions of the Provincial Small Cause Courts Act and does not include Courts vested with the jurisdiction of a Court of Small Causes. The words themselves in no way support this contention but it is argued that because section 7 makes a distinction between Courts constituted under the Provincial Small Cause Courts Act and Courts exercising the jurisdiction of Courts of Small Causes, and as it is not expressly stated in section 24 (4) that a Court of Small Causes includes a Court exercising the jurisdiction of the Court of Small Causes, therefore, the section must refer only to Courts of Small Causes as defined in the Provincial Small Cause Courts Act. I am unable to accept this contention. A Court invested with the jurisdiction of a Court of Small Causes and the same Court when exercising its ordinary jurisdiction are to be deemed different Courts under section 33 of the Provincial Small Cause Courts Act ; and it must be that the Court, when exercising the jurisdiction of a Court of Small Causes which has been vested in it, must necessarily be a Court of Small Causes. If any distinction had been intended it would certainly have been made clear in section 24 (4) and some such words "as constituted under the Provincial Small Cause Courts Act" would certainly have been inserted after the words "Court of Small Causes." That there is no distinction is, as I have already said, the view which is now taken by the Courts of Calcutta, Madras, Bombay and Allahabad and in my opinion it is the correct view. The learned Subordinate Judge has, for the contrary view, relied on the case of *Dulal Chandra Deb* v. *Ram Narayan Deb* (6). This decision has, however, been dissented from in the case of *Madhusudan Gope* v. *Behari Lal Gope* (2), and cannot now be treated as an authority.

In the result then no appeal in my opinion lay against the decision of the Munsif. The Subordinate Judge, therefore, acted without jurisdiction and his decision must be set aside I would accordingly set aside the decree of the learned Subordinate Judge and would allow this application with costs.

Adami, J —I agree.

Decree set aside.

(1) (1917) 39 All 214=37 I. C. 809=15 A. L. J. 69

(2) (1918) 27 C. L. J. 461=44 I. C. 881.

(3) (1912) 38 Mad. 25=23 M. L. J. 373=17 I. C. 425=(1912) M. W. N. 1086

(4) (1907) 31 Bom. 314=9 Bom. L. R. 827 (F. B.)

(5) (1899) 23 Bom. 382.

(6) (1904) 31 Cal. 1057.

A. I. R 1923 Patna 50

COUTTS AND DAS, JJ.

Ram Prasad Singh and others —Accused-Appellants.

v.

King-Emperor —Respondent.

Cr. Appeal. No. 71 of 1922, decided on 15th June 1922, from S. J. of Monghyr, dated 5th April 1922.

Penal Code, S 149—Principal offender guilty—Guilty under S. 302. Penal Code—Other members cannot be convicted under S 304 read with S 149

There is no authority for convicting the principal offender of one offence and the rest of the members of the unlawful assembly of another offence.

Where the principal offender is guilty under S. 302 the other members cannot be found guilty under S. 304 read with S. 149.

If a member of an unlawful assembly is to be found constructively guilty of an offence under S 149 it must be the same offence of which the principal offender is guilty and not some other offence. [P 53, C. 1]

Gour Chandra Pal -for Appellants.

H. L. Nandkeolyar—for the Crown.

Coutts, J.—This is an appeal by nine persons, Ram Prasad Singh, Daroga Singh Pearey Singh, Bhuso Singh, Misra Singh Tilakdhari Singh, Tarni Singh, Nemdhari Singh and Lalit Singh who have been convicted under sections 302 and 148 of the Indian Penal Code and sentenced to transportation for life under section 302; the other appellants have been convicted under sections 304, 149 and 147 of the Penal Code, and sentenced to five years' rigorous imprisonment each under the former section and they also have been directed to pay a fine of Rs. 100 each.

The facts of the case as alleged by the prosecution are shortly as follows. About one and half *prahars* before sunrise on the 23rd of October last, one Daroga Singh had gone to see his kalai field. When he got there he found one Ajwa Gowla grazing five buffaloes belonging to the appellants, Ram Prasad Singh and Bhuso Singh. He at once attacked Ajwa and was beginning to drive the buffaloes to the pound when Ajwa raised an outcry whereupon the appellants with Ramadhin and Gudar Singh ran up and surrounded Daroga. Ram Prasad had a spear in his hand and with it he struck Daroga Singh in the chest. Daroga Singh fell down and the rest of the appellants who were armed with *lathis* ran away. Some persons who were near by came up and took away the bamboo shaft of the spear which was sticking in Daroga Singh's chest leaving the spear point in it. Some of them then took Daroga to his home and from there to the *thana* which is ten miles away. His first information was taken at the thana at about 9 a. m. and the Sub-Inspector then took him to Gogri hospital where he recorded his dying declaration at about 11-15 a. m. The spear head was then extracted by the doctor but Daroga died shortly afterwards at about 11-20 a. m. The body was then sent to Monghyr and the postmortem examination showed that death was due to shock and haemorrhage from the injuries to the chest wall and lungs.

The accused persons set up a counter case alleging that Daroga had been killed during a fight at a hut belonging to Ajwa where Daroga had gone with ten or twelve men during the night for the purpose of looting. No evidence has been adduced in support of the defence story and the learned Sessions Judge has entirely disbelieved it.

To establish the prosecution case the evidence of the prosecution witnesses Jagrup Singh, Kishore Singh and Mahabir Singh, has been relied on. Jagrup's evidence is to the effect that at the time of the occurrence he was looking after his buffalo which was grazing in a *gachhi* near by and he saw the whole occurrence which he describes very much in the same way as I have already stated it. Kishore Singh and Mahabir Singh depose to the same effect and they say they saw the occurrence because they were out watching their field which was close by.

If we believe the evidence of these witnesses, as the learned Sessions Judge has done, there can be no doubt that the prosecution case has been fully established. But we have been asked to disbelieve the evidence on account of various circumstances. It is urged that it is curious that the accused persons should have arrived on the spot as soon as Ajwa called out, and that they should have been armed—Ram Prasad with a spear and the rest with *lathis*. It is also suggested that rather than attack Daroga who had gone to take the cattle to the pound they would have rescued the cattle and taken them off. It is further pointed out that there were no blood marks at the place of occurrence, that there were several injuries on Ajwa although the prosecution case is that he was only struck twice with a *lathi*, and that there was a denial by the prosecution witnesses that Ajwa had a hut in the neighbourhood.

I am unable to find such improbabilities in these circumstances as would lead me to disbelieve the prosecution evidence in the case. So far as the arrival of the accused persons as soon as they were called by Ajwa is concerned, this is not at all improbable because it was getting towards dawn, Daroga himself had gone out and it is not unlikely that the rest of the accused persons were also beginning to go about their usual business. So far as attacking Daroga rather than rescuing the cattle and taking them away is concerned, it seems to me quite probable because natural anger against Daroga for taking the cattle to the pound would lead the accused to attack him knowing that after he had been disposed of the cattle could be taken away also. The matter of no blood marks having been found has been discussed by the learned Sessions Judge. He says that it is quite possible that any blood which flowed from the wound was soaked up in Daroga's *dhoti* as he subsided on the ground in a sitting posture. Moreover one of the police officers has stated that soon after the occurrence he found that the ground at the place of the occurrence had been dug up and it is not at all impossible that the accused persons dug up the ground in order to do away with traces of blood. With regard to injuries on Ajwa it is true that the doctor who examined him seven days after the occurrence has found five injuries on his person most of them being merely abrasions. We do not know how he got these small abrasions, but he did not necessarily get them when he was struck by Daroga and it is no part of the prosecution case that he did. Such abrasions are common and are received in the natural course of daily life. The mere fact, therefore, that five injuries on Ajwa's person were described by the Doctor in no way contradicts the prosecution case or supports the defence case, that there was a fight in Ajwa's house in the course of which he was struck. So far as the hut is concerned it is true that the prosecution witnesses have denied that there was a hut, but the hut appears to be of a very insignificant character, it is not a permanent structure and the fact that it is not mentioned is not of much consequence.

It has next been urged that the witnesses on whose evidence the convictions have been based should not be believed. The prosecution witness No. 1 Jagrup is an old man and so it is urged he would have been unlikely to be out tending his buffalo at such an early hour and as to the other accused persons it is contended that it is not likely that they would be watching their crops at that hour. I am unable to accept any of these contentions. Jagrup was looking after one buffalo only and although he is an old man and somewhat decrepit it is just the sort of work that such an old man would do and it is not at all improbable that he should be out at that particular hour. So far as the criticism of the evidence of the other witnesses is concerned I see no reason to suppose that they would not be out watching their crops. Crops are watched at night and it would be an usual thing for these witnesses to be watching their field at that hour. So far then as the evidence of these witnesses is concerned I see absolutely no reason why it should not be believed. I am prepared to accept it and if it is accepted the prosecution story has been fully established.

The question remains as to what offences the appellants are guilty of and what sentences should be passed on them. So far as Ram Prasad is concerned there cannot be the slightest doubt that he is guilty of murder, he attacked a defenceless man with a spear which he drove into his chest. The learned Sessions Judge does not consider that it was necessary to inflict the extreme penalty of the law and although the case is on the border line I see no reason to differ from his view on this point.

There remains the question of the other appellants. There can be no possible doubt that these accused persons are guilty of the offence of rioting with the intention of assaulting Daroga who was driving to the pound cattle belonging to Ram Prasad and Bhuso, but it has been urged that their conviction under section 304/149 cannot be sustained and, with this view, I am inclined to agree. Section 149 of the Indian Penal Code runs as follows :

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that

assembly or such as the members of that assembly knew to be likely to be committed in the prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

That is to say, any member of an unlawful assembly is in the circumstances contemplated by section 149, constructively guilty of the same offence as that which is committed by one of its members. In the present case Ram Prasad has been found guilty under section 302. The learned Sessions Judge has found that the rest of the appellants cannot be held to be constructively guilty under section 302 but he has found that they are constructively guilty under section 304. I can find no authority, however, for convicting the principal offender of one offence and the rest of the members of the unlawful assembly of another offence nor has the learned Assistant Government Advocate been able to refer us to any such case, and it seems to me clear from the section itself that if a member of an unlawful assembly is to be found constructively guilty of an offence under section 149 it must be the same offence of which the principal is guilty and not some other offence. If the members of an unlawful assembly are not guilty of the same offence as the principal the only reason why they are not guilty is because they do not come within the terms of section 149. If then the rest of the appellants are not constructively guilty of the same offence as Ram Prasad they cannot be found guilty under section 149 at all. This being so they must be acquitted of the offence under section 304/149. They are, however, guilty under section 147, and under this section I would sentence them to rigorous imprisonment for two years each. In the result then the appeal of Ram Prasad is dismissed and the appeals of the other appellants are allowed to this extent that their convictions and sentences under section 304/149 are set aside but they are convicted under section 147 and sentenced to rigorous imprisonment for two years each under this section.

Das, J.—I agree.

Order modified.

A. I. R. 1923, Patna 53.*

JWALA PRASAD AND COUTTS, JJ.

Moti Singh and others—Petitioners.

v.

Dhanukdhari Singh and *others*—Opposite Party.

Cr. Rev. No. 279 of 1922, dated 2nd August 1922.

(a) *Criminal P. C. S. 145—Trial under—Procedure for warrant case should not be adopted—Acting in evidence in chief without opportunity of cross-examination is illegal—Evidence.*

The object of S. 145 is to prevent a breach of the peace by a summary decision as to the possession of the contending parties leaving them to decide their title and right to possession in a competent Civil Court where naturally the proceeding has to be a protracted one. It is therefore incumbent upon Magistrates to dispose of proceedings under S. 145 as quickly as possible and with due regard to the rules of procedure prescribed by that self-contained Section. The procedure for the trial of a case under S. 145 is that laid down for the trial of summons cases where witnesses are examined, cross-examined, and re-examined, and then discharged. The Magistrate is wrong in treating the case as if it was a warrant case.

The present case was prolonged from day to day. The Magistrate examined the witnesses in chief and postponed their cross-examination till after the first party had closed its case. When the cross-examination of one of the witnesses of first party had to be resumed, the second party did not appear in time. The Magistrate then disposed of the case *ex parte* holding that the evidence adduced by the first party was sufficient to prove its possession over the lands in question. *Held*, that the magistrate acted without jurisdiction in acting on the evidence which was not tested by cross-examination, and that the order was wrong also because no opportunity was given to the opposite party to produce their evidence.

[P. 54, C. 1, 2; P. 55, C. 1.]

(b) *Evidence Act, S. 138—No opportunity to cross-examine witnesses—Evidence is not admissible.*

S. 138 implies that the party had an opportunity to cross-examine and does not mean that merely a right to cross-examine a witness without an opportunity being offered for cross-examination is sufficient compliance with the requirements of the law. [P. 55, C. 1.]

Yunus and *Reyasat Hussain*—for petitioners.

Akbari and *Hasan Jan*—for Opposite Party.

Jawala Prasad, J.—I regret that the order of the Magistrate dated the 3rd of May 1922, declaring the possession of the first party under Section 145 of the Code of Criminal Procedure, must be set

aside and the case remanded for continuing the trial thereof from the stage at which it had reached that day This was a very old case The dispute between the parties led to a proceeding under section 145 of the Code some time last year and on account of the indiscretion of the Magistrate who tried that case, the order had to be set aside by this Court on the 19th of October 1921 with the direction to start a fresh proceeding in case of a danger of the breach of the peace still existing. On the 26th of November 1921 the Magistrate considered the Police report and the High Court judgment referred to above and started the proceeding which is the subject matter of the present application obviously because the dispute between the parties still continued in so acute a form as to necessitate the adoption of a fresh proceeding under section 145.

Now the object of Section 145 is to prevent a breach of the peace by a summary decision as to the possession of the contending parties leaving them to decide their title and right to possession in a competent Civil Court where naturally the proceeding has to be a protracted one. It is therefore incumbent upon Magistrates to dispose of proceedings under Section 145 as quickly as possible and with due regard to the rules of procedure prescribed by that self-contained Section. These rules are very simple and it is to be regretted that the Magistrate in the present case has not adopted them although his attention was drawn to the rules by the order of this Court, dated the 19th October 1921. It is extremely harassing to the parties that the present proceeding started on the 26th November 1921 could not be finished by the 3rd of May 1922.

Without going to the earlier orders in the case I would at once come to the order of the 6th of February 1922. By that order the case was made over to the Magistrate in question when the evidence had already commenced in the Court of the Magistrate who had before that the seizin of it. In the order of the 7th of February the Magistrate directed the witnesses of the first party to appear on the 17th of February; thereby he allowed the second party to keep back his witnesses till the evidence on behalf of the first party was finished. Thereafter on various dates he examined several witnesses on behalf of the first party only in chief. The procedure for the trial of a case under section 145 is that laid down for the trial of summons cases where witnesses are examined, cross-examined and re-examined and then discharged. The Magistrate in the present case started the enquiry as if it was a warrant case. He examined the witnesses in chief and postponed their cross-examination till after the first party had closed its case Then on the 5th April 1922 the first party closed its case and the witnesses were directed to be produced for cross examination on the 18th. One witness for the first party was then cross-examined on three dates the 18th, the 19th and 20th of April. The cross-examination shows that the Magistrate would not have taken more than half an hour or so each day in recording the cross-examination of that witness. This was, as observed above, extremely harassing to the parties. For cross-examining one witness the second party had to go to the Court day after day. There is no reason why the Magistrate should not have taken up this case and continued the hearing of it till it was finished in two or three sittings. The result was that the parties had got tired of this procedure and on the 3rd May 1922 when the cross-examination of the witness had to be resumed the second party did not appear in time. The Magistrate then disposed of the case *ex parte* holding that the evidence adduced by the first party was sufficient to prove its possession over the lands in question. No opportunity was given to the second party to cross-examine the witnesses other than the one already referred to and two other witnesses, Nos. 11 and 15. Witness No. 11 was a Sub Deputy Collector and he was a formal witness. His cross-examination was declined by the second party. Witness No. 15 was also a formal witness. He simply proved the complaint petition.

Mr. Akbari says that the second party had a right to cross-examine these witnesses and if they did not cross-examine them after they were examined-in-chief there was no irregularity committed by the Magistrate. He has also referred to section 138 of the Indian Evidence Act. I am unable to agree with this view

Section 138 of the Act has obviously no application. It only lays down the order in which the witnesses will be examined, cross-examined and re-examined; and referring to the cross-examination it says that the witnesses will be cross-examined after the examination-in-chief if the party so desires. It certainly implies that the party had an opportunity to cross-examine and does not mean that merely a right to cross-examine a witness without an opportunity being offered for cross-examination is a sufficient compliance with the requirements of the law.

Now, it is an elementary principle of law that an examination-in-chief of a witness, without an opportunity being offered to the opposite party to cross-examine, is not legally acceptable. Therefore the evidence of the witnesses in the present case was not such as upon which the Magistrate could act. It may, however, be said that the 2nd party was absent when the case was called on and one of the witnesses of the 1st party referred to above who was under cross-examination was present in Court and therefore there was an opportunity to cross-examine him. The non-appearance of the 2nd party does not therefore make evidence of that witness inadmissible. There is some force in this argument. But the Magistrate does not in his order say that he has acted upon the evidence of that witness alone and not upon the evidence of witnesses who were not cross-examined and whose evidence was, as observed above, inadmissible. It appears to me that apparently he has not referred to any evidence. After the default was committed by the 2nd party he simply in continuation of his recording the order that the second party did not put in appearance, wrote one passage in his order that the " first party had adduced sufficient evidence to prove possession." There is also a good deal of force in the contention of Mr Yunus that on that day only the first party's witness referred to above was to be cross-examined and that the Magistrate ought to have given opportunity to the second party to adduce its evidence. This opportunity was never given.

Considering all the circumstances of the case I hold that the order of the 3rd of May 1922, does not seem to have been based upon the legal evidence and is therefore without jurisdiction. I also hold that the Magistrate has denied a fair trial of the case to the second party. I further hold that the Magistrate has, in the present case, shown great indifference in the disposal of the case. He seems to have treated this case as if of no importance and used to take it up when it suited him. This is perhaps due to his being in charge of the treasury and thus not being able to afford much time for this case. I think some better arrangements should have been made for the trial of this case.

I therefore set aside the order of the Magistrate, dated the 3rd of May 1922 and direct that the case be taken up from that stage after giving an opportunity to the second party to cross-examine one witnesses already referred to and the other witnesses on behalf of the first party and to adduce its own evidence if any.

Coutts, J: —I agree that the order must be set aside and the trial continued from the stage it had reached.

Order set aside.

A. I. R. 1923 Patna 55.

COUTTS AND ROSS, JJ.

Ghura Manjhi and others —Defendants-Appellants

v.

Prabodh Chandra Mazumdar and others —Plaintiffs-Respondents.

Appeal No. 197 of 1919, decided on 16th June 1921 against the Appellate decree of J. C. of Chota Nagpur, dated 12th June, 1918 affirming the decision of the Munsiff of Daltonganj.

Chota Nagpur Tenancy Act, S 177—Claim to receive rent on behalf of third person cannot be made by the tenant himself.

What the tenants had done in this case is to claim the right, or rather, to acknowledge an obligation, to pay rent to a third person.

Held, a right to receive rent can only be claimed by or on behalf of the person entitled to receive it and not by a person who is under the obligation to pay it. [P. 56, C. 1.]

W. H. Akbari and *H. P. Sinha*—for Appellants.

Kulwant Sahay—for Respondents.

Ross, J.—The decree against which this appeal is brought was passed in a suit for rent, governed by the Chota Nagpur Tenancy Act. The appellants are the tenants, whose defence was a plea of payment to a third person, one Narsingh Dayal. Both the

Courts below have found that they failed to prove payment of rent in good faith to Narsingh Dayal.

It is contended on behalf of the appellants, that under section 177 of the Act it was necessary that Narsingh Dayal should be made a party to the suit on the ground that the right to receive the rent was claimed on his behalf, within the meaning of that section. Narsingh Dayal did not intervene in the suit, but it is argued that if the tenant claims the right to receive the rent on behalf of a third person, then section 177 of the Act is brought into operation. This construction does violence to the natural meaning of the words of the sections. What the tenants have done in this case is to claim the right, or rather, to acknowledge an obligation, to pay rent to a third person. The tenants cannot claim the right to receive rent on behalf of a third person. A right to receive the rent can only be claimed by or on behalf of the person entitled to receive it and not by a person who is under the obligation to pay it. This view is in accordance with the decision in *Budhan Singh* v. *Mawar Kali Charan Singh* (1).

In my opinion, therefore, section 177 does not operate in the present suit and the appeal must be dismissed with costs.

Coutts, J.—I agree.

Appeal dismissed.

(1) (1920) 57 I. C 28.

A. I. R. 1923 Patna 56.

SULTAN AHMAD, J.

Damodar Das—Applicant.

v.

Emperor—Opposite Party.

Criminal Reference No. 40 of 1920 dated 14th May 1920, by the S. J. Cuttack.

(a) *Criminal P. C., S. 263—Summary Trial—Reasons justifying conviction must be given by the Magistrate.*

Under section 263 the Magistrate must give the reasons, though briefly for justifying the conviction. Convictions are revisable by a Superior Court, and the Superior Court will always insist on having materials before it so that it may be in a position to say whether the conviction is proper or not. [P. 56, C. 2.]

(b) *Penal Code, S. 447—Intention to annoy or insult is necessary.*

The main ingredient of section 447 is that the trespass must be with the intention of annoying or insulting some one, or with the intention of committing an offence, without which the conviction for criminal trespass is an impossibility. [P. 56, C 2.]

Assistant Govt. Advocate, for the Crown.

Judgment.—This is a reference by the Sessions Judge of Cuttack, recommending that the conviction of the accused under section 448 of the Indian Penal Code by the Deputy Magistrate be quashed. The trial was summary, but it appears to me that the order of the Deputy Magistrate does not comply with the provisions of section 263 of the Code of Criminal Procedure. It must be remembered that the summary procedure provided for in Chapter XXII of the Code of Criminal Procedure is not to become too summary. Under section 263 the Magistrate must give the reasons, though briefly, for justifying the conviction. The only reason that I find in the order that he has passed is that the accused is guilty under section 447. If that were sufficient, then no other reasons justifying the conviction could possibly be given. Convictions are revisable by a Superior Court, and the Superior Court will always insist on having materials before it so that it may be in a position to say whether the conviction is proper or not. The main ingredient of section 447 is that the trespass must be with the intention of annoying or insulting some one, or must be with the intention of committing an offence. There is nothing in the order of the Magistrate which would show the intention of the accused. That not having been found, the conviction for criminal trespass is an impossibility. At the highest it can be said that the accused trespassed into the room of the Sub-Inspector, but that would be criminal trespass if the criminal intention of the accused is clearly found. Therefore, I agree with the learned Sessions Judge that the conviction of the accused is not maintainable and, therefore, direct that the fine, if paid by himself, must be refunded, the conviction being quashed

Conviction quashed.

A. I. R. 1923 Patna 57.

ADAMI, J.

Harendra Krishna Bagchi and others—Petitioners

v.

Balkumar and others—Opposite Party.

Criminal Rev. No. 508 of 1922, decided on 9th October 1922 against the order of Sub. Div. Magistrate, Banka, dated 28th June, 1922.

(a) *Criminal P. C., S 148 (3) and 145—Order for costs—Application for recovery of—Magistrate has no discretion to refuse on ground of delay.*

Where a Magistrate or his predecessor has ordered the costs to be recovered, he has afterwards no discretion to refuse to recover costs on the ground of long delay, limitation being six years or any other ground The Magistrate having excused one of the persons from payment or costs it will be open to the opponent in applying for distress warrants to exempt him from the list of persons from whom the costs are to be recovered The use of the word "may in his discretion" in section 386 cannot be used for the purpose of interpreting the words "may be recovered" in Section 148. [P. 57, C 2.]

(b) *Criminal P C., S 386—Discretion in recovering fine—Only exercisable when there is sentence of fine and in default imprisonment.*

The discretion in S 386 only refers to cases where there has been a conviction and sentence and the sentence directs that in default of payment of fine, the offender shall be imprisoned. [P. 57 C. 2]

C. C. Das and *S. S. Bose*—for Petitioners.

P. C. Roy and *S. N. Ray*—for Opposite Party.

Adami, J.—It appears that the petitioners obtained an order in their favour in proceedings under Section 145, Cr P. C. and were awarded costs to the amount of Rs. 500 on the 23rd December 1919 They applied for distress warrants in March 1920 and distress warrants were issued but in May 1920 the petitioner withdrew their claim for costs as against the opposite party No 7, who, as a fact, had given evidence in their favour and taken their side. The Magistrate allowed the name of the opposite party to be taken out of the warrant. As a result of the distress only Rs. 71 were recovered and for a considerable space of time, the petitioners do not seem to have taken any further steps to recover the balance. On the 7th March 1922, however, they applied to the Magistrate, who had succeeded the Magistrate who passed the order under Section 145, Cr. P. C. for a further distress warrant to recover the balance. On the 17th May 1922 this Magistrate rejected the application; the ground given was that the petitioners had been slack in waiting so long to make their application and also that it is impossible to execute a distress against only the opposite party 1 to 6 and to exclude No. 7 when the order for costs was passed against the opposite party jointly and severally. On the 26th June the petitioners made a fresh application asking for recovery of costs from all the opposite party: and this application was again rejected and it is against the order of rejection that the present application is made to this Court.

The chief ground, which the learned Magistrate took, was that on the wording of Section 148, sub-section (3) of the Code of Criminal Procedure, it was optional for the Magistrate to either take steps for recovery of costs as if they were fines or to refuse to do so; and he based his refusal on the ground that there had been long delay in making the application.

Now an order had been made granting costs to the petitioner and there is no doubt that if the Magistrate who passed that order still held office he would have enforced his order. The learned Magistrate now maintains that it is in his power, although his predecessor had ordered the costs to be recovered, to exercise discretion and refuse to carry out that order. In my opinion the wording of Section 148, sub-section (3).

"all costs so directed to be paid may be recovered as if they were fines" does not give the Magistrate a discretion to refuse to recover the costs. It merely points out the way in which those costs are to be recovered and the reference is merely to Section 386, Cr. P. C. The use of the words "may in his discretion" in Section 386 cannot be used for the purpose of interpreting the words "may be recovered" in Section 148. The discretion in Section 386 only refers to cases where there has been a conviction and sentence and the sentence directs that in default of payment of fine, the offender shall be imprisoned." To my mind there is no doubt that the petitioners were entitled to insist that steps should be taken to recover the amount of costs awarded and that the Magistrate had no option to refuse to take steps.

It is then urged that the delay in making the application for a further warrant entitles the Magistrate to refuse to grant

the application. The petitioners had six years within which to apply for recovery of the costs and any time within those six years, they had a right to go before the Magistrate and ask him to take proper steps to recover the amount. I think, therefore, that the order of the Magistrate was wrong and that he should have issued distress warrants as desired by the petitioners.

With regard to the recovery of costs from the opposite party No. 7 the Magistrate had excused him from payment and it will be open to the petitioners in applying for distress warrants to exempt him from the list of persons from whom the costs are to be recovered.

The order of the Magistrate must, therefore, be set aside and opportunity must be given to the petitioners to recover their costs as provided by the law.

Order set aside.

A. I. R. 1923 Patna 58.

DAWSON MILLER, C. J. AND MULLICK, J.

Henry Hill and Co.—Plaintiffs-Appellants

v.

Sheoraj Rai and others—Defendants-Respondents.

L. P. A. No. 7 of 1921 decided on 31st May 1922 against the decision of Jwala Prasad, J. in S. A. No. 513 of 1919, dated 21st December 1920.

* *Fishery—Exclusive right of, is an interest in immoveable property—But if mere right to fish along with others it is an easement—Limitation Act, Ss. 26, 28, Art 144—Adverse possession.*

If the right claimed is a mere right to fish not excluding the lawful owner, it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years, uninterrupted enjoyment If it is an exclusive right of fishery it is an interest in immoveable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right contains all the essential elements of property and even if it may properly be described as a profit a *prendre*, it has also the distinctive features of an interest in immoveable property. Even if S. 26 of the Act should be applicable, this would not bar the operation of Art 144 and S. 28 if the right came under both descriptions. 2 P L. J 283, Foll. 5 Cal. 945: 12 Bom. 221; 18 Cal. 80, Ref.

[P 62, C. 1.]

P. Kennedy and *B. N. Mitter*—for Appellants.

Kulwant Sahay and *Sambu Saran*—for Respondents.

Dawson Miller, C J.:—This is an appeal under the Letters Patent from a decision of Jwala Prasad, J; which comes before us for final determination after remand to the first appellate Court for certain findings of fact.

The plaintiffs, first party, are the tenure holders of *Mauza* Madhubani in Champaran under an *istimarari mokurari* lease granted by the proprietors, the Bettiah Raj. The plaintiffs, second party, are the lessees of the *jalkar* rights in the *mauzah* under a *ticca* lease granted by the tenure-holders. The Defendants who are the tenants in occupation of the land over which the Plaintiff's claim the *jalkar* right, have interfered with the exercise of that right by refusing to allow the plaintiffs to erect upon the land *bari* and *chilwan* for the purpose of catching fish. The plaintiffs accordingly instituted this suit claiming a declaration that they have *jalkar* rights over the property from which they have been excluded by the defendants. They claimed that by law and custom the *jalkar* rights with respect to the *chaur* lands in the village belong to them and that they are in enjoyment of the entire zamindary right appertaining to the *mauza* under their *istimarari mokurari* settlement, which rights did not pass to the tenants of the land. They further claim that in any case they have by long enjoyment acquired a prescriptive right to the fishery. The plaint is not very scientifically drawn. It alleges that the *jalkar* rights over the *chaur* lands of the *mauza* belong to the plaintiffs first party according to law and custom, and that they have for a pretty long time been in enjoyment of the said rights, and in the next paragraph it alleges that the *jalkar* right with respect to the water accumulated on the aforesaid lands has belonged to the plaintiffs first party for more than several 20 years, and that the *ticcadars* under the plaintiffs first party have every year, for a pretty long time, been appropriating the *jalkar* produce of the aforesaid *jalkar* land by means of catching fishes, and, in order to prevent the escape of the fish from the water, every year *bari* and *chilwan* (wire) are put up north and south, east and west, over the aforesaid lands, and in this way the fish of the aforesaid *jalkar* has for several periods of 20 years continued to be appropriated and the right of fishery exercised on behalf of the plaintiffs first party and their *tic-*

cadars and that the defendants and their ancestors have had full knowledge of the same. It then alleges that two weeks before the suit, the defendants aforesaid prevented the plaintiff second party from putting up the *bari* and *chilwan*. It further alleges that the suit is based on the right of easement and prescription as also on the custom obtaining in the village. The plaintiffs claim (1) a declaration that the plaintiffs first party have the *jalkar* right over the land in question, (2) an injunction restraining the defendants from interfering with the exercise of their rights, and (3) damages.

The Munsif who tried the suit held that the fishery right passed to the tenant, in whom the right of occupation of land was vested, and found that no custom had been proved whereby the tenure holder retained the right of fishery. He also found that the plaintiffs had not made out a prescriptive right by 20 years' uninterrupted enjoyment and dismissed the suit

The plaintiffs appealed from this decision to the District Judge who dismissed the appeal and affirmed the decree of the Munsif. It was contended before him that the right claimed was in fact an interest in immoveable property, the adverse possession of which for 12 years would extinguish the right of the lawful owner under S. 28 of the Limitation Act, and that it was not necessarily an easement which under S. 26 of the Act could be acquired by 20 years' uninterrupted enjoyment. The plaintiffs also contended that by a custom of the village the *jalkar* rights remained in the tenure-holder. The learned District Judge held that the right of fishery could not without an express grant, pass either to the tenure-holder or to the raiyat in actual occupation of the land but remained in the superior landlords, in this case the Bettiah Raj, and that, in the absence of the Bettiah Raj, as parties, he was not competent to determine the question either as to adverse possession or custom, as these were matters which could only be proved as against the superior landlord, there being no evidence of a grant of the fishery to the plaintiffs. The learned District Judge came to certain findings on the question of custom admitted by some of the defence witnesses whereby the tenure-holders let out the *jalkar* to *ticcadars* but his findings on this question were inconclusive.

A second appeal to this Court was heard before Mr. Justice Jwala Prasad sitting singly. He held that the jalkar rights were in the occupier and not in the landlord, but agreed with the lower appellate Court that no declaration of the plaintiff's rights could be granted in the absence of the Bettiah Raj. He further considered that on the findings 20 years' uninterrupted enjoyment had not been proved. He did not in terms deal with the question as to 12 years adverse possession raised before the District Judge or with the question of custom.

From this decision an appeal was preferred under the Letters Patent and heard by my learned brother and Ross, J., who agreed with the opinion of the learned Judge in second appeal that the fishery rights belonged to the occupier and held that the superior landlords were not necessary parties to the suit. They also held that the right of fishery claimed was an interest in immoveable property within the meaning of Art. 144 of the first Schedule to the Limitation Act and that it was not necessary for the plaintiffs to prove enjoyment for 20 years as required by S. 26 of the Act but that, under Sec. 28, the right claimed might be acquired by adverse possession for 12 years. As in their opinion no proper findings had been come to by the learned District Judge in first appeal either as to adverse possession or as to custom they remanded the case to the Court of the District Judge for findings on the following questions.

(1) Whether the plaintiffs have acquired any right by adverse possession, and,

(2) Whether they have acquired title by custom.

The learned District Judge on remand found that it was proved that the *mukararidars* and their *ticcadars* had since 1899 that is some 18 years before the suit, regularly exercised fishery rights over the land in question, but not so as to interfere with the crops, and that the fishing rights had been regularly leased to the *ticcadars* by the *mukararidars*, but that the tenants and their labourers had at harvest time appropriated small fish such as could be caught by hand. He accordingly held that the plaintiffs had acquired the *jalkar* right by 12 years' adverse possession but not so as to interfere

with the cultivation of crops or so as to restrain the tenants from catching small fish by hand. He further found that the evidence did not go far enough back to establish a custom but that there was a local usage by which the rights of the parties were as stated above. The case now comes before us with the above findings for final disposal.

The appellants contend that on these findings they are entitled to a decree declaring their right to the fishery. The respondents, on the other hand, say that the right claimed is an easement which can only be acquired by 20 years' uninterrupted enjoyment.

By S. 26 of the Limitation Act easements can be acquired by peaceable and open enjoyment as of right and without interruption for 20 years. A right of fishery of whatever nature is not strictly an easement. It is either an interest in immoveable property or a profit a *prendre* which may be either in gross or appurtenant to a dominant tenement, but by S. 2 (5) of the Limitation Act easement includes a right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing on or attached to or subsisting upon the land of another. In so far as, therefore, a right of fishery is a mere profit a *prendre* which is not an exclusive right to the fishing, it would, I think, clearly come within the provisions of the definition section. If, however, it is an exclusive right to the fishing, as in the case of a several fishery it would, in my opinion, amount to an interest in immoveable property within Art. 144 of the first Schedule of the Limitation Act, and adverse possession of such a right for 12 years would by the operation of S. 28 of the Act extinguish the rights of the lawful owners, in this case, the tenants.

Much ingenuity has been expended in determining whether a right of fishery is an easement within the meaning of that word as used in the Limitation Act, or whether it is an interest in immoveable property as contemplated by Art. 144 of the first Schedule of the Act. In *Chundee Churn Roy* v. *Sahib Sunder Mundul* (1) it was held that a prescriptive right of fishery was an easement within the meaning of S. 3 of the Limitation Act, and could be acquired by 20 years' uninterrupted enjoyment. The difference between uninterrupted enjoyment referred to in Sec. 26 and adverse possession in Art 144 was pointed out in that case, and, although the case as reported does not definitely show whether the right claimed was an exclusive right to the fishing or merely a right which might be shared with others, there is no reason to suppose that an exclusive right was there claimed. The distinction just mentioned is an important one. A profit a *prendre* in the nature of an easement which can be acquired by 20 years' enjoyment must, I think, be a right which does not exclude the acquisition of similar rights by others or bar the enjoyment of such rights by the lawful owners of the land. It may, I think, be either a personal right which is not transferable or one attached to a dominant tenement, as in the case of an easement properly so called, which also cannot be transferred apart from the transfer of the dominant tenement. An exclusive right to the fishing in a particular locality, as in the case of a several fishery, is both transferable and heritable and is, in my opinion, an interest in immoveable property and one which can be acquired by 12 years' adverse possession as against the lawful owner. The question has frequently arisen in connection with S. 9 of the Specific Relief Act. The High Court at Bombay in *Bhundal* v. *Pandol Pos Patil* (2), held that a right of fishery came within the denomination of immoveable property within the Specific Relief Act. The right there claimed was the exclusive right of fishing in certain tidal waters, between high and low water marks, the plaintiffs being the fishermen of the village of Naogher claiming what in legal phraseology is known as a common of fishery. On the other hand, a majority of a Full Bench of the Calcutta High Court in *Fadu Jhala* v. *Gour Mohan Jhala* (3), held that a suit for possession of a right to fish in a *khal* the soil of which did not belong to the plaintiff did not come within the provisions of S. 9 of the Specific Relief Act. That decision followed an earlier case

(1) (1880) 5 Cal. 945=6 C. L. R. 269.

(2) (1887) 12 Bom. 221.

(3) (1892) 19 Cal. 544 (F.B.)

decided by a Bench of the same Court in *Natabar Parue* v. *Kubir Parue* (4). That case also does not indicate clearly whether the subject of the suit was a several fishery, that is an exclusive right to the fishing, or merely a right to fish which would not exclude the owner of the land or others claiming similar rights. In the later case of *Lokenath Bidyadhar Mahapatra* v. *Jahania Bibi* (5), decided by the Calcutta High Court, the plaintiffs and defendants were respectively proprietors of adjoining properties. The plaintiffs as proprietors of Gopinathpur claimed the exclusive right during certain seasons of the year to the fishery in the waters of the neighbouring estate of Bara Benakula belonging to the defendants. The suit was one in ejectment on the ground that the defendants had prevented the plaintiffs from exercising their rights for some years before the suit. It was contended by the defendants that the right claimed was a prescriptive right to profit a *prendre* falling under the description of easement in the Limitation Act and that it had not been proved that the right had been exercised within two years of the suit. They also objected that a suit in ejectment would not lie and further contended that the claim was barred by limitation under Art. 120 of the Schedule of the Limitation Act, the period for which was six years. Each of these points was determined in favour of the plaintiffs. It was held that a claim to an extra territorial fishery, annexed to the plaintiffs' estate and exercised over the waters on the defendant's land, was not a claim to an easement within the Limitation Act, but was an interest in immoveable property and that a suit in ejectment would lie in such a case. It was also held that the period of limitation was not six years under Art. 120 but 12 years under Art. 144 of the Limitation Act, and a possessory action could be maintained at any time within 12 years of the date when the defendant's possession became adverse, the claim being one for possession of an interest in immoveable property. In that case the right set up was claimed as being appurtenant to the plaintiff's land and it was undoubtedly an exclusive right, but I can see no reason why such a right should not be acquired altogether apart from the ownership of property by 12 years' adverse possession against the lawful owner so as to extinguish his title by the operation of S. 28 of the Limitation Act. It has been held in this Court that where an owner of land has been completely ousted from the right to fish in the waters of his own land by definite acts of aggression by another, this constitutes in fact dispossession from immoveable property. *Syed Baker Husain* v. *Rani Ranjit* (6). From the proposition so stated I see no reason to differ. It was argued before us that the right claimed in the plaint was dependent upon prescription and that the proof should be limited to such rights as might be so obtained It is true that in England under the common law, rights in gross which are unassignable and unappurtenant cannot be acquired by prescription but require evidence of a grant. Under the Limitation Act, however, right of the description can be acquired by long enjoyment and if, as in the present case, they amount to an interest in immoveable property they can be acquired by adverse possession without proof of a grant. There is, therefore, in my opinion, no reason why a right claimed as arising by prescription should not aptly describe a right arising by 12 years' adverse possession under the Indian Limitation Act. All the facts necessary to determine this question were before the Court and although the point may not have been definitely raised until the case came before the District Judge in first appeal, it is not a case in which the parties were taken by surprise. I agree that isolated acts of trespass even if extending over a number of years would not be sufficient to found a claim by adverse possession. The present case, however, is one where the plaintiffs have openly and as of right claimed the fishing as theirs alone and have leased out the rights to *ticcadars*, who have exercised those rights continuously and openly and without opposition for more than 12 years.

In my opinion, the question in all such cases must be determined by reference to the nature of the right claimed and proved to have been exercised. If it is a mere right to fish not excluding the lawful

(4) (1891) 18 Cal. 80.

(5) (1911) 14 C. L. J. 572=12 I. C. 905.

(6) (1917) 2 Pat L. J. 289=39 I. C. 777=1 P. L. W. 687.

owner it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years' uninterrupted enjoyment. If it is an exclusive right of fishery it is, in my opinion, an interest in immoveable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right, in my opinion, contains all the essential elements of property and even if it may properly be described as a profit *a prendre* it has also the distinctive features of an interest in immoveable property. In my opinion, even if S. 26 of the Act should be applicable, this would not bar the operation of Art. 144 and S. 28 if the right came under both descriptions.

It was contended, however, that in the present case there was no complete ouster of the defendants as it is found that they have the right of catching small fish by hand at harvest time. This is a matter of such trifling importance that it does not, in my opinion, alter the nature of the right acquired by the plaintiffs. I would admit the appeal, set aside the decree of the trial Court and the lower appellate Court and decree the Plaintiffs' suit, granting them a declaration of their rights in accordance with the findings of the learned District Judge on remand and issue an injunction upon the defendants restraining them from interfering with the Plaintiffs in the exercise of those rights. The appellants are entitled to their costs here and in each of the lower Courts.

Mullick, J.—I agree.

Appeal allowed.

A. I. R. 1923 Patna 62.

COUTTS AND DAS, JJ.

Jagdeo Singh—Accused-Appellant.

v.

Emperor—Respondent.

Criminal Appeal No. 98 of 1922 decided on 28th June 1922, from the conviction of S. J., Shahabad, dated, 18th May 1922.

Evidence Act, S. 141—Prosecution witness - Leading question without declaring witness hostile.

It is not open to the prosecution to put a question of the nature of cross examination to their own witness without declaring him hostile and then cross-examining him It is improper for the Court to allow the question; the question and the answer are both inadmissible and cannot be taken into consideration. [P. 64, C. 1.]

G. C. Pal—for Appellant.

Asst. Govt. Advocate—for the Crown.

Coutts, J.—The appellant in this case, Jagdeo Singh, has been convicted by the Sessions Judge of Shahabad; under section 302 of the Indian Penal Code, and has been sentenced to transportation for life on a charge of shooting his father Matadin Singh, about noon on the 15th of January last.

The case for the prosecution is that on the morning of that day Matadin Singh was working at his *kaluhar* (place where sugarcane is pressed). At about noon one Beni Singh met Jagdeo going towards the *kaluhar* carrying a gun and a haversack. Shortly afterwards he met Barhamdeo Singh, a cousin of Jagdeo running towards the *kulhar*, he asked him why he was running and Barhamdeo told him that there had been a quarrel between Jagdeo and his father and that Jagdeo had gone and got his gun. He asked Beni to join him in running after Jagdeo which he did. When they came near the *kaluhar* they saw Thakur Singh trying to stop Jagdeo." Matadin called out "Jagdeo is always troubling me, if he kills me he will suffer for it afterwards". Thereupon Jagdeo pointed his gun at Matadin, fired it and Matadin fell down wounded in the chest. At this time Bachi Ahir Thakur Singh Garjan Dusadh and Rekha Ahir had come to the kaluhar, Jagdeo reloaded his gun and went off towards the south. Matadin was then found to be dead. Beni told Dwarka Ahir Chaukidar, what had happened and Dwarka after going to the place and finding Matadin dead went off to the thana and laid a first information. The Sub Inspector went to the spot and after making the inquest and sending the dead body for *post mortem* examination he began his enquiry. Jagdeo was not to be found and when his house was searched there was no trace of the gun or the haversack, but on the 30th of January a gun and a haversack were found by one Bali Koiri, a resident of Chaugain six miles from the accused's village, in his sugarcane field. A warrant and subsequently proclamation and attachment were issued against Jagdeo and he eventually surrendered. I may mention that Jagdeo had apparently served in the army. The reason assigned by the prosecution for the commission of the crime is that Jagdeo objected to his father keeping a woman in the village.

So far as Matadin's death is concerned there can be no doubt that he died from the effects of a gunshot wound in the chest which traversed the lower half of the left lung, the left ventricle of the heart and its covering, the root of the left lung up to the spine at the fifth dorsal vertebra A portion of a bullet was found in the wound and the shot appears to have been fired from a distance of ten to fifteen yards.

The question is whether Jagdeo fired the shot. The most important evidence in the case is the evidence of the witness Beni Singh. This witness's evidence is to the effect that on the morning of the day of occurrence, he had been working at his sugarcane press and as he was going towards his home he met the accused going towards his father's *kaluhar* carrying a gun and a khaki-coloured haversack. The witness went on and a little after he met Barhamdeo Singh who was running after Jagdeo He asked him why he was running and Barhamdeo told him that there had been a quarrel between Jagdeo and his father and that Jagdeo had gone for his gun He joined Barhamdeo in running after Jagdeo and when they got near the *kaluhar*, they saw Thakur "trying to stop "Jagdeo and presently saw Jagdeo shooting his father. For corroboration of this evidence the prosecution relies on the evidence of three witnesses, Jagat Kahar Rameshwar Ahir and Kadaru Singh. Jagat says he saw Jagdeo going towards the *kaluhar* with a gun shortly before he heard the shot Rameshwar Ahir deposes to the same effect; and Kadaru Singh says that after he heard the shot he went to Matadin's *kaluhar* and saw Jagdeo there with what he thought was a gun; the witness, however, does not appear to be quite sure of this as his sight is defective The learned Assistant Government Advocate contends that this is reliable evidence and should be believed and that with certain other evidence and circumstances on which he relies it is sufficient to substantiate the prosecution case.

The question is whether it can be believed and it has been made impossible for us to come to a decision by the way in which the case has been conducted. As I have already indicated Beni's evidence is the most important evidence in the case and it is attacked on three main grounds: (1) that Beni has a motive for deposing against Jagdeo; (2) that he has given different accounts as to the distance from which he saw the occurrence; and (3) that his evidence is inconsistent with the evidence of five witnesses who have been examined for the prosecution.

For reasons which will presently appear I do not propose to discuss the first point. The second ground for disbelieving Beni's evidence is that he stated in his evidence in Court that he was one *rassi* away from the *kaluhar* at the time the shot was fired whereas to the police he stated that he was at a distance of 10 *bighas* or about 400 yards, and it is urged that as there were crops, bushes and trees round the *kaluhar*, it is impossible that Beni could have seen the occurrence. It apprars from the map which has been prepared in the case that there were crops, bushes and trees round the *kulahar* but the learned Sessions Judge does not appear to have considered the question of the place from which Beni is supposed to have seen the occurrence or whether it was possible for him to have seen it. There is no evidence on this point and the map prepared by the Sub-Inspector is useless. There is also nothing on the record to show where Beni is supposed to have met Barhamdeo. These are the very important points which are essential to a proper decision of the case.

The next ground on which we are asked to disbelieve Beni's statement is that his evidence is inconsistent with the evidence of the five witnesses, Thakur Singh, Bachli Ahir, Rakha Ahir, Garjan Dusadh and Barhamdeo Singh who have been examined for the prosecution in this case All these witnesses are said by Beni to have witnessed the occurrence; further Barhamdeo is said to be the man who met Beni, told him about the quarrel and asked him to go with him; and Thakur is said by Beni to have taken an active part in trying to stop Jagdeo from firing. They all, however, in Court depose that they know nothing about the occurrence and that they did not see Jagdeo either before or after the occurrence. The Sub-Inspector states that they made important statements to him. In these circumstances the obvious course was for the prosecution to declare them hostile witnesses and ask to be allowed to cross examine them. If the Court allowed this, they could then have been cross-examined and their evidence could have been discredited. What was done, however, was that in the case of each of

the witnesses, Thakur, Bachli, Rekha and Garjan the prosecution put a question which could only have been allowed in cross-examination. In the case of Thakur the question was

"Did you then say (that is to the police) I saw the dead body of Matadin Singh and I saw Jagdeo Singh with a gun ?"

to which the witness replied.

"No"

It was clearly not open to the prosecution to put a question of this nature to the witness without declaring him hostile and cross-examining him and it was improper for the Court to allow the question This question and answer were inadmissible and they cannot be taken into consideration. So far as the witnesses Bachli Ahir, Rekha Ahir and Garjan Dusadh are concerned, we do not know what the question asked by the prosecution was but the replies of Bachli and Rekha were

"I did not tell the police that I had seen Jagdeo" and the reply of Garjan was, "I did not tell the police that I saw Jagdeo Singh going towards south with a gun."

This evidence is not only inadmissible but it is useless for it could not assist the Court to judge whether the witnesses were denying statements made to the Sub-Inspector or not. As to the witness Barhamdeo he was not asked any question about what he said to the police and the reason which the learned Sessions Judge gives for disbelieving his evidence is that from his demeanour it appeared to him that he was concealing something The learned Sessions Judge however made no such remark at the time of recording the evidence. The result of this is that we have no means of judging whether these witnesses should be believed or not If they have deposed falsely in Court their evidence could be discarded and the case decided on the rest of the prosecution evidence. As it is, however, we have also these witnesses whose evidence we have no means of testing.

There is other evidence on the record and there are many circumstances which, if we were to decide the case now, we would have to consider, but I do not propose to discuss the case further because in my opinion it has been so unsatisfactorily conducted that the only course open to us is to direct a retrial.

I would accordingly set aside the conviction and sentence and remand the case for retrial. The case will be transferred to the Sessions Judge of Saron for trial.

Das, J :—I agree.

Case remanded for retrial.

A. I R. 1923 Patna 64.

COUTTS AND DAS, JJ.

(*Kumar*) *Ramyad Singh*—Plaintiff-Appellant

v.

Chhedia Barhi and others—Defendants—Respondents.

Appeals Nos 702, 746 and 747 of 1920, decided on 13th June 1923, from the Appellate decree Addl. Sub J. of Hazaribagh, dated 26th April 1920.

(a) *Chota Nagpur Tenancy Act—Rent decree—Execution—Court cannot exempt any portion of holding from sale.*

There is nothing in the Act which would authorise the Court to exempt from sale in execution of rent decree, any portion of a holding or to forbid an intending purchaser to bid for a portion of it The order of Court exempting the portions of the holdings from sale is without jurisdiction and the sales themselves which purport to exclude the portions of the holdings which were put up for sale are also clearly without jurisdiction [P 65, C. 1.]

(b) *Chota Nag. Ten. Act, S 213—Execution Sale—Suit to set aside is not barred.*

S 213 of the act does not bar a suit to set aside an execution sale on account of want of jurisdiction [P 65, C. 1]

Sivanandan Rai—for Appellant.

Coutts, J.—These appeals arise out of suits brought to set aside sales in execution of decrees on the ground of want of jurisdiction. The case is a somewhat curious one.

Kumar Ramyad Singh, the plaintiff, brought suits against three persons Jhamna Dusadhh, Chhedia Barhi and Lochan Koeri for arrears of rent The suits were under the provisions of the Civil Procedure Code; decreed and on applying for execution the defendants' holdings were put up for sale in the ordinary course. On the date fixed for the sales the plaintiff applied for permission to bid and permission was granted by the Deputy Collector with the reservation that the plaintiff should not be allowed to bid for the defendants' *ghars* and *Gharbaris*. The plaintiff alleges that he

had no knowledge of this reservation; he bid for and purchased the holdings, the sales were confirmed and it was not until after the confirmation of the sales that the plaintiff discovered that the *ghars* and *gharbaris* had been exempted. His contention is that in exempting these portions of the holdings the Deputy Collector acted without jurisdiction and he has consequently brought these suits to set aside the sales.

The suits were dismissed in the Court of first instance and the decisions having been upheld on appeal the plaintiff has again appealed to this Court. The defendants at the time of the trial alleged that the *ghars* and *gharbaris* were no portions of the holding; this, however, was found against them by the Court of first instance, and apparently on appeal the question was not raised so that we must now take that the *ghars* and *gharbaris* are parts of the holdings. The only questions, therefore, which remain are whether the Deputy Collector had jurisdiction to exempt these portions of the holdings and whether for this reason the sales were without jurisdiction. The whole holdings were put up for sale and I can find nothing in the Chota Nagpur Tenancy Act which, would authorise the Deputy Collector to exempt any portion of a holding or to forbid an intending purchaser to bid for a portion of it. In these circumstances it seems to me that the order of the Deputy Collector exempting these portions of the holdings from sale was without jurisdiction and if this is so, clearly the sales themselves which purport to exclude these portions of the holdings which were put up for sale are also clearly without jurisdiction. Both the Courts below have referred to the fact that the plaintiffs might have made an application under section 213 to set aside the sales and they seem to think that because the plaintiff did not do this he is not entitled to succeed in these suits. I am unable to understand this view. It is true that the plaintiff could have made an application under section 213 but the fact that he did not do so certainly cannot bar the suits. In my view the sales were without jurisdiction and should be set aside. I would accordingly decree these appeals

Das, J.:—I agree.

Appeals dismissed.

A. I. R. 1923 Patna 65.

DAWSON MILLER, C. J. AND MULLICK, J.

Mt. Sarban —Defendant-Appellant

v.

Phudo Sahu and others —Plaintiffs-Respondents.

L. P. A. No. 1 of 1922 decided on 25th July 1922 against Judgment of Bucknill, J. in S. A. No. 470 of 1920, dated 13th December 1921.

(a) *Civil P. C., S. 11—Issues not same in the two—Suits—Section does not bar subsequent suit*

Where in a previous suit by defendant against plaintiff, the former's claim to let out the water on his land through a particular opening, was denied and in the present suit the plaintiff claimed a prescriptive right to a flow of water from the defendant's land, to his own, *held* that the issues in the two suits were not the same and the present suit is not barred by *res judicata*. [P. 68, C. 1.]

(b) *Easements Act, S. 7—Owner of land can use water falling thereon or allow it to flow naturally on to his neighbour's land—Scope.*

Every land-owner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire He may also allow it to flow away in the usual course or nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing He cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired such an easement which his neighbour is bound to submit to. If he should acquire such an easement, the owner of the servient tenement acquires no reciprocal rights as against the owner of the dominant tenement with regard to the flow of surface water, that is, water not passing through a defined channel. [P. 68, C 1.]

(c) *Easements Act, S. 50—Servient owner cannot compel exercise of Easement right.*

The owner of the servient tenement cannot compel the owner of the dominant tenement to continue the exercise of his right even where that right has been exercised uninterruptedly for over 20 years and even if its exercise should be beneficial to the servient tenement [P. 68, C 1]

(d) *Easements Act, S. 15—Right to flow of water—Easement right can be claimed only in respect of water flowing in defined channel*

Before the right to the use of water can be the subject of an easement by prescription or grant it must be water flowing through a defined and permanent channel The essential features from which a grant or arrangement whereby the right claimed may be presumed to rest in some legal origin are that there should be a permanent channel, artificial or otherwise, or indeed a defined channel of any sort conducting the overflow of water and that the overflow should be controlled or directed in any particular course; 6 I A. 33; Foll. [P 68, C. 2.]

(e) *Civil P. C., O. 1, r. 8—Claim of easement against several Proprietors—One only obstructing—Suit against him—Joinder of other proprietors is not necessary*

Where a plaintiff claims an easement over the land of several proprietors one of whom obstructs the easement while another adjacent to his land does not do so, such other is not a necessary

party to a suit by the plaintiff against the obstructor.' [P. 70. C. 2]

Naresh Chandra Sinha and *Jagannath Prasad*—for Appellant.

Sultan Ahamad and *S. Das*—for Respondents.

Dawson Miller, C. J.:—This is an appeal by the Defendant under the Letters Patent against a decision of Mr. Justice Bucknill dated the 13th December 1921.

The suit was instituted by the Plaintiffs as proprietors of Jagir Ram Krishna Subedar claiming a prescriptive right to irrigate their lands from the surface water flowing from the Defendant's field which has been bunded up and collects a considerable quantity of surface water during the rainy season. They also claimed an injunction restraining the Defendant from cutting the southern bund of her land at any place whatsoever for the purpose of draining off the water which accumulates on the north side of the bund. In order to appreciate the points in dispute, it is necessary shortly to indicate the position of the Plaintiffs' and Defendant's land respectively and that of other adjoining holders. The plaintiffs' field in which the water accumulates is roughly square in shape. On the north and south boundaries there are bunds which have been in existence for many years. On the east and west sides there are also ridges or *addas* of less height than the bunds. Immediately south of the Defendant's field is the land of Mr. Grant who is not a party to this suit. Immediately to the west of the Defendant's field is the land of Dip Narain who also is not a party to this suit. South of Dip Narain's land and west of that of Mr. Grant, lies the Plaintiff's land which is accordingly situated to the south-west of that of the Defendant. The whole of the land slopes generally from the north-east to the south-west, that of the defendant being higher than that of the Plaintiffs or of the other persons just mentioned. To the northward and eastward, the land is still higher and the surface water flows generally in a south-westerly direction. The origin of these bunds which lies on the Defendant's land does not appear from the evidence, but it has been assumed that the northern bund was erected many years ago in order to divert the water flowing down towards the Defendant's land whilst that to the south was no doubt erected in order to retain the water, the flow of which was controlled by an opening in the northern extremity of the eastern *adda*. By inserting a hollowed palm trunk through the *adda* in this position the water can be allowed to flow in or can be kept out at will provided it does not rise above the height of the eastern *adda*. It appears that there is a dip in the Defendant's land to the southward, the lowest level being somewhere about the middle of the southern bund. Towards the eastern end of that bund which is where the land is a little higher than in the centre there is a cutting through the bund whereby the water when it accumulates and rises to that point escapes to the southward and flows in a south-westerly direction over Mr. Grant's land and it is possible and perhaps probable that some of it eventually finds its way on to the land of the Plaintiffs. Before the water rises, however, to this level, some of it escapes over the western *adda* of the Defendants field and flows across the land of Dip Narain to the westward and eventually finds its way over the surface on to the Plaintiffs' land In the north-eastern corner of the Plaintiffs' land south of that of Dip Narain and south-west of that of the Defendant there is a tank belonging to the Plaintiffs which has been in use for many years and in which they collect the surface water for the purposes of irrigation. Through the north-western corner of the Plaintiffs' tank there is a cutting through which water is allowed to flow into the tank. The water thus accumulated by the Plaintiffs no doubt includes some of the surplus water which flows across the western *adda* of the Defendant's land on to the land of Dip Narain and eventually into the Plaintiffs' tank. It is found as a fact by the lower appellate Court, by which findings we are bound, that the water escaping from the Defendants' land is water not flowing in any channel but flowing over the surface and ultimately finding its way into the land of Dip Narain and thence into the Plaintiffs tank whence it flows out into the Plaintiffs' land after over-reaching the banks of the tank. It appears that the Defendant has cut a second opening somewhere about the middle of the southern bund whereby the water instead of accumulating on her land and flowing eventually on to that of the Plaintiffs now escapes on to the land of Mr. Grant so that the Plaintiffs' supply from this source has been cut off.

In the year 1877 or shortly before, it appears that the Defendant's predeces-

sor cut an opening through the bund in about the same position as to that which is now complained of. This opening was subsequently filled up by Mr. Grant's predecessor and by the predecessor of the Plaintiffs. A suit was thereupon instituted in that year by the predecessor of the present Defendant against the predecessors of the present Plaintiffs and Mr. Grant claiming damages and an injunction to restrain them from filling up the cutting which he had made. The Plaintiff in that suit rested his case upon a prescriptive right to discharge the water accumulated on his land, on to the land of Mr. Grant and one of the issues in the case was whether the Plaintiff in that suit had acquired such a prescriptive right. The defence set up by the present Plaintiffs' predecessor, as far as can be gathered from the judgment of the Munsif, who tried the suit in 1877 and of the District Judge, before whom it went on appeal in 1878, appears to have been that there never was a cutting through that part of the bund and consequently it was never filled up by the Defendants. The Munsiff found as a fact that the passage had existed in that spot for more than 30 years and for this reason came to the conclusion that the Plaintiff had a prescriptive right to keep that passage open. On appeal the learned District Judge found that the passage in question had not been in existence for any length of time but had been recently cut and that the Plaintiff in that suit had not acquired the prescriptive right upon which his claim was founded. He accordingly dismissed the suit.

In the present case the learned Munsif before whom the case came for trial found that the Plaintiffs had acquired by prescription a right to receive the overflow of water from the Defendant's land and that the Defendants could not interfere with that right by cutting the bund in the middle and granted a permanent injunction restraining the Defendant from cutting the bund. He further was of opinion that the rights of the parties were concluded by the previous judgment of 1878 to which I have referred above.

The learned Subordinate Judge, before whom the case came on appeal, considered that the Plaintiffs could acquire no prescriptive right in the circumstances proved as it was really a case of a servient tenement claiming an easement against the owner of the dominant tenement. He further considered that although the Plaintiff's tank may have been in existence for over 20 years, the Plaintiffs could acquire no prescriptive right to the surplus surface water which did not flow through any defined channel upon the Defendant's land to their tank. The learned Subordinate Judge, further, whilst stating that no contentions as to *res judicata* had been argued before him, pointed out that the question whether the predecessor of the Plaintiffs had any right of easement was not the subject matter of the previous suit and was not decided thereon. He accordingly allowed the appeal and dismissed the claim.

A second appeal was preferred by the Plaintiff to this Court and was heard before Mr. Justice Bucknill. He was of opinion that the Defendant was estopped by the decision in the previous suit from putting forward the defence that she was entitled to cut the bund as she pleased and that this concluded the matter. He was further of opinion that the decision of the Judicial Committee in *Ramessur Pershad Narain Singh* v. *Koonj Behary Pattuk* (1) laid down a principle which was applicable to the facts of the present case and that a grant might be presumed in favour of the Plaintiffs to the right to the surplus water flowing on to the Plaintiffs' land from that of the Defendant's. From this decision the present appeal is brought.

Two points have been argued before us on behalf of the Appellant, first, that the previous decision cannot act as *res judicata* in the present case and secondly, that on the facts found by the learned Subordinate Judge, the Plaintiffs could acquire no right of easement such as they claimed. With regard to the first point the question for determination and the only question which was decided in the previous suit was that the present Defendant, or rather her predecessor at that time, had acquired no prescriptive right to discharge the overflow of water from her land through a cutting in the middle of the bund on to the land of Mr. Grant and therefore could not maintain a suit for damages against the predecessors of the present Plaintiffs or Mr. Grant for filling up the cutting which she had no right to

(1) (1878) 4 Cal. 688=6 I. A. 88=3, Sar. 866 (P. C.).

make.' The question whether or not the present Plaintiffs had acquired by prescription the right to a flow of water from the Defendant's land was not decided in that suit. All that was decided was that the Defendant had not at that time acquired the prescriptive right upon which the claim for damages was based. If the Defendant with the consent of Mr. Grant should make a cutting through the middle of the bund so as to let the water flow on to the latter's land it is difficult to see how anything decided in the previous suit would give the Plaintiffs any right to object. Mr. Grant is not a party to the present suit and we are not called upon to decide what the rights as between the Defendant and Mr. Grant may be, and it seems to me clear that the Plaintiffs could not maintain an action merely because the rights of a third party may possibly have been infringed. In so far as the suit is based upon any question of *res judicata* I think it must fail.'

With regard to the second point it must be remembered that no question arises in this case of water flowing in any defined channel either natural or artificial from the land of the Defendant to that of the Plaintiffs. The right claimed is that to the surface water collected for a time upon the Defendant's land and, after reaching a certain height, allowed to escape not by any defined or permanent channel or water course but over the surface of the neighbouring land of Dip Narain and thence on to the land of the Plaintiffs. I think it may be conceded that every land owner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing. He cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired an easement which his neighbour is bound to submit to. If he should acquire such an easement the owner of the servient tenement acquires no reciprocal rights as against the owner of the dominant tenement with regard to the flow of surface water, that is, water not passing through a defined channel. The owner of the servient tenement cannot compel the owner of the dominant tenement to continue the exercise of his right even where that right has been exercised uninterruptedly for over 20 years and even if its exercise should be beneficial to the servient tenement [See *Arkwright* v. *Gulf* (2), *Mason* v. *Shrewsbury and Hereford Ry. Co.* (3) and *Khoorshed Hossain* v. *Teknarain Singh* (4)]. The Indian Easements Act of 1882, which however, does not apply to this province, also recognises this principle subject to certain restrictions as to notice. In the present case it appears to me that the Defendant had either acquired an easement to allow the surplus water accumulated on her land to discharge on to the land of Dip Narain and eventually on to that of the Plaintiffs or the water flowed there in the ordinary course of nature. In either case the Plaintiffs have no right of complaint if the Defendant should cease to exercise that right or to interfere with the surface water accumulating on her land so as to prevent the surplus flowing in the direction in which it previously flowed. If the Defendant has acquired an easement, she cannot be compelled to exercise it. In fact the evidence shows that the inflow of water on to the Defendant's land can be controlled at will, at all events until it rises so high as to flow over the *adda* or ridge on the eastern side. If, on the other hand, the water flows naturally over the Defendant's land towards that of the Plaintiffs it is surface water not flowing through a defined or permanent channel and the Defendant can accumulate it and use it for her own purposes or allow it to flow away as she may choose. If she cuts an opening through the bund and lets it escape in that way by artificial means, the only person who could object is the owner of the land on to which it so flows and not the Plaintiffs on to whose land it does not flow. I think it must be taken as settled law that before the right to the use of water can be the subject of an easement by prescription or grant it must be water flowing through a defined and permanent channel. In the case of *Rameswar Pershad Narain Singh* v. *Koonj Behary Pattuk* (1) relied upon by the learned Judge, whose decision is now under appeal, the facts were entirely different. In that case the right claimed was a right to water flowing through an artificial water course from one tank on

(2) (1839) 5 M. & W. 203=2 H. & H. 17.
(3) (1871) 6 Q. B. 578=40 L. J. Q. B. 293.
(4) (1878) 2 C. L. R. 141.

the Defendant's land to another tank on the boundaries of the Plaintiff's and Defendant's land and thence carried by several channels to the Plaintiff's land for the purposes of irrigation. This construction had been in use for a great number of years when the Defendant obstructed the water channel and diverted the course of the water which otherwise would have flown into the tank from which the Plaintiff's lands were irrigated. In my opinion that decision was no authority for the proposition now contended for. In that case the question for decision was whether the Plaintiff could acquire by long user an indefeasible right to the surplus water flowing from a reservoir on the Defendant's land through a permanent artificial water course to a smaller tank at a lower level on the confines of the Plaintiff's land from which the Plaintiff had from time immemorial irrigated his own lands. It was found that the tanks and water courses were of a permanent nature indicating that a permanent and connected system of irrigation for what were then the Plaintiff's and Defendant's mouzas, beneficial to both, was by these means provided, and the fact that the lower reservoir was built mainly on the Defendant's land led irresistibly to the conclusion that it was constructed by, or with the consent of, the then owner of that mouza, and it was evident from its situation that its main, if not the only, use was to store water for the convenient irrigation of the Plaintiff's mouzas. It was proved that the water had been used in this manner for irrigating the Plaintiff's mouzas from a time beyond living memory. It appeared to their Lordships that, from all these facts, a presumption fairly arose that the enjoyment had an origin which conferred a right.

In the present case it seems to me that the essential features from which a grant or arrangement whereby the right claimed may be presumed to rest in some legal origin are absent. There is no permanent channel, artificial or otherwise, or indeed a defined channel of any sort conducting the overflow of water from the Defendant's land to that of the Plaintiffs. The overflow is not controlled or directed in any particular course. It escapes in the first instance on to Dip Narain's land and thence flows over the surface in such direction as the laws of gravity in the present state of the land may dictate. If Dip Narain should erect a tank and intercept it, or divert by constructing channels to irrigate his land I apprehend he would be within his rights in so doing. The fact that the overflow from the Defendant's land helps to fill the Plaintiff's tank is a purely fortuitous circumstance depending partly upon the acquiescence of Dip Narain and partly upon that of the Defendant who can control the inflow of water upon her own land to the extent already mentioned. The facts of the present case appear to me to bring it directly within the principle of the decision in *Altafuddin* v. *Aso Khadem* (5) and other cases cited by the learned Judge, the correctness of which he acknowledged. But, with great respect to his opinion, I think he failed sufficiently to appreciate the fundamental distinction that exists between the class of cases just mentioned and the case where, as in *Rameswar Persad Narain Singh* v. *Koonj Behary Pattuk* (1), a legal origin to the right claimed may be presumed. In the last mentioned case the facts pointed irresistibly to one conclusion, namely, that a permanent artificial construction had been made at some period beyond living memory for the very purpose of irrigating the lands of which the Plaintiff was the owner at the date of the suit. I can find nothing in the facts found in the present case which could reasonably lead to such a conclusion. In my opinion the learned Subordinate Judge rightly appreciated and gave effect to the principles applicable to the case. I think the appeal should be allowed, the judgment and decree appealed from should be set aside and the suit dismissed with costs here and in each of the Courts below.

Mullick, J. :—In this case the facts found are as follows.

The surface water from the hills on the north when it reaches the Defendants embankment, marked plot No. 195 on the survey map, branches off to the east and west. A pipe constructed out of the trunk of a palm tree has been put in at the eastern end of this embankment through which the eastern branch flows into the Defendant's Plot No. 196; the water in the western

(5) (1913) 18 C. L. J. 181=20 I. C. 915=17 C. W. N. 1066.

branch enters Mr. Dip Narain Singh's land, plots Nos. 156 and 158 at some point on their northern boundary and flows down south and south-west to the lands of the Plaintiffs, namely, plots Nos. 152, 153, 154 and 145. The water from the eastern branch is next collected in plot No. 196 by means of an embankment on the south marked plot No. 197 and "*ails*" or ridges on the eastern and western boundaries. Owing to a depression along the southern embankment the water collects there in considerable quantities. At the eastern end of plot No. 197 there in an opening which lets out the water first into the eastern and then to the western parts of Mr. Grant's land, which lies immediately to the south, but when notwithstanding this outlet the accumulated water is sufficiently high, it flows over the western ridge into Mr. Dip Narain's plot No. 156 and enters the Plaintiffs' tank, plot No. 154, by an opening at the north-west corner of the tank. In 1877 the present Defendant's predecessor brought a suit (No. 370 of 1877) against the predecessor of the Plaintiffs and Mr. Grant's predecessor who were respectively Defendant No. 1 and Defendant No. 2 in that suit alleging that he had a prescriptive right to discharge his surface water through an opening in the middle of the southern embankment and claiming damages against the two Defendants for filling up the opening. That suit first ended in favour of the Plaintiff in a decree which declared the size of the opening which the Plaintiff was entitled to maintain, but on appeal the District Judge reversed the Munsiff's decree and dismissed the suit.

In the present suit the Plaintiffs allge that in 1917 the Defendant, who is the successor-in-interest of the Plaintiff in the former suit, again cut an opening in the middle of the embankment and by diverting the water, which used to flow into his tank plot No. 154, caused damage to the extent of Rs. 100. The Plaintiffs accordingly ask for a declaration and injunction and damages.

The Munsiff decreed the suit and issued an injunction upon the Defendant restraining her from depriving the Plaintiffs "of the enjoyment of the current of water in the bed of the southern bund up to a limit of 6 Lagas south to north and 6 Lagas east to west."

The Subordinate Judge having on appeal set aside that decree and dismissed the whole suit, the Plaintiffs prefer the present second appeal.

Now, the first question that arises is, whether the judgment of the District Judge in Suit No. 370 of 1877 constitutes *res judicata*. In my opinion it does not. Although in that suit the Plaintiff alleged that the object of Defendant No. 1 in filling up the opening was to fill his own tank with the surplus surface water by diverting it westward and although the Court found that if no opening was made in the middle of the embankment, the eastern lands of Defendant No. 2 and the tank of Defendant No. 1 would be benefitted no issue was either expressly or by implication raised as to the right of the Defendant No. 1 to have the opening closed or as to his right to compel the Plaintiff to discharge his surplus water westward into the tank of the Plaintiff. No question was directly and substantially raised or tried as between the Plaintiff and Defendant No, 1 in that suit as to the right of Defendant No. 1 to any surplus water at all. All that was decided was that as against the Defendant No. 2, the Plaintiff had no prescriptive right to let out his water by the newly made opening in the middle and that Defendant No. 1 by assisting Defendant No. 2 to block up that opening had not committed any tort.

In these circumstances, the learned Subordinate Judge was right in holding that the decision in Suit No. 370 of 1877 does not debar the present Defendant from resisting the claim of the Plaintiffs. I agree that the decree in that suit conferred a right upon Defendant No. 2 but none upon Defendant No. 1.

The next question is, whether the Plaintiff's suit must fail on the ground of the non-joinder of Mr. Dip Narain Singh. Now it seems clear that if a Plaintiff claims an easement over the lands of several proprietors, one of whom obstructs the easement while another adjacent to his land does not do so, then there is no reason why he should seek any relief against the latter. The learned Subordinate Judge's view that an adjudication cannot be made in this suit without the presence of Mr. Dip Narain Singh does not seem well founded.

I do not also agree with the learned Subordinate Judge's view that this is a case in which the owner of a servient tenement is seeking to compel the owner of the dominant tenement to continue the easement for his benefit. There is no finding that the Defendant as proprietor of plot No. 196 has a right to discharge his surface water on to the Plaintiffs' land and the Plaintiffs have not been shown to be the owners of a servient tenement in respect of an easement enjoyed by the Defendant.

But in my opinion the ground on which the Plaintiffs must fail seems to be this. The water is surface water; the Defendant has a perfect right to do what she pleases with it; the Plaintiffs can have no right to the water accumulated within her land unless they can establish a grant or contract. The Defendant may be liable in damages to Mr. Grant for making an opening in the middle of the southern embankment but that does not give the Plaintiffs any right to relief. In my opinion there is no satisfactory evidence of the existence of a grant or contract between the predecessors of the parties by which the Plaintiffs are entitled to have the water accumulated in the southern part of the Defendant's land so that it might overflow the western ridge. The learned Subordinate Judge appears to have considered this matter and to have found that the Plaintiffs had not made out any case for the application of the rule in *Rameswar Pershad Narain Singh* v. *Koonj Behary Pattuk* (1). It is contended on their behalf that the embankment at plot No. 197 was put up over a hundred years ago for the benefit of all the neighbouring owners and that some arrangement must have been then made by which the Plaintiffs were entitled to fill their tank with the surface water from plot No. 196. No doubt the finding of the District Judge in Suit No. 370 of 1877 that the predecessor of the Plaintiffs was then claiming such a right is some evidence in favour of the plaintiffs, but there was no finding by the District Judge on this point and the learned Subordinate Judge in the present case was apparently unable to find in spite of the length of the Plaintiffs' enjoyment that any grant or arrangement was ever made. Before him the Plaintiffs appear to have directed their efforts at establishing two points: firstly, that they had an exclusive and unrestricted right to, the whole of the surface, water and, secondly, that they had a right to the water before it entered plot No. 196. As to the former right the Subordinate Judge found that it was not claimed in the Munsif's Court and as to the latter right that it was not claimed in the plaint. The opening in the northern embankment (plot No. 195) by which the Defendant lets the surface water into her plot No. 196 cannot be called an artificial channel, nor is there any finding that the latter plot formed an artificial reservoir which was maintained by the defendant for the benefit of the Plaintiffs. The claim of the Plaintiffs to any easement in the water cannot be accepted.

The appeal, therefore, must succeed.

Appeal allowed.

A. I. R. 1923 Patna 71.

DAS AND ADAMI, JJ.

Chintamani Mahapatra and others—Plaintiffs-Appellants

v.

Satyabadi Kar and another—Defendants-Respondents.

Appeal No. 4 of 1921, decided on 29th Nov. 1921 from the Appellate decree of the D. J., Cuttack, dated 31st August 1920.

(a) *Hindu Law—Joint family—Debt by one member—All members are liable if creditor proves necessity or bona fide inquiry.*

A creditor is entitled to a decree as against the entire joint family, if he can establish that there was legal necessity for the loan taken by one of the members of the joint family. If he is unable to establish legal necessity, he is still entitled to succeed, if he shows that there was representation made to him as to existence of a legal necessity and that he made an honest enquiry and that he was satisfied that there was such a necessity. [P. 72, C 1]

(b) *Evidence Act, S. 114—Failure to get third persons to produce account books—Suit cannot fail.*

It is often impossible for a creditor to compel third parties to produce their account books, to prove that money is actually due to them and the suit cannot fail because the third parties did not produce the account books. [P. 72, C. 1.]

Damodar Kar—for Appellants.

Bichitranand Das—for Respondents.

Das, J.—This case must go back. The learned Judge has decided the first issue in favour of the appellants. He has come to the conclusion that Narayan, who executed the document, and Satyabadi were joint. On this finding the plaintiff is entitled to a decree as against the entire joint family if he can establish that there was legal necessity for the loan. The learned Judge in discussing the question of

legal necessity records a finding that the minor respondent is not bound; but his judgment is very unsatisfactory on this point. He says that the case of the plaintiff is that Rs. 190 was required for paying off the debts of three *mahajans*. He apparently declines to consider this question because the *khatas* kept by the *mahajans* have not been produced. But surely it was unnecessary for the plaintiff, and it may have been impracticable for him, to compel the *mahajans* to produce the account books. The onus is undoubtedly on the plaintiff to prove that there was legal necessity for the loan. But if he is unable to establish legal necessity, he is still entitled to succeed if he shows that there was a representation made to him as to the existence of a legal necessity and that he made an honest enquiry and that he was satisfied that there was such a necessity. That is the question which the learned Judge should have decided. It is very often impossible for the creditor to compel third parties to produce their account books and the plaintiff's suit cannot fail because the third parties did not produce the account books.

The Court to which we propose to send back the case must determine, first, whether there was a legal necessity; and, secondly, if there was not, whether a representation was made to the plaintiff that there was a legal necessity and whether he made an honest enquiry about the existence of the legal necessity and was satisfied that it did exist.

We allow this appeal, set aside the judgment and decree of the Court below and send the case to the lower appellate Court for decision according to law. The costs will abide the result.

Adami, J.:—I agree.

Case remanded.

A. I. R. 1923 Patna 72.

DAWSON MILLER, C. J. AND MULLICK J.

(*Sheikh*) *Abdur Rahman*—Defendant-Appellant v.

Sheikh Wali Mohamad—Plaintiff-Respondent.

L. P. A. No. 2 of 1922 decided on 13th July 1922 against a judgment of Bucknill, J. in S. A. No. 260 of 1920, dated 14th December 1921.

(a) *Mahomedan Law—Alienation by widow in possession for dower debt—No transfer of dower debt—Alienee cannot retain possession after widow's death as against heirs of widow.*

In an instrument of sale by a Mahomedan widow in possession of her husband's estate in lieu of her dower debt, it was recited that she was in possession both by virtue of inheritance and in lieu of dower debt, and the deed purported only to transfer the proprietary interest and all rights, title and interest which the vendor had in the vended properties but not her dower debt.

Held: the transferee after the death of the widow was not entitled to retain possession of the estate excepting the share to which the widow was absolutely entitled and the heirs of the widow's husband were entitled to recover possession.

Per Dawson Miller, C. J—It is not possible for a Mahomedan widow to transfer the lien on the property so as to be binding after her life time without transferring also the dower debt because the lien on the property which gives the widow the right to possession until the debt has been discharged, is not an interest in property which can be severed from the right to dower and transferred as a separate interest. A transfer or possession of the property forming the security for the dower debt would not enure to the benefit of the transferee after the widow's death when the dower debt passed to her heirs The possession of the donee in such a case must be regarded as constructive possession of the widow [P. 74, C 1.]

Per Mullick, J.—The right of Muhammadan widow to retain possession of her husband's estate in lieu of dower is strictly speaking neither a lien nor a charge. She has a right to transfer the debt coupled with the security so as to bind her co-heirs until they discharge the debt She can also during her life time transfer the right of possession apart from the debt but that is a matter between herself and her transferee and the transfer will not bind her co-heirs after her death [P. 76, C. 1.]

(b) *Limitation Act, Art.* 141—*Time runs from death of widow.*

Time begins to run against the transferee from the death of the widow and not from the date of transfer by widow. [P. 74, C 2.]

(c) *Possession—Suit for—Plff. having better title than deft. must succeed.*

A plaintiff in a suit for possession against defendant is bound to succeed if he is able to show abetter title in himself than the defendants. [P. 74, C 2.]

Isfaq—for Appellant.

Syed Mahamed Tahir—for Respondent.

Dawson Miller, C. J.—This is an appeal under the Letters Patent on behalf of Sheikh Abdur Rahman, the second Defendant in the suit, against a decision of Mr. Justice Bucknil dated the 14th December last. The Plaintiff, Sheikh Wali Mohammed, and the first Defendant Sheikh Ezid Baksh, are brothers and the Appellant, the second Defendant, is the son of Sheikh Ezid Baksh. The suit was instituted before the Munsiff of Sassaram in January 1918 claiming possession of a six annas share in the estate of his deceased brother Sajjad Hussain to which he was entitled as one of his

deceased brother's heirs subject to the widow's right to retain possession as security for her unpaid dower. Sajjad Husain, the elder brother of the Plaintiff and the first Defendant, died in 1899 leaving surviving him his widow, Mussammat Kabiran, and his two brothers. His widow whose unpaid dower debt is said to amount to Rs. 4,000 was left in possession of the estate of her deceased husband holding it in lieu of dower, as she was admittedly entitled to do, until out of the profits of the estate, her dower debt had been discharged. The estate was a small one and we are not told what the net annual profits arising therefrom amounted to. It is not suggested, however, that the debt at the date of that lady's death in 1911 had been discharged. On the 15th October 1900 Musammat Kabiran transferred to the Appellant the whole of her interest in her deceased husband's estate. As one of his heirs, she was entitled by inheritance to a quarter share in that estate and this she could undoubtedly transfer. The document, however, purports to transfer, in one place at all events, the whole of the interest which had come into her possession from her deceased husband and sets out in detail the properties which, it is argued, included the whole of her husband's estate. It recites that the donor has been in possession of the estate by virtue of inheritance and in lieu of dower debt and that she wishes to give away all her properties in her life-time to the donee, subject to her right of maintenance during her life-time, which she reserves at the rate of Rs. 60 per annum which is to be a charge on the property. It then purports to sell without reserving the right of cancellation "the whole and entire property owned and possessed by me together with all rights and appurtenances, for a consideration of a monthly allowance of Rs. 5 amounting to Rs. 60 per annum, with effect from to-day up to my death. I have by making over this deed of sale to the vendee put him in possession of the vended property as absolute proprietor in my place." It subsequently adds. "In short, the proprietary interest and all rights, title and interest which I had in the vended properties have under this sale deed been transferred from me and become extinguished in so far as I am concerned and have devolved on and vested in the said purchaser and his heirs and representatives." It is not absolutely clear from this document whether the vendor intended merely to transfer her own interest in the property, that is, the quarter share which she acquired by inheritance, or whether she intended, to transfer the whole of the interest of her husband of which she was then in possession. But whatever her intention may have been, it is clear and cannot be disputed that she had no power of disposition over the property beyond the quarter share to which she was entitled by inheritance and to this extent alone could the transfer of property be valid.

Both the learned Munsif and the learned Subordinate Judge, before whom the case came on appeal, took the view that the widow had no right to transfer the property beyond the extent of her own vested interest, *viz*, a quarter share and that, although she was in possession of the remainder in lieu of dower, she could not transfer the remainder or even the possession thereof so as to be binding after her life-time without also transferring her right to dower. The learned Munsif however, considered that the Plaintiff's right to sue accrued in 1900 when the deed was executed and the donee was put in possession and that therefore the suit which was instituted more than 12 years after that date was barred by limitation. The learned Subordinate Judge, on the other hand, came to the conclusion that the Plaintiff's right to sue for possession did not arise until the widow's death in 1911 and that the suit having been brought within 12 years from that date was not barred.

On appeal to this Court Mr. Justice Bucknill took the same view as the learned Subordinate Judge' and dismissed the appeal.

It does not appear to have been argued either in the trial Court or before the Subordinate Judge on appeal that the conveyance by the widow transferred to the Appellant her dower debt. It was however, argued before Mr. Justice Bucknill and the argument has been repeated before us in this appeal that, on a proper construction of the document the dower debt must be taken to have been transferred. It was also contended that even if the dower debt was not in fact transferred, the widow had a lien or charge upon the property as secu-

rity for the enforcement of the debt which she could transfer not only during her life time but even so as to enure for the benefit the transferee after her death. The learned Judge, whose judgment is now under appeal carefully considered these questions and decided them against the Appellant. In my opinion his decision was right Although the instrument of transfer recites that the widow is in possession both by virtue of inheritance and in lieu of dower debt, it purports only to transfer the proprietary interest and all rights, title and interest which the vendor had in the vended properties. There is not a word, from first to last, relating to any transfer of her dower debt and I am unable to construe the document as purporting to transfer the dower debt. Nor, in my opinion was it possible for her to transfer the lien on the property so as to be binding after her life-time without transferring also the dower debt. The lien on the property which gives the widow the right to possession until the debt has been discharged is not, in my opinion an interest in property which can be severed from the right to dower and transferred as a separate interest. It is a right to the possession of the property by the person entitled to be paid the dower as long as the debt is not discharged either by the income from the property or by payment by the heirs or others interested in discharging the debt. It certainly gives the widow the right to possession and it may be assumed, I think, that as long as she does not transfer her dower debt and that debt remains undischarged, she may transfer for her life-time possession of the property the proceeds of which belong to her until the debt is paid off. The possession of the transferee in such a case, might be regarded as constructively her possession and, in this sense, it would not be severed from the dower debt. Just as she could dispose of the proceeds in any way she chose during her life-time and until the debt was discharged, so also I apprehend she could transfer possession of the property in the same circumstances, the transferee being entitled to the usufruct. But if she should transfer the dower debt or if she should die and her estate devolve upon her heirs or assignees, the transferee's right to possession would be extinguished as the debt and the security cannot be severed thereby converting the security into a separate interest in the property. It would appear therefore that even if the instrument in question purported to transfer to the Appellant possession of the property forming the security for the debt, this would not enure to the benefit of the transferee after the widow's death when the dower debt passed to her heirs. The possession of the donee, in such a case, must, I think, be regarded as constructive possession of the widow. It is not an interest in property which is capable of absolute transfer. In any view of the case therefore, in my opinion, the decision under appeal, upon this point, cannot be assailed.

It remains to consider the question of limitation. It is found as a fact, and cannot now be disputed, that the Appellant was in actual possession of the whole of the property. He contends that from the moment he obtained possession, in the year 1900, his possession was adverse to that of the Plaintiff who cannot, after more than 12 years had elapsed, be held to assert his right to the property. The Plaintiff no doubt knew that the Defendant was in possession but he was not entitled to possession himself as long as the widow was alive and the debt remained undischarged. It is not suggested that the debt was discharged during the widow's life-time. Had the Plaintiff sued for possession before 1911, when the widow died, the Appellant would have had a complete answer to such a suit. He was in possession of the property with the consent of Mussammat Kabiran, the only person at that time entitled to possession and the cause of action, which the Plaintiff now seeks to enforce, had not at that time arisen and did not arise until after her death in 1911.

A further point, however, was taken by the Appellant which must be considered. On the assumption that the widow retained her dower debt and did not transfer it to the Appellant, he argues that the right to the dower debt does not belong to the Plaintiff but to Mussammat Kabiran's heirs. It is not shown, however, that Musammat Kabiran left any heirs and, in the absence of such heirs the Plaintiff, as the heir of her deceased husband, has a better title to his six annas share in the property than the Appellant who has no title at all.

A further point which does not appear to have been suggested before was that in

any case the Crown would be the ultimate heir to Musammat Kabiran. It is not shown, however, in this case that the Crown, even if the point is one which is sustainable, had any better title than the present Plaintiff and in these circumstances it seems to me that there is no force in this argument. In my opinion this appeal should be dismissed with costs.

Mullick, J.—In my opinion there are only two points of any substance in this appeal. The first is the construction of the deed of transfer by Musammat Kabiran in favour of Abdur Rahman. Both Courts below have found that the document was a deed of sale for consideration, and that what the widow transferred was neither her dower debt nor the right to retain possession of the estate of her deceased husband as security for that debt but her interest in the property as proprietor of that estate which admittedly includes the three-eighths share claimed by the Plaintiff.

Now it is admitted that it is the Plaintiff who is the sole proprietor of that three-eighths share by right of inheritance and that Musammat Kabiran had no proprietary interest in it, and that if she did not sell her dower debt together with the right to possession of the property as security, then the Plaintiff has a good title against her transferee.

The Munsif, however, found that the transferee came into possession in 1900 immediately upon the sale and was in adverse possession as against the Plaintiff from that date. The Munsif has accordingly dismissed the suit on the ground that the suit has not been brought within 12 years of the date from which possession became adverse.

The Subordinate Judge agrees with the Munsif as to the construction of the document but not as to the question of the limitation. He is of opinion that as the Plaintiff was not entitled to eject the transferee during the lifetime of the widow, the possession of the latter could not have been adverse to him and that therefore limitation began to run only from the date of the widow's death which took place in 1911. He finds that the suit having been instituted in 1918, it was within time and he has given a decree to the Plaintiff in respect of the disputed share.

That judgment was affirmed by Mr. Justice Bucknill and there can be no doubt that his construction of the deed of sale is correct. Except in preamble which states that Musammat Kabiran is in possession of her husband's estate by right of inheritance and in lieu of dower debt, there is no mention in the document of the dower debt. Throughout the transferor purports to transfer her proprietary interest in the whole and entire estate of her husband together with all rights and appurtenances. She sums up the effect of her dispositions in the following words :—"In short the proprietary interest and all rights, title and interest which I had in the vended properties have under this sale deed been transferred."

It is contended on behalf of the Appellant that the words of transfer are perfectly general and must be construed as meaning that it was intended to include not only a proprietary interest in the land in suit, which she thought she possessed but which it is now admitted she did not, but also the dower debt and the right to retain possession till it was paid. In my opinion this contention cannot be accepted. In *Maina Bibi* v. *Wasi Ahmad* (1), their Lordships of the Allahabad High Court had to construe a deed of gift of which the terms were very similar, and it was argued in that case that the greater right includes the lesser and that if the transferor had no right of ownership in the property, she at least had the right to retain possession of it and she should be taken to have transferred that right. The recital in that deed stated that the widow was in possession by virtue of two separate titles ; the first was in lieu of dower and the second by virtue of a former decree under which, the heirs of her deceased husband having failed to pay her dower debt within the time appointed by the Court, she claimed to have become absolute owner. Their Lordships declined to accede to the contention that because she transferred the whole property believing herself to be the owner of it, she should, in the absence of clear and definite words, be taken to have transferred also her dower debt and her right to retain possession.

In the present case the conditions are similar and I think it will be wrong without express words indicating an intention

(1) (1919) 41 All. 538=51 I. C. 242=17 A. L. J. 629.

to transfer the dower debt to assume that the debt was also transferred.

The right of a Muhammadan widow to retain the possession of her husband's estate in lieu of dower has been sometimes described as a lien and sometimes as a charge. Strictly speaking, it is neither, but it is agreed that she has a right to transfer the debt coupled with the security and that the transfer will be binding upon her co-heirs till they discharge the debt. She may also during her life-time transfer the right of possession apart from the debt, but that is a matter between herself and her transferee and the transfer will not be binding upon the co-heirs after her death. That is the meaning of the proposition that a Mahammadan widow in possession of her husband's estate in lieu of unsatisfied dower cannot alienate the estate. This view of the law is in accord with the decision of the Full Bench in *Beeju Bee* v. *Syed Moothsya Saheb* (2) and in my opinion the Defendants in the present suit have no answer to the Plaintiff's claim.

The second point in the case relates to the question of limitation. Now, the onus of proving adverse possession for more than 12 years is clearly upon the Defendants; the Plaintiff was obviously not entitled to take possession during the widow's life-time and there is no evidence that when the transferee took possession in 1900, the Plaintiff had any notice that he was claiming to hold adversely to him.

The Munsif finds that possession became adverse from the moment of the transfer but that finding has been set aside by the Subordinate Judge and in second appeal. Upon the facts found no case of adverse possession arises.

It was finally contended that the widow's heirs and, perhaps remotely, the Crown may have a right to resist the Plaintiff's possession, but such a case was not made in the Courts below and cannot be inquired into at this stage. On the findings there is nothing to show that any one has at present a better right than the Plaintiff.

The appeal should, therefore, be dismissed.

Appeal dismissed.

(2) (1919) 43 Mad. 214=37 M. L. J. 627=26 M. L. T. 419=53 I. C. 905=11 L. W. 150 (F. B.).

A. I. R. 1923 Patna 76.

ADAMI, J.

Maharaja Pratap Udai Nath Sahi Deo and another—Petitioners.

v.

Sunderbans Koer and others—Opposite Party.

Criminal Rev. Nos. 124, 132 to 155 of 1922 dated 10th May 1922, against orders passed by 1st Class, Dy. Mag., Gumla.

(a) *Criminal P. C., S. 115—Decree of Civil Court—Possession delivered in execution—Magistrate is bound to uphold it.*

S. 145, Cr. P. C. requires a decision as to actual possession at the date of the order or within two months of it without reference to the merits of the claims of the parties to a right to possess the subject of dispute: But if a decree was obtained by one party and possession of the disputed lands given to him in execution of the decree, then the Magistrate would have no jurisdiction to entertain the proceedings under S. 145. A recent delivery of possession by a Civil Court binds a Criminal Court in disputes as to possession, and the Court must uphold that possession

[P. 78, C. 2.]

(b) *Chota Nagpur Tenancy Act, S. 14—Resumption of Jagir tenure annuls all Sub-tenures—Lands on which mines sunk are excepted.*

"Land whereon a mine has been sunk under lawful authority is expressly excepted from annulment by exception (a) of S. 14. When a jagir tenure is resumed all sub-tenures created by the previous Jagirdars are annulled and became void, and not merely voidable. The words' grantee or any of his ancestors' clearly mean 'succeeding grantees.' and under tenures, created by whichsoever grantee (who successively held the tenures), would be annulled on resumption. To prove consent to the under-tenure is upon him who asserts it. A grantee or any of his successors could not create an under-tenure to exceed in duration the subsistence of their own tenure. S. 14 expressly provides that on resumption of the tenures all sub-tenures granted by the grantee of the tenure whom he succeeded should be deemed to be annulled. 27 Cal. 156, 44 Cal. 715 and 17 M. L. J. 598 Foll.

[P 80, C 1, 2 P. 81 C. 1.]

(c) *Civil P. C. O. 21, R. 100 and 101—'Judgment'-debtor, includes all persons bound by decree.*

The word 'judgment debtor' will include a representative of the judgment-debtor, the word 'representative' being taken to mean all persons who are bound by the decree, [P 84 C 1.]

(d) *Civil P. C. O. 21, Rr., 35 and 36—Large tract of land—Delivery can only be under R. 36 and will operate as one under R. 35.*

Where possession is delivered over a large Parganah including several villages and a large area of bakasht and zerait land, actual eviction under O. 21, R. 35 may well be substituted by the mode of delivery of possession under O. 21 R. 36 but the symbolical possession under R. 35 (2) has the same binding force against the judgment-debtor-tenure

holder and those claiming under him as actual possession under r. 35 (1), O 21. [P. 82 Cs 1 & 2]

(e) *Civil P C. O.* 21 R 36—*Erroneous delivery under, will operate as actual possession against judgment-debtor.*

The delivery of symbolical possession even erroneously operates as actual possession against the judgment-debtor and his representatives.
[P. 82, C. 1.]

(f) *Jurisdiction—Consent cannot give*

Parties cannot confer on the Court, by their agreement jurisdiction which it otherwise does not possess. [P. 83 C 1.]

(g) *Crim P. Code, S.* 439—*Possession delivered by Civil Court.—Failure to maintain, by magistrate is an error of jurisdiction*

The failure by the magistrate to maintain possession delivered by a Civil Court under its decree amounts to an error of jurisdiction vitiating the order under S. 145, Crim P. Code and the High Court will interfere and set it aside [P 83 C. 1]

(h) *Evidence Act, Ss* 101, 102, 103—*Transfer by tenure holder Knowledge of grantor—Onus cannot be laid upon him to prove negative.*

Where the question is whether the grantor knew of the transfers made by the grantee tenure holder *held* that the onus of proving the negative could not be laid on the grantor as in cases such as these the likelihood is that the grantor would have no such knowledge. [P. 80, C. 2]

P. C. Manuk, S. M. Mullick, B. C. De—for Petitioners.

Hasan Imam, Sami G. S. Prasad, T. N. Sahay and *Anand Prasad*—for Opposite Party.

Adami, J.—The thirty-nine applications covered by this judgment are directed against the orders passed by the Deputy Magistrate, Gumla, in the Ranchi district, in 41 cases under section 145 of the Cr. P. Code declaring the second party, the present respondents, to be in possession of the *zerait* and *bakasht* lands in dispute in 39 villages in *pargana* Barwe, Chota Nagpur. The petitioners, who were the first party to the proceedings, are the Maharaja of Chota Nagpur and his manager, Mr. Peppe.

The history of the Barwe Pargana has been given in the judgment of this Court in the case of *Maharaja Pratab Udai Nath Sahi Deo* v. *Ganesh Narain Sahe* (1) and the finding in that case cannot now be contested. It has been found that in the year 1799 it was established and recognised that the Barwe Estate was a dependancy of the Chota Nagpur Raj, and that the Raja of Barwe who in that year was Deo Sahi, held a *putra putradi jagir* tenure under the Maharaja of Chota Nagpur which was resumable by the Maharaja on failure of male heirs of the original grantee. In 1853 Lachminath Sahi Deo, the last of the line of the Deo Sahi, died without male issue and the Maharaja then resumed the tenure. In 1855 the Maharaja made a life grant of the *pargana* to Lal Sahi excluding however six villages and increasing the rent. Lal Sahi died in 1860 and the Maharaja could have then resumed the tenure but instead he allowed Raghbir, the son of Lal Sahi, to continue to hold the tenure. On Raghubir's death, on the 26th January, 1914, the Maharaja instituted a suit for resumption of the tenure claiming that Raghubir held a grant for the term of his life only. He joined as defendants Ganesh, the son of Raghubir, and the son of Ganesh and also Nibaran Chandra Chatterjee, who had obtained a mineral and forest lease from Raghubir. The result of that suit was that it was declared on appeal to this Court, in the judgment I have cited above, that Raghubir held a life tenure only, which was resumable on his death. The decree of this Court after declaring the right of the Maharaja to resume *pargana* Barwe and to be put in possession of the whole of the *pargana* directed that he should be put in possession thereof by evicting the defendants. The decree was passed on the 29th of March, 1920. The Maharaja took out execution of the decree. In the order sheet at first the direction was that possession should be delivered under O. 21, R. 35 but evidently this was afterwards changed, the figures 35 being crossed out and the figures 36 substituted therefor Writs for delivery of possession were issued bearing the heading that they were made under Order XXI, rule 35. In August 1920 possession was delivered to Mr. Peppe, Manager of the Maharaja, of all the villages covered by the decree, not by actual eviction but by beat of drum and the affixing of notices at conspicuous spots in the villages. This possession was peacefully obtained, but in the year 1921, when the Manager of the Maharaja sought to sow or cut the crops on the lands which are now in dispute, he was opposed by the present respondents who claimed that they were in possession of those lands under agreements and leases granted to their predecessors by Lal Sahi and earlier holders of the Barwe *pargana*.

Their contention was that in respect of

(1) (1921) P. H. C. C. 369.

the *zerait* and *bakasht* lands in 25 of the villages one Lachmi Singh had held them as tenant of the holders of the Barwe *Pargana* previous to Lal Sahi and that Lal Sahi, on consideration of Lachman's services to him, executed a document called an *ahadnama*, which was registered whereby he continued Lachman in his tenancy of the land and settled that the tenancy should devolve on the eldest legitimate male heir or, failing such heir, on the eldest legitimate female member of the family, or, failing a female member, on the eldest illegitimate male member of the family. Lachman died leaving a widow Meghrani, and an illegitimate son, Guru Prasad. Meghrani succeeded Lachman in possession of the lands but had a dispute with Guru Prasad who sued her to restrain her alienation of the property. In 1896, probably in settlement of the dispute, Meghrani leased for her lifetime 31 villages to Guru Prasad. Two of these villages were not covered by Lal Sahi's *ahadnama*. Guru Prasad died in 1911 and Meghrani Kuer in April 1921. Guru Prasad left two widows, Bhayani Sundarbans Kuer and Bhayani Kailash Kuer, and these two ladies are the second party who dispute the possession of the Maharaja over the lands which they claim to have inherited from their husband, Guru Prasad.

With regard to the lands in the other 15 cases the Respondents, 2nd party, based their claim on confirmatory *pattas* granted to them by Lal Sahi and others.

As I have mentioned above, in 1921 there were several criminal cases between the parties regarding the possession of the lands, culminating in a *fracas* in which police officers were severely beaten. The police asked that, as there was likelihood of a further breach of the peace, proceedings should be taken. Separate proceedings were drawn up in respect of each village in which the disputed lands lie.

It was agreed that all the cases should be heard together and further, when the parties had each filed documentary evidence they declined to give any oral evidence of possession, it being agreed that the Maharaja 1st party should get possession of what he was entitled to under the decree of the High Court. The learned Deputy Magistrate remarked in his judgments that this course was most reasonable as delivery of possession had been given to the Maharaja only in 1920 and there had, admittedly, been no change of possession since then. The Deputy Magistrate delivered one judgment covering 25 villages alleged to be mentioned in the *ahadnama*, and 15 other judgments in cases where the 2nd party relied on confirmatory *pattas*.

Now, at first sight, the procedure adopted by the Deputy Magistrate on the agreement of the parties would seem contrary to the provisions of the Section 145, Cr. P. Code which requires a decision as to actual possession at the date of the order or within two months of it without reference to the merits of the claims of the parties to a right to possess the subject of dispute, for it was agreed not to call evidence of actual possession. But in these cases it seems clear that what the Deputy Magistrate and the parties aimed at was, first to find out whether there was jurisdiction to decide the dispute under Section 145. If it was found that the 2nd party were bound by the resumption decree obtained by the Maharaja shortly before, and that possession of the disputed lands was given in execution of the decree, then the Deputy Magistrate would have no jurisdiction to entertain the proceedings under Section 145, or to decide in favour of the 2nd party, for it has been held consistently that a recent delivery of possession by a Civil Court binds a Criminal Court in disputes as to possession, and the Court must uphold that possession. If, on the other hand, the Deputy Magistrate was satisfied that the 2nd party was not bound by the decree and that possession had not been delivered to the 1st party in execution of the decree, then on the admission of the parties the second party having been in possession up to the date of the supposed delivery of possession, and there having been no change of possession since then, the second party must be declared to be in actual possession.

The learned Deputy Magistrate considered the effect of Section 14 of the Chota Nagpur Tenancy Act, 1908, under which the 1st party claimed that the under-tenures in the disputed lands were annulled by the resumption decree; he conceded that if the under-tenures had been granted by Raghubir Sahi whose *jagir* tenure had been resumed under the decree, Section 14 would have operated and the under-tenures

would have been annulled, but he pointed out that the under-tenures were confirmed by Lal Sahi in 1860 under the *ahadnama*, and had existed from before his time having been obtained by inheritance and self-acquisition; he held that Section 14 would not permit the resumption of the under-tenure on the resumption of the tenure of Lal Sahi "who had a life interest and got the tenure subject to all the encumbrances and under-tenures existing since before his time, much less could the resumption of Raghubir's life-grant affect it"

The learned Deputy Magistrate held that the decree would not bind the under-tenure-holders, because they were not made parties to the suit. He was much impressed by the fact that the Maharaja joined only one under-tenure-holder as a party defendant, namely, Nibaran Chandra Chatterjee, who had obtained a forest and mineral lease from Raghubir, and argued that the Maharaja understood that Section 14 alone would not help him and that, to get rid of an under-tenure, he must join the under-tenure-holder as defendant in the resumption suit. He held that the Maharaja cannot now go beyond his plaint and claim to dispossess the other under-tenure-holders, and that the other under tenure holders were not affected by the decree. He noticed too that the 2nd party were entered as under-tenure-holders in the record of rights finally published in 1909 and that the Maharaja had taken steps to have the entry altered in one case only arguing that the Maharaja, if he had any objection against the other entries, should have pressed it at the same time.

With regard to the delivery of possession he was of opinion that, if the Maharaja was resisted in taking possession, his proper course was to proceed under Rules 97 and 98 of Order 21, C. P C. and to go to the Civil Court for an order. He held that the delivery of possession under the decree was effected under Rule 36 of Order XXI and not R. 35 and that, as delivery of possession under Rule 36 affects only the parties to the suit and not a third party, there was no delivery of the under-tenures in possession of the respondents as they were not parties to the decree. He then found that, even if the two ladies of the 2nd party had no right under the *ahadnama*, and their tenure was resumable, the 1st party must establish his claim in the Civil Court. Finally he came to a finding as to actual possession, namely:—

"Lastly Ex. B Judgment of the High Court and Ex. J. Judgment of the Deputy Commissioner of Ranchi show that the Bhaiyans are in possession of the land in dispute."

This is the only finding as to actual possession in the whole judgment. I have perused Ex. B and Ex J and do not find a word in them to show or even hint that the 2nd party were in possession. I cannot think that the learned Magistrate ever read those two documents.

The Deputy Magistrate declared the 2nd party to be in possession in all cases.

Mr. Manuk, on behalf of the petitioners 1st party, argues firstly that the Magistrate had no jurisdiction to decide the dispute on title in proceedings under Section 145 and that the agreement of the parties cannot confer jurisdiction. He points out that no witnesses were examined on either side.

I have pointed out earlier in this judgment that having the Civil Court decree and the writ of delivery of possession before him, it was necessary to decide whether the 2nd party were bound by the decree or possession was actually delivered by the Civil Court according to law to the 1st party so as to dispossess the 2nd party. The point I have to decide is whether the Deputy Magistrate has jurisdiction, or exceeded or abused jurisdiction; if he had it in fact I have to decide whether the under-tenures were annulled under Section 15 of the Chota Nagpur Tenancy Act and the 2nd party were bound by the decree, and whether in fact possession of the lands was delivered to the first party under the decree.

In the first place, the argument of the Deputy Magistrate that, because the Maharaja included one 'under tenure-holder as a party defendant to his suit, it must be held that other under-tenure-holders are not bound, is fallacious'; 'Nibaran Chandra Chatterjee held a mining and forest lease and "land whereon a mine has been sunk under lawful authority" is expressly excepted from annulment

by exception (a) to Section 14. Hence it was necessary to make this gentleman a defendant, otherwise on resumption his under-tenure would continue as an encumbrance. It is admitted that the lease of this land was granted by Raghubir, the tenure-holder for life, whose tenure was being resumed, and the arguments used by the Magistrate in the case of the under-tenures of the second party, that they could not be resumed because they were ancient grants, could not apply to the grant to Nibaran Chandra Chatterjee.

The most important question is whether Section 14 applies to the under-tenures in dispute, and whether they were annulled on the passing of the resumption decree; for on the decision of this question depends the decision whether possession of the lands was delivered to the 1st party so as to put them in such possession as to oust the jurisdiction of the Court in proceeding under Section 145, Criminal Procedure Code.

Mr. Hasan Imam shows that up to 1853 there had been a long line of tenure-holders, and between 1853 and 1855 there was a resumption by the Maharaja and then in 1855 a grant to Lal Sahi He argues that when in 1860 Lal Sahi executed the *ahadnama* it was therein stated that Lachman's under-tenure was continued showing that the under-tenure had been granted from before Lal Sahi's time by some previous tenure-holder, so that the under-tenures are of long standing and of uncertain origin. The answer to this is I think, that, when on Lachmanath's death the Maharaja resumed the *jagir* tenure all sub-tenures created by the previous *jagirdars* were annulled and became void, and not merely voidable, I am supported in this view by the judgment of their Lordships of the Privy Council in *Beni Prasad Koeri* v. *Dudnath Roy* (2). The *ahadnama* granted by Lal Sahi really was a new grant of an under-tenure by the new tenure-holder, but even were it not, and the under-tenures were granted by a previous tenure-holder and even if it were shown that previous to the enactment of the Chota Nagpur Tenancy Act in 1908, no provisions similar to Section 14 existed the words of Section 14 as it now stands are clear and plain to the effect that any encumbrance created by the grantee or any of his successors, without the consent and permission of the grantor or his successors-in-interest shall be deemed to be annulled on the resumption of the tenure by the grantor Mr. Hasan Imam contends that the section does not lay down that an under-tenure granted by a prior grantee of the tenure is to be annulled by the resumption of the tenure of a new grantee. In fact his argument is that on the resumption of the life tenure of Raghubir, only under-tenures granted by Raghubir or at most by his immediate predecessor, Lal Sahi, can be annulled. If this argument were to be accepted the words "grantor or his successor-in-interest" and "the grantee or any of his successors" would be meaningless. The words "grantee or any of his successors" clearly mean succeeding grantees", and under-tenures, whether created by Deo Sahi's direct heirs or by Lal Sahi or Raghubir who successively held the tenures, would be annulled on resumption by the Maharaja after Raghubir's death. Then Mr. Hasan Imam points to the words "without the consent or permission of the grantor or his successor" and urges that it was for the Maharaja to prove that no consent or permission was given. The onus of proving a negative could not be laid on the Maharaja, in cases such as these the likelihood is that the grantor would have no knowledge of the transfers and grants made by the tenure-holder. It is nowhere shown that consent or permission was given.

It is next argued that Raghubir did not hold under a grant but merely by indulgence and that the annulment of the under-tenure should have been made at the time of Lal Sahi's death and after that Section 14 could not apply to the under-tenure. The answer to that is that this Court has held that Raghubir held a tenure for life which was resumable, and so Section 14 will apply. The argument that it can never have been intended that under-tenure which has existed from before the grant to Lal Sahi should be liable to annulment, as this would be hardship, can be met by the answer that if the under-tenure had been granted by Deo Sahi himself and Deo Sahi's family had held in direct succession up to 1920 and then failed in the male line, under Section 14 any under-tenure granted in the first instance by Deo Sahi and held by the

(2) (1899) 27 Cal. 156=26 I. A. 216=4 C. W. N. 274=7 Sar. 580 (P. C.).

under-tenure holders in succession up to 1920 would be annulled under Section 14 in spite of the fact that the under-tenure had been in the family for so long a time.

There is nothing to show that the under-tenure which Lal Sahi stated in the *ahadnama* of 1860, had existed previously under the previous grantee of the tenure, was in any way recognised by the Maharaja between 1853 and 1855 or that it was treated as otherwise than annulled when the Maharaja in 1853 resumed the tenure.

The very fact that Lal Sahi and the under-tenure-holders found it necessary that an *ahadnama* or confirmatory *patta* should be executed to continue the sub-tenancy which had been granted by Deo Sahi or one of his successors shows, in my opinion, that the parties to the *ahadnama* and *patta* recognised that on the resumption in 1853 the under-tenure had been annulled, and that it was in the power of Lal Sahi to refuse to recognise it. As the *ahadnama* shows, Lachman had performed some good service for Lal Sahi and it was for that reason that the latter agreed to execute the deed. The *ahadnama* and the *patta* were new grants. Deo Sahi or any of his successors could not create an under-tenure to exceed in duration the subsistence of their own tenure. Even though Section 14 of the Chota Nagpur Tenancy Act had not been enacted in 1860, when the tenure held by Deo Sahi's line ended any sub-tenure created by him or his successors must necessarily come to an end too.

Now if the grant of the sub-tenure was by Lal Sahi, who had a life interest, he could not grant the sub-tenure to exceed the period of his life, and when he died the sub-tenure came to an end. Raghubir, his successor, was allowed to continue as tenure-holder by indulgence with a life interest and, without a fresh grant, he recognised the sub-tenure but had no power to give that recognition effect beyond the period of his life. Furthermore at the time of his death Section 14 expressly provided that on resumption of the tenures all sub-tenures granted by the grantee of the tenure whom he succeeded should be deemed to be annulled.

Howsoever we look at it, whether we treat the under-tenure as first granted by one of the tenure holders previous to Lal Sahi, or whether it is held that the grantor was Lal Sahi, Section 14 will apply.

I must hold that by the decree of this Court in 1920 the under-tenures claimed by the respondents 2nd party were annulled under Section 14 of the Act, and that the second party were bound by the decree to that extent. The argument put forward by the Deputy Magistrate that they were not bound because they were not made parties to the resumption suit cannot stand, and I have pointed out that the reasons stated by the Magistrate are fallacious.

The learned Magistrate seemed to think that because the second party were entered in the record-of-rights, finally published in 1909, as under-tenure-holders and the Maharaja did not put in any objection to those entries but only objected to the entry of Raghubir as holding a *putra putradi* interest and succeeded in having that entry changed to a life interest, the Maharaja must be held to have acquiesced in the claim of the second party to be under-tenure-holders, and he was precluded from annulling their under-tenures. The Maharaja's conduct would show no such intent. Raghubir was still alive in 1909 and during his life could grant any under-tenures he liked, and the Maharaja knowing that these under-tenures would be annulled on the expiry of Raghubir's life-interest had no good reason to object at that time to the entries in the record-of-rights, while to allow the entry of a *putra putradi* jagir in favour of Raghubir would have the effect of preventing resumption of the tenure.

Having found that the under-tenures of the second party were annulled by the resumption decree, it remains to be decided whether the Maharaja, first party, obtained delivery of possession of the disputed lands under the decree. It is argued that the order sheet in the execution proceedings shows that it was directed that possession should be delivered under rule 36 of Order 21 that is to say, symbolical possession should be given which would not operate as actual possession against third persons who were not parties to the decree. Under rule 35 actual delivery is given by eviction of the person bound by the decree if he refuses to vacate. It is plain that at first the order of the Subordinate

Judge was that possession should be delivered under rule 35 and in fact the writs were drawn up under rule 35 as shown by their heading, but afterwards the figures in the order-sheet were altered to rule 36 and possession was delivered in the manner prescribed in rule 36.

Now rule 36 refers to "Immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree."

It can hardly be said that after the decree for resumption the second party, under-tenure holders, were entitled to occupy the lands and were not bound by the decree having in view the provisions of section 14. This was a case in which actual possession should have been delivered, but by reason of the size of the Barwe *pargana* and the multitude of villages and under-tenures it would have been well nigh impossible to give actual possession by eviction. The High Courts of Calcutta and Madras, in *Hari Mohan Shaha* v. *Baburali* (3), and *Govind* v. *Venkata Sastrulu* (4) in dealing with questions of limitation have held that where symbolical possession is delivered in a case where actual possession ought to have been delivered the symbolical possession will operate as actual possession. The delivery of symbolical possession even erroneously operates as actual possession against the judgment-debtor and his representatives.

The second party were bound by the decree as they were affected by it under section 14, and as pointed out by Chapman, J. in *Bhikhia Jha* v. *Braj Behari Singh* (5) in regard to Order 21, rules 100 and 101, the word "judgment-debtor" will include a representative of the judgment-debtor, the word "representative" being taken to mean all persons who are bound by the decree. I need only refer to the cases of *Juggobunahu Mukerjee* v. *Ram Chunder Bysack* (6) and *Juggobundhu Mitter* v. *Purnanand Goswami* (7).

I would hold then that at the time delivery of possession was given, the officer of the Court who delivered possession was acting under writs described as being issued under rule 35, though the only possible means of delivery of possession over such a large area as the whole of the *zerait* and *bakshat* lands of the Barwe *pargana* was by beat of drum and the posting of notices as described in rule 35, and that, as the second party were bound by the decree, the possession so given had the same effect as actual possession. This possession being possession delivered under the decree of the Civil Court, took away the jurisdiction of the Deputy Magistrate to entertain proceedings under section 145 and declare the second party to be in possession.

It has been necessary to deal with the questions raised in this case at Great length and to enter into topics which would usually be quite foreign to proceedings under S. 145, but it has been essentially necessary to find whether actual possession was given to the 1st party by the Civil Court and for that purpose to decide whether the second party were bound by the decree.

The Deputy Magistrate having found that possession of the disputed lands had not been delivered to the first party, examined no witnesses to prove that the second party were in possession, but in each of his judgments mentions certain documents on which he based his finding as to the second party's possession.

So far as I can see none of these documents proved possession at the time of the order or within two months of it. The record of rights was finally published in 1909 when, there is no question, the second party were in possession, and the Maharaja had no reason to question their possession, and I have already pointed out that the two documents Exs B and J contain no finding or proof of the second party's possession. Rent receipts relied on, in some of the cases show possession up to 1915 only. According to the police reports on which the proceedings started it appears that just before the proceedings started the first party were in possession seeking to cultivate the lands. Having no evidence as to possession at the time of the order or within two months the Magistrate had really no

(3) (1897) 24 Cal 715.
(4) (1907) 17 M L. J 598.
(5) (1917) 2 P.L.J. 478=42 I. C. 526=1 P. L. W 685
(6) (1880) 5 Cal. 584=5 C. L. R. 548 (F. B.)
(7) (1889) 16 Cal. 530.

jurisdiction to come to a finding that the second party were in possession. He relied on the agreement between the parties and the admission that there had been no change of possession since the delivery of possession by the Civil Court. The parties cannot confer in the Court by their agreement jurisdiction which it otherwise does not possess.

The failure to maintain possession delivered by the Civil Court under its decree amounts to an error of jurisdiction which vitiates the order of the Deputy Magistrate. I accordingly set aside the order in all the proceedings covered by this judgment.

The paddy which has been attached by the order of the Court will now be released from attachment.

Rule made absolute.

A. I. R. 1923 Patna 83.

DAWSON-MILLER C. J. AND DAS, J.

Tikait Ganesh Narayan Sahi Deo—Petitioner.

v.

Chandu Mistri—Opposite Party.

Civil Rev. No. 53 of 1920 decided on 21st May 1920, from an order of D. C. of Ranchi, dated 14th December 1919.

Chota Nagpur Tenancy Act, Ss. 270 and 211—Landlord recognising transfer—Finding of Dy. Collector that registration was not necessary—Finding is not ultra vires.

S. 270 provides for giving certain powers of control both to the Commissioner and to the Deputy Commissioner over acts performed by subordinates whilst exercising the powers of their superiors. If it can be shown that the Deputy Collector whilst exercising the powers delegated to him of the Deputy Commissioner has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise then the Deputy Commissioner would have power to order him either to exercise that jurisdiction or to refrain from exercising it as the case may be. The same, of course, would apply in the case of the Commissioner and the Board dealing with acts performed by the Deputy Commissioner. [P. 84, C. 1]

H. L. Nandkeolyar—for Petitioner.

Tribhuban Nath Sahay—for Opposite Party.

Dawson Miller, C. J.—This is an application in revision brought by the landlord of certain property against an order of the Deputy Commissioner of Ranchi, in which he refused to interfere by way of exercising powers of revision over an order of the Deputy Collector made in an application under S. 211 of the Chota Nagpur Tenancy Act. It appears that the Petitioner who is the landlord of the property in question obtained a decree for rent against his registered tenant. He thereupon sought to put in execution the decree. The Opposite Party Mangal Nath Tewari and Jagdish Nath Tewari instituted proceedings before the Deputy Collector under S. 211 of the Chota Nagpur Tenancy Act, contending that they were the transferees of the tenants who had been sued, the transfer having taken place sometime before the rent action was instituted, and that they alone were entitled to the land; and they asked the Deputy Collector to adjudicate upon their claim. The section in question provides in effect that, if before the day fixed for the sale of the property in suit a third party appears and alleges that he, and not the person against whom the decree has been obtained, was in lawful possession or had some interest in the tenure or holding when the decree was obtained then the Deputy Commissioner shall examine such party according to law, and, if he sees sufficient reason for so doing and if the party deposits in Court or gives security for the amount of the decree, he shall stay the sale and, after taking evidence, adjudicate on the claim. There is a proviso, however, to the section that no transfer of a tenure (which this was) shall be recognised unless it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner. Now the Deputy Collector before whom the case originally came considered the evidence put forward by the objectors, the present Respondents, and it appears that they filed certain documents showing that they had been sued for rent by the landlord, that is to say by the manager appointed under the Encumbered Estates Act to manage the property in question, and they also produced a money order receipt for payment of registration fees. The Deputy Collector considered that in these circumstances the landlord could not contend

that they had not registered their names because he had already recognised them as tenants and had already recognized the transfer.

From that decision the landlord applied to the Deputy Commissioner asking him to exercise his powers of revision, if in fact he had any, over the Deputy Collector and to set aside his order on the ground that he had not properly exercised his jurisdiction under S. 211. It is clear that the Deputy Commissioner had no power to hear an appeal from a decision under the section in question from the Deputy Collector. Whether he has any powers of revision or not depends upon the interpretation of S. 270 of the Act. That section provides that in the performance of their duties and the exercise of their powers under the Act, Deputy Commissioners shall be subject to the general direction and control of the Commissioner and the Board, and Deputy Collectors exercising the functions of the Deputy Commissioner (which was the case here) shall also be subject to the direction and control of the Deputy Commissioner. That section I think provides for giving certain powers of control both to the Commissioner and to the Deputy Commissioner over acts performed by subordinates whilst exercising the powers of their superiors and it is not necessary in my opinion to lay down with any exactitude or precision the entire scope of the powers which are intended to be included in that section. I think however that if it can be shown that the Deputy Collector whilst exercising the powers delegated to him of the Deputy Commissioner has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise then the Deputy Commissioner would have power to order him either to exercise that jurisdiction or to refrain from exercising it as the case may be. The same of course would apply in the case of the Commissioner and the Board dealing with acts performed by the Deputy Commissioner. In the present case the Deputy Commissioner considered that he had no powers of revision under S. 270 and refused to interfere. To that extent I think he was wrong. But whether the present case is one in which he ought to have interfered is another question. Having considered the decision of the Deputy Collector I think it is clear that what he intended to hold was that the circumstances of the case brought it within the exception to the proviso which I have already mentioned. The proviso is that no transfer of a tenure shall be recognized except in certain cases and these exceptions are where it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner. What I think the Deputy Collector intended to hold was, although he does not say so in terms, that the circumstances of this case show that as there had been recognition by the landlord of the tenancy of the objectors there was sufficient reason shown for not having it registered. There was further the evidence which he had before him of a money order receipt in payment of registration fees and he may well have thought in these circumstances that that was an additional reason for coming to the conclusion that sufficient cause had been shown for non-registration. It appears therefore that there was in fact no failure to exercise jurisdiction nor was there any attempt to usurp a jurisdiction which he in fact had not. In these circumstances it seems to me that the Deputy Commissioner was right in refusing to interfere by way of revision with the order made by his subordinate officer. I think that this application should be dismissed with costs. Hearing fee 3 gold mohurs.

Das, J.—I agree.

Application dismissed.

A. I. R. 1923 Patna 84.

SULTAN AHMAD, J.

Jhumak Singh—Petitioner.

v.

Tota Mahto and others—Opposite Parties.

Criminal Rev. No. 232 of 1920, decided on 21st May 1920, against an order passed by the Dt. Mag., Monghyr, dated 28th April 1920.

Criminal P. C., S. 517—Property out of the Court's custody—Section does not apply.

Section 517 of the Cr. P. C. is not applicable to a case where the property has already passed out of the custody of the Court. Section 517 does not contemplate double restoration.

Akbary—for Petitioner.

G. C. Pal—for Opposite Party.

Judgment:—This is an application against an order passed by the District Magistrate of Monghyr, dated 28th April 1920, directing the first party to return certain crops to the second party of which they had taken delivery from the Police. The order, as it stands, cannot be supported under the law.

The learned Vakil appearing for the opposite party seeks to justify this order under Section 517 of the Criminal Procedure Code. Section 517 of the Criminal Procedure Code, however, is not applicable to a case where the property has already passed out of the custody of the Court. It is perfectly clear, on the order of the Magistrate himself, that the petitioner had taken delivery of the property from the Police. Whether the delivery of this property to the petitioner by the Police was right or wrong under the law is not a matter which can in the least affect the question which I have to decide. The fact remains that the property had already been restored to the first party and neither the Court nor the Police had the custody of that property. That being so, section 517 cannot apply. Section 517 does not contemplate double restoration. There was nothing in the custody of the Court which could be restored. Therefore, the order of the Magistrate directing the petitioner to return the crops to the second party of which the petitioner has taken delivery from the Police must be set aside.

Order set aside.

A. I. R. 1923 Patna 85.

COUTTS AND MACPHERSON, JJ.

Bansidhar Dhar and others—Plaintiffs-Appellants

v.

Tikait Harnarayan Singh and others—Defendants-Respondents.

Appeal No. 695 of 1920, decided on 27th July 1921, from the Appellate decree of J. C. Chota Nagpur.

Chota Nagpur Encumbered Estates Act, Ss. 3, 21 B, 2 A—Suit pending—Estate taken over under the act—Suit cannot proceed.

Section 21-B cannot restrict the provisions of section 3; this section refers to suits other than proceedings in regard to the debts or liabilities referred to in section 2-A. The suit instituted before the estate is taken over cannot proceed after the estate is taken over, even though the manager is brought on record [P 86, C 1.]

Atul Krishna Roy—for Appellants.

Kulwunt Sahay and *Panchanan Banerjee*—for Respondents.

Coutts, J.—This was a suit for recovery of a sum of Rs. 566-2-0 principal and Rs. 393 interest on a *bahikhata* transaction, which is said to have been jointly entered into with the plaintiffs by the defendant No. 1 and the deceased father of the defendants Nos. 2 and 3 who are minors. After the suit was instituted, the estate of the defendant No. 1 was taken under the management of the Encumbered Estates. The plaintiff then brought the manager on to the record. The manager objected on behalf of himself and the defendants No. 1 under the provisions of Section 3 of the Chota Nagpur Encumbered Estates Act; and on this objection being disallowed, he did not enter any defence. The suit was decreed *ex parte*. Against this decree the defendant No. 4, the manager of the Encumbered Estates appealed on behalf of the defendant No. 1 and himself. The learned Judicial Commissioner has found that Section 3 was a bar and has decreed the appeal.

Section 3 is to the effect that—

" On the publication of an order under Section 2, the following consequences shall ensue;—

" All proceedings which may then be pending in any Civil Court in British India or in any Revenue Court in Bengal in respect to such debt or liabilities, shall be barred."

The debts and liabilities referred to are debts and liabilities mentioned in Section 2, A (i) (a)—

" All debts and liabilities to which the said holder is subject."

Clearly then the suit which was brought by these plaintiffs was barred by the provisions of Section 3.

It has been contended, however, that the plaintiffs are saved by Section 21 B. Section 21 B runs as follows—

"During the period of management in every pending suit or appeal in which the holder is plaintiff or defendant, the manager shall be named as the representative of the holder for the purposes of the suit or appeal."

Clearly however, Section 21 B cannot restrict the provisions of Section 3; this section refers to suits other than proceedings in regard to the debts or liabilities referred to in Section 2 A.

The view of the law which has been taken by the learned Judicial Commissioner is obviously correct and I would dismiss this appeal with costs.

Macpherson, J.—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 86.

ADAMI AND BUCKNILL, JJ.

Kumar Madav Surendra Sahi and another—Appellants

v.

Awadh Missir and others—Respondents.

Appeals Nos. 775 and 776 of 1920, decided on 19th January 1922, from Appellate decree of the Special Judge, Saran.

(a) *Bengal Tenancy Act, Ss* 188, 105—*Suit for rent by co sharer landlords—Receiver appointed to collect rents in respect of one co-sharer's share not made party—Suit will not fail.*

Where two co-sharers filed a suit under S. 105 of the Act against tenants, without joining with themselves the Receiver who had been appointed in another suit to collect the rents and profits in respect of the share belonging to one co-sharer *held* that the non-joinder will not affect the maintainability of the suit.

If the Receiver had been appointed in a suit in which the title of the co-sharer was in dispute, it would be absolutely necessary to implead him also The Receiver in such a case would be entitled to be represented in a suit the result of which may be to affect the property *in Custodia legis.* But whereas in this case there is no dispute as to the title of the co-sharers and the Receiver was appointed merely to collect the rents he is not a necessary party to a suit for rent under S 105 of the Act. [P. 87, C. 1.]

(b) *B. T. Act, S* 105—*Question as to—Maintainability of suit—Second appeal lies.*

Second appeals not from decisions of special Judge settling fair and equitable rents, but from decisions regarding the maintainability of the suits, do lie. [P. 87, C. 1.]

P. Dayal, A. P. Upadhaya Harnandan Sahay and *Bhagwan Prasad*—for Appellants.

P. N. Sinha.—for Respondents.

Adami J.—These two second appeals arise out of suits instituted by the co sharer landlords of Mauza Mahmadpur against certain of their tenants under Section 105 of the Bengal Tenancy Act, 1885, read with Section 30 (*b*), and sub-section (1), clause (*a*), of Section 52 of the Act.

It appears that 10 or 12 years before the suit, at the instance of a mortgagee, a Receiver was appointed by the Court in respect of the eight-annas share in the Mauza owned by the father of plaintiff No. 2, who is now proprietor of the share. The two co-sharer landlords joined in the institution of the suit as required by Section 188 of the Bengal Tenancy Act, but did not join with themselves the Receiver, who however, filed a petition asking to be made a plaintiff on the 10th August 1918. four months after the institution of the suit. No order was passed on the petition and the Receiver did not appear at the hearing.

In both the lower Courts the objection was raised by the defendants that the failure to join the Receiver as a plaintiff in the suit was a bar to the maintainability of the action.

The Assistant Settlement Officer overruled the objection and settled fair and equitable rents. On appeal the Special Judge set aside the order of the lower Court holding that the suits were not maintainable, as the Receiver was a necessary party to the applications.

It is contended before us that, in the circumstances of the case, the Receiver was not a necessary party and I am of opinion that the contention is sound.

There was nothing before the lower Courts to show what were the powers and duties of the Receiver under the order of the Court which appointed him; ordinarily, his function would be to collect rents and otherwise safeguard the property in the interest of the mortgagee; and in the absence of evidence on the point the trial Court was fully justified in rejecting the objection. There can be no doubt that if the Receiver had been appointed in the course of a suit in which the title of the co-sharer landlord to a share

in the estate was in dispute, it would have been absolutely necessary to join him as a party to the proceedings under section 105 according to the requirements of section 188, but in the present case there was no dispute as to the title of plaintiff No. 2; the Receiver was appointed merely to ensure the re-payment of a mortgage-debt. The Receiver had no title to the property nor interest in it: though appointed long before the final publication of the Record-of-rights, his name is not entered in the record as having any interest at all in the estate. The recorded proprietor landlords are the plaintiffs.

The Receiver is entitled to be represented in a suit the result of which may be to affect the property in *custodia legis*, but here no attempt has been made to interfere with the right of the Receiver to the property entrusted to his care. Though the appointment of a Receiver may in many cases operate to change possession it has no effect whatever on the title of the party to the property which is placed in the possession of the Receiver.

Section 188 of the Bengal Tenancy Act requires that all the co sharer landlords should be joined as parties in proceedings authorised to be taken by a landlord under the Act, and, in my opinion, the provisions of the Act have been complied with in joining the two plaintiffs who alone are shown by the Record-of-rights to have title as landlord. It might have been well to allow the Receiver to be added as a plaintiff but his absence does not vitiate the trial.

It has been urged by the respondents that no second appeal lies from the decree of the Special Judge in appeals from decisions settling fair and equitable rents. In the present cases, however, the second appeals are not from decisions settling fair and equitable rents, but from decisions regarding the maintainability of the suits, and second appeals do lie from decisions of this nature.

The appeals must be allowed with costs. The decrees of the lower Appellate Court are set aside, and it is directed that the appeals be re-heard by the learned Special Judge on the merits and be decided according to law.

Bucknill, J.—I agree.

Appeal allowed.

A. I. R. 1923 Patna 87.

COUTTS, AND ROSS, JJ.

Sarabjit Pande and others—Plaintiffs-Appellants

v.

Raj Kumar Pande—Defendant-Respondent.

Appeal No. 857 of 1920 decided on 16th January 1922, against the Appellate decree of Sub. J. of Gaya dated 12th March 1920.

Deed—Construction—Grant as 'Malik' to wife but saying that she should utilise income and that property is to go to son if born—Grant is only that of life estate.

A deed declared that neither the declarant nor his heirs or representatives will have any right or title of claim against the said Musammat or her heirs and legal representatives in respect of the properties. But the succeeding clause made specific reference to the income as that which the lady was to utilize and there was the further clause that if a child should be born the property should belong to that child

Held, these two clauses seem inconsistent with the construction of the deed as conferring an absolute estate and to indicate what the real intention of the grantor was and construing the deed as a whole it conferred a life interest only.

[P. 88, C. 1.]

Kulwant Sahai and *Kailaspati*—for the Appellants.

Surendra Mohan Das and *Nawal Kishore Prasad*—for Respondent.

Ross, J.—This is an appeal by the Plaintiffs. The suit was brought for a declaration that a deed executed by Fakira Pande in favour of his wife conveyed only a life estate and the subsequent alienation made by her is without effect as against the Plaintiffs who are the reversioners of Fakira Pande. The trial Court holding that only a life estate was given decreed the suit. The Subordinate Judge on appeal took the opposite view and the only question is whether the deed referred to in the plaint executed by Fakira on the 1st of January 1903 conveyed to his wife an absolute estate or only a life estate.

The deed must be construed as a whole. It begins by reciting that the executant is the only member of his family and is separate and has no concern with any other person except his wife. As he has no expectation of children and is afraid that after his death his wife may be put to trouble

and his property wasted, therefore, in order to preserve his property he makes his wife the permanent and full owner "*Malik mustakil kamil*" of the property. Later on the phrase is used again; "*malik mustakil kamil jaidad mahuba.*" The deed then goes on to say that neither the declarant nor his heirs or representatives will have any right or title or claim against the said Musammat or her heirs and legal representatives in respect of the properties and that it is proper that the Musammat, remaining in possession of the properties, may utilize the income as a matter of right. The last clause is that in the event of a son or daughter being born to the Musammat by the executant and living at her death then the son or daughter will be the permanent and full owner.

The clause which refers to "the Musammat or her heirs and legal representatives" may seem to present difficulty in the way of construing this deed as the grant of a life estate only. But it is contended that this clause is common form, that it must be read with its context and that what it refers to is simply the possession of the properties. In my opinion if the deed had stopped there, there could have been no question that an absolute estate was conferred. But the succeeding clause makes specific reference to the income as that which the lady is to utilize and there is the further clause that if a child should be born the property should belong to that child. These two clauses seem to me inconsistent with the construction of the deed as conferring an absolute estate and to indicate what the real intention of the grantor was; and construing the deed as a whole I would read it as conferring a life interest only.

I would therefore allow this appeal, set aside the decree of the learned Subordinate Judge and restore that of the Munsif with costs to the Plaintiffs throughout.

Coutts, J—I agree.

Appeal allowed.

A. I. R. 1923 Patna 88.

DAS AND BUCKNILL, JJ.

Chandrika Ray—Defendant-Petitioner.

v.

Ram Kuer Thakur and another—Plaintiffs-Opposite Party.

Civil Rev. No. 64 of 1921 decided on 3rd June 1921, from an order of Dt. J. Arrah dated the 3rd January 1921.

(a) *Limitation Act, S. 22—Application under C. P. C. O. 9, R. 13—Section does not apply.*

A "suit" under S. 2 (10) does not include "application" and Sec. 22 of the Limitation Act does no apply to an application made under O. 9, r. 13 of the Code. [P. 89, C. 1.]

(b) *Interpretation of statutes—"Deemed"—What it indicates.*

Where a thing is to be "deemed" to be something else it is in truth not that something else but is treated as that something else by a statutory fiction for the purpose of the particular statute. [P. 89, C. 1.]

S. M. Mullick for *S. Roy*—for Petitioner.

L. N. Sinha—for Opposite Party.

Das, J.—I am unable to agree with the view taken by the Court below. It is quite clear that S. 22 of the Limitation Act applies to suits, and not to applications. Mr. Lachmi Narain Singh on behalf of the Opposite Party contends that the term "suit" ought not to be used in its narrow sense as being terminated by the decree made by the first Court, but should be used in a broad sense as including not only the stages of a suit down to its termination by the decree of the first Court, but as including its appellate state and proceedings in execution of the decree made in the suit. No doubt the term "suit is used in a broad sense in most procedural Codes, but here we are dealing with a special Act, the Limitation Act, which expressly states that a suit does not include either an appeal or an application. For the purpose of the Limitation Act, therefore a "suit" does not include "applications" and S. 22 of the Limitation Act did not apply to an application made by the Petitioner under O. 9, R. 13 of the Code.

It was then contended on behalf of the Opposite Party that, quite apart from S. 22 of the Limitation Act, the application as regards the added party, must be regarded as having been made when the added party was actually brought on the record of the application. I do not at all agree with his view. If it were not for S. 22 of the Limitation Act, it could not be urged that a suit as regards the added party should be regarded as having been instituted when he was so made a party. But S. 22 of the Limitation Act provides that "Where after the institution of a suit, a new

Plaintiff or Defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party."

This is a special provision for suits, but not for applications. I regard the use of the word "deemed" in S. 22 as significant. It indicates that a statutory fiction is resorted to for a particular purpose. As has been said more than once when a thing is to be "deemed" to be something else, it is in truth not that something else, but is treated as that something else by a statutory fiction for the purpose of that particular statute. Therefore, when we are asked to apply the statutory fiction, we are entitled and even bound to enquire for what purposes the statutory fiction is to be resorted to. When we come to S. 22, it is clear that it can be resorted to only when, after the institution of a suit, a new Plaintiff or Defendant is substituted or added.

I must allow the application, set aside the order passed by the Court below, and remand the matter to that Court for decision according to law. Petitioner is entitled to his costs of this application.

Bucknill, J.—I agree.

Application allowed.

A. I. R. 1923 Patna 89.

BUCKNILL, J.

Audhi Rai and others—Accused-Petitioners.

v.

Emperor—Opposite Party.

Criminal Rev. No. 162 of 1921, decided on 9th May 1921, against the order of the S. J. Monghyr.

Criminal P. C., S. 439—Compromise after conviction—High Court in Revision has no power to sanction.

The High Court has no power as a Court of Revision under section 439 read with section 423, (1) (*d*), to sanction the composition of an offence when entered into after the conviction of the accused. [P. 90, C. 1.]

C. C. Das and *S. S. Bose*—for Petitioners.

Assistant Govt. Advocate—for the Crown.

Judgment.—This is an application in Criminal Revisional Jurisdiction and arises out of the conviction of certain persons who are the petitioners here and who were convicted of certain offences against the provisions of S. 504 and 341 of the Indian Penal Code. Apparently the first petitioner was sentenced to six weeks' rigorous imprisonment; the second and third to one month's rigorous imprisonment and the fourth and the fifth accused to a fine of Rs. 40 each (or in default to one month's rigorous imprisonment) under section 504; although they were found guilty also under section 341, no separate sentences were passed in respect of the offence committed against the provisions of that section. Certain circumstances in this case to which I will refer presently, were somewhat curious, but the legal points which have been placed before me and upon which I have been asked to interfere are really but two in number. The first point is certainly an interesting one. It is said that there was a possibility of a compromise and that in fact there had been a compromise. When the case had been tried (the Sub-Divisional Officer thought there was no effective composition) it went up on revision to the Sessions Judge of Monghyr, and it was then suggested that even then it was open to him to allow the conviction to be set aside on a composition on agreement being accomplished. He held, however, that on the authority of certain cases, he could not accept or give effect to any such alleged compromise. The question is now, however, brought before me and it is suggested that under sections 345 423, (1) (*d*) and 439 of the Criminal Procedure Code it is possible for the matter to be dealt with in that manner. It is said that under the provisions of that section it may be open for a Court exercising revisional jurisdiction to give effect to a compromise. The point has been very well put before me by the learned Counsel for the petitioners and a good deal of authority has been quoted to me much of which was in favour of the contention, whilst much on the other hand was against it, but I think that the latest case of *Akshoy Singh* v. *Rameswar Bagdi* (1) places the matter, so far as I am concerned

(1) (1916) 43 Cal, 1143=35 I. C. 515=20 C. W. N. 107.

substantially out of further serious consideration. In that case which was heard before Mr. Justice Mookerjee and Mr. Justice Sheepshanks, it was held that the High Court has no power as a Court of Revision under section 439 read with section 423 (1) (*d*), to sanction the composition of an offence when entered into after the conviction of the accused. The learned Judges there quoted every case which has been quoted before me and whilst dissenting from some followed a line of decision of which the following are most important. *Adhar Chandra* v. *Subodh Chandra* (2), *Shanker Rangayya* v. *Sanker Ramayya* (3) and *Ram Chandra* v. *Emperor* (4). I think in view of these that it is unnecessary for me really to review this matter further. (The remaining portion is not necessary for our Report).

Application rejected.

(2) (1914) 18 C. W. N. 1212=26 I. C. 176.
(3) (1915) 29 Mad 604=31 I. C. 350=29 M. L. J. 621.
(4) (1915) 37 All. 127=23 I. C. 103=13 A. L. J. 104

A. I. R. 1923 Patna 90.

DAS AND ADAMI, JJ.

Mohant Ramkishun Das—Petitioner

v.

Beni Prosad and others—Opposite Party.

Civil Rev. Nos. 306 and 318 of 1921, decided on 7th January 1922, from an order the Sub. J., Patna.

(a) *Patna High Court Rules, R. 37 (b)—'Dismissed for default'—Withdrawal after witnesses have been examined does not operate as dismissal for default.*

No distinction on principle can be drawn between the withdrawal of a suit and the dismissal of a suit for default, but it cannot be said that where a suit is withdrawn after witnesses had in fact been examined on behalf of the defendants that such withdrawal operates as a dismissal for default and defendant is entitled to full costs. [P. 91, C. 1.]

(b) *Civil P. C., S. 115—Wrong order as to pleader's fees is not revisable*

Wrong order relating to pleader's fees arising on the misconstruction of the rules, is not revisable under S. 115 of the C. P. C. [P. 91, C. 2.]

P. N. Sinha and *N. C. Ghosh*,—for Petitioner.

Siveswar Dayal—for Opposite Party.

Das, J.—These applications are directed against the order of the learned Subordinate Judge of Patna, by which he has calculated the fees payable to two sets of defendants on the whole value of the suit under rule 35. The facts are these:

The plaintiffs brought a mortgage action against the defendants. The question as between the plaintiffs and defendants Nos. 3 to 5 was one of priority; defendants Nos. 3 to 5 claimed to be the prior mortgagees and the plaintiffs' case was that they were the prior mortgagees. So far as the defendant No. 9 is concerned the controversy between the plaintiffs and him was as to a particular property which had been purchased by defendant No. 9, the case of defendant No. 9 being that he had acquired a title to the property before the mortgage in favour of the plaintiffs.

When the case came up before the learned Subordinate Judge, the plaintiffs withdrew the case as against defendants Nos. 3 to 5. The question arises whether the learned Subordinate Judge was right in assessing costs payable to defendants Nos. 3 to 5 on the whole value of the suit.

Mr. Purnendu Narain Sinha appearing on behalf of the plaintiffs argued that the Court was wrong, and he relies upon rule 37 (b). That rule provides that: "If the suit be dismissed for default, the amount of the fee to be paid to the defendant's Pleader shall be left to the discretion of the Court, provided that such fee shall not exceed the moiety of the fee calculated on the whole value of the suit under rule 35." According to Mr. Purnendu Narain Sinha the amount of the fee payable to the Pleader of defendants Nos. 3 to 5 should not have exceeded the moiety of the fee calculated on the whole value of the suit. The learned Vakil appearing on behalf of defendants Nos. 3 to 5 urges that rule 37, paragraph (b) has no application inasmuch as the suit was not dismissed for default, but, as against this, Purnendu Babu relies upon the case of *Nanhilal Agrari* v. *Secy. of State* (1)

(1) (1910) 11 C. L. J. 217=5 I. C. 770.

In that case, which was a case that arose on certain land acquisition proceedings, the claimant applied to withdraw the case and the District Judge allowed him to do so but directed him to pay full costs to the Government. Mr. Justice Mukerjee and Mr. Justice Teunon came to the conclusion that full costs should not have been allowed. But there is this distinction between the case upon which Purnendu Babu relies and this: that it does not appear from the facts recited in the judgment of Mr. Justice Mukerjee that the case was withdrawn after witnesses had in fact been examined on behalf of the petitioner. The opposite party has filed an affidavit in this Court in which he swears that the petition for withdrawal of the suit was not filed until the witnesses had been examined on behalf of the petitioner. I quite agree that no distinction on principle can be drawn between the withdrawal of a suit and the dismissal of a suit for default, but I am unable to say that where a suit is withdrawn after witnesses had in fact been examined on behalf of the petitioner that such withdrawal operates as a dismissal for default. I am of opinion, therefore, that so far as the order granting full costs to defendants Nos. 3 to 5 is concerned that order is right and ought to be affirmed.

I have now to consider whether the learned Judge was right in awarding full costs to defendant No. 9. The learned Subordinate Judge relies upon rule 40, but Purnendu Babu argues before us that rule 41 was the rule that applied in this case, and he says that the value of the property in which defendant No. 9 was interested being Rs. 50, the fees awarded to the Pleader of defendant No. 9 should have been calculated with reference to that value.

Now the learned Vakil appearing on behalf of defendant No. 9, argues first, that if there is any error in the order passed by the learned Subordinate Judge of Patna that error arose out of a misconstruction of the rules relating to Pleader's fees and this Court ought not to revise such an order as the learned Subordinate Judge had complete jurisdiction to misconstrue these rules. Alternatively he argues that it is not established that Rs. 50 was the value of this property. I am of opinion that these arguments are entitled to succeed. The question was a question of construction of rules 40 and 41. Both these rules were placed before the learned Subordinate Judge and he came to the conclusion, erroneously in my opinion, that rule 40 applied to this case. But I am unable to say that that order is revisable under section 115 of the Civil Procedure Code.

On the next point which has been argued by the learned Vakil I am of opinion that the document by which the defendant No. 9 purchased the property does not establish the value of the separate interest of the defendant in the property at the date of the suit. There is no evidence before us as to what the value of the separate interest of the defendant was at the date when the learned Subordinate Judge passed his order. On the whole I am of opinion that we cannot interfere with the order passed by the learned Subordinate Judge.

These applications must be refused but in the circumstances without costs.

Adami, J.—I agree.

Application refused.

A. I. R. 1923 Patna 91.

BUCKNILL, J.

Panchu Chowdhry—Petitioner.

v.

Emperor—Opposite Party.

Criminal Rev. No. 353 of 1921 decided on 28th October 1921, from the order of S. J., Monghyr.

(a) *Evidence Act, S. 118—Witnesses of tender age—Capacity to give evidence—Record of opinion as to, is not obligatory.*

When the evidence of a child of tender years is adduced the Judicial Officer should for the sake of precaution ascertain as a preliminary measure by means of a few simple questions whether the intelligence of the child is such that (whether sworn or not) it is capable of giving testimony and it is certainly desirable that something should at the commencement of the record of the evidence of a witness of this character be entered to show that such a test has been in fact made. But the mere fact that the Judge omits to make the record will not render the evidence inadmissible, if the Judge is, as a matter of fact satisfied about the capacity to give the evidence.

[P. 92, C. 2., P. 93, C. 1.]

(b) *Criminal P. C., S. 342—Accused defended by counsel—Lengthy examination is unnecessary.*

Where an accused is undefended the Tribunal may point out to him the elements of the evidence adduced against him which seem in his own interest to demand his explanation but where an accused is defended by a legal practitioner a Tribunal ought not to enter upon a lengthy examination of an accused person [P. 93, C. 2, 94 C. 1.]

K. P. Jayaswal—for Petitioner.

Assistant Govt. Advocate—for the Crown.

Judgment:—This was an application in Criminal Revisional Jurisdiction made by one Panchu Chaudhry who was convicted of rape by the Assistant Sessions Judge of Monghyr on the 25th of April of this year, and was sentenced to two years' rigorous imprisonment. An attempt was made to raise before me arguments based upon the general merits of the case and also as to the nature of the sentence. I have read through very carefully all the evidence and the learned Judge's judgment and, although the Assessors did not think that the evidence for the prosecution was altogether reliable, I am bound to say that I cannot see any ground for thinking that the learned Judge has come to a wrong decision, nor do I think that, assuming as I do, his decision was right, the sentence was in any way too severe.

The points, however, upon which I was particularly addressed were two in number. The first of these was with regard to the procedure adopted by the Judge in connection with the reception by him of the evidence of a small girl who, it is said, was an eye witness of the occurrence. In order to understand this point which has been urged, it is necessary, very shortly, to refer to the circumstances under which, it is said, that the offence took place.

The complainant was a young married woman about 18 or 20 years old who was engaged in company with two little girls, aged about 11 and 7 respectively in scraping up grass in a glade in the middle of a thick field of *rahar*, she was seized by the accused, a young man of about 20 or 22, who, pushing her on the ground, had connection with her notwithstanding her attempts to push him off. The two little girls stood by frightened and in tears, and saw it all. I need not detail what took place afterwards or the circumstances under which the complainant told what had taken place to persons whom she subsequently encountered, because those circumstances are not really material with regard to the immediate point under consideration. The Assistant Sessions Judge, in coming to the decision which he did, relied very materially upon the evidence of these two children as corroboration of the story which was told in Court by the complainant herself. In the case of the elder girl he writes at the foot of her deposition: "Explained to the witness in Hindi and admitted by her to be correct. I believe this witness understood what was asked of her and gave the answers recorded fairly intelligently." With regard to the younger girl, however, he does not make any comment beyond the formal one: "Explained to the witness in Hindi and admitted by her to be correct." It is clear from the judgment that the Judge does rely upon the evidence of both these children and, therefore, I think, it must be presumed that, in doing so, he must have felt satisfied that both the children were capable of giving intelligent and intelligible evidence although they were of tender years. It is admitted that what he wrote at the foot of the deposition of the elder child was sufficient to indicate that her evidence was capable of being received and that it was adequate for any purposes necessary. Whether or not he accidently omitted to make a similar entry on the deposition of the younger child I do not know; but I am inclined to think that it was probably accidental. However, it is argued before me that the omission to record any statement of the kind indicated is one which vitiates the proceedings and makes it necessary that there should be a new trial. I have been unable to find any authority, nor has any clear authority been pointed out to me, which would justify me in coming to any such conclusion. I should like, however, to point out that it is undoubtedly of very great importance that when the evidence of child of tender years is adduced the Judicial Officer should, for the sake of

precaution, ascertain, as a preliminary measure, by means of a few simple questions whether the intelligence of the child is such that (whether sworn or not) it is capable of giving testimony which is patent of credit; and it is certainly desirable that something should, at the commencement of the record of the evidence of the witness of this character, be entered to show that such a test has been in fact made. It may, of course, turn out in the course of the examination at the trial that the test has been a fallacious one and that the evidence which the child gives is not intelligible and in such a case of course it is always open to the Judicial Officer to say, at any stage, that he cannot accept the evidence which the child is giving. On the other hand, I do not find that there is anything obligatory imposed by law upon a Judge definitely to make on the record any endorsement of his own view as to a child's capacity, and when, as in this case he has clearly relied upon the evidence given, it would be absurd to suggest that he could have been other than thoroughly satisfied as to the capacity of the child to give intelligible testimony. I observe that in these depositions there seems no clear indication as to whether either of the children was sworn or affirmed or neither. But it seems to be a common practice to omit to note what has taken place with regard to the taking of an oath or the making of an affirmation. I cannot, therefore, think that, under the circumstances shown in this case, there is any ground for interference in Revisional Jurisdiction on this point. I have been referred to the cases of *Sheikh Fakir* v. *Emperor* (1), *Dhani Ram* v. *Emperor* (2), *Fatu Santal* v. *Emperor* (3) and *Queen-Empress* v. *Lal Sahai* (4). But all that they may, in my opinion, seem substantially to show is that it is important that, in some way or other, it should be clear that the Judge has satisfied himself that the child whose evidence has been taken before him is capable of giving evidence of an intelligible nature.

The second point is a very small one. It is suggested that the examination which was made of the accused in the Sessions Court after the close of the prosecution under the provisions of section 342 of the Code of Criminal Procedure was not in accordance with law. On the ground that it was inadequate, I am not prepared, without very convincing authority, to say that it is open in Revisional Jurisdiction of this Court to enquire into the sufficiency of the examination which has been made under the section. Indeed, it is freely admitted that it is impossible to lay down any very definite hard and fast rule and my own view is that this Court would not enquire, in Revisional Jurisdiction, into any such sufficiency, except possibly in very exceptional and special circumstances. Here I have looked at the examination which was made both in the committing and in the trial Courts. It must be remembered that the accused was defended by a legal practitioner and that every thing which could be urged on his behalf was urged. In the Committing Court, the accused was only asked one question which was as follows: "Did you forcibly outrage Rudia Chamarin in the *rahar* field"? The answer was "No, I did not do any thing." In the trial Court this statement was read over to him and he was then asked if he wished to add any thing to that statement. His answer was that he would file a written statement. I cannot, I think, in these circumstances say that in this case this was insufficient or that it showed any special circumstance which would justify any interference by me. It can easily be seen that if it is to be said that a Judicial Officer must ask this or that question or this or that series of questions under the provisions of section 342 of the Code of Criminal Procedure, the practical effect of the working of that section could be criticised in revisional applications on every possible occasion. I can well understand that where an accused is undefended, the Tribunal may well point out to him the elements of the evidence adduced against him which seem in his own interest to demand his explanation but where an accused is defended by a

(1) (1906) 11 C. W. N. 51.
(2) (1916) 38 All. 49=31 I.C. 1005=18 A. L. J. 1072.
(3) (1920) 6 P. L. J. 147=61 I.C. 705=2 P.L.T. 288.
(4) (1889) 11 All. 188=(1889) A. W. N. 65.

legal practitioner it would be, I think, altogether impossible to expect or desirable to contemplate a Tribunal entering upon a lengthy examination of an accused person which might easily develop into a recounting of the history of the whole case or into what would be far worse, some sort of cross examination.

For these reasons, I, therefore, think that this point must also fail and that the application must be rejected.

Application rejected.

A. I. R. 1923 Patna 94.

CHAMIER, C. J. AND SHARFUDDIN, J.

Mt. Wajihunnissa Begum—Plaintiff-Appellant

v.

Fakira Mahton—Defendant-Respondent

S. A. No. 637 of 1916, decided on 25th April 1917, against a decision of Dt. J. of Patna, dated 17th March 1916.

B.T. Act, S 44—Homestead land, let for cultivation—Non-occupancy raiyat, cannot be ejected except on grounds in section.

Where the land was formerly homestead land within the meaning of that expression as used in the Act, but ceased to be so and had been let for cultivation, i e, for an agricultural purpose, to the respondent and both cereals and vegetables had been grown on it for many years.

Held, the respondent who is a non-occupancy raiyat is not liable to be ejected except on one or other of the grounds specified in section 44 of the Bengal Tenancy Act [P. 94, C. 2 & P. 95, C. 1.]

Ali Imam,—for Appellant.

Debendra Nath Das—for Respondent.

Chamier, C. J.:—This was a suit by the appellant for possession of some land known as Pushta Oleudez (apparently a corruption of Hollandaise) in one of the *Mohallas* of the City of Patna. It appears that on part of the land there stood at one time a house and out-houses but they fell down many years ago and since 1285 F, at all events the whole of the land now in question has been under cultivation.

The appellant's case was that at first a portion and subsequently the whole of the land was let by them in *thika* to different persons quite temporarily in order that they might grow vegetable thereon, that the *thikadars* were forbidden by express conditions in their *thikas* to settle the land permanently with any one, that the last *thikadar* was Mahomed Askari who gave up possession in 1318 F., and that the respondent, who has built a *kutcha* house, on part of the land and is cultivating the rest of it, prevented the appellant from taking possession. Hence this suit. The appellant says that the land is homestead land and that even if it was settled with the Respondent by one of the *thikadars* the respondent has no right to retain possession.

The respondent's case was that he had a right of occupancy in the land which was his ancestral holding and he pleaded that even, if he failed to establish a right of occupancy in the land, he was a non-occupancy *raiyat* of the same and not liable to be ejected except on one or other of the grounds specified in section 44 of the Bengal Tenancy Act.

The Courts below have agreed in dismissing the suit.

In this Court it was at first suggested that Patna City had been excluded altogether from the operation of the Bengal Tenancy Act. But the suggestion was abandoned.

It was next contended that Patna City is not a village and, therefore, with reference to sections 3 (10), 20 and 21 of the Act the defendant could not be held to be an occupancy *raiyat* of the land. It appears to me to be unnecessary to decide this question, for if the Respondent is, as I hold, a non-occupancy *raiyat* of the land the suit must fail.

It was contended that the Respondent was not a non-occupancy *raiyat* inasmuch as the Bengal Tenancy Act does not apply to homestead land or to land not used for agricultural or horticultural purposes. There appears to be no force in this. If the land was ever homestead land within the meaning of that expression as used in the Act it ceased to be so before it was let to the Respondent or his predecessors and the land has been let for cultivation, *i.e.*, for an agricultural purpose, and both cereals and vege-

tables have been grown on it for many years. The growing of vegetables is admitted by the appellant and the Subordinate Judge found traces of cereals having been grown on it when he inspected the land.

In the last resort it was contended that the land was the proprietor's private land (*zerait, nij, sir or khamat*) within the meaning of section 116 of the Act and, therefore, section 44 did not apply to it. No such case seems to have been put forward in the Court below and there appears to be no force whatever in the contention. The land was at one time a building site but many years ago, long before the appellant acquired it, the buildings fell down and the proprietor of the time let it out as ordinary agricultural land. It would be absurd to call the land *zerait, nij sir, or khamat.*

As regards that portion of the land on which the Respondent's house stands there are concurrent findings of the Courts below that by the custom the Respondent is entitled to retain possession. As regards the rest of the land, the appellant has failed to show that the *thikadars* of the land had not power to settle it with tenants for cultivation. It appears to me that the Respondent is at least a non-occupancy *raiyat* of it, and I hold that the suit was rightly dismissed as none of the grounds stated in section 44 of the Act have been so much as suggested. I would dismiss the appeal with costs.

Sharfuddin, J.—I agree.

Appeal dismissed.

A. I. R. 1923, Patna 95.

DAS AND ROSS, JJ.

Maharaja Sir Rameshwar Singh Bahadur—Appellant.

v.

Basudeva Singh and another—Respondents.

Appeals Nos. 186 to 188 of 1918 decided on 8th February 1921, against the original decrees of Dt. J. of Darbhanga, dated 22nd June 1918.

(a) *Landlord and Tenant—Property in timber, is in the landlord*

The property in trees or in that which is likely to become timber, is in the Landlord and the property in bushes in the tenant. [P. 95, C. 2.]

(b) *Custom—Party setting up, not proving it—General law applies.*

If no custom as set up is proved by the party setting it up, the case must be governed by the general law modified by any admission which the other party makes in his favour.

[P 95, C. 2]

(c) *Words and Phrases—Timber means trees fit for building—Bamboos if so used are timber*

By timber is meant trees fit to be used in building. Bamboos are timber inasmuch as they are used, by the custom of the country, in the building and repairing of the houses.

P. N. Singh and *Murari Prasad*—for Appellant.

N. N. Sinha—for Respondents.

Ross, J.—These appeals raise a question between landlord and tenant as to the right to the compensation for trees on land acquired by the Government under the Land Acquisition Act. The Collector awarded half the value of the trees to the tenant and half to the landlord. The District Judge held that the tenant was entitled to the whole. The landlord appeals. The trees are 10 *sisoo* trees, 1 *barhar*, 1 mango and 29 bamboos. The law is well known:—

"The property in trees or of that which is likely to become timber, is in the landlord, and the property in bushes in the tenant." (Woodfall on Landlord and Tenant, 19th Edition, Page 736).

The District Judge seems to hold that because the landlord set up a custom by which he is entitled to only half of the value of the trees, and failed to prove it, the tenant is entitled to the whole, although he also has failed to prove such a custom. This decision is wrong. If no custom is proved, the case must be governed by the general law modified by any admission which the landlord makes in favour of the tenant. The result is that the landlord is entitled to half the compensation for timber and the tenant to half.

A question is then raised as to bamboos. The tenants claim the entire compensation for bamboos on the ground that they are not timber.

"By the term timber is meant properly such trees only as are fit to be used in building and repairing houses. Many descriptions of trees which are not generally considered as timber are so in some places by custom of the country, being there used for the purposes of building.

Applying this test it seems to me

that whatever the botanical classification of bamboos may be, they are timber inasmuch as they are used, by the custom of the country, in the building and repairing of houses, and must, therefore, fall under the present rule.

It was faintly suggested that the respondents as tenants at fixed rates, are entitled to the whole compensation. It is unnecessary in this case to determine what the rights of tenants at fixed rates are, because there is no evidence that the respondents have that status.

Finally, it was urged that the tenants are entitled to compensation by reason of their loss of the fruits of the trees. This is not a matter between the parties to these appeals.

The result is that the appeals are decreed with costs and the decree of the District Judge is modified by awarding the landlord half of the compensation for the trees (including bamboos).

Das, J.:—I agree.

Decree modified.

A. I. R. 1923 Patna 96 (1).

DAS AND ADAMI, JJ.

Kali Kumar and others—Petitioners-Appellants

v.

Mt. Munabati Kumari—Objector-Respondent.

Appeal No. 57 of 1919 decided on 14th July 1920, against the original decree of Dt. J. of Damka, dated 24th January 1919.

Probate and Administration Act—Claimant by survivorship is not entitled to get Letters of administration to estate of deceased.

A person who claims to succeed by survivorship cannot be granted Letters of Administration for in that case the deceased leaves no estate.

N. C. Sinha—for Appellants.

Surendra Mohan Das—for Respondent.

Das, J.:—This appeal arises out of an application for Letters of Administration to the estate of one Dhodhal Kumar. The Petitioners who were the Applicants in the Court below claim the estate by right of survivorship. Their case in their petition was that the deceased was joint with them and that therefore they were entitled to take the estate by survivorship.

I am of opinion that on these allegations their claim for Letters of Administration was bound to fail. If their allegations be correct that Dhodhal was joint with them, then it must follow that Dhodhal left no estate whatsoever to which Letters of Administration could be granted. Although the learned District Judge has not decided the case on this finding, I think that his decision in rejecting the application of the Petitioners is right and ought to be affirmed.

I would dismiss this appeal with costs.

Adami, J.:—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 96 (2).

COUTTS AND ROSS, JJ.

Balgobind Kumar and others—Plaintiffs-Appellants

v.

Rai Behari Lal Mitter and others—Defendants-Respondents.

Appeal No. 79 of 1919, decided on 20th February, 1922, against the original decree of Sub. J. of Bhagalpur, dated 31st January 1919.

(a) *Limitation Act, Art. 142—Suit for possession—Plaintiff not in possession 12 years back—He cannot succeed unless he proves dispossession of defendants since that date.*

Where the plaintiffs have not been in possession, for more than 12 years, of land beyond the boundary line in dispute, determined by order of Revenue officers 12 years back, unless they can show that they had since that date dispossessed defendants, their suit is barred by limitation with respect to this land.

(b) *Bengal Survey Act, S. 41—Assistant Settlement Officer—Decision of, will have the force of a Civil Court decree.*

Revenue Officer appointed with the additional designation of Settlement Officer is vested with the powers of a Superintendent of Survey under the Bengal Survey Act and he has the powers of a Collector under Section 41 of the Act. He has power to delegate his function under this section to an Assistant Settlement Officer and the latter's decision as to possession has the force of a decree of a Civil Court. [P. 97, C. 2, P. 98 C. 1.]

(c) *Evidence Act, S. 114—Official acts will be presumed to be done within jurisdiction.*

Official acts are to be presumed to be legally performed. Where the jurisdiction of the Assistant Settlement Officer was not questioned in the Trial Court, it was presumed in second appeal, where only the question was raised, that he acted within his jurisdiction in passing the particular order deciding the dispute as to the boundary line. [P. 98 C. 1.]

C. C. Das and *Lalmohan Ganguly*—for Appellants.

P. K. Sen, N. C. Ghose, Baikunth Nath Mitter, Bhagwan Prasad, Surendra Narain Bose and *Subal Chandra Mazumdar*—for Respondents.

Coutts, J.—This is a suit for declaration of the plaintiffs' title to, and for possession of, a considerable area of land which is described in the plaint. The plaintiffs are the owners of village Nasum Nawaz, which is usually known as Gamail; the defendant first party are proprietors of a village contiguous on the east of Gamail, named Hathiondha, and the land in dispute is on the boundary of the two villages.

The plaintiffs' case is that in the year 1902 there was a partition by which this land fell to their share but that at the time of the Settlement it was wrongly recorded in the name of the defendants, and that on the strength of this wrong record, the defendant first party dispossessed the plaintiffs and then settled the land with the defendant second party. The land is described partly by Settlement numbers and partly by Batwara numbers. The Survey numbers are 1414, 1415, 1416 and 1417, and the Batwara numbers are 1165 and 1168 to 1175. The land described by Batwara numbers lies principally to the east of the land described by Survey numbers and is coloured red in the map filed with the plaint the land described by Survey numbers being coloured indigo.

The suit has been decreed only in respect of the land described by Survey numbers, which is a small portion of the whole land and the plaintiffs have appealed in respect of the rest.

It appears that, at the time of the Cadastral Survey, there was a boundary dispute between the villages Gamail and Hathiondha which was decided on the 13th June, 1904, by the Assistant Superintendent of Survey. By this decision the boundary was declared to be a black dotted line A C D E F G H I J K L M N O P Q R: this is the line which was adopted at the time of the Cadastral Survey, and it is this line which has been made the basis of the decision of the learned Subordinate Judge, and he has found that east of the line the plaintiffs have failed to establish possession within 12 years, and that consequently their suit is barred by limitation.

The Assistant Settlement Officer's decision being so very largely the basis of the decision, it has been made the first ground of attack by the learned Counsel for the appellants, who contends that it was passed without jurisdiction. The learned Subordinate Judge treats the decision as having the force of a Civil Court decree, and the first point for consideration is, whether this is so or not. It is admitted that if the order is within jurisdiction it has the force of a Civil Court decree under section 41 of the Survey Act, but the learned Counsel for the appellants contends that the plaintiffs have not established that the Assistant Settlement Officer had jurisdiction. Section 41 of the Bengal Survey Act (Act V of 1875) says that the boundary is to be determined by the Collector according to actual possession and

"The order of the Collector under this section shall, until it be reversed or modified by competent authority, have the force of an order of a Civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector."

The person then who has jurisdiction under section 41 is the Collector, and "Collector" is defined in the Act as an Officer who is generally or specially vested with the powers of a Collector for the purpose of this Act, and "Deputy Collector" includes any Deputy Collector to whom the Collector or the Superintendent of Survey may delegate any of his functions under this Act.

Now, it appears from Notification No. 11574 L. R. dated the 7th December 1914, that a Revenue Officer appointed with the additional designation of Settlement Officer is vested with the powers of a Superintendent of Survey under the Bengal Survey Act and it is not disputed that he has the powers of a Collector under section 41 of the Act. It is also admitted that he has power to delegate his function under this section to an Assistant Settlement Officer, but what is contended is, that it has not been shown that in fact there was delegation in the present case.

The contention is, in my opinion, without force. The point is an entirely new one taken for the first time in appeal before us. The delegation must have been by an office order and if the objection

had been taken at the trial stage it would have been a simple matter to produce the order, or, if the order were destroyed in the ordinary course, as is probable, to have examined witnesses. We are precluded from taking such evidence at the appellate stage and it would, in my opinion, be improper and unfair to remand the case on this ground. The ordinary rule of law is that official acts are to be presumed to be legally performed and in the present case the jurisdiction of the Assistant Settlement Officer not having been questioned in the Trial Court, it must be presumed that he acted within his jurisdiction in passing the order of the 13th June 1904. This being so, his order has the force of a Civil Court decree as to possession, so that in regard to all the land west of the boundary line laid down by him it was in possession of the plaintiffs on the 13th June, 1904, and all the land east of that line was in the possession of the defendants. The present suit was filed on the 27th of June, 1916, so that the plaintiffs were not in possession of the land east of the boundary line within 12 years of the filing of the suit, and their suit is barred by limitation in respect of this land unless they can establish that they had since that date dispossessed the defendants. Mr. Das, the learned Counsel for the appellants, frankly admits that he has not established this.

I may note here that in addition to the order of the Assistant Settlement Officer there is a mass of other evidence, both oral and documentary, to show that before the time of the decision of the boundary dispute and at that time, the plaintiffs and defendants were in possession of the land as therein defined. This evidence has been very carefully considered by the learned Subordinate Judge, but in view of my finding that the order of the Assistant Settlement Officer has the effect of a Civil Court decree as to possession, it is unnecessary to do more than say that I fully agree with his finding that on this evidence the plaintiffs were clearly not in possession even before the date of that order. (The rest of the judgment is not material to the report.)

Ross, J.—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 98.

JWALA PRASAD, C. J. AND DAS, J.

Ram Narayan Rai and others—Plaintiffs-Appellants

v.

Ram Deni Rai and others—Defendants-Respondents.

Appeal No. 939 of 1919 decided on 27th July 1921 from the Appellate decree of Sub. J., Chupra.

(*a*) *Limitation Act, Arts* 148 *and* 144—*One mortgagor redeeming mortgage—Suit for possession by co-mortgagor is governed not by Art* 148 *but by Art.* 144

Art 148 provides for a suit against a mortgagee to redeem or to recover possession of immoveable property mortgaged. But a suit by a mortgagor against a co-mortgagor to recover possession of his share of the mortgaged property is not a suit for redemption nor a suit for possession of immoveable property mortgaged. This suit must be governed by Art. 144 and not by Art. 148.

[P. 99, C. 1, & 2]

(*b*) *Adverse possession—Redemption by one co-mortgagor—His possession is not adverse ipso facto to the other co mortgagors—Record-of-rights*

Where defts co-mortgagors redeem the mortgage and get into possession, their possession as alienors does not, in any way, contradict the ulterior proprietary right of the Plaintiffs mortgagors It must be established that the Defendants have been in possession for twelve years on an assertion of a hostile title to the knowledge of the Plaintiffs The entry in record-of-rights would not operate to the prejudice of the Plaintiffs even if it has recorded the exclusive title of the Defendants, unless it has been established that the Plaintiffs had knowledge of the entry more than twelve years before suit. [P. 99, Cs. 1, 2, P. 100, C 1]

Purnendu Narain Sinha—for Appellants.

Lachmi Narain Sinha and *Satya Sunder Bose*—for Respondents.

Das, J.:—This was a suit by the Appellants for recovery of possession of their 10 annas 6 pies 8 krants share in the properties specified in the plaint. The facts found by the lower Appellate Court are as follow :—

1. That the Plaintiffs and the Defendants executed a usufructuary mortgage in respect of certain properties including the Plaintiff's share in them in favour of one Tirath Pande.

2. That the Defendants paid off Tirath Pande and redeemed the mortgage on the 20th October 1894 and obtained possession of the properties.

3. That the plaintiffs did not contribute their proportion of the expenses properly incurred in redeeming the mortgage, nor

did they relinquish their title to the properties in favour of the Defendants.

On the facts so found, the only question that arises for consideration is one of limitation. The Courts below have concurrently come to the conclusion that Art. 144, and not Art. 148, applies, and that the Plaintiffs' suit is accordingly out of time.

Now it will be noticed that under S. 95 Transfer of Property Act, "where one of several co-mortgagors redeems the mortgaged property, and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession." Under S. 100 of the same Act, where immoveable property of one person is by act of parties or operation of law made security for payment of money to another, and the transaction does not amount to a mortgage the latter person is said to have a charge on the property. In other words, there is a clear distinction in the Transfer of Property Act between a charge and a mortgage. This is at the bottom of the rule formulated in the decisions to which the learned Subordinate Judge refers that Art. 148 does not govern a suit brought by a mortgagor against a co-mortgagor for possession of his share of the properties redeemed by the co-mortgagor.

Speaking with great respect, the consideration whether the Transfer of Property Act has drawn a distinction between a charge and a mortgage does not seem to me to be material. The question is one of limitation, and it is necessary to see whether the Limitation Act has recognized a distinction between a charge and a mortgage. As to this, there cannot be any possible room for controversy that no such distinction has been recognized in the Limitation Act. A suit against a charge-holder would be a suit against a mortgagee within the meaning of the term as used in Art. 148.

But notwithstanding this view of the matter, I am of opinion that Art. 148 does not apply to a suit such as this. Art. 148 provides for a suit against a mortgagee to redeem or to recover possession of immoveable property mortgaged. Now a suit by a mortgagor against a co-mortgagor to recover possession of his share of the mortgaged property is not a suit for redemption nor a suit for possession of immoveable property mortgaged. The redemption has already taken place, and it cannot be said that because, by operation of law the Defendants have a charge on the property for the Plaintiffs' proportion of the expenses properly incurred in redeeming the property, that there was a mortgage of the property in favour of the Defendants. The Plaintiffs have a right to recover their share on recouping to the Defendants their proportion of the mortgage money paid by the Defendants, and the suit in which such a right is asserted is a suit for possession, not a suit for redemption. I agree with the Courts below that this suit must be governed by Art. 144 and not by Art. 148 of the Limitation Act.

But this conclusion does not decide the case. Under Art. 144, the time begins to run when the possession of the Defendant becomes adverse. The Courts below have taken the view that the possession of the Defendants become adverse to the Plaintiffs in 1894 when he recovered possession of the property on redemption. This is incorrect. As was pointed out by West, J., in *Ram Chandra Yashvant* v. *Sadashiv Abaji* (1) the possession of the Defendants as lienors did not in any way contradict the ulterior proprietary right of the Plaintiffs. On the contrary it implied and preserved that right, since it would be impossible for a man to hold a lien on his own property. To quote the words of West, J., "as long as a possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right, rather than to a right which contradicts the ownership. As the right to possession exists, the owner is not called on to take any step towards putting an end to it, and hence no presumption arises against him from his quiescence, nor does the possession become adverse to him. This principle is the one on which the decision in *Dadoba* v. *Krishna* (2) proceeds, and it

(1) (1886) 11 Bom. 422.
(2) (1879) 7 Bom. 34.

is implied in *Doe Dem Colclough* v. *Hulse* (3) and other cases." This principle has been accepted in numerous cases: see *Moidin* v. *Oothumanganni* (4) *Bhaudin* v. *Sheikh Ismail* (5) *Faki Abas* v. *Faki Nurdin* (6). In my opinion the mere fact that the Defendants took possession of the property on redemption does not decide the suit between the parties. It must be established that the Defendants have been in possession for twelve-years on an assertion of hostile title to the knowledge of the Plaintiffs; otherwise the Plaintiffs are entitled to succeed. The record-of-rights may be valuable evidence, if it has recorded the exclusive title of the defendants and if there is evidence from which the Court below is able to come to the conclusion that the Plaintiffs were aware of the entry twelve-years before suit. But if it has merely recorded the possession of the Defendants, it will have no effect whatever, for such possession is referable to a right consistent with the subsistence of the Plaintiffs' title in the property. Nor would the entry operate to the prejudice of the Plaintiffs even if it has recorded the exclusive title of the Defendants, unless it has been established that the Plaintiffs had knowledge of the entry more than twelve-years before suit.

I would remand the case to the Court below for a finding on the following issue: did the possession of the Defendants become adverse to the plaintiffs, and, if so, when?

Let the record be sent down to the Court below forthwith and let the lower appellate Court return its finding to this Court within a month from the date he receives the record from this Court. Costs will abide the result.

Jwala Prasad, C. J.:—I agree.

Case remanded.

(3) (1825) 3 B & Cr. 757=5 Dowl & Ry. 650.
(4) (1888) 11 Mad 416.
(5) (1887) 11 Bom 425.
(6) (1891) 16 Bom 191.

A I. R. 1923 Patna 100.

DAS AND FOSTER, JJ.

Ugramohan Chowdhri—Plaintiff-Appellant

v.

Lachmi Prasad Chowdhri and others—Defendants-Respondents.

Ref. in F. A. No. 66 of 1920 decided on 29th January 1920 from a decision of Sub-J., Bhagalpur, dated 13th August 1919.

(a) *Court Fees Act, S. 7 (4) (c—Suit for declaration as adopted son and for possession is within S 7 IV (c) and S. 7, cl. (1)*

A challenge having been directly thrown upon the title a suit for declaration of title as adopted son and for possession is a suit that comes within S. 7, cl. (4), sub cl. (c) of the Court Fees Act [P 101, C 1]

(b) *Specific Relief Act, S 42—Challenge thrown on title—Suit for declaration to meet the challenge is one under S 42*

Where, a challenge is directly thrown on the title of the Plaintiff, and the plaintiff comes to Court in order to meet that challenge, it is a suit clearly under S 42 of the Specific Relief Act. [P 101, C. 1.]

S. M. Mullick, Rajendra Prasad and *Sambhu Saran*—for Appellant.

L. M. Ganguli and *N. C. Ghose*—for Respondents.

Judgment:—This is a Court-fee matter. The question involved is of considerable importance and in our view should be decided by a large Bench. The point is this: Whether a suit for declaration of title as adopted son and for possession is a suit that comes within S. 7, cl. (4), sub-cl. (*c*) of the Court Fees Act, or within S. 7, cl. (5) of that Act. The learned Registrar has taken the view that it comes under S. 7, cl. (4), sub-cl. (*c*) of the Court Fees Act. Mr. Sushil Madhub Mullick on behalf of the Appellant has argued that this view is erroneous inasmuch as every suit for possession must necessarily involve adjudication of the title of the Plaintiff. He says that in every suit for possession the Plaintiff must prove his title, and that consequently he must necessarily ask for declaration of his title. In my view the question depends on whether the suit is a suit that comes within S. 42 of the Specific Relief Act. If it is a suit that comes within S. 42 of the Specific Relief Act then it must come under S. 7, cl. (4), sub-cl. (*c*) of the Court Fees Act.

It is true that every suit for possession does involve a question of title in

the sense that the Plaintiff in an ejectment suit might prove his title. But that is not the case here. Where, however, a challenge is directly thrown on the title of the Plaintiff, and the Plaintiff comes to Court in order to meet that challenge, it is a suit clearly under S. 42 of the Specific Relief Act, and it would accordingly in my view come under S. 7, cl. (4), sub-cl. (c) of the Court Fees Act. In this case it appears to me that there was undoubtedly a challenge thrown on the Plaintiff's title. He came to Court to meet that challenge. He asked for a declaration that he was the adopted son of somebody, and for consequential relief, that is, for possession. It is not the same thing as an ordinary suit for possession where the question of title incidentally arises. In my view the learned Registrar has taken an entirely correct view of the matter, but as the question is always coming before us in one garb or another we think that it ought to be finally settled by a larger Bench. Place the record before the learned Chief Justice for necessary orders.

The Record was placed before C. J. who passed the following order:

Dawson-Miller, C. J.—In my opinion this decision is correct. There is no other decision in conflict with the above and I do not think it is necessary to refer it to a Full Bench.

A. I. R. 1923 Patna 101.

COUTTS AND ROSS, JJ.

Rameshwar Singh Bahadur—Plaintiff-Appellant

v.

Younus Momin—Defendant-Respondent.

L. P. A. No. 77 of 1920 & I of 1921 decided on 7th June 1921, against the Judgment of Das, J. in S. A. No. 835 of 1918 dated 26th May, 1920.

B. T. Act, Ss. 105 and 109—Rent fixed by Compromise under S. 105—Subsequent decision fixing different rate is without jurisdiction.

The rent was fixed under S. 105 by compromise. Later on in 1910 the suit was decreed based on lesser rate of rent admitted by tenant. In the present suit rent at rate fixed by the compromise was demanded.

Held, the Court which decided the rent suit in 1910 had jurisdiction to pass a decree for the rent for the years which were in suit in that particular case, but in view of the provision of S. 109 of Bengal Tenancy Act, it obviously had no jurisdiction to pass a decree fixing the rate of rent as this had already been decided in the proceeding, under S. 105 by a compromise decree and in so far as it did so there was no doubt that it was acting without jurisdiction. This being so, the decision, cannot be *res judicata*. (P. 102, C. 1).

S. C. Mitter and *Murari Prasad*—for Appellant.

Ram Prasad—for Respondent.

Coutts J.—This appeal (No. 77 of 1920) arises out of a suit for rent for the years 1319 to 1322. The rent is claimed at the rate of Rs. 10-11-6 which was the rate fixed on compromise in a proceeding under Sec. 105.

It appears that previous to the present suit the Plaintiff in the year 1910 instituted a suit for rent at this rate. The suit was contested by the Defendant who relied on the record of rights in which the rent of the holding was shown as Rs. 9-11-7½. The suit was decreed at the rate admitted by the Defendant. Subsequently in the year 1915 there was another rent suit by the Plaintiff and the Plaintiff again claimed at the rate fixed on compromise in the proceeding under S. 105. This suit was not contested by the Defendant and the Plaintiff was given an *ex-parte* decree at the rate claimed by him. He has now brought the suit out of which this appeal has arisen. The suit was decreed in the Court of first instance at the rate admitted by the Defendant. Namely, Rs. 9-11-7½, and on appeal to the District Judge this decision was upheld. There was a second appeal to this Court which was heard by a single Judge and the decisions of both the lower Courts have been upheld. It is against this decision that the present appeal has been filed.

The basis of the decision appealed against is that the rate of rent decreed in the rent suit of 1910 is *res judicata* and that therefore the Plaintiff is not entitled to a decree at the rate of rent fixed in the compromise.

The only point which is urged before us in this appeal is that the decree of the Court which decided the rent suit of 1910, in so far as it decided the rate of rent, was without jurisdiction and S. 109 of the Bengal Tenancy Act is relied on. That section runs as follows:—

"Subject to the provisions of Sect. 109A

a Civil Court shall not entertain any application or suit concerning any matter which is or has been the subject of an application made under Ss. 105 to 108 both inclusive."

There is no doubt that the Court which decided the rent suit in 1910 had jurisdiction to pass a decree for the rent for the years which were in suit in that particular case, but in view of the provision of S. 109 of the Bengal Tenancy Act, it obviously had no jurisdiction to pass a decree fixing the rate of rent as this had already been decided in the proceeding under S. 105 and in so far as it did so there is in my opinion no doubt that it was acting without jurisdiction. This being so, the decision, so far as this particular point is concerned, cannot be *res-judicata*. In this view of the case the contention urged on behalf of the Appellant must in my opinion prevail. I would accordingly set aside the decision appealed against and decree the suit at the rate fixed in the compromise in the S. 105 proceeding. In other words I would decree this appeal with costs throughout.

Ross, J. :—I agree.

Appeal allowed.

A. I. R. 1923 Patna 102 (1)

COUTTS AND ROSS, JJ.

Sukhraj Bahadur and another —Petitioners

v.

Debi Bukhsh—Opposite Party.

Civil Rev. No. 381 of 1921, decided on 7th January 1922, from an order of the Sub. J., Gaya.

Civil P. C., O. 21, R. 66—Date fixed for valuation on Sale proclamation—Fixing Valuation before that date is without jurisdiction—Jurisdiction.

The Court acts without jurisdiction in fixing the valuation on a sale proclamation before the date fixed for the same.

Kailaspathi—for Petitioners.

Coutts, J. :—This is an application in revision against an order fixing the valuation on sale proclamation. It appears that time was granted until the 30th of July 1921 for hearing the parties as to the proper valuation but on the 16th of July 1921 the valuation was fixed. It is clear that having fixed the 30th of July 1921 for the hearing of the matter the Judge acted without jurisdiction in fixing the valuation on the 16th of July. His order and his subsequent order declining to review this order must be set aside. The application is allowed.

Ross, J. :—I agree.

Application allowed.

A. I. R. 1923 Patna 102 (2).

DAS, J

Hiralal Mahton—Petitioner

v.

Lila Mahton and another—Opposite Party.

Criminal Revision Nos. 416, 417 and 418 of 1921 decided on 29th September 1921, from an order of the Addl. Dt. Mag., Patna.

Criminal P. C., S. 195—Different views of Courts—Sanction should not be granted.

When two Courts take different views of facts, sanction for prosecution should not be granted.

[P. 103, C. 1.]

B. C. Sinha—for Petitioners.

H. L. Nandkeolyar—for Opposite Party.

Judgment :—These applications are directed against the order of Mr. S. L. Gupta, Additional District Magistrate of Patna, according sanction to the opposite party to prosecute the petitioners under section 193 of the Indian Penal Code.

It appears that the petitioner in the Revision Case No. 416 instituted criminal proceedings against the opposite party with reference to a certain plot of land. His case was that the opposite party was a non-occupancy *raiyat* in respect of the plot of land and was so recorded in the record-of-rights, that he abandoned the holding and on such abandonment the landlord settled the land with the petitioner and that he grew the crops, but that the opposite party carried them away. That was the case as made by him in the Criminal Courts and in support of his case he produced the record as a non-occupancy tenant holding for one year only. The Court of first instance believed his case and convicted the opposite party. There was an appeal to Mr. S. N. Gupta who took a different view on the facts of the case and set aside the conviction. But it is certainly noteworthy that in the judgment of

Mr. S. L. Gupta allowing the appeal of the opposite party, there is not one word to suggest that there was any perjury committed by the petitioners before him. He took the view that there was a *bona fide* civil dispute between the parties and that the story of running away was manifestly incredible, as on the complainant's own evidence the accused continued uprooting the crops in spite of the protest and was still in the act when he returned with the Chowkidar. The opposite party, then applied before the trial Court under section 195 of the Code of Criminal Procedure for sanction to prosecute the petitioners under section 193 of the Indian Penal Code. The trial Court declined to accord sanction. Thayt hen came up to Mr. S. L. Gupta again and asked him to grant them sanction to prosecute. Mr. S. L Gupta has now accorded sanction to the opposite party.

In my opinion this is not a case in which sanction should have beeen granted at all. On the facts the two Courts, took two different views. The trial Court convicted the opposite party. It may be that the conviction was wrong and it may be that Mr. S. L. Gupta was quite right in setting aside the conviction. But still the fact remains that on the facts two Courts took two different views. That being so it is impossible to see how, sanction could be granted for prosecution of any one I must revoke the sanction which has been granted in this case by Mr. S. L. Gupta.

Sanction revoked.

A. I. R. 1923 Patna 103

JWALA PRASAD AND ADAMI, JJ.

Sumeshwar Jha and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 123 of 1921, decided on 7th November 1921, against an order of the S. J. of Muzafferpore.

Criminal P.C S. 279—Charge to Jury—Failure to refer to inadmissible evidence heard by jury—Vitiates verdict.

The verdict of the Jury cannot be set aside unless there is a clear misdirection in the charge by the Judge to the Jury [P 103, C. 2]

But where statement of the accused amounting to confession was brought to the light in the presence of the Jury, but was not referred to in charge to the Jury.

Held: if the statement was inadmissible then omission to refer to it in the charge was a misdirection in law and vitiated the trial. If on the other hand it was admissible this statement must have been prominently brought out by the Judge in his charge to the Jury. [P. 104, C 1, 2.]

S. P. Varma and *H. P. Sinha*—for Appellants.

Assistant Govt. Advocate—for the Crown.

Jwala Prasad, J.—The appellants were committed to the Court of Sessions on charges under sections 147, 148 and 379, Indian Penal Code. The accused No. I, Sumeshwar Jha, was further charged under section 304 and the remaining accused were charged under section 304 read with section 149, Indian Penal Code.

As to the charge under section 379, the accused have been convicted by the learned Sessions Judge on acceptance of the unanimous verdict of the Jury. The verdict of the Jury cannot be set aside unless there is a clear misdirection in the charge by the Judge to the Jury. It is pointed out by the learned Counsel on behalf of the accused that the verdict of the Jury is vitiated on account of the statement of the accused, which was in the nature of an admission of his having removed potatoes from the field in question, having been brought on the record. During the examination of the Sub-Inspector P. W. No. 10, upon questions put to him by the Public Prosecutor, he stated that Sumeshwar Jha had stated to him that "he had gone there (the field)" for sharing *alua* which was given by one Hiraman Dusadh of village Sultanpore on behalf of complainant, he having only *bata* interest in it; only 6 *passeries* of *alua* were dug by Hiraman, of which he took three *passeries* as his own share leaving the

other half with Hiraman Dusadh for sharing with him, and they had exchange of blows in which Ramruch sustained injuries" The Sub-Inspector then stated that "it further appeared from him (Sumeshwar Jha) that he was alone and that he took away 3 *passeries* of *alua* on his own head." The learned Sessions Judge held that the latter portion of the statement, where Sumeshwar told the Sub-Inspector that he had taken 3 *passeries* of *alua* on his own head, was inadmissible in evidence, as it may in certain circumstances amount to a confession. He remarked in the margin of the evidence of the Sub-Inspector that this portion will not be placed before the Jury in summing up. In the charge to the Jury there is no reference made to this statement. If the evidence in the shape of the statement of the accused referred to above was inadmissible, in view of its having been brought to light in the presence of the Jury and formally recorded as part of the evidence, it cannot with any confidence be said that the Jury were not at all influenced by the statement It is immaterial that the Judge did not refer to it in his charge to the Jury and it does not at all affect the question. The Jury had heard the statement and they knew that the accused Sumeshwar had admitted before the police the fact of his having removed the three *passeries* of *alua*. It is possible, therefore, that their judgment in the case was affected by the statement in question. The removal of the *alua* is, we think, the most important ingredient in the charge of theft which the Jury was trying at the moment; and the statement of the accused Sumeshwar Jha before the Police tending to show that he had admitted the removal of *alua*, must have weighed with the Jury to a great extent in arriving at the conclusion as to whether the accused had or had not committed the offence in question. The mischief had been already done in bringing the statement to the notice of the Jury and therefore, it could not be undone by the omission by the Judge to refer to it in the actual charge to the Jury.

It will also be observed that the charge to the jury does not clearly bring out the delay that took place in the lodging of the first information, but it only asked the question as to whether the delay would go against the prosecution case.

If the statement referred to above was inadmissible as held by the learned Judge, then his omission to refer to it in the charge was a misdirection in law and vitiated the trial and the accused, therefore, must be re-tried. If, on the other hand, the statement in question was admissible as is contended for by the learned Assistant Government Advocate, then the trial is not vitiated. But this statement must have been prominently brought out by the learned Judge in his charge to the Jury. Therefore whether the statement is admissible or not, the result is the same and the verdict of the Jury is vitiated. The question then is whether the accused should be put upon their trial again on the charge under section 379.

In view of the findings we have arrived at on the general circumstances of the present case and in view of the circumstances of the case and also in view of the fact that Sumeshwar has already been punished under section 325, we do not think that a re-trial at this stage is at all desirable in the interests of justice.

The result is that we set aside the convictions and sentences of all the accused under all the sections except that of Sumeshwar Jha under section 325, Indian Penal Code. The sentence passed upon him under that section has been already reduced to a period of three years' rigorous imprisonment.

Adami, J.—I agree.

Appeal allowed in part.

A. I. R. 1923 Patna 104.

JWALA PRASAD, AND ROSS, JJ.

Jai Sao and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Rev. Nos. 335 and 337 of 1921 decided on 2nd December 1921, against the order of Dist. Mag. of Patna.

(a) *Crim. P. C. SS.* 117 (4), and 110—*Association of accused not proved—Joint trial is illegal.*

The legality of a joint trial does not depend merely upon what is alleged for the prosecution.

A joint trial is not permissible unless there is evidence of something in the nature of conspiracy or of concert in respect of the various acts of habitual mischief to which the witnesses depose. Ordinarily, under S 110, Cr. P. C every person has to be tried separately for the offences enumerated therein. In other words, a joint trial is only permissible when two or more persons have been associated for the purpose of committing the offences mentioned in section 110, clauses (a) to (f). The association of several persons in the commission of the offence mentioned in section 110 of the Cr. P C must be established in order to entitle the Magistrate to try several persons jointly. In a case under section 110, Cr. P C. in which the evidence of bad character of the accused persons and of the individual nefarious acts committed by them form the integral parts of the offence, it is impossible to conceive that the evidence led against one will not at all prejudice the case of the other accused persons assembled together in the same dock. [P. 110, C. 2, P. 111, C.1.]

(b) *Practice—Criminal Trial—Suggestions of Public Prosecutor—Court should not brush aside.*

Where the accused as well as the Public Prosecutor wanted a separate trial of the accused persons and the Magistrate nevertheless tried them jointly, *held* that the Magistrate should not brush aside the suggestion of the Public Prosecutor in charge of the case who knows how far he can establish criminal association by actual evidence, which the Magistrate cannot anticipate. This is a salutary principle. [P. 111, C. 1, 2.]

S. N. Haq, J. N. Gupta and *Yusuf*—for Petitioners.

Assistant Govt. Advocate—for the Crown.

Jwala Prasad, J. :—The petitioners, eight in number, Raja Kam Sao, Jhari Lal, Jai Balgovind Lal, Gajoo Sao, Chilhauri Sao, Jai Sao, Parshadi Sao, Chamru Sao, of village Aunta, near Mokameh Ghat Station, have been directed by the Sub-Divisional Officer of Barh, by his order dated the 29th of April 1921, to execute bonds of Rs. 100 each, with two securities of Rs. 100 each to be of good behaviour for one year or in default to undergo rigorous imprisonment for one year each under section 110 (b) of the Criminal Procedure Code. This order has been based upon the finding of the Magistrate that the accused habitually, " dealt in goods which they knew to have been stolen from railway goods shed at Mokameh Ghat."

Upon the Report of the Police at Mokameh, dated the 15th of October 1920 the Magistrate drew up the following proceeding :

" Whereas from the report of G. R. Police, Mokameh, dated the 15th of October 1920, it appears that the above named eight accused persons are by habit receivers of stolen property knowing the same to have been stolen. I, therefore, order the above eight accused to show cause at 10 A.M. on 8th November 1920 why they should not be bound down for three years to be of good behaviour under section 110, Criminal Procedure Code, in terms given below. —Raja Ram a bond of Rs. 1,000 with two sureties of Rs. 500 each—other seven defendants bonds of Rs. 100 each with two sureties of Rs. 100 each."

Now, the circumstances setforth in the report of the Police referred to above are as follows:—

1. That about 302 bags of linseed and other articles were found short at destination from Mokameh Ghat although seals on the waggons were intact, leading to a conclusion that the thefts occurred at Mokameh Ghat before the waggons left the place.

2. That the coolies, who mostly came from the village Aunta, have been generally found concealing the grains from the Ghat Station and disposing them off to their receivers at Aunta.

3. That one gang of receivers, under the leadership of Jhari Sao, was prosecuted in the year 1913 under section 110, Criminal Procedure Code, and Jhari and Balgovind were convicted.

4. That it came to light during enquiry the proceedings in 1913, that the stolen property received by the then accused receivers was despatched by them by rail to Lakhisarai Station under different fictitious names.

5. That the remnants of the above mentioned gang gradually formed afresh the present gang of receivers under the leadership of accused Raja Ram. This time they changed their *modus operandi* to defy the Police and to avoid detection, that is, they began to send away their stolen property by carts or boats towards Lakhisarai, Barb, and other places across the river.

6. In the year 1919 there was an abnormal increase of crime at Mokameh Ghat and about 27 coolies were arrested red-handed carrying property in almost each case towards the village of the accus-

ed. Eighteen coolies were similarly arrested in 1918 and eleven in 1920 with more or less the same result.

7. That during the enquiry of this case it transpired that present accused are mainly responsible for the thefts as receivers and that they actually sent large consignments from time to time to Lakhisarai and Barh per carts and boats.

8. That the accused Raja Ram, Jai, Parshadi and Chamru have transacted in linseed to the extent of Rs. 20,280, in spite of the fact that none of them has got even a small plot of land producing linseed nor have they been known to have ever imported it from other places.

9. That the accused have been maintaining each a nominal shop only to screen their *mala fide* dealings with the coolies and to afford the latter opportunities to frequent their shops with the ulterior object of purchasing things.

In order to show that the accused persons had facility in perpetrating the offences of receiving stolen property, the Sub-Inspector in his report has given a description of the situation of the village Aunta, their shops and the Railway transhipment platform, which show that they are all in close proximity. In his report the Sub-Inspector says that: "Aunta is a large village inhabited mostly by Babhan and low class people. Almost every adult male member of the latter class works as a cooly in the Mokameh Ghat goods shed where transhipment of goods from B. and N. W. Ry and E. I. Ry. and *vice versa*, is carried on on a very grand scale. The accused have got nominal shop of groceries. Their shops and houses are located on the outskirts of the village just outside the Railway fencing within easy reach of distance from the Railway shed. The Mokameh Ghat shed is one of the biggest transhipment stations in India. Some time about three hundred waggons are transhipped in one day. The commodities passing through the shed are of a variety, but chiefly rice, wheat, grain, linseed, sugar, salt and the like. The yard is about two miles in length. A portion of that is tinned, known as the shed but without any enclosure. The goods are usually detained for one day, sometimes for two or more for being transhipped. About 250 coolies are always at work. About 100 of them hail alone from Aunta. A considerable number of these coolies have got every facility of pilfering from the consignments in the shed or carrying away a bag or two as opportunity offers."

The plan of the Mokameh Ghat Station, the transhipment platform and the Aunta village, where the shops of the accused are, has been appended to the report of Sub-Divisional Officer dated the 15th of January 1921. In order to show that the accused are members of one gang associating together for the purpose of carrying on the offence of receiving stolen property from the coolies, the Sub-Inspector says in his diary:

"The accused live in one village and are intimate with each other. They have been seen often associating together and with the coolies working in the shed who are admittedly bad characters. They have also been found transacting together with one and the same Mahajan at Lakhisarai, Barh and Mokameh. They were given an opportunity but could not explain satisfactorily about their transactions and the sudden change in their circumstances. A few years back they were men of no means but now they are men of thousands living comfortably in a high style."

The evidence laid in the present case is enormous. As many as 148 witnesses for the prosecution and 48 witnesses for the defence have been examined, and no less than 115 Exhibits, excluding their sub-numbers have been produced. By means of the aforesaid evidence the prosecution has tried to establish what is contained in the report of the Sub-Inspector upon which the proceeding under S. 110, Criminal Procedure Code, was come to. The report of the Sub-Inspector does not itself show any specific instance of receiving stolen property in which all the accused were acting jointly and in concert. No doubt, the Sub-Inspector's report says that the accused persons belong to a gang of receivers of stolen property; the conclusion is not justified by the materials set forth in the report. The report refers to a gang of receivers of stolen property in 1913 headed by Jhari and Balgobind in which Jhari and Balgobind were convicted but nothing has been stated

in report, nor anything shown in the evidence that the remaining six accused were members of that gang. The present gang is said to have been formed under the leadership of Raja Ram and the only circumstances mentioned for thinking seven accused were also members of that gang is the fact that four of the accused, Rajaram, Jai, Parshadi and Chamru, have transacted in linseed, etc., to the extent of an enormous sum of rupees, namely Rs. 20,280 with the Mahajans in Lakhisarai, Mokameh and Barh. This circumstance, again, even if accepted as an evidence of association, leaves out of account the remaining four of the accused. It has not been stated in the report, nor shown in the evidence, that the remaining four of the accused had any concern with the transaction referred to above. The facts and incidents relied upon by the prosecution do not establish an association of all the accused in the nefarious act of receiving stolen property. There are no doubt, certain facts, namely, they were carrying on shops in the close proximity of the Railway transhipment shed; that they were residents of a village from where Railway coolies are largely recruited: that they were carrying on shops affording facilities to the coolies in disposing of the stolen grains through them, and also giving facility in receiving the stolen goods. Each of the accused holds separate shops in that locality. There is nothing to show that these accused have associated together and received any stolen goods from the coolies. The coolies coming from the village Aunta, shown above, are about 100 in number. Some of these, as set forth in the report of the Sub-Inspector, have been convicted for theft. No particulars have been given as to which of the coolies have formed into a league with the accused in the present case. The reasons, therefore, for the Sub-Inspector to report that these accused persons formed a gang do not hold good. Therefore, upon his report, the Magistrate could not draw up a charge under section 117 (4) for the joint trial of the present accused upon the ground that they had associated together for the purpose of receiving stolen property. The report of the Police, therefore, if truly analysed leads only to the conclusion that the accused were receivers of stolen property but not necessarily the fact that they were members of a gang having associated themselves under a common leader, Raja Ram, for the purpose of carrying on this nefarious act. The Magistrate, in his proceeding under section 110, Criminal Procedure Code, apparently does not accept the report of the Police as being sufficient to frame a charge of association of these accused persons; for he only says in the proceeding that, "the accused are by habit receivers of stolen property."

The fact that they are members of a gang or have associated together for the purpose of carrying on their profession of receiving stolen property, is a very material fact which ought to have been clearly stated in the proceeding in question. The proceeding stands in the position of the charge and on the principle of framing a charge, the proceeding must have mentioned the material facts of the accused having associated together or being members of a gang to carry out the offence of receiving stolen property in order to give the accused notice of this so as to enable them to meet it. Upon the charge, therefore, thus framed I very much doubt whether the accused could be jointly tried. At the very initial stage of trial, that is, just when the accused appeared before the Magistrate in pursuance of the notice served upon them of the proceeding, they took objection to the joint trial of all of them. This application was refused by the Magistrate in the following words:

"application for separate trial disallowed" without giving any reson for doing so.

This is not judicial determination of the legal question raised in the accused's petition. The prayer appears to have been pressed again in the course of the argument before the Magistrate who again, for the reasons set forth in his judgment, rejected the contention. In this connection, reference may profitably be made to the petition of Rajaram and Jai Sao, made before the Court of the Sub-Divisional Officer of Barh and the order passed there-

on by that officer. The petition runs thus:

"That your petitioners' Pleader from the very beginning of the case has been objecting to your petitioners' joint trial along with other accused persons. That your petitioners understand that your Honour once expressed your Honour's opinion that after the close of the case your Honour would consider the propriety or otherwise of your petitioners' separate trial. That now, as the prosecution has closed its case except to examine two or three formal witnesses, your petitioners beg to request your Honour to order separate trials. That *the prosecution also applied for the separate trial of each accused.* That the joint trial is illegal and greatly prejudicial to your petitioners."

The order passed on this petition runs thus:

"The application is refused, 146 witnesses have been examined and 54 have been cross-examined. The hearing has occupied 19 days already. My opinion has been misunderstood and the words "after the close of the case must be understood literally and not to mean after the close of the case for the prosecution."

I have underlined (here italicised) the passage in the aforesaid quotation for showing that prosecution also applied for separate trial. Thus, both the prosecution and the accused persistently asked the Magistrate to try the accused separately but the Magistrate had been putting off his decision thereon. The objection was pressed before the lower appellate Court but was overruled on finding that there was evidence of joint association of the accused in the commission of the offence of receiving stolen property and that the Magistrate had properly exercised the discretion vested in him by the section 117 (4) of the Code of Criminal Procedure. The plea has been taken pointedly before us.

We have been taken through the long and voluminous evidence of both the parties in the present case. The learned Counsel for the petitioners has urged strenuously that the evidence such as that has been adduced in the present case, does not show that there was any association of the accused persons for the purpose of perpetrating the offence of receiving stolen property. The learned Assistant Government Advocate, on the other hand, has read the evidence with his comments throughout for the purpose of refuting the argument of the defence and for saying that the evidence was sufficient for establishing that the accused were acting in concert for the purpose of committing the offence for which they have been charged. We have given our anxious consideration to the points urged before us on both sides and we have come to the conclusion that the evidence given in the case, voluminous though it is, has not carried the case of the prosecution an inch further than what was stated in the report of the Sub-Inspector upon which the proceeding under section 110 of the Criminal Procedure Code had been founded, and what has been shown to us already is insufficient for establishing any criminal association. The learned Assistant Government Advocate has relied upon the same witnesses that have been referred to in the judgment of the trial Court for the purpose of showing association of the accused persons for committing the offence in question, and I am extremely indebted to my learned brother for furnishing me with an analysis of that evidence which I here quote *in extenso* with his kind permission:

"The witnesses to whom the learned Government Advocate referred on the question of association were Nos. 5, 6, 7, 33, 41 to 48, 110 and 111.

"Witnesses Nos. 5, 6, and 7, are Chaukidars of Aunta and Mokameh Ghat. I take witness No. 5 as a sample of this part of evidence. He says that the accused are of bad character and receive stolen property from goods shed coolies at the Ghat and that all the eight accused persons sit and associate together. Evidently this statement is not relevant to proof of association "in the matter under enquiry" required by section 117 (4).

"The other witnesses are chiefly

cultivators of Aunta. I shall give some sample of their evidence. P. W. No. 33 says that all the accused associate together and send goods together by boat and by cart. This is not evidence of the required association. P. W. No. 34 speaks generally about the accused he says that they receive stolen property and that they associate together and consult together about the despatching of the property by boat and by bullock carts. In cross-examination, however, he refers specifically only to Jai, Rajaram and Balgobind as sitting together at each other's house and says that he does not remember about the other accused persons and that he only referred in his examination-in-chief to these three. This is, therefore, no evidence of general association. P. W. No. 35 only says that they associate jointly and send their goods by boat and cart. P. W. No. 36 admits that he has never seen the accused purchasing from coolies and consequently his evidence comes to nothing. P. W. No. 37 says that the accused associate together and when they have got consignments together they send them together by boat and cart. The value of this evidence is shown in his cross-examination by Pershadi where he said that he had been seeing Pershadi taking goods by cart and when asked what he was taking he said that it was Rainchi and Tissi that he was sending to Lakhisarai. The strongest statement is that made by witness No. 46, who says that the accused associate and consult together in purchasing and disposing of property. This statement, however, disappears completely in cross-examination where he says, referring to a meeting of Jai, Jhari, Pershadi and Rajaram, that he did not hear what they were saying or whether they were saying anything. That is why I said they associate and consult together in purchasing and disposing of the property."

The evidence of all the witnesses of this group is similar in character and is equally vague and indefinite.

Witness No. 110 says that the accused associate together and consult together and send their goods away together. In cross-examination he admits that he has never seen Balgobind sending away goods by cart: the specific instance that he gives of despatch of goods affects only five of the accused: and this statement is difficult to credit. He says the bags of grain were taken from the house of Parshadi, Jhari, Raja Ram, Gajoo, Chilauri, and that he saw this from his house; but he admits that Parshadi's house is not visible from his, nor is Jhari Lal's nor are any of the other accused's. P. W. No. 111 says nothing about association in his examination-in-chief. The learned Assistant Government Advocate referred to a passage in his cross examination where he said that Parshadi sends goods jointly with the other accused and that he saw him last Bhado. If this witness had been a witness to the association of the accused it is difficult to understand why he was not examined-in-chief on the point, and this single instance which he referred to can hardly be seriously regarded as evidence of association. My estimate of the evidence has been the same.

There is, therefore, no evidence of association of the accused to justify a joint trial.

The learned Assistant Government Advocate, however, contends that the proceeding cannot be quashed even if it has transpired during the trial that the evidence given to prove such an association falls short of what is required in law. He contends that there is an allegation and perhaps, an assertion in the report of the Police that the accused belong to a gang whose main profession was to receive stolen property and, therefore, the charge or proceeding which was founded upon that report cannot be questioned in the subsequent stage of the trial, although the prosecution might have failed to establish it by evidence. This contention is based upon the decision in the case of *Jogendra Kumar Nag* v. *Emperor* (1). No doubt, in the judgment of Beachcroft, J., in the case referred to the following passage occurs:

"The legality of a joint trial must depend upon what is alleged for the prosecution, not on the facts subsequently found

(1) (1920) 25 C. W. N. 884=61 I. C. 293.

to be true. In the very nature of things that must be so. Otherwise, we should be driven to this state of things that in many cases, there could be no determination whether the joint trial was legal or not till the result of the case was known; a proposition which has only to be stated to be rejected. The case for the Crown was, that certain facts existed; the existence of such facts would undoubtedly prove such association as was necessary to justify joint trial: the legality of the trial could not depend on whether the Crown succeeded in proving those facts."

With great respect to the learned Judge, I have no hesitation in dissenting from the view expressed therein. No doubt, in that case, the learned Judge came to the conclusion that there was evidence which, if believed, would justify a joint trial. The facts of that case are different from the present one where we find that there is no evidence of joint association which would justify the joint trial. If therefore, there was evidence in that case, the question did not arise as to whether the joint trial would not be vitiated merely because there was an allegation on the part of the prosecution which was not established by evidence at the trial. The observation of the learned Judge is, therefore, an *obiter dictum*. Apart from it, if the mere allegation of the prosecution were to determine the legality of a trial there is no reason why an allegation by the accused refuting the prosecution allegation at the very outset of the trial should not be accepted and the accused tried separately. In the present case, the Police Officer, in the report stigmatised the accused as belonging to a gang of receivers of stolen property. The accused, at the very first hearing, refuted this charge and said that they were not members of any gang and that the joint trial was illegal. Why should the allegation of the prosecution be preferred to that of the accused for the purpose of initiating a joint trial? There is no justification in principle for this differentiation. What is sauce for the gander is sauce for the goose. We are, on the other hand, fortified in our opinion by the decision of a Divisional Bench of this Court in the case of *Godhan Ahir* v. *Emperor* (2). At page 10, Mullick, J, observed as follows:

"It has been strongly contended that there is no evidence of habitual mischief to bring the petitioners within the operation of section 110 (*d*) of the Criminal Procedure Code, nor of any association such as would justify a joint trial, nor any specific finding as to the part which each of the accused took in the acts which have been held to constitute habitual mischief. These are matters, however, which must be the subject of the new trial, which we now direct the Magistrate to hold. The Magistrate, of course, will bear in mind that a joint trial is not permissible *unless there is evidence of something in the nature of conspiracy or of concert in respect of the various acts of habitual mischief to which the witnesses have deposed.*"

In the above quotation the lines have been underlined [here italicised] by me. We, therefore, hold that the joint trial of the accused person was illegal.

The learned Assistant Government Advocate then contends that section 117 (4) is permissive and gives ample discretion to the Magistrate to try the accused persons under section 110 of the Criminal Procedure Code either individually or jointly. This is the argument which has also been advanced by the lower appellate Courts in support of this trial. Clause (4) of section 117 of the Code of Criminal Procedure runs as follows:

"Where two or more persons have been associated together in the matter under enquiry, they may be dealt with in the same or separate enquiries as the Magistrate shall think just."

Ordinarily, under section 110 of the Code of Criminal Procedure every person has to be tried separately for the offences enumerated therein. Clause (4) of section 117, Criminal Procedure Code only permits the Magistrate to try. "Two or more persons jointly when they have associated together in the matter under enquiry."

In other words, a joint trial is only permissible when two or more persons

(2) (1918) 4 P. L. J. 7=47 I. C. 95.

have been associated for the purpose of committing the offences mentioned in section 110, clauses (*a*) to (*f*), which are under enquiry. But for clause (4) of section 117 of the Code of Criminal Procedure a joint trial would not have been in any case permitted. The circumstances mentioned therein, namely, the association of several persons in the commission of the offences mentioned in section 110 of the Criminal Procedure Code must be established in order to entitle the Magistrate to try several persons jointly. This contention of the learned Assistant Government Advocate is, therefore, also over-ruled.

Lastly, it has been contended that the joint trial of the accused cannot be set aside unless it has prejudiced the accused persons. This argument cannot be advanced seriously, for, in a case under section 110 of the Criminal Procedure Code in which the evidence of bad character of the accused persons and of the individual nefarious acts committed by them form the integral parts of the offence, it is impossible to conceive that the evidence led against one will not at all prejudice the case of the other accused persons assembled together in the same dock.

Looking into the evidence, we are satisfied that the accused have been seriously prejudiced in the trial by the evidence in the present case just in the same way as the Sub-Inspector of Police was prejudiced against all the accused on account of having found evidence against some of them. We, therefore, hold that the joint trial in this case was illegal and without jurisdiction. The convictions of the accused persons and the order passed against them under section 110 of the Criminal Procedure Code must be set aside. It will be open to the Magistrate to try the accused separately if he finds that the evidence is sufficient in the case of each accused person.

All the trouble would have been saved had the Magistrate not persisted in trying the accused persons jointly in spite of repeated objections at every stage of the trial on their behalf and notably on behalf of the prosecution itself. The Magistrate in such matters should not brush aside the suggestion of the Public Prosecutor in charge of the case who knows how far he can establish criminal association by actual evidence which the Magistrate cannot anticipate. This is a salutary principle which the Magistrate ignored in this case and took upon himself the responsibility of acting both as Public Prosecutor and as a Judge with the result that the calculation of the Magistrate to save time and trouble of trying the accused persons separately has come to naught and there has been serious waste of time and possibly prejudice to the case.

Ross, J.:—I agree.

Application allowed.

A. I. R. 1923 Patna 111.

DAWSON MILLER, C. J. AND MULLICK J.

Budhan Teli and others—Defendants-Appellants

v

Madanmohan Lal—Plaintiff-Respondent.

L. P. A. Nos. 89 and 95 of 1921, decided on 19th December 1921, against the decision of Adami, J.

(a) *Evidence Act, S. 91—Party in possession of document cannot let in secondary evidence.*

Where documents of title were in existence and defendants, upon whom the onus lay had them in their possession and failed to produce them,

Held, that secondary evidence of the terms and contents of the document cannot be adduced. [P. 112, C. 2.]

(b) *Evidence Act, S. 114—Party not producing document—Presumption is against him.*

Where in a case where the question is whether a lease is a permanent or a temporary one, the lessee does not produce the lease deed though it is in his possession, the inference to be drawn is that the lease was only a temporary one. [P 113, C. 1.]

(c) *Evidence Act, S. 115.*

Where the lessees had a right to build on the land, but they did not produce the lease deed in their possession which will show under what terms they had such a right, the mere fact that the landlord stood by while the tenants built on the land will not estop the landlord from pleading that the lease was only a temporary one. [P. 113, C. 1]

Satyadeva Sahai—for Appellants.

Kailashpathi—for Respondent.

Dawson Miller, C. J.:—The appellants in these cases are two out of 8 tenants of the respondent who sued to

eject them and recover possession of the property. The case for the landlord was that the holdings of the defendants were yearly holdings or that they were merely tenants at will and liable to ejectment. There were 8 cases altogether and the Munsif found that the character of the tenancy in these cases could not be determined, they were apparently of some age, that no fixed rent could be established on the evidence, that there was no custom of transferability, and eventually decreed the plaintiff's suit.

The defendants appealed to the District Judge and the District Judge held that the tenants had been in possession for a long period and that, from the facts, he was entitled to draw an inference that the tenancies were permanent. He also found in favour of the custom of transferability and, further, upon the question of estoppel, he found that the landlord was estopped from denying the permanency of the defendants' interest.

From this decision a second appeal was brought and heard before Mr. Justice Adami in this Court. The learned Judge of this Court agreed with the decision of the District Judge in 6 of the cases and as to those there is no appeal. In the other two cases it had been found as a fact by the Munsif and was not in dispute in the first appellate Court that the defendants' settlement papers or *bandobast* papers showing their title were in their possession and not produced. He, therefore, came to the conclusion that in such circumstances it was not competent for these defendants to give any evidence as to the nature of the terms contained in their documents of title. Therefore, he allowed the appeal in so far as these two tenants were concerned, finding that they had in the circumstances failed to make out that they had anything more than a yearly interest in the land.

From that decision the two defendants in question have appealed, and it is argued before us to-day that it was not competent to the learned Judge of this Court to overrule the findings of fact of the learned District Judge. The question, however, raises a point of a law arising under the Evidence Act. It is quite clear by the terms of section 91 of the Evidence Act that where a contract or a grant or any other disposition of property has been reduced to writing no evidence shall be given in proof of its terms except the document itself or except secondary evidence in certain cases. It was admitted here that the documents of title were in existence, that the defendants, upon whom the onus lay, had them in their possession and they failed to produce them. The cases in which secondary evidence of a document may be given do not include cases such as the present. It was, therefore, no longer open, to my mind, to the defendants, the present appellants to give any evidence at all as to what were the terms of the settlement of the land with them, they having failed to produce what after all was not only the best but was conclusive evidence as to those terms. The findings of the learned District Judge, therefore, which were arrived at by drawing inference from such facts as long possession and the acts of the parties and so on can have no application to a case such as this, and the learned District Judge was, in my opinion, not entitled to draw these inferences, which, after all, were merely inferences drawn from evidence which was given to prove what were the terms of a written grant or contract, and to this extent it seems to me that the learned Judge of this Court was perfectly right.

A further point was taken that the evidence showed to the satisfaction of the District Judge that the landlord was estopped from denying the permanency of the defendants' holding. The findings of the learned District Judge upon this point were stated thus:—

"I find that the sites of the houses were settled with the defendants for the purpose of providing them with a home; and in accordance with that settlement they built brick foundations in the sub-soil, and for generations maintained superstructures of a quality which, in the circumstances of an Indian village, both they and the landlords must have recognised as appropriate to the making of permanent family abodes. In one year they may have put up a new thatch, that in another they may have renovated a wall, but the permanent house remained. In the light

of ordinary experience it seems likely that the tenants expended this money in expectation of a permanent home and the landlord acquiesced; otherwise the tenants would have been foolishly wasting money and the landlord would have been standing inactive while the tenants were injuring his property."

In the circumstances of this case it does not seem to me that that finding of the learned District Judge can have any possible bearing upon our decision. The finding is that the tenants built what has been described as a *katcha pucca* house, that is, a house with brick foundation and mud walls and a thatched roof as a permanent abode, and that the landlord stood by and took no action to prevent them from doing so. If by the terms of their lease it was quite clear that the lease gave them no power whatever to erect anything in the nature of a permanent home or a building of this nature and the landlord either by his omission to interfere or by his active intervention encouraged the tenants in the mistaken idea that they had power to build such a house and that they had a permanant interest in the land, no doubt the landlord could not afterwards turn round and set up a case that they only had a temporary interest, but in this case the terms of the lease have not been proved though they might have been proved by the defendants and it has been found that the leases were granted for the purpose of building some sort of a home. If that is so it may well be that, although they had power to build a house of this nature, the lease was only a temporary lease. Whether it was or not the defendants could easily have proved. They have failed to do so and, therefore, the inference must be drawn against them that this was only a temporary lease making them tenants from year to year or tenants at will although they had power to build some sort of house. If that is the inference that must be drawn, it does not really matter in the least that the landlord stood by whilst they built their houses because it must in such circumstances be presumed that the tenants knew perfectly well what their rights were, and, therefore, that they were not deceived or encouraged in any way merely by the landlord standing by and taking no action. Further in cases where the landlord stands by and takes no action it must also be shown that he was aware of what his rights were and had power to prevent the tenants from building. But the finding is that they had power to build, and the facts necessary in order to bring about an estoppel have not been proved in these cases. In my opinion, these appeals, in so far as they rest upon any estoppel, must also be dismissed with costs and the decision of the learned Judge of this Court must be upheld.

Mullick, J.—I agree.

Appeals dismissed.

A. I. R. 1923 Patna 113.

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

Rachhya Raut and others—Plaintiffs-Appellants.

v.

Mt Chandoo and others—Defendants-Respondents.

S. A. No. 1023 of 1921 decided on 28th January 1921, reference as regards Court fees payable on the plaint.

Court Fees Act, Sch. II, Art. 17 (6)—*Declaration claimed under guise of partition suit—Suit must be valued as a title suit.*

Where the plaintiffs claim under the guise of a partition suit a declaration of their title, which is the proper subject matter of a title suit, the suit must be valued as if it is a suit on title for the purposes of court-fee. [P. 114, C. 1.]

Atul Krishna Ray—for Appellants.

Judgment.—It appears to us that in this case the decision of the Taxing Officer was right. The plaintiffs brought a suit for partition of 13 *bighas*, 16 *kattas*, 1 *dhur* of land. Before the suit was brought it appeared that some of the land had been entered in the record-of-rights as in the possession of the Defendants, and in these circumstances a cloud was cast upon the title of the Plaintiffs, and in the forefront of their prayer in the plaint they claimed a declaration that the land in suit with the trees standing thereon is the ancestral property of the Plaintiffs and the Defendants and that both the parties according to their respective shares are in joint possession and have been appropria-

ting the produce thereof, and secondly, they claimed that as a result of the adjudication on the above point a decree for partition may be passed by the Court. We quite agree, as appears from the cases of *Mohendro Chandra Ganguli* v. *Asutosh Ganguli* (1) and *Bidhata Rai* v. *Ram Charitar Rai* (2), one must look to see what is the real nature of the claim. If it is merely a suit claiming a partition and nothing else, then it makes no difference that the Defendants by their written statement raise a question disputing the title or possession of the Plaintiffs. But if, as here, in the very forefront of their claim they ask the Court for declaration of their title and possession, then it seems to us that they are claiming under the guise of a partition suit a declaration of their title, which is the proper subject-matter of a title suit, and therefore, as the Taxing Officer has determined, the fee payable in the Court of first instance was deficient to the extent of Rs. 17-4-0. Before this appeal can proceed we must declare that the deficit Court-fee upon the plaint, *viz.*, Rs. 17-4-0 must first be paid. The learned Vakil for the Appellants has undertaken to pay the Court-fee by the end of this week Let the Court fee be accepted if paid by Saturday next.

Order accordingly.

(1) (1893) 20 Cal 762.
(2) (1907) 12 C. W. N. 37=6 C. L. J. 651.

A. I. R. 1923 Patna 114.

JWALA PRASAD AND ROSS, JJ.

Nagendra Nath Ghosh—Appellant.

v.

Sambhu Nath Pande and others—Respondents.

In the matter of F. A. No. 120 of 1921 dated 1st December 1921.

(a) *Civil Pro Code, O. 41, R 18—Notice to Respondent not served—Failure of appellant to supply identifier is no ground for dismissal of appeal*

Under the law no obligation is cast upon the appellant to supply an identifier of the Respondent for the purposes of serving the notice of appeal and the failure to do so cannot entail a dismissal of the appeal. [P. 115, C. 1]

(b) *Civil P. C. O V, R 10—Service of summons on defendant—Identifier of defendant need not be one supplied by party.*

The identifier referred to in O. V, R 10 need not necessarily be one supplied by the party. He may be a person in the village knowing the defendant. [P. 115, C. 1]

(c) *Patna High Court Rules, Chap. I, R. 14—Notice of appeal to Respondent—No identifier is necessary.*

No identifier is certainly required now for a service of a notice upon a respondent in an appeal pending in the High Court. [P. 115, C. 1]

S. C. Mitter and *B. N. Mitter*—for Appellant.

N. N. Sen—for Respondents.

Order.—This matter has been placed before us for orders on account of the notice of the appeal not having been served on the respondent No. 10. On the first occasion the serving peon returned the notice unserved on the 22nd of July 1921, with a report saying "since the Parwana was made over to me no identifier came (to me)". But apparently the peon did not make any effort to find out the respondent and it appears that he did not even go to the village where the respondent resides. On the second occasion, however, the peon did go to the village and reports that he searched for the indentifier, but could not find him; and as he did not know either the respondent or his residence, he was unable to serve the Parwana. The address of the respondent was given in the notice and it is the same as was given in the summons when the respondent in question was a defendant in the trial Court and that summons was served upon him in accordance with that address. The peon does not state that he made any effort to find out the respondent at the given address of the respondent. Perhaps he would easily have found out the respondent (the address being correct), if he had taken the least pain to enquire from the witnesses whom he names in the service return as being present at the time when he went to the village. It is noteworthy that he does not say that the witnesses did not know the respondent or his residence.

Under the law no obligation is cast upon the appellant to supply an identifier. Order V, rules 10 to 17, lay down the modes in which service of summons upon defendants has to be effected. Rule 18 says that "when a summons has been served under rule 16 (that is by delivering or tendering a copy of the summons to the defendant personally, etc.) the serving peon shall endorse etc., on or to the original summons, a return stating the time when and the manner in which the summons was served, and the

name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons." The identifier referred to herein need not necessarily be one supplied by the party. He may be a person in the village knowing the defendant. Even if any identifier was required for the service of a summons upon a defendant, no identifier is certainly required now for a service of a notice upon a respondent in an appeal pending in the High Court. Rule 14, Chapter I, of the General Rules and Circular Orders, originally required the affidavit of the person (if any) identifying the defendant or respondent served with a process of the Court; but as early as March 1917, the word "respondent" in that rule was deleted, so that no longer any affidavit of an identifier is required in case of a service of processes upon respondents. Rule 25, Chapter 1, bearing upon the point was also omitted from the General Rules and Circular Orders. Under Order XLI, rule 18, an appeal against the respondent can only be dismissed on the failure of the appellant to deposit, within the period fixed, the sum required to defray the costs of serving the notice. There is no rule to dismiss the appeal on account of the failure of the appellant to give an identifier. Under Order IX, rule 5, a suit may be dismissed on account of the plaintiff, who applies for the issue of fresh summons, failing to satisfy the Court that he used his best endeavours to discover the residence of the defendant who was not served. In the present case that rule does not apply, as the appellant has supplied address in which the residence of the defendant has been given.

The appeal, therefore, at this stage cannot be dismissed and it must proceed. The appellant is ready to deposit fresh *talbana* and the learned Vakil appearing on his behalf has also expressed his desire to take necessary steps to have the notice served upon the respondent. We direct that the necessary cost be deposited by the appellant by to-morrow. The Court below is directed to see that every effort is made by the peon of that Court to serve the notice upon the respondent. The appellant will assist the peon in this respect. It is unlikely that in this important case the respondent, who has succeeded in the Court below, will ignore the notice and will allow the appeal to go *ex parte*.

Order accordingly.

A. I. R. 1923 Patna 115.

DAS, J.

Maharaj Bhagat —Plaintiff-Petitioner

v.

Hari Har Bhagat —Defendant-Opposite Party.

Civil Rev. No. 130 of 1921 decided on 21st December 1921, from a decision of the Munsiff, Hajipur (Muzzaffarpur).

Civil P. C., Sch. 2, Para 8—Day fixed for award—Award not filed—Court cannot immediately proceed to try suit

Where on the date fixed for filing the award, the award was not filed by the arbitrators and the Court immediately called on the suit and dismissed it *held* that the order was wrong. The filing of the award is an act of the arbitrator, and it will be manifestly unjust to require the party to be present in the Court on the date on which the award is required to be filed by the arbitrator. The paragraph obviously means that the Court must wait till the date fixed by it for the filing of the award. If the award is not filed on that date the court may then, and not in anticipation of the arbitrators not filing award, make an order superseding the arbitration and fix a date for proceeding with the suit [P. 116, C 1]

H. P. Sinha—for Petitioner.

H. P. Sinha—for Opposite Party.

Judgment:—The order complained of must be set aside.

The petitioner was the plaintiff in a suit to recover money on a handnote alleged to have been executed by the opposite party. The suit was by consent of the parties referred to the arbitration of certain individuals, and it appears that time for filing the award was extended from time to time. On the 3rd March 1921 the Court recorded the following order in the order sheet. "Time extended to 17th March 1921 for filing the award. Pleaders of both parties be informed that parties must come ready with their witnesses, if the award is not filed till the date fixed, the order for arbitration will be superseded."

It appears that the award was not filed on the 17th March 1921 and the learned Munsif at about 4 P.M. called on the suit and dismissed it. Thereafter the petitioner presented an application under Order IX, rule 4, but the learned Munsif

dismissed that application in a very elaborate judgment.

In my opinion the learned Munsif has not acted according to the provision of paragraph 8 of the Schedule, II Civil Procedure Code. That paragraph provides as follows:—

"Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit."

In my opinion a Judge does not act within the spirit of this paragraph by proceeding with the suit on the date fixed for the filing of the award. It must be remembered that the filing of the award is an act of the arbitrator, and it will be manifestly unjust to require the party to be present in the Court on the date on which the award is required to be filed by the arbitrator. The paragraph obviously means that the Court must wait till the date fixed by the Court for the filing of the award. If the award is not filed on that date, the Court may then, and not in anticipation of the arbitrators not filing the award, make an order superseding the arbitration and fixing a date for proceeding with the suit. That course was not adopted in this case and the order must accordingly be set aside.

I would set aside both the orders of the learned Munsif and direct him to proceed with the suit.

The petitioner will be entitled to costs of this application, hearing fee one gold *mohur*.

Order set aside.

A. I. R. 1923 Patna 116.

JWALA PRASAD, J.

Shivadhin Singh—Accused-Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Mis. Case No. 66 of 1920 decided on 14th September 1920 for transfer of the case.

(a) *Crim. P. C., S. 509—Medical witness—Cross examination reserved for Sessions Court—Latter Court not summoning him but admitting previous deposition—Procedure is wrong.*

Where in the committing Court, the cross examination of the medical witness was reserved for the Sessions Court but the latter Court admitted the previous deposition without summoning the witness himself *held* that, though the accused had an "opportunity to cross examine the witness" in the lower Court, inasmuch as the same was expressly reserved for the Sessions Court, with the permission of the committing Magistrate, the Sessions Court should summon the witness for the cross-examination by the accused. [P. 118, C. 1, 2]

(b) *Evidence Act, S. 138—Prosecution is not entitled to examine-in-chief on the substantive case after cross-examination by accused.*

After the cross-examination of the witness on behalf of the accused the re-examination would ordinarily be directed to the explanation of the matter referred to in the cross-examination. No doubt, a new matter may, by the permission of the Court, be introduced with leave to the other side to cross-examine the witness upon that matter But this cannot possibly entitle the prosecution to examine-in-chief on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witness. [P. 118, C. 2.]

(c) *Criminal P. C., S. 284—Objection to assessors—Assessors selected should be above suspicion.*

Assessors should be selected judicially and with great caution If the assessors are the admitted tenants of the other party this in itself is a sufficient ground for the accused to mistrust the impartiality of the assessors and the relationship of landlord and tenant, or of master and servant creates an incapacity in a person to sit as a Judge or as an assessor in a case There is no express provision for objecting to the selection of an assessor as is in the case of jurors under section 278. Yet the opinion of the assessors is of great value both to the Judge who tries the case and to the superior Court. It is, therefore, necessary as an elementary principle that they should be above suspicion. [P. 119, C. 1]

S. N. Sahai and *J. N. Mastra*—for Petitioner.

Manoher Lal—for the Crown.

Judgment.—This is an application for transfer of a Sessions Trial pending in the Court of the Sessions Judge of Monghyr.

The petitioner, Shivadhin Singh, along with others was placed on the trial before the Sessions Judge of Monghyr for having committed riot in the course of which one Rajdhari Lal, Tahsildar of the Goenka Estate, was killed. There was, therefore, a charge also under section 304, Indian Penal Code.

The trial commenced on 27th August. The Civil Surgeon, as Superintendent of the Monghyr Jail, reported that one of the accused, Bacha Tiar, was ill and was unable

to attend the Court. The remaining accused applied for an adjournment of the case so that there might not be a separate trial and consequent double expense and harassment to them. This petition was rejected and the trial proceeded.

Six assessors were summoned for the day: (1) Baij Nath Mahto, (2) Jamna Mahto, (3) Krishna Dayal Bhagat, (4) Mahadeo Choudhry, (5) Professor P. G. Dutt and (6) Ram Prasad Singh. Nos. 1 and 6 did not appear. Professor P. G. Dutt did not understand Hindi. Out of the remaining three assessors, the learned Sessions Judge selected Jamna Mahto and Krishna Dayal Bhaghat. The accused objected to the selection of Jamna Mahto as an assessor on the ground that he was on intimate terms with Kedar Nath Goenka, proprietor of the Goenka Estate and master of the man who was killed, and that another assessor out of those present be selected. The learned Sessions Judge asked the assessor about this. He denied being intimate with Kedar Nath, but admitted that he was a tenant of the Estate. The learned Sessions Judge overruled the objection.

The petitioner then applied for postponement of the case to enable him to move the High Court for a transfer. This petition also was rejected with the observation.

'Shivadhin Singh has plenty of time to move the High Court before I reach the stage (if I ever reach it) of calling upon him for his defence."

The trial proceeded on. In the course of the trial the Public Prosecutor tendered a prosecution witness, Bansi Lal, for cross-examination. The witness, was cross- examined on behalf of the accused. Instead of confining himself to questions arising out of the cross-examination, the Public Prosecutor was permitted by the learned Sessions Judge to examine the witness *de novo* as a principal witness on behalf of the prosecution with leave to further cross-examination by the accused.

On the 4th of September the medical witness, Charu Chandra Sur, failed to attend though summoned by the Sessions Court. His evidence was admitted under section 509 of the Code of Criminal Procedure in spite of the objection by the accused that no opportunity was given to them to cross-examine the witness. The Court directed that the witness be summoned for the defence on the 13th September but the accused refused to have him as their own witness.

The prosecution evidence closed on the 4th of September and the accused were called upon to enter on their defence.

The petitioner filed another petition impugning the impartiality of the second assessor Krishna Dayal Bhagat upon the ground that he was also a tenant of the Goenka estate. It was further stated that both the assessors were putting up in the *Dharamsala* of Kedar Nath Goenka and were having communication with the opposite party.

The petitioner was granted time by the learned Sessions Judge to move this Court for a transfer of the case. The application was prepared on the 3rd September and filed on the 6th. The allegations made in the petition of the 4th September before the learned Sessions Judge were subsequently set forth in a supplementary petition filed on the 11th September. On the aforesaid allegations the petitioner asked the Court to transfer the case from the file of the learned Sessions Judge.

The learned Sessions Judge has submitted a report upon the allegations made in the first petition for the transfer. No report could be had from him on the supplementary petition, as that was filed on the 11th September after the report of the Sessions Judge was transmitted. The learned Assistant Government Advocate was given a copy of the petition of the 11th September.

The allegations set forth in the first petition are almost admitted, except that the learned Sessions Judge could not verify the allegation as to the Assessor Krishna Dayal Bhagat being a tenant of the Goenka Estate, inasmuch as that witness was not present in Court having been summoned for the 13th of September, the date fixed in the case.

The principal allegations set forth in the second petition of the 11th September are borne out by the order-sheet and therefore, do not require any further investigation.

The grounds urged for transfer on behalf of the petitioner may be summarised as follows :—

(1) That the assessors are not impartial and are interested in the result of the case in favour of the prosecution, they being tenants of the Estate whose Tahsildar was killed. The constitution of the Court was, therefore, illegal and irregular.

(2) That the learned Sessions Judge committed grave irregularity in allowing the prosecution witness, Bansi Lal, to be examined-in-chief by the Public Prosecutor after he was cross-examined on behalf of the accused on being tendered by the Public Prosecutor. This has prejudiced the accused in the defence.

(3) That the learned Sessions Judge has illegally admitted the evidence of the medical witness, Charu Chandra Sur, under section 509 of the Code of Criminal Pro cedure without giving an opportunity to the accused to cross-examine him.

The consideration of the aforesaid grounds becomes immaterial in view of the fact stated by the learned Sessions Judge in his letter of the 9th September 1920 that the defence have given a list of 50 witnesses and that it would not be possible for the learned Sessions Judge to finish the trial as he is about to go on leave on October 1st and the attempt of the accused to secure *de novo* trial will doubtless succeed. This apprehension was also felt by the learned Sessions Judge on the 27th August when he commenced the trial, for he noted in the order sheet of that date when Shivadhin applied for time to move this Court for a transfer, that Shivadhin had ample time to move the High Court before he would ever reach the stage of calling upon him for his defence. This is also obvious from the third objection of the accused referred to above which must prevail, for the Doctor will have to be cross-examined by the accused. No doubt, section 509 of the Code permits the deposition of a medical witness taken in the Commitment Court to be given in evidence at the Session trial but that is subject to the condition that the accused should have been given full opportunity to cross-examine the witness and the Court may, if it thinks fit, summon and examine such a witness as to the subject matter of his deposition. In the present case, the accused reserved the cross examination of the witness in the Commitment Court which apparently was allowed and the witness was summoned by the Sessions Court to give evidence on behalf of the prosecution. Although, therefore, the accused had an opportunity of cross-examining the witness, they reserved it with the leave of the Magistrate for the Sessions Court. The Sessions Court also apparently confirmed this, inasmuch as it summoned the witness, which would not have taken place if his evidence in the Commitment Court was to be accepted without any opportunity of cross-examination being given to the accused. Though, therefore, the evidence already recorded might have been rightly admitted under section 509, the accused had a right to cross-examine the witness and the Court was apparently in error in refusing to summon the witness when he did not attend on the 4th September and insisted upon his being called as a defence witness.

As to the second objection, namely that Bansi Lal should not have been allowed to be examined-in-chief by the Public Prosecutor, a reference may be made to section 138 of the Evidence Act, which lays down the order in which the witness should be cross-examined and examined. After the cross-examination of the witness on behalf of the accused the re-examination would ordinarily be directed to the explanation of the matter referred to in the cross-examination. No doubt, a new matter may, by the permission of the Court, be introduced with leave to the other side to cross-examine the witness upon that matter. But this cannot possibly entitle the prosecution to examine-in-chief on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witness. The procedure adopted by the learned Sessions Judge was, therefore, irregular and prejudicial to the accused.

As to the first ground referred to above, namely that the assessors were not properly selected, in spite of their having been challenged by the accused then and there, I think there is much substance in it. Great weight is attached to the opinion of the assessors and the accused is entitled to an impartial and unprejudiced opinion. In the case of *Queen* v. *Ram Dutt Chowdhry* (1). Jackson, J., in

(1) (1874) 23 W. R. Cr. 35.

agreement with the opinion of Woodroffe, J., held that the assessors should be selected judicially and with great caution. The opinion of the assessors in that case was discarded upon that ground. The learned Judge himself is conscious of the principle when he says that he is always ready to listen to any reasonable objection to the selection of an assessor. The assessors in the particular case may not be intimate personally with the present proprietor. Kedar Nath Goenka, it is admitted that the manager of the Estate, who is a relation of the proprietor, is naturally taking keen interest, as stated by the Judge, on behalf of the prosecution inasmuch as the Tahsildar of that Estate was killed in the riot. The assessors are the admitted tenants. This in itself is a sufficient ground for the accused to mistrust the impartiality of the assessors and the relationship of landlord and tenant, master and servant creates an incapacity in a person to sit as a Judge or an assessor in a case. No doubt section 284 empowers the Judge to choose such assessors as he thinks fit from the persons summoned to act as such and there is no express provision for objecting to the selection of an assessor as is in the case of jurors under section 278 of the Code of Criminal Procedure. But there is no reason why an objection of presumed or actual partiality should not be allowed, particularly when it is urged at the time of the selection of the assessors. I am fully alive to the distinction made in the Code between the selection of the assessors and the jurors which is based upon the principal that the opinion of the jurors is final and binding upon the Judge, whereas that of the assessors is not. Yet, as observed above, the opinion of the assessors is of great value both to the Judge who tries the case and to the superior Court. It is, therefore, necessary as an elementary principle that they should be above suspicion. The reason stated by the learned Sessions Judge why the third assessor even if selected, would have been incapable of acting as such would apply with equal, if not greater, force to the other assessors selected by him. The learned Sessions Judge reports that he has now discovered that the third assessor, Mahadeo Choudhury, was a casteman of the accused and hence it would have been a valid objection to his being appointed as an assessor. This connection is disputed by the defence. Accepting it to be correct, if it was a valid objection on behalf of the prosecution to Mahadeo Choudhury acting as an assessor the fact that the other assessors were tenants of the Goenka Estate was still more objectionable from the accused's point of view.

There is however, no prejudice in the mind of the learned Sessions Judge himself, who appears to have been compelled by the circumstances to select the assessors, who were present on the date; nor is there any prejudice in him shown from some of the irregularities noticed above in the conduct of the trial. They were mere errors of judgment. It further appears that the learned Sessions Judge permitted the accused to cross-examine Bansi Lal after the examination by the Public Prosecutor and that he directed the medical witness to be summoned for the defence. I do not, therefore, think that a sufficient case has been made for taking the case out of the hands of the learned Sessions Judge and to transfer it to some other district. But I do think that the accused are entitled to be tried *de novo* after the selection of independent assessors, and, if the learned Sessions Judge will not be able to complete the trial, as it is apprehended on account of his going on leave on October 1st, the case will be tried *de novo* by his successor.

Retrial ordered.

A. I. R. 1923 Patna 119.

JWALA PRASAD AND ROSS, JJ.

Emperor—Appellant.

v.

Kunja Dusadh and others—Respondents.

Government Appeal No. 3 of 1921 decided on 24th November 1921 by the Local Government against order of acquittal passed by the S. J. of Darbhanga.

(a) *Criminal P. C., S 417—Appeal from acquittal—High Court will not interfere except where the Lower Court has obstinately & seriously blundered.*

The High Court will not interfere unless lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of Justice and the interests of the public. But the reason that

another tribunal or another Judge might have arrived at a view other than that formed by the assessors and the Judge in the case is not the reason for disturbing the verdict of acquittal which is arrived upon the full consideration of the circumstances and evidence in the case.

[P. 121, C. 1, 2]

(b) *Criminal Trial—Inadmissible evidence on record—Conviction not necessarily bad.*

Per Ross, J.:—The mere fact that an inadmissible piece of corroborative evidence was on record through a technical error should not stand in the way of conviction. [P. 120, C. 1]

Sultan Ahmed—for the Crown.

S. N. Sahay—for Respondents.

Ross, J.:—(His Lordship after dealing with facts referred to the contention of the prosecution that there ought to have been conviction but that the prosecution could not ask this Court to convict as the first of the statements on which it relied is not evidence as the record stands and then proceeded.) To deal with this contention it is necessary to consider the whole case. The first statement of Nawab Khan is merely corroborative evidence, and if it seemed that the evidence in Court was a true account of the circumstances in which Nawab Khan was wounded. I do not think that the mere fact that an inadmissible piece of corroborative evidence was on the record through a technical error should stand in the way of conviction here. There is, therefore, no necessity for a re trial in any event. But in dealing with the evidence we must give the accused any benefit they may derive from the statements of Nawab Khan as if they had been properly admitted as they are an important element in the case.

The case for the prosecution is that on the evening of 29th March Nawab Khan, a Tokedar of Benipur Factory, was returning from Benipur Hat to his village Antore along with Phulwa Chowkidar and other persons. Near a Gachhi and Banswari of Jagannath Hajari he was attacked by a number of men some of whom were armed with axes and one with a sickle and the others with *lathies*. He was struck on the leg with an axe and was then assaulted generally, and finally one Somna cut off his nose and right ear. Twenty-four injuries were found on his person of which five were severe. Phulwa Chowkidar names eleven persons as having been in the party with Nawab Khan of whom six have been examined in Court. Nawab Khan names thirteen, adding four, namely, Baldeo Chowdhury, Gopi Jha, Asarafi Chowdhury and Ramkishun Jha, to those named by Phulwari and omitting two, namely Chuni and Mithu Tati. In his dying declaration, however, he had said that he did not know the names of the persons who were with him except Phulwari. Of these persons six have not been examined at all, namely, Gopalji Jha, Baikunt Jha, Baldeo Missir, Bagru Jha, Rupan Dusadh, Mithu Tati, and Asarafi Chowdhury on this point. Of these persons not examined in Court the Sub-Inspector of Police examined on the 30th March, three Gopalji Jha, Baldeo Missir and Bagru Jha, and none of them named any of the assailants. The Sub-Inspector says that he sent for the other witnesses but they did not come. Of the witnesses examined in Court Phulwa gave what has been called the first information on the 29th, seven were examined on the 3rd April and one on the 1st April. These witnesses are all tenants and labourers of the Benipur Factory and their residence is Anatore. The explanation of their delay in coming forward that is now offered is that they were afraid of Ganowra Dusadh, one of the accused who is a bad character; but only two of the witnesses give this reason. One is Buchan Jha who says in his evidence that he stated before the Police that he was afraid of Ganowra as people said that he was a desperate character but he adds that this he heard three or four days after the assault. The other is Baldeo Chowdhury who says that he was hiding through fear of Ganowra, but he admits that he had only heard of the bad livelihood case against Ganowra and that Ganowra had never beaten him. The delay in the production of this evidence seems to me a grave reason for doubting the truthfulness of the witnesses. Further, it appears from Mr. Guise's evidence that several persons who came to the factory that night with Nawab Khan said that they had been with him and of these Mr. Guise picked out Phulwa. It does not appear who the others were, and if the witnessess are believed they were not among them because they say they did

not go to the factory. As to the details of the occurrence, Phulwa says that Nawab Khan was struck on the leg from behind, but the Assistant Surgeon says that the injury on the leg could not have been caused from the back. Nawab Khan's own account of the affair is not consistent as the learned Sessions Judge has shown. Moreover there are serious discrepancies between his earlier and later statements. In the statement made to Mr. Guise he named only the Dusadhs as his assailants. In his dying declaration he omitted two of the names that he had previously given and substituted the names of two Babhans. Moreover in the earlier statement he said that Somna cut off his nose and ears while Kunjwa and Kail hit him with an axe; while in the later statement it was Somna who struck him.

Jwala Prasad J.—(After stating the facts his Lordship went on.) The case of the prosecution is, therefore, not without suspicion. It is not a case in which it can be said that the opinion of the Assessors was perverse or that of the learned Judge who accepting that opinion acquitted the accused, and this Court will not interfere with a judgment of acquittal unless the lower Court has been perverse in its judgment or taken such unreasonable and distorted conclusions of the facts as to cause a miscarriage of justice. This has been established by a long course of decisions in this country; *vide Empress* v. *Gayadin* (1) and *Deputy Superintendent, Bengal* v. *Amulya Charan* (2). The observation of Straight, J. in the first mentioned case fits in so well with the present case that I would conclude this judgment in the words of that learned Judge:—"It is not because a Judge or a Magistrate has taken a view of a case in which Government does not coincide, and has acquitted accused persons, that an appeal from his decision must necessarily prevail, or that this Court should be called upon to disturb the ordinary course of justice by putting in force the arbitrary powers conferred on it by section 272 (corresponding to section 417, Criminal Procedure Code). The doing so should be limited to those instances in which the lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public. We cannot say in the present case that the Session Judge so egregiously and foolishly erred in his conclusions, as to the accused that we should feel ourselves bound either to convict them or to order a new trial. The Assessors and the Sessions Judge had the witnesses before them and consequently the best opportunity of judging the truth. It is not said that they did not conduct the enquiry with carefulness and weighed the facts to the best of their ability. The reason that another Tribunal or other Judge might have arrived at a view other than that formed by the Assessors and the learned Judge in the present case is not the reason for disturbing the verdict of acquittal which appears to us to have been arrived upon the full consideration of the circumstances and evidence in the present case.

Agreeing, therefore, with the view expressed by my learned brother I dismiss this appeal.

Appeal dismissed.

(1) (1882) 4 All. 148=(1881) A.W.N. 159.
(2) (1914) 18 C.W.N. 666=22 I. C. 736=15 Cr. L.J. 160.

A. I. R. 1923 Patna 121.

DAS, J.

Govind Mahton—Accused-Petitioner.

v.

Emperor—Opposite-Party.

Criminal Rev. No. 599 of 1920, decided on 17th January 1921, against order of the Dist. Mag. of Dhanbad dated 14th December 1920.

(a) *Penal Code, Ss. 379 and 108—Accused standing by the thief—No other evidence—Accused is not guilty.*

The evidence against accused was that he was standing by the thief. There was no evidence at all to lead one to the conclusion that he was engaged in any conspiracy with the principal offender for the doing of the theft. [P. 122, C. 1.]

Held, he was not guilty of abetting the theft.

(b) *Criminal P. C., Ss. 236 and 237—Commission of any offence itself doubtful—Section does not apply.*

S. 237, Cr. P. C. authorises the Court to convict a person for an offence with which he has not been charged but for which he might have been charged under the provisions of S 236. But S 236 which must control S 237 only applies when, from the evidence led by the prosecution, it is doubtful which of the offences has been committed by the petitioner, and not when it is doubtful whether an offence has been committed at all. [P. 122, C. 2]

H. L. Nandkeolyar—for Petitioner.

Judgment.—The petitioner, who was charged with having committed an offence under S. 379, I. P. C has been convicted of an offence under S. 381 read with S. 109, I. P. C. and has been sentenced to undergo rigorous imprisonment for one month. In my view the conviction is unsustainable on two grounds: first, on the ground that the facts found by the learned District Magistrate do not establish that the petitioner abetted any offence by the principal offender, and secondly, on the ground that he should not have been convicted under S. 381 read with S. 109, I. P. C. when he was not charged with having committed that offence.

On the first point, the evidence against him is that he was standing by the thief. Now there is no evidence at all to lead one to the conclusion that he was engaged in any conspiracy, with the principal offender for the doing of the theft and I do not think that on the evidence the learned District Magistrate should have come to the conclusion that he was guilty of abetting the theft. The learned Magistrate says:

"I cannot agree that a man, who comes with a thief to steal an article and stands by to receive that article, is not aiding and abetting theft."

Now the only fact deposed to by the witnesses is that he was actually standing by the side of the man who ultimately turned out to be a thief. The learned District Magistrate has assumed that he was standing by to receive the article and that he accompanied the principal offender knowing that he was out to steal an article. I am of opinion that the conviction is unsustainable on facts.

In the next place, he should not have been convicted of an offence under S. 381 read with S. 109 since he was not charged with having committed that offence. I dealt with this point at some length in the case of *Sheo Ratni* v. *Emperor* (1). I pointed out in that case that

"S. 237 of the Criminal Procedure Code is limited by the express provision of that section only to the case mentioned in S. 236 that is to say, to a case where it is doubtful which of several offences the facts which can be proved will constitute. In such a case S. 237, Cr. P. C., authorises the Court to convict a person for an offence with which he has not been charged but for which he might have been charged under the provisions of S. 236, Cr. P. C. I pointed out that S. 236 which must control S. 237 only applies when from the evidence led by the prosecution, it is doubtful which of the offences has been committed by the petitioner. Now in this case if the evidence which has been led by the prosecution leads to one result only, it cannot, in my view, be said that it is doubtful which of the offences has been committed by the petitioner.

I hold that the conviction is unsustainable and order that the petitioner be set at liberty.

Rule made absolute.

(1) (1919) 21 Cr. L. J. 44=54 I. C. 252.

A. I. R. 1923 Patna 122.

DAWSON MILLER, C. J. AND MULLICK, J.

Maharaja Kesho Prasad Singh Bahadur—Plaintiff-Appellant.

v.

Chandrika Prasad Singh and others—Defendants-Respondents.

F. A. Nos. 232 and 233 of 1919 decided on 3rd August 1922, against a decision of the Sub. J. of Shahabad.

Hindu Law—Alienation—Widow—Gift by widow cannot be challenged by persons other than reversioners.

It is the reversioners and the reversioners alone that can dispute a gift or other alienation by a Hindu widow. If they choose to allow the property to which they are entitled to remain with the donee or alienee that is their affair and no one else can object.

It is not a correct view that a gift is void beyond the life time of the widow even if it remains unchallenged by the reversioners during her life time or after her death.

A Hindu widow is not a tenant for life but is owner of her husband's property subject to certain restrictions on alienation. Her alienation is not therefore absolutely void but is voidable at the election of the reversionary heir.
[P. 126, C. 2; P. 127, Cs. 1 & 2, P. 128, Cs. 1 & 2]

(b) *Lease—Construction*—Zarpeshgi *lease or mortgage— Interest to continue after termination of lease—Transaction is a mortgage.*

In a *Zarpeshgi* lease properly so called there is an advance to the lessor in consideration of which the lessee is given possession of the land for a term during which he recoups himself for the sum advanced and interest out of the profits of the land of which he is put in possession. There is no question of redemption upon paying off an advance. The lease terminates at the expiration of the term and the lessor may re-enter as on the termination of any other lease.

Where, however, the interest created in the lessee continues after the expiration of the term until the advance, which is essentially a loan and not an advance of rent, is repaid, the transaction, has the essential characteristics of a mortgage.
[P. 128, C. 2]

Kulwant Sahai and *N. N. Sinha*—for Appellant.

S. M. Mullick, H. Sahai, Sembhu Saran and *S. S. Lal*—for Respondent.

Dawson Miller, C. J.:—These appeals arise out of two suits, numbered 3 and 8 of 1912, which were tried before the Subordinate Judge of Shahabad. They were instituted by the appellant as plaintiff, claiming to redeem two *zarpeshgi* mortgages or leases of Mauzas Singhanpura and Magazpura respectively of which he claims to be proprietor to the extent of two-thirds of the interest. The proprietors of the other one-third share are some of the defendants in the suit. Amongst the defendants are also the representatives of the original *zarpeshgidars* who have acquired their interest either by survivorship or purchase from those interested. The villages in question formerly belonged to Sheo Daya Singh who died childless many years ago leaving two widows who succeeded to his estate. The elder of the two died in 1872 leaving the younger, Bahuria Rikeba Kuer, in sole possession of the estate. On the 12th October 1875 Rikeba Kuer executed a deed of gift of the two villages in question, together with other property formerly belonging to her husband, in favour of Sheo Lochan Singh, a relative of her deceased husband who had lived with, and been brought up by her since infancy. The plaintiff's interest in the two-thirds share of the two villages in question is derived by purchase from Sheo Lochan Singh under a deed of sale dated the 11th April 1890. The gift by Rikeba Kuer to Sheo Lochan appears to have been made with the sanction and approval of most, if not all, of the members of the family. It is further stated in the plaint and in the verbal evidence that two of the three reversioners of Sheo Dayal Singh, namely, Thakur Singh and Raj Nath Singh, executed a deed of relinquishment of their shares of the inheritance in favour of Sheo Lochan in the year 1877 during the widow's lifetime. This deed, however, was not produced and was not strictly proved. However that may be, it is not disputed that from the time when Rikeba made the gift in 1875 up to the present moment, neither of the two reversioners named whose interest vested on Rikeba Kuer's death in 1880 has made any attempt to dispossess Sheo Lochan or the plaintiff who claims through him and it is too late now to question the validity of the gift to Sheo Lochan to the extent of the two-thirds share in the estate.

The third reversioner, Saheb Singh, however, insisted upon enforcing his right to a third share in the property and for this purpose brought a suit against Sheo Lochan for possession of his third share together with mesne profits which was finally determined in his favour on appeal to His Majesty in Council. The decree so obtained by Saheb Singh was eventually executed by his grandsons, Lochan Prasad Singh and Chandrika Prasad Singh, after his

death and they obtained possession of the respective properties awarded to them under the decree. The two villages mentioned were, however, subject to the *zarpeshgi* mortgages or leases, the subject of this suit. These *zarpeshgis* had in fact been in existence since 1873, that is before the gift of 1875 to Sheo Lochan, and were granted by Rikeba Kuer to the *zarpeshgidars*. Accordingly the gift to Sheo Lochan in 1875 was subject to these *zarpeshgis* as also is the plaintiff's interest derived from Sheo Lochan. That relating to Singhanpura is dated the 8th July 1873 and was granted to Lal Bisweswar Dayal, Jai Prakash Lal and Beni Prasad whose grandsons now represent them, being the defendants Nos. 5 to 9 in Suit No. 2 of 1919, one of those now under appeal. It recites that the executant has let out in *ijara* to the *zarpeshgidars* at the annual rental of Rs. 483 the entire 10 annas of Mauza Singhanpura for a term of 9 years from 1281 to 1289 F. (corresponding to 1873 to 1882) and that she has taken from the lessees Rs. 3,701 bearing interest at 1 per cent. per month and it provides that the *zarpeshgidars* should deduct from the annual rent Rs. 444 on account of interest on the *zarpeshgi* and pay the balance, Rs. 39, to the executant, her heirs and representatives. It provides also that the executant shall not pay off the *zarpeshgi* for 9 years, the term fixed for the lease, and if she fails to pay the *zarpeshgi* in one lump sum by the end of the term the *ijara* settlement shall stand good and remain in force as it is and when she shall pay off the *zarpeshgi* by the end of *Jeyth* in any year the *ijara* shall be cancelled.

That relating to Magazpura was of similar import. It is dated the 30th June 1873 and related to Magazpura and one other village called Gharbair. The rental in this case was Rs. 852 and the term was for 15 years from 1295 F. The *zarpeshgi* money advanced was Rs. 6,750 and the interest at 1 per cent. per month amounting to Rs. 810 to be deducted from the rent by the *zarpeshgidars* and the balance of Rs. 42 was to be paid annually to the executant. The *zarpeshgidars* in this case were Thakur Singh, Debi Dayal Singh and Sham Behari Singh, who are now represented by their descendants, the defendants Nos. 4 to 11 in Suit No. 8 of 1919, the defendants Nos. 1 to 3 in that suit being purchasers from the other defendants.

After obtaining their decree in the Privy Council and after the death of Saheb Singh his grandsons, Lachmi Prasad and Chandrika Prasad Singh, also instituted suits against the *zarpeshgidars* of both villages for a declaration that the *zarpeshgis* were not binding upon their grandfather, Saheb Singh, to the extent of his one-third share and for possession and mesne profits. In these suits they were successful and got the *zarpeshgis* annulled as to their third share and obtained possession in or about the year 1894. In 1898 they also acquired the remaining-two-thirds interest in the *zarpeshgi* of Magazpura at a sale in execution of a decree against the *zarpeshgidars*. It is further the case of the plaintiff that Lachmi and Chandrika also acquired one of the remaining two-thirds share in the *zarpeshgi* of Singhanpura the interest of Beni Prasad, one of the *zarpeshgidars*, from his grandson and representative Ambika Prasad, the defendant No. 9 in Suit No. 3. This is denied by the defendants Nos. 1 to 3. Lachmi Prasad Singh died before the present suits were instituted but Chandrik, the defendant No. 1 in both suits and the defendants Nos. 2 and 3 in both suits, with whom he was joint in estate, are his legal representatives. It would appear, therefore, that the whole body of *zarpeshgidars* are represented as defendants in the suits, whether the interest of Beni Prasad Singh was transferred to Lachmi and Chandrika or not, the representatives of the other *zarpeshgidars*, Lal Bisweswar Dayal and Lal Jaiprakash Lala being the defendants Nos. 4 to 7 in Suit No. 3. It was contended, however, by the defendants Nos. 1 to 3 that Beni Prasad's interest in Singhanpura was purchased by one Janki Prasad Singh and that as he is not a party the suit for redemption is bad for non-joinder. Janki is admittedly a near relation of Chandrika, the first defendant, and it is suggested that if Beni Prasad's share was purchased in the name of Janki it was a *benami* transaction on behalf of Chandrika

and his co-sharers. The only point about which we can be certain is that Chandrika has been in possession all along. No document has been produced showing the alleged sale. Verbal evidence as to the sale is conflicting and unsatisfactory on both sides and it is impossible to say whether Beni Prasad's interest has been transferred at all. The probabilities point in favour of the plaintiff's version as the defendant Chandrika has been in possession. It is unnecessary to decide this point because it is clear that for much more than 12 years before the suit was instituted the defendants Nos. 1 to 3 have been in possession of Beni Prasad's interest which was that of a *zarpeshgidar* and have acquired an indefeasible title thereto. They must accordingly be regarded as such.

The learned Subordinate Judge who tried the suit dismissed it upon various grounds. He considered that the *zarpeshgi* deeds having been declared, by a Court of competent jurisdiction, invalid as against the reversioner, Saheb Singh, as they were executed by Rikeba Kuer without legal necessity, they must be considered invalid for all purposes. He further held, by a chain of reasoning, which I am unable to follow, that the conveyance to the plaintiff by Sheo Lochan in 1890 of the two-thirds interest in the *Mauzas* did not convey the right to redeem the mortgages. The deed purports to transfer, " all *zamindari* rights appertaining to the said *mahals*, save and except those prohibited by Government, and all arrears due from tenants and *ticcadars* of the said *mahals* up to this day, together with the decrees passed by the Court, the *kasht* lands, orchards and houses purchased at auction sale by me (the vendor) in satisfaction of my decree, as also the houses and orchards situate in the said *mahals*, etc., etc., as per boundaries given below."

The learned Judge apparently interpreted the words :

" and all arrears due from tenants and *ticcadars* of the said *mahals* up to this day,"

as being governed by the words "save and except" which from the context would not appear to be justified, but even assuming the arrears of rent, etc., from tenants and *ticcadars* up to the date of sale were excluded, I am unable to follow his reason for holding that the right of redemption would not pass with the proprietary interest to the purchaser. The learned Judge said that the words quoted were a clear indication that the right now claimed was never meant to be conveyed. He further considered that the conveyance to the plaintiff by Sheo Lochan was a sham transaction. He based this conclusion upon certain remarks appearing in a judgment of the District Judge of Shahabad in 1895 in which the present plaintiff was appellant and one Nand Lal Sahu a creditor of Sheo Lochan, who held a decree against the latter at the date of the sale, was the respondent. The question for decision was apparently whether the sale to the Maharaja who had undertaken to pay off Sheo Lochan's creditors out of the purchase money, the bulk of which was retained for that purpose, had undertaken to pay Nand Lal Sahu, and, if not, whether the sale was made to defeat Sheo Lochan's creditors. It was found in that case that Nand Lal had an express promise from the Maharaja to pay off his debt and apparently had taken no steps to execute his decree at the time of the purchase and further that the purchase was not made in good faith. If I have rightly appreciated that judgment it was based upon an estoppel arising from the conduct of the Maharaja which induced Nand Lal to forego the enforcement of his decree against the estate of Sheo Lochan in course of transfer, with an alternative finding that if the creditors were defeated the purchase was not in good faith. There are no facts proved, however, in the present case upon which such a finding can be arrived at, nor would it be open to the respondents to raise such a plea. These matters, however, need not be discussed further, as the learned Vakil for the respondents admits that he cannot support the judgment on the ground that the sale by Sheo Lochan to the appellant was to defeat creditors or that the conveyance did not pass the right of redemption of the *zarpeshgi*. It is contended, however that the gift to Sheo Lochan himself by Rikeba

Kuer passed no interest continuing beyond the lifetime of that lady. This question will be considered presently.

The learned Judge also found that the *zarpeshgis* were not mortgages but leases and that the most that could be claimed against the lessees would be three years' rent. He did not consider the terms upon which the leases could be redeemed but his previous findings made this unnecessary. He also thought that Suit No. 3 relating to Singhanpura was bad for non-joinder of Janki to whom reference has already been made. He fell into an extraordinary error in this respect. He said, "Exhibit E. shows that one Janki purchased certain *zarpeshgi* interest in 1898. The plaintiff cannot under the law (S. 66, Civil Procedure Code) be allowed to assert that this Court-sale was *farzi* and the real beneficiaries were the defendants Nos. 1 to 3."

Exhibit E. is a certified copy of a sale certificate of the *zarpeshgi* interest not in Singhanpura but in Magazpura which was purchased by Chandrika Prasad Singh, the defendant No. 1 in execution of a decree held by him against the defendants of the original *zarpeshgidar*. In addition to the signature of the Subordinate Judge the certificate also bears the signature of the *sheristadar* of the Court which granted it and his name happens to be Janki Sinha. The learned Judge apparently mistook this for the name of the purchaser. He seems to have misapprehended at the same time both the meaning of the certificate and the scope of S. 66 of the Civil Procedure Code.

The respondents place little or no reliance upon the reasons given by the learned Subordinate Judge for his findings but contend that the conclusions arrived at can be supported upon other grounds. Their first contention is that Suit No. 3 of 1919 relating to Singhanpura is bad for defect of parties. They contend that the defendants Nos. 1 to 3 never purchased the interest of Beni Prasad, one of the *zarpeshgidars*, from his grandson, the defendant No. 9 in that suit, but that one Janki Singh, not the *sherishtadar* of the Subordinate Judge of Arrah, but another person of the same or a similar name, was the real purchaser. The evidence of this transaction is altogether unsatisfactory and cannot be accepted and, in my opinion, does not prove that Janki was the purchaser. It is admitted, however, that Janki, if indeed he purchased, never got possession of the purchased property but that Chandrika, the first defendant, and his co-sharers the second and third defendants took and retained possession of this share. They were well aware of the *zarpeshgi*, as they themselves had it set aside as to the third share of which they were proprietors through their ancestor, Nawab Singh. They have admittedly collected the rents ever since in the capacity of *zarpeshgidars*. It was faintly suggested in the course of argument that their possession was adverse to that of the plaintiff but there is nothing to show that they ever asserted a right as proprietors which would be adverse to that of the plaintiff and the right they have acquired either by purchase or long possession must be treated as that of *zarpeshgidars*. I have already stated that, in my opinion, the defendants Nos. 1 to 3 have acquired the *zarpeshgi* rights in Beni Prasad's share and the suit is, therefore, not bad for defect of parties.

It is next contended by the respondents that the interest of the plaintiff's vendor, Sheo Lochan, although valid during the lifetime of Rikeba Kuer, terminated on the death of that lady, notwithstanding that the reversioners of the two-thirds share have never from the year 1880 when Rikeba Kuer died, up to the present, elected to treat the transfer as void. It is not disputed that a sale or mortgage by Hindu widow which purports to pass or hypothecate the absolute title is valid against every one except the reversioners and that unless the reversioners elect to treat it as a nullity it subsists as against everyone else. In the present case the gift as to the two-third share was never challenged by the reversioners interested in the share. It is argued, however, that a gift stands on a different footing from a sale or mortgage and certain authorities have been relied on in support of this contention. The general rule is clearly laid down by Lord Davey in delivering the

judgment of the Judicial Committee in *Bijoy Gopal Mukerji* v. *Krishna Mahisi* (1). A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may, at his pleasure, treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. The alienation in question in that case was an *ijara* lease but there is nothing in the judgment to suggest that any other form of alienation would not come within the doctrine applied, and it is difficult to see upon what principle a distinction can be drawn between a gift and any other form of transfer.

In *Bakhtawar* v. *Bhagwan* (2), which was relied on by the respondents, the question for decision was whether a gift made by a Hindu widow with the consent of the immediate reversioner could be impeached by a more remote reversioner. The High Court at Allahabad held that it could. They drew a distinction between a gift and other forms of alienation and held that the earlier decision of the Full Bench of the Allahabad High Court in *Ramphal Rai* v. *Tula Kuari* (3), had not been overruled by the decision of the Judicial Committee in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (4). The restrictions on alienation laid down by the Full Bench of the Allahabad High Court in *Ramphal Rai* v. *Tula Kuari* (3), had been dissented from by their Lordships in the case last mentioned. It is unnecessary, however, to express an opinion upon the authority of the two cases decided by the Allahabad High Court for assuming that they were rightly decided, they go no further than this that the consent of the immediate reversioner to a gift by a Hindu widow does not bar the right of a more remote reversioner to challenge the transaction. They do not afford any authority for the proposition now contended for that such a gift is void beyond the lifetime of the widow even if it remains unchallenged by any of the reversioners during her lifetime or after her death. In the later case of *Abdulla* v. *Ram Lal* (5), decided in 1911 the ruling in *Bajrangi Singh* v. *Manokarnika Baksh Singh* (4), was again discussed by the Allahabad High Court. The view there taken was that the consent of the immediate reversioners to an alienation by a Hindu widow was merely evidence from which legal necessity could be presumed, and unless rebutted it would bind the more remote reversioners. The consent raising such a presumption must necessarily be limited to transfers for consideration. It could not be extended to gifts where there was no room for the theory of legal necessity. This also was the view expressed by the Bombay High Court in 1909 in the case of *Pillu Appa* v. *Babaji Naru* (6). The whole subject of the powers of the Hindu widow to deal with

(1) (1907) 34 Cal. 329=34 I. A. 87=11 C. W. N. 424=9 Bom. L. R. 602=17 M. L. J. 154=2 M. L. T. 183=5 C. L. J. 334=4 A. L. J. 329 (P.C.)

(2) (1910) 32 All. 176=5 I. C. 270=7 A. L. J. 121.

(3) (1888) 6 All. 116=(1883) A. W. N. 248 (F. B.).

(4) (1908) 30 All 1=35 I. A. 1=12 C.W.N. 74=9 Bom L. R. 1348=6 C. L J. 766=3 M. L. T. 1=5 A. L. J. 1=17 M. L. J. 605=11 O. C. 78 (P.C.).

(5) (1911) 34 All. 129=12 I.C. 601=8 A. L. J. 1318.

(6) (1909) 34 Bom. 165=4 I. C. 584=11 Bom. L. R. 1291.

her deceased husband's property was discussed by their Lordships of the Judicial Committee in 1918 in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (7), and the result of the decided cases was there summarised. A distinction is drawn between a surrender of the widow's interest in the whole estate in favour of the nearest reversioner, where the question of necessity does not fall to be considered, and the case of an alienation of the whole or a part of the estate where the consent of such reversioners as might fairly be expected to be interested to dispute the transaction will afford presumptive proof of its validity. None of these cases, however, in my opinion form a guide to the determination of the exact question we are now called upon to decide. It is not a question between presumptive and remote reversioners. The question is, whether a gift of the whole of her husband's property made by a Hindu widow not challenged by the reversioners during her lifetime and acquiesced in by those who would take a vested interest after her death can be challenged by any one else. In my opinion, there can be only one answer to this question. It is the reversioners and the reversioners alone who can dispute the gift. If they choose to allow the property to which they are entitled, to remain in the possession of the donee that is their affair and no one else can object. If the donee remains in possession under a claim of a right for 12 years he will acquire an indefeasible title even against the reversioner. There are certain cases, however, which have been drawn to our attention where expressions have been used to the effect that a gift by a Hindu widow is void and not merely voidable on her death. *Nabakrishna Roy* v. *Hem Lal Roy*(8), is an instance amongst others, which need not be discussed in detail in which such expressions occur. In all those cases the question was one of the rights of reversioners and in most of them the point arose in connection with limitation where it was contended that the alienation must first be set aside before the reversioner could sue for possession. Such expressions must be regarded in connection with the context and the subject-matter of the suit. It is, in a sense, permissible, though perhaps not strictly accurate, to say that the gift is void when considering its validity as against the reversioner. He may treat it as a nullity and need not sue to have it set aside before claiming possession. The true view appears to be that it is not binding upon him and he can elect to treat it as a nullity and sue for possession at any time within 12 years of his interest becoming vested without first suing to have it set aside notwithstanding Art. 91 of the Limitation Act. He may, on the other hand, elect to treat it as valid, but no third person can claim this option or set up the plea that such a gift is void merely because it may have been but was not so treated by the reversioner. The judgment of the Calcutta High Court in *Kishori Pal* v. *Bhushai Bhuiya* (9) is, I think, an authority for this view. In my opinion the respondent's plea that the gift was void cannot be supported.

The next question to be determined is, whether the *zarpeshgis* which it is sought to redeem are mortgages or leases. Certain cases have been cited during the argument upon this question. I do not propose to go through them in detail. I think the result of the authorities as well as of the text books is that the test in such cases must be whether there is a secured debt and a right of redemption. In a *zarpeshgi* lease properly so called there is an advance to the lessor in consideration of which the lessee is given possession of the land for a term during which he recoups himself for the sum advanced and interest out of the profits of the land of which he is put in possession. There is no question of redemption upon paying off an advance. The lease terminates at the expiration of the term and the lessor may re-enter as on the termination of any other lease. The re-entry does not depend upon the re-pay-

(7) (1918) 42 Mad. 523=46 I. A. 72=36 M L. J. 493=17 A. L. J. 586=29 C. L. J. 589=10 L. W. 105=21 Bom. L. R. 640=28 C. W. N. 777=26 M. L. T. 5=50 I. C. 498=(1919) M. W. N. 262 (P. C.).

(8) (1905) 2 C. L. J. 144.

(9) (1909) 14 C. W. N. 106=8 I. C. 78.

ment of the advance nor can the property be held after the determination of the lease to secure re-payment as there is nothing to re-pay. The transaction is really one in which rent is paid in a lump sum in advance instead of by instalments during the term. Where, however, the interest created in the lessee continues after the expiration of the term until the advance, which is essentially a loan and not an advance of rent, is repaid, the transaction, in my opinion, has the essential characteristics of a mortgage. It is the mortgage of a leasehold interest in the land and can be redeemed by the mortgagor upon re-payment of the advance with interest, if any is due, upon the termination of the lease, or at any time thereafter within the limitation period, just as in the case of any other mortgage, the leasehold interest in such a case being held as security for re-payment.

In my opinion, the appeals should be allowed with costs here and in the Trial Court and a decree should be passed in favour of the appellant declaring him entitled to redeem the two-third share of the properties in suit upon payment of whatever may be found due upon an account being taken between the parties. The suits will be remitted to the Court of the Subordinate Judge of Arrah for the taking of the account.

Mullick, J.—I agree.

Appeal allowed.

A. I. R. 1923 Patna 129.

DAWSON MILLER, C. J., AND MULLICK, J.

Sagarmal Marwari—Appellant.

v.

Lachmisaran Misir—Respondent.

S. A. No. 669 of 1922 decided on 29th June 1922.

(a) *Limitation Act, S. 12—Day of pronouncing judgment is day of judgment.*

For the purposes of limitation it is impossible to hold, that the date of judgment should be any other than that upon which judgment is pronounced in Court, when the parties know the effect of that judgment, whether it would be necessary for them to appeal or not.

[P. 130, C. 1.]

(b) *Civil P. C. O. XX Rr. 1, 7—Pronouncing judgment in open Court—Rule should be complied with in all cases.*

In many cases it is not the practice to pronounce judgment in open Court But it is a direct breach of the practice laid down in Order XX, R. 1, and in all cases that rule ought to be complied with.

[P. 130, C. 1, 2]

S. M. Mullick and *N. N. Sen*—for Appellant.

S. S. Bose—for Respondent.

Dawson Miller, C. J.—This is a question of limitation. The case was heard before the learned District Judge of Bhagalpur on the 6th January, 1922. On the 8th January after the hearing, the learned Judge left Bhagalpur for Dumka to hold sessions there. On the 17th January he appears to have written a judgment and signed it but this was not communicated to anybody and certainly not delivered in open Court as provided by Order XX, rule 1. On the 4th February he returned to Bhagalpur and on the 10th February a decree was prepared after the signatures of the pleaders on each side had been taken. Nobody apparently knew anything about the judgment having been written or signed by the learned Judge until the 10th February and in fact as the learned District Judge himself says there was no delivery of judgment in Bhagalpur before that date; nor does it appear that there was any delivery of judgment anywhere else. The appeal in this case was filed on the 18th May and the question arises whether that was within the 90 days prescribed by Article 156 of the Limitation Act for an appeal to the High Court. The rules provide in terms that judgment shall be pronounced in open Court either immediately after the case has been heard or on some future date of which due notice shall be given to the parties or their pleaders. It is contended by the respondents that the judgment having been written by the learned Judge and signed on the 17th January although it was not pronounced on that date the limitation period runs from that day. I am entirely unable to accept this view. There was in fact no judgment delivered until it was pronounced in open Court according to the rules. The decree was prepared on the 10th February and I understand it was dated the 17th January, the day upon

which the judgment was written and signed by the learned Judge although not communicated to anybody. Under the Limitation Act the period of limitation begins from the date of the decree or order appealed from and under Order XX, rule 7, the decree shall bear date, the day on which the judgment was pronounced. Therefore, even if the decree was dated the 17th January that date in fact was altogether wrong because at that time no judgment had been pronounced at all and whatever the date may be upon the face of the decree it ought to be dated the 10th February when the judgment was pronounced. In these circumstances it seems to me quite clear that the period of limitation begins from the 10th February. The appeal in fact was filed more than 90 days after the 10th February but it appears from the report of the learned District Judge that an application for copies of the judgment and decree was made on the 30th January although at that time judgment had not been pronounced and no decree was drawn up, and on the 21st February, the copies were supplied. Therefore the time occupied in obtaining copies of the judgment and decree between the 30th January and the 21st February ought to be deducted but as the limitation period did not begin to run until the 10th February the period between the 10th and 21st February may be deducted in this case. It would follow, therefore, deducting these days, that the appeal was entered in time. For the purposes of limitation it seems to me that it is impossible to hold, having regard to the Statutes to which I have referred, that the date of the judgment should be any other than that upon which judgment is pronounced in Court when the parties know the effect of that judgment whether it would be necessary for them to appeal or not. There may be cases, I can conceive, where the judgment has not been properly pronounced in open Court, when for example, a Judge dies after having written and signed his judgment or there may be other cases in which the failure to pronounce judgment in open Court may be a mere irregularity which, under the provisions of the Code is not fatal to the validity of the judgment. In the present case, however, it seems to me impossible to hold that the period of limitation could begin before in fact the parties were aware by the pronouncement of judgment in open Court, what the judgment in fact was. We are told that in many cases it is not the practice to pronounce judgment in open Court. If that is so I can only say that it is a direct breach of the practice laid down in Order XX, rule 1, and in all cases in my opinion that rule ought to be complied with. The appellant is entitled to his costs of this application which has been strenuously opposed by the respondents.

Mullick, J :—I agree.

Application granted.

A. I. R. 1923 Patna 130.

DAWSON MILLER, C. J. AND MULLICK, J.

Raghubir Singh and others—Plaintiffs Appellants.

v.

Jethu Mahton and Sobharam Gorain—Defendants-Respondents

L. P. A. Nos 3 and 4 of 1922 decided on 25th July 1922 against a judgment of Ross, J. in S. A. No. 900 of 1919 and No. 14 of 1920 dated 14th July 1921.

Hindu Law—Reversioner—Tenancy beyond lifetime by limited owner terminates on death of limited owner and reversioner can sue for possession.

There are more ways than one by which a tenancy may determine. The limited owner has no power to grant a tenancy beyond his own life as against the reversioner and once the reversioner elects to treat the interest granted to the tenant as an interest extending only for the life-time of the grantor, then in such a case it terminates upon the death of the grantor and there is therefore nothing more to be done to terminate the tenancy The tenant becomes a trespasser if he refuses to turn out and the reversioner is entitled to bring a suit in ejectment without giving any notice whatever.

[P. 131, C. 2.]

A. K. Ray—for Appellants.

Abanibhusan Mukerjee, A. P. Upadhya and *H. B. Mukerji*—for Respondents.

Dawson Miller, C. J. :—In my opinion this appeal is really governed by the decision of the Judicial Committee in the case of *Bijoy Gopal Mukerji* v.

Krishna Mahishi Debi (1). The suit was instituted by the reversioner of one Manmohan Singh who was a tenant of land in Chota Nagpur. After his death his daughter had been in possession during her life and had granted what is described as a *mokurari* lease of the raiyati holding to the Defendant in the suit. Upon the death of the limited owner, the Plaintiff as nearest reversioner sued to recover possession.

The Judicial Committee have laid down in the case just referred to that in such a case the reversioner may treat the alienation which purports to extend beyond the life of the limited owner as a nullity and he may sue for possession at any time within 12 years of the death of the limited owner without first seeking to set aside the transfer in favour of the Defendant. In other words if he elects to treat the transfer as a nullity after the death of the limited owner he may do so and there is nothing left in such a case to be set aside and he may sue for possession and is entitled to obtain possession. The present case is the case of a holding and in either case it seems to me all that is necessary for the reversioner to do is to exercise his option and that he may do by merely bringing a suit to claim possession. If that is the proper view to take and it appears to me that it is the view taken by their Lordships of the Judicial Committee, it follows that from the moment the reversioner exercises his option there is nothing left in the transferee and the lease has terminated on the death of the limited owner. It was contended in this case that the Defendant had acquired the interest at all events of an under-raiyat and that therefore he was entitled to notice to quit. Under the Chota Nagpur Tenancy Act there is no provision requiring notice to quit to be served upon an under-raiyat but even supposing that it is necessary that he should be served with a reasonable notice by his immediate landlord that is only because the tenancy does not terminate until such notice is given and one cannot sue in ejectment to recover land in the possession of a tenant until the tenancy has come to an end. If the only means by which such a tenancy could come to an end were by notice to quit, I agree it would be necessary for the Plaintiff to prove that notice had been given. But there are more ways than one by which a tenancy may determine. The limited owner had no power to grant a tenancy beyond her own life as against the reversioner and once the reversioner elects to treat the interest granted to the Defendant as an interest extending only for the life time of the grantor then in such a case it terminates upon the death of the grantor and there is therefore nothing more to be done to terminate the tenancy. The defendant becomes a trespasser if he refuses to turn out and the Plaintiff is entitled to bring a suit in ejectment without giving any notice whatever. In my opinion these appeals ought to be allowed and the decree of the Subordinate Judge restored. The plaintiff is entitled to his costs in each appeal here and in the Courts below.

Mullick, J.—I agree. There are authorities which show that an under-raiyat in Chota Nagpur may in certain circumstances be entitled to notice under Sec. 106 of the Transfer of Property Act but that question does not arise in the present case. Here the Defendant is liable to be ejected at the option of the reversioner unless he can show that he has acquired any statutory right of occupancy. There is no suggestion of any such right here and the decree of the Subordinate Judge is therefore right.

Appeals allowed.

(1) (1907) 34 Cal 329=34 I A 87=5 C. L J 334=11 C. W. N 424=2 M L T. 133=9 Bom. L. R. 602=4 A. L. J. 329=17 M. L. J. 154 (P. C.).

A. I. R. 1923 Patna 131.

BUCKNILL, J.

Ajodha Tewari—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 630 of 1922 decided on 13th November 1922, against the order of Sub Div. Mag. Sitamarhi, dated 28th October 1922.

(a) *Penal Code, S* 188—*Order to remove obstruction—Disobedience—Order to show cause against prosecution—Petitioner coming and saying that he has removed obstruction—Order for prosecution is bad.*

The petitioner was alleged to have obstructed a roadway. Apparently he maintains that at that time the roadway was not public. Proceedings were accordingly commenced against the petitioner under section 133 on the 25th of May 1922. The petitioner, as he had a right to do, applied to the Magistrate for a Jury under section 134. The Jury was accordingly appointed and instructed to report on a certain day ; but they did not report on the appointed day and on that day the Magistrate without any further ado made the conditional order which he had previously made absolute, ordering the alleged obstruction to be pulled down. Apparently the order directed the petitioner to pull the obstructions down by the 5th of August For some reason or other he did not do so and some days later, the fact that he had not done so was brought to the notice of the Magistrate who directed him to show cause why he should not be prosecuted for an offence against the provisions of section 188 of the Indian Penal Code. However, a little later on, the petitioner came and told the Magistrate that he had removed the alleged obstructions; but nevertheless, the Magistrate had directed that he should still be prosecuted. *Held* the order was illegal and must be set aside.

[P. 132, C. 2, P. 133, C. 1]

(b) *Cr. P. C., S. 141—Jury not returning verdict in time—Magistrate must make inquiry before he passes order.*

The words " If the jury appointed does not return its verdict within the time fixed, the Magistrate may pass such order as he thinks fit " mean that if the Jury for any reason does not return its verdict the magistrate must inquire into the matter before he passes an order. [P. 132, C. 2.]

B. C. De—for Petitioner.

Bucknill, J.—This is an application made by one Ajodha Tewari asking that an order made by the Sub-divisional Magistrate of Sitamarhi directing the prosecution of the petitioner for an offence against the provisions of section 188 of the Indian Penal Code may be set aside.

The matter is a very simple one. The petitioner was alleged to have obstructed a roadway. Apparently the petitioner maintains that at that time the roadway was not public. However, the police received information that there was some obstruction and they reported that the petitioner had put up a post in a path running from the village to the well and had also erected a tatti which had the effect of diminishing the width of the path. Proceedings accordingly were commenced against the petitioner under provisions of section 133 of the Code of Criminal Procedure on the 25th of May this year. The petitioner, as he had a right to do, applied to the Magistrate for a Jury in the manner provided by the provisions of section 134 of the Code of Criminal Procedure. The Jury was accordingly appointed and instructed to report on a certain day; but they did not report on the day which they had been told and on that day the Magistrate without any further ado made the conditional order which he had previously made, absolute, ordering the alleged obstructions to be pulled down. Apparently the order directed the petitioner to pull the obstructions down by the 5th of August. For some reason or other he did not do so and some days later the fact that he had not done so was brought to the notice of the Magistrate who directed him to show cause why he should not be prosecuted for an offence against the provisions of section 188 of the Indian Penal Code, *i.e.*, for having disobeyed an order duly promulgated by a proper authority. However, a little later on the petitioner came and told the Magistrate that he had removed the alleged obstructions; but, nevertheless, the Magistrate has directed that he should still be prosecuted

Now we must proceed a little further and ascertain what has been brought to the notice of this Court. The position really is that, when the Jury had failed to return their verdict as ordered at the time fixed, the Magistrate should not have, without giving anybody an opportunity of being heard, made the order absolute. Section 141, which says that, if the Jury appointed does not return its verdict within the time fixed, the Magistrate may " pass such order he thinks fit' must mean that, if the Jury for any reason does not return its verdict the Magistrate must inquire into the matter before he passes an order. This is obviously only in consonance with the proper conduct of legal investigation and I cannot imagine that it could seriously be maintained that, without any investigation whatever and merely upon either an *ex parte* statement made by the complainant or on report by the police as to what the police may have found at the place in question, a Magistrate is really justified in passing anything but an emergency order (which is provided for by another section) without any attempt to investigate the rights and circumstances which surround the position of the affair. This view, which I think is the correct

one, is borne out by the case of *Raimohan Karmakar* v. *Emperor* (1) and the whole tendency of the other decisions to which I have been referred points in the same direction. Under these circumstances it appears to me that the proper course in this case is to set aside the order which was made by the Sub-divisional Magistrate on the 28th October, 1922, ordering the prosecution of the petitioner in connection with an offence against the provisions of section 188, Indian Penal Code ; of course, if there is obstruction still existing (which I do not find from the papers which are at present before me) there is nothing to prevent further proceedings being taken against the petitioner and with his being dealt in the manner provided by law.

Order set aside.

(1) (1916) 44 Cal. 61=35 I. C. 969=20 C. W. N. 1171.

A. I. R. 1923 Patna 133.

MULLICK AND KULWANT SAHAY, JJ.

Bishun Prashad Pathak and others—Appellants

v.

Sashi Bhusan Misra and others—Respondents.

Appeal No. 5 of 1922, decided on 2nd January 1923 from the original order of Subordinate Judge of Manbhum, dated 28th November, 1921.

Civil P. C., O. 39, R. 1—Case where permanent injunction cannot be given—Temporary injunction also cannot be given.

The general principles applicable to cases of interim injunctions is that where a permanent injunction cannot be given, no prayer for a temporary injunction will be allowed. [P. 133, C. 2.]

S. M. Mullick and *N. N. Sen*—for Appellants.

A. B. Mukherji and *B. B. Mukherji*—for Respondents.

Mullick, J. :—The plaintiffs brought a suit out of which this appeal arises for a declaration of their Patni Taluk right to certain jungle alleging that the defendant No. 6 with a large number of men was ready to cut the trees in the jungle. The defendants pleaded that the plaintiffs had no right in the jungle and that they had no possession for 12 years. While the suit was pending the plaintiffs applied for an *ad interim* injunction to restrain the defendant from cutting any trees and on the 28th November 1921 the Subordinate Judge passed an order restraining the defendants from disposing of such trees as they might cut in reclaiming the land till the disposal of the suit. The Subordinate Judge's view was that the defendants were apparently entitled to cut trees for the purpose of reclamation and that while it was not proper and reasonable to restrain them from cutting any trees at all, it would be right and proper to restrain them from disposing of the trees that they might cut.

The present appeal was lodged by the defendants on the ground that this is not a case in which there can be any interim injunction. Now, the general principle applicable to cases of this kind is that where a permanent injunction cannot be given, no prayer for a temporary injunction will be allowed. The learned Vakil for the respondents urges that it is necessary that the *statue quo* should be preserved and that the trees should not be allowed to go out of the hands of the defendants in the event of the plaintiffs succeeding in their present suit but he forgets that the present suit is only for declaration and that it will not give the plaintiffs any consequential relief so far as the trees are concerned. Upon the frame of the plaint it may be contended that the present suit does not lie ; that is another matter which will be decided at the trial; but so far as the justice of the case goes, I see no reason why the defendants, who deny the plaintiffs' title and claim to be in possession should be restrained from disposing of what they claim to be their own property. The learned Vakil for the respondents attempted to distinguish the case of the *Jital Singh* v. *Raja Kamlleswari Prasad* (1); in that case the interim prayer was to restrain a person who had obtained a decree, from executing such decree while a suit was pending for a declaration that the decree had been obtained without jurisdiction and the principle, that an *ad interim* injunction ought not to be given when

(1) (1912) 16 C. L. J. 555=15 I. C. 614=18 C. W. N. 12.

permanent relief is not obtainable, was affirmed; this principle is consistent with reason and in the present case, therefore, we should comply with it.

The result is that the appeal is allowed with costs.

Kulwant Sahay, J.:—I agree.

Appeal allowed.

A. I. R. 1923 Patna 134.

DAS AND ADAMI, JJ.

William Maling Grant and others—Decree-holders-Appellants

v.

Suraj Mal Marwari and others—Judgment-debtors-Respondents.

Appeal No. 133 of 1921, decided on the 30th November 1922, from an original order of Subordinate Judge of Bhagalpur, dated 30th April 1921.

(a) *Civil P. C., S. 47—Petition that properties should not be sold subject to incumbrances as notified in sale proclamation is one under section 47.*

A petition which invites the Court to hold that the properties could not be sold subject to the incumbrances as notified in the sale proclamation raises a question relating to the execution of the decree and is one under section 47. An order thereon is appealable as a decree. [P 134, C. 1.]

(b) *C. P. C., S 11, O 21, R 66—Settlement of sale proclamation after notice—Court cannot go behind, in subsequent proceedings.*

Where after notice to the judgment-debtors, a sale proclamation was duly settled under O 21, R.66, the court cannot, in subsequent proceedings, go behind that order. [P. 135, C. 1.]

Sultan Ahmed, S. M. Mullick, Nirod Ch. Roy and *S. Ch. Roy*—for Appellants.

C. C. Das and *Jagarnath Prasad*—for Respondents.

Das, J.—This is an appeal on behalf of the decree-holders against an order of the learned Subordinate Judge of Bhagalpur, dated the 30th April 1921, in a proceeding for execution of a decree.

It appears that the decree-holders wanted certain incumbrances to be notified in the decree. They made their application to that effect to the Court under the provisions of Order 21, rule 66 of the Code and the sale proclamation as finally drawn up by the Court did notify those incumbrances. Thereafter the respondents, who were the petitioners in the Court below, made an application which is to be found at page 1 of the paper book. That petition is as follows:—

"These petitioners have come to know to-day that the decree-holders have cunningly shown certain incumbrances on the properties entered in the sale proclamation. This is contrary to the real state of things. As a matter of fact the decree under execution is on the basis of a bond that was executed before the debts referred to in the sale proclamation were contracted; and if the said properties be sold subject to the liabilities mentioned in the sale proclamation, they won't fetch adequate price. This will cause immense loss to the judgment-debtors. The decree-holders have no right to cause the properties to be sold subject to the said liabilities which are contrary to the real state of things; nor is the decree under execution of such nature. The mortgaged properties cannot, according to law, be sold subject to those incumbrances."

This petition was presented by the judgment-debtors under the provisions of Section 47 of the Code and they invited the Court to hold in substance that the properties could not be sold subject to the incumbrances as notified in the sale proclamation. The learned Subordinate Judge who deals with this application thought that as the decree holders did not produce before him the mortgage bonds or the pattas which, according to the decree-holders, constituted the incumbrances on the land, the properties could not be sold subject to those incumbrances. In the result he allowed the objection of the judgment debtors.

It was argued by Mr. Das on behalf of the respondents judgment-debtors that the order of the learned Subordinate Judge being an order in a proceeding under Order 21, rule 66, of the Code, is not an appealable order. In my view the contention does not deserve any success: the proceedings

under Order 21, rule 66 were concluded long before the petition, upon which the order of the 30th of April 1921 was passed, was presented. The application of the judgment-debtors did not raise any question as to the terms on which the sale proclamation should be settled ; it raised the question whether the Court could sell the properties subject to the incumbrances. In other words the question raised by the judgment-debtors was a question relating to the execution of the decree. In my opinion the order of the learned Subordinate Judge was an order under Section 47 of the Code and is accordingly appealable.

On the merits, there is nothing at all to be said in favour of the view of the learned Subordinate Judge. The sale proclamations did notify those incumbrances. There is no dispute between the parties that those incumbrances do exist; in fact the assertion in the petition that the debts referred to in the sale proclamation were contracted after the date of the decree is undoubtedly incorrect as the facts show. The learned Subordinate Judge could not, in those proceedings go behind the sale proclamation which was settled upon notice to the judgment-debtors.

The order of the Subordinate Judge must accordingly be set aside.

The appellants-decree-holders are entitled to the costs of this appeal.

Adami, J. :—I agree.

Order set aside.

A. I. R. 1923 Patna 135.

DAS AND ROSS, JJ.

Foujdar Sahu—Defendant-Appellant

v.

Nema Bhogta—Respondent

Appeal No. 573 of 1920 decided on 27th June 1921, from the Appellate Decree of Offg. J.C., Ranchi, dated 13th March 1920.

Chota Nagpur Tenancy Act (VI of 1908), S 87, 224 (2)—Decision under S. 87—Second Appeal does not lie to High Court

A decision under section 87 of the Chota Nagpur Tenancy Act is not a decree; it is, a decision, and there is no appeal to the High Court under the Civil Procedure Code from a decision not under S. 224 (2). [P. 136, C 2.]

Ram Lal Dutt and *R. P. Sinha*—for Appellant.

S. A. Asghar and *H. B. Mukerji*—for Respondent.

Das, J. :—The defendant, who is the appellant before us, was recorded as proprietor of a certain share in Mauza Meral. Thereupon the respondent instituted a suit under the provisions of section 87 of the Chota Nagpur Tenancy Act before a Revenue Officer for a decision of the dispute between them regarding the entry which the Revenue Officer had made in the record. The Revenue Officer dismissed the suit. Thereupon the plaintiff appealed to the Court of the Judicial Commissioner, Ranchi. The learned Judicial Commissioner allowed the appeal and decreed the plaintiff's suit. The defendant has now appealed to this Court from the decree passed by the Judicial Commissioner.

The first point taken on behalf of the respondent is that no appeal lies. The decisions of this Court on the point raised by Mr. Asghar are conflicting. But there is a judgment of two Judges of this Court in favour of the view which has been advanced before us by Mr. Asghar, whereas there is a decision of a single Judge in favour of the view maintained by Mr. Ramlal Dutt. The decision which is relied upon by Mr. Asghar is *Jaydeshar Dayal Singh* v. *Bhagdi Mahton* (1) and the decision relied upon by Mr. Ramlal Dutt is *Lal-man Naik* v. *Kanhya Lall Pandey* (2). There is a decision of the Calcutta High Court in favour of the view which has been advanced before us by Mr. Asghar. That decision is in *Raghubir Sahi* v. *Protab Udoy Nath Sahi Deo* (3).

In my opinion the decision in *Jagdeshar Dayal Singh* v. *Bhagi Mahton* (1) is correct. The point in this. Section 224, sub-section (2), gives a right of appeal to this Court first from and appellate decree passed by the Judicial Commissioner under Chapter XVI, and secondly from any order passed by him on appeal under section 215, sub section (3). There is, therefore, a right of appeal to this Court if the decision of the Judicial Commissioner is a decision under Chapter XVI, or is

(1) (1930) 5 P. L. J. 697=58 I. C. 434=1 P. L. T. 705=1920 P. H. C. C. 302.

(2) (1917) 40 I. C. 891.

(3) (1912) 39 Cal. 241=15 C. L. J. 145=13 I. C. 193=16 C. W. N. 294.

an order passed by him on appeal under section 215, sub-section (3). Mr. Dutt does not contend that the order passed by the learned Judicial Commissioner is an order passed by him on appeal under section 215, sub-section (3). But he strenuously contends that the decree passed by the Judicial Commissioner is a decree under Chapter XVI and, therefore, appealable under clause (2) of section 224.

His argument is this. He says that an appeal from an order passed under section 87 lies in the prescribed manner and to the prescribed officer. The Local Government under the provisions of section 264, clause (8), has framed rules prescribing the manner in which and the officer to whom appeals lie from decisions passed under section 87. Those rules are to be found at page 110 of Mr. Reid's book on the Chota Nagpur Tenancy Act. They are as follows.—

(1) Appeals from decisions of Revenue Officers under section 87 (1) shall lie to the Judicial Commissioner.

(2) Every such appeal must be presented within thirty days from the date on which the decision appealed against was signed and delivered.

(3) The provisions of sections 220 to 223 shall, as far as they are applicable, apply to such appeals.

Mr. Dutt's contention based on the Notification passed by the Lieutenant-Governor on the 24th May 1909 is this. He says that the appeal lies to the Judicial Commissioner of Ranchi and the procedure laid down in sections 220 to 223 of the Chota Nagpur Tenancy Act applies to appeals which must be taken to the Judicial Commissioner. Under section 223 the Judicial Commissioner has to give judgment in the manner provided in section 170 for giving judgment in original suits. Therefore, Mr. Ramlal Dutt says, the order of the Judicial Commissioner in an appeal from an order under section 87 is an order under section 223, and as section 223 is to be found in Chapter XVI of the Chota Nagpur Tenancy Act, an appeal lies to the High Court under section 224, sub-section (2). In my opinion the argument does not deserve any success. It is quite true that by virtue of the Notification passed by the Lieutenant-Governor the Judicial Commissioner is competent to deal with an appeal from an order passed under section 87 of the Chota Nagpur Tenancy Act, but he does not exercise that jurisdiction under Chapter XVI but under a special jurisdiction which has been conferred on him by the Lieutenant-Governor by the Notification of the 24th May 1909; in other words, Chapter XVI does not by its own force apply to the decision of the Judicial Commissioner. Accordingly that decision cannot be a decision under section 223. In my opinion therefore, an appeal does not lie to this Court under section 224, sub-section (2), of the Chota Nagpur Tenancy Act.

Next it was contended by Mr. Ramlal Dutt that there is a right of appeal to this Court under the Civil Procedure Code. In my opinion this argument again is unsound. A decision under section 87 of the Chota Nagpur Tenancy Act is not a decree; it is a decision, and there is no appeal to the High Court under the Civil Procedure Code from a decision. The point was discussed in the Calcutta High Court in the case of *Raghubir Sahi* v. *Protab Udoy Nath Sahi Deo* (3). I agree with the decision of Stephen, J., in that case, and in accordance therewith and with the decision of this Court in the case of *Jagdeshar Dayal Singh* v. *Bhagdi Mahton* (1) must dismiss this appeal with costs.

There is a revision petition against the order of the Judicial Commissioner. In my opinion there is no error of jurisdiction at all. It was argued by Mr. Ramlal Dutt that the learned Commissioner had no business to decide a question of title. But I do not think that he has in fact decided any question of title. No doubt in deciding whether the entry in the Record-of-Rights is correct or incorrect he had incidentally to discuss the question of title, but his decision on the question of title is only incidental; it is nothing more than that. His decision really is a decision on the question of possession. I must refuse the revision petition but without costs.

Ross, J.—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 137.

DAWSON MILLER, C. J. AND MULLICK, J.

Ram Sekhar Prasad Singh and others—Defendants-Appellants

v.

Sheonandan Dubay and another—Plaintiffs-Respondents.

In re S. A. No. 1136 of 1922, decided on 1st August, 1922, from the decision of Sub-Judge, Shahabad.

(a) *Court Fees Act, S. 5—Decision of Taxing Officer as to Court-fee payable is final.*

The Taxing Officer has the jurisdiction to fix the amount of fee payable and if he decides that the valuation put by the appellants upon the relief was incorrect he has the power to correct it. Even if he has done anything which the law does not allow him to do, the Court Fees Act gives the High Court no jurisdiction to interfere with his decision as to the amount of the fee. A decision under S. 5 of the Court Fees Act is not open to appeal, revision or review and is final for all purposes and no means have been provided or suggested by Legislature for questioning it. [P. 138, C. 1.]

12 All. 139 (F. B.) 32 All. 59, 3 P. L. J. 92 and 4 P. L. J. 700 Foll.

(b) *Court Fees Act, S. 7 (iv) (c) Plaintiff's valuation can be corrected by Court*

Plaintiff's valuation if arbitrary and incorrect can be corrected by Taxing Officer The section must be held to mean that the valuation for purposes of Court-fee is to be made in the first instance by the party concerned but is finally determinable by the Court. [P. 140, C. 1.]

(c) *Practice—Pleadings—Prayer for confirmation of possession includes prayer for recovery of possession—Court Fees Act, S. 27, Cl. (iii) (c).*

The words "confirmation of possession" have now acquired a technical meaning and include a prayer for recovery of possession if the Court thinks the plaintiff is out of possession. It is for this reason that such a relief has been held to be consequential relief within S. 7 *(iv) (c)* of the Court Fees Act. [P. 138, C. 2.]

Atul Krishna Rai—for Appellants.

Mullick, J.—The plaintiffs allege that they held under the proprietor defendants Nos. 4 to 18 a holding of 11 bighas 3 kathas, which, by private partition, has been split up into 3 sets of parcels, survey plots 253 and 72 being allotted to defendants Nos. 4 to 14, survey plots 253/1136 and 363 to defendants Nos. 15 to 17 and plot 177 to defendant No. 18. The rent of plot No. 253 is shown in the record-of-rights as Rs. 4-2-0 whereas the plaintiffs state that it is Rs. 1-13-6, and plot No. 712 is shown as *kabillagan*, whereas the plaintiffs state that it is part and parcel of plot No. 253. The plaintiffs also allege that the defendants have conspired together and got the name of defendant No. 1 entered as a raiyat of the entire 11 bighas 3 kathas although he has no interest in the same. The plaintiffs accordingly pray for a declaration that the record-of-rights is wrong. In regard to possession they state that the defendants are resisting their possession and they, therefore, ask for confirmation of possession. In the Court of the Munsif the land was valued at Rs. 100 evidently for the purpose of jurisdiction and a fee of Rs. 10 was paid upon the plaint upon the footing that the suit was for a declaration only. The Munsif dismissed the suit and the same amount of Court-fee was paid by the plaintiffs in their appeal to the Subordinate Judge. The Subordinate Judge having decreed the suit, the defendants have preferred the present second appeal and have paid the same Court-fee as the plaintiffs did in the Courts below. The Stamp-Reporter, however, found that the market value of the land affected was Rs. 1,239-10-6 and that an *ad valorem* fee was payable thereon, and as the appellants had paid Rs. 10 he claimed a deficit of Rs. 80. There being a difference of opinion between the Stamp-Reporter and the appellants, the case was referred to the Taxing Officer who has affirmed the view of the Stamp-Reporter and called upon the appellants to pay the deficit. As the appellants have refused to do so, the case has been sent up to this Bench in order that final orders may be passed on the appeal.

Now, the first question to be decided is, whether the Taxing Officer's decision as to the amount of the Court-fee due on the memorandum of appeal is final. Sec. 5 of the Court Fees Act would seem to conclude the matter, but the learned Vakil for the appellants before us contends that as the case comes under S. 7 *(iv) (c)* of the Act the appellants are entitled to value the relief at their own figure, that in declining to accept their valuation the Taxing Officer has exceeded his jurisdiction, and that his decision can therefore be revised

by the Court. Now it seems to me that the wording of Sec 5 is so explicit and general that it leaves the Court no option. The Taxing Officer has jurisdiction to fix the amount of fee payable and if he decides that the valuation put by the appellants upon the relief was incorrect he has the power to correct it. Even if he has done anything which the law does not allow him to do, the Court Fees Act gives the High Court no jurisdiction to interfere with his decision as to the amount of the fee This view is also completely covered by authority. In *Bilkaran Ray* v. *Gobindnath Tewari* (1) it was held that a decision under Sec. 5 of the Court Fees Act is not open to appeal, revision or review and is final for all purposes and that no means have been provided or suggested by the Legislature for questioning it. In *Kuar Karan Singh* v. *Gopal Rai* (2) it was held that the decision of a Taxing Officer as to the category within which a suit falls for the purpose of ascertaining the proper amount of Court-fees payable on a memorandum of appeal, as also his decision as to the amount of fee, is final and binding upon the Court under S. 5 of the Court Fees Act and that the Court cannot go behind the order of the Taxing Officer to examine the method which he adopted to arrive at his decision. This Court also has uniformly adopted this view of Sec. 5 and I think it is too late for the appellants to attack the Taxing Officer's decision on the ground that he has illegally assumed jurisdiction. See *Lagan Bari Kuer* v. *Bhakhan Singh* (3) and *Chanderbati Kuer* v. *Gorey Lal Singh* (4).

Then it is contended that the Taxing Officer has jurisdiction only to deal with fees payable under Chap. II and that as the fee now demanded is one payable under Sch I of the Act, it is not a fee in respect of which his decision is final. The reply to this is that Sch. I is merely supplementary to Sec. 7; it is a table provided for ready reckoning and indicates how the *ad valorem* fee prescribed by Sec. 7 is to be calculated.

But apart from this preliminary point I think it is quite clear that the Taxing Officer's procedure was perfectly correct and that his decision must be affirmed.

The plaintiffs pray for a declaration and for confirmation of possession. It may be contended that the prayer for confirmation of possession is nothing more than a prayer that the fact of, and his right to, possession may be declared; but the words "confirmation of possession" have now acquired a technical meaning and include a prayer for recovery of possession if the Court thinks the plaintiff is out of possession: and it is for this reason that for over half a century confirmation of possession has been held to be consequential relief within the meaning of Sec 7 (iv) (c) of the Court Fees Act. See *Bahuroonissa* v. *Kureemoonissa Khatoon* (5), *Jhumak Kamti* v. *Debu Lal Singh* (6) and *Dina Nath Das* v. *Rama Nath Das* (7).

I have been unable to discover how and when this form of pleading originated but at the present time I think it is indisputable that though it may be often unnecessary to ask for it a prayer for confirmation of possession is added as an useful precaution against failure to prove possession up to the date of the suit. In the present case the plaintiff states in para. 13 of his plaint that owing to the resistance of the defendants he is compelled to bring a regular suit. This is therefore in essence a suit for possession which is a form of consequential relief.

That being so, how is the consequential relief to be valued in this case. Are the plaintiffs entitled to put their own valuation or is the Court or, in a High Court, the Taxing Officer competent to correct such valuation?

The learned Vakil for the appellants relies upon various decisions in the High Courts of Bombay and Madras and of the Chief Court of the Punjab which, though affirming the principle that the plaintiffs' valuation must be accepted, do not seem really to cover the case now before us. I proceed to refer to these briefly.

(1) *Parathavi* v. *Sankumani* (8). In this case the plaintiff sought to set aside a sale

(1) (1890) 12 All 129=1890 A.W.N. 39 (F. B.).
(2) (1909) 32 All. 59=4 I. C. 128=6 A. L. J. 972.
(3) (1917) 3 P. L. J. 92=43 I. C. 962.
(4) (1919) 4 P. L. J. 700=52 I. C. 508.
(5) (1872) 19 W. R. 19.
(6) (1912) 22 C. L. J. 415=16 I. C. 898.
(7) (1915) 25 C. L. J. 561=24 I. C. 702.
(8) (1891) 15 Mad. 294.

of which the consideration was Rs. 60,500. He paid a Court-fee of Rs. 10 only as on a declaratory suit but the Court held that he must pay *ad valorem* fee on the value of his interest on the document.

(2) *Samiya Mudali* v. *Minammal* (9). In this case the plaintiff sued to set aside a sale deed and valued his relief at Rs. 600. The trial Court assessed the value at Rs. 2,000, the amount mentioned in the sale deed. The High Court on second appeal held that the plaintiffs' valuation should be accepted. The report does not show whether in the opinion of the Court that was the proper valuation of the relief.

(3) *Vachhani Keshabhai* v. *Vachhani Nanbha Ravaji* (10). The plaintiffs prayed for a declaration of title to certain lands, recovery of a sum of Rs. 637 being their share of the income for the years 1956-1960 Samvat and for an injunction. They valued the first relief at Rs. 130, the second at Rs. 637-8-0 and the third at Rs. 25. The High Court held that both for Court-fees and jurisdiction the plaintiffs' valuation must be accepted and that notwithstanding the defendants' objection that the property was worth Rs. 5,000 the suit was triable by a Second Class Subordinate Judge whose jurisdiction was confined to suits less than Rs. 5,000 in value.

Their Lordships, however, were of opinion that the valuation would be determinable by the Court if a claim for possession were made and on this ground they distinguished the previous ruling of their own Court in *Dayaram Jagjivan* v. *Gordhandas Dayaram* (11).

(4) *Sunderabai* v. *Collector of Belgaum* (12). This was a suit for a declaration and an injunction. Their Lordships of the Privy Council cited with approval the observation of the Bombay High Court that jurisdiction should be determined by the plaintiffs' valuation.

(5) *Barru* v. *Lachhman* (13). In this case the plaintiffs sought a declaration and an injunction and valued the relief at Rs. 130 for purposes of Court-fee and at Rs. 1,100 for purposes of jurisdiction though the value of the land was Rs. 73,192. A Full Bench of the Punjab Chief Court held that as the case fell within S. 7 (iv) (c) of the Court Fees Act the valuation was proper.

(6) *Hari Sanker Dutt* v. *Kali Kumar Patra* (14). In this case the plaintiff sought a declaration of title to some jungle land, damages for the cutting of some trees and an injunction. He valued the declaration together with the injunction at Rs. 130 and the damages at Rs. 79. The High Court of Calcutta held that though the value of the whole jungle was Rs. 1,200, it was neither the duty nor within the power of the Court to ascertain the value of the property for purposes of jurisdiction.

It will be observed that none of the cases relate to possession. They would all seem to relate to claims in which the Court had no option but to accept the plaintiffs' valuation. No case has been shown to us where there was a claim for possession and where the plaintiff was allowed to put a valuation upon it which the Court knew to be false.

On the other hand, it was observed by Richards, C. J. in *Jageshra* v. *Durga Prasad Singh* (15) that S. 7, cl. (iv) (c) requires that the plaintiff shall truly state the value of his relief; to the same effect is *Bibi Umatul Batul* v. *Nanji Koer* (16), *Krishna Das Laha* v. *Hari Charan Bannerji* (17) and *Raj Krishna Dey* v. *Bepin Behari Dey* (18)

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(9) (1899) 23 Mad. 490=10 M. L. J. 240.

(10) (1908) 33 Bom. 307=1 I. C. 108=11 Bom. L. R. 80.

(11) (1906) 31 Bom. 73=8 Bom. L. R. 885.

(12) (1919) 43 Bom. 376=46 I. C. 15=(1919) M W. N. 254=28 C. W. N. 753=52 I. C. 897=21 Bom. L. R. 1148 (P. C.)

(13) (1913) 111 P. R. 1913=23 P. L. R. 1914=22 I. C. 503=228 P. W. R. 1913.

(14) (1905) 32 Cal. 734=9 C. W. N. 690.

(15) (1914) 36 All. 500=24 I. C. 679=12 A. L. J. 844.

(16) (1907) 11 C. W. N. 705=6 C. L. J. 427.

(17) (1911) 14 C. L. J. 47=10 I. C. 865=15 C. W. N. 823.

(18) (1912) 40 Cal. 245=16 C. L. J. 194=17 I. C. 162=17 C. W. N. 591.

and in the High Court at Patna the authorities are unanimous that it is not open to the plaintiff to give an arbitrary and incorrect valuation. See *Pandit Brij Krishna Das* v. *Chowdhury Murli Rai* (19) and *Shama Prasad Sahi* v. *Sheopersad Singh* (20).

In this state of the authorities I think the Taxing Officer was clearly right in following the practice prevailing in this Court.

Apart from authority, it is also quite clear that the interpretation put by the appellants on S. 7 (iv) (c) cannot be accepted; for if pushed to its logical conclusion it would lead to manifest absurdities. It is admitted that a suit for declaration of title and recovery of possession is a suit for declaration with consequential relief. If the section is to be literally construed, then while a plaintiff suing simply for possession would under S. 7 (v) have to pay *ad valorem* fees on the value of the property, he would, by joining a prayer for declaration, pay an *ad valorem* fee on whatever smaller value he chose to put upon the consequential relief. Again when a plaintiff had valued his prayer for consequential relief at a certain figure in his plaint and had failed in the trial Court it would be open to him in appeal to value the consequential relief at any lower figure he might choose. These inconsistencies and anomalies would not occur if the section were held to mean that the valuation for the purposes of Court-fee is to be made in the first instance by the party concerned but is finally determinable by the Court.

The next question is, what is the proper value of the consequential relief in this case. No rules have been made under Ss. 3 and 4 of the Suits Valuation Act in this province for the valuation of an interest in land which is the subject-matter of a suit under S. 7, cl. (iv) of the Court Fees Act. Secs. 3 and 4 of the former Act provide for the valuation of land for the purposes of jurisdiction and under Sec. 8 the value as determinable for the computation of Court-fees is to be the same as the value for the purposes of jurisdiction. No rules having been framed, we must look to the value of the subject-matter of the relief, that is to say, the money value of the loss which the plaintiffs apprehend; and in this case we must follow the practice of this Court, and assess the value of the relief at the value of the 11 bighas 3 kathas in respect of which possession is claimed. The Taxing Officer finds that in 1910 the plaintiffs purchased the entire holding of 11 bighas 18 kathas at a Civil Court auction sale for Rs. 1,323-10-6 and that the proportionate value of the 11 bighas 3 kathas is Rs. 1,239-10-6. The *ad valorem* fee payable upon this sum is Rs. 90 and there is, therefore, a deficit of Rs. 80 in the present case. It may be that the value of the property at the time of the suit was less, though this is not probable, than its value 8 years earlier, but the appellants had an opportunity of proving its real value before the Taxing Officer and as no proof was given we are not in a position to say that the Taxing Officer's decision is incorrect. I think therefore that his decision must be affirmed.

The learned Vakil for the appellant desires two days' time to pay the deficit Court-fee. If the amount is not paid by the 3rd instant, the appeal will be dismissed without further reference to a Bench.

Dawson-Miller, C. J.—I agree.

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(19) (1919) 4 Pat. L. J. 703=56 I. C. 316.
(20) (1917) 5 Pat. L. J. 394=41 I. C. 95=2 P. L. W. 173.

A. I. R. 1923 Patna 140.

DAWSON MILLER, C. J. AND MULLICK, J.

S. C. Dey—Appellant

v.

Mt. Rajwanti Kuer—Respondent.

Misc. Judicial Case No. 25 of 1921, decided on 27th January 1921.

Limitation Act, S. 5—Sufficient cause—Mistake of pleader may amount to.

It could not be laid down as an inflexible rule of law that in no case can the circumstance that a litigant has under the erroneous advice of Counsel or Pleader, presented an appeal out of time, be deemed a 'sufficient cause' within the meaning of section 5. Where the mistake is of such a description that it may arise even amongst practitioners of experience, a litigant should not be made to suffer for such an error.

A person could not deduct the same period twice over and where a legal practitioner thought he could, *held*, that such a mistake cannot be sufficient cause. [P. 141, C. 2

Hurshed Hasnain and *A. N. Singh*—for Appellant.

R. L. Dutt—for Respondent.

Dawson Miller, C. J.—This is an application for extension of time for filing an appeal under section 5 of the Limitation Act. The contention on behalf of the appellant is that he was misled by his Pleader, who informed him that the time for filing the appeal did not expire until the 12th July, the Judgment having been delivered on the 1st of March in the same year. Although the Judgment was delivered on the 1st March, and, therefore, under the practice which hitherto has prevailed in this Court but which may be open to question, the period of limitation would not begin to run until the signing of the decree, namely, on the 16th March.

It appears that before that date, namely, on the 3rd March, the appellant applied for copies of the judgment and decree. On the 26th March he was informed of the number of stamps and folios requisite and he supplied them without delay on the following day and on the 31st March the copies were ready. Under the practice prevailing, as the time for limitation did not begin to run until the 16th March and an application was at that time before the Court for copies and the copies were not supplied until the 31st March, that period up to the 31st March at all events is to be excluded in computing the period of limitation.

Taking the period of limitation as beginning on the 16th March when the decree was signed and excluding the further period up to the 31st March, the 90 days would expire on the 29th June, but as the appeal was not lodged until the 12th July, the appellant was clearly out of time upon that computation. He now, however, puts forward the contention that not only was he entitled to deduct the period between the 6th March, when the period of limitation began to run, and the 31st March, when the copies were ready, but he contends that he is entitled to deduct the period between the 3rd March when he made his application, and the 16th March, when the period began to run, in other words, that he is entitled to deduct from the limitation period certain days which passed before the limitation period actually began to run at all under the rule laid down in this Court; or looking at it in another way he contends that he is entitled to deduct from the limitation period when it did begin to run certain days which had already been deducted; in other words, that he was entitled to deduct these days twice over. It seems to me that it is only necessary to state that proposition to see that it is almost impossible to conceive that any legal practitioner of experience and knowledge of legal principles could make a mistake of that sort.

But assuming that it is possible that a *bona fide* mistake of that sort might be made the case relied upon by the appellant in asking us to extend the time in the particular circumstances of the present case was that decided by Mr Justice Mookerjee and Mr. Justice Carnduff (*Sundar Koer* v. *Raghunath Sahai*) (1), and the principle which was acted upon in that case was that it could not be laid down as an inflexible rule of law that in no case can the circumstance that a litigant has, under the erroneous advice of Counsel or Pleader, presented an appeal out of time be deemed a sufficient cause within the meaning of section 5 of the Limitation Act. And the principle upon which the Court should act in such cases was further stated to be that where the mistake is of such a description that it may arise even amongst practitioners of experience, a litigant should not be made to suffer for such an error.

Accepting that proposition as a reasonable principle upon which the Court should act, it is only necessary, I think, to point out that in that very case decided in 1911 it was in terms decided that the party who was entitled to a deduction of time under the Indian Limitation Act could not ask for a deduction of the same period twice over.

The same principle has been enunciated in at least one case in this Court. How then can it be said that in the year 1920 a legal practitioner of experience could possibly make a mistake which it is alleged has been made on this occasion so as to enable the Court to exer-

(1) (1911) 12 I. C. 677.

cise its powers under section 5 of the Limitation Act ? But the matter does not really rest there because the evidence before us, which consists of the petition verified by an affidavit of one of the Pleaders who was engaged in the matter and who had to do with the preparation of the appeal and lodging it, is of a most unsatisfactory character. It does not say that he (the Pleader in question) was responsible for the mistake. It does not mention in fact who was responsible for the mistake, nor does it very clearly state how the mistake really came to be made if in fact there was any mistake. It says the papers were entrusted to Babu Shambu Saran, a Vakil who had been acting as the Junior Vakil of the petitioner in cases pending in this Court, for the purpose of drawing up the grounds of appeal and that under the instructions of the petitioner a draft of the grounds of appeal was sent to him (when we do not know) and that he was informed (by whom it is not stated) that the last day for filing the appeal would be the 12th July, which was calculated on the basis that the petitioner was entitled to exclude the time between the 3rd and the 31st March spent in taking copies of judgment and decrees.

The matter to be observed about that is this; it does not say who made the mistake or whether it was some practitioner of experience or whether the mistake was merely made by some clerk in the Pleader's office, and so far as the affidavit itself goes, it merely states that he was entitled to deduct the time up till the 31st March, and the time would not expire on the 12th July, but on the 29th June. In these circumstances it seems to me that absolutely no case has been made out why we should extend the time under the provisions of section 5 of the Limitation Act.

The memorandum of appeal is rejected. The respondent is entitled to the costs of his appearance to-day.

Mullick, J.—I agree.

Memorandum of appeal rejected.

A. I. R. 1923 Patna 142.

DAS AND BUCKNILL, JJ.

Madodar Ram—Accused-Appellant

v.

Emperor—Opposite Party.

Death Ref. No. 13 of 1921 and Criminal Ref. No. 133 of 1921, decided on 28th September, 1921, by the S. J., Patna, dated 31st August, 1921.

Jury—Trial by—Inadmissible confession read out—Verdict is vitiated.

Where an inadmissible confession was read out to the jury *held* that this would vitiate the verdict even though the Judge in his charge may have endeavoured to point out the inadmissibility.

Baikuntha Nath Mitter—for Appellant.

Manohar Lal—for the Crown.

Bucknill, J.—In this appeal and reference, appellant, who has been sentenced to death for murder, has, through his Counsel, drawn the attention of this Court to a certain circumstance (which took place in the course of the trial) which is a matter of very grave concern.

It would appear from what is stated by the learned Sessions Judge in his summing up to the Jury, that to use his own words, "the confession which was opened by the Public Prosecutor and was read to the Jury in the course of the trial was not recorded according to law and had to be ruled out as inadmissible."

The fact that such procedure took place in a case of such gravity as this, is a matter of very great regret. Whatever may have actually taken place it seems quite clear that the Jury was informed that the accused had made a confession. I have no doubt whatever that a statement may very reasonably be regarded as having been bound to affect in some measure the minds of the jurymen, however carefully the learned Judge may have (and quite rightly) endeavoured to remove that impression from their minds. In those circumstances, and without expressing the least view as to the facts of this case, I think that the accused is entitled to a new trial. I should like to add that, pending this new trial, I think it would be highly advisable that the accused should be kept under medical observation so that his state of mind may be watched in order to see whether his mentality is

normal. The circumstances under which, as is alleged at the trial, the murder took place, were so violent and barbaric, that it seems possible that the mind of a person who could have committed such a crime was unhinged.

The case will go back for a new trial.

Das, J.:—I agree.

Case sent back.

A. I. R. 1923 Patna 143.

JWALA PRASAD AND ADAMI, JJ.

(*Sheik*) *Karoo and others* —Appellants

v.

Rameshwar Sao and another —Respondents.

Misc. A. Nos. 258 of 1919 and 5 of 1920, decided on 2nd June, 1921, from a decision of the Dt. J., Gaya, dated 5th May, 1919.

(a) *Civil P. C., S. 53—Mortgage decree against Hindu father—Execution can be levied against sons as Legal Representatives.*

Under the present law there is no necessity of any order for attachment of the property in execution of a mortgage decree Consequently after father's death, the proceedings in execution may be continued against the sons. The sons of a Mitakshara family have been made, by express enactment under section 53 of the Code of Civil Procedure, legal representatives of their father in respect of the property which descends to them under the Hindu Law and which has been made liable for the satisfaction of the decree passed by the Court. [P. 147, C. 1.]

(b) *Civil P C., O. 47—Decree against Hindu father—Execution against sons as Legal Representatives—Question of executability of decree on ground of immorality of debts is one within S. 47.*

A separate suit for the determination of the liability of the sons for the debt covered by the decree passed against their father would be barred by section 47. The only remedy of the decree-holder is to apply for execution of the decree against the son of the deceased judgment-debtor as his legal representative The question as to whether the decree is capable of execution inasmuch as the debt covered by it was tainted with immorality, is one relating to the execution of the decree and the plea with respect to that must be taken and determined in the execution proceedings. [P. 148, Cs 1, 2.]

(c) *Hindu Law—Debt—Sons liability is a personal one for debts not incurred for immoral purposes.*

The sons are bound to pay the decreed debt of their father under the Hindu Law. The liability of theirs is a personal one, and it is not barred up to six years from the date of the decree. The rule of Hindu Law is that where a son or a grandson takes ancestral property by survivorship, he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes including the judgment-debtor.

[P. 148, C. 2, P. 149, C. 1.]

(d) *Evidence Act, Ss 101, 102, 103—Plea of Hindu son that debt of father was immoral—Onus of proving it is on son.*

The onus of proving illegality or immorality as affecting the debt incurred by the father is upon the sons, for after the death of their father their liability to pay the father's debt arises under the express text of the *Mitakshara* [P. 148, C. 2.]

(e) *Evidence—Recitals are not proof of necessity.*

Mere recitals in bonds are not presumptive proof of the necessity for the debts borrowed thereunder. [P 146, C 1.]

S. M. Mullick Ray and *T. N. Sahai*—for Appellants.

Kulwant Sahay and *Shiveswar Dayal*—for Respondents.

Jwala Prasad, J :—These two appeals arise out of an order of the District Judge of Gaya, dated the 5th May, 1919. By this order the District Judge disposed of two appeals before him from the order of the Munsif, dated the 1st of February 1919 passed under section 47 of the Code of Civil Procedure in Objection Cases Nos. 219 and 220 of 1918. These two objections were respectively made by the sons of two brothers Gopi and Gobardhan, judgment-debtors in the appellant's decree under execution. The two objections raised the same points and were disposed of by one order by both the Courts and will, therefore, be disposed of by one judgment of this Court.

The Courts below have upheld the objection of the respondents and dismissed the execution of the decree. The decree-holder is, therefore, the appellant before us. The facts have been fully and clearly stated by the Court below and I adopt the same from its judgment.

On 12th September 1906, Gopi and Gobardhan, who were undivided brothers governed by the Mitakshara Law, executed a mortgage-bond in favour of the appellant. September the 21st 1907 (30th Bhado, 1314) was the due date of payment mentioned in the bond. On the 4th of October 1915, eight years after the expiry of the due date, the appellant brought an action to enforce the mortgage security, making Gopi and Gobardhan and a third brother Jogeshwar as defendants. Gopi and Gobardhan did not appear to contest the suit; but Jogeshwar appeared and pleaded that the mortgage of the ancestral property by Gopi and Gobardhan was invalid, as it was not made for family necessities or antecedent debts. Two issues were raised :—

(1) Was Jogeshwar Sahu, defendant No. 3, separate from the other defendants at the time of the execution of the deed?

(2) Was the money advanced by the plaintiff for the benefit of the joint family?

The Subordinate Judge held that Jogeshwar Sahu was joint with his brothers at the time of the mortgage and that the money advanced by the plaintiff was not advanced for the benefit of the joint family. Jogeshwar was accordingly exempted from the liability but, as the mortgaged property had on partition, subsequent to the mortgage, been allotted to the executants of the bond, Gobardhan and Gopi, with which Jogeshwar ceased to have any concern, the Court passed an *ex parte* decree against Gobardhan and Gopi.

The preliminary decree was passed on the 25th of November 1916. On the 2nd of November 1917, the final decree was passed. The direction in the decree was that if the decretal amount was not paid within six months, the mortgaged property would be sold to satisfy the debt. On the 19th December 1917, the appellant-decree-holder took out execution of the decree, making Gopi, Gobardhan and Jogeshwar parties as judgment-debtors. On the 21st of December 1917, the execution was dismissed, no steps apparently having been taken. In the meantime Gopi and Gobardhan died. On the 31st of October 1918, the decree was put in execution for the second time.

We are concerned with this execution. The execution was against four minor sons of Gobardhan and two minor sons of Gopi, with a prayer to substitute them in place of their deceased fathers. Notice was issued against the six minor sons under Order XXI, rule 22. Their application for time to file objection was rejected and the Court substituted their names in place of the original judgment-debtors, Gopi and Gobardhan, and directed issue of notice under Order XXI, rule 66, for the settlement of sale proclamation. These sons filed objection to the execution of the decree under section 47 of the Code of Civil Procedure, which gave rise to Miscellaneous Cases Nos. 219 and 220 of 1918, the lower Court Appeals Nos. 20 and 21 of 1919 and Second Appeals Nos. 5 and 258 of 1919 respectively. The grounds for the objection urged by the minor sons of Gopi and Gobardhan are:—(1) that they are not bound by the decree, inasmuch as they were not joined as parties in the mortgage suit and that the mortgage loan was not taken for family necessities or spent for legal purposes; and (2) that the mortgaged properties, which are ancestral properties and to which they have succeeded after the death of their fathers by survivorship, cannot be followed by the decree holder in execution of his mortgage-decree.

The appellant-decree-holder filed a rejoinder to the effect that some of the sons were not alive at the time of the institution of the suit and of the existence of the others they had no information; that the mortgage loan was taken for the benefit of the joint family and not for illegal purpose; and that the petitioners, the sons of Gopi and Gobardhan, were not born at the time of the mortgage. The decree-holder did not produce his witnesses, although he had got summonses issued, on the dates fixed for the hearing of the case and accordingly the case was decided without any evidence having been gone into.

The Subordinate Judge, resting his decision upon the judgment in the mortgage suit, held that the property was mortgaged without family necessity and consequently the decree against the deceased fathers, Gopi and Gobardhan, was extinguished on their death and no longer subsisted. Relying upon the cases of *Ali Ahmad* v. *Sohan Lal* (1) and *Jowala Prasad* v. *Protap Udai Nath Sahi Deo* (2) the Subordinate Judge dismissed the execution. On appeal the District Judge took the same view and dismissed the appeal. Hence these second appeals by the decree-holder.

The learned vakil on behalf of the decree-holder relies upon section 53 read with section 52 of the Code of Civil Procedure. These sections have now provided that the sons in a Mitakshara family are the legal representatives of their deceased father. Accordingly the respondents represent the

(1) (1914) 12 A. L. J. 619=24 I. C. 6.
(2) (1917) 1 Pat. L. J. 497=37 I. C. 184=1917 P. H. C. C. 27=2 Pat. L. W. 406.

original debtors, Gopi and Gobardhan, and they are liable to satisfy the decree out of the assets of their deceased fathers in their hands. This is conceded by the learned Judge.

The aforesaid new sections in the Code have given effect to the Full Bench decision in *Amar Chandra Kundu* v. *Sebak Chand Chowdhury* (3) vide also the Full Bench decision in *Periasami Mudaliar* v. *Seetharama Chettiar* (4) referred to by the District Judge in his judgment. The learned Judge also concedes that the sons would have been liable to satisfy the decree in case the original decree was a mere decree for money, and they could avoid the decree only on their proving that the debt was immoral for then the son's liabilities as representatives of their deceased fathers, judgment-debtors and their liabilities under their pious duty would coincide: vide *Amar Chandra Kundu* v. *Sebak Chand Chowdhury* (3).

The learned Judge says that the fathers' (Gopi and Gobardhan) undivided shares, as they existed at the time of the mortgage, could be sold if there was an order for the issue of sale proclamation in the execution of the decree during the lifetime of the fathers. The learned Judge on this point observes as follows :—

"No doubt attachment in a mortgage suit is no longer needed after a final decree; but that fact seems to me to make it all the more necessary that the other members of the joint family should be bound by some proceeding which reaches and affects them indicating the order for sale, (such as a sale proclamation) which will have the effect of charging the property in their hands".

For this proposition the learned Judge relies upon the case of *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (5) where in execution of an *ex parte* decree against a Hindu governed by the Mitakshara the estate was attached, but prior to the sale the judgment-debtor died and on objection being made by the infant sons of the judgment-debtors and co-sharers, the latter were referred to a regular suit and the property was sold.

In the suit brought by the infant sons and other co-sharers to set aside the mortgage-decree and the execution sale, it appeared that the debt was incurred without justifying necessity and it was held that neither the infants nor the ancestral properties in their hands were liable for their father's debt, but as regards the judgment-debtor's undivided share in the estate sold, whether or not his alienation was valid by the law as in vogue in Bengal, it was capable of being seized in execution and the effect of the execution sale was to transfer the said share to the purchaser, no execution proceeding having, at the time of the judgment-debtor's death, gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment-debtor's death before the actual sale.

Latterly in the case of *Madho Persad* v. *Mehrban Singh* (6) the decision in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (5) was interpreted to mean that if no proceedings had been taken to enforce the debt in the lifetime of the judgment-debtor, his interest in the property on his death passed to his sons by survivorship, so that it could not be followed by the creditors in their hands.

Thus the learned Judge holds that in order to follow the properties in the hands of the sons, it was necessary for the decree-holder that the execution should have been levied during the lifetime of the fathers by obtaining an order for sale of the property, such as the sale proclamation, in order to create a charge on the undivided share of the fathers and that not having been done, the fathers' undivided share passed on to their sons after their death by right of survivorship without any charge of the mortgage-decree having been imposed upon it. The Judge also relies upon

(3) (1907) 34 Cal. 642=11 C. W. N. 593=5 C. L. J. 491 (F. B.).
(4) (1904) 27 Mad. 243=14 M. L. J. 84 (F.B.).
(5) (1880) 5 Cal. 148=6 I. A. 88=4 Sar. 1=3 Suther 589=4 C. L. R. 226 (P. C.).
(6) (1891) 18 Cal. 157=17 I. A. 194=5 Sar. 8[illegible] (P.C.).

the case of *Ali Ahmed* v. *Sohan Lal* (1) for the aforesaid proposition.

The learned Judge, therefore, concludes by observing " that the charge created by the mortgage on the undivided share of Gobardhan and Gopi has been defeated by the death of the judgment-debtors and that the ancestral property cannot now be charged merely by reason of the mortgage-decree". The word ' merely ' was advisedly used in view of the previous finding. The mortgage executed by Gobardhan and Gobi could not bind their own share in the family property and the fathers in the present case did not execute the bond in their representative capacity inasmuch as no family necessity was proved, and at least some of the sons of the judgment-debtors were alive at the time of the mortgage and the decree obtained against the fathers was not in their representative capacity.

Now the onus of proof was upon the mortgagee-appellant under the decision of *Hunoomanpersuad Panday* v. *Musammat Babooee Munraj Koonveree* (7) and the mere recitals in the bonds are not presumptive proof of the necessity : vide *Raj Luckhee Debea* v. *Gakool Chunder Chowdhry* (8) read with section 38 of the Transfer of Property Act. The decree-holder did not in the present case prove that there was any legal necessity or that the sons were not in existence at the time of the execution of the mortgage.

On the other hand, it was admitted in the rejoinder filed by the decree-holder-appellant that some of the sons were alive. It was also held in the mortgage suit in which the decree under execution was obtained that Jogeshwar was joint with Gopi and Gobardhan at the time of the mortgage and that the property was the ancestral joint property at that time belonging to all the three brothers and that there was no justifiable necessity for the mortgage loan, nor any benefit had accrued thereby to the joint family.

But as the mortgaged property fell to the share of Gopi and Gobardhan after the execution of the mortgage, the mortgage charge was transferred to that share by the principles of the subrogation and was liable to the mortgage-debt, but it was invalid to charge the property after partition, inasmuch as the sons that were in existence were the joint members of their families with their fathers and the ancestral property could not be validly mortgaged to their prejudice, and the objection of Jogeshwar to the alienation must be deemed to be on behalf of the sons in existence as well as on behalf of the sons yet unbegotten or still in the womb : vide Chapter I Section I, verse 27 of the Mitakshara, relied upon by the learned Judge.

Therefore, the learned Judge was right in holding that there was no charge created by the mortgage upon the ancestral property in question even to the extent of the undivided share of the fathers. No doubt, as observed by the learned Judge,

" the fathers stood out of the litigation and in any case they could not be expected to urge that their alienation was unauthorized."

As to the charge upon the undivided share of the fathers, the learned Judge holds that inasmuch as there was no order for sale in the shape of a proceeding for the issue of a sale proclamation during the life-time of the fathers, there was no subsisting valid charge upon the property which followed it in the hands of their sons, who got the property by right of survivorship. He is of opinion that in the present execution the undivided share cannot be sold and that in order to make the sons liable for the decree in question as a debt against the fathers, the mortgagee should bring a separate suit based upon the pious obligation of the sons to pay the debt of their fathers.

The learned Judge says that it will then be open to the sons to raise the question of the debt being immoral or illegal, a question, which, according to the learned Judge cannot legitimately arise for decision within the scope of the proceedings under section 47 of the Code of Civil

(7) (1851) 6 M. I. A. 393=18 W. R. 81 (*n*)=2 Suther 29=1 Sar 552 (P. C.)

(8) (1918) 13 M. I. A. 209=3 B. L. R. 37= 12 W. R. 47=3 Suther 275=2 Sar. 518 (P.C.)

Procedure. He says that the decree is still within six years and such a suit by the decree-holder appellant will be well within time, the preliminary decree being of 25th November 1916 and the final decree of December 2nd, 1917. In this view he is of opinion that there is no hardship caused to the decree-holder.

I have fully considered the well reasoned judgment of the learned Judge and the contentions on behalf of both the parties. It appears to me that under the present law there is no necessity of any order for attachment of the property in execution of a mortgage-decree. The decree in a mortgage suit directs, as has been done by the present decree the sale of the ancestral property mortgaged by the fathers.

Consequently after their death, the proceedings in execution may be continued against the sons. The sons of a Mitakshara family have been made, by express enactment under section 53 of the Code of Civil Procedure, legal representatives of their father in respect of the property which descends to them under the Hindu Law and which has been made liable for the satisfaction of the decree passed by the Court. The section runs as follows:—

"For the purposes of section 50 and section 52 property in the hands of a son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative".

This question was enacted in order to settle a section of procedure on which there was conflict of judicial decision. The Bombay and the Calcutta High Courts were of opinion, under the old Code of Civil Procedure of 1882, that the question of the liability of the sons to pay their fathers' debt unless tainted with immorality was one "relating to the execution of the decree within the meaning of section 47 and that it should be determined by the Court executing the decree. Vide *Umed Hathisingh* v. *Goman Bhaiji* (9), *Shivram Dhondu Pujara* v. *Sakharam Krishna* (10), *Hanmant Kashinath Joshi* v. *Ganesh Annaji* (11) and *Amar Chandra Kundu* v. *Sebak Chand Chowdhury* (3).

On the other hand, the Madras and the Allahabad High Courts were of opinion that a decree against a Hindu father could not be executed against the ancestral property in the hands of the sons even to the extent of the father's interest in the property and the only remedy of the decree-holder was to institute a regular suit against the sons, they being of opinion that the question whether the debt was tainted with immorality was not one that could be gone into in execution proceedings: *Ravi Varma Raja* v. *Yadayil Koman* (12), *Beresford* v. *Ramasubba* (13), *Lachmi Narain* v. *Kunji Lal* (14) and *Jagannath Prasad* v. *Sita Ram* (15).

There was no difference of opinion in any of the High Court as to the execution being continued, whether the family property was attached during the lifetime of the father or not. The Allahabad and the Madras decisions are no longer law. They have been virtually overruled by section 53 of the Code, which has given effect to the Bombay and the Calcutta High Courts views.

Under Section 50, clause (1) of the Code of Civil Procedure, if the judgment-debtor dies before the decree is fully satisfied, the decree-holder may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Under Section 53 when a person governed by the Hindu Law dies before the decree against him is satisfied, his sons or other descendants would be deemed to be his legal representatives in respect of the property which is liable under the Hindu

(9) (1896) 20 Bom. 385.

(10) (1909) 33 Bom. 89=1 I. C. 459=10 Bom L. R. 939

(11) (1919) 43 Bom 612=51 I.C. 612=21 Bom. L R. 485

(12) (1882) 5 Mad. 223.

(13) (1890) 13 Mad. 197.

(14) (1894) 16 All. 449=1894 A. W. N. 169.

(15) (1889) 11 All. 302=1889 A. W. N. 81.

Law for the payment of the debt of the deceased ancestor in respect of which the decree has been passed.

Therefore, under the new law the decree can be executed against the son to the extent of the ancestral property which is liable for the debt of the decree passed against the father. The procedure is that the decree-holder should bring the son on record as the legal representative of the deceased father judgment-debtor. This being done, the question relating to the execution, (discharge and satisfaction of the decree) must be determined by the Court executing the decree and not by a separate suit by virtue of Section 47 of the Code. Therefore, having regard to the present Section 53 read with Sections 52 and 47, a separate suit for the determination of the liability of the sons for the debt covered by the decree passsed against their father would be barred by section 47.

The only remedy of the decree-holder is to apply for execution of the decree against the son of the deceased judgment-debtor as his legal representative. Again, the amendment of the old words 'fully executed" by the words "fully satisfied" in section 50 was with a view to settle the conflict of decisions between the Allahabad and the Madras High Courts as to when the legal representative should be brought on the record.

Under the present Code, at any time when the decree has not been "fully satisfied" the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased. The application for substitution of the legal representative and to continue the execution may be made when the judgment-debtor dies during the pendency of execution proceedings as well as when the judgment-debtor dies after the decree but before it has been put into execution.

Therefore, the appellant adopted the right procedure in the present case in applying for the execution of the decree against the sons of the judgment-debtors, the respondents, when the first execution failed and thereafter the judgment-debtors died without having "fully satisfied" the decree. The question as to whether the decree is capable of execution inasmuch as the debt covered by it was tainted with immorality, is one relating to the execution of the decree and the plea with respect to that must be taken and determined in the execution proceedings.

The learned Judge, is therefore, to my mind wrong in holding that the decree-holder must necessarily bring a separate suit for the determination of the liability of the sons to pay the debt on the ground of their pious obligation to discharge the debt of their fathers. The question was one which appertained to the execution of the decree and was well within the scope of section 47 of the Code. The judgment-debtors in the present case where the applicants under the section 47 of the Code, objecting to the execution of their liability under the decree. Their objection was, as stated by the learned Judge, that

"they were not bound by the decree inasmuch as they were not joined as parties to the mortgage suit and that the mortgage loan was not taken for family necessity or spent for legal purposes".

There was no objection taken on the score of the debt being tainted with immorality. No evidence was also offered on that point. The onus of proof of immorality or illegality as affecting the debt incurred by the fathers was upon the sons, for after the death of their fathers their liability to pay the fathers' debt arises under the express text of the Mitakshara, on the ground of their pious obligation to save their fathers from the region of torment or hell. The sons are, therefore, bound to pay the decreed debt of their fathers under the Hindu Law.

The liability of theirs is a personal one and, as the learned Judge has held, it is not barred inasmuch as six years from the date of the decree have not yet elapsed. Therefore, in the execution proceedings the appellant-decree-holder is entitled to enforce the decree in question by executing it against the sons. This is a personal liability of the sons, irrespective of any ancestral property or self-acquired

property of their fathers in their hands. The properties in mortgage are now held by the sons, and, therefore, they can be sold in execution of the decree. Under section 50, clause (2) of the Code of Civil Procedure, when the decree is executed against a legal representative, he is "liable to the extent of the property of the deceased which has come to his hands and has not been fully disposed off."

The rule of Hindu Law is that where a son or a grandson takes ancestral property by survivorship, he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes including the judgment-debts. It was with a view to enforce this recognized rule of Hindu Law, namely, that members of a joint Hindu family may not escape the payment, out of the joint family property, of any debt incurred and decreed against their father before his death, provided that such debt is not tainted with immorality, that section 53 was enacted in the new Code.

The result is that the ancestral property in the hands of the sons of Gopi and Gobardhan is liable to be sold on the basis of their personal liability to pay off the debt of their fathers.

In this view the objections of the sons against whom the decree has been executed as the legal representatives of the deceased fathers, who were the original judgment-debtors in the decree, must be disallowed under section 47 of the Code of Civil Procedure. The orders of the Court below are set aside and the appeals are decreed with costs.

Adami, J. :—I agree.

Appeal allowed.

A. I. R. 1923 Patna 149.

JWALA PRASAD, AG. C. J. AND ROSS, J.

Patait Dinanath Sahi—Appellant

v.

Patait Malhiji Baid—Decree-holder-Respondent.

Civil Appeal No. 75 of 1920, decided on 12th July 1921, against order by the Special Sub.-J., Palamou.

Civil P. C., S 47—Objection to liability of legal representative must be decided under section 47.

The executing Court is bound to decide whether a certain legal representative is liable to satisfy the decree. Order of substitution of legal representative making him liable to satisfy the decree as legal representative, but without deciding his objections is improper. [P. 150, C. 1.]

Ram Chander Bhaduri and *Panchanan Banerji*—for Appellant.

Sambhu Sharan—for Respondent.

Ross, J. :—On the 8th September 1915, the Respondents obtained a mortgage decree against Tekait Koslesnath Sahi. In Sawan 1325 the judgment-debtor died. On the 8th February 1919, the decree-holders applied for the substitution of the two minor sons of Tekait, namely, Tekait Goannath Sahi and Babu Juru Partapnath Sahi and of his brother, Patait Dinanath Sahi in his place. On the 17th September 1919, Patait Dinanath Sahi, the Appellant, filed in the Court of the Subordinate Judge an objection petition alleging that he was not liable to satisfy the decree passed against his brother. He denied that the judgment-debtor was the *malik* and *karta* of the joint family and *gadinashin* of the objector's estate and that the *gadinashini* system was in vogue in his family. He alleged that he was a sharer in the estate and that his share was equal to that of the judgment-debtor; he further stated that he along with his brother supervised and managed the estate as *malik*, and that the deceased judgment-debtor never exercised any right over the objector's estate and that the mortgage did not affect the objector's property.

The Subordinate Judge held that the question raised in the petition of objection could not be gone into in execution proceedings. He further held that the *khewat* showed that the objector was jointly recorded with the deceased Tekait and that he was a co-parcener of a joint Mitakshara family and, therefore, a legal representative within the meaning of S. 2 cl. (11) of the Civil Procedure Code.

He also held that the substitution of the objector in the place of the deceased judgment-debtor was not bad and that the question whether he was bound by the decree and was an heir of the Tekait was left open and undecided.

In my opinion ; this order cannot stand; it is in fact self-contradictory. The Subordinate Judge in the first place refuses to go into the questions raised by the petition of objection on the ground that they cannot be gone into in execution proceedings. He then proceeds to hold on the strength of the *khewat* that the objector is a co-parcener in a joint Mitakshara family, a fact which the objector had denied. This is in reality a decision of one of the objections which the Subordinate Judge had declined to enter into. He then, after making the order for substitution which itself renders the objector liable to satisfy the decree, says that the question whether the objector is bound by the decree is left open and undecided. This also seems to be a plain contradiction.

It seems to me that as the objector was not a party to the decree, he was entitled to a decision on the points raised in his objection.

I would, therefore, allow this appeal with costs and remand the case to the Subordinate Judge for trial of the objection.

Jwala Prasad, Ag. C. J.—I agree.

Case remanded.

A. I. R. 1923 Patna 150.

JWALA PRASAD, J.

Anand Ram Pramhans and others—Plaintiffs-Appellants

v.

Ramgulam Sahu and others—Defendants-Respondents.

Stamp Reference decided on 31st October, 1922.

(a) *Civil P. C., O. 41, R 1—Memorandum of appeal can be received by proper officer even on holidays.*

There is nothing to prevent the presentation of a plaint or a memorandum of appeal during a vacation or even on a Sunday provided it is presented to a proper officer and that officer receives it. [P. 151, C. 1.]

(b) *Patna High Court Rules, Ch. II, Rr. 16, 14, and 13—Memorandum presented to Assistant Registrar is not a valid presentation.*

Whether the receiving of a memorandum of appeal is a judicial act or not, rule 16 expressly says that it shall be only within the competence of a Judge or Judges of the High Court, in the absence of the Registrar, to receive a memorandum of appeal, and in the face of this express provision the Deputy or the Assistant Registrar could not receive the memorandum of appeal. [P. 151, C. 2.]

(c) *Bihar and Orissa Court Fees Act (1922)—Memo. of appeal presented to wrong officer before, and received by proper officer after the new Act—Court-fee under the new Act must be paid—Act has no retrospective effect.*

Where a memorandum of appeal was presented to a wrong officer before the new Court Fees Act came into force but was received and filed by the proper officer after the new Act came into force, *held*, that the memo of appeal must bear Court-fees under the new Act. But the copies of judgment of decree obtained before the present Act came into force must bear stamp under the old Act The fact that they were filed after the new Act came into force would not make them inadmissible The present Act cannot have retrospective operation so as to impose liability upon appellants to pay Court-fee which they were not liable to pay when the copies were obtained. [P. 151, C. 2; P. 152, C. 1.]

S. C. Mitter, S. N. Palit, Jadubans Sahay and *Hareshwar Prasad Sinha*—for Appellants.

Sultan Ahmad—for the Crown.

Jwala Prasad, J.:—This is a court-fees matter and has been referred to me as a Taxing Judge. The first question for determination is whether the memorandum of appeal is sufficiently stamped.

The memorandum of appeal was filed before the Assitant Registrar of the High Court on the 18th of August 1922 when the old Court Fees Act, was in force. According to that Act, the memorandum of appeal bore court-fee of sufficient value. The new Bihar and Orissa Court-Fees Act (Act II of 1922) came into force on the 24th day of August 1922, according to which the court-fees should have been much larger than has been paid by the appellant. The Court was closed for the long vacation from the 4th of August to the 22nd of October, 1922, though the offices were open and the Registrar was on duty.

Under Order 41, rule 1, the memorandum of appeal must be " presented to the Court or to such officer as it appoints in this behalf". This Court has appointed the Registrar to receive memorandum of appeal (Chapter II, rule 13, clause 3, Patna High Court Rules).

There are ample authorities to show that a memorandum of appeal presented during the vacation to the proper officer appointed

in that behalf will be valid presentation although it is open to an appellant to present a memorandum of appeal on the first day of opening of the Court under the Law of Limitation if the time fixed for the filing of the same expires during a vacation. This is for the benfit of litigants. But there is nothing to prevent the presentation of a plaint or memorandum of appeal during a vacation or even on a Sunday provided it is presented to a proper officer and that officer receives it vide *Ummto Ram* v. *Protab Chunder* (1), *Gobind Kumar* v. *Hurogonal* (2) and *Ram Das Chakarbati* v. *Official Liquidator of the Cotton Ginning Company, Limited* (3). Therefore if the Assistant Registrar in this case was the officer properly constituted to receive the memorandum of appeal, in my opinion the appeal was then properly presented and filed on the 18th of August 1922 and the court-fee payable was that prescribed by the Act which was then in force, namely, the old Court Fees Act.

The chief question, therefore, for determination is whether the Assistant Registrar was the officer authorized to receive the memorandum of appeal in question. He has not been expressly so appointed by the rules of our Court. The Registrar though on duty, was not in Patna those days. It has been urged that he had delegated his powers to the Assistant Registrar under rule 14 of Chapter II of our Rules.

There is nothing to show that the powers were delegated by the Registrar under that rule, even if the Registrar had the power to do so and that the receiving of the memorandum of appeal was not a judicial or *quasi* judicial matter.

It is then said that the Assistant Registrar must be deemed by implication to have the powers of the Registrar delegated to him. This contention is based upon what is said to have been the practice prior to 1919 when the Deputy and the Assistant Registrar used to receive appeals during vacation. We do not know whether they did it under any delegation of powers made by the Registrar, or only as a mere matter of practice. I do not think that the delegation, if any prior to 1919 will be of any avail for the year 1922.

In order to apply rule 14, it must be clearly shown that there was a declaration by the Registrar of his powers to the Deputy or the Assistant Registrar before he left for Ranchi during the last vacation. Therefore rule 14 does not help the appellants in the present case.

Under rule 16, in the absence of the Registrar, his powers under rule 13, clause (1) to (13), must be exercised by a Judge or Judges; in other words the power of the Registrar to receive an appeal under clause (3) of rule 13 could, only during the vacation and in the absence of the Registrar, be exercised by a Judge of this Court.

The memorandum of appeal should therefore have been, in the absence of the Registrar, presented to Mr. Justice Adami who was the Vacation Judge. Whether the receiving of a memorandum of appeal is a judicial act or not, rule 16 expressly says that it shall be only within the competence of a Judge or Judges of this Court, in the absence of the Registrar, to receive a memorandum of appeal, and in the face of this express provision I do not think that the Deputy or the Assistant Registrar could receive the memorandum of appeal in question. They could only perform such of the duties of the Registrar as were enjoined upon them under clauses (14) to (23) of the said rules.

Therefore although, in my opinion, the appeal could be presented on the 18th of August 1922 to the Registrar or a Judge of this Court, it was not properly presented to the Court or to the officer appointed by the Court under Order 41, rule 1 of the Code of Civil Procedure.

Therefore the memorandum of appeal should be deemed to have been presented on the 23rd of October 1922 when the Court reopened and the Registrar actually received the document and noted on the order sheet as having been filed on that date. The new Bihar and Orissa Court-Fees Act, which had already come into force before the 23rd of October 1922 will

(1) 16 W. R. 230.
(2) 3 Beng L. R. 72=11 W. R. 537.
(3) (1887) 9 All. 866=1887 A. W. N. 34.

apply to the present case, and hence the memorandum of appeal is insufficiently stamped to the extent and the value indicated by the Stamp Reporter. The Vakalatnama is also insufficiently stamped, as is reported by the said officer. The copies of the judgments and the decrees, to my mind, are properly stamped and bear sufficient court-fees, inasmuch as they were obtained before the present Act came into force, and therefore the fact that they were filed after the present Court-Fees Act came into force would not make those documents invalid and unreceivable under the new Court-Fees Act. This is also supported by the General Clauses Act, Section 6, clause (c). The present Act cannot have the retrospective effect to impose a liability upon the appellants to pay court-fee which they were not liable to pay on the date when the copies were obtained by them. I understand that there are number of cases of this nature. They will all be governed by this Judgment.

Reference answered.

A. I. R. 1923 Patna 152.

JWALA PRASAD, J.

Mt. Manik and others—Appellants

v.

Ranjas Agarwalla and others—Respondents.

F. A. No. 220 of 1922 decided on 30th October, 1922.

(a) *Court Fees Act, Sch. II, Art.* 17 (1)—*Suit under O.* 21, *R* 63, *C. P. C.—Court-fee payable on, is Rs.* 10 *though the property is sold before suit is brought.*

Where plaintiff sues for declaration under R. 63, O. 21 against an order made under R. 58, O. 21. Art. 17, Sch. II, Court Fees Act applies. The fact that the property was actually sold two days later but before the suit was brought does not affect the nature and scope of the suit.

[P. 152, C. 2]

(b) *Practice—Question of Court-fee—Depends upon nature of suit*

Where the question is one of Court-fee payable on the plaint the object and nature of suit has to be ascertained and the cause of action stated by the plaintiff affords the test for the determination of the nature and scope of the suit. [P. 152, C. 2.]

Subal Chandra Mazumdar—for Appellants.

Jwala Prasad, J.—The question referred for decision is whether the ruling in *Phul Kumari* v. *Ghanshyam Misra* (1) holds good for a case in which the property in dispute has not only been attached but sold before the suit has been brought. I would answer the question in the affirmative.

Lord Robertson in delivering the judgment of the Judicial Committee observed that for the right determination of the question at issue the object and nature of the suit has to be ascertained and his Lordship looked upon the cause of action stated by the plaintiff as the test for determination of the nature and the scope of the suit. In that case, as in the present, the cause of action was stated to be the date of the judgment pronounced by the Court in the claim lodged by the plaintiff under the Code of Civil Procedure (Order 21, Rule 58). The plaintiff in the present case was apparently aggrieved by the order of the Court dismissing her claim to the property in dispute and distinctly averred that the cause of action arose on the date her claim was disallowed, the 19th of February 1921. Her obvious intention in bringing the action was to have the said order of the Court, rejecting her claim, set aside. Such right has been expressly conferred upon the plaintiff by Order 21 Rule 63 of the Code. The fact that the property was actually sold two days later, that is, on the 21st February, but before the suit was brought does not affect the nature and scope of the suit.

The plaintiff claims to be in possession of the property and does not ask for her being restored or the possession being delivered to her as in the case of *Chandradhari Singh* v. *Tipan Prasad Singh* (2) decided by the late Taxing Judge, Mr. Justice Roe. Nor does the decision of Mukherji J, in the case of *Krishna Das Laha v. Hari Charan Banerji* (3) apply to the facts of the present case. It is difficult to distinguish the present case from the case of *Phul Kumari* v. *Ghanshyam Misra* (1) and to take it out of the purview of the decision of their Lordships of the Judicial Committee. To my mind the case clearly comes under the first head of Article 17, schedule 2 of the Court Fees Act and the Court-fee payable is Rs. 10. The plaintiff, however, undervalued the property and the valuation as estimated by the stamp reporter is accepted to be correct.

(1) [1908] 35 Cal 202=35 I. A. 22=7 C. L. J. 36=12 C. W. N. 1069.

(2) [1918] 43 I. C. 971.

(3) [1911] 14 C. L. J. 47=10 I. C 965=15 C. W. N. 823.

A.I.R. 1923 Patna 153 (1)

DAS, J.

Ramdheyan Ram—Petitioner.

v.

Mt. Ram Dularia—Opposite Party.

Cr. Ref. No. 51 of 1921, decided on 21st October, 1921.

Criminal P. C., S. 488—Effect of decree on previous order under the section considered

A Civil Court decree is no answer to an application for enforcement of an order previously obtained by the wife under S. 488 of the Code for her maintenance, without proof by the husband that the conditions of the decree for custody had been duly complied with and that, without any sufficient reason, she has left his custody. The question that her consent to the decree was obtained by fraud could not be investigated by the Criminal Court.

[P. 153, C. 1.]

S. N Sahay—for Opposite Party.

Judgment.:—I am unable to agree with the views taken by the learned Sessions Judge of Shahabad. It is quite true that the subsequent decree of the Civil Court supersedes any order for maintenance that may have been previously passed by a Criminal Court under section 448 of the Code of Criminal Procedure; but as has been held, such a decree is no answer to an application for enforcement of an order previously obtained by the wife under section 488 of the Code for her maintenance, without proof by the husband that the conditions of the decree for custody had been duly complied with and that, without any sufficient reason, she has left his custody. See *Devi Dutta* v *Ganga Devi* (1).

It is quite true that one of the questions which was raised by the lady, namely, that her consent to the decree was obtained by fraud could not be investigated by the Criminal Court; but still her other allegations were there, namely, that her husband refused to maintain her and was in fact ill-treating her. Those were matters which could be investigated by the Criminal Court, and they were in fact investigated by the Criminal Court. The learned District Magistrate has recorded a finding that the husband refused to maintain her.

In my opinion, upon that finding it was open to the wife to apply for enforcement of the previous order passed in her favour under section 488 of the Code of Criminal Procedure.

I am unable, therefore, to accept the reference.

Reference not accepted.

(1) (1906) 4 P R. 1906 (Cr.) = 115 P.L.R. 1907.

A.I.R. 1923 Patna 153 (2).

COUTTS AND DAS, JJ.

Nabijan—Defendant-Appellant

v.

Mt. Sahifan and others—Plaintiffs-Respondents.

Appeal No. 317 of 1920, decided on 15th June 1922, from the appellate decree of the Dt. J., Bhagalpur.

Mahomedan Law—Dower—Transfer by widow in possession of property of her husband is valid until the dower is paid.

Where a Muhammadan widow is in possession of property belonging to her deceased husband in lieu of dower it is competent to her to sell it without necessarily selling her right to receive her dower. Such a transfer conveys to the transferee the right to remain in possession during the widow's life-time or until the widow's dower or the proportionate party thereof corresponding to the property transferred is satisfied [P 154, C. 2]

B. B. Saran for *Parameshwar Dayal*—for Appellant.

S. A. Sami—for Respondents.

Coutts, J.:—The plaintiffs in this case are the heirs of one Shaikh Wahid. The defendant No. 2 is his widow. The plaintiffs brought the suit for recovery of possession of their share of the land after ejectment of the defendants first party to whom the widow had sold the land. The suit was dismissed in the Court of first instance but on appeal to the District Judge this decision has been set aside and the suit has been decreed. The reason why the learned District Judge has decreed the suit is that the widow was holding the land in lieu of dower, that as she had no right to transfer the entire property to the defendants first party they have no title, and, consequently, the plaintiffs are entitled to a decree for ejectment.

This decision is undoubtedly wrong. The position is, as has been laid down by their Lordships of the Privy Council in the case of *Ali Baksh* v *Allahabad Khan* (1), where they observed in a similar case that "the right is one which the widow secures as a creditor for her dower and it is

(1) (1910) 32 All. 551 = 6 I.C. 376 = 7 A.L.J. 567.

one to continue holding until her debt is satisfied. Such a right is property and *prima facie* in the absence of any law or contract to the contrary. It is property which is both heritable and transferable." The present case is on all fours with the case of *Abdulla* v. *Shams-ul-Haq* (2), in which it was held

"Where a Muhammadan widow is in possession of property belonging to her deceased husband in lieu of dower it is competent to her to sell it without necessarily selling her right to receive her dower. Such a transfer conveys to the transferees the right to remain in possession during the widow's lifetime or until the widow's dower or the proportionate party thereof corresponding to the property transferred is satisfied."

This is clearly the correct view of the law. I would accordingly set aside the decision of the learned District Judge and would decree this appeal with costs. The plaintiff's suit will stand dismissed.

Das, J.:—I agree.

Appeal accepted.

(2) A.I.R 1921 All. 262=43 All. 127.

A.I.R. 1923 Patna 154.

DAS, J.

Mahabir Misser—Plaintiff Appellant.

v.

Mt. Aso Kuer and others—Defendants Respondents.

Appeals Nos. 203 and 204 of 1920, decided on 27th March, 1922.

Civil P. C., S. 100—Misreading of documents not of title is no point of law.

Misreading the documents, not documents of title and misconstruction of those documents is not a point of law which would justify High Court in interfering with the decision of the Court below. [P. 155, C. 1]

Murari Prasad—for Appellant.

Harihar Prasad Singh—for Respondents.

Judgment.:—This appeal arises out of a suit under section 105 of the Bengal Tenancy Act for correction of certain entries made in the finally published Record-of-Right. We are in this appeal concerned only with two plots, *viz.*, plot No. 1140 and plot No. 1138; being an orchard. The Court of first instance found in favour of the plaintiff in respect of these two plots of land. The lower appellate Court, however, has reversed the decision of the Court of first instance.

The plaintiff claims as the *chela* of Janak Das in whose favour, according to him there was a grant of certain lands by the predecessors-in-title of the defendants. Both the Courts have come to the conclusion that the plaintiff is not the *chela* of Janak Das. That finding is a finding of fact which is binding on me in second appeal. But it is urged on behalf of the appellant that the plaintiff having been in possession of these two plots for some years and having pulled down the old building and built a new house on plot No. 1140 he is entitled to retain possession of these two plots of land. According to him there is no such thing as permissive possession under the Bengal Tenancy Act and that as he was a settled *raiyat* of the village he acquired an occupancy right to these plots by being allowed by the landlord to retain possession of them. Now, in my opinion, the appellant cannot be regarded as a tenant at all. A 'tenant' as defined in the Bengal Tenancy Act "is a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that person."

The learned Judge in the Court below has come to the conclusion that the plaintiff did not hold any land under the defendants and that it has not been suggested that there was any special contract between the plaintiff and the defendants.

The plaintiff would, therefore, not be liable to pay any rent for that land to the defendants. The Bengal Tenancy Act is in no sense exhaustive. It may be that the plaintiff, who looked after Janak Das during his lifetime, was allowed by the defendants to retain possession of these plots of land. As regards the case of the plaintiff, that he built the house on plot No. 1140, the lower appellate Court has found against him. The learned Vakil for the appellant contends that the learned Judge in the Court below misread the documents which were filed on his behalf. That may be so but we are

not in second appeal entitled to reverse the decision of the lower appellate Court merely on the ground that it misread the evidence that was adduced on behalf of the plaintiff. The documents, upon which the learned Vakil for the appellant rely, are not documents of title and accordingly misconstruction of those documents is not a point of law which would justify this Court in interfering with the decision of the Court below.

In my opinion the appeal involves question of facts and as these facts have been decided against the appellant by the learned Judge in the Court below I must dismiss this appeal and dismiss it with costs.

The analogous appeal is not pressed. That appeal, *viz.*, Second Appeal No. 204 of 1920, must also be dismissed but without costs.

Appeals dismissed.

A. I. R. 1923 Patna 155.

ADAMI, J.

Hari Bux Ram—Petitioner

v.

Chhedi Pande—Opposite-Party.

Cr. Rev. No. 113 of 1922 and Civ. Rev. No 86 of 1922, decided on 22nd May, 1922, to revise an order passed by the Dt. Reg. Motihari, dated 6th February, 1922.

Registration Act, S. 82 (a)—Revision-Registrar not a Criminal Court—High Court cannot interfere with his order.

The District Registrar examined witnesses and made a full inquiry and then proceeded to enquire into the whole case; and he came to a finding that the documents in question ought to be cancelled and that they could not be registered. He, therefore, upset the order of the Special Sub Registrar directing registration and at the same time refused to sanction the prosecution for falsely denying execution, under section 82 of the Registration Act.

Held District Registrar has given good reasons in that judgment and until that judgment is upset by a proper authority, either by the Board of Revenue or by a decree of a Civil Court, that judgment is a good judgment. That being so, and the High Court being unable to go into the reasons for which that finding was came to, High Court cannot interfere with that part of the order which refused to accord sanction. The District Registrar acts as a Revenue Court, and there can be no doubt that High Court has no jurisdiction to interfere with orders passed by the Revenue authorities in their Revenue administration or by the Revenue Courts. The order passed by the District Registrar may have been with ut jurisdiction but the remedy for the petitioner was either to approach the Board of Revenue to get the order set aside as being without jurisdiction, or, if necessary, to file a suit in the Civil Court.

[P. 156, C. 1.]

Asghar and *H. P. Sinha*—for Petitioner.

Government Advocate — for Opposite Party.

Judgment:— The facts which are necessary for a decision of this case are as follows:—

On the 6th of December 1920 the petitioner applied to the Sub-Registrar of Bettiah for compulsory registration of a mortgage and a sale-deed which he alleged had been executed by one Chhedi Pande. Chhedi Pande before the Sub-Registrar on the 16th December denied execution of those documents and therefore, the Sub-Registrar refused to register them. The petitioner then filed an application under section 73 of the Registration Act before the District Registrar of Motihari.

The District Registrar made over the matter for enquiry to the Special Sub-Registrar who had amalgamated powers under sub-section (2) of section 7 of the Registration Act and had, therefore power to make the inquiry just as if, he were the District Registrar. The Special Sub-Registrar examined witnesses on both sides and found on the 15th of July 1921 that the documents in question had been duly executed by Cheddi Pande and, therefore, ordered those documents to be registered. The deeds were actually registered on the 22nd July 1921.

The Special Sub-Registrar found that Cheddi Pande had made false statements and had thus committed an offence under section 82, clause (*a*) of the Registration Act and, therefore, submitted the papers and a report, dated the 20th July 1921, for the sanction of the District Registrar under section 83 of the Act. The District Registrar called on Cheddi Pande to show cause against the prosecution under section 82 (*a*) for falsely denying execution of the sale-deed and the mortgage deed.

When cause was shown the District Registrar examined witnesses and made a full inquiry and then proceeded to enquire into the whole case; and he came to a finding that the documents in question ought to be cancelled and that they could not be registered. He, therefore, upset the order of the special Sub-Registra

directing registration and at the same time refused to sanction the prosecution of Chhedi Pande under section 82 of the Registration Act. It is against this order of the District Registrar that this application has been made.

The grounds taken are that as the Special Sub Registrar had co-ordinate powers with the District Registrar the District Registrar had no jurisdiction to upset the order of the Special Sub-Registrar, directing registration, or to refuse to confirm the sanction granted by the Special Sub-Registrar for the prosecution of Chhedi Pande.

Now, it is quite clear that the District Registrar was acting as a Revenue Court and there can be no doubt that this Court has no jurisdiction to interfere with orders passed by the Revenue Authorities in their revenue administration or by the Revenue Courts. The order passed by the District Registrar may have been without jurisdiction but remedy for the petitioner was either to approach the Board of Revenue to get the order set aside as being without jurisdiction, or, if necessary, to file a suit in the Civil Court. With that part of the application this Court has nothing to do.

It is next contended that the District Registrar in refusing to accord sanction for the prosecution of Chhedi Pande under section 82 (*a*) was acting as a Court in a criminal matter and, therefore, this Court has jurisdiction to interfere.

I do not think that it is necessary to enter into the question of the power of this Court to interfere with this order as to sanction. The facts are that the District Registrar has, as District Registrar, given judgment after full inquiry and has found that the sanction should not be accorded. He has given good reasons in that judgment and until that judgment is upset by a proper authority, either by the Board of Revenue or by a decree of a Civil Court, that judgment is a good judgment. That being so, and this Court being unable to go into the reasons for which that finding was come to, I cannot see that I can now interfere with that part of the order which refused to accord sanction.

The matter might be looked at also in another way. If this order were upset by this Court at the present juncture while the judgment of the District Registrar still holds good so far the revenue side of the matter is concerned, there must necessarily be some confusion. The result of upsetting the District Registrar's order as to sanction would be to restore the order of the Special Sub-Registrar granting sanction to prosecute Chhedi Pande, and, therefore, we would at the same time have an order of the Sub-Registrar directing the prosecution and a revenue order of the District Registrar to the effect that the case is not one in which registration should be allowed owing to faith being put in the statements made by Chhede Pande.

Under the circumstances, even if this Court had jurisdiction to interfere with the order as to sanction, I think that this is a case in which this Court would refuse to interfere. The application is, therefore, rejected.

The order passed in the above case will also govern Civil Revision No. 86 of 192-.

Application rejected.

A.I.R. 1923 Patna 156.

COUTTS AND ADAMI, JJ.

Basdeo Narain Singh and others—Defendants-Petitioners.

v.

Harakh Narain Singh and others—Plaintiffs Opposite Party.

Civil Rev. No. 134 of 1922, decided on 6th June, 1923.

Civil P. C., O. 9, R. 8—Scope.

On the date fixed for hearing the plaintiff and his Pleader were present in Court and an application filed for time was rejected whereupon the Pleader who was the junior Pleader saying that he had no instructions asked for time to go and consult his senior. The Court granted half an hour's time and again took up the case. No one appears to have been present and the suit was dismissed.

Held. The dismissal was under O. 9, R. 8, for default.

[P. 157, C. 1.]

Mahabir Prasad—for Petitioners.

Shivshwar Dayal—for Opposite Party.

Coutts, J.:—The facts of this case shortly are that on the date fixed for hearing the plaintiff and his Pleader were present in Court and an application was filed for time. This was

rejected whereupon the Pleader who was the junior Pleader saying that he had no instructions asked for time to go and consult his senior. The Court granted half an hour's time and again took up the case. No one appears to have been present and the suit was dismissed. Subsequently an application for restoration under O. IX, R. 9 was made and rejected. An appeal was preferred to the Subordinate Judge and the application allowed and the suit restored.

This application in revision has been made by the defendant and the contention is that the dismissal was not under O. IX, R. 8. The question for decision is whether in the circumstances there was an appearance of the plaintiff or not. Similar cases to the present case decided in this Court are the cases of *Lalji Sahu* v. *Lachmi Narain Singh* (1) and *Ramlhan Tewari* v. *Bishun Pragash Narain Singh* (2) in which it was held that the plaintiff had not appeared.

The present case is on all fours with the above decisions and the application is dismissed with costs.

Hearing fee two gold *mohurs*.

Adami, J.:—I agree.

Application dismissed.

(1) (1918) 3 P. L. J. 355=47 I. C. 27
(2) (1920) 5 P. L. J. 17=54 I. C. 715=1 P. L. T. 156.

A. I. R. 1923 Patna 157.

JWALA PRASAD, J.

Mohammad Ishaq and others—Petitioners.

v.

Emperor—Opposite-Party.

Cr. Rev. No. 568 of 1921, decided on 16th January, 1922, against an Order of the Sess. J., Bhagalpore.

(a) *Criminal P. C., S. 260 (1) (c)—Scope.*

Though there was a dispute concerning land, *marpit* took place when a Panchayat was called in order to settle the dispute and at the time nothing was pending in connection with the land.

Held there was nothing in the character of the dispute between the parties which rendered it desirable that the case should not have been tried summarily and, therefore, sub-section (2) of section 260 did not apply. [P. 157, C. 2.]

(b) *Criminal P.C., S. 355—Summary trial—Evidence need not be read to witnesses.*

Section 355 does not require that the evidence of witnesses should be read over to them in a case triable summarily. [P. 157, C. 2.]

S. P. Bose—for Petitioners.

Mohan Lal—for Opposite Party.

Judgment.:—The four petitioners have been convicted under section 323, Indian Penal Code, and sentenced to pay a fine of Rs. 40 each. The learned Vakil on behalf of the petitioners urges that the conviction is bad, firstly, because the accused should not have been tried summarily; secondly, because the depositions of the witnesses were not read over to them, and; thirdly, because the evidence of the *alibi* on behalf of the petitioner No. 3 Sadullah was not considered.

The petition of complaint clearly discloses an offence under section 323, Indian Penal Code, although sections 147 and 447, were mentioned. The Magistrate, therefore, summoned the petitioners under section 323, Indian Penal Code, only.

The offence came under section 323 only which is triable summarily, *vide* section 260, sub-clause 1 (*c*) of the Code of Criminal Procedure.

On the 22nd of August, the date fixed for the examination of the witnesses, a petition was filed on behalf of the accused admitting that the case was triable not summarily and praying that, in view of the fact that the dispute related to the land, the accused should be tried in a regular way. The Magistrate refused this petition on the ground that the case was purely of *marpit*. Though there was a dispute concerning land, yet the occurrence took place when a Panchayat was called in order to settle the dispute and at the time nothing was pending in connection with the land. There was nothing in the character of the dispute between the parties which rendered it desirable that the case should not have been tried summarily and therefore, sub-section (2) of section 260 did not apply. The trial was, therefore, not illegal or irregular.

As to the second ground, a reference be made to section 355 of the Code of Criminal Procedure which does not require that the evidence of witnesses should be read over to them in a case triable summarily. Section 360, which requires the evidence to be read over to the witnesses, applies only to sec-

tions 256 and 257 and does not apply to section 255. This contention also is, therefore, unsubstantial.

As to the third ground, true, the petitioner No. 3 examined two witnesses for defence. The first witness expressly stated that he had no personal knowledge as to where the accused Sadullah was on the date of occurrence (7th of July, 1921). Similarly, witness No. 2 stated that he could not give the date of service of Court process on Musaddi Mondal. The evidence was not at all an evidence of *alibi*. It does not appear from the judgment of the Sessions Judge that any reference to the *alibi* evidence was made before that Court in argument. This contention is also overruled.

The result is, that the application is dismissed.

Application dismissed.

A. I. R. 1923 Patna 158.

COUTTS AND DAS, JJ.

Dasrath Singh and others—Appellants

v.

Emperor—Opposite Party.

Criminal Appeal No. 43 of 1922, decided on 9th May, 1922, against the Order of the Assistant Sessions Judge, Gaya.

Criminal P. C., S. 298—Reference to statement not on record amounts to misdirection.

The Judge told the Jury what the purport of the statement made on the 5th of July was although the statement had not been proved and was not on the record, and furthermore, he told the Jury that the statement of the 13th of July proved as the first information merely amplified the statement of the 5th of July and that its importance was not more than that of a statement made in the ordinary course to a Police officer.

Held he placed before the Jury a statement which was not on the record and he did not tell them that they should exclude from consideration a statement which was not evidence in the case. There was consequently misdirection. [P. 159, Cs. 1 & 3.]

K. N. Choudhry and *G. C. Pal*—for Appellants.

The Asst. Government Advocate—for the Crown.

Coutts, J.:—The appellants, Dasrath Singh, Suraj Singh, (son of Santokhi Singh). Suraj Singh, (son of Dular Singh) and Iswer Singh have been convicted under section 379 of the Indian Penal Code and have been sentenced to seven years' rigorous imprisonment each; the other appellant, Sant Prokash Singh, has been sentenced to the same term of imprisonment under section 379/114, Indian Penal Code. The trial was by Jury and the contention of the learned Counsel for the appellants is that there has been misdirection in the charge to the Jury.

The facts of the case as alleged by the prosecution are, shortly, that for some time there has been a dispute between Kishun Lal and his nephew Gajadhar Prasad regarding the possession of two villages which adjoin each other. The tenants are chiefly Goalas and they have taken the side of Gajadhar Prasad and have been paying rent to him and his brothers. Kishun Lal attempted to get rent without success and eventually he took the aid of Bachhu Singh, one of the proprietors of an adjoining village Pipra.

Village Pipra is inhabited by Babhans and tenants of Bachhu Singh. In order to coerce the tenants of Barka and Chotki Kunhri, Bachhu Singh's *gomashta* the appellant Sant Prakash Singh with about 20 men went on the morning of the 5th of July last to Barka Kunhri. Sant Parkash rode with a sword in his hand and the rest of the mob followed him armed with swords or *lathis*. When they got to Barka Kunhri they looted the houses of Bhuan Goala, Tanak Goala and Bansi Goala and beat them. They then went to Chhotki Kunhri and did the same thing at the houses of Gangoo Goala, Abhiram Goala and Dila Goala.

Two men Sital Singh and Narayan Singh Kurmi went to Fatehpore Thana and gave information to the Sub-Inspector of Police of an occurrence which had taken place at Barka Kunhri. This was not the occurrence with which we are at present concerned, but the Sub-Inspector went to the village and when he got there he found Bhuan Goala and others injured; so he took their statements and sent them to hospital. He then enquired into the case. On the 13th July he went to the hospital and took the statement of Bhuan Goala and treated it as the first information in the case. He then continued the investigation which eventually led to the sending

up and conviction of the present appellants.

The case was tried by the Assistant Sessions Judge of Gaya and it has been tried by him with great care. The charge to the Jury is also an exceedingly fair one; but it is contended by the learned Counsel for the appellants that the learned Assistant Sessions Judge has committed an error in law with regard to the first information and that in connection with this first information he has misdirected the Jury. Now what happened is this. The Sub-Inspector on the 5th of July took the statement of Bhuan Goala. He did not, however, treat this as the first information, but on the 13th of July he recorded Bhuan's statement again and this statement he did treat as the first information. This was a mistake on the part of the Sub-Inspector but if the mistake had stopped there it would have been of little consequence

Unfortunately, however, possibly because he did not know of the statement of the 5th of July the learned Sessions Judge allowed the statement of the 13th of July to be proved as the first information and he did not have the statement recorded by the Sub-Inspector on the 5th of July (which was really the first information) proved at all. In argument, however, this statement was evidently referred to and apparently it was contended that the statement of the 13th of July was not the first information.

The learned Assistant Sessions Judge realized the correctness of this contention and he told the Jury that the statement of the 5th of July was the first information and that the statement of the 13th of July was not. Unfortunately, however, he told the Jury what the purport of the statement made on the 5th of July was, although the statement had not been proved and was not on the record; and, furthermore, he told the Jury that the statement of the 13th of July merely amplified the statement of the 5th of July and that its importance was not more than a statement made in the ordinary course to a Police officer. The contention of the learned Counsel for the appellants is that the learned Assistant Sessions Judge had no right to place the statement of the 5th of July before the Jury and that he should have informed the Jury that the statement of the 13th of July was not evidence at all and that except in so far as its contents may have been brought out in evidence for purposes of corroboration or contradiction they should discard it entirely from their minds. These contentions are, in my opinion, uncontrovertible, and under the circumstances, the only course is to set aside the convictions and sentences and to remand the case for retrial.

I may say that I do this with considerable reluctance because the learned Assistant Sessions Judge's charge is a good one and very fair to the accused persons; but the facts remain that he has placed before the Jury a statement which is not on the record and he has not told them that they should exclude from consideration a statement which is not evidence in the case.

I would, therefore, set aside the convictions and sentences and direct that the case be re-tried. There will be no order as to bail.

Das, J.—I agree.

Case remanded.

A. I. R. 1923 Patna 159.

ADAMI, J.

Ramshivendra Narayan Ojha and others—Petitioners

v.

Awadh Bihary Saran and another—Opposite-Party.

Civil Rev. Nos. 27 and 28 of 1922, decided on 27th May, 1922, from a decision of the Sub. J., Shahabad.

Civil P. C., O. 21, R. 89—Deposit with condition to withhold money—Condition withdrawn—Sale can be set aside.

The deposit was made within the time allowed by law, and as soon as the decree-holder put in an objection, the judgment-debtor expressed his readiness and wish to dissassociate the prayer for setting aside the sale from the prayer for the withholding of the money pending the disposal of the appeal.

Held: What was meant was that the petitioner wished his prayer for setting aside the sale on receipt of the deposit to be considered absolutely separate and as a separate prayer. It would have been quite open to him to have put in a petition for setting aside the sale on receipt of the deposit and after he had been granted the application, to have put in a prayer that the money deposited should be remitted. It was no fault of the petitioner that the delay in hearing the application

deprived the petitioner from depositing the money, with an application merely praying for setting aside the sale. Had the application been heard at once and decided, it would have been open to him to put in a fresh application. The judge had no jurisdiction to refuse to set aside the sale and revision lay. [P. 161, Cs. 1 & 2.]

Sultan Ahmed and *Hurnarayan Prasad*—for Petitioners

Kulwant Sahay, *S. N. Ray*, *S. Dayal* and *Sambhu Saran*—for Opposite Party

Judgment:—The opposite party, having obtained two decrees against the petitioners, took out execution on the 9th December 1921, and at the sales in execution of the two decrees, bought a house belonging to the petitioner for Rs 200 in each case, and on the 10th of December deposited the earnest money. On the 3rd of January 1922 the petitioner, judgment-debtor, filed two applications which differ in a certain degree and which are as follows. In the case which is covered by Civil Revision No. 27 before this Court the petition runs as follows:

"The petitioners' property has been sold at auction, therefore, the petitioners have brought the whole decretal money with costs and damages into Court. A *chalan* may be prepared in office and granted to the petitioners so that they may deposit the money into the Treasury Be it known that the petitioners filed a petition for setting off this decree which was disallowed. An appeal is being filed in the Court of the District Judge. Let this money be not given to the decree-holder until the disposal of this appeal."

The other petition was similar except that after the words "so that they may deposit the money into the Treasury," the words "and the sale may be set aside" were added. The Court on these petitions ordered that the *challans* should be granted and that the prayer as to the withdrawal of the money by the decree-holder would be heard later on.

On the 6th of January the opposite party deposited the whole of the purchase-money and on the same date the petitioner put in his *challan* for the whole of the decretal amount in respect of each decree and the Court passed an order that the decretal amount should be deposited and that the petition with regard to the withholding of the money should be put up in the presence of the Pleaders. On the 7th it was directed that the question should be heard in the presence of the Pleaders but no order was passed until the 10th of January 1922. On that date the learned Subordinate Judge remarked that it appeared from the petition of the judgment-debtor that he had deposited the decretal amount and prayed for setting aside the sale.

This remark was made in both the cases. He then proceeded to say that, if the prayer in the petition had been merely for setting aside the sale, there would have been no difficulty in granting it: but in the second paragraph of the petition the judgment-debtor had asked for the money to be withheld by the Court until the disposal of the appeal which he had lodged.

The learned Subordinate Judge held that this prayer made the deposit a conditional one and, although on that date the Vakil for the judgment-debtor had asked to dissociate the prayer for withholding the money from the prayer for setting aside the sale after depositing the money made in the same petition, the petition must be read as a whole and one prayer must depend upon the other and could not be divided. He was, therefore, of opinion that the deposit made by the judgment-debtor could not be held to be valid so as to set aside the sale because it was not unconditional He then confirmed the sale and refused the petition of the present petitioners.

This finding was upheld by the District Judge on appeal. He relied on the case of *Shakoti* v. *JotindraMohan Tagore* (1). It is clear, I think, that the learned District Judge had not his attention called to the case of *Dulhin Mothura Koer* v. *Bansidhar Singh* (2). That is a case which is exactly on all fours with the present one, and I think I might rely on the following passage from that case:

(1) (1896) 1 C. W. N. 132.
(2) (1912) 16 C.W.N. 904=10 I.C. 880=15 C.L.J. 88.

"It appears, however, that the deposit was accepted by the Court without any question and as soon as objection was taken by the decree-holder, the petitioner withdrew the condition, so that the money became available for payment to the decree-holder before he had made any attempt to withdraw the money from Court."

"Under such circumstances, we are not prepared to hold that the deposit was invalid and not sufficient for reversal of the sale. The position might have been different, if, upon objection taken by the decree-holder, the petitioner had persisted in her effort to annex a condition to the deposit. The decree-holder was not prejudiced in any manner by the insertion of the prayer in the application of the petitioner that the money should be retained in Court, and he was substantially in the same position in the end as if such prayer had never been made."

"We must consequently hold that there was substantially a valid deposit within the time limited by law; sufficient for reversal of the sale"

Now, in the present case the deposit was made within the time allowed by law, and as soon as the decree-holder put in an objection, the Vakil for the present petitioner expressed his readiness and wish to disassociate, as the Subordinate Judge said, the prayer for setting aside the sale from the prayer for the withholding of the money pending the disposal of the appeal.

The learned Government Pleader on behalf of the opposite party distinguished this present case from that in *Dulhin Mothura Koer* v. *Bansidhar Singh* (2) in that in the latter case the Vakil for the judgment debtor stated his wish to altogether withdraw the prayer for the retention of the money, while in the present case he does not withdraw the prayer but wishes to make it a separate prayer.

I do not think that this distinction can really affect the case. What was meant was that the petitioner wished his prayer for setting aside the sale on receipt of the deposit to be considered absolutely separately and as a separate prayer. It would have been quite open to him to have put in a petition for setting aside the sale on receipt of the deposit and after he had been granted the application, to have put in a prayer that the money deposited should be retained. As I have said the payment was made within time, and though on the 10th when the application was heard, the thirty days had expired, it was no fault of the petitioner that the delay in hearing the application deprived the petitioner from depositing the money with an application merely praying for setting aside the sale. Had the application been heard at once and decided, it would have been open to him to put in a fresh application. It is thus through no fault of his own that he was deprived of the chance of saving his property.

It is next argued on behalf of the opposite party that in one of the petitions there was no specific prayer to set aside the sale; it merely asked that the money should be received in deposit. Now it is quite clear that the learned Subordinate Judge took this as a prayer for setting aside the sale; and in fact it was quite certain that that was the purpose of the deposit. Two cases have been relied on in support of this objection, namely, the case of *Ranji* v. *Bansilal Narayan Marwari* (3) and the case of *Rayapati Venkatasubba Rao* v. *Kalapatapu Narayan Rao* (4).

Those two cases, however, must be distinguished, because there no application was put in to the Court at all. The judgment-debtor merely went to the Nazir of the Court and deposited the decretal amount and the Court without any knowledge of his deposit naturally confirmed the sale; and in the former of the two cases it was not until three years afterwards that objection was made that as the deposit had been made the sale should, therefore, be set aside. I do not think that the decisions in those two cases can effect the present case.

The next objection is that no question of jurisdiction arises and, therefore, this Court should not interfere,

(3) (1919) 43 Bom. 735=58 I.C. 185=21 Bom. L.R. 835.
(4) 2A I.R. 1922 Mad. 83.

but with this I cannot agree. If the deposit was a good deposit, the Subordinate Judge had absolutely no jurisdiction to refuse to set aside the sale; and I find that the deposit was a good deposit as soon as the Vakil expressed his willingness that the prayer for setting aside the sale after depositing the decretal money should be taken as a substantive prayer without any condition attached to it.

In my opinion, therefore, the decision of the lower Courts should be set aside and the sale should be held to be invalid and set aside. Hearing fee three gold *mohurs* in both cases.

Revision allowed.

A. I. R. 1923 Patna 162.

COUTTS AND DAS, JJ.

Nandkeshwar Misra and others—Defendants-Appellants

v

Sudarshan Ram Tewari (Plaintiff) *and others*—Defendants-Respondents.

Appeal No. 706 of 1921, decided on 28th June, 1922.

(a) *Civ. P. C., O. 1, R. 1—Suit for partition—Co-sharer vendor is not necessary party.*

In a suit for partition by transferee the co-sharers who transfer their interest are proper but not necessary parties. [P. 162, C. 2.]

(b) *Partition—Unity of title and possession—Both are necessary.*

In order to succeed in a suit for partition there must not only be the unity of title but there must be unity of possession and if, plaintiff is not in possession of the properties he is not entitled to a decree for partition.

[P. 163, C. 1.]

Shiveshwar Dayal—for Appellants.

Lakshmi Narayan Singh—for Respondents.

Das, J.:—This appeal arises out of a suit for partition instituted by the plaintiff-respondent, Sudarshan Ram Tewari against the appellants. The plaintiff on the 10th February 1914 obtained a conveyance from one Palta Kuer and her son, Ram Surat Sukal. Palta Kuer, according to the case of the plaintiff, inherited the share which was of Ram Yad. According to the case of the plaintiff Ram Yad was separate from the predecessors-in-title of the defendants. The defendants resisted the suit on the ground that Ram Yad was joint with their predecessors-in-title and that on Ram Yad's death, the interest which was of Ram Yad survived to them and did not vest in Palta Kuer, the predecessor-in-title of the plaintiff. The Courts below have concurrently held that Ram Yad was separate from the predecessors-in-title of the defendants and that his share vested on his death in his widow, Sheo Tahla Kuer, and that on her death it vested in her daughter Palta Kuer.

On this finding the plaintiff was entitled to a decree for partition, if in fact he had obtained joint possession of the property on the execution of the conveyance in his favour by Palta Kuer and Ram Surat Sukal.

In this Court it has been ingeniously argued by Mr. Shiveshwar Dayal on behalf of the defendants-appellants that Palta Kuer not being cited in the action as a defendant, the plaintiff is not entitled to a decree for partition. The argument of Mr. Shiveshwar Dayal is this: that upon the finding of the Court that Ram Yad was separate from the defendants' predecessors-in-title, it is open now to Palta Kuer and to her son Ram Surat Sukal to institute a suit for partition as against them and he says that in order to prevent Palta Kuer and her son, Ram Surat Sukal from harassing them, the Court should have insisted upon the plaintiff bringing Palta Kuer and her son on the record as parties defendants.

I quite agree that Palta Kuer and Ram Surat Sukal would be proper parties to an action for partition, but I am not prepared to say that they were necessary parties to the action. In my opinion, the appellants would be entitled to succeeded on this point only if it could be shown that on the judgments of the Courts below or on the admission of the plaintiff there was an interest which was outstanding in somebody else and was not represented in the action.

Now, that is not the conclusion at which the Courts below have arrived. Their conclusion is that the interest of Palta Kuer has properly vested in the plaintiff; there is, therefore, no interest according to the decision of the Courts below outstanding in anybody who is not a party to the suit. The Courts cannot possibly prevent Palta Kuer from instituting a suit if she likes against the parties to the suit.

The only question which we have to decide is this: is Palta Kuer a necessary party to the suit? In my opinion she is not, and the argument of Mr. Shiveshwar Dayal on this point must fail.

It was then argued that the plaintiffs are not entitled to a decree for possession since the Court of first instance has come to the conclusion that Palta Kuer is in possession of some of the properties in suit. It has been argued that in order to succeed in a suit for partition there must not only be the unity of title but that there must be unity of possession and that if, on the finding of the Court below, the plaintiff is not in possession of the properties he is not entitled to a decree for partition. That is true, but still the plaintiff would be entitled to a decree for joint possession and for partition.

That argument is really an argument on Court-fees and does not affect the merits of the case. If, indeed Palta Kuer is still in possession of the property, the plaintiff may have some difficulty in enforcing the decree which he has obtained, but we have nothing to do with that question. The question is one of technicality without any merit to recommend it.

I would dismiss this appeal with costs.

Coutts, J —I agree

Appeal dismissed.

A. I. R. 1923 Patna 163.

ADAMI, J.

Sadhu Saran—Defendant-Appellant

v.

Ambika Lal and another—Plaintiffs-Respondents.

Appeal No 963 of 1920, decided on 17th July, 1922, from appellate decree of the Dt J., Shahabad.

(a) *Evidence Act, S. 35—Batwara Khasra is not a 'record' within S 35.*

A *Batwara Khasra* is not a "record" within the meaning of S. 35 of the Evidence Act, 1872, and an entry made therein of the name of a tenant in possession is not admissible in evidence. 25 C. 90, Ref. [P. 164, C. 2]

(b) *Evidence Act, S 13—Batwara Khasra.*

Where *Batwara Khasra* was used to show the past history of the plots long before the landlords predecessors in interest obtained a settlement and to show that in 1866 the land was raiyati land.

Held, that there is no reason why the document should not be held admissible under S. 13. [P. 164, C 2.]

(c) *Evidence—Road Cess Return is admissible against landlord who signed it—Evidence Act, S. 115.*

Where the Road Cess Return was signed by the landlords it would be admissible as against them. [P. 164, C 2.]

L. N. Singh—for Appellant.

Parmeshwar Dayal—for Respondents.

Judgment.:—In this suit the plaintiffs sought to redeem an usufructuary mortgage, executed some 22 or 23 years before the suit, in favour of their landlords-defendants Nos. 1 to 5.

According to the plaintiffs, one Bilati Ahir had an occupancy holding of 5 *bighas*, 6 *kathas*, 17 *dhurs*, his son, Sansar Ahir, and two others sold 3 *bighas*, 1 *katha*, 3 *dhurs* of this land to the mother of the plaintiff No. 1 who in 1898 or 1897 mortgaged it to his landlord stipulating that they should remain in possession appropriating the profits till re-payment of the debt. The defendants Nos. 1 to 5, however, at the time of the Survey managed to get defendants Nos. 6 and 7, Thag Koeri and Ratan Koeri, recorded as the occupancy *raiyats* of the land which was measured in the survey as two plots Nos. 1069 and 1070, comprising 2 *bighas*, 18 *kathas*, 5 *dhurs*. In 1324 *F. S.* the plaintiff No. 1 tendered the principal amount due under the bond but the defendants Nos. 1 to 5 refused to receive it.

The plaintiffs then instituted the suit giving rise to this second appeal joining as defendants Thag Koeri and Ratan Koeri and certain persons who claimed interest through purchase from them.

Defendants Nos. 1 to 5, the mortgagee-landlords, did not contest the suit, and though some of the other defendants filed written statements, it was defendant No. 15, the present appellant, who alone really resisted the claim. He denied that the plaintiff or his predecessors ever held the land under any title or ever mortgaged it. According to him the land was the *bikasht* land of defendants Nos. 1 to 5 who settled it with Bhagbat Koeri who was succeeded by his cousin Thag Koeri.

In execution of a decree against Thag Koeri the land was sold and purchased by Paltan Koeri who in 1915 sold it to defendant No. 15, the present appellant.

The Munsif found that there was a sale of the land now in dispute to the mother of the plaintiff, and that the

land mentioned in the *kabala* Exhibit 4 was identical with plots Nos. 1069 and 1070. He relied on a *batwara khasra* Exhibit 1 and a map showing that Bilati Ahir was in 1866 acknowledged by the signature of the landlords to be a tenant of plots identifiable with those in dispute. He relied also on a Road Cess Return (Exhibit 5) of 1888 signed by the landlords showing the plaintiff as tenant, and on the landlords' *jamabandis* of 1872. He found that the entry in the Record-of-Rights was merely based on the lease given by the landlords to defendants Nos. 6 and 7 and that the presumption of its correctness was rebutted by the evidence produced by the plaintiff. He disbelieved the defence evidence as to possession, and found that the sale certificate granted to Paltan Koeri and receipts granted after the lease to Bhagbat Koeri could have no weight in the case and were not binding on the plaintiffs. He held that the plaintiff had proved the mortgage He, therefore, granted a decree.

The learned District Judge on appeal has upheld the decree of the Munsif. He held that the *batwara* papers of 1866 proved that Bilati Ahir was then tenant of the plots now in suit, and that the plots in suit were the lands sold by the son of Bilati Ahir to the mother of the plaintiff. He found the sale deed to be genuine. He laid special stress on the Road Cess Return signed by the landlords showing a holding to the extent of the disputed plots in the plaintiff's name. He disbelieved the oral evidence of the defence witnesses, and believed in the genuineness of the mortgage bond. He described the documents put forward by the defence as fictitious ones evidently executed with a view to the Survey proceedings without any title.

On the face of the Judgment the findings of fact by the learned District Judge would preclude success by the appellant in second appeal. It has been found that defendants Nos. 1 to 5 did in fact take the lands in suit in usufructuary mortgage.

It is contended, however, that the appellant was a *bona fide* purchaser without notice and that the Record of Rights entitled him to assume that his vendor had a good title. It is urged too, that the Courts were not entitled to rely on the *batwara khasra* and map or to use the Road Cess Return against the appellant.

The case of *Permi Roy* v. *Kishen Roy* (1) is authority for the proposition that a *batwara khasra* is not a "record" within the meaning of section 35 of the Evidence Act, 1872, and that an entry A made therein of the name of a tenant in possession is not admissible in evidence, and *Nanda Lal Pathak* v. *Mohunt Chanarpat* (2) is to the same effect.

However, in the present case the *batwara khasra* was used to show the past history of the plots long before the defendant's predecessors-in-interest obtained a settlement and to show that in 1866 the land was *raiyati* land of Bilati. The above cited cases deal only with admissibility under section 35 of the Evidence Act. There is no reason why section 13 of the Evidence Act should not apply. Relief was being claimed against the landlords who signed the *batwara* papers. A *batwara* entry made under the old Act would not be admissible against the tenant if made after the creation of the tenancy, but here the partition was in 1866 and the tenancy on which the appellant relies was not created till 1906.

The Road Cess Return being signed by the landlords would be admissible as against them, and it shows, as against them that the plaintiffs were their tenants, and lends support to the case that Thug Koeri was never a tenant in possession.

With regard to the contention that the appellant had no notice of the mortgage and was an innocent purchaser, the mortgagees have been found to have entered into a fictitious transaction with a view to the Survey proceedings; as mortgagees they had no power to take away any of the mortgagor's rights; the mortgage still subsisted and any possession by the appellant must be subject

(1) (1898) 25 Cal. 90.
(2) (1913) 17 C. W. N. 779 = 18 I.C. 148 = 17 C. L. J. 462.

to the mortgage, the appellant is merely representative of the mortgagee and is not entitled to the relief asked for.

The appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1923 Patna 165.

DAS AND ADAMI, JJ.

Rameshwar Narain Singh—Appellant

v.

Rani Reknath Koeri—Respondent.

Appeal No. 15 of 1919, decided on 7th March, 1922, from the decision of the Sub.-J., Ranchi.

(a) *T. P. Act, S. 130—Transfer of rent due—Oral transfer is not valid.*

The rent, arrear and current due, cannot be transferred orally. They being actionable claims can only be transferred by the execution of an instrument in writing signed by the transferor or his duly authorised agent. [P. 166, C. 2.]

(b) *Hindu Law—Gifts—Oral gifts*

An oral gift must be established by satisfactory oral evidence. [P. 167, C. 2.]

(c) *Pleadings—Evidence consistent with allegation of plaintiff and denial of defendant—Plaintiff must fail.*

Where the undoubted evidence is consistent both with the allegation of the plaintiff as with the denial of the defendant, the plaintiff must fail [P. 168, C. 2.]

(d) *Hindu Law—Widow—Maintenance grant—Accumulation goes to her heirs.*

The substance of a maintenance grant is that it is the rents, issues and profits that are alienated and not the immoveable properties out of which such rents, issues and profits arise and which remain the property of the grantor annexed to his estate. In order that there may be accretion, there must be an estate to which the accumulation may accrete. Therefore the accumulations made by a Hindu widow from the property held under a lease from her husband by way of maintenance grant would go to her heirs. [P. 169, C. 2.]

(e) *T. P. Act, Ss. 122-123—Gift—Delivery in the case of gift of moveables is as described in Contract Act, S. 90.*

Under the law in India, in order that a transaction may operate as a gift, there must, first, be a transfer of the property which, in the case of immoveable property, may be effected either by a registered instrument or by delivery, and secondly, there must be acceptance by or on behalf of the donee. This is the law as laid down in S. 122 and S 123 of the Transfer of Property Act. Under S 123 of the Transfer of Property Act, the delivery required in the case of gift of moveables is that described in S. 90 of the Contract Act. [P. 170, C. 2.]

P. C. Manuk, S. K. Bhattacharji, S. N. Palit and *B. C. De*—for Appellant.

K. B Dutt, A. T. Sen, S. M. Mullick and *S. N. Roy*—for Respondent.

Das, J.—The main question which we have to deal with in this appeal is whether there was a verbal gift of the cash balance standing to the credit of Rani Ram Kumari at the time of her death by Raja Ram Narain Singh of Ramgarh in favour of his wife, the plaintiff. The admitted facts are these: On the 22nd of December, 1897, Raja Ram Narain Singh, the father of Raja Ram Narain Singh, and the father-in-law of the plaintiff, made a grant of certain villages in favour of his wife, Rani Ram Kumari. These villages were subsequently placed in charge of the defendant who happened to be the younger son of Raja Ram Narain Singh.

It will be convenient to describe these villages as Ram Kumari villages to distinguish them from the villages which Raja Ram Narain, about the same time, granted to the plaintiff and which were also placed in charge of the defendant. Rani Ram Kumari died on the 26th November, 1910 and thereupon the Ram Kumari villages reverted to the Raj of which the title was then vested in Raja Ram Narain. On the 17th June, 1911 Raja Ram Narain made a gift of the Ram Kumari villages to the plaintiff and placed them in charge of the defendant.

The plaintiff alleges that, on or about the 17th June, 1911, Raja Ram Narain made a further gift to her of the cash balance standing to the credit of Rani Ram Kumari at the time of her death, and it is her case that the defendant is bound to render an account to her of his dealings with Ram Kumari villages for the purposes of ascertaining what that cash balance was

The defendant in his written statement denied that any gift of the cash balance was made by Raja Ram Narain in favour of the plaintiff. The learned Subordinate Judge has found in favour of the plaintiff and has directed an account to be taken of the dealings of the defendant with the estate of Rani Ram Kumari for the purpose of ascertaining what the cash balance was at the date of the death of Rani Ram Kumari

Before dealing with the evidence in the case, it will be necessary to consider the case which the plaintiff

has made in her plaint. Her case is fully set out in the 3rd paragraph of the plaint and is as follows :—

" That in the meantime, Rani Ram Kumari died in 1967 *Sambat* and all the moveable and immoveable properties reverted according to law and usage to the Raj; that is to say, the Raja for the time being, the plaintiff's husband became the *malik* of the properties left by her and he used to affix his seal and signature on the receipts, etc., for sometime; and he allowed all the properties, collection of rent, arrear and current, collection in cash and kind; the collection papers in short, everything to remain in the defendant's hand. Sometime after, in 1968 *Sambat*, the plaintiff's husband made a gift of all the properties left by the said Rani Ram Kumari, deceased, including the *tahvil* in cash and kind, the rent arrear and current, due till 1967 *Sambat* to the plaintiff; he executed a *khorposhnama* in respect of the *mauzahs* From that time the plaintiff became the *malik* of all the properties including the savings in cash and kind, mentioned above, and all the papers connected with the said properties. The properties belonging to the plaintiff were from before under the management of the defendant and she allowed those properties as well to remain under his management and he acted as manager till Kartik 1970 *Sambat*, when he had, for some reasons, to be removed from the management of all those properties."

The case has made in the plaint certainly suggests that, "the gift of the *tahvil* in cash and kind, the rent arrear and current due till 1967 *Sambat*" was made as part of the transaction by which the gift of the villages was made.

This case, however, was abandoned at the hearing and it was then suggested that although the gift of the villages was made by a registered document on and bearing date the 17th June, 1911, the gift of the cash balance was made orally though made on or about the 17th June, 1911. Indeed, the abandonment of the case made in the plaint became inevitable when it was discovered that the registered instrument creating the gift of the villages could not be construed so as to include 'the *tahvil* in cash and kind the rent arrear and current due till 1967.'

The learned Vakil appearing for the defendant protested that, on the pleadings, evidence as to the oral gift was not admissible; but the learned Subordinate Judge overruled the objection and allowed the evidence to be led in regard to the alleged oral gift.

In my opinion the case of the oral gift is inherently improbable. It is admitted that there was a registered instrument in regard to the gift of the villages. It is admitted that the gift of the cash balance was part of the transaction which resulted in the gift of the villages. There is no explanation whatever why the gift of the cash balance should have been made orally when there was no lack of opportunity to make it by the document which brought into existence the gift of the villages, especially when it is remembered that so far at least as part of the gift is concerned, it could only be effected by an instrument in writing signed by the donor. The alleged gift was of 'the *tahvil*' in cash and kind, the rent arrear and current, due till 1967 *Sambat*.

It is true that we are not in this suit concerned with the rent arrear and current due; but it is still permissible to enquire whether the rent arrear and current due could be transferred orally to the plaintiff. I have no doubt whatever that they could not; for they were actionable claims and could only be transferred "by the execution of an instrument in writing signed by the transferor or his duly authorised agent." See section 130 of the Transfer of Property Act. It is necessary, therefore, to scrutinize the evidence with some care to see whether, on the evidence in the case, the oral gift has been established.

Next, it is admitted that the account books which were kept by the defendant were examined regularly by Raja Ram Narain Singh The evidence is that Raja Ram Narain had in his possession the seal both of Rani Ram Kumari and of his wife the plaintiff and that the account books were regularly placed before Raja Ram Narain for his examination. Most of the entries in the account-books are in fact sealed with

the seals of the ladies and as the seals were admittedly kept by Raja Ram Narain and as admittedly the account-books were placed regularly before Raja Ram Narain, these entries establish, in my opinion, that Raja Ram Narain accepted the accounts, as kept by the defendant, as correct.

That being so, we would expect, if the plaintiff's case be correct, the cash balance standing to the credit of Rani Ram Kumari at the date of her death, that is to say, the 26th November, 1910, to be transferred to the credit of the plaintiff on that date or soon thereafter. But as a matter of fact the cash balance was never transferred to the credit of the plaintiff's account. The plaintiff challenged the genuineness of the books of account produced by the defendant, but the learned Subordinate Judge has come to the conclusion, and I entirely agree with him, that the books produced by the defendant are genuine and that, to quote the words of the learned Subordinate Judge. "We must take it as a stern fact the deposited cash balance was not entered in the Rani's *rokar* after the *sal tamami*."

Now it seems to me incredible that the cash balance whatever it was should not have been transferred to the credit of the plaintiff's account, if in fact there was a gift of that cash balance in favour of the plaintiff. The defendant was the custodian of such properties as then belonged to the plaintiff. He had regular books of account relating to such properties. Those books of account were regularly checked by Raja Ram Narain, the husband of the plaintiff. The matter could not have been everlooked by Raja Ram Narain and it is impossible to take the view that the defendant successfully deceived Raja Ram Narain who, as the documents show carefully scrutinized the plaintiff's accounts as kept by the defendant.

In order to succeed it was absolutely necessary for the plaintiff to establish as was undoubtedly her case, that the cash balance was in fact entered in the plaintiff's *rokar* and that the genuine *rokar* has been suppressed. That was her evidence in the Court below, but the learned Subordinate Judge found it impossible to rely on that evidence. That being so the case of an oral gift becomes still more improbable.

Now an oral gift must be established by satisfactory oral evidence: but the oral evidence adduced on behalf of the plaintiff did not make any impression on the learned Subordinate Judge. In the course of his judgment the learned Subordinate Judge said as follows.—"I would not place the least reliance on the evidence of the plaintiff's witnesses touching the loose conversations which had happened several years ago and which they came to reproduce before me.

But other facts and circumstances to which I shall presently refer make it fairly clear to my mind that there was indeed a verbal bequest by the Maharaja in favour of his wife which, by some reason or other, was not incorporated in the *khorposh* deed contemporaneous as it was and that the Rani came into possession of them in due course through the defendant as her manager or agent." It will be necessary for me to examine the other facts and circumstances, but so far as the oral evidence is concerned, all that I need say is that I entirely accept the view of the learned Subordinate Judge on this point.

It is necessary now to consider the "other facts and circumstances" to which the learned Subordinate Judge has referred. These consist of entries in the books of account of Rani Ram Kumari and of the plaintiff respectively which have been produced by the defendant which, according to the learned Subordinate Judge, establish the case of the oral gift.

In order to understand the evidence to which the learned Subordinate Judge refers it is necessary to remember that we are concerned with three distinct periods in the history of the defendant's management of the Ram Kumari villages. The first period is the period of Rani Ram Kumari which comes to an end with her death which took place on the 10th Aghan 1967 corresponding with the 26th November, 1910. The second period has been referred to by the learned Subordinate

Judge as the *khas* period, the period during which the title was with the Raj, that is to say, the period between the 10th Aghan 1967 corresponding with the 26th November 1910 and 5th Ashar 1968 corresponding with the 17th June 1911.

The third period is the plaintiff's period which began on the 17th June 1911. The defendant has produced the *rokars jinsi* and *nakli* (grain and cash) of the period both of Rani Ram Kumari and of the plaintiff; but he has not produced any account-books of the *khas* period, his case being that these books were returned to the Raj office and are now to be found in the Raj office. The explanation seems a reasonable one, for there is no reason to think that the books of account belonging to the Raj would remain with the defendant.

Now, the important fact that emerges on a critical examination of the books of account that have been produced by the defendant is that the cash balance standing to the credit of Rani Ram Kumari at the time of her death was in fact not transferred to the plaintiff's *rokars*.

This certainly does not support the case of a gift in favour of the plaintiff especially when it is remembered that Raja Ram Narain regularly scrutinized the books of account and sealed practically every entry in the books of account with the seal of the plaintiff.

The plaintiff's books of account, therefore, do not furnish any direct evidence of gift; but the learned Subordinate Judge has come to the conclusion that there are entries in the books of account which are consistent only with the case of gift and incapable of explanation on any other hypothesis. It will be necessary, then to deal with these various entries in order to see whether the finding of the learned Subordinate Judge can at all be supported. In dealing with these entries I will follow the order which was adopted by the learned Subordinate Judge:

These are the entries upon which the learned Subordinate Judge has come to the conclusion that there must have been a gift of the cash balance standing to the credit of Rani Ram Kumari's account to the plaintiff by Raja Ram Narain.

I am wholly unable to agree with the view which has been taken by the learned Subordinate Judge in this case. The onus is upon the plaintiff to establish the oral gift. Where the undoubted evidence is consistent both with the allegation of the plaintiff as with the denial of the defendant the plaintiff must fail for the simple reason that she must establish the affirmative of the proposition which she asks us to accept. In the first place the case is inherently improbable having regard to the fact that there was admittedly a registered instrument in respect of the villages. No reason has been assigned why Raja Ram Narain should not have made the gift of the cash balance in writing since he had the time and the opportunity to make a gift of the villages by a registered document.

In the second place, the account books which have been disclosed by the defendant and which have been accepted by the learned Subordinate Judge as genuine afford no direct proof of the gift as they should have, had the plaintiff's case been true. There is no reason at all why the cash balance standing to the credit of Rani Ram Kumari should not have been transferred to the account of the plaintiff since the entries were carefully scrutinized by Raja Ram Narain and the defendant must have known that Raja Ram Narain would scrutinize the accounts.

In the third place, the oral evidence which has been adduced on behalf of the plaintiff is not such as commended itself to the learned Subordinate Judge. There then remain certain entries in the books of account produced by the defendant, of which those which are relevant are equally consistent with the allegation of the plaintiff as with the denial of the defendant. They do not, in my opinion, lead to inevitable conclusion that there must have been a gift by Raja Ram Narain in favour of the plaintiff.

In the absence of a written document and direct evidence as to the gift, the entries in the books of account, if they are to be relied upon as proving the case of the plaintiff, must not only be consistent with the plaintiff's case but must be incapable of explanation on any other hypothesis. In my opinion they are

capable of explanation on the hypothesis that there was in fact no gift by Raja Ram Narain in favour of the plaintiff.

The question, I am aware, is one of fact; and it is not without strong reason that I would venture to differ on a question of fact from so careful a Judge as Mr. Tulsidas Mukerji. But I consider that I have greater freedom in the matter, since the conclusion reached by the learned Subordinate Judge was not based on his estimate of the oral evidence. In my opinion, the learned Subordinate Judge took no note whatever of the inherent improbabilities of the plaintiff's case.

I have anxiously considered them and also the documentary evidence in the case; and I have come to the conclusion that the plaintiff has failed to establish the case which she made in the plaint.

The conclusion reached by me in regard to the question which I have just discussed is sufficient to dispose of the appeal; but as various other questions have been argued before us, I think it necessary to indicate my views in regard to them, especially as the case is likely to travel across the seas. And the first question which arises for consideration is, was Raja Ram Narain competent to make a gift of the undisposed of accumulations of Rani Ram Kumari to the plaintiff? The villages which were granted to Rani Ram Kumari for and by way of maintenance undoubtedly reverted to the Raj on the death of Rani Ram Kumari, and it was undoubtedly within the power of Raja Ram Narain to make a gift of them to the plaintiffs. But the savings effected by her stood on a different footing and would ordinarily vest in her heirs unless it be that they were accretions to the villages and followed them into the hands of Raja Ram Narain.

The plaintiff's case, as made in the plaint, is that "all the moveable and immoveable properties" which belonged to Rani Ram Kumari "reverted according to law and usage to the Raj". So far as usage is concerned the evidence did not satisfy the learned Subordinate Judge; and I am not prepared to differ from the learned Subordinate Judge on this point. But the learned Subordinate Judge thought that the savings followed the properties from which the savings arose and that accordingly they followed the properties into the hands of the Raj. He relied upon the case of *Isri Dutt Koer* v. *Hanskulti Koerain* (1). That was a case where the Judicial Committee had to consider the question of succession to the savings effected by a Hindu widow out of the estate of which she was in possession as and for a Hindu widow's estate. Their Lordships came to the conclusion that such savings could not be regarded as the *stridhan* of a Hindu widow, and that, if she has made no attempt to dispose of them in her life-time, they follow the estate from which they arose.

We are here concerned with an entirely different case. Rani Ram Kumari was in possession of the villages, not as a Hindu widow by right of inheritance, but under a lease granted to her by her husband subject to the payment of rent by her to her husband. In truth she had no estate in the villages, but only a maintenance grant; and the substance of a maintenance grant is that it is the rents, issues and profits that are alienated and not the immoveable properties out of which such rents, issues and profits arise which remain the property of the grantor and annexed to his estate. If I am right in my view as to the true nature of a maintenance grant, it is difficult to see how the undisposed of accumulations "follow" the estate, since the title to the estate was never in Rani Ram Kumari, but was always in the grantor. In order that there may be accretion, there must be an estate to which the accumulation may accrete; and as there was no estate which was in the possession of Rani Ram Kumari, I am of opinion that the undisposed of accumulations could not be regarded as having vested in Raja Ram Narain.

I hold that Raja Ram Narain was incompetent to make a gift of the undisposed of savings to the plaintiff.

The next question is, assuming that Raja Ram Narain was competent to, and did in fact, make the gift of the

(1) (1884) 10 Cal. 824=10 I.A. 150=13 C.L.R. 418=4 Sar. 459 (P.C.)

undisposed of savings to the plaintiff, did the transaction, as spoken to by the plaintiff's witnesses, operate to pass the title in those savings to the plaintiff. The evidence adduced on behalf of the plaintiff may be summarised as follows: On the fourth day after the death of Rani Ram Kumari, Raja Ram Narain informed the defendant that the Rani's *khorposh* properties reverted to him together with all her goods, cash, grains etc., and asked the defendant to make collection in respect of the resumed villages.

To this, the defendant assented. Four or five days after the *sradha* of Rani Ram Kumari, Raja Ram Narain informed the defendant that he intended to give the resumed villages together with all the goods and cash to the plaintiff. To this the defendant replied that the proposal was a proper one and that he would manage the properties both moveable and immoveable. Stopping here for a moment, it is quite clear that up to this point of time, there was no gift, for all the authorities are agreed that an intention to give does not operate as a gift. The evidence then continues that in Assar following (June 1911), Raja Ram Narain said this to the defendant.

"The deed has been executed in the name of the Rani in respect of the villages. You do enter the *khorposh* villages together with the goods left by Rani Ram Kumari and also the collections of the *khorposh* villages made by you in my time in my wife's name in the *rokar*"

To this the defendant replied as follows: "The year is going to expire. I will enter all the said properties as directed in the new *bahi* to be opened soon". The question which we have to decide is whether there was a gift by Raja Ram Narain to the plaintiff as a result of what took place in June 1911 between him and the defendant.

Now in dealing with this question, it is necessary to remember that there is no suggestion that the plaintiff took any part in the conversation or accepted the gift or authorised the defendant to accept it on her behalf. There is no suggestion that she dealt with the subject-matter of the gift or at any time gave any order to the defendant to deal with the subject-matter of the gift in any way. The unimpeachable documentary evidence in the case establishes that the defendant throughout acted under the direction and control of Raja Ram Narain and that Raja Ram Narain dealt with the properties just as he liked without any reference to the plaintiff: See Exhibits D-3, D-4, D-5, D-6, D-8, D-24, D-27, D-28, B-6, B-20, B-23.

Now, under the law in India, in order that a transaction may operate as a gift, there must, first, be a transfer of the property which, in the case of moveable property, may be effected either by a registered instrument or by delivery, and secondly, there must be acceptance by or on behalf of the donee. This is the law as laid down in section 122 and section 123 of the Transfer of Property Act. Was there then a transfer of the property to the plaintiff? It is conceded that the transfer was not effected by a registered instrument, but it is contended that, if the property be in the hands of a third person as undoubtedly it was, a request to such person by the donor to deliver is the only delivery possible.

Now I do not think that the proposition in the form in which it was stated by Mr. Dutt is correct. Section 90 of the Contract Act provides that delivery of goods may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorised to hold them on his behalf. Under section 123 of the Transfer of Property Act, the delivery required in the case of gift of moveables is that described in section 90 of the Contract Act. Admittedly nothing was done which had the effect of putting the property in the possession of the plaintiff, but it was contended that there was constructive delivery to the plaintiff in that the defendant consented to hold them on behalf of the plaintiff.

There is, in my opinion, an obvious weakness in the argument employed, for there is nothing to show that the defendant was authorised to hold the property on behalf of the plaintiff. Illustration (*f*) of section 90 of the Indian Contract

Act, taken from *Godts* v. *Rose* (2) will make good my point That illustration is as follows:

"*A* agrees to sell *B* five tons of oil at Rs. 1,000 per ton, to be paid for at the time of delivery. *A* gives to *C*, a wharfinger, at whose wharf he had 20 tons of the oil, an order to transfer five of them into the name of *B*. *C*. makes the transfer in his books, and gives *A*'s clerk a notice of the transfer for *B*. *A*'s clerk takes the transfer notice to *B*. and offers to give it him on payment of the price of the oil. *B*. refuses to pay. There has been no delivery to *B* as *B* never assented to make *C* his agent to hold for him the five tons selected by *A*."

As was pointed out by Jervis, C. J., in delivering the judgment in the case from which the illustration is taken "All these cases of delivery of the symbols of property are founded upon that sort of tripartite contract which is adverted to in some of the cases between the vendor, the vendee, and the wharfinger...The defendant got possession of it," that is to say, the paper given by the wharfinger acknowledging the order of the plaintiff who was the seller, "by means of a fraud or an accident or mistake, and not with the intention to adopt Humphray," that is to say, the wharfinger as his agent. "The wharfinger seems to have acted upon the notion that the order transmitted to him amounted to an absolute transfer of the property. The distinction now pointed out by my brother Byles and Mr. H James was not adverted to at the trial. The plaintiff never in fact parted with the property at all".

"The argument of Mr. Byles to which reference was made in the judgment was that the delivery was not complete until the vendee had accepted the wharfinger as his agent. This was the view which was accepted by the Court. Crowder, J. in the same case said as follows. The plaintiff intended that five tons of the oil which he had at Humphray's wharf should be delivered to the defendant, and he gave an order to the wharfinger to transfer that quantity accordingly. Did that bind the goods, and was it equivalent to a delivery to the defendant? "The wharfinger, in obedience to the plaintiff's order, did transfer five tons of the oil to the name of the defendant. Was that transfer operative until the defendant had agreed to accept it? I find no authority to show that a mere delivery of an order to the wharfinger, or any act done thereon by the wharfinger, has the effect of binding the vendee without his acceptance."

In this case there is nothing more than an order on the defendant who was in possession of the goods on behalf of Raja Ram Narain to transfer the goods in the name of the plaintiff. There is no evidence that the plaintiff ever assented to make the defendant her agent to hold for her the goods given to her by her husband. In my opinion, the transaction did not operate to transfer the property in the goods to the plaintiff.

It was contended by Mr. Dutt that the service of the notice by the plaintiff upon the defendant to make over the account-books to her must be taken as her assent to the position occupied by the defendant. But the argument is of no avail, since the notice was served on the defendant after the death of the donor. At the time of the death of the donor the property in the goods was still in him, and nothing that was done by the plaintiff subsequent to the death of the donor could take away the property from his heir and vest it in her.

The other prerequisite of a gift is also wanting. The Statute requires that there must be acceptance by or on behalf of the donee and during the lifetime of the donor. It is conceded that there was no acceptance by the plaintiff during the lifetime of Raja Ram Narain, but it was contended that there was acceptance by the defendant and that was the same thing as acceptance by the plaintiff.

I am unable to accede to this argument, as there is no proof that the plaintiff assented to make the defendant her agent to accept the gift on her behalf. In my opinion the transaction spoken to by the witnesses examined on behalf of the plaintiff did not operate to vest the savings of Rani

(2) (1855) 17 C.B. 229=139 E.R. 1058=25 L. J. C. P. 61=1 Jur. (N. S) 1173=4 W. R. 129=26 L T. (O. S.) 240=104 R. R. 668.

Ram Kumari in the plaintiff.

There were two other questions discussed by Mr. Manuk before us, the question of jurisdiction and the question of limitation. The argument as to jurisdiction is based on section 139 (7) of the Chota Nagpur Tenancy Act which provides that all suits by landlords and others in receipt of the rent of the land against any agents employed by them in the management of land or the collection of rents of money received or accounts kept by such agents in the course of such employment or for papers in their possession shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of Chota Nagpur Tenancy Act and shall not be cognizable in any other Court.

It was contended that the suit was in substance a suit by a landlord against an agent employed in the management of land or the collection of rents for money received by such agent in the course of such employment.

Now, in my opinion, in so far as the plaintiff sought to recover from the defendant an account of the dealings of the defendant with the specific sum of money that stood to the credit of Rani Ram Kumari at the time of her death, the suit was cognizable by the Civil Court of Hazaribagh, for such a suit cannot be said to be a suit by a landlord against an agent for money received by him as such agent. But in so far as the plaintiff sought to reopen the accounts of Rani Ram Kumari in order to show that a much larger sum of money should have been shown to the credit of Rani Ram Kumari at the time of her death, the suit fell within the class of suits mentioned in section 139 (7) and was cognizable only by the Revenue Court. For what is the right of the plaintiff to reopen such accounts? Either she claims in the right of Rani Ram Kumari as the person in whom the right of Rani Ram Kumari to claim an account from her agent is vested or she has no cause of action at all.

Her claim is substantially this: Rani Ram Kumari was undoubtedly entitled to claim an account from the defendant of his dealings with the rents, issues and profits that arose out of the Ram Kumari villages; after the death of Ram Kumari that right devolved on Raja Ram Narain, when Raja Ram Narain made a gift of the Ram Kumari villages to her together with the undisposed of savings effected by her and which were in the hands of the defendant, she obtained the right to obtain from the defendant an account of his dealings with the Ram Kumari villages to discover what those undisposed of savings were.

Her claim so put is one which is possible to understand; but then that claim being in the right of Ram Kumari is one which was cognizable by the Revenue Court, and by no other Court; for the relationship between Rani Ram Kumari and the defendant was one of landlord and agent, and the savings whatever they were, represented money received by the agent in the management of land and the collection of rents and in the course of such employment as agent. The suit as constituted undoubtedly invited the Court to go into the accounts of Rani Ram Kumari, and, in my opinion, it was not cognizable by the Civil Court of Hazaribagh.

It was, however, contended by Mr. Dutt that certain specific sums of moneys undoubtedly stood to the credit of Rani Ram Kumari at the time of her death, and that it was competent to the plaintiff to institute a suit in the Civil Court for recovery of those specific sums of moneys. This contention is right; and, if the plaintiff had established her case as to the gift, she would clearly be entitled to a decree in respect of such specific sums of moneys as stood to the credit of Rani Ram Kumari at the time of her death. Admittedly there was a sum of Rs. 19,059-6 to the credit of Rani Ram Kumari at the time of her death

Mr. Dutt contends that he is entitled to recover four other sums of moneys which according to him undoubtedly belonged to Rani Ram Kumari and which he says he has been able to trace into the hands of the defendant. The first is an item of Rs. 23,414-9-0 covered by Exhibit 71-1, an entry in the loan book under date the Jeth Badi 10, 1916. The entry shows that the defendant took a

loan of Rs. 23,414-9-0 from the money which was in his hands. The entry bears the seal of Rani Ram Kumari. Raja Ram Narain, therefore, had notice of the loan and it may be assumed that the loan was taken by the defendant with the assent of Raja Ram Narain. When the relationship between the parties is remembered, there is no difficulty in understanding the entry. The question is—is the plaintiff entitled to recover this sum of money by virtue of the gift alleged to have been made in her favour by Raja Ram Narain?

In my opinion it is impossible to uphold the contention of the plaintiff. It may be that Raja Ram Narain had a claim to recover this sum of money from the defendant; but an actionable claim cannot be transferred by word of mouth, it could only be transferred by an instrument in writing signed by the transferor, and admittedly the plaintiff does not base her claim on any instrument in writing signed by Raja Ram Narain.

The next is an item of Rs. 30,000 which was given to the defendant as "aid for building a house". Exhibit 31-1 is the entry upon which Mr. Dutt relies. This entry again was inspected by Raja Ram. Narain and was sealed by him. We must assume that the aid was in fact given to the defendant and the plaintiff cannot recover this sum of money from the defendant.

The next is an item of Rs. 6,000 which was given to the defendant as an "aid." This item does not appear to have been sealed, but the defendant in his evidence states that he took the amount under Raja Ram Narain's order. The entry is Exhibit 32-1 and it is unlikely that the defendant could have appropriated this sum of money without the knowledge of Raja Ram Narain who, as I have already mentioned, regularly inspected the books of account. Lastly there is a sum of Rs. 5,729-6-3 which again was given to the defendant as "aid for building a house." The relevant entry is Exhibit 2-1. The entry does not appear to have been sealed, but as I have said before, it is unlikely that he could have taken this sum of money without the assent of Raja Ram Narain.

In my opinion if the plaintiff succeeds on the question of the factum and the validity of the gift and if it is established that Raja Ram Narain was competent to make a gift of the undisposed of savings of Rani Ram Kumari to the plaintiff, the plaintiff would be entitled to a decree as against the defendant for the sum of Rs. 19,053-6-3.

Lastly, there is the question of limitation. In my opinion Art. 89 of the Limitation Act applies and the plaintiff's suit in so far as it may be considered to be a suit for recovery of such sums of moneys as stood to the credit of Rani Ram Kumari at the time of her death is not barred by limitation.

But so far as the plaintiff invited the Court to re-open the accounts of Rani Ram Kumari in order to show that there was a much larger sum of money standing to the credit of Rani Ram Kumari at the time of her death, the suit is clearly barred by limitation. It is true that Rani Ram Kumari was entitled to claim an account from the defendant as to his dealings with the rents, issues and profits that arose out of the Ram Kumari villages in the hands of the defendant. The agency came to an end with the death of Rani Ram Kumari which took place on the 26th November 1910. Raja Ram Narain had three years from the death of Rani Ram Kumari to maintain an action for account as against the defendant. The suit was brought more than three years after the date of Rani Ram Kumari's death and in so far as the suit is a suit for account of the dealings of the defendant with Rani Ram Kumari's estate, it is clearly barred by limitation.

Mr. Dutt contended that the defendant was an express trustee in respect of the funds which belonged to Rani Ram Kumari and which were in his hands. I am unable to agree with this contention.

In the result, I would allow this appeal, set aside the judgment and the decree passed by the Court below and dismiss the plaintiff's suit with costs in both the Courts.

Adami, J.:—I agree.

Appeal allowed.

A. I. R. 1923 Patna 174.

DAS, J.

Maharaja Bahadur Kesho Prasad Singh—Defendant-Appellant

v.

Bhagwat Saran Pande—Plaintiff-Respondent.

Appeal No. 911 of 1920, decided on the 10th July, 1922, from the decision of Sub-J., Shahabad.

(a) *Civil P. C., O. 41, R. 23—Remand can be made where the decision of lower Court is based on pleadings and not on evidence.*

There would be a remand if Lower Court fails in its duty to discuss the evidence bearing on a point, and comes to a conclusion not on the pleading of the parties, but on the evidence adduced before the Court.

[P. 175, C. 1]

(b) *B. T. Act, Ss. 109 and 105*—Res judicata—*Doctrine of, does not apply to proceedings under Ss. 105-109, B.T. Act—Civil P C., S. 11.*

The tenant claimed abatement of rent under S. 52, but no such question was raised or investigated in the proceeding under the S. 105. The landlord contended that as in a case where S. 11, Civil P.C. is applicable, a question which might and should have been raised is deemed to have been raised and decided, High Court should hold under S. 109 that a matter has been the subject of an application under S. 105 whenever it might and ought to have been raised and decided under S. 105 read with S. 105-A.

Held, that this contention is unsound. If this construction were accepted words which are not found there would have to be read into S. 109. It would be held on the analogy of the doctrine of constructive *Res judicata*, that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under S. 105 read with S 105-A. 44. C. 788, Foll.

[P. 176, C. 1.]

Kulwant Sahai and *N. N. Sinha*—for Appellant.

S. N. Roy—for Respondent.

Judgment.—This appeal arises out of a suit instituted by the respondent for abatement of rent under section 52 (*b*) of the Bengal Tenancy Act. The area of the plaintiff's holding according to the Jamabandi is 3 *bighas*, 3 *kathas* and 16 *dhurs* and the Jamabandi shows that the rent payable by the defendant in respect of this holding is Rs. 15-15-0. The Record-of Rights, however, shows that the area in possession of the plaintiff is 2 *bighas*, 3 *kathas* and 4 *dhurs*.

The defendant applied under section 105 of the Bengal Tenancy Act for settlement of fair rent on the ground that there was a rise in the average local price of staple food crops. The Settlement Court gave effect to the contention of the landlord and settled the rent at Rs. 17-13-9. The plaintiff's suit was instituted subsequent to the settlement of rent by the Settlement Court and there is no allegation in the plaint that there has been any diminution in the area of the holding subsequent to the settlement of rent by the Settlement Court. The Courts below have given effect to the contention of the plaintiff and have allowed abatement accordingly.

Two questions have been urged by Mr. Kulwant Sahai on behalf of the appellant in this Court. First, that the judgment of the lower appellate Court proceeds on a misapprehension in so far as it thought that the defendant did not deny the allegation of the plaintiff that the original settlement of the land was at Rs. 5 per *bigha*, and, secondly, that the present suit is not maintainable in view of the provisions of section 109 of the Bengal Tenancy Act.

The first question arises in this way. The land was originally settled with the plaintiff by the Government and the Government subsequently sold their proprietary interest in the land to the Dumraon Raj. The plaintiffs case is that the original settlement was at the rate of Rs. 5 per *bigha*. The defendant contends that a consolidated rent of Rs. 15-15-0 was fixed for the holding in the possession of the defendant. It is obvious that if the defendant's case is right then the plaintiff is not entitled to any abatement of rent and the suit must accordingly fail. The question then is this, was the original settlement at the rate of Rs. 5 per *bigha*, or was a consolidated rent fixed in respect of the holding in possession of the defendant?

The plaintiff undoubtedly alleged in the plaint that the original settlement was at the rate of Rs. 5 per *bigha*. The learned Judge in the Court of Appeal says that there was no denial of this allegation in the written statement. It appears, however, that there is a clear denial of the allegation in the written statement of the defendant Mr. Kulwant Sahai has argued before me that this was a vital point in the case, and if

there was any misapprehension in the mind of the Court I ought to remand the case to that Court for a decision of the point. I ought to mention that the Court of first instance came to the conclusion that the original settlement was a settlement at the rate of Rs. 5 per *bigha*. It was clearly the duty of the lower appellate Court to discuss the evidence bearing on this point and to come to a conclusion, not on the pleadings of the parties, but on the evidence adduced before the Court.

The question then which I have to consider is, whether I ought to remand the case to the lower appellate Court for a decision of this point, or whether in order to save a remand, I ought to determine the point in this Court. Only two witnesses have been examined in the case and there is no reason at all why I should not determine this point in this Court.

The witness examined on behalf of the plaintiff is definite on the point that the land was settled at the rate of Rs. 5 per *bigha* and he denies that there was a consolidated rent for the defendant's holding. The defendant examined a Patwari. In the examination-in-chief he did say that the Jama was a consolidated Jama but in cross-examination he had to admit that his knowledge was based on the Jamabandi of the plaintiff. He was not present at the time when the land was settled with the plaintiff by the Government, and obviously his evidence on this point is of no importance whatever. It was urged by Mr. Kulwant Sahai that the Jamabandi of the defendant itself constituted an important evidence in his favour.

I am unable to agree with this contention. The Jamabandi in no sense binds the plaintiff and I am of opinion that the Court of first instance was right in coming to the conclusion that the land was settled with the defendant at the rate of Rs. 5 per *bigha*.

I now come to the next question, namely whether the plaintiff's suit is barred by the provisions of section 109 of the Bengal Tenancy Act. Now, the important point to remember in this connection is this : In those proceedings the defendant claimed an enhancement of rent on the ground that there was a rise in the average local price of the staple food crops No question was raised by the plaintiff as to whether he was entitled to an abatement of rent under section 52 (*b*) of the Bengal Tenancy Act.

Section 109 runs as follows—" Subject to the provisions of section 109-A"—We are not in this suit concerned with the applicability of section 109A—" a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108, both inclusive."

The critical question then is this, has this question, namely, the question whether the plaintiff is entitled to relief under section 52 (*b*) of the Bengal Tenancy Act, been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108, both inclusive? Admittedly it was not directly the subject of an application under section 105 of the Bengal Tenancy Act; but it has been urged by Mr. Kulwant Sahai on behalf of the appellant that the question might or ought to have been raised by the plaintiff in the proceeding under section 105 and that accordingly we must assume that constructively it was the subject of an application made under section 105 of the Bengal Tenancy Act.

Fortunately for me, the question has been decided by two learned Judges of the Calcutta High Court in the case of *Nawab Bahadur of Murshidabad* v. *Ahmad Hussain* (1). In that case the landlord applied for settlement of rent under section 105 of the Bengal Tenancy Act. No question was raised by the defendants as to whether they were *mokarrari maurushi raiyats* or whether the land held by them was one tenure or distinct *raiyats* holdings. The Settlement Court settled the rent on the footing that the land held by the tenants formed one tenure and that they were tenure-holders. In so doing they proceeded on the footing of the Record-of-Rights which had already been published. It was

(1) (1917) 44 Cal. 783=21 C.W.N. 1004=35 I.C. 695=25 C.L.J. 556.

argued that the tenants should have raised the question in the proceeding under section 105 and that, not having done so, section 109 of that Act operated so as to prevent them from maintaining the action. The learned Judges dealt with the point argued before them as follows:

"With regard to the alternative declaration, the appellants contend that as the questions for determination might have been made the subject of controversy in the proceedings under section 105, they cannot be investigated in the present suit. In our opinion, there is no force in this contention. Section 105-A, no doubt, authorises the Settlement Officer in the course of proceedings under section 105, for the settlement of fair and equitable rent to investigate questions which would otherwise be determined at the instance of the aggrieved party in a suit instituted under section 106. But in the case before us no such question was raised or investigated in the proceeding under section 105.

Consequently, on a plain and literal reading of section 109, the position cannot be maintained that the present suit concerns a matter which has already been the subject of an application under section 105. The appellant, however, urges us to put a wider construction upon section 109. He contends that, as in a case where section 11, Civil Procedure Code, is applicable a question which might and should have been raised is deemed to have been raised and decided, we should hold under section 109 that a matter has been the subject of an application under section 105, whenever it might, if the defendant had so chosen, have been raised and decided under section 105 read with section 105-A.

"We are of opinion that this contention is unsound. If we were to accept the construction put forward by the appellant, we should have to read into section 109 words which are not to be found there; we cannot hold, on the analogy of the doctrine of constructive *res judicata*, that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under section 105 read with section 105-A."

I respectfully endorse the view of the learned Judges of the Calcutta High Court in the case already cited. To hold otherwise would be to say that the jurisdiction of the Civil Court is ousted not only when a matter had been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 both inclusive, but that it is also ousted where the matter might have, but was not, the subject of an application made, suit instituted or proceedings taken under those sections.

In my opinion the decision of the learned Judge in the Court below is right and I would dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1923 Patna 176.

DAWSON MILLER, C. J. AND

MULLICK, J.

Chatter Kumari Debi—Appellant

v.

Pratabbhuj Singh and others—Defendants-Respondents.

F. A. Nos. 89 and 116 of 1919, decided on 6th July, 1922, from a decision of the Sub. J., Muzaffarpore, dated 24th January, 1919.

Bengal Tenancy Act, S. 3 (3)—Payment of rent is not necessary to create tenancy of waste land.

The immediate payment of rent is not an essential factor in the creation of a tenancy. It is by no means unusual for waste lands to be granted to a tenant by his landlord with a stipulation that no rent shall be payable until they are brought under cultivation. There is nothing in the Bengal Tenancy Act which prevents such an arrangement.

[P. 179, C. 2 & P. 180, C. 1.]

P. N. Singh, A. P. Upadhya and *K. Sahay*—for Appellant.

S. M. Mullick, B. N. Mitter and *H. N. Prasad*—for Respondents.

Judgment.—In this case both the plaintiff and some of the defendants have preferred appeals from the decision of the Subordinate Judge of Muzaffarpur, dated the 24th January, 1919. The question for decision is whether the defendants Nos. 2 to 6 have acquired a *raiyati* interest in the lands in suit or whether the plaintiff is entitled to possession of them as her *bakasht* lands.

The plaintiff is the widow of the late Raja Mohan Bikram Sha, proprietor of the Ramnagger Raj who died without male issue in 1912. On

her husband's death the plaintiff succeeded to his estate, included in which are the two villages of Manchangwa and Ghoraghat. From the year 1889 these villages together with others with which we are not concerned were leased under three successive registered *ticca patta* granted by the late Raja. The *ticcadar* under the first lease was one Dowlat Singh who held for a period of five years which expired in September 1894. The second lease which was for a period of 10 years from September 1894 to September 1904 was granted to Babu Pratapdhuj also known as Jung Bahadur Singh, the defendant No. 1 in the suit. The third was for a term of 11 years in continuation of the previous one in favour of the defendant No. 1 and expired on the 23rd September, 1915.

The leases provided that the lessee should not, without the permission of the Raja Sahib, dismiss the Patwari of the villages already holding appointment who, it appears, was employed and paid by the Raja, and if the lessee should employ his own *Matsuddi* for writing collection papers, etc., he was to furnish a copy of them to the lessor, obtaining receipt for the same from the registered Patwari, and to file six monthly *jamabandi* papers in the office of the Raja. Without permission of the Raja Sahib the lessee was not to settle lands at a low rate of rent with his dependants or any *raiyat*. Otherwise there were no special features in the lease calling for attention

It is not contended that the *ticcadar* could himself aquire any *raiyati* interest in any of the demised property during the term of the lease. It also is not disputed that apart from the restriction as to not settling the lands at a low rate the *ticcadar* could settle tenants upon any part of the land other than the landlord's *zerait*.

When the last lease expired in 1915 the plaintiff took over possession from the *ticcadar* Pratapdhuj Singh and claimed that the lands in dispute, amounting to about 110 *bighas* altogether in the two Mauzas, which were then occupied by the defendants Nos. 2 to 6, were really the *bakasht* of the *ticcadar*, and, as such returned into her direct possession as *malik* on the termination of the lease.

It is the plaintiff's case that the lands were, never in fact, settled with the defendants Nos. 2 to 6, or, if they were, that the settlement was merely colourable and made by the *ticcadar* for his own benefit in the *farzi* names of the defendants Nos. 2 to 6, so that he might retain a *raiyati* interest in the disputed lands at a low rate of rent after his lease terminated.

The defendant No. 1 disclaims all interest in the disputed lands and denies that the other defendants were his *farzidars*. It is the defendants' case that about 32 *bighas* odd in Manchangwa and 18 *bighas* odd in Ghoraghat were the ancestral *kaimi* holding of the defendants Nos. 2, 3 and 4 who form a joint family and that these lands were recorded in the names of their respective fathers in the Record-of-Rights prepared at the Cadastral Survey and Settlement operations in 1898, having been in their family before the defendant No 1 acquired any interest in the land

These three defendants further acquired by settlement from Pratapdhuj Singh, the *ticcadar*, a further plot of 3 *bighas* and some odd *cottahs* in Manchangwa in 1905. In July of the same year Munder Singh, now deceased, the father of the defendants Nos 3 and 4, endeavoured to obtain some Parti lands in the Mauzas from the *ticcadar* for the purpose of grazing his bullocks but without success. He thereupon applied to the Raja, with whom he was on friendly terms, to intercede with the *ticcadar*. The Raja thereupon issued a Parwana dated the 25th July, 1905 addressed to Pratapdhuj Singh requesting him to arrange that Munder Singh should get about 20 to 25 *bighas* of Parti land for grazing his plough bullocks and storing straw, adding that

"If, at any time, the said Babu bring the said Parti land under his cultivation contrary to these terms, then you can realise from the said Babu a fair and proper rent for the said Parti land."

On receipt of this document Pratapdhuj Singh told the Patwari Amar Lal, who, as already stated, was a Raj servant, to settle some lands with Munder Singh on the terms mentioned in the Parwana which accordingly was done. In fact

the land settled with Munder Singh in this manner was altogether between 38 and 39 *bighas* in the two villages. No rent was to be paid for it, but if it should be brought under cultivation then a fair rent was to be assessed. The defendants Nos. 2, 3 and 4 thus came to have altogether a holding of about 93 *bighas* in the two Mauzas and this land has been recorded in their names in the Record-of Rights prepared at the Revisional Settlement and finally published in 1916. The remainder of the disputed land, amounting to about 17 *bighas*, was settled with the defendants Nos 5 and 6 by the *ticcadar* in small plots at different times between the years 1899 and 1913 For all this land, except that which was settled in accordance with the terms of the Parwana, rent was payable by the tenants to the *ticcadar* and the sum is in each case recorded in the Record-of-Rights.

During the Revisional Settlement operations which began before the last *ticca* lease terminated, the plaintiff objected to the lands being recorded in the names of the defendants as *raiyats* and claimed them as *ticcadar's bakasht*, contending that the defendants were merely the *farzidars* of the *ticcadar*. The objection was heard in February 1914 by the Khanapuri Officer who, after taking evidence on behalf of both parties, dismissed the objection.

His order was subsequently confirmed by the attestation officer. An objection by the plaintiff under S 103-A of the Bengal Tenancy Act was subsequently filed and was heard before the Assistant Settlement Officer in May 1915. That officer, after hearing the evidence, dismissed the petition and the names of the defendants were entered as *raiyats* in the Record-of-Rights finally published in January 1916.

At the trial the plaintiff did not seriously dispute the fact that the lands had been settled with the defendants Nos. 2 to 6 and no serious attempt appears to have been made to rebut the presumption arising from the earlier Record-of-Rights published in 1898, after Cadastral Survey, which recorded the 50 *bighas* as the *kaimi khasht* of the ancestors of the defendants Nos. 2 to 4. She contended, however, that the settlement was a *farzi* transaction for the benefit of the *ticcadar* and that the lands, and especially those more recently settled, were cultivated by the servants of the *ticcadar* and not by the other defendants. She also questioned the authenticity of the Parwana issued by the Raja in 1905 and disputed the *bona fides* of the settlement alleged to have been made in consequence thereof. She also contended that as no rent had been settled for what may be called the Parwana lands the relationship of landlord and tenant had not been created between the parties with respect to these lands. As the lands recorded in the Cadastral Survey as the *kasht* of the defendants' ancestors were not settled with them by the defendant No 1, it was suggested that Dowlat Singh, the *ticcadar* under the first lease, granted by the Raja for the years 1889 to 1894, was merely the servant and *benamidar* of Pratapdhuj Singh and that the settlement was made by Dowlat Singh in the interests of Pratapdhuj

The learned Subordinate Judge dismissed the suit as to all the lands except the 30 *bighas* of Parti land settled with the defendants Nos. 2, 3 and 4 in pursuance of the Parwana of 1905 for which he gave a decree in favour of the plaintiff.

From this decision the defendants Nos. 2, 3 and 4 have appealed and contend that the learned Subordinate Judge has gone wrong both in law and fact in holding that no proper settlement of these lands was made with them. The plaintiff has also appealed and contends that the defendants Nos. 2 to 6 were the *farzidars* of the defendant No. 1 and further that the settlement by the latter was contrary to the terms of the *ticca patta* executed in his favour and is not binding on the plaintiff.

It will be convenient to deal first with the plaintiff's appeal which is numbered 89 of 1919.

Apart from the Parwana lands which were settled in 1905, and for which the plaintiff has got a decree in her favour, it will be convenient to remember that the lands, the subject of the plaintiff's appeal, consist of (1) 50 *bighas* or thereabouts claimed as the ancestral *khasht* of the defend-

ants Nos. 2, 3 and 4, which may be referred to as the ancestral lands, and (2) 3 *bighas* and some odd *cottahs* settled with the defendants Nos. 2, 3 and 4 by the defendant No. 1 in 1905 and about 18 *bighas* settled with the defendants Nos 6 and 7 at different times between 1889 and 1913.

There was a volume of evidence both documentary and oral to show that the defendants Nos. 2 to 6 and not the defendant No. 1 were the real occupiers. The Record-of-Rights is also in their favour and it is sufficient to say that the plaintiff has entirely failed to make out a case that the defendants Nos. 2 to 6 were the *farzidars* of the defendant No. 1.

Further there is no evidence to show that the rent assessed for the ancestral lands and the subsequently settled lands was at a low rate. There is likewise no evidence from which it can be inferred that Dowlat Singh, even if he settled the ancestral lands with the defendants' father, held the lease merely as a *benamidar* for Pratapdhuj Singh. Nor is there anything to show that the ancestral lands were in fact settled by Dowlat In so far as the plaintiff's appeal is concerned it must, in my opinion, be dismissed with costs to the defendants who have appeared.

The appeal by the defendants Nos. 2 to 4 is numbered 116 of 1919. The question for determination in this appeal is whether there was in fact a settlement of the Parwana lands with the defendants Nos. 2 to 4 and, if so, whether it is binding upon the plaintiff. I have already held that there is nothing in the evidence to show that these defendants were *farzidars* of Prataphhuj Singh, and this is in accordance with the learned Subordinate Judge's finding.

He found, however, that the defendants had not made out their title to the Parwana lands partly on the ground that the circumstances under which they were settled ,were suspicious and partly on the ground that as no rent was immediately payable the relationship of landlord and tenant was not created He was of opinion that there could be no tenancy unless there was a contract to pay rent. I shall consider these questions separately. Here His Lordship discussed in detail the reasons which led the Subordinate Judge to regard the Parwana with suspicion. From the Parwana it would appear that the lands were originally Parti and were to be settled with the tenant for grazing cattle and storing straw, and that no rent was to be payable as long as the land was used for that purpose but that, if it should be brought under cultivation, a fair rent was to be assessed.

The defendant No. 1 in his evidence says he directed the Patwari Amar Lall to settle about 25 *bighas* of Parti land with Munder Singh and that when the latter some time later began to cultivate the lands he demanded rent at the rate of Rs 4 per *bigha*. The tenant offered a lower rate, *viz.*, that which he paid for the other lands occupied by him. About that time the Settlement operations began and no agreement as to rent was come to before the defendant No. 1's *ticca* lease expired in 1915.

In 1916 the Record-of-Rights was finally published recording the names of the defendants Nos. 2, 3 and 4 as *raiyats* after the objection by the plaintiff, already referred to, her husband having in the meantime died. After the Record.of-Rights it was open to the landlord to have a fair and equitable rent settled for the lands which by that time appear to have been brought under cultivation but this apparently was not done. Instead, the plaintiff instituted the present suit in September 1916, Munder Singh, with whom the settlement was made, died some years ago and cannot be called as a witness. Amar Lall, Patwari, the plaintiff's servant, through whom the settlement was made, was not called to dispute the settlement.

On this evidence there can be no room for doubt that the settlement was made as alleged by the defendants. Moreover, the Record-of-Rights is in their favour and raises a presumption which, in my opinion, so far from being rebutted, is supported by the evidence. The immediate payment of rent is not an essential factor in the creation of a tenancy. It is by no means unusual for waste lands to be granted to a tenant by his landlord with a stipulation that no rent shall be payable

until they are brought under cultivation. There is nothing in the Bengal Tenancy Act which prevents such an arrangement. The definition of tenant in section 3 (3) of the Act is "a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that person"

There is no reason why the landlord should not forego the payment of rent in the case of waste lands until they are made fit for cultivation by the labour of the tenant. Such an arrangement is for their mutual benefit. The tenant gets the use of the land for a limited purpose free of rent and gives his labour to render the land more productive to his landlord. The landlord gets the benefit of the tenant's labour which improves the nature of the land and increases its letting value.

References to four cases were given in the judgment of the learned Subordinate Judge in support of his view that there can be no tenancy unless there is a contract to pay rent. Two of the cases appear to be wrong references and as their names were not given I have been unable to trace them. Of the other two that of *Lyons* v. *Betts* (1), merely lays down that willingness to pay rent does not make a trespasser a tenant. The other *Deo Nandan Pershad* v. *Meghu Muhton* (2), is an authority for the proposition that a mere request by the plaintiff to the defendant to give up possession of land and to pay the produce or the value thereof during occupation cannot be regarded as a demand for rent and is not sufficient to create the relationship of landlord and tenant which is a matter of contract. Neither of these cases supports the broad proposition that there can be no tenancy where no rent is payable.

It was finally contended that the settlement of this land was against the terms of the *tieca patta* which does not permit the *tiecadar* to grant lands at a low rate without the consent of the landlord. There appear to me to be two answers to this argument; first, the settlement was made on the landlord's instructions and, secondly, the land was not settled at a low rate. The *tiecadar*, during the term of his lease, could no doubt forego the right to receive any rent at all, provided he made no contract which would bind the landlord afterwards. In the present case he has not impinged on the landlord's right to demand a fair and equitable rent when the lands are brought, as they now are, under cultivation. For the above reasons, I am of opinion that the appeal of the defendants Nos. 2, 3 and 4 should be allowed with costs against the plaintiff.

The decree of the Subordinate Judge will be set aside in so far as it finds in favour of the plaintiff's right to possession of 38 *bighas*, 17 *cottahs* 5 *dhurs* of the land in suit together with proportionate costs, and in lieu thereof a decree will be entered in favour of those defendants dismissing the plaintiff's suit with costs.

Mullick, J.:—I agree.

Appeal allowed.

(1) 13 W. R. 94.
(2) (1907) 34 Cal. 57=5 C. L. J. 181=11 C. W. N. 225.

A I. R. 1923 Patna 180.

JWALA PRASAD AND BUCKNILL, JJ.

Gour Chandra Ray—Appellant

v.

Janardan Prasad Thakur and others—Respondents

Appeals Nos. 178 of 1920 and 111 of 1921, and Civil Rev. No. 155 of 1921, decided on 3rd May 1921, from an Order of the Sub-J., Purneah, dated 19th July, 1920.

(a) *Limitation Act, art. 182—Application for issue of notice to judgment-debtor is step-in-aid.*

There is ample authority for the proposition that an application for the issue of notice upon judgment debtors is an application in aid of execution. [P. 181, C. 2.]

(b) *Execution*—Res judicata, *Principle of, applies to execution—Civil P. C., S. 11.*

Where the Court, decided after due notice upon the judgment-debtors that the execution was in order and that it should proceed.

Held, that the order is binding upon the judgment-debtors It is an order deciding as between the parties that the execution was not barred by limitation Such an order operates as *res judicata* and whether right or wrong, the order cannot be challenged in subsequent execution proceedings. [P. 182, C. 1.]

(c) *Civil P. C. S. 141, and O. 43, R. 1—Execution proceedings—Dismissal for default—No appeal lies.*

The order in question was passed in execution of the decree on account of the default of the decree-holder to take certain steps. The order was passed in execution proceedings by virtue of S. 141 of the Civil P. C., in other words, the order was similar to what is passed in suits on account of default of plaintiffs. Where the decree-holder failed to take necessary steps for the prosecution of his application in execution it was accordingly dismissed for default.

Held, that whether such oder is an order in the suit or in the execution, it is not at all appealable. [P. 183, C. 2.]

(d) *Execution—Order dismissing execution proceedings without notice to Decree-holder is without jurisdiction—Civil P. C., S. 115*

An order dismissing an execution application without notice to decree-holder is without jurisdiction. No order can be passed to the prejudice of a party without having given him an opportunity to be heard [P 188, C. 2]

K. Sahay, Sivashar Dayal and *B. K Prasad* for *D. S. Sinha*— for Appellant

S. N. Palit, S M. Mullick—for Respondents.

Jwala Prasad, J.:—This appeal arises out of an order of the Subordinate Judge, dated the 19th July 1920, rejecting the petition of the judgment-debtor—appellant with respect to the execution of the decree obtained by the respondent.

The only question involved in this appeal is whether the execution of the decree is barred by limitation. The decree was obtained on the 19th of April 1909 and was put into execution several times. The present execution was levied on the 11th November 1919. This was within three years from the previous execution which was filed on the 10th of April 1917 and disposed of on the 13th of September 1917.

Before this execution the decree-holder had levied execution of the decree on the 19th December 1913. That execution was dismissed on the 27th April 1914 The contention of the judgment-debtor is that the execution levied on the 10th April 1917 was barred by limitation and consequently the decree-holder lost all right to execute the decree on the 11th of November 1919.

The determination of this question rests entirely upon the construction of an application made by the decree-holder on the 25th April 1914. It is conceded that if that application be in aid of execution, this execution of the decree-holder which commenced on the 10th April 1917 was well within time. On the 6th of April 1914 the Court directed "Notice to issue under O. 21, R. 66, upon the judgment debtors fixing 25th May 1914."

The decree-holders had put in process-fee and notices for the parties. The return of notice was received, but the notice was not served, at least upon some of the judgment-debtors, and consequently the decree-holder filed the application of the 25th April 1914 praying that an order may be passed for issue of another notice for service upon the judgment debtors in the suit and one week's time may be allowed for filing *talbana* and notice.

The learned Vakil on behalf of the judgment-debtors contends that this was an application simply for time to file the *talbana*, and was not an application praying for issue of notices upon the judgment-debtors. The plain meaning of the application is that it was for both the purposes The notice upon some of the judgment-debtors had been returned unserved. It was, therefore, necessary for the decree-holder to apply for the issue of fresh notices upon those judgment-debtors. This interpretation is borne out by the order of the Court which runs in the following words :-

"Decree-holders filed a petition for issuing fresh notice and prayed for time to file notice and process fees. Put up on 27th April 1914 for orders."

There is ample authority for the proposition that an application for the issue of notice upon judgment debtors is an application in aid of execution. There can, therefore, be no manner of doubt that the application of the 25th of April 1914 was an application-in-aid of execution.

Therefore, the application of the judgment-debtor for execution of the decree filed on the 10th of April 1917 was within three years from the application of the 25th April 1914 filed by the decree-holder in-aid-of execution. In this view the present execution of the judgment-debtor is not at all barred by limitation.

Supposing, however, that the application of the 25th April 1914 was not in aid of execution, the judgment-debtors did not object to the execution of the decree in 1917 in respect of notice having been served upon them. In the execution of 1917, (No. 234 of 1917) the Court directed notice to issue under O. 21, R. 22, of the Code of Civil Procedure, fixing the 3rd May 1917. That notice was served upon the judgment-debtors on the 23rd April 1917. The decree-holder has

examined the Court peon and the identifier to prove of that notice. The learned Subordinate Judge has accepted that evidence. He has also considered the objection of the judgment-debtors as to why the evidence of service of the notice should not be believed. The same objection was urged before us, but on examination of the evidence in the case we are satisfied that the objections are unsubstantial and that the Court below was right in accepting the evidence of service of the notice upon the judgment-debtors.

Accepting, therefore, that the judgment-debtors had received notice of the execution, it was open to them to object to the execution of the decree upon the ground that it was already barred by limitation. This they did not do, and on the 3rd of May, 1917 the Court accepted the affidavit filed on behalf of the decree-holder in proof of service of the notice and directed a writ of attachment to issue fixing the 22nd of May, 1917. The Court accepted the evidence on the record that the writ of attachment was also served and directed on the 12th of June, 1917 notice to issue for the sale proclamation under O. 21, R. 66.

Therefore, not only the notices were served upon the judgment-debtor under O. 21, R. 22, but also the writ of attachment was served upon the spot. The Court, therefore, decided after due notice upon the judgment-debtors that the execution was in order that it should proceed. That order is binding upon the judgment-debtors. It is an order deciding as between the parties that the execution was not barred by limitation. Such an order has been held to operate as *res judicata*, and whether right or wrong, the order cannot be challenged in subsequent execution proceedings.

The result is that it is not open to the judgment-debtors now to challenge the execution of the decree filed in 1919 that the decree was barred long before the present execution.

The result is that we accept the view taken by the Court below and dismiss the appeal with costs.

The decree-holders' trouble does not cease with the disposal of this appeal, for we find that after the objection of the judgment-debtors was disposed of on the 19th of July, 1920 and the execution was directed to proceed, the execution was dismissed as being infructuous on the 8th of May, 1921. The decree-holder has, therefore, come to this Court aggrieved by the order of the Subordinate Judge, dated the 6th May, 1921, passed by the Subordinate Judge both in appeal and in revision The order of the Subordinate Judge is in the following words:

"Decree-holder takes no step, though the case was fixed for yesterday when I was busy with sessions. The execution case is accordingly dismissed as infructuous."

The order in question is not appealable. This kind of order is not included in the list of orders in O. 43, R. 1, and no order unless included in that list is appealable. The order in question was passed in execution of the decree on account of the default of the decree-holder to take certain steps. The order was passed in execution proceedings by virtue of section 141 of the Code of Civil Procedure, in other words, the order is similar to what is passed in suits on account of default of plaintiffs. Here, the decree-holder failed to take necessary steps for the prosecution of his application in execution and it was accordingly dismissed for default. Whether this order is an order in the suit or in the execution it is not at all appealable. Mr. Kulwant Sahay concedes that the preliminary objection of the respondents that the appeal is incompetent must prevail. The appeal is, therefore, dismissed.

Knowing of this difficulty Mr. Kulwant Sahay has also preferred an application in revision. The question then is whether the order of the 6th of May was without any jurisdiction or jurisdiction was exercised illegally or with material irregularity or whether the Subordinate Judge failed to exercise the jurisdiction vested in him by law. On the 28th of April, 1921 the decree-holders filed process fee and notice. The Court directed notice to issue under O. 21, R. 67, fixing the 9th of May, 1921 for its return. In the meantime, notices were returned unserved, and on the 4th of May the Court passed the following order:—"Notices returned

unserved. Judgment-debtor No. 2 refused to take notice as there is mistake in his name in the notice. The notices of other judgment-debtors not served, there was no different *goshwara*. Decree-holder to take necessary step by to-morrow."

On the 6th of May the Court passed the order with which we are concerned.

" Decree-holder takes no step though the case was fixed for yesterday when I was busy with sessions. The execution case is accordingly dismissed as infructuous."

Now, the date fixed for the return of notice was the 9th of May 1921 and that obviously was done in the presence of the decree-holder, for upon his filing process-fee that order was passed. The orders of the 4th and the 6th of May do not appear to have been passed with the notice and knowledge of the decree-holder. The order sheet does not show that any intimation was given to the decree-holder or his Pleader. On the other hand, column 4 of the order-sheet does not contain signature of the decree-holder's Pleader.

The order of the 4th of May directed the decree-holder to take necessary steps by the next day. Such an important order requiring a party to do something must necessarily have been signed by the Pleader of that party. The rules of the High Court on the subject are explicit and column 4 is expressly designed for that purpose. The decision of this Court in the case of *Ram Sukul* v. *Kesho Prasad Singh* (1) has concluded the matter. On behalf of the decree-holder an affidavit has been filed stating that they had no knowledge or information of the orders of the 4th and the 6th of May. There is no counter-affidavit filed on behalf of the judgment-debtors and the record of the Court, namely, the order sheet in question supports the statement of the decree-holder.

Therefore, it must be held that the orders of the 4th and the 6th of May were passed behind the back of the decree-holder and the case was taken up without notice having been given to the decree-holder. Such an order is without jurisdiction. No order can be passed to the prejudice of a party without having given him an opportunity to be heard. The order in question was also irregular, inasmuch as the return of notice was fixed to be taken up on the 9th of May. It was taken up and disposed of long before the said date. Considering all the circumstances we have no hesitation in holding that the order of the 6th of May 1921 must come within the purview of the revisional power of this Court and is one which, the justice of the case demands, must be set aside.

We, therefore, set aside the said order and direct execution to proceed in continuation of the order of the 28th of April 1921, allowing an opportunity to the decree-holder to have notice under O. 21, R. 66 served upon the party and to take such legal steps as he may be entitled to in prosecution of the execution of his decree. In the circumstances of the case we make no order as to costs both in the decree-holder's Appeal No. 111 and Civil Revision No. 55, and direct that each party should bear its own costs.

It is necessary that in this case notice of every order must be given to the parties and their signatures or those of their Pleaders must be obtained on the orders, inasmuch as the decree is an old one of 1909 and is about to be barred altogether by 12 years limitation. If the parties or their Pleaders refuse to sign, the Court must make a note to that effect.

Bucknill, J.—I agree.

Order set aside.

(1) (1918) 3 P.L.J. 218 = 4 P.L.W. 75 = 43 I.C. 925 (F.B.)

A. I. R. 1923 Patna 183.

COUTTS AND DAS, JJ.

Kuldip Singh and others—Defendants-Appellants v.

Ram Sewak Singh and others—Plaintiffs-Respondents.

Appeal No. 938 of 1920, decided on 16th April 1922 from a decision of the Dt. J., Gaya.

Adverse Possession — Joint collection of rent proved—Failure to pay shares does not amount to asserting adverse claim.

Where there is joint collection of rent any failure to deliver to the plaintiffs their share of the rent can hardly be held to amount to assertion of adverse title or to dispossession until it is shown that the plaintiffs' title was definitely denied, [P. 184, C. 2]

Mullick, S. N. Rai and *S. N. Bose*—for Appellants.

Manuk and *N. K. Prasad*—for Respondents.

Coutts, J—This appeal arises out of a suit for recovery of possession of a 2-annas share in village

Manikpore on the allegation of the plaintiffs' *ijara* right. It appears that the plaintiffs' ancestor took a 2-annas *ijara* from one Fazal Hussain who had a 4-annas *mokarari* interest in the village. This was in the year 1879.

In 1882 the defendants' ancestor purchased Fazal Hussain's 4 annas *mokarari* but before this date Fazal Hussain had mortgaged his remaining 2 annas to the plaintiffs' ancestor. In the year 1897 the plaintiffs sued on the mortgage and got a decree, and the position of the parties now is, that the plaintiffs are the 2 annas *ijaradars* and the defendants are the 2 annas *mokararidars*. This suit was decreed in the Court of first instance and this decree was upheld on appeal by the District Judge. The defendants have now appealed to this Court.

The point taken in appeal is that the suit being one in ejectment the plaintiffs must show possession within 12 years and it is contended that on the finding of the District Judge the suit is governed by the Full Bench decision of this Court in case of *Shiva Prasad Singh* v. *Hira Singh* (1) and that the plaintiff's suit must fail. The finding of the District Judge on this point is as follows:

"On the evidence I feel constrained to agree with the Subordinate Judge that neither party has satisfactorily proved his possession during the period between 1304 and 1315." But the District Judge has brought to his aid the title which the plaintiffs admittedly had in the year 1304 and has decreed the plaintiffs' suit. The learned Vakil for the appellants contends that the learned District Judge should not have brought to his aid the title of the plaintiffs and for this he relies on the Full Bench decision already referred to, where the learned Judges have said: 'If it is found that the evidence produced by both the plaintiff and the defendant as to possession is unworthy of credit the plaintiff's suit must fail, inasmuch as the presumption which arises upon proof of title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given."

On the other hand, Mr. Manuk appearing on behalf of the respondents relies on that portion of the judgment of the Full Bench where the decision in the case of *Maharajah Koowur Baboo Nitrasur Singh* v *Babu Nund Lall Singh* (2) is relied on, *viz*, "Where there is evidence on both sides of more or less equal weight so as to create a doubt as to where the truth lies, the probabilities may be regarded and may supply the additional weight necessary to turn the scale in favour of one side or the other."

In the present case it is somewhat difficult to discover under which of these categories the finding of the learned District Judge comes, and if this appeal had to be decided on this point alone I should be inclined to direct that the appeal be remanded for clear decision by the District Judge. The appeal before us, however, must be dismissed on another ground.

The position of the parties, as I have already said, is that the plaintiffs are *ijaradars* in respect of 2 annas and the defendants are *mokararidars* of another 2 annas. There was a partition between the defendants and their co sharers and the learned District Judge says that, "It is admitted that up to the time of the Civil Court partition collection was (joint)"

No question of limitation therefore, can arise, because the collection being joint there could be no adverse possession by the defendants until, at all events, the year 1906, and 1906 was within 12 years of the institution of the suit. As the learned District Judge says "If there was joint collection at the time then any failure to deliver to the plaintiffs their share of the rent can hardly be held to amount to assertion of adverse title or to dispossession until it is shown that the plaintiffs' title was definitely denied."

The decision of the learned District Judge is certainly correct and I would dismiss his appeal with costs.

Das, J.—I agree

Appeal dismissed.

(1) (1921) 6 P L J. 478=2 P.L.T. 487=62 I C. 1=1921 P.H.C.C. 305 (F B.).

(2) (1859-61) 8 M.I.A. 199=1 W.R. 51=1 Suther 20=1 Sar. 744 (P.C.)

* * A. I. R. 1923 Patna 185 (1).
(Special Bench)

DAWSON-MILLER, C. J., MULLICK AND KULWANT SAHAY, JJ.

(*Mukhtar*) *Manzur ul-Haq* ... Petitioner

v.

King-Emperor ... Respondent

M. J C. No. 122 of 1922, decided on the 18th December, 1922.

Legal Practitioners Act, S. 14—Inquiry by superior Court is invalid.

Where the offences with which the Mukhtar is charged were not committed in the Court of the Sessions Judge at all, but were committed in the Magistrate's Court,

***Held* the enquiry contemplated by section 14 must be made by the presiding officer of the Court in which the misconduct was alleged and not by the presiding officer of a superior Court. The High Court, when the matter was referred to it, refused to take action upon that account.** [P. 185, C. 2]

Naresh Chandra Sinha, Netai Chandra Ghosh and *Nirod Chandra Roy*—for the Petitioner.

Dawson-Miller, C. J. :—The petitioner in this case is a Mukhtar practising in the District of Bhagalpur. He was charged by the Sessions Judge with certain offences under the Legal Practitioners Act. The offences were of such a nature that they came within clause (*a*) or (*b*) of section 13 of that Act. The offences, if they were committed at all, were committed in the Court of the Sub-divisional Officer during the course of a criminal prosecution. The criminal case was eventually committed for trial to the Court of the Sessions Judge. The Sessions Judge afterwards drew up a charge under section 14 of the Legal Practitioners Act against the Mukhtar. The nature of the charge speaking generally was that the Mukhtar had, in the course of the criminal proceedings before the Sub-divisional Officer, filed certain documents on behalf of the complainant in that case without having proper instructions and without being engaged as a Mukhtar in the case. It is unnecessary to go into the facts in connection with the charges against the Mukhtar and we have purposely refrained from doing so, but it seems to us that the point raised on his behalf in the present proceedings, namely, that the Sessions Judge had no jurisdiction to take action under section 14 of the Legal Practitioners Act must succeed. The offences with which the Mukhtar is charged were not committed in the Court of the Sessions Judge at all. They were committed in the Magistrate's Court and it seems to us that the case is governed entirely by the decision in *King-Emperor* v. *Satyendra Nath Ray* (1). That was a case where the enquiry contemplated by section 14 of the Legal Practitioners Act was made not by the presiding officer of the Court in which the misconduct was alleged but by the presiding officer of a superior Court and in that case the High Court, when the matter was referred to it, refused to take action upon that account. In these circumstances it seems to us that according to the ruling of this Court the learned Sessions Judge had no jurisdiction to hold the enquiry and the proceedings ought to be set aside.

Proceedings quashed.

(1) (1920) 1 P L T. 379=57 I. C. 277=(1920) Pat H. C C. 235=21 Cr. L. J. 613

* *A. I. R. 1923 Patna 185 (2).
(Special Bench)

DAWSON-MILLER, C. J., MULLICK AND KULWANT SAHAY, JJ.

In the matter of Madhava Singh, Vakil.

Miscellaneous Judicial Case No. 149 of 1922, decided on the 18th December, 1922.

Legal Practitioners Act, S 13—Warning is not sufficient punishment for defying law—Duties of a Vakil are discussed.

Where it is perfectly clear that a vakil had deliberately taken the law into his own hands and defied the orders of constituted authority, and where he expressed no regret for his past conduct and has given no assurance as to his conduct in the future.

***Held* warning would not be sufficient punishment. Advocates and Pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice, for which they are entitled to be paid, to those members of the public who require their services. Their position, training and practice give them immense influence with the public and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position. It is not necessary in order to enable High Court to exercise its jurisdiction that any offence should have been committed, nor is it necessary that what the pleader had done should subject him to anything like general infamy or imputation of bad character.** [P. 187, Cs. 1 & 2.]

Purnendu Narayan Sinha—for Vakil.

Sultan Ahmed, Government Advocate—for the Crown.

Dawson-Miller, C. J. :—In this case, Babu Madhava Singh, a Vakil of this Court ordinarily practising in the District Courts of Saran, having been enrolled in the Calcutta High Court in the year 1913, has been called upon to show cause why he should not be dealt with and either removed or suspended from practice under the powers conferred on the Court by cl. 8 of the Letters Patent. It appears that in January last Babu Madhava Singh was tried and convicted of an offence under sec. 17, cl. (2) of the Criminal Law Amendment Act, 1908, and was sentenced to one year's simple imprisonment. The sentence was afterwards reduced by the Local Government to six months. S. 17, cl. (2) of the Criminal Law Amendment Act provides :—

"Whoever manages or assists in the management of an unlawful association or promotes or assists in promoting a meeting of any such association or of any members thereof as such member, shall be punished with imprisonment for a term which may extend to three years or with fine, or with both."

It appears from the decision of the Magistrate before whom Babu Madhava Singh was tried and convicted that there were certain persons known as the Sewak Dal volunteers and by a notification in December last these volunteers were declared by the Local Government to be an unlawful association within the meaning of Part II of Act XIV of 1908, the Criminal Law Amendment Act. Notwithstanding this notification a meeting was held at which a large number of persons were present and I have no doubt many of them, if not most of them, belonged to the Sewak Dal volunteers. At that meeting speeches were made in direct defiance of the notification and the persons present were invited to enrol themselves as volunteers. Two other persons were tried and convicted along with Babu Madhava Singh. The learned Magistrate said that he appeared to be the most educated of the accused and although the speech he made on that occasion was not the principal speech still he was convicted and given the same sentence as the other two. After he had served his sentence he applied for renewal of his clerk's license and the matter was brought to the notice of the Court by the District and Sessions Judge of Saran. The Court thereupon issued notice to him asking him to offer any explanation which he might be in a position to make both of his past conduct and his future attitude towards offences of the nature of which he had been convicted. In reply to that notice he stated that the action for which he was convicted was done in perfect good faith for he sincerely believed that it was necessary in those days to enlist volunteers for the preservation of peace in the district, that the restriction of the enrolment of volunteers was unnecessary in the District of Saran, a fact of which he held a sincere conviction and he adds that the lack of necessity for restricting their enrolment was proved by the fact that the restriction was withdrawn a few days after his arrest. He then concludes by saying that his conviction was on a matter of opinion which does not come under the purview of the Legal Practitioners Act. Then as regards his future attitude he says that he does not intend to commit any offence against any law.

Reading that answer I cannot help thinking that the attitude of the Vakil is that the orders of the Local Government declaring the volunteers to be an unlawful association are altogether unnecessary and unwarranted and that he himself knew much better than the Local Government whether such an order ought to have been issued and knowing that such orders were unnecessary and unwarranted he felt perfectly justified in defying them and in taking part in a meeting with the object of enrolling further volunteers in an association which had been declared to be an unlawful association and that the whole matter was merely one of opinion in which he was entitled to put forward his opinion even against the orders of constituted authority. There is not a word in his reply which indicates that he feels any sense of regret for having done acts which undoubtedly amount to defiance of the law, or that he intends in future to refrain from any such offence. It is quite obvious that whether for political considerations or for any other reason, if we take the law into our own hands and say what we shall do and what we shall not do notwithstanding that there may be a prohibition under the law against doing certain acts, all good Government in the country would come to an end and a state of anarchy and chaos would exist, and I cannot help regret-

ting that this young man who was enrolled as a Vakil in 1913 does not even now realise the exact nature of the offence which he has undoubtedly committed. On his behalf to-day Rai Bahadur Purnendu Narayan Singh has appeared and even now no expression of regret is put forward on his behalf, but it has been contended that upon the facts disclosed in the Magistrate's judgment there really was no offence committed under S. 17, Cl. (2) of the Criminal Law Amendment Act and that it has not been proved that the meeting in which he took part was really a meeting of the association which had been prescribed and declared an unlawful association by the Local Government. Whether such a case could be made out or not must depend upon the evidence in the case. On further consideration, the learned Rai Bahadur did not pursue the matter or take us through the evidence before the Magistrate, because it was pointed out to him that whether or not the Vakil was guilty of an offence under that section it is perfectly clear that he had deliberately taken the law into his own hands and defied the orders of constituted authority.

In these circumstances it seems to me that it would be impossible for us to take the course which I certainly had in mind to take at one time, had the Vakil appeared and expressed regret for his past conduct and given some assurance as to his conduct in the future. In such a case he might have been content to let him off with a warning and to accept his assurances as to his future conduct, but having regard to the attitude which he has taken throughout, I do not think that we should be justified in acting in such a manner. With regard to the actions of persons in the position of a Vakil who is an officer of the Court and who holds a responsible position and who certainly ought to uphold the preservation of law and order, I do not think I can do better than refer to the words of the learned Chief Justice of the High Court at Bombay in a recent case which was heard in October 1919. The learned Chief Justice in a very similar case to the present said:—

> "Advocates and Pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice, for which they are entitled to be paid, to those members of the public who require their services. Their position, training and practice give them immense influence with the public and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position. It is not necessary in order for us to be able to exercise our jurisdiction that any offence should have been committed, nor is it necessary that what the Respondents have done should have subjected them to anything like general infamy or imputation of bad character."

I entirely agree with the remarks of the learned Chief Justice in that case and desire to impress them upon the Respondent in this case. In these circumstances although I have already stated I should have been willing had the Respondent shown a different attitude to let him off with a warning, I think that the least we can do is to suspend him from practice for a period of six months from this date.

Mullick, J.—I agree.

Kulwant Sahay, J—I agree.

Order accordingly.

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* A. I. R. 1923 Patna 187.

JWALA PRASAD AND ADAMJI, JJ.

Mahomed Yakub and others ... Plaintiffs-Appellants

v.

Abdul Quddus and others ... Defendants-Respondents.

Appeal No. 32 of 1919, decided on the 2nd August, 1922, against the decree of the Sub. J. of Saran.

(a) *Contract Act, S 12—Weakness of mind is not sufficient—Incapacity to understand business and to form rational judgment is the test of unsoundness.*

The test of soundness of mind is that the person is capable of understanding the business and of forming a rational judgment as to its effect upon his interest. There being a presumption in favour of sanity, the person who relies on the unsoundness of mind must prove it sufficiently to satisfy this test. Mere weakness of mind is not sufficient. Although it is not necessary to prove utter mental darkness or congenital idiocy, the party alleging must establish that the person was incapable of understanding business and forming rational judgment as to its effect [P. 192, C. 1.]

(b) *Benami—Intention to gift presumed.*

Where the father purchased the property in the name of the son but with the father's money and the intention was to make a gift to son and the interest was acted upon.

***Held* it is a gift to the son.** [P. 194, C. 1.]

(c) *Contract Act, S.* 16—*Evidence.*

Where the old donor was losing the strength of his mind and body, but was able to exercise an independent and intelligent mind over what he was doing, and was taking great interest in his affairs, and whatever weakness he might have shown in other directions, he showed strength of mind in dealing with his properties and business, and was not unmindful of the interest of his other sons.

Held **it is impossible to contend that he executed the documents on account of any undue influence brought to bear upon him or without his understanding the *pros* and *cons* or the transactions.** [P. 194, C. 2 ; P. 195, C. 1.]

Hasan Jan and *Janak Kishore*—for Appellant.

P. S. Sen, Hyder Imam, Syed Muhammad Tahir, Kailaspati, S. C. Mozumdar and *Sambhu Saran*—for Respondents.

Jwala Prasad, J.—This appeal arises out of a suit for recovery of properties, moveable and immoveable, mentioned in Schedules 1, 2, 3 and 4 of the plaint, with the exception of the shares in Mouza Madarpur, Pargana Goa, Touzi No. 2569, and Chandpura, Touzi No. 2370, with respect to which the plaintiffs prayed for confirmation of their possession upon an adjudication of their right thereto and on invalidating the deeds mentioned in paragraphs 10 and 15 of the plaint.

The facts of the case have been fully and clearly given in the judgment of the Court below, which may safely be adopted for the purpose of this appeal. The following geneology will show the relationship of the parties :—

Moulvi IMDAD HOSSAIN.
died on 26th January 1915.

Moulvi Ali Hussain	*Moulvi* Muhammad Yakub, plaintiff No. 1	*Hafiz* Muhammad Yusuf, defendant No. 6	*Moulvi* Ishfaq	*Moulvi* Abdul Razak, plaintiff No. 2.	*Moulvi* Abdul Wahab, defendant No. 7.	*Moulvi* Abdul Aziz, died on 15th January 1912—*Musammat* Bibi Azmat, defendant No. 5.

Abdul Quddus, defendant No. 1.	Abdul Waddud, defendant No. 2.	Fakhruddin, defendant No. 3.	Bibi Zohra, defendant No. 4.	Mohiuddin.

The two plaintiffs are the sons of one Imdad Hossain. Defendants Nos. 1 to 3 are the sons, defendant No. 4 is the daughter, and defendant No. 5 is the widow of Moulvi Abdul Aziz, the youngest son of Imdad Hossain. Defendants Nos. 6 and 7 are two other sons of Imdad Hossain. Imdad Hossain had two more sons with whom we are not concerned in this litigation. In all he had seven sons. He died on the 26th of January 1915, at the age of about 97 years. His wife had predeceased him in 1891. He had during his lifetime acquired considerable property by his own exertions. On the 17th of February 1887 he divided by a deed of partition (Exhibit 14) the bulk of the properties acquired by him up to that time amongst all his seven sons, keeping some of the properties for himself. Moulvi Abdul Aziz, however, lived with his father, while all the other sons lived separately from him.

The plaintiffs' case is that Abdul Aziz managed his own properties as well as the properties and business of his father from 1888 up to September 1911, and as his father advanced in age he became weak mentally and physically, and in the last two decades of his life lost his senses and became of unsound mind and incapable of managing his affairs. Moulvi Abdul Aziz, taking advantage of the unsoundness of his mind and exercising undue influence over him caused several deeds to be executed by his old father in his favour, which deeds are invalid and without consideration. Moulvi Abdul Aziz died on the 15th of January 1912. The properties left by him and detailed in Schedule 4 of the plaint were inherited by defendants Nos. 1 to 5 and his son, Mohiuddin, since deceased, and his father, Moulvi Imdad Hossain, has his legal heirs. A few days after the death of Abdul Aziz, his son Mohiuddin also died. Imdad Hossain, as grandfather of Mohiuddin, received 2/3rd of the share inherited by Mohiuddin in the properties of his father, Abdul Aziz. At that time defendants Nos. 1

to 5, along with Shaikh Mohammad, brother-in-law of Abdul Aziz, used to live with Moulvi Imdad Hossain. Shaikh Mohammad also took advantage of the insanity of Moulvi Imdad Hossain and, by procuring recommendation of the local authorities of Chapra for the time being got a *hibanamah*, dated the 10th March 1912 (Exhibit 16), executed in favour of defendants Nos. 1 and 2 and defendant No. 4 step-children of defendant No. 5, in respect of the share which Imdad Hossain had received by inheritance from Moulvi Abdul Aziz. After the death of Abdul Aziz, defendant No. 1, his son, and defendants Nos. 6 and 7 gained influence for some time over Moulvi Imdad Hussain. Defendant No. 6 got a *hibanamah* (Exhibit 9), dated the 26th April 1912, executed in respect of the properties situate in Patna. Defendant No. 7 got a *mukarrari*, dated the 4th July 1912, executed in respect of Mauza Hukam, at a low *jama*. Both the defendants Nos. 6 and 7 got a *taksiknamah*, having the force of a *wasiatnamah*, Exhibit 2, dated the 18th January 1913, executed in respect of the entire property which was in the name of Abdul Aziz with the exception of the properties allotted to him by the deed of partition (Exhibit 14), dated the 17th of February 1877. Afterwards, defendant No. 7 got a mortgage-bond (Exhibit 15), dated the 15th June 1913, executed in his favour by Moulvi Imdad Hossain and finally, they got a *hibanamah*, dated the 11th April 1914, executed in their own favour, but the said deed was not registered as Moulvi Imdad Hossain was not in his senses.

The plaintiffs impugn all the aforesaid deeds in favour of Abdul Aziz, or in favour of the defendants, in the case, as having been executed when Imdad Hossain was "insane" and as being invalid and "null and void" in consequence, and assert that by these deeds neither the right nor the possession of Moulvi Imdad Hossain was transferred in the properties mentioned in Schedules 1, 2 and 3 which belonged to him, or in the property of Abdul Aziz mentioned in Schedule 4 to the extent of the share inherited by him therein after the death of Abdul Aziz in 1912. The plaintiffs, therefore, state that after the death of Imdad Hossain, they being the sons of Imdad Hossain, became entitled to possession of their legal shares in the properties mentioned in the aforesaid Schedules by right of inheritance, but that the defendants were wrongfully in possession of the plaintiffs' share. Hence the plaintiffs seek to recover possession of their share in the said properties by declaring their right and title therein and by invalidating the aforesaid deeds detailed in paragraphs 10 and 15 of the plaint. With respect to their shares in Mouza Madarpur, Pargana Goa, Touzi No. 2569, and Chandpura, Pargana Goa, Touzi No. 2370, they allege that they are in possession and hence they want their possession to be confirmed. They also pray for mesne profits from the date of the institution of the suit up to the date of realisation. They claim that, as Imdad Hossain was insane from 1892 up to his death on the 28th of January 1915, the said period should not be taken into account while considering limitation.

The plaintiffs' claim is resisted mainly by defendants Nos. 1 to 5, the heirs of Abdul Aziz. They plead that the suit was barred by limitation and the rule of estoppel, and that it was bad for misjoinder of parties and causes of action. On the facts, they deny that Moulvi Imdad Hossain was isane or of unsound mind and incapable of managing his affairs. They assert that he was a shrewd man of business, was managing his own properties as well as the properties of his son, Abdul Aziz, and that he executed all the deeds in question of his own free will and accord while in full possession of his senses and received good consideration for each and every one of them, and that no fraud or undue influence was ever exercised upon him, and that the deeds were always acted upon and are valid and binding upon the plaintiffs. In short, they say that the plaintiffs are not entitled to any relief.

Defendants Nos. 6 and 7 also put in separate written statements. They support the deeds that were executed by Imdad Hossain in their own favour, but dispute the validity of the deeds in favour of the ancestor of defendants Nos. 1 to 5. In the Court below the following issues were raised by the parties :—

"1. Whether the suit is maintainable?"

"2. Whether the plaintiffs have got any cause of action for this suit?"

"3. Whether the suit is barred by limitation?"

" 4. Whether the suit is barred by the principle of estoppel ? "

" 5. Whether the suit is bad for misjoinder of parties and of causes of action? "

" 6. Was Moulvi Imdad Hossain a person of unsound mind as alleged in the plaint and was he not competent to execute the deeds in question ? "

" 7. Were the deeds sought to be set aside executed under undue influence and were they brought about by fraud ? "

" 8. Were the said deeds executed for consideration and were they acted upon ? If not, are they valid and binding ? "

Issues Nos. 1, 2, 4 and 5 are pleas in bar of the plaintiffs' suit. They were decided in their favour and we are no longer concerned with them.

Issues Nos. 6, 7 and 8 were decided by the Court below against the plaintiffs and in favour of the defendants. As a result of his finding on those as well as on Issue No. 3, the learned Subordinate Judge dismissed the plaintiffs' suit. Hence this appeal by the plaintiffs.

With reference to Issue No. 6, the learned Subordinate Judge has recorded the finding that,

" Imdad Hossain was not of unsound mind and incompetent to execute the deeds sought to be set aside in the suit. "

He has arrived at this finding upon a thorough review of the evidence and the facts and circumstances of the case. The question of insanity of Imdad Hossain was first raised at the time when he executed a deed of gift in favour of defendants Nos. 6 and 7 in April 1914. The Sub-Registrar refused to register the deeds and his order was upheld by the District Registrar (Exhibits 20 and 21). This led to an application being made by Mohammad Ayub, son of plaintiff No. 1, before the District Judge of Saran, under Act IV of 1912, for his appointment as guardian of Moulvi Imdad Hossain on the ground of the latter's insanity. The District Judge refused the application by his order (Exhibit A), dated the 29th June 1914.

The retired Assistant Surgeon, Babu Upendra Narain Rai, who has been examined in this case as P. W. No. 3, and Major F. P. Commor, I. M. S., were examined as witnesses in that case. Their certificates and deposition in that case are Exhibits No. 27-R., and 34 respectively. In the opinion of the Assistant Surgeon, Imdad Hossain was suffering from " softening of the brain, " and was not capable of managing his own estate. This was, according to him, due to senility or old age : (*vide* his certificate, Exhibit 27, and his deposition in the Lunacy Case, Exhibit R. and his deposition as witness No. 3 in this case). On the other hand, the Civil Surgeon and Dr. K. C. Das, after testing his mental powers in several ways, stated in their certificates :—

" His mental powers are good for a man of his age and his power of reasoning clear and logical. "

The Civil Surgeon confirmed this opinion by his evidence (Ex. 34, dated the 23rd of June 1914) in the Lunacy Case. I would quote some passages from his deposition. Says the Civil Surgeon—

" He answered questions intelligently and logically without exception. I asked him how he lived, what he ate, the time of year, the time of day. I asked if he had any case. He said a case was pending regarding his property. He wished to leave property to two sons whom he named (Wahab and Yusuf) because his other sons had already had property left them ; that he bore them no ill will. I asked other questions too. I should think he would transact business with great difficulty and very badly owing to his infirmity, by which I mean the weakness of his mind and body, due to old age. He is extremely infirm in body and is also infirm in mind, I should call it senile mental infirmity. He would be much more easily influenced by those round him than a man in the prime of life and in good health."

In spite of his mental and physical infirmity, the Civil Surgeon in the cross-examination stated that he would consider him " quite sane."

Witnesses on both sides have been examined regarding the state of the mind of Imdad Hossain in the last two decades of his life. The witnesses on behalf of the plaintiffs cite some specific acts of insanity, such as mistaking one person for another, dusting the wall, drinking ghee from *Khibhdi* and drinking tea from teapot and mistaking grapes for pieces of stone. The learned Subordinate Judge very rightly holds that these instances only prove temporary " aberrations of intellect " or temporary " insane delusions." They are isolated cases, few and far between and would not necessarily indicate that he was incapable of managing his

affairs and do not constitute such acts on the part of Moulvi Imdad Hossain as an insane person only would have done. They may have been due to loss of memory, absent-mindedness and other circumstances and are not inconsistent with the acts of a sane man. The view taken by the learned Subordinate Judge is supported by standard works on Medical Jurisprudence, such as of Lyon and Gribble. Heaps of documents have been filed in the case which the learned Subordinate Judge has relied upon for showing that Moulvi Imdad Hossain's intelligence was of a high order and that he could transact business rationally. He would add up large sums, make pertinent and careful correction in draft deeds, keep accounts and could understand intricate questions of fact. He was a *mutwali* of a mosque and *waqf* properties appertaining thereto and had civil and criminal cases regarding a drain near the mosque as evidenced by Exhibits U 1 and U 2. He was plaintiff in that litigation. The suit terminated with the judgment and the decree, dated the 18th June, 1907.

Two of the plaintiffs' witnesses, namely, the 2nd and the 8th witnesses, who cite some instances of the acts of insanity such as those referred to above, entered into transactions with him which transactions are still in force. These witnesses would not have entered into such transaction if in fact they knew or believed Imdad Hossain to be a man of unsound mind. Muhammad Ayub, son of plaintiff No. 1, who had applied to the District Judge in 1914 to have Imdad Hossain declared a lunatic, had brought a suit claiming Mouza Hukam on the basis of a verbal gift from Moulvi Imdad Hossain. Moulvi Imdad Hossain denied this gift and the dispute was referred to the arbitration of two Vakils and a Deputy Magistrate. Moulvi Imdad Hossain was examined as a witness in that case. His deposition (Exhibit Q) clearly shows that he was able to give intelligent replies to the questions addressed to him; that he understood the business and that he was fully alive to his own interest. This happened on the 27th of October, 1912. Similarly, the Succession Certificate (Exhibit W), dated the 29th April 1912, shows that he took interest in his affairs and applied for Succession Certificate to recover debts due to his deceased son, Abdul Aziz. The learned Subordinate Judge has referred to a number of transactions entered into by Imdad Hossain within two years of his death as showing that:—

"far from being incapable of managing his affairs and protecting his interest ...he was extremely mindful of his own interest."

The plaintiffs alleged in paragraph 13 of the plaint that Moulvi Imdad Hossain had become "*fatir-ul-aqb*" since 1893 and died while in this state of mind in 1915. The word "*fatir-ul-aqb*" literally means 'unsoundness of mind or at least imbecility of mind.' This the plaintiffs have failed to establish. He was a pleader and had retired from the profession in the year 1872. He was a shrewd man of business and acquired considerable property by his own self-exertions. He himself divided all his properties amongst his sons in 1877 keeping only Mahal Shiva Diara and Mahal Mahaji Barhara in which he had two-annas share, for himself. Even after partition he seems to have acquired considerable properties by his own exertion. No doubt, as he was growing older he was gradually losing his physical and mental strength, and when the Doctors examined him in 1914, at the age of 97, which is an extreme age for a hot climate like that of India, he suffered from senility and, as the Civil Surgeon states he must have been managing his business with difficulty and have been liable to be easily influenced by those around him. His infirmity must have been hastened by the death of his youngest son, Abdul Aziz, in 1912, who, after the partition of 1877 always lived with him and to whom he was much attached, but his faculties were not so impaired as would amount to insanity or unsoundness of mind. This is clear from the evidence of the second witness examined by the plaintiffs.

The learned Subordinate Judge is, therefore, right in his finding that the plaintiffs have failed to establish that the transactions in question were void on account of Imdad Hossain being incompetent to enter upon them by reason of his not being a man of sound mind under Ss. 11 and 12 of the Indian Contract Act. S. 12 says that a person is said to be of a sound mind for the purpose of making a contract if at the time he makes it he is capable of understanding it and forming a rational judgment as to its effect upon his interests; in other

words, the test of soundness of mind is that he is capable of understanding the business and of forming a rational judgment as to its effect upon his interest. There being a presumption in favour of sanity, the person who relies on the unsoundness of mind must prove it sufficiently to satisfy this test: *Hall* v. *Warren* (1). Mere weakness of mind is not sufficient as is laid down in the case of *Durga Bakhsh Singh* v. *Muhammad Ali Beg* (2). Although it is not necessary to prove utter mental darkness or congenital idiocy. *Tirummagal Ammal* v. *Ramasami Ayyangar* (3), *Ram Sahay* v. *Laljee Sahay* (4), *Drew* v. *Nunn* (5), the plaintiff must establish that Imdad Hossain was incapable of understanding business and forming rational judgment as to its effect. This the plaintiffs have failed to do.

Assuming that Imdad Hossain was suffering from occasional aberrations of mind, as has been sought to be proved by the plaintiffs, the plaintiffs must further show that the particular transactions in question were entered into when he was subject to those occasional fits. There is no evidence that the documents in question were executed at a time when Imdad Hossain was suffering from any hallucination of his brain. Therefore, the documents in question were not executed when he was 'insane' and that they are consequently not invalid and null and void as is stated in paragraph 17 of the plaint. Issue No. 6 was therefore, rightly decided by the learned Subordinate Judge against the plaintiffs.

The learned Vakil on behalf of the plaintiffs then contended that, although the documents in question were not null and void on the ground of Imdad Hossain being of unsound mind, yet they are liable to be set aside inasmuch as they were executed on account of undue influence and pressure having been brought to bear upon him by the donees under the gift—firstly, by his youngest son, Abdul Aziz, who always used to live with him, and, after the death of Abdul Aziz in 1912, by Sheikh Mohammad, brother-in-law of Abdul Aziz, and, lastly, by defendants Nos. 6 and 7. It is necessary in this connection to place here the history of the general transactions. Imdad Hossain, as already stated, had divided the bulk of his properties among all his seven sons in 1877 under a *Taksimnamah* (Ex. 14). Under the *Taksimnamah* he gave 4 annas 1 *karant* 5 *masant* share in village Madarpur Goa (Touzi No. 2569) and 1 anna 4 pies share in Chandpura (Touzi No. 2870) to each of his sons Mohammad Yakub and Moulvi Abdul Aziz. Mohammad Yakub dealt in cloth and his business failed. Accordingly he sold his 4 annas 1 *karant* 5 *masant* share in Mouza Madarpur Goa to his father, Moulvi Imdad Hossain, in 1889. This was given in conditional mortgage by Imdad Hossain to his son Abdul Aziz on the 14th of March 1893 per Ex. 35, to secure a loan of Rs. 7,000. On the 16th of January 1894, the plaintiff, Mohammad Yakub, executed a sale-deed (Ex. 1) in favour of Abdul Aziz with respect to his 1 anna 4 pies share in another Mouza called Chandpura (Touzi No. 2870), for Rs. 3,500. Previous to this, Moulvi Imdad Hossain had under date the 28th of January 1891 taken out Baiharsana of 6 annas 6 pies share of Shankerpur Harbans for Rs. 7,000 from one Moulvi Abdul Gafur. On the 18th of August 1903, he assigned half of the Baiharsana share in Shankerpur Harbans to Moulvi Abdul Aziz for Rs. 3,500 (Ex. P. 1 or P 2) Subsequently Imdad Hossain acquired 14 annas of Shankerpur Harbans, 14 annas of Shankerpur Aiyama, about 3 annas 7 pies 5 *karants* in Shankerpur Lila, Pergana Barai, and some other shares in the said villages and also one anna of Hukam, from 2nd October 1905 to 19th October 1907, partly in his own name and partly in the *farzi* name of his sons Abdul Wahab and Abdul Aziz. This was by means of four sale-deeds and a deed of exchange executed by the owners of the shares referred to above: (*vide* Ex. H, H-1 and 32). The other two deeds do not appear to have been filed in this suit.

On the 11th of December 1907, he sold 4 annas 1 *karant* 5 *masant* share of Madarpur, Pergana Goa, which he had acquired from the present plaintiff Mohammad Yakub in the year 1889, and 3 annas 3 pies share in Shankerpur Harbans and Shankerpur Aiyama, 4 pies 10 *karants* share in Shankerpur Lila, for Rs. 7,500 (per Ex. 3).

(1) (1801) 9 Ves (Jun.) 605=7 R R. 306
(2) (1904) 27 All. 1=31 I. A 2=5=7 C. C. 287 =8 Sar. 725 P C)
(3) 1 M H. C R. 324
(4) (1881) 8 Cal. 149=9 C. L R 457.
(5) (1879) 4 Q. B. D. 661.

He set off the sum of Rs. 7,000 which was due to Abdul Aziz under Baiharsana (Ex. 35), dated the 14th March 1893, with respect to Madarpur, Pargana Goa. On the 7th December 1907, he executed a deed of exchange in favour of Abdul Aziz, whereby he exchanged 8 annas 2 *karants* 10 *masant* of Madarpur, Pargana Goa, belonging to Abdul Aziz, for 7 annas 6 pies share in Shankerpur Harbans and Shankerpur Aiyama, and 10 pies share in Lila belonging to himself. On the 23rd of December 1907 he exchanged (by deed Ex. 4) his 3 annas 3 pies share of Shankerpur Harbans and Shankerpur Aiyama and 1½ pies of Shankerpur Lila for 2 annas 8 pies share of Chandpura belonging to Abdul Aziz (1 anna 4 pies share which Abdul Aziz had purchased per Ex. 1 in 1894, from the plaintiff No. 1, and his 1 anna 4 pies share under the *Taksimnama* Ex. 14 of 1877). Thus under the aforesaid deeds Abdul Aziz got the entire share acquired by Imdad Hossain in Shankerpur Harbans, Shankerpur Aiyama and Shankerpur Lila, called Shakri, and Imdad Hossain got 8 annas odd of Madarpur Goa and 2 annas 8 pies of Chandpur.

Besides the aforesaid documents, Imdad Hossain executed a deed of gift (Ex. 6 or P. 5), dated the 28th April 1910, with respect to 4 annas 6 pies share of Madarpur, Pargana Barai, in favour of Abdul Aziz. On the 7th March 1911, he executed a *mokarrari* deed (Ex. 7 or P. 5) in favour of Abdul Aziz with respect to 3 annas 6 pies in Madarpur Barai. Under this deed a sum of Rs. 400 per mensem was payable to Moulvi Imdad Hossain as landlord's rent and Rs. 300 to Moulvi Wahab (defendant No. 7), one of the sons of Imdad Hossain. On the 14th of August 1919, he made a *waqf* of the Haq Ajri or rent reserved of Rs. 400 in favour of Sahebgunj Mosque of which he appointed Moulvi Abdul Aziz as *Mutwali*. Abdul Aziz died in January 1912, and on his death Imdad Hossain conveyed by a deed of gift, dated the 10th March 1912 (Ex. 5), the one-sixth share of the properties which he had inherited from Abdul Aziz to some of the children of the latter.

On the 25th April 1912 Imdad Hossain, executed a deed of gift (Ex. 9) with respect to villages Darweshpur Diara and Darweshpur Raonia in favour of defendant No. 6. On the 8th January 1913 he executed a *Tansikhnamah* (deed of revocation) in which he declared some of the aforesaid transactions to have been *farzi* and that his properties should be inherited by his heirs according to law.

On the 4th of July 1912, he executed a *mokarari istamrari* in favour of his son Abdul Wahab. On the 15th June 1913, he executed a mortgage-bond in favour of Abdul Wahab. On the 11th April 1914 he executed a *Hibanamah*, in favour of defendants Nos. 6 and 7, but this deed was not registered and we are not concerned with it in this litigation.

The deeds in favour of Abdul Aziz are impugned as having been executed without any consideration and on account of the undue influence of Abdul Aziz and as being merely *farzi*. The earliest document is the conditional sale, Exhibit 35, in favour of Abdul Aziz with respect to Madarpur Goa which Imdad Hossain had acquired by purchase from his son in 1891, for Rs. 7,000. Now, Abdul Aziz was living with his father and the learned Subordinate Judge has held that the properties which he had got under the *Taksimnamah* (Exhibit 14) were managed by the latter. The expenses of Abdul Aziz were borne by Imdad Hossain. Abdul Aziz was the youngest son and was loved by Imdad Hossain more than his other sons. After allotting to them properties by deed of partition of 1877 he helped his other sons also sometimes by giving them money and sometimes purchasing their properties for adequate prices when they were in need of money. He also paid them monthly allowances, and helped them in various other ways: *vide* the deposition of plaintiff No. 1 himself. There is, therefore, no wonder that he bore all the expenses of Abdul Aziz who was obedient to him and lived with him and also purchased the properties in question sometimes with the income of the properties belonging to Abdul Aziz and which he held in his hands, and sometimes from his own pocket. The recitals in the documents clearly prove this. In this view the question whether the consideration of the deeds in question was satisfied out of the money belonging to Abdul Aziz or to his father Imdad Hossain seems to be immaterial. Imdad Hossain has not been shown to be otherwise than a conscientious person and when he states in the documents, such as Exhibits 35, 1, 2 and 3 that the consideration money of those documents

was met out of the income of the properties of Abdul Aziz, there is no reason to suspect that these statements are false and fictitious. He has recited the history of the transactions in all the subsequent documents : in other words, he has repeatedly confirmed the transactions in favour of Abdul Aziz.

Now, Exhibit 3 is a sale-deed, dated the 11th December 1907, executed in favour of Abdul Aziz with respect to the properties set forth therein. The details of how the consideration passed have been recited in the documents. The consideration of the exchange deeds (Exhibits 4 and 5) are the properties belonging to Abdul Aziz. The stamps of all these documents were purchased through Mohammad Ayub, son of plaintiff No. 1, who also attested Exhibits 4 and 5 and who, as the learned Subordinate Judge says, was looking after the suit on behalf of the plaintiffs in the Court below. The sale deed (Exhibit 3) was attested by Yakub, plaintiff No. 1, and Yusuf, defendant No. 6, and Ishfaq, since deceased. The scribe of Exhibit 4 is Moulvi Yusuf, defendant No. 6. It is, therefore, idle on the part of the plaintiffs to impugn these documents on the ground of want of consideration or undue influence brought to bear upon Imdad Hossain by Abdul Aziz.

It is said that the consideration of the sale deed Exhibit 1 of 1894, with respect to Chandpur, in favour of Abdul Aziz, must have been borne out if the money belonging to Imdad Hossain and not that of Abdul Aziz, inasmuch as all the income of Abdul Aziz, which Imdad Hossain had in his hands was accounted for in the earlier document, the *Baharsana*, Exhibit 35, dated the 14th March 1893. We do not attach much importance to this argument. Even if there be any substance in this contention, the document will be valid as a deed of gift on the principle laid down by their Lordships of the Judicial Committee in the case of *Ismail Mussajee* v. *Hafiz Boo* (6), and in *Gostho Behary* v. *Rohini Gowalini* (7) inasmuch as the intention of Imdad Hossain was obviously to convey the property to his son, Abdul Aziz, and this intention is supported by the subsequent conduct of Imdad Hossain in taking the property in exchange for certain shares of his in other properties which he had acquired (*vide* Exhibit 5). The relationship between the parties leads also to the same conclusion. The documents Exhibits 6, 7 and 8, convey to Abdul Aziz the interest held by Imdad Hossain in 4 annas 6 pies by way of gift and *mokarrari* and *waqfnamah*. These transactions, therefore, require no other consideration than that of love and affection entertained by Imdad Hossain towards his son for his obedience and dutifulness towards him. The aforesaid documents are then impugned on the ground that they were brought into existence on account of undue influence exercised by Abdul Aziz over his father. Now, the circumstances urged in support of this plea are that Abdul Aziz was always living with Imdad Hossain and that he took advantage of his weakness of body and mind and his extreme old age. These in themselves are not sufficient to raise any presumption of Abdul Aziz having really dominated the will of his father in the execution of the document in his favour as was held in the case of *Ismail Mussajee* v *Hafiz Boo* (6).

There is nothing to show that Abdul Aziz took advantage of the old age of his father It has been already shown that old though he was, and though he was losing the strength of his mind and body, he was able to exercise an independent and intelligent mind over what he was doing. On the other hand he seems to have taken great interest in his affairs and whatever weakness he might have shown in other directions he showed strength of mind in dealing with his properties and business : *vide* Exhibit Q, deposition of Moulvi Imdad Hossain dated the 27th October 1912, Exhibit W, Succession Certificate, dated the 29th April 1912 : and heaps of documents, such as notes, memoranda, accounts, etc., kept by Imdad Hossain himself and relied upon by the learned Subordinate Judge. There is no evidence of undue influence having been exercised over him by Abdul Aziz. The events subsequent to the death of Abdul Aziz show that he was transacting his business not on account of any undue influence exercised over him by Abdul Aziz for although that influence ce sed. he executed on the 10th of March 1912 a deed of gift with respect to the share inherited by him in the properties of Abdul Aziz in favour of the latter's children. This docu-

(6) (1905) 33 Cal 778=33 I A. 86 =10 C W. N. 570=3 C. L. J. 484=8 Bom L. R. 379 =1 M. L. T. 137.

(7) (1903) 13 C. W. N. 692 =4 I. C. 541.

ment was executed after consultation with the District Magistrate, a Deputy Magistrate and a Vakil of Chapra. The document has been attested by them. The object of the document obviously was to make provision for the children of his beloved son, Abdul Aziz. He was not unmindful of the interest of his other sons, for he executed documents in favour of defendants Nos. 6 and 7 such as the deed of gift (Exhibit 9), dated the 26th April, 1912, *mokarrari istamrari* dated the 4th July, 1912, and mortgage bond dated, the 15th June, 1913. To the Civil Surgeon in June, 1914, he said: "He wished to leave property to two sons" whom he named (Wahab and Yusuf) because his other sons had already had property "left them" *vide* Exhibit 34. This was his intention which he seems to have fulfilled by giving properties to Wahab and Yusuf, defendants Nos. 6 and 7, by means of the documents referred to above. In the face of the evidence of the Civil Surgeon it is impossible to contend that he executed these documents on account of any undue influence brought to bear upon him or without his understanding the *pros* and *cons* of the transactions. The declaration of Imdad Hossain to the Civil Surgeon was made without any prompting from anybody. Therefore, it must be held that none of the documents in question was executed on account of undue influence.

Now, the learned Subordinate Judge says that the plea of undue influence is inconsistent with the plea of unsoundness of mind and he relies upon the decision quoted above in *Ismail Mussajee* v. *Hafiz Boo* (6) and in *Durga Bakhsh Singh* v. *Muhammad Ali Beg* (2). In the former case their Lordships say—

"the question of undue influence was never properly before the Court at all. No such case was set up in the pleadings.....There was a clear issue as to Khaja Boo having been of unsound mind in 1889, but none with regard to undue influence."

After dealing with the evidence, their Lordships observed—

"assuming, however, that undue influence might properly be made a ground of decision ...the evidence is insufficient to establish anything of the kind."

In the latter case, the mortgages in question were sought to be set aside on the ground that the mortgagor was of unsound mind at the time of the execution of the deeds and the evidence given sought to establish insanity of a violent type in its crudest and most palpable form. The evidence was disbelieved. Their Lordships hold that it was not allowable for the Court to substitute for the case of insanity advanced by the plaintiff, case of weakness of mind and consequent helplessness. Similar was the view taken in the case of *Sayad Muhammad* v. *Fatteh Muhammad* (8). In the present case as to the plea of undue influence, the learned Subordinate Judge observes:

"it is not alleged by the plaintiffs that Moulvi Imdad Hossain was stark mad or a lunatic. The plaintiff No. 1 in his cross-examination by the guardian of defendant No. 2 says that Imdad Hossain was neither insane nor mad. The case of the plaintiff in the plaint is also similar. The sixth paragraph of the plaint, as well as the other paragraphs show that what the plaintiffs complained of is that Moulvi Imdad Hossain was in the last two decades of his life so mentally imbecile and so physically infirm that he was incapable of managing his own affairs or protecting his own interest. In fact the terms of the plaint are such that it is rather a case of undue influence which the plaintiffs alleged than of insanity."

From the aforesaid observation, as well as from the fact that the plea of undue influence and fraud was distinctly raised in issue No. 3, it is contended that it is open to the plaintiffs to show that the documents in question were affected by undue influence and fraud, although they had raised the plea of insanity in the plaint. The question as to whether the plea could or could not properly be taken, however, becomes immaterial inasmuch as upon the facts found the plea has not been substantiated.

The plaintiffs then attacked the transaction as being *benami*, and as not having been acted upon. There is nothing to show that the transactions were *farzi* and fictitious in any way. No motive has been suggested for Imdad Hossain to execute these *farzi* documents. It is not said that he was involved in debts and that he executed these documents in order to protect his properties from being seized by his creditor as is usually the case in *farzi* transactions. It has also not been shown that he was ill-disposed towards his other sons and that the documents in question were executed in order to deprive them of their legal shares. No motive has, therefore, been shown for his executing the documents is question *farzi* in the name

* (8) (1894) 22 Cal. 324=22 I. A. 4=6 Sar. 615 (P. C.)

of Abdul Aziz or the defendants in the case. No doubt he acquired some properties between the 2nd of October 1905 and the 19th of November 1907 in the *farzi* name of his sons, Abdul Aziz and Abdul Wahab (*vide* Exs. F and 11). But this is different from transferring his own properties as *farzi* transactions. Reliance has been placed upon Ex. 17, dated the 25th of May 1908 an application made by Abdul Aziz for registration and mutation of his name with respect to 10 pies share in Shankerpur Lila based upon Exs. 3, 5 and 7. The statement relied upon relates only to Ex. F, dated the 25th September, 1907, whereby Imdad Hossain has acquired 1 anna in Shankerpur Harbans and Shankerpur Aiyama and 1 pie in Shankerpur Lila in the *farzi* name of Abdul Aziz. The other documents (Exs. 3 and 5) although referred to in the application have not been declared to be *farzi*. Therefore, instead of helping the plaintiffs the documents in question are against them, for when Abdul Aziz stated that Ex. F was *farzi*, the fact that he does not mention that Exs. 3, 4 and 5 are also *farzi* goes to show that the latter were not *farzi*.

The next document relied upon is Ex. 24, the *Tansikhnamah*, or the deed of revocation, dated the 16th January 1913. This document does not declare Exs. 3, 4 and 5 as *farzi* but seeks to set aside the exchange of the properties by Exs. 4 and 5 on the ground that there was breach of covenant, inasmuch as Abdul Aziz had stated that the properties given by him in exchange to Imdad Hossain were free from encumbrance, whereas it was discovered that there was a mortgage on those properties of Rs. 2,000. In this *Tansikhnamah* no doubt, the documents Exs. 6, 7 and 16, were declared to be *farzi*. The plaintiffs, however, attack this *Tansikhnamah* also as being *farzi* and executed on account of the undue influence exercised by defendant Nos 6 and 7 over Imdad Hossain and as being null and void on account of Imdad Hossain being insane : *vide* paras. 16 and 17 of the plaint. In the face of the pleadings in the case it is impossible to hold that the documents executed by Imdad Hossain previous to the *Tansikhnamah* were *farzi*.

It appears that the documents in question were acted upon, inasmuch as the Chalans filed by the defendants show that Mohammad Yakub paid revenue of the three Shankerpurs briefly called Shakri on behalf of Abdul Aziz The Shakri properties admittedly belonged to Imdad Hossain. Unless these properties came to be held by means of Exs. 3, 4 and 5, there is no reason why the Government revenue should have been paid by Abdul Aziz. Madarpur Goa, the property which Abdul Aziz gave to Imdad Hossain in exchange under Ex. 4 in 1907 was in lease with Marhaura Factory per *patta* executed by Moulvi Abdul Aziz, at an annual rental of Rs. 2,000. Witness No. 6 for the plaintiff states that Abdul Aziz received the rent of it up to 1911 and after Moulvi Imdad Hossain received the rent till his death in 1915, and after the death of Imdad Hossain his four sons, namely, the two plaintiffs and defendants Nos. 6 and 7 received the rent and that the plaintiffs had mortgaged their share to the Marhaura Estate. This evidence clearly shows that Imdad Hossain came to be in possession of these properties and after his death his four sons received their shares therein by inheritance. The properties belonged to Abdul Aziz and unless the exchange per Ex. 4 was given effect to, the plaintiffs would not have received any share in those properties. The plaintiffs admit in their plaint (para. 20) that they have got their names registered in respect of Madarpur Goa and Chandpura in accordance with the share that Imdad Hossain got by exchange and which after him they received by inheritance. There is, therefore, nothing to show that the documents were *benami*. On the other hand, the learned Subordinate Judge upon the evidence in the case has held that they were acted upon. The deeds of gift in favour of Abdul Aziz and his sons seem to have been acted upon. Therefore, Issues Nos. 7 and 8 were properly decided by the Court below against the plaintiffs.

The learned Subordinate Judge also held that the suit was barred by limitation. The plaintiffs' case is that the documents were null and void inasmuch as Imdad Hossain was of unsound mind. They claim their right in the property by inheritance as heirs of Imdad Hossain who is said to have died on the 26th of January, 1915. The suit is said to have been instituted on the 15th of July 1915. So, if the documents were null and void on account of insanity

of Imdad Hossain, they could not stand in the way of the plaintiffs' succeeding to the properties as heirs of their father. The same result would have happened if the documents were held to be *benami* or fictitious. The plaintiffs need not in that case have the documents set aside, and the suit would not be barred by limitation, in accordance with the principle, enunciated in the case of *Bijoy Gopal Mukerjee* v *Krishna Mahisi Debi* (9).

It is, however, urged that the suit of the plaintiffs is barred by the rule of three years' limitation under Art. 91 of the Limitation Act in so far as the deeds are impugned on the ground of undue influence or fraud. The question becomes only of an academic interest in view of our findings on the merits of the case and does not call for any serious consideration.

Agreeing with the view taken by the Court below we dismiss the appeal with costs.

Adami, J. :—I agree.

Appeal dismissed.

(9) (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. 188=17 M. L J. 154=4 A L. J. 329 (P.C.).

*A. I. R. 1923 Patna 197.

DAS AND BUCKNILL, JJ.

Jatadhari Singh and others—Defendants—Appellants

v

Dukhi Singh and others—Plaintiffs—Respondents.

Appeal No. 24 of 1920, decided on 8th December, 1922, from a decision of Sub-Judge, Gaya, dated 28th August 1919.

Hindu Law—Joint family—Alienation—Legal necessity—Mere representation not sufficient—Purchaser must prove that on a bona fide enquiry he satisfied himself as to its truth.

A representation by itself raises no equity in favour of the purchaser or the mortgagee, for the law does not permit him to act upon that representation unless he satisfies himself by an honest and *bona fide* enquiry that the representation is true. Where he so enquires into the necessity for the loan or the sale and satisfies himself by an honest and *bona fide* enquiry that the necessity exists, the law completely protects him; for it is not a condition for his success in any litigation which may arise out of the transaction that he should prove the existence of the necessity. It is sufficient if he proves that he made an honest enquiry and was satisfied that the necessity existed. The case would stand on a different footing if, in addition to the representation that he had power to charge the joint family property there is a further undertaking that he would make good the representation by partition or otherwise. Where it is proved to the satisfaction of the Court that there was such an undertaking on the part of the Karta of the joint family, the Court has ample power to compel him to do that which he undertook to do, but where there is no such undertaking, it is impossible for the Court to direct that the members of a joint family should hold their properties in definite shares and that the share of one or some of the members should remain charged for the payment of any money to the mortgagee or the purchaser. 20 W R 192; 13 C. W. N. 8 15; 14 C. W. N. 552, Diss 39 All. 500 Foll. [P. 199, C. 1.]

Kailashpati—for Appellants.

Shiveshwar Dayal—for Respondents.

Das, J.:—This was a suit by the respondents to set aside two sale-deeds, the first executed on the 20th of December, 1904, and the other executed on the 15th of February, 1906, by the defendants Rameshwar Singh and Parmeshwar Singh. Rameshwar Singh and Parmeshwar Singh are the sons of the plaintiff No 1, Dukhi Singh, and it is not disputed that the plaintiffs together with the defendants, Rameshwar Singh and Parmeshwar Singh, formed a joint *Mitakshara* Hindu family. The documents show that the sale-deeds had to be executed because there were prior debts and because the executants wanted money for necessary family purposes; but there is not an *iota* of evidence in the record to establish that there were any debts prior to the execution of the sale-deeds which were binding on the joint family. The sale-deed of the 20th of December, 1904, is Ex. C, and it appears that the consideration money for Ex C. was Rs. 2,000 which went to satisfy two earlier bonds Exs. A and B, Ex. A was executed on the 11th of May, 1901, and Ex B was executed on the 10th of November, 1903.

There is not an atom of evidence in the record to the effect that the money which was borrowed on Ex. A and on Ex. B was required for joint family purposes; and the same appears to be the case with reference to the second sale-deed executed on the 15th of February, 1906, Ex. C (1). The consideration for the second sale-deed was Rs. 1,625—and we are informed that the whole of it went to satisfy the hand notes Exs. H. and H (1) and the bonds Exs J and K. But again there is no evidence at all that Exs. H, H (1), J and K were executed for any purpose which would bind the joint family. The result is that there was no legal necessity at all for the docu-

ments which were impeached in this suit. The plaintiffs were accordingly entitled to succeed and the appeal must be dismissed with costs.

The learned Subordinate Judge in giving a decree to the plaintiffs has made an order that the plaintiffs should recover the property,

"subject to the charge of Rs 888-12-0 declared above in respect of 1 anna 2 pies 16 *krts* 4 *masants* interest of plaintiff 1 and defendants 5 and 6 in the same".

Against this portion of the decree the plaintiffs appeal to this Court. The learned Subordinate Judge thought that as there was a misrepresentation on the part of plaintiff No. 1 and defendants 5 and 6, he was at liberty to put a condition into the decree, which in effect compels the members of the joint family, of which the plaintiffs and defendants 5 and 6 are members, to hold the joint family properties in defined shares. Now, in my opinion, the proposition enunciated by the learned Subordinate Judge is quite untenable on the decided cases. It is quite true that in *Mohabeer Prasad* v. *Ramyad Singh* (1) the Calcutta High Court took the view that the minor (who was not a party to the transfer, which transfer was held to be without legal necessity), was entitled to a declaration that the mortgage decree and sale were void, and on that declaration to recover the property for the family, but that the mortgagees were entitled, in equity, as against the father and the elder brother, to insist upon their calling their shares into existence by partition and realizing them with a view to repayment of the loan with interest, and it is also true that this case has been followed in two subsequent decisions of the Calcutta High Court. See *Bunwari Lal* v. *Sheo Sunker Misser* (2) and *Mohunth Ram Sundar Das* v *Barhma Deo Narain Thakur* (3). In my opinion this view can no longer be maintained in view of the decision of the Judicial Committee in *Lachman Prasad* v. *Sarnam Singh* (4). The learned Judges deciding *Mohabeer Prasad* v. *Ramyad Singh* (1) were impressed by the fact that the consequence of giving a decree to the plaintiffs without making it conditional on the refund of the mortgage money would be that the properties would return to the management of the very man who obtained the loan on the pretended security afforded by the mortgage of the property; and they thought that this result did not accord very well with equity or good conscience. Investigating the question a little more in detail, they thought that as any member of the joint family may, whenever he chooses, require that the properties shall be divided by metes and bounds, it was open to the mortgagees in equity to insist upon the person who entered into the mortgage transaction calling his share into being and realizing it for the benefit of the mortgagees; and in this view, the learned Judges said as follows:—

"He obtained their money by representing that he had a power to charge the joint family property, which he knew at the time he did not possess; he is, therefore, at least bound to make good to them that representation, so far as he can, by the exercise of such proprietary right over the same property as he individually possesses;"

and in the result the learned Judges in giving a decree to the plaintiff made it a condition that on recovery, the property should be held and enjoyed by the family in defined shares and that the shares of the father and of the eldest son should be jointly and severally subject to the lien thereon of the defendants first party for the re-payment of the sum of Rs. 3,000 advanced by the defendants first party to them. The Judicial Committee in the case of *Lachman Prasad* v. *Sarnam Singh* (4) declined to say whether that case was rightly decided or not but it took the view that that case proceeded upon the footing that there was a representation on the part of the persons who entered into the mortgage transaction that they had power to charge the joint family property, and that they would make good the representation by partition or otherwise. The Judicial Committee pointed out that there was little, if any, evidence of such a representation, but that such a representation was undoubtedly the basis of the judgment; and that unless the learned Judges had held that an equity arose out of it, their judgment would have amounted to this, that for every mortgage by the head

(1) (1878) 20 W. R 192=12 B L R 90.
(2) (1907) 13 C. W. N. 815=1 I. C 670
(3) (1909) 14 C. W. N. 552=2 I. C. 986.
(4) (1917) 39 All. 500=44 I. A 168=15 A. L. J. 584=2 Pat. L. W 29=40 I. C 264=21 C. W. N. 990=33 M.L.J. 95=19 Bom. L. R. 646=26 C.L. J. 97=(1917) M. W. N. 516=6 L. W. 394 (P. C.).

of the joint family the property of the joint family could be made available to the extent of the interest of the mortgagor.

Now, in my opinion, no question of equity does arise in this case, nor indeed did it arise in the case of *Mahabeer Prasad* v. *Ramyad Singh* (1). It may be that there was a representation that they had power to charge the joint family property; but such a representation is to be found in every case where the *karta* of a joint *Mitakshara* family alienates joint family property. Such a representation by itself raises no equity in favour of the purchaser or the mortgagee, for the law does not permit him to act upon that representation unless he satisfies himself by an honest and *bona fide* enquiry that the representation is true. Where he so enquires into the necessity for the loan or the sale and satisfies himself by an honest and *bona fide* enquiry that the necessity exists, the law completely protects him; for it is not a condition for his success in any litigation which may arise out of the transaction that he should prove the existence of the necessity. It is sufficient if he proves that he made an honest enquiry and was satisfied that the necessity existed. It is difficult to imagine why the Court should raise an equity in his favour if he does not do what the law compels him to do, namely, to make an honest and *bona fide* enquiry, into the existence of the necessity for the loan or the sale.

There is, in my opinion, no room for the application of any equitable doctrine where the purchaser or the mortgagee does not choose to protect himself but merely relies upon the representation made to him. The case would stand on a different footing if, in addition to the representation that he had power to charge the joint family property there is a further undertaking that he would make good the representation by partition or otherwise. Where it is proved to the satisfaction of the Court that there was such an undertaking on the part of the *Karta* of the joint family the Court has ample power to compel him to do that which he undertook to do; but where there is no such undertaking, it is, in my view, impossible for the Court to direct that the members of a joint family should hold their properties in definite shares and that the share of one or some of the members should remain charged for the payment of any money to the mortgagee or the purchaser.

I would allow the cross-appeal and vary the decree by directing that the claim of the defendants to a charge for Rs. 388-12 upon 1 anna 2 pies 15 *krts* 4 *masants* interest of plaintiff No. 1 and defendants Nos. 5 and 6 be entirely disallowed.

Appeal dismissed.
Cross appeal allowed.

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* A. I R. 1923 Patna 199.

DAS AND KULWANT SAHAY, JJ.

Jai Pragash Singh—Defendant No. 17-Appellant.

v.

Rupmanjari and others—Plaintiffs-Respondents.

F. A. No. 26 of 1920, decided on 2nd January, 1923, against decision of Sub-J. of Arrah, dated 2nd June, 1919.

(a) *T. P Act, S. 75—Intention necessary.*

Where the evidence only showed that it was likely that the money advanced by A simple bond holder went partly to satisfy the prior debt, without this knowledge.

***Held*—That A had no right to be subrogated in place of the prior mortgagee.**

[P. 200, C. 2.]

(b) *Mortgage, suit on—Contribution between puisne mortgagees is irrelevant—C P C., O. 34, R 1.*

A question of contribution between the several subsequent mortgagees is a question which is foreign to the mortgage suit.

Shiva Saran Lal, L. N. Singh and *Raghunandan Prasad* — for Appellant.

Saroshi Charan Mitter — for Respondents.

Kulwant Sahay, J.:—This is an appeal by the defendant No. 17 against the decree of the Officiating Subordinate Judge of Arrah, dated the 2nd June 1919 and the only question raised in the appeal is as regards the right of priority between the different mortgagees. The suit is based on four mortgage bonds executed by the mortgagor-defendants in favour of the plaintiffs. Three of these bonds are dated the 17th November 1904 and the fourth is dated 18th November 1904. The appellant's bond is dated 5th April 1902 and the appellant contends that he has got a right of priority over the plaintiffs inasmuch as his money went to pay off a prior bond, dated the 26th April 1890 of Kashi Nath Chaudhry. The learned Subordinate Judge has found that the appellant has failed to prove that the money

advanced by him went to satisfy the previous mortgage of 1890 and further that there is nothing to show that there was any intention on the part of the appellant to keep the prior mortgage of 1890 alive. It appears that the money advanced under the plaintiffs' first bond of 17th November 1904 went to satisfy three bonds, dated 6th January 1902, 4th February 1902, and 4th March 1902, in favour of one Mangar Ram, and that advanced under their bonds Exs. (A) and (B) of 1904 went to satisfy another mortgage of one Ram Prasad Chaudhry, dated the 5th May 1893. In the plaintiffs' bond there is distinct recital that these prior bonds of Mangar Ram and Ram Prasad Chaudhry were kept alive and the learned Subordinate Judge has held that as the money advanced by the plaintiffs went to pay off the prior mortgages of 1893 and 1902, the plaintiffs have got a right of priority over the defendant No. 17.

It has been contended by the learned Vakil for the appellant that there is evidence on the record to show that the money advanced by the appellant went to satisfy the bond, of 26th April 1890 and in support of this contention he relies upon Ex. (1) certified copy of the bond, Ex. D, judgment in the suit on the above bond; Exhibit E, certified copy of the decree passed on that judgment and Ex. F, certified copy of the Register of Civil Suits which shows that a sum of Rs. 7,500 was paid in full satisfaction of the bond of Kashi Nath Chaudhry. Now, none of these documents goes to show that the sum of Rs. 7,200 advanced by the defendant No. 17 went to pay off the debt of Kashi Nath Chaudhry. It has been contended that although execution was taken out for the realisation of a sum of Rs. 7 500 on the date on which the appellant's bond was executed, a sum of Rs 7,200 only was due upon Kashi Nath Chaudhry's bond and the money advanced by the appellant went to completely satisfy that prior bond. But the documents relied upon are not sufficient to come to this conclusion; nor is the oral evidence of any value to show that the money advanced by the appellant went to satisfy the whole of the debt due upon Kashi Nath's bond. I, therefore, agree with the learned Subordinate Judge in his finding that the evidence is not sufficient to come to a finding that the prior debt was paid off by the money advanced by the appellant. All that can be said upon the evidence is that it is likely that a sum of Rs. 7,200 went to partly satisfy the prior debt, but that is not sufficient to subrogate the defendant No. 17 into the position of the prior mortgagee, Kashi Nath Chaudhry. Then there is no evidence on the record to show that the defendant No. 17 was even aware of the prior mortgages in favour of Mangar Ram and other persons which were satisfied by the debts advanced by the plaintiffs, and that being so, there could be no intention on the part of the defendant No. 17 to keep the prior mortgage of Kashi Nath Chaudhry alive. The position, therefore, is that we have nothing on the record to show that there was any intention on the part of the appellant to keep the mortgage of Kashi Nath alive and therefore he has no right to be substituted in the place of Kashi Nath. In this connection I may refer to the observations of the Privy Council in the case of *Mahesh Lal* v. *Mahanth Bawan Das* (1) where their Lordships quoting from the judgment in the case of *Adams* v. *Angell* (2) observed :—

"In a Court of Equity, it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance, for although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee, or in tail, pays off a charge, the presumption is the other way, but in either case the persons paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it; if there is no reason for keeping it alive, then especially in the case of an owner in *fee*, equity will, in the absence of any declaration of intention, destroy it; but if there be any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it"

Here we find no reason disclosed upon the evidence from which an intention could be presumed on the part of the appellant to keep alive the prior bond of Kashi Nath Chaudhry and, therefore, by the satisfaction of the decree obtained by Kashi Nath, the mortgage in his favour was extinguished and it was not kept alive for the benefit of the appellant.

(1) (1883) 9 Cal. 961=10 I. A 62=4 Sar. 424 (P. C).
(2) (1876) 5 Ch. D. 634.

Another point has been taken by the learned Vakil for the appellant to the effect that the learned Subordinate Judge ought to have determined the several liabilities as between the defendants Nos. 15 and 16 and the appellant. It appears that only two properties were mortgaged to the appellant, whereas some other properties also were mortgaged to the plaintiffs, and the defendants Nos. 15 and 16 are interested in the other properties, and the contention was that the extent of the several liabilities of the defendants Nos. 15, 16 and 17 ought to have been distinctly found by the learned Subordinate Judge. But that is a question of contribution between the several subsequent mortgagees and is a question which is foreign to the present suit. It would be open to the appellant, if he satisfies the whole of the decree of the plaintiffs, to institute a properly framed suit for contribution and in such a suit the several liabilities will have to be determined. The appeal is, therefore, dismissed with costs.

Das, J.—I agree.

Appeal dismissed.

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*A. I. R. 1923 Patna 201.

DAS AND BUCKNILL, JJ.

Ram Lochan Baid and another—Defendants-Appellants.

v.

Kumar Kamakhya Narain Singh—Plaintiff—Respondent.

F. A. No. 52 of 1920, decided on 11th January, 1923, against a decision of Addl. S. J. of Hazaribhag, dated 17th January, 1920.

(a) *Limitation Act, Art* 139—*Tenant by sufferance becomes a tenant by consent to continuance of tenancy.*

A tenancy by sufferance would not by itself make the possession of the holder rightful, so as to prevent limitation from running. But the proposition is subject to one important qualification and that is that if the landlord or the person entitled to resume the tenancy does anything to indicate his assent to the continuance of the tenancy, that would itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year. [P. 202, C. 1.]

(b) *T. P. Act., Ss.* 107, 116—*Distinction.*

The effect of holding over upon payment of rent to the landlord is this that a tenant must be regarded as a tenant from year to year. [P. 202, C. 2]

(c) *Adverse possession—Landlord and Tenant—Mere non-payment of rent does not amount to asserting hostile title.*

Mere non-payment rent is not equivalent to an assertion of a hostile title to the knowledge of the landlord though there is no registered deed as required by S. 116. [P. 203, C. 1.]

Bankim Chandra De—for Appellants.

H. L. Nand Keolyar and *S. M. Mullick*—for Respondents.

Das, J.—On the 11th May 1866 Maharaja Ram Nath Singh the predecessor-in-title of the plaintiff granted the village Goniatu in Mokarrari Istamrari lease to Hiraman Baid and Sambhu Baid. The defendant No. 1 is the grandson of Hiraman Baid and defendant No. 2 is the grandson of Sambhu Baid. It is not disputed before us that the lease did not confer on the grantees a permanent interest in the land demised. It is conceded that it created in their favour a lease for life determinable on the death of the survivor of the grantees. In 1875 Hiraman Baid, the survivor of the grantee, died leaving behind him a son named Doman. Sambhu had died previously leaving a son Chattur. Although the lease came to an end in 1875 on the death of the survivor of the grantees, Doman and Chattur with their sons continued to be in possession of the demised premises up to 1899 upon payment of rent by them to the landlord. It is conceded that since 1899 no rent has been paid either by Doman and Chattur or by the defendants to the landlord. The landlord served a notice to quit upon the defendants first in September 1909 and then in September 1917 and on the 9th January 1919 commenced the suit, out of which this appeal arises, for the ejectment of the defendants from the demised land. The suit was contested mainly on the ground that it was barred by limitation, but it appears that it was also urged on behalf of the defendants that they had acquired a title to the disputed land by adverse possession. The pleas put forward on behalf of the defendants did not find favour with the learned Subordinate Judge and he has given the plaintiff a decree substantially as claimed by him.

In my opinion, the decision of the learned Subordinate Judge is right and ought to be affirmed. In the course of a

very able argument Mr. B. C. De contended before us that the lease having come to an end in 1875, the possession of the defendants was that of trespassers and that the suit is clearly barred by limitation under Art. 139 of the Limitation Act. Now there is no dispute that Art. 139 of the Limitation Act does apply; but the question still remains, when the tenancy ought to be considered as having been determined. Mr. B. C. De argues that subsequent to 1875, the defendants or their predecessors-in-title could only be regarded as tenants by sufferance and that as tenants by sufferance are only in by the laches of the owner, so there is no privity between them, and that the holding over by the tenants was wrongful, and that the limitation provided by Art. 139 commenced to run against the landlord from the time when the fixed lease expired. The proposition in the form in which it is put by Mr. De may be accepted as well-founded, and there is abundant authority for the view that a tenancy by sufferance would not by itself make the possession of the holder rightful, so as to prevent limitation from running. But the proposition is subject to one important qualification and that is that if the landlord or the person entitled to resume the tenancy does anything to indicate his assent to the continuance of the tenancy, that would itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year. See *Ram Chandra Singh* v. *Bhikhambar Singh* (1). Now on the admitted facts of the case the landlord accepted rent from Doman and Chattur and after the death of Doman from Chattur up to the year 1899. It follows that the landlord did indicate his assent to the continuance of the tenancy, and in my opinion the receipt of rent by the landlord was sufficient to convert the tenancy by sufferance into a tenancy from year to year.

It was then contended by Mr. De that there was, at the utmost, a tenancy in favour of Chattur up to the end of the year 1899 and that Doman and Chattur were not tenants from year to year but that they were tenants for the years for which they paid rent to the landlord. The argument of Mr. De is based upon the terms of S. 107 of the Transfer of Property Act, which provides that a lease of immoveable property from year to year can be made only by a registered instrument. The question, however, is not whether a lease from year to year was created in favour of the predecessors-in-title of the defendants by the landlord, but whether there was by implication of law a lease from year to year in favour of the predecessors-in-title of the defendants. Let it be assumed that upon the expiry of the lease in 1875 there was no valid lease in favour of the defendants or of their predecessors-in-title, and that the position of Doman and Chattur and after the death of Doman, of Chattur, was not higher than that a lessee for one year who held over at the end of the last year for which he paid rent. His rights must still be tested by a reference to the provisions of S. 116 of the Transfer of Property Act. Now, S. 116 of the Transfer of Property Act provides that if a lessee remains in possession of the demised property after the determination of the lease and the lessor or his legal representative accepts rent from the lessee or otherwise assents to his continuing in possession, the lease in the absence of agreement to the contrary is renewed from year to year or from month to month according to the purpose for which the property is leased as specified in S. 106. The question then is not whether there is a lease from year to year under S. 107, Transfer of Property Act, but what is the effect of holding over under S. 116 of the Transfer of Property Act. There is no doubt, in my opinion, that the effect of holding over upon payment of rent to the landlord is this that we must recognize the defendants as coming within the provision of S. 116 of the Transfer of Property Act That being so, they must be regarded as tenants from year to year; and such a tenancy is determinable only by six months' notice expiring with the end of a year of the tenancy. In my opinion limitation began to run on the expiry of the notice to quit which was served by the plaintiff upon the defendants.

It is the case of the defendants that the notice to quit was served on them some time in 1904, and that even on the hypothesis that the defendants are tenants from year to year the suit is barred by limitation. The learned Subordinate Judge has, however, come to the conclusion that there was no notice at all in 1904, but that the first notice was in September

(1) (1910) 37 Cal. 674.

1909. It is quite true that the defendants have produced a notice which bears date the 9th September 1904, but it is worthy of note that the defendants have not produced the Hindi notice corresponding to the English portion nor have they produced the notice which was served upon them in 1909. The plaintiff's case is that the notice produced by the defendants was served on them in 1909 and that the date in the notice was by mistake written as 1904 instead of 1909. The learned Subordinate Judge has given good reasons for accepting the explanation offered by the plaintiff and I see no reason whatever to differ from him on this point. If the notice was in fact served upon the defendants in September 1909, then, there is no question that the suit is well within time.

The question as to whether the defendants acquired a title by adverse possession must also be decided against the defendants. The position of the defendants was that of the tenants and, as the learned Subordinate Judge has pointed out, mere non-payment of rent is not equivalent to an assertion of a hostile title to the knowledge of the landlord.

I would dismiss this appeal with costs.

Bucknill, J. :—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 203.

DAWSON MILLER, C. J. AND FOSTER, J.

Brij Ratan Das and another—Plaintiffs-Appellants.

v.

Raghunandan Gir and others—Defendants-Respondents.

F. Appeal No. 94 of 1920, decided on 16th January, 1923, against a decision of Sub. J., Gaya, dated 7th February, 1920.

(a) *Mortgage suit—Question of paramount title should not be considered.*

The Court is not concerned for the purpose of determining the issues in a mortgage suit whether some third party as a title adverse to that of the mortgagor. [P. 204, C. 2.]

(b) *Evidence Act, S. 116—Mortgagor though trustee is estopped from setting up trust.*

Even where the mortgagors are trustees acting in a public capacity and not for their own benefit, they are estopped from denying their title and cannot set up as a defence against the mortgagee that the property so mortgaged is trust property which the mortgagors had no right to mortgage. Where the mortgage deed clearly and unmistakeably purports to be executed by the mortgagor as the proprietor of the property in his own interest, he is estopped from denying the interest which he represented as his own proprietary right in the deed. [P. 204, C. 2.

L. N. Singh, N. C. Sinha, Banwarilal and *S. S. Bose*—for Appellants.

S. M. Mullick and *Kailaspati*—for Respondents.

Dawson Miller, C. J. :—This is an appeal by the plaintiffs from a decision of the Subordinate Judge of Gaya, dated the 7th February 1920.

The appellant Brij Ratan Das and his son Raj Kumar Lal, who is joint with him in estate, instituted the suit as plaintiffs on the 4th March 1919 to enforce a mortgage bond executed in favour of Brij Ratan by the first defendant Goshain Raghunandan Gir on the 22nd October 1910 to secure payment of a sum of Rs. 4,850-14-6, the amount found due on an adjustment of accounts between the parties, together with interest. The property hypothecated under the bond is described by the mortgagor in the instrument itself as "the entire 16 annas of *bisi* and the temple of Sri Pita Maheshwarji with the orchards and houses appertaining to it and all sorts of income and profits accruing therefrom situate in mahalla Utarmanus appertaining to mahalla Ramna, ward No. 5, one of the quarters of Sahebganj, pargana and District Gaya, constituting my proprietary interest and held by me in occupancy right and which has been acquired by me personally, the boundaries whereof are given below—*minhai mafi* land appertaining to the temple and the said temple."

The defendants other than the mortgagor are his brother Wazir Gir and other members of his family most of whom are minors. Raghunandan Gir, the mortgagor, filed a written statement but took no part in the trial and was not represented in this appeal. His brother, the second defendant, as also the minors, filed written statements and contested the suit. It was pleaded that the plaintiffs had no cause of action, that the court-fee was insufficient, that the suit was barred by limitation, that it was bad for mis-joinder of parties, that the bond was executed by the first defendant under fraud and undue influence of the plaintiffs, that there was no consideration for the bond and that it was not genuine and valid, that the loan

covered by the bond was not contracted for legal necessity and that the minors were not benefited thereby and were not liable for the same, that the rate of interest was usurious and unconscionable and by way of penalty, that the properties mortgaged were inalienable and the mortgagor had no right to mortgage them. A plea of payment was also set up by the first and second defendants and the suit was challenged as being invalid on the ground of champerty and as against public policy. Most of those pleas, as to which issues were framed, were abandoned at the trial and the only questions left for determination by the learned Subordinate Judge were those which related to limitation, the genuineness and validity of the bond and the consideration therefor, the question of legal necessity, the question relating to interest and whether the properties were inalienable so as to preclude the mortgagor's right to mortgage them.

All these issues except the last were determined in favour of the plaintiffs. The last mentioned issue, however, was one which in the opinion of the learned Subordinate Judge went to the root of the whole claim and was determined in favour of the defendants. The learned Judge found that the properties mortgaged were inalienable, that the defendant Raghunandan Gir had no right to mortgage them and that the mortgage was absolutely void.

From this decision the plaintiffs have appealed and contend in the first place that it was not competent to the mortgagor to dispute the title which he himself had granted or to set up against the mortgagee the paramount title of a third party even though the latter might eventually prove a right to recover the property. They contend in the second place that the Judge was not justified upon the evidence in arriving at the conclusion that the property was inalienable.

[Here the judgment discusses the evidence regarding the inalienability of the mortgaged property and continues as follows.]

Having regard to the documentary evidence in the case from which it appears that since the year 1852 the property in suit has been disposed of or dealt with by those from time to time in possession as if they had a proprietary and transferable interest therein, there is much to be said for the appellants' contention that it is not made out that the property is inalienable or that the mortgagor had no right to mortgage the same. It is not, however, in my opinion, necessary to determine this question for I consider that the appellants must succeed upon the first point. The respondents by the plea taken are in fact endeavouring to set up the *jus tertii* and to plead as between the mortgagor and his mortgagee the paramount title of another. The Court is not concerned for the purpose of determining the issues in a mortgage suit whether some third party has a title adverse to that of the mortgagor. It was contended on behalf of the respondents that Raghunandan Gir, the first defendant, was really in the position of a trustee in regard to the property in suit and therefore had no powers of alienation contrary to the terms of the trust and that no question of estoppel could arise in such a case. Had the mortgagor purported to transfer the property in the capacity of trustee, this question would have arisen for determination. There is authority both in this country and in England for the proposition that even where the mortgagors are trustees acting in a public capacity and not for their own benefit, they are estopped from denying their title and cannot set up as a defence against the mortgagee that the property so mortgaged is trust property which the mortgagors had no right to mortgage. [*Doe d Levy* v. *Horne* (1) and *Mahamaya Debi* v. *Haridas Haldar* (2)] and Fisher's Law of Mortgage, S. 872.

It is unnecessary, however, in the present instance to decide this wider issue as the mortgage deed clearly and unmistakably purports to be executed by the mortgagor as the proprietor of the property in his own interest and he is estopped from denying the interest which he represented as his own proprietary right in the deed. With great respect to the learned Subordinate Judge I think that he ought not to have embarked upon a consideration of the question of the defendants' interest in the present suit. If it should hereafter turn out either that the Hindu public or anybody else is interested as proprietor of the mortgaged property or has a paramount title adverse to that of the mortgagor the

(1) (1842) 3 Q. B. 760.
(2) (1914) 42 Cal. 455=19 C. W. N. 208=21 I. C. 400=20 C. L. J. 189

decision in this suit will not be binding upon such a person, and if in fact there is a paramount title in anybody else, it is competent to such person to take proper steps at the proper time to protect his interests. In my opinion this appeal should be allowed with costs against the respondents who have appeared and contested the appeal. The judgment and decree of the learned Subordinate Judge should be set aside and in lieu thereof there will be the usual mortgage decree for the amount claimed with interest at the bond rate up to the expiry of the days of grace which in this case will be three months from the date of this decree, and costs and further interest thereafter on the decretal amount so found due and costs at 6 per cent. per annum until realisation.

Foster, J :—I agree. As to themortgagor's plea that the mortgaged property is held in trust for the Hindu public and the idol, in my opinion, there can be no doubt that it lies outside the scope of the mortgage suit, so far as it asserts a third person's title. A mortgage decree for sale does not purport to assure a good title to the prospective auction-purchaser.

As to the plea that the property is inalienable on the ground that the sale of a public endowment and its emoluments is against public policy, my opinion is that the mortgagor is in this case estopped by his own deed. A material question of law would, I concede, have arisen, had the defendant expressly mortgaged the emoluments of a public endowment: for there are decisions which declare such properties inalienable. There are English decisions which have removed the bar of estoppel where the mortgagor in his deed has contravened legislative enactments limiting his authority and where he has in the mortgage suit raised the question of alienability. So a plea of public policy, based on Indian decisions, might possibly by brought into analogy with those English decisions. But in my opinion, we have no such case before us. A close study of the whole mortgage deed, the subject-matter of the suit, will, I think, show that the private ownership of the mortgagor was emphasized by frequent reiteration. Much has been made of the meaning of certain terms in the deed implying (in the circumstances of this case) that the income is derived from daily offerings made by devotees to the idol, but in my opinion this is not inconsistent with private ownership. So having regard to the general tenor of the mortgage deed, which indicates mortgage of private property, I do not think that any question of public policy can be raised in the present suit, and the defendant is estopped by his own act and deed. If in fact it is a public endowment, the Hindu public and the idol have identical interests and they have numerous remedies, both under special enactments and the general provisions of law.

Appeal allowed.

A. I. R. 1923 Patna 205.

COUTTS AND DAS, JJ.

Hari Prasad Chowdhury—Defendant-Appellant.

v.

Harihar Prasad Chowdhury and others—Plaintiffs-Respondents.

Appeal No 107 of 1920, decided on 12th May 1922, against a decision of Sub. J. of Patna, dated the 28th September 1920, modifying that of Munsif of Patna, dated 23rd December 1919.

(a) *Evidence Act, S. 101—Effect of Admission of execution is laid down.*

Defendant having admitted the execution of the document it is for him to establish that consideration did not pass. [P. 206, C. 1.]

(b) *T. P. Act, S. 55 (4)—Lien gives no title to possession.*

A lien on the property for the unpaid purchase-money does not entitle the vendor to retain possession of the property. [P. 206, C. 2.]

Sunder Lal—for Appellant.

T. N. Sahay—for Respondents.

Das, J.:—This appeal arises out of a suit instituted by the respondents against the Appellant for an order directing the defendant to deliver the registered sale-deed dated the 20th May 1916 to the plaintiffs or in the alternative for a mortgage decree against the defendant for a certain sum of money. The plaintiffs' case is that the defendant executed a mortgage-deed in their favour for Rs. 400 on the 7th October 1915 and that thereafter, that is to say, on the 2nd February 1916 and the 22nd February 1916 the defendant borrowed two other sums from the plaintiffs. According to them on the 20th May 1916 the defendant sold to them two

of the properties out of four mortgaged to them for Rs. 700. They assert in the plaint that they offered to pay to the defendant the sum of Rs. 186-8-0 and asked the defendant to deliver the sale-deed to them but that the defendant refused to deliver the same to them. The defendant's case in the written statement was that the entire transaction upon which the plaintiffs rely was fraudulent and that he never borrowed any sum of money from the plaintiffs and that although he executed the mortgage-deed in favour of the plaintiffs and also the sale-deed, dated the 20th May 1916, there was no consideration at all for either of these transactions.

The Court of first instance came to the conclusion that the defendant took a loan of Rs. 200 from the plaintiffs. He accordingly gave the plaintiffs a money decree for Rs. 200. On appeal the learned Judge in the Court below has reversed the decision of the Court of first instance and has decreed the plaintiffs' suit in its entirety. It is argued before us by Mr. Sunder Lal on behalf of the appellant that the decision the learned Judge in the Court below is erroneous.

The first point is whether the decision of the learned Judge on the question of the passing of consideration is good in law. The learned Subordinate Judge in the Court below pointed out that the Court of first instance dealt with the case as if the onus was on the plaintiffs to establish that there was a consideration in respect of the transactions. The learned Subordinate Judge was right in pointing out that the defendant having admitted the execution of the document, it was for him to establish that consideration did not pass. Mr. Sunder Lal on behalf of the appellant has urged before us that the defendant did adduce evidence in the Court below. He undoubtedly, did adduce evidence, but then the Court of first instance entirely disbelieved this evidence. In my opinion the learned Subordinate Judge is right in his decision that the burden was upon the defendants to establish that consideration did not pass. As regards his finding that that burden has not been discharged, that is a finding of fact which is binding on us in second appeal.

It was then urged before us that the Court below erred in giving a decree for meene profits to the plaintiff. Mr. Sunder Lal urges before us that the sum due to him was Rs. 186-8-0 and that the plaintiff on his own admission tendered the sum of Rs. 103-13-0. He maintains, therefore, that as he had a lien on the property for the unpaid purchase-money he ought not to be liable for mesne profits. The question is not free from difficulty. There is a decision of the Madras High Court in *Yella Krishnamma* v. *Kottipalli Mali* (1) which decides that the lien does not entitle the vendor to retain possession of the property. Mr. Sunder Lal has not given us any authority which holds the contrary. In my opinion the point urged by Mr. Sunder Lal fails.

I would accordingly dismiss this appeal with costs.

Coutts, J.:—I agree.

Appeal dismissed.

(1) (1920) 43 Mad. 712=38 M. L. J. 467=11 L. W. 563=(1920) M. W. N. 380=56 I. C. 530=28 M. L. T. 88

A. I. R. 1923 Patna 206.

DAS AND ADAMI, JJ.

Jaidab Thakur and others—Defendants-Appellants.

v.

Jamahir Missir and another—Plaintiffs-Respondents.

Appeal No 880 of 1920, decided on 27th October, 1922, against the appellate decree of District Judge of Darbhanga.

B. T. Act—Sale of Tenure—Only one tenant recorded—Representation by such recording, on behalf of all explained.

So far tenures are concerned, the Bengal Tenancy Act makes it obligatory upon the tenants to have their names recorded in the landlord's *sherista* whenever they become entitled to them by succession. In the case of a tenure, therefore, where only one tenant takes the trouble to have his name recorded in the landlord's *sherista*, and the others, either through design or negligence fail to do so, it may be presumed that the tenants who failed to have their names recorded in the landlord's *sherista* consented to the tenant who had his name recorded representing them both in transactions and in suits affecting the landlord and the tenants. But other principles arise where the Court has to deal with the case of the sale of a holding, as to which there is nothing in the Bengal Tenancy Act compelling raiyats to have their names recorded in the landlord's *sherista*. It is a question of fact in each case whether the recorded tenant does in fact represent the holding in dispute and the fact that only one tenant is registered is an item in the evidence upon the question whether he is or is not the representative tenant *qua* the landlord. It is impossible to say that it follows

as a matter of law that a co-tenant does represent the holding *qua* the landlord when all that is shown is that he is the only recorded tenant and is the head of the family. If the recorded tenant went and applied for a settlement and the landlord settled the land with him then whatever the position may be as between him and his brother, *qua* the landlord he is the only tenant. But if on the other hand he along with his brother became entitled to the holding by succession, question will have to be considered whether he did in fact represent the holding *qua* the landlord. [P. 208, Cs. 1 & 2.]

L. K. Jha—for Appellants.

S. K. Mitter and *B. N. Mitter*—for Respondents.

Das. J.:—This appeal arises out of a suit instituted by Jamahir Missir for declaration of his title to, and for confirmation of possession or in the alternative for recovery of possession of, certain lands specified in the plaint. The material facts are as follows :—

The appellants who were the defendants first party in the action were in possession of the disputed land as occupancy tenants under the defendants second party. The record-of-rights shows that the defendants first party are jointly interested in the holding in question, but it appears that only one of them, Chiranjiv, was recorded in the landlord's *sherista* as the occupancy tenant in respect of the holding. The plaintiff appears to have taken a mortgage of the disputed land from the defendants first party and to have entered into possession as a usufructuary mortgagee. The landlord then instituted a rent suit against Chiranjiv, the only recorded tenant, and obtained a decree as against Chiranjiv. In execution of that decree, he caused the right, title and interest of Chairanjiv in the holding to be sold and it was in fact sold and was purchased by the plaintiff himself in the *benami* name of his wife. The defendants first party appeared not to have noticed the events which resulted in the sale of the occupancy holding and they in the usual course tendered to the plaintiff the mortgaged money which the plaintiff accepted Thereupon the defendants first party obtained possession of the occupancy holding. The plaintiff then brought the suit out of which this appeal arises for recovery of possession of the occupancy holding. The plaintiff's case is that the decree obtained by the landlord as against Chiranjiv bound the entire holding and that his title as a purchaser cannot now be defeated by the production of the record-of-rights which may favour the claim of the defendants first party.

The learned District Judge in the Court below gave effect to the contention raised on behalf of the plaintiff and gave him a full decree in respect of the land in dispute.

The important question which the learned Judge had to decide was, whether the decree obtained by the landlord as against Chiranjiv was a rent decree, or whether it was a money-decree and if it was a rent decree whether it was executed as a rent decree under the Bengal Tenancy Act, or as a money decree under the Civil Procedure Code. The learned Judge conceded that the *khatian* mentioned four persons as tenants in respect of the land, but thought that, as Chiranjiv was the only recorded tenant, and, as Chiranjiv was the head of the family, the decree against Chiranjiv bound the entire holding and that the decree had the effect of a rent decree. The learned Judge was apparently much influenced by the case of *Jeolal Singh* v. *Gunga Pershad* (1). That was a case where a tenure standing in the name of one of the joint holders thereof was sold in execution of a rent decree, and the Court had to consider whether the sale bound the tenants other than the tenant against whom the action was brought. Sir Richard Garth, in delivering the judgment of the Court, said that where it was clear from the proceedings, that what was sold and intended to be sold was the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holders might have sold the whole tenure if they had taken proper steps to do so, or although the purchasers might have obtained possession of the whole tenure under the sale; but that where it appeared that the judgment-debtor had been sued as representing the ownership of the whole tenure, and that the sale, although purporting to be of the right and interest of the judgment-debtor only, was intended to be, and in justice and equity, ought to operate as a sale of the tenure; the whole tenure then must be considered as having passed by the sale.

Upon the facts the learned Judge found that the tenant against whom the suit was brought was the manager of the joint family and was alone registered in the zemindar's *sherista*

(1) (1884) 10 Cal. 996.

as proprietor of the tenure. On these facts the learned Judge, applying the law which he laid down, came to the conclusion that there was complete representation in the case and that the decree against the recorded tenant was operative against the whole body of tenants. It will be noticed that this was a case of a joint family: but in the case of *Nityi Behari Saha Pramanick* v. *Hari Govinda Saha* (2) the Calcutta High Court came to the conclusion that the principle laid down in the leading case of *Jeolal Singh* v. *Gunga Pershad* (1) would apply even though the tenure did not belong to a joint family. The law was precisely laid down by Mr. Justice Bannerji in these words:—

"The reason for the decision is that as the law required tenants to register their names in the landlord's office, unregistered co-owners of a tenure by their omitting to have their names registered, must be taken to have acquiesced in the registered tenant representing them in their dealings with the landlord; that in a suit for rent against the registered tenant he must be taken to have been sued as representing the ownership of the whole tenure; and that a sale in execution of the decree obtained in such a suit though in terms only a sale of the right, title and interest of the judgment-debtor, must be held really to pass the right, title and interest, not only of the registered tenant but also of the unregistered co-owners whom he represents; and that reason holds good quite as much in this case as in the case relied upon."

Mr Mitter appearing on behalf of the respondents strongly relied upon these two cases and upon other cases which he cited before us. But all these cases are cases of sales of tenures, and it must be remembered that so far as tenures are concerned, the Bengal Tenancy Act makes it obligatory upon the tenants to have their names recorded in the landlord's *sherista* whenever they become entitled to them by succession. In the case of a tenure, therefore where only one tenant takes the trouble to have his name recorded in the landlord's *sherista*, and the others, either by design or negligence fail to do so, it may be presumed that the tenants who failed to have their names recorded in the landlord's *sherista* consented to the tenant who had his name recorded, representing them both in transactions and in suits affecting the landlord and the tenants.

But other principles arise where the Court has to deal with the case of the sale of a holding, as to which there is nothing in the Bengal Tenancy Act compelling raiyats to have their names recorded in the landlord's *sherista*. Indeed in the case of *Ashok Bhuiyan* v. *Karim Bepari* (3) it was denied by the Calcutta High Court that any presumption as to representation could be drawn by a Court where only one of the co-raiyats had his name recorded in the landlord's *sherista*, and the others failed or neglected to do so. The question has, however, been discussed in various cases, of which it is sufficient to mention one, namely, the case of *Jagattara Dassi* v. *Daulati Bewa* (4). In that case it was held that it is a question of fact in each case whether the recorded tenant does in fact represent the holding in dispute and that the fact that only one tenant is registered is an item in the evidence upon the question whether he is or is not the representative tenant *qua* the landlord.

If the finding of the learned District Judge had been that Chiranjiv completely represented the holding *qua* the landlord, his finding would have been a finding of fact binding on us in second appeal. But, as I read the judgment of the learned District Judge, he came to the conclusion that the decree was to be regarded as a rent decree first because Chiranjiv was the only recorded tenant, and secondly because Chiranjiv was the head of the family. I do not think that the conclusion that he did represent the holding *qua* the landlord follows from the findings of fact at which the learned Judge arrived. It may be that Chiranjiv did represent the holding *qua* the landlord and that the learned District Judge on a consideration of the whole evidence in the case will come to that conclusion, but it is impossible to say that it follows as a matter of law that a co-tenant does represent the holding *qua* the landlord when all that is shown is that Chiranjiv is the only recorded tenant and is the head of the family.

(2) (1899) 26 Cal. 677.

(3) (1905) 2 C. W. N. 843

(4) (1909) 37 Cal. 75=2 I. C. 695=13 C. W. N 1110.

It is necessary therefore that this case should be re-heard by the learned District Judge: but I think it desirable to point out that if it should appear that there was no succession at all, that is to say, that the settlement was with Chiranjiv, then the claim put forward on behalf of the defendants first party must fail. If Chiranjiv went and applied for a settlement and the landlord settled the land with Chiranjiv then whatever the position may be as between Chiranjiv and his brother, *qua* the landlord he was the only tenant, and the case of the defendants first party must fail. But if on the other hand Chiranjiv along with his brother became entitled to the holding by succession, then the learned Judge will have to consider whether Chiranjiv did in fact represent the holding *qua* the landlord. In discussing the question, the learned Judge will give due weight to the two facts which he has found in favour of the respondents, namely, that Chiranjiv was the only recorded tenant, and that he was the head of the family.

I would allow the appeal, set aside the judgment and decree of the Court below and remand the case to that Court for a decision according to law. Costs will follow the result and will be disposed of by the lower Appellate Court.

Adami, J.—I agree.

Case remanded.

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* A. I. R 1923 Patna, 209.

DAWSON-MILLER, C. J., AND ROSS, J.

(Maharaja) Bahadur Singh and others—Defendants-Appellants

v.

Seth Hukum Chand and others—Plaintiffs-Respondents.

Appeal No. 109 of 1921, decided on 21st November 1922, against the order of Addl. Sub. J, Hazaribagh.

(a) Jurisdiction—Voluntary submission by foreigner vests jurisdiction and then foreigner can be restrained from executing decree in another Court

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. The Courts of this country would not grant an injunction against persons residing outside their jurisdiction and not subject to the jurisdiction of the Court in cases where they would have no means of enforcing the order. A Court has jurisdiction on the application of the plaintiff in a suit in which the defendants have entered appearance, to issue a temporary injunction restraining the defendant from executing in another Court a decree obtained against the plaintiff.

[P 210, Col 2; P 211, Col. 1.]

(b) Civil P. C., O. 39, R 1—Prima facie existence of right and its infringement are first requisites of injunction.

One must be satisfied in the first instance before granting a temporary injunction, that the plaintiff has a fair question to raise as to the existence of the right alleged. The Court must also be satisfied that the defendants have infringed or are threatening an infringement of those rights. A consideration that by the cutting of *pipal* tree the susceptibilities of a community would be wounded should not be allowed unduly to restrict the recognised rights of ownership in property. The fact that plaintiffs' veneration for a sacred hill leads them to regard the creation of buildings thereon as an act of sacrilege, cannot by itself confer the right to restrain the owner from exercising the ordinary acts of ownership. Every one is entitled to his own religious beliefs but he cannot force them upon another so as to restrain that other from dealing with his property in a manner incompatible with those beliefs.

[P 212, Col 2]

Kulwant Sahay, and *B. C. De*—for Appellants.

Sultan Ahmad, S. *M Mullick*, and *S. N. Bose* for Respondents.

Dawson Miller, C. J.—The suit out of which this appeal arises was instituted in 1920 by the plaintiffs representing the Digambari sect of Jains against the defendants who are representatives of the Sitambaris claiming a declaration of the plaintiffs' rights in connection with their worship at the tonks and temples on Parasnath Hill and a permanent injunction restraining the defendants from committing certain acts alleged to be an infringement of the plaintiffs' rights.

After filing the plaint the plaintiffs applied for and obtained a rule calling upon the defendants to show cause why a temporary injunction restraining them from committing certain of the acts complained of in the plaint should not be granted pending the hearing of the suit. An *interim* injunction pending the hearing of the rule having been granted, the defendants appeared before the learned Additional Subordinate Judge of Hazaribagh to show cause and, after hearing the parties, the rule was made absolute pending the hearing of the suit which has not yet taken place. From that decision the defendants have preferred this appeal.

We are told that the suit is practically ready for hearing and has only been held up as the record was sent here from the Subordinate Court for the purposes of this appeal and that we ought not in the circumstances to interfere with the temporary injunction which was granted in May last year, and that no useful purpose would be served by vacating the order already made and deciding, without full material, questions which will be the subject of determination in the suit. I am not satisfied that this reason in itself is sufficient for dismissing the appeal although on the score of convenience it may have some weight. It is necessary, therefore, to consider the grounds upon which the learned Judge below has based his decision.

I need not repeat here what has been said in the judgment under appeal as to the differences which divide the two sects of the Jain community and the protracted litigation which for some years now has been tending to widen the breach between them. It is sufficient to bear in mind that the ritual attending the worship of the two sects has marked differences which in recent years have formed the subject of heated disputes and much litigation. The fact that they both have rights of worship in the same shrines on Parasnath hill is no doubt a source of continual friction as each sect regards the mode of worship of the other as unorthodox. Sometime before the present suit was instituted the Sitambaris who are represented by the defendants in the present suit, sued the present plaintiffs and others representing the Digambaris for a declaration that the Digambaris were not entitled to worship in the shrines and temples on Parasnath Hill except with their permission and in the manner prescribed by them. That suit was decided on appeal in this Court in April last year after the present suit had been instituted and by that decision it was declared that both sects had equal rights of worship in the majority of the tonks on Parasnath Hill. Up to that time however, there can be no doubt that the Sitambaris had been claiming exclusive rights over the hill and the tonks and temples thereon and the right to control the mode of worship of the other sect. The proprietary rights in the hill itself are now vested in the Sitambaris by a recent purchase and they have for many years in fact exercised acts of management and superintendence over the existing shrines and temples repairing or rebuilding the same when necessary. The *Charans* which are representations in stone or marble of the footprints of the *Trithankars* who have attained *Nirvan* on the hill in past and present cycles are enshrined in the tonks and are devoutly worshipped and regarded as objects of peculiar sanctity by both sects. The ritual attending the worship, however, is marked by broad differences as already mentioned. Both sects also regard the hill itself as an object of veneration and are very tenacious of the rights which they claim to have acquired therein and resent the intrusion of those of a different faith or the performance of any act on the hill itself which may offend their religious scruples. The Digambaris, it is said, regard eating and drinking on the hill or the performance of any of the usual functions of nature as a desecration of that holy place.

The acts complained of in respect of which the injunction has been granted are divided into 4 heads:—

(1) The construction of houses for residential purposes on the top of the hill tending to the desecration of the sanctity of the hill

(2) The collection of building materials on the top of the hill for the purposes of constructing a gate or closed archway tending to prevent free access by the Digambaris to the summit of the hill and the tonks thereon.

(3) Interference with the worship of Digambari pilgrims in their own prescribed way in company with their Pujaris and guards.

(4) The removal of existing *Charans* and the substitution of new *Charans* offensive to the religious sentiments of the plaintiffs' community.

It was contended on behalf of the appellants in the first instance that as they reside in the presidencies of Calcutta and Bombay, outside the jurisdiction of this province the Court has no jurisdiction to grant an injunction against them. This argument is based upon the assumption that the Court would be unable to enforce its order against persons not subject to its jurisdiction. No doubt the Courts of this country would not grant an injunction against persons residing outside its jurisdiction and not subject to the jurisdiction of the Court in cases where they would have no means of enforcing the order. In the present

case, however, the acts complained of are acts taking place within the jurisdiction and the appellants, although they reside outside the jurisdiction, have appeared in the suit and submitted personally to the jurisdiction of the Court. Nor was this done under protest or merely as a means of questioning the jurisdiction of the Court. No point is taken in the written statement that the Court has no jurisdiction over the defendants. In fact it would appear that both parties are anxious to obtain a judicial decision from the Courts of this province upon the matters in issue between them. Had they merely appeared for the purpose of questioning jurisdiction, other considerations would arise. The late Professor Dicey, an authority of undoubted weight on this subject, in his Conflict of Laws (second edition, at p. 44) states the rule thus :—

"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 with the principle or test of submission."

Indeed in such a case the Courts in England would restrain a foreigner who had appeared and submitted to the jurisdiction from committing certain acts outside the jurisdiction. The late Lord Halsbury in Vol. 17, p. 263 of the Laws of England expresses the rule thus :—

"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 the case of *Kumar Ganga Singh* v. *Prithichund Lal* (1) this Court has followed the principle of the rules above stated and held that a Court has jurisdiction on the application of the plaintiff in a suit in which the defendants have entered appearance to issue a temporary injunction restraining the defendant from executing in another Court a decree obtained against the plaintiff. This point which was not raised by the defendants in their written statement nor taken in argument before the lower Court was put forward here for the first time. The defendants are before the Court, having submitted to the jurisdiction, and the acts complained of are acts committed or to be committed within the jurisdiction, and I have no doubt whatever that the Court has jurisdiction to make the order.

With regard to the merits of the case one must be satisfied in the first instance before granting a temporary injunction, as pointed out by the learned Subordinate Judge, that the plaintiff has a fair question to raise as to the existence of the right alleged. I may add that the Court must also be satisfied that the defendants have infringed or are threatening an infringement of those rights. I have considered each of the four grounds in respect of which the plaintiffs claim the injunction and, in my opinion, the first ground stands upon an entirely different footing from the other three. The defendants are the proprietors of Parasnath Hill and are, therefore, entitled to erect buildings thereon as and where they please so long as they do not interfere with the rights of other parties. It has been declared by the decision of this Court that the plaintiffs as well as the defendants have rights of worship in the majority of the shrines on that hill and any act calculated to interfere with or restrict in any way the plaintiffs' right of worship would give rise to a cause of action. The mere fact, however, that the contemplated act of the proprietor would shock the religious sentiments of the plaintiffs is not in itself a matter which would give rise to a cause of action. No person is entitled, to whatever religion he may belong, to enforce his religious views upon another or to restrain that other from committing any lawful act or making any lawful use of his property merely because it would not fit in with the tenets of his particular religion, and it is not suggested in the present case that the building of residential houses upon the hill would interfere in any way with the unrestricted right of worship in the tonks and temples by the plaintiffs. Nor can the act of building itself be regarded as a nuisance which might give rise to a cause of action. There are already on the hill buildings of various sorts. There are rest houses for the pilgrims, and a Dak Bungalow and servants' quarters near the principal temple

(1) A. I. R. 1923 P. 14=1 Pat. 356.

on the hill and the defendants contend that the buildings it is proposed to put up are necessary for the purposes connected with the religious institutions over which they have the management. The plaintiffs, however, rely upon the judgment of the Calcutta High Court in what is known as "The piggery case" in which an injunction was granted at the instance of representative members of the Jain community against Mr. Boddam, the lessee of the Raja of Palganj, then the proprietor of the hill, restraining him from slaughtering pigs and carrying on the manufacture of lard on a certain part of the hill. The decision in that case, however, was based upon an *ekrarnama* of 1872 granted to certain persons representing the whole Jain community giving them certain rights over the hill and the lease by the Raja of Palganj to Mr. Boddam was found to be a contravention of certain restrictive covenants in favour of the Jains contained in the *ekrarnama*. It is true that since that date the restrictive covenants in the *ekrarnama* have been declared inoperative by the Privy Council but the decision relied upon gains no more binding force by that fact. It could not, in my opinion, be supported upon any other ground.

The case of *Behari Lal* v. *Ghisa Lal* (2) appears to me to have been properly decided and is an authority directly in point. The plaintiffs in that case were the owners of a house adjacent to the site of a temple. Within the temple enclosure was a *pipal* tree which had grown there for many years. Some of the branches of the tree extended over the plaintiff's premises and over his house. He thereupon proceeded to cut down the offending branches which he had a perfect right to do as the owner of the property. The defendants, the proprietors, of the temple endeavoured forcibly to prevent him from doing so. The plaintiff then sued for an injunction against the defendants to restrain them from obstructing his right to cut the branches which spread over his house. It was contended that the *pipal* tree was an object of veneration to pious Hindus and that the cutting of the branches was regarded by them as an act of sacrilege and highly offensive to their religious sentiments It was held that the plaintiff was entitled to the injunction prayed for and that the fact that his motion might cause annoyance to and offend the religious sentiments of a large number of Hindus was no sufficient ground for cutting down the well recognised common law rights of an owner of property. The proposition put forward by the defendants in that case was stated by the learned Judge to be unsupported by authority and inconsistent with common-sense. With every desire to avoid offending the religious scruples of any sect of the community, I am unable to hold that such a consideration should be allowed unduly to restrict the recognised rights of ownership in property. The plaintiffs have no proprietary rights in the hill. The extent of their interest therein is the right to worship at the shrines with free access to the hill for that purpose. It is a right *in aliena solo* and as long as it is not interfered with the owner can do what he likes with his own. The fact that the plaintiffs' veneration for the hill leads them to regard the erection of buildings thereon as an act of sacrilege cannot in itself confer the right to restrain the owner from exercising the ordinary acts of ownership. Every one is entitled to his own religious beliefs but he cannot force them upon another so as to restrain that other from dealing with his property in a manner incompatible with those beliefs. It has been pointed out that the plaintiffs claim the right by custom to worship every part of the hill. It may be so. But it is not clear how such a right, if it can be established, is interfered with. The particular objects of worship at present are in the tonks and temples and access to those is not barred by the proposed buildings. It is argued, however, that at some distant period in the future, footprints of the saints may be discovered on the very spot where it is now proposed to erect buildings. I think a claim based upon this somewhat insecure foundation may be left to be considered by the Courts if and when the event foreshadowed becomes an accomplished fact. In any case it should not be allowed to interfere with the present rights of the proprietors. In my opinion, the plaintiffs have failed to make out a case for a temporary injunction upon the first of the grounds alleged and the injunction under that head should be discharged.

The case presented under the other three grounds stands upon a different

(2) (1902) 24 All. 499=(1902) A. W. N. 169.

footing. The learned Judge has found that the erecting of a gateway or closed arch upon the pilgrim road on the summit of the hill would have the effect of obstructing the free access of the Digambaris to certain of the tonks wherein their rights of worship have been declared. No satisfactory explanation has been given by the defendants why such an obstruction is needful and what its real object is and in the present tension of feeling between the two sects the temptation to use it for obstructing free access to the shrines would, I think, be almost irresistible. I see no reason to interfere with the learned Judge's decision upon this part of the case.

With regard to the third ground, the injunction was granted without much opposition, the plaintiffs' right to worship in their own way having been declared by the Court in the other suit before this application was presented. The defendants, however, had up to that time been strenuously contending that the plaintiffs' rights of worship were permissive and could be performed only in a manner conformable to the ritual of the Sitambari sect. Under this head also, I think, that the learned Judge's decision should be confirmed.

As to the fourth ground on which the rule was based, I think, the plaintiffs' apprehensions are well-founded. The defendants in their written statement whilst asserting the right to replace the *charans* which had been broken or destroyed and denying the right of the Digambaris to any part in their re-establishment did not allege that they intended to replace them in the same form as before. On the contrary they alleged that they had every right to construct and establish any kind of *charans* permissible by the Jain Sitambari religion. Their attitude, it is true, has been somewhat modified since the plaintiffs' rights were declared in this Court and they now say that they have no intention of replacing the old *charans* by those of a different form. However this may be, I agree with the learned Subordinate Judge in thinking that the injunction based upon this part of the case should continue until the hearing of the suit.

In my opinion, the injunction in so far as it restrains the defendants from constructing houses for residential purposes on the top of Parasnath Hill should be discharged. In other respects, I think that the appeal should be dismissed. The order of the learned Subordinate Judge will be varied accordingly. As the appellants have succeeded upon one substantial matter in the appeal but have failed in the others, I think, that the justice of the case would be met by ordering that each party bears his own costs of this appeal.

Ross, J.:—I agree.

Order varied.

A. I. R. 1923 Patna 213.

DAS AND BUCKNILL, JJ.

E. A. Moore and others—Defendants-Appellants

v.

Rai Babu Gulab Chand Saheb—Plaintiff-Respondent.

First Appeal No. 285 of 1921, decided on the 7th December 1922, against the decision of Sub-Judge of Muzaffarpur, dated 23rd August 1919.

B. T. Act, S. 106—Powers of a Revenue Officer are to decide about possession only but can decide title of landlord and tenant except in case of neighbouring estates.

A Revenue Officer in deciding disputes between rival proprietors under S. 106 is confined to the question of possession alone and is not competent to decide the question of title. It is quite true that the Revenue Officer is competent to decide the question whether the relationship of landlord and tenant exists, but, he is only competent to decide the question provided the question is not between neighbouring estate. Where plaintiff is asking the Court to determine that he ought to be recorded not as a tenure holder but as a proprietor and that the proprietor's *kiawat* with respect to the aforesaid land should be prepared in his name, he is definitely asking the Court to decide a question of title as between him and the defendants. Where the Settlement Officer had no jurisdiction to entertain the suit, he has no jurisdiction to make any order under S. 106 transferring the case to a competent Civil Court for trial. The Civil Court accordingly has no jurisdiction to try the suit.

[P. 214, C. 2; P. 215, C. 2.]

Sushil Madhab Mullick and *Nawal Kishore Prasad No. II*—for Appellant.

S. P. Sen and *Baikuntha Nath Mitter*—for Respondents.

Das, J.:—The disputed lands having an area of 66 *bighas* 8 *cattahs* and 9 *dhurs* were recorded in the finally published Record-of-rights as appertaining to *Mouza* Bhagwanpur. The Record-of-rights further stated that the land was in the possession of the proprietor of *Mouza* Manpurwa as a tenure-holder. The plaintiff is the

proprietor of *mauza* Manpurwa and he instituted a suit under the provisions of S. 106 of the Bengal Tenancy Act in the Court of the Settlement Officer of North Bihar for the following reliefs:—

(1) That it may be held that the 66 *bighas* 8 *kathas* 9 *dhurs* of land in suit appertains to *mauza* Manpurwa and it is, as *milik* (proprietary interest), in possession of the plaintiff. It bears *khasra* Nos. 3, 26, 34, 2, 9, 1, 10, 11, 33, 14, 15, 4, 27, 38, 7, 29, 30, 31, 34, 36, 5, 12, 22, 23, 18, 19, 13, 28, 35, 24, 37, 6, 16, 17, 20, 21, 8 and 25.

(2) That it may be held that the defendants have no connection and concern whatever with the land in suit and that it does not appertain to Bhagwanpur.

(3) That it may be held that there is a custom prevailing in both the *mauzas* and the neighbouring villages that whatever land accrues to whatever *mauza* on account of (change of current of) the river Sikrahana, is declared as appertaining to that *mauza* and the other *mauza* has no connection with the same.

(4) That the Court may be pleased to decide that the *maliks* of both the *mauzas* have right to fishery of the aforesaid river Sikrahana, in shares of halves and it may be held that a red line (on a map) should be fixed in the middle of the said river Sikrahana, so that the *maliks* of both the *mauzas* may have their boundary limits fixed with respect to their share of halves.

(5) That it may be held that the proprietors's *khewat* with respect to the aforesaid land in suit should be prepared in the name of the plaintiff and the entry made in the case under S. 103, stating him (the plaintiff) as *raiyat*, should be struck off.

(6) That a decree for the above (reliefs) may be passed and costs in Court, interest *pendente lite* and future interest up to the date of realization may be awarded against the defendants.

The learned Settlement Officer before whom the suit came up for hearing thought that there was no question of possession raised in the suit, but that it involved a question of right and title. He considered that the question was important because it would affect other considerable areas in the locality. He accordingly under S. 106 of the Bengal Tenancy Act read with R. 40, para. 1) of the Government Rules directed that the record of the case be sent to the District Judge for trial by such competent Civil Court as he may direct. The learned District Judge directed that the suit should be heard by the Subordinate Judge of Muzaffarpur. The learned Subordinate Judge accordingly heard the suit. He considered that he had no jurisdiction to decide the question of title. But nevertheless he held that the disputed lands appertained to the plaintiff's village Manpurwa.

The defendants appeal to this Court and on their behalf it is argued by Mr. S. M. Mullick that the learned Subordinate Judge had no jurisdiction to take cognizance of the case or to decide the question at all. S. 106 of the Bengal Tenancy Act provides that a suit may be instituted before a Revenue Officer at any time within three months from the date of the final publication of the record-of-rights under sub-S. (2) of S. 103-A by presenting a plaint on a stamped paper for the decision of any dispute regarding any entry which a Revenue Officer has made in, or any omission which the said officer has made from the record, whether such dispute be between landlords and tenant or between landlords of the same or neighbouring estates, or between tenant and tenant, or as to whether the relationship of landlord and tenant exists, or as to whether land held rent free is properly so held, or as to any other matter, and the Revenue Officer shall hear and decide the dispute.

It is contended on behalf of the respondents that there was a dispute regarding an entry which was made by the Revenue Officer although it may be that the dispute was between the landlords of neighbouring estates. It was also contended that in so far as the entry recorded the plaintiff as the tenant of the appellants it was clearly within his power to maintain the suit under S. 106 of the Bengal Tenancy Act which expressly authorises a suit raising a question whether the relationship of landlord and tenant exists. It has been held in numerous cases that a Revenue Officer in deciding disputes between rival proprietors under S. 106 is confined to the question of possession alone and is not competent to decide the question of title. It is quite true that the Revenue Officer is competent to decide the question whether the relationship of landlord and tenant exists, but, in my opinion, he is

only competent to decide that question provided the question is not between neighbouring estates. The question for our determination then is: does the suit raise a question of title between neighbouring proprietors. The learned Settlement Officer himself took the view that it raised the question of title and in that view, and in that view only, he has sent the case for trial to the Civil Court.

A careful perusal of the plaint leaves no doubt whatever in my mind that the plaintiff in this suit raised a question of title for trial by the Settlement Court. In the first prayer he claims that he is in possession of the disputed land in proprietary interest. The record-of-rights shows that the proprietary interest was in the defendants and in so far as he claims by prayer 1 that the proprietary interest is in himself, he has clearly raised the question of title as between him and the defendants. The second para. in my opinion raised the same question He asks that it may be held that the defendant had no connection and no concern whatever with the land in suit. The Record-of-rights shows that the defendants have connection and concern with the land in suit. In so far as he asked the Court to hold that the defendants had no connection or concern with the land in suit, he invited the Court to determine that the defendants had no title whatsoever. The third prayer invites the Court to hold that there is a custom prevailing in *mauzas* and the neighbouring villages that whatsoever land accrues to whatever *mauza* on account of the change of current of the river *Sikarahana*, is declared as appertaining to that *mauza* and the other *mauza* has no connection with the same. He is in this paragraph inviting the Court to determine that the custom of the mid-stream prevails in the *mauza*. That again can by no stretch of language be held to raise a question of possession and not a question of title. Mr. Sen strongly relies upon the fifth prayer of his plaint. In that prayer he asks that it be held that the proprietor's *khewat* with respect to the aforesaid land in suit should be prepared in the name of the plaintiff and the entry made in the case under S. 103 stating him (the plaintiff) as *raiyat* should be struck off. I am unable to see how it can be said that this prayer raises a question of possession. Mr. Sen has insisted before us that all that he is asking the Court to do is to strike off the word "tenure-holder" appearing as against his name but if the Court strikes off the word "tenure-holder" it is obliged to record the plaintiff either as the proprietor or as something else. In asking the Court to determine that he ought to be recorded not as a tenure-holder but as a proprietor and that the proprietor's *khewat* with respect to the aforesaid land should be prepared in his name, he is definitely asking the Court to decide a question of title as between him and the defendants. In my opinion, it is impossible to contend that the suit does not raise a question of title as between rival proprietors I hold that the Settlement Officer had no jurisdiction to entertain this suit. That being so he had no jurisdiction to make any order under S. 106 transferring the case to a competent Civil Court for trial. The Civil Court accordingly had no jurisdiction to try the suit.

I must allow this appeal and set aside the judgment and the decree of the Court below and dismiss the suit. I would make no order as to costs.

Bucknill, J.—I agree.

Appeal allowed.

A. I. R. 1923 Patna 215.

DAWSON-MILLER, C. J. AND MULLICK, J.

The Midnapur Zemindary Co., Ltd.—Decree-holders Appellants

v.

Madan Marwari and others—Judgment-debtors-Respondents.

Appeal No. 53 of 1922, decided on 1st July 1922, against a decision of Dt J. of Manbhum, dated the 10th December 1921

(a) *Civil Procedure Code, S. 35—Decree for costs without indicating proportions can be executed against any judgment-debtor.*

If costs are awarded against a number of defendants or a number of respondents without indicating the proportion in which these costs shall be borne by the different respondents, such an order is always taken to mean that the respondents or the defendants, as the case may be, are jointly and severally liable for the costs, and the order for costs may be executed against any one of them, who will have a right of contribution against others in a case of this nature.

[P. 216 C. 1.]

(b) *Civil P. C., S. 151—Consolidation of suits, effect of.*

Once appeals are consolidated for whatever reason, they form in fact one appeal and the parties in that suit must be treated as the parties in one suit.

[P. 916, Col. 2]

P. C. Rai—for Appellants.

Atul Krishna Ray—for Respondents

Dawson-Miller, C. J.—The appellants in this case were the plaintiffs in 20 different suits for annulment of encumbrances which after being dismissed by the Courts in India eventually went on appeal before His Majesty in Council. These suits were consolidated under the provisions of O 45, R. 4, of the Civil Procedure Code for the purpose of appeal to His Majesty in Council. In that appeal the plaintiffs were successful or partly successful and an order was made as appears from the report of the Judicial Committee, dated the 3rd June 1919, which is a part of the order in Council of the 25th June 1919 that the appellants in that case were awarded their costs against the respondents. They were awarded not only the costs of the appeal to His Majesty in Council but also certain costs incurred in the High Court in Calcutta and the order as to costs is in these words:

"Their Lordships do direct that there be paid by the respondents to the appellants their costs of these appeals incurred in the High Court and the sum of £561-6-0 for their costs thereof incurred in England"

So far as the costs in the High Court at Calcutta are concerned there were, no doubt, at that time separate appeals and the costs, I presume, awarded against the respondents, would be the costs against each of them in the appeal to which each was a party But so far as the costs of the consolidated appeals to His Majesty in Council are concerned it seems to me that there is no reason for interpreting that order as bearing any different meaning from that which is its ordinary and natural meaning If costs are awarded against a number of defendants or a number of respondents without indicating the proportion in which those costs shall be borne by the different respondents, such an order is always taken to mean that the respondents or the defendants, as the case may be, are jointly and severally liable for the costs, and the order for costs may be executed against any one of them, who will have a right of contribution against the others in a case of this nature. It is contended, however, that as there were a number of appeals in this case, the costs ought to be apportioned between the various respondents who appeared in the appeal. It does not seem to me that that contention can be supported. The appeal, although it might not be inappropriate to refer to it as several appeals, was in fact one appeal which was consolidated for the purposes of presenting it before His Majesty in Council and it could not otherwise have been presented. Therefore in dealing with the costs of this appeal, I have no doubt at all that what their Lordships meant was that the costs of this appeal should be borne in the ordinary way by one and all of the respondents jointly and severally. Each of them is responsible for this appeal and was contesting the appellants' case and each of them in that sense is liable to bear the costs He has a right of contribution against his co-respondents and is entitled to be reimbursed for their portion of the costs which he in the first instance will have to pay. It is said that under O. 45, R. 4, the case is only consolidated for the purpose of pecuniary value. It does not seem to me that it really matters what the reason is why the appeals are consolidated. Once they are consolidated for whatever reason, they form in fact one appeal and the parties in that appeal must be treated just as the parties in one suit. In my opinion the learned District Judge, from whose decision this appeal was brought, is wrong. His decision ought to be set aside and the case sent back to the executing Court for execution in the ordinary way.

The Appellants will be at liberty to amend their application for execution by giving the number of the suits and the appeals out of which the Privy Council appeal arises. The Appellants are entitled to their costs of this appeal here and in both the Courts below, the costs to be paid by the Respondents who appeared and contested the claim.

Mullick, J.—I agree.

A. I. R. 1923 Patna 217.

DAS AND ADAMI, JJ.

Dhirakshan Singh -Defendant No. 1-Appellant.

v.

Triloki Prashad Singh and others--Defendants-Respondents.

Appeal No. 82 of 1922, decided on 1st December 1922, against an order of Dt. J. of Shahabad, dated 16th March 1922.

(a) *Pre-emption — Subject of pre-emption, mokurari land is not—Strict limits must be recognised as right is opposed to public interest.*

The law of pre emption was founded on the supposed necessities of a Muhammadan family arising out of their minute sub-division and inter-division of ancestral property. It is therefore purely a creature of the Muhammadan Law and, as the exercise of the right is adverse to public interest, the Courts are not disposed to recognise this right beyond the strict limits of the Muhammadan law or beyond the decisions of the Courts. There is no right of pre-emption in *mukurari* land. [P. 217, Col. 1.]

(b) *Pre-emption—Time for exercise of right.*

Unless the proprietary possession is transferred the right of pre-emption does not accrue. [P 217 C. 2.]

(c) *Pre-emptor—Ownership (not necessarily possession) is necessary for pre-emptor —Perpetual lease is not sufficient.*

The milkiat or ownership of the property is *sine qua non* for the exercise of the right of pre-emption and the pre-emptor must have the *milkiat* or ownership in the property on account of which he claims the right of pre-emption. But it is not necessary that he should be in actual possession of it As a corollary to the above principle it follows that no right of pre-emption arises in respect of property leased in perpetuity. [P. 217, Col. 2.]

Parmeshwar Dayal and *Nirsu Narain Singh*—for Appellant.

T. N. Sahay—for Respondent.

Das, J.:—As was pointed out in the case of *Ram Golam Singh* v. *Nursingh Sahay* (1), the law of pre-emption was founded on the supposed necessities of a Muhammadan family arising out of their minute sub-division and inter-division of ancestral property. It is therefore purely a creature of the Muhammadan Law, and, as the exercise of the right is adverse to public interest, the Courts are not disposed to recognise this right beyond the strict limits of the Muhammadan law or beyond the decisions of the Courts.

The learned Vakil on behalf of the Respondents has not been able to refer us to any case which has held that there is any right of pre-emption in *mokurari* land. He did rely upon the short notes of a case reported in the Calcutta Weekly Notes, but for obvious reasons it is impossible for us to rely upon notes.

On the other hand, it seems to me that the decision of this Court in the case of *Shaikh Mohamed Jamil* v. *Khub Lal Raut* (2) is decisive on the point. It is true that the plaintiff in that case did not claim the right to pre-empt as a co-partner in the land sold ; but the learned Judge discussed the basic principles upon which the law of pre-emption rests and he pointed out that, unless the proprietary possession is transferred, the right of pre-emption does not accrue. That case is an authority for the proposition that the *milkiat* or ownership of the property is *sine qua non* for the exercise of the right of pre-emption and that the pre-emptor must have the *milkiat* or ownership in the property on account of which he claims the right of pre-emption. This view accords with the view of Mr. Ameer Ali expressed in his well-known work on Muhammadan law. "To entitle a person to claim the right of pre-emption," this is what the learned author says in his book, 4th Ed. Vol. I, p. 712, the *milkiat* or proprietary interest in the property on which he bases his right must be in him but it is not necessary that he should be in actual possession of it." And then the learned author at p. 715 says as follows: "As a corollary to the above principle it follows that no right of pre-emption arises in respect of property leased in perpetuity

We are bound to follow the decision of our Court in the case to which I have referred. I would allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance.

The result is that the suit will stand dismissed with costs in all the Courts.

Adami, J:—I agree.

Appeal allowed.

(1) (1875) 25 W. R. 2.

(2) (1920) 5 P. L. J 740 = 59 I. C. 534.

*A. I. R. 1923 Patna. 218 (1).

MULLICK AND BUCKNILL, JJ

Kartar Rai and another --Decree-holders-Petitioners

v.

Taley Chowdhury and others —Judgment-debtors Opposite party.

Appeal No. 153 of 1922, decided on 9th November 1922, against an order of Dt. J. of Monghyr, dated 16th Feb. 1922.

Civil P. C. S. 152 —*Clerical error*

A clerical error was corrected even after dismissal of the appeal in the interests of justice, by directing plaint and decree to be corrected.

Kulwant Sahay and *D. N. Sarkar* —for Petitioners.

Siveswar Dayal—for Opposite Party.

Mullick, J. :—Although, I express the opinion with some hesitation, I think this is a case that is covered by S. 151, C. P. C.

This Court when hearing the second appeal under O. 41, R. 11, would have, I take it, had jurisdiction to order an amendment of the plaint under S. 151, C. P. C., and the dismissal of the appeal does not, in my opinion, alter the Court's powers now. This being an obviously clerical error, the Court should, I think, in the interests of justice, direct that the plaint and the relevant decrees thereafter be amended so that the mortgaged property be described as *Khata* No. 435, *Khasra* No. 994, instead of *Khata* No. 439, and *Khasra* No. 194.

The inherent powers of the Court are not to be lightly invoked and in this case it is clear that the Petitioners should pay the costs of the application The hearing fee is fixed at Rs. 32

Bucknill, J :—I agree.

Application allowed.

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*A. I. R. 1923 Patna 218 (2).

DAWSON-MILLER, C. J. AND JWALA PRASAD J.

(*Mahanth*) *Jagernath Dass* - Plaintiff-Appellant

v.

Jang Bahadur Rai—Defendant-Respondent

First Appeal No. 223 of 1919, decided on 21st December 1922 from Addl. 1st Sub. J., Darbhanga, dated 11th April 1919.

(a) *Evidence Act, S.* 114—*Non-production of documents.*

Non-production of documents affords presumption against the defaulting party [P. 220, Col. 1]

(b) *Hindu law—Religious endowments—Satlakha Asthan in Behar—Succession devolves upon chief disciple.*

Satlakha is a *mourasi Asthan*, that is to say, one in which the office of *mahant* is hereditary and, apart from custom, devolves upon the chief disciple of the existing *Mahant*. If therefore a party wishes to prove that some other mode of devolution is customary, the onus rests on him to prove it. The principle *chela* or pupil is entitled to succeed on the death of the presiding *mahant* of *mourasi* or hereditary *muth*. If the principal pupil be personally unfit to succeed, or be disqualified by any of those causes which, according to the *shastras*, are sufficient for such disqualification, then in that case the presiding *mahant* should, during his life-time, select one properly qualified from among his pupils to succeed him The person so selected will succeed No doubt different customs prevail in different *muths*, and, where such are proved to exist, they must govern the order of succession.

[P. 222, Col 2]

Shoroshi Charan Mitter and *S. Dayal*—for Appellant

Manohar Lal and *H. P Sinha*—for Respondent.

Dawson Miller, C. J. :—The suit which is the subject of this appeal arises out of a dispute between the plaintiff and the defendant as to the right to succeed to the *mahantship* of the Satlakha *Asthan* in mauza Satlakha in the Muzafferpur District of this province on the death of the late Mahant Manohar Dass who died in June 1915.

The learned Additional Subordinate Judge of Darbhanga before whom the suit came for trial found in favour of the Defendant and dismissed the plaintiff's claim. From that decision the plaintiff has preferred this appeal.

According to the Appellant's case, Mahant Manohar Dass, who was admittedly the last incumbent of the office, appointed the Appellant, his *chela*, in March 1898, since when he has acted in that capacity performing the *puja* and faithfully carrying out the duties of a *chela* and up to the date of his death in 1915 Manohar Dass appointed no other *chela*. Upon the death of his *guru* the Appellant, as his heir and successor, performed the *sradh* and *bhandara* and was presented with the *pagri* and *chader* of *mahantship* by the *mahants* and *sevaks* of the neighbouring *Asthans* and entered into possession of the *Asthan* and the properties appertaining thereto until he was dis-

possessed by the defendant in February 1916.

It appears that the respondent, the defendant in the suit, applied for registration of his name in the Collectorate in place of the late Mahant Manohar Dass. The appellant entered an objection and the case was decided by the Deputy Collector on the 11th February 1916 in favour of the respondent. On that occasion the respondent produced a document which has been referred to as a Will and which purports to be executed by the late *mahant* and attested by several witnesses appointing the respondent his successor. The Deputy Collector was not satisfied with the evidence of either party as to possession of the property appertaining to the *Asthan* but considered that the respondent was in possession of the *Asthan* itself and he relied upon the so-called Will executed by Manohar Dass in the respondent's favour. He accordingly ordered the respondent's name to be entered in the register. About the same time proceedings under S. 145 of the Criminal Procedure Code were instituted by the respondent against the appellant and were heard on the 16th February 1916. The Sub-Divisional Officer considered that the question of possession had been decided by the previous order of the Deputy Collector and made no order under S. 145, but as he considered that the attitude of both parties was such that a serious breach of the peace was likely to occur, he passed orders under S. 144 of the Criminal Procedure Code directing the appellant not to commit a breach of the peace by interfering with the possession of the respondent. The appellant has accordingly instituted the present suit claiming a declaration of his rights and possession of the property.

The appellant contends that by the custom and usage of the Satlakha *Asthana* the *chela* of a deceased *mahant* succeeds him in his office. He denies that the respondent was ever appointed a *chela* of the last *mahant* but pleads that, even if he was, the custom is that where there are a number of *chelas*, the eldest is entitled to succeed and the respondent being many years junior to him can claim no right of succession, nor has the *mahant* for the time being any power of appointment.

He further disputes the authenticity of the Will which is dated the 27th February 1915, that is about four months before the death of Monohar Dass, and says that at that time and for many months before his death he was not physically fit to execute, or to understand the contents of, such a document. He alleges that it was a fraudulent and spurious document got up by the Respondent's relations and that one of the attesting witnesses whose name appears thereon was not alive at the time. He further says that the Respondent is not a *bairagi*, a person who has renounced the world, but *grihast* and still lives and dines with his mother and brothers, and eats food cooked by *grihasts* and is a man of bad character and quite unfitted for the spiritual duties of a *mahant*.

The respondent, on the other hand, denies every material allegation made by the appellant. His case is that the appellant never was the *chela* of Manohar Dass but was a cook in the service of the *mahant* of Basuara, an old enemy of the Satlakha *Asthan* at whose instigation the suit has been brought. He denies the custom as to the order of succession alleged by the appellant and says that, where there are more *chelas* than one, the custom is for the *mahant* during his life-time to appoint his successor, but, failing such appointment during his life-time, then after his death the *mahanths* and *sevaks* present at the *bhandara* appoint the *chela*, or, where there are more than one, the most deserving *chela* of the late *mahant* as his successor. He denies that the appellant performed the *sradh* and *karaj* and asserts that he himself performed those ceremonies and the *bhandara* on the late *mahant's* death. He denies that the late *mahant* was ill or incapacitated for several months before his death and says he was ill for 10 days only and continued to work and remained in possession of all his faculties up to the day of his death. He contends that the Will was a genuine and valid instrument and relies on the fact that it was duly registered on the 27th April 1915.

In this mass of contradictions it is perhaps not easy to ascertain on which side the truth lies. The difficulty of arriving at any confident conclusion is increased by the fact that a great number of witnesses on either side, many of them ap-

patently respectable, have deposed to the facts alleged on behalf of the rival claimants for whom they respectively appear. Nor is it in any way diminished by the fact that, apart from the Will already referred to, no documents of much importance and no records of the *Asthan* which has been in existence for some seven generations have been produced, and there is nothing except the oral evidence of the witnesses from which we can come to a conclusion as to the rules or customs regulating the succession to the *mahantship*. The respondent is admittedly in possession of the records and in so far as their non-production affords any presumption, it must raise a considerable amount of suspicion as to the genuineness of the respondent's case when he asserts that the existing *mahant* has power to appoint his successor during his life-time.

Three issues only were framed for determination by the trial Court. They are as follows:—

1. Whether the plaintiff or defendant is the *chela* of Manohar Dass?

2 What is the custom of succession to the *mahantship* of Satlakha *Asthana*?

3. Whether the Will is genuine or fraudulent?

4. Whether Manohar Dass had the right to execute it?

These issues were considered together by the learned Additional Subordinate Judge He arrived at a conclusion by a process of reasoning which leaves much to be desired. He considered that the whole case depended upon the question of whether the Will executed by the late *mahant* in favour of the respondent was genuine. He further considered that the story put forward by the appellant that he was the only *chela* of Manohar Dass was greatly discredited by the fact that he also pleaded that, where there were more than one *chela*, the senior *chela* succeeded as *mahant* according to the custom of the *Asthan*. He says that this demolishes his story that he was the only *chela* of the *mahant*, and that the appellant should have shewn a bold front by one definite prayer and clear evidence of his being the only *chela* of Manohar Dass. I can see no reason why the appellant's story should be suspected merely because he pleads that he was the only *chela* and, even if the respondent was at a later time appointed *chela*, the custom of the *Asthan* provides that the senior *chela* should succeed. It must be remembered that the respondent only claims to have been appointed *chela* some nine months before the death of Manohar Dass. The appellant contended that the respondent was never a *bairagi* but always continued to live with his family and to eat food prepared by *grihasts*, and, further, that the ceremony whereby the respondent was appointed the *chela* was not orthodox and that he was not appointed on *ramnomi* day, the most propitious day in the year when all *chelas* are appointed, but on *janmasthami* day which is quite irregular, and that his head was not shaved nor were other necessary ceremonies carried out. He knew before the suit was instituted that the respondent was claiming to be a *chela* and further that his case was that the *mahant* had the power of appointing his successor. In these circumstances it is difficult to see why the appellant's case should be discredited merely because he pleaded that even if the respondent were in fact a *chela* he was not entitled by the custom of the *Asthan* to succeed. The same suspicion might equally be applied to the case of the respondent who pleads not only that he was the sole *chela* but also that, where there are more than one, the *mahant* may during his life-time appoint his successor and, failing this, the successor is appointed after his death at the time of the *bhandara* by the *mahants* of the neighbouring *Ashans* and the *sevaks* present at that ceremony. He then considers the facts relating to the execution of the Will and comes to the conclusion that it was a genuine document and, having arrived at this conclusion, adds that the late *mahant* had a right to execute it as no law had been shewn by the appellant that the *mahant* cannot appoint a successor by a registered deed. He does not deal in detail with the facts which would go to shew whether the appellant was ever a *chela* of Mahant Manohar Dass or not, but states simply that "the plaintiff is proved not to be the *chela* of the late *mahant* at all"; he accordingly dismissed the suit.

The evidence with regard to the execution of the Will is of a most unsatisfactory character throughout. It is not a Will in the proper sense of the term. It is in fact an appointment by Manohar

Dass of his successor with a schedule of the properties of the *Asthan* attached. It directs that the respondent shall, after his death, be installed on the *gadi* and made the *mahant* in his place and take possession of the moveable and immoveable properties according to the details given in the schedule and that he shall get his name registered in his place.

It is important, as bearing upon the credibility of the respondent's case, to notice that it begins by stating that the executant always remains ill and has become about 70 years old. It further states that he has one disciple only, namely, the respondent, and gives as a reason for executing the document that it is generally seen that after the death of the *mahant*, there is always a dispute as to who will succeed him and in order to guard against any such dispute in the future he wishes to make some arrangement. In this connection it should be pointed out that according to the respondent's case the *mahant* was in perfectly good health until about 10 days before his death in June 1915. The Will is dated the 27th February 1915 and the recital that he now remains always ill supports the appellant's case and is entirely at variance with that put forward by the respondent. Again, if in fact he had only one disciple, namely, the respondent, it is not easy to appreciate why there should be any fear as to the appointment of his successor. It is the case of both parties that if there is only one *chela*, he, and he alone, has any right to succeed. The one fact which appears to arise, with any reasonable certainty, out of the mass of contradictory evidence is that the appellant was in fact appointed *chela* of Manohar Dass in March 1898 having gone to the *Asthan* in the previous year If the respondent's case that the appellant never was the *chela* of Manohar Dass is to be believed it would follow that from 1898 up to 1914 when the respondent says he was appointed *chela*, the late *Mahant* never had any *bairagi chela* at all. It is not suggested that any person other than the appellant was the *bairagi chela* during those years. It is difficult to believe that such a state of affairs could have existed and I am satisfied, on the evidence that the appellant was in fact appointed and acted as *chela* from 1898 up to the time of Manohar Dass's death. There are also documents in existence executed by the appellant, according to his case, on behalf of *Mahant*, in which he describes himself as the *chela* of Manohar Dass. Ex. 5 is a mortgage bond, dated the 30th June 1910. The scribe of this document was one Rup Lal Das who was at that time the *patwari* of Manohar Dass. The Appellant is openly described therein as a *bairagi* and the *chela* of Manohar Dass. It is difficult to believe that he would have so described himself in a document written by the *patwari* of the *mahant* if it were not the fact, as at that time no dispute as to his right of succession had arisen and there was no object in giving a false description of his status. This document and one other of a similar nature were produced by the appellant himself, all the other documents being in the possession of the respondent. It was argued that the fact of these documents having been retained by the appellant shewed that they were not transactions executed on behalf of the *mahant* but related to his own private affairs. *A bairagi chela* who has renounced the world is not in a position to lend money on his own account and I must accept the appellant's statement that these documents were executed by him as a *benamidar* on behalf of the *mahant*. The loans had been repaid and the documents returned to the lender.

The importance of them, however, is that they describe the appellant as the *bairagi chela* of Manohar Dass at a time when there was no reason for giving a false description, and I have no doubt, upon the evidence as a whole, that the appellant was, as he says, the *bairagi chela* of the late *mahant*. It may be that the respondent was also appointed in 1914 although the ceremonies attending his appointment appear to have been somewhat unorthodox. The respondent was closely related to the late *mahant*. He was in fact his nephew, and it may be that his relations, as alleged by the appellant, were primarily responsible for bringing about the execution of the document of the 27th February 1915 in favour of the nephew. It is possible also in the circumstances that the late *mahant* was not an unwilling party to this document but the evidence with regard to it is so unsatisfactory, as I shall presently shew, that I am not prepared to accept it as proof that

Mahant Manohar Dass executed the document with full knowledge and appreciation of its contents. Nor does the document alone, if genuine, prove that the *mahant* for the time being had any power of appointment with regard to his successor. The judgment then discussed the evidence about the Will and after holding it to be not genuine or at least that the *mahant* was not aware of the nature and contents, discussed the evidence about the parties being *chelas* and proceeded. I am satisfied on the evidence that the appellant was appointed *bairagi chela* of the late *mahant* in 1898 and that the respondent was also appointed in 1914, and I further find that the document of the 27th February 1915 cannot be accepted as an effective appointment of the respondent as the successor of the late Mahant Manohar Dass.

The question as to what was the custom of succession in the Satlakha *Asthan* remains to be considered. I have already found that the authenticity of the Will is not satisfactorily proved and must be rejected. But I further consider that the evidence of the custom given on behalf of the appellant is preferable to that of the respondent and should be accepted. The evidence on the point on each side is entirely oral and is supported by no documents. Both sides are agreed that seven *mahants* in all have presided over the *Asthan* since its institution many years, probably more than a century, ago. They also agree as to their names although the second and third names given by the appellant are reversed in the order given by the respondent. It is the appellant's case that in each instance the senior *chela* succeeded his *guru* and the names of the *chelas* are given.

The respondent alleges that in three instances a junior *chela* succeeded, the last instance being that of Manohar Dass himself who, it is claimed, was the junior *chela* of his predecessor. It is admitted that the documents and records relating to the *Asthan* are in the respondent's possession and it is reasonable to suppose that they would afford some evidence of the custom prevailing. If a junior *chela* were appointed by the *mahant* in his life-time as his successor by Will or deed, such an important document would undoubtedly be preserved and I can only presume that the absence of all documents is due to the fact that if produced they would not support the respondent's case. It is admitted by the respondent that Satlakha is a *mourasi Asthan*, that is to say, one in which the office of *mahant* is hereditary and, apart from custom, devolves upon the chief disciple of the existing mahant. If therefore the respondent wishes to prove that some other mode of devolution is customary the onus rests on him to prove it. The question of the devolution of the *mahantship* in a *mourashi muth* was decided as long ago as 1839 when the case of *Mahant Ramanooj Doss* v. *Debraj Dass* (1) came before the Sudder Dewani Adaulat in Bengal. In that case the Court directed the Pundit to state what was the law of the *shastras* in regard to the appointment of the presiding *mahant* of a *mourasi muth*; whether the principal disciple of the last *mahant* should succeed or whether the existing *mahant* was competent to appoint whom he pleased among the body of his disciples. The reply of the Pundit was "under the circumstances stated in the question the principal *chela*, or pupil is entitled to succeed on the death of the presiding *mahant* of a *mourasi* or hereditary *muth*. If the principal pupil be personallly unfit to succeed, or be disqualified by any of these causes which, according to the *shastras*, are sufficient for such disqualification, then in that case the presiding *mahant* should, during his life-time, select one properly qualified from among his pupils to succeed him. The person so selected will succeed."

No doubt different customs prevail in different *muths*, and, where such are proved to exist, they must govern the order of succession. But I apprehend that in the absence of proof of any special custom we should follow the general rule laid down in 1839 with regard to *mourasi* or hereditary *muths*. The respondent has in my opinion for the reasons already given failed to prove the custom as to devolution which he alleges and has admitted that the Satlakha *Asthan* is one of the description known as *mourasi*. For this reason also, apart, from the fact that I consider the evidence of the appellant's witnesses more reliable as to custom, I think the appeal should be allowed and the decree of the Additional Subordinate Judge set aside.

(1) (1839) (6 S. D. A Beng. 262.)

It will accordingly be decreed and declared that the appellant is entitled to succeed the late Mahant Manohar Dass as *mahant* of the Satlakha *Asthan* and that the document of the 27th February 1915 purporting to be executed by the Mahant Manohar Dass is of no force and effect and that by the rules of the said *Asthan* the senior *bairagi chela* on the death of the *mahant* is entitled to succeed to the *mahantship* and that the appellant is entitled to possession of the said *Asthan* and the properties appertaining thereto.

The appellant is entitled to his costs against the respondent here and in the trial Court.

Jwala Prasad, J.:—I agree to the order proposed.

Appeal allowed.

A. I. R. 1923 Patna 223.

MULLICK AND KULWANT SAHAY, JJ.

Syed Baker Hussain . Plaintiff-Petitioner

v.

Mirza Hussain Mirza and others ... Defendant—Opposite Party.

Application No. 229 of 1922, decided on 8th December 1922, against the order dated 28th April 1922 passed by 1st Munsiff of Patna.

Civil P. C., S. 115—Remedy of appeal open

The High Court cannot interfere in revision if an appeal can lie but has not been preferred against the order complained of. [P 223, C 2.]

Janak Kishore -for Petitioner.

Shiveshwar Dayal and *Brijkishore Prasad*—for Opposite Party.

Mullick, J.:—On the 28th April, 1922 the defendant in the suit, out of which this application arises, was present, but the plaintiff was not present in person and his pleader filed a petition for time to adduce evidence. The plaintiff's application was rejected and the pleader thereupon said that he had no further instructions. The Court then proceeded to hear the case and allowed the defendant to file a petition for the amendment of issues and to tender the certified copy of a decision in a previous application under O. 9, R. 13, C. P. C. which related to the case. The Court, after considering this decision and hearing the defendant's pleader, found that the suit was barred by *res judicata* and it accordingly made a decree of dismissal. In making this order the Court was careful to note that it was acting under provisions of R. 3 of O. 17, C. P. C.

Now, whether or not the Court was right in disposing of the case under O. 17, R. 3, C. P. C. or whether it should have acted under R. 2 of that Order is not a point which appears to be material for the decision of the present application before us. Here the plaintiff applies to us to exercise our revisional jurisdiction under S. 115, C. P. C., in respect of the order of 28th April 1922, on the ground that the Court had no jurisdiction to make it under O. 17.

He contends that by reason of R. 2 of that Order the Court should have proceeded under O. 9, and, therefore, any decree purporting to have been passed under R. 3 was made without jurisdiction. Now, S. 115, C. P. C., clearly lays down that the High Court cannot interfere in revision if there is an appeal against the order complained of. Whether we view the order of the 28th April as an order properly made under R. 3 of O. 17 or as an order under O. 9, R. 8, the plaintiff had a right of appeal. In the former case he had an appeal against the decree and in the latter case it was open to him to apply under O. 9, R. 9 and in the event of being unsuccessful, he had a right of appeal under O. 43 against the decision under O. 9, R. 9. He did in fact apply under O. 9, R. 9 and that application was rejected. No appeal was filed against that order of rejection and there is no application for the revision of that order before us. It is clear that the present application is not maintainable.

The result is that the application is dismissed with costs; hearing-fee one gold *Mohur*.

Kulwant Sahay, J.:—I agree.

Rule discharged.

**A. I. R. 1923 Patna 224.

MULLICK AND KULWANT SAHAY, JJ.

Ram Sumran Prasad and others (Decree-holders-Petitioners

v.

Ram Bahadur and others...(Judgment-debtors-Opposite Party.

Civ. Rev. No. 239 of 1922 decided on 22nd December 1922 from Sub. J. of Monghyr, dated the 11th July, 1922.

(a) *Execution—Simultaneous execution under all the Codes including that of* 1882 *was recognised.*

Under the Civil Procedure Codes of 1859, 1877 and 1882 the legality of concurrent execution has always been recognised though in practice it was not generally carried out (Case-law Discussed) [P. 224, C. 2.]

(b) *Civil P. C., S* 46—*Concurrent execution in transferee court is permissible.*

Indeed in principle there seems to be no difference between a concurrent execution after transfer in another Court and a concurrent execution in the Court in which the decree was passed. That the present Code does not view with disfavour concurrent execution is among other sections indicated by S. 46 which is new and relates to precepts Two applications for attachment of different properties can proceed simultaneously in execution of the same decree. There is no provision of law which prevents the Court from entertaining a fresh application for the execution of the decree by attachment of money in deposit to the credit of the judgment-debtor in the same Court or in any other Court, when another execution proceeding is going on, in the same Court [P. 225, Col 1.]

(c) *Civil P. C. O* 21, *R* 11—*Rule is no bar to simultaneous executions*

O. 21, R 11 of the present Code which requires that the decree-holder shall state the result of all previous executions is, no bar to the maintenance of concurrent execution. [P. 225, Col 1.]

(d) *Civil P. C. O.* 21 *R.* 17—*Simultaneous execution being permissible amendment by adding properties during execution should be permitted*

It being open to the decree-holder to file a fresh application, the amendment of the application already filed while the execution case is still pending, by the addition of other properties to the list of properties sought to be attached should be allowed. R. 17 of O. 21 does not contemplate that there can be no amendment after the execution case has been registered. The argument that the object of the law is to prevent excess in realization does not conclude the matter: the Courts will always endeavour to protect the judgment-debtor against unnecessary harassment. [P. 225, Cols 1, 2.]

S. M. Mullick and *Narendra Nath Sen* —for the Petitioners.

S. K. Mitra and *L. K. Jha*—for the Opposite Party.

Mullick, J:—This case has been well argued on both sides and the result seems to me to be quite clear.

The petitioners before us obtained a decree for money against the opposite party in Suit No. 858/80 of 1913-15 in the Court of the Subordinate Judge of Monghyr and on the 20th May 1915 they made to that Court an application. No. 133 of 1918, for the execution of that decree Some property belonging to the judgment-debtors was sold for a sum of Rs. 37,642 leaving a balance of Rs. 7,396-2-4 still due, and the execution case is still pending for the disposal of two applications for setting aside the sale; the sale has therefore not been confirmed. On the 11th July 1922 the decree-holders filed a petition before the executing Court stating that they had learnt that an amount of Rs. 6,809-10-0 realised upon a decree in favour of the judgment-debtor, was in deposit in the Court of the Subordinate Judge and praying that this sum might be attached and paid to the decree-holders in satisfaction of their debt. On the 12th July 1922 the Subordinate Judge made the following order:—

"Heard the Vakil for the decree-holders. As the execution case in respect of the same decree is still pending before this Court, no fresh execution-petition in respect of the same decree can be entertained. Rejected."

The present application for revision has been made by the decree-holders against this order.

It is urged by the opposite party that while execution case No. 133 of 1918 is pending no fresh execution-proceeding can be instituted. In my opinion this is a wholly incorrect view of the law. Under the Civil Procedure Code of 1859, 1877 and 1882 the legality of concurrent execution has always been recognised though in practice it was not generally carried out. If authorities are required reference may be made to *Saroda Prasad Mullick* v. *Luchmeeput Singh Doogur* (1) *Krishtokishore Dutt* v. *Rooplall Dass* (2), *Baijnath Goenka* v. *F. H Holloway* (3) and *Maharaja of Bobbili* v *Sri Raja Narasaraju* (4) affirmed by the Privy Council in *Maharaja of Bobbili* v. *Sri Raja Narasaraju* (5). Indeed on principle there seems to be no

(1) (1873) 14 M. I. A. 529=17 W. R. 289=2 Suther 560=3 Ser 77 (P. C.)
(2) (1882) 8 Cal. 667=10 C. L. R. 609.
(3) (1905) 1 C. L. J. 315.
(4) (1912) 37 Mad. 281=24 M. L. J. 236.
(5) (1918) 21 C W. N. 162 (P. C.)

difference between a concurrent execution after transfer in another Court and a concurrent execution in the Court in which the decree was passed. That the present Code does not view with disfavour concurrent executions is among other sections indicated by S. 46 which is new and relates to precepts. That section enacts that upon the application of the decree-holder, the Court, which passes the decree, may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such a decree, to attach any property belonging to the judgment-debtor and specified in the precept, provided that no attachment shall continue for more than two months unless the period of attachment is extended by an order of the Court: or unless before the determination of such attachment the decree has been transferred to the Court and the decree-holder has applied for an order for the sale of such property.

Further, it has been held by the Calcutta and the Allahabad High Courts that separate and successive applications for execution giving reliefs of different character may always be made (See *Radha Kishen Lall* v. *Radha Pershad Singh* (6) and *Sadho Saran* v. *Hawal Pande* (7), and I see no reason why two applications for attachment of different properties cannot proceed simultaneously in execution of the same decree. In my opinion there is no provision of law which prevents the Court in the present case from entertaining a fresh application for the execution of the decree by attachment of money in deposit to the credit of the judgment-debtor in the same Court or in any other Court.

O. 21, R. 11 of the present Act which requires that the decree-holder shall state the result of all previous executions is, in my opinion, no bar to the maintenance of concurrent executions.

If, then, it is open to the decree-holder to file a fresh application, I see no reason why the Court cannot allow the amendment of the application already filed, while the execution case is still pending, by the addition of other properties to the list of properties sought to be attached. It is contended that R. 17 of O. 21, contemplates that there can be no amendment after the execution case has been registered but, in my opinion, there is no force in this contention and it has been so held in *Ganendra Kumar Roy Chaudhry* v. *Sri Shyam Sunder Jiu* (8).

It is contended by the learned Counsel for the Opposite Party that this last mentioned case was wrongly decided and that it conflicts with the Full Bench decision of the Calcutta High Court in *Asgar Ali* v. *Troilokhya Nath Ghose* (9). But this Full Bench case, in my opinion, has no application to the present case. There an application for execution was made which was not in proper form, and when the prayer for amendment was made, the period of limitation for executing the decree had expired. The Court held that the amendment could not be made after the decree had become barred by limitation. But where the decree is still alive, I do not see why an application for amendment cannot be allowed if the Court so chooses at any time before the close of the execution proceedings. To hold otherwise would mean that although the decree-holder has discovered property belonging to the judgment-debtor, which is within his grasp, and although he knows that the properties which he has already attached will not satisfy his decree, he cannot have any relief till the disposal of the execution case, which may, as in the present instance, be protracted for a considerable time. The argument that the object of the law is to prevent excess in realization does not conclude the matter; the Courts will always endeavour to protect the judgment-debtor against unnecessary harassment.

Reference has been made to the English practice on the subject. It seems that a judgment creditor in England may, in execution of a judgment for money or costs, issue any number of writs addressed to the Sheriffs of different counties or places in which the judgment-debtor's assets are and he may also issue more than one writ in the same county but he cannot, in the latter case, if a seizure be made under one of the writs, ordinarily proceed with the other writs without obtaining a return of the first writ. Two or more writs of the same kind can be executed in

(6) (1891) 18 Cal. 515.
(7) (1898) 19 All. 98 (F. B.)

(8) (1918) 27 C. L. J. 398=44 I.C. 553=22 C. W. N. 540.
(9) (1890) 17 Cal 631 (F. B).

different counties but care must be taken that too much is not realized. These rules cannot, of course, affect the procedure in India, but they support the view that there is no objection in principle to the concurrent execution of a decree.

In the case before us the Subordinate Judge was wrong in holding that he had no jurisdiction to entertain the decree-holder's application of the 11th July 1922. He had jurisdiction to accept it either as a fresh application for execution or as an application for amendment of the previous application, and he must now exercise the discretion with which the law vests him and dispose of the application according to law. The application is therefore allowed with costs. Hearing fee five gold mohurs,

Kulwant Sahay, J. —I agree.

Application allowed.

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* A. I. R. 1923 Patna 226.

DAWSON-MILLER, C. J. AND ROSS, J.

(Rai) Brij Raj Krishna etc—Defendants,

v.

Chathu Singh and others—Plaintiffs.

Appeal Nos. 392 -397 of 1920, decided on 25th October 1922, from Sub-J. of Muzaffarpur.

Decree—Setting aside—Fraud.

A decree obtained by false evidence cannot be set aside by a suit [P 227, Col 1]

Civil P. C. S 105—Reasons for remand for further findings on issue not decided are not binding on same Court but are binding when remand lays down the law to be followed by lower Court

In the case of keeping the appeal pending in the Appellate Court and remanding the case for further findings on an issue not decided, the Court, when the matter comes up for final consideration, can disregard the reasons given for remanding the case; but a decision on a point of law by a Court of co-ordinate jurisdiction is final in so far as it sets aside the decision of the lower Court and lays down the law to be followed by that Court on remand. [P. 228, Col. 1]

Banwari Lal—for Appellants.

Shiveshwar Dayal—for Respondents.

Dawson-Miller, C. J.—In these appeals it seems to me that our decision must be governed by the order of the Division Bench of this Court, dated the 3rd February 1919. The appeals arise out of certain suits which were brought by the respondents against the appellants to set aside certain rent decrees obtained by the appellants against the respondents in the year 1911. The appellants were the *mukarraridars* of an interest in *mauza* Raghopur. The respondents were tenants holding under them. The appellants brought rent suits against the respondents claiming rent in respect of certain additional land over and above that which they admittedly held at the rate of Rs. 3-0-0 per *bigha*. The respondents defended the suits and put in written statements but when the cases came on for trial they did not appear before the trial Court and the suits were decreed upon the plaintiff's evidence alone. The respondents thereupon applied for review of judgment which was rejected. They then took proceedings under O 9. R. 13 of the Civil Procedure Code to have the decrees set aside alleging that their absence from the trial was due to the fraud of the landlords, the plaintiffs in the rent suits. The fraud alleged was that the parties in those rent suits had entered into a compromise whereby the tenants agreed to pay not Rs. 3-8-0 per *bigha* but Rs. 2-8-0 per *bigha* and agreed to judgment upon these terms; that they prepared a compromise petition which they handed to the landlords who undertook to present it to the Court and obtain a decree upon the terms of that compromise but that when the time came, the landlords fraudulently suppressed the fact that a compromise had been come to and in the absence of the tenants proved their case and obtained judgment. That application under O. 9, R. 13 was heard in due course and evidence on behalf of both sides was given The Court rejected the story of the compromise and refused to set aside the decrees. That decision was affirmed on appeal

Subsequently in July 1914 the tenants instituted the suits out of which these appeals arise They claimed to have the rent decrees set aside on the ground that they were obtained by fraud. They alleged in their plaint the facts as to the compromise which they had relied upon but unsuccessfully, in the application under O. 9, R. 13, and, in addition, they say that in truth and in fact the land in respect of which the rent was claimed has no existence and presumably never did have any existence and further that there never was any settlement by the landlords with the tenants of these lands for which rent was claimed in the rent suits; and the inference they ask the Court to draw from these facts is that the landlords in the

rent suits being aware of the non-existence of the lands and also being aware that they never made any settlement of them with the tenants nevertheless deliberately and fraudulently put forward a concocted case before the Court and thereby misled the Court and so obtained judgment and they ask the Court to say that if these facts are proved, the decrees were clearly obtained by fraud perpetrated upon the Court and upon themselves.

When the case came for trial before the Munsif it was obvious that the tenants could not hope to succeed upon the plea they had originally put forward in the application under O. 9, R. 13 as to the compromise That matter had already been decided against them in proceedings between the same parties by a Court of competent jurisdiction and it was not open to them to ask another Court subsequently to determine the same questions and, therefore, that story, which must be treated as entirely false, was abandoned at the trial. They did contend, however, that the land did not exist and that there had been no settlement. With regard to these points, if the matter were open to us, I should have said that it was no longer within the competency of the Court to adjudicate upon them because these questions were in issue in the original rent suits and had been determined between the same parties, although it is true that the tenants did not actually appear at the trial in the rent suits, and it is now well-settled that one cannot ask the Court to come to the conclusion that a fraud has been practised in obtaining a decree merely because it is sought to prove that the evidence put forward on behalf of a successful party in the original suit was not true. It is important to bear in mind that in the rent suits those questions as to whether there was any land and as to whether there was a settlement were in fact matters in issue. We have not seen the pleadings in the rent suits but from the plaints in the present suits it appears clear that the matters were in issue in those suits. In paragraph 6 of the plaint after stating that they never took settlement of those lands and that these lands did not in fact exist, they go on to say that as the defendants' claim in the abovementioned rent suit was false and based on lands which had no existence and as the suit had been filed out of malice. Plaintiffs Nos. 1 to 5 and the father of plaintiffs Nos. 2 to 4 filed a written statement noting the facts therein and also filed sufficient evidence for testing the defendants' allegations. It is obvious, therefore, that the allegations upon which the plaintiffs in the present suits sought to have the rent decrees set aside were matters which had been put in issue in the original rent suits and, as already stated, if I were free to decide this case for myself, I should come to the conclusion that whatever the findings of the Court in the present suits as to the settlement or as to the existence of the land when the present suits were brought, it was not competent to the Court to discuss these questions and upon coming to a conclusion contrary to the landlords, to decide that the original decrees had been obtained by fraud. The learned Munsif, however, in a judgment which rather treated the onus of proving the settlement and the existence of the lands as resting upon the landlords came to the conclusion that it had not been proved that the land in fact existed or that any settlements such as those deposed to in the rent suits had been made and relying rather upon the absence of evidence on the part of the landlords, he came eventually to a conclusion of fact in favour of the non-existence of the land and the absence of any settlements with the tenants and in the result he arrived at the conclusion that the decrees in the rent suits must have been obtained by fraud.

The matter then went on appeal to the Subordinate Judge, who was of opinion that the mere fact that the existence of the lands and the settlements with the tenants had not been proved to the satisfaction of the Munsif could not by any stretch of imagination be construed into a finding that the suits were entirely false and the original decrees obtained by fraud. In his opinion, it merely amounted to this that the Munsif had arrived at a conclusion different from the one arrived at in the previous litigation by the Court which passed the rent decrees.

The matter then went on second appeal to a Division Bench of this Court and came before the late Mr. Justice Atkinson and Mr. Justice Manuk. In their opinion, the Subordinate Judge was wrong if he accepted the facts found by the Munsif in coming to the conclusion that fraud had not been proved. They said :

"All that remains for us to consider is whether the learned Munsif, having found as a fact that no lands existed in respect of which a letting could have been made, and also that no contract was ever made to support the creation of a tenancy as between the landlord and tenants was justified in law in setting aside the rent decrees obtained as against the plaintiffs without contest in the rent suits of 1911. Clearly he was. The evidence adduced in this case was such as, in our opinion, would have justified the Munsif in arriving in law at the conclusion that he did."

Having arrived at that opinion they did not decide the case themselves but sent it back to the lower appellate Court for a finding as to the actual facts, that is to say, whether the lower appellate Court agreed with the findings of fact come to by the Munsif. The reason for this was that the Subordinate Judge in first appeal originally had not thought it necessary to come to an independent finding on the facts having arrived at the conclusion that accepting the facts found by the Munsif no fraud had been proved. The learned Judges of this Court thereupon set aside the decision of the Subordinate Judge and remanded the case to the Court of the Subordinate Judge again for final adjudication and disposal according to law on the facts and the merits.

There can be no doubt to my mind, whether I am prepared to agree with it or not is another matter, that the finding of this Court in second appeal was that upon the facts found by the Munsif, the Court was perfectly justified in arriving at a conclusion that there was fraud. That was a question of law and, in so far as that question was determined by two Judges of this Court of co-ordinate jurisdiction in a final judgment which set aside the decision of the lower Court, I think we must hold ourselves bound by that decision and cannot go behind it. Had it merely been a case of keeping the appeal pending in this Court and remanding the case for further findings on an issue not decided we should no doubt have been entitled, when the matter came up for final consideration, to disregard the reasons given for remanding the case but the present decision appears to me to be one which we cannot ignore. It is, as I have said a decision on a point of law by a Court of co-ordinate jurisdiction and it is final in so far as it sets aside the decision of the lower appellate Court and lays down the law to be followed by that Court on remand.

The matter then went back to the Subordinate Judge, who after discussing the evidence came to the conclusion that he saw no reason to differ from the findings arrived at by the learned Munsif. Although the judgment was not perhaps beyond criticism as again it rather placed the onus upon the landlords still he does come to a clear conclusion that the findings of fact of the learned Munsif were justified, and in these circumstances it seems to me that we are bound to give effect to the decision of this Court on the previous occasion and hold that there must be judgment for the tenants. The appeals will, therefore, be dismissed with costs.

Ross, J : – I agree.

Appeals dismissed.

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*A. I. R. 1923 Patna 228

MULLICK AND KULWANT SAHAY, JJ.

Gobind Swain and others—Accused-Petitioners

v

King-Emperor—Opposite-Party.

Cri Rev. No. 719 of 1922, decided on 18th December, 1922, against an order of Dt. Mag of Puri, dated the 20th November, 1922.

(a) *Criminal P. C., S 528—Notice should be issued but non-issue is not by itself fatal.*

The omission to issue a notice to the accused before ordering the transfer on application of complaint is certainly irregular. Although, as a rule of practice, it is desirable that notices should be issued, the law is not mandatory upon the point and the omission to issue notice is not in itself a reason for setting aside an order of transfer. [P. 229, Col. 1.]

(b) *Criminal P. C., S 528—Grounds.*

It is not the object of S 528 that a case should be transferred merely because it is going against a particular party. [P. 229, Col. 2.]

(c) *Criminal P. C., S. 403—Charge for minor offence only triable by Magistrate—Discharge under S. 352, I. P. C. does not bar charge under S 384, I. P. C*

It is open to the complainant, after the disposal of the case under S. 352, I. P. C, which is the only offence which a Magistrate was investigating, to move the officer empowered to take cognizance thereof, to proceed with the trial of the charge under S. 384, I. P. C.

G. C. Pal—for Petitioners.

H. Nand Keolyar, Asst. Govt. Advocate—for the Crown.

Mullick, J. :—The complainant filed a complaint against his landlord and two other persons alleging that he had been beaten by them and that the landlord had taken four thumb impressions from him and two thumb impressions from his brother upon blank pieces of paper with the intention of using them hereafter.

The Sub-Divisional Magistrate before whom the complaint was lodged directed a police inquiry and finding that the charge of extorting the thumb impressions on blank pieces of paper with the intention that they might be hereafter converted into valuable security was false, he issued processes under S. 352, I. P. C., against Golab Khan and made the case over to a Bench of two Honorary Magistrates. The Honorary Magistrates after examining three witnesses thought that a case was made out against the Zemindar and one of his servants and they issued processes against these persons also. The trial was begun afresh and a number of witnesses were examined and cross-examined. At this stage the complainant applied to the District Magistrate and prayed that the case should be transferred to some other Court as the Bench Magistrates have no jurisdiction to try a charge under S. 384, I. P. C. The District Magistrate, without issuing any notice upon the accused, acceded to that request and he has transferred the case to another Magistrate empowered to try the case.

Now, it is clear that the omission to issue a notice upon the accused before ordering the transfer was certainly irregular. I cannot go so far as to say that it was illegal and that S 528, Cr. P. C., empowers a Magistrate to make an order of transfer only after issuing notice to the person affected. The section is general in its terms and although, as a rule of practice, it is desirable that notices should be issued, I cannot say that the law is mandatory upon the point and that the omission to issue notice is in itself a reason for setting aside an order of transfer. But upon the merits I think there is good ground for objecting to the learned District Magistrate's procedure. Here the case for the prosecution has been practically closed and even though the Bench Magistrates may have expressed the opinion that the graver charge under S. 384, was in their opinion not sustainable, I doubt whether that circumstance would be any justification for an Appellate Court's removing the case from the jurisdiction of the tribunal which was seized with it. It is not the object of S. 528 that a case should be transferred merely because it is going against a particular party. Here it will be open to the complainant, after the disposal of the case under S. 352, I. P. C., which is the only offence which the Bench Magistrates are investigating, to move the officer empowered to take cognizance thereof, to proceed with the trial of the charge under S 384, I. P. C.; and the proposal that the case should now be tried by another Court will really effect no saving either of time or trouble. In any event there will have to be a fresh trial by the officer to whom the learned District Magistrate has transferred the case.

I do not therefore think that, in the present instance, sufficient reason has been shown for removing the case from the file of the Bench Magistrates and transferring it to another Magistrate.

The Bench Magistrates have full jurisdiction to disbelieve the allegations as to extortion and to convict or acquit on the charge of simple assault and nothing should be done by the Appellate Court that may give rise to any impression that an attempt is being made to interfere with the judgment of the trial Court.

In these circumstances the order of the District Magistrate will be set aside and the case will proceed in the Court of the Honorary Magistrates from the stage at which it was left when the order of transfer was made.

Kulwant Sahay, J. :—I agree.

Order set aside.

A. I. R. 1923 Patna 229.

ADAMI, J.

Jiblal Teli and others – 2nd Party-Petitioners

v.

Gena Sahu and others – 1st Party-Opposite Party.

Criminal Rev. No. 658 of 1922, decided on 4th December 1922, against the order of the Sub-Divisional Mag. Madhubani, dated the 17th May 1922.

Criminal P. C., S 141—Failure of Jury without any fault of a party entitles him to alternative remedy under. S. 135, Cr. P. C.

If the Jury failed to return their verdict within the time fixed, the Magistrate has jurisdiction to make the order absolute. Where the Jury fails to perform its duty through no fault of the person against whom a conditional order has been passed, the person should be allowed to revert to the other alternative given him by S 135.

S. M. Tahir—for Petitioners.

Braj Kishore Prasad—for Opposite Party.

Adami, J.—This application is directed against an order of the Sub-divisional Magistrate of Madhubani passed under S 141 of the Cr. P. Code directing the petitioners to remove an obstruction in a certain road. Notice was issued by the Magistrate under S. 133 of the Cr. P. Code on the application of the first party. It was alleged that an obstruction caused by the second party prevented free access to a certain well which had been used by the public. On receipt of the notice the petitioners came forward and under S 135 applied for the appointment of a Jury. Certain members of the Jury were nominated by the parties and others by the Magistrate and the Sub-Registrar was appointed to be Foreman of the Jury with instructions to report by the 28th April. On the 28th of April, 1922, the report had not been received and time was extended till the 17th of May On this latter date the Sub-divisional Magistrate recorded in the order-sheet that the Foreman had sent back the papers stating that he was unable to meet the other members of the Jury as he was too busy. Thereupon the Sub-divisional Magistrate made the order absolute under S. 141 and directed the petitioners to remove the encroachment which had been reported to exist by the Sub-Overseer. Time was given for a report as to compliance with the order. On the 28th of July the Sub-Overseer reported that the encroachment had not been removed and the petitioners were then called upon to shew cause why they should not be prosecuted under S. 188, I. P. C.

Now, according to the provisions of the Code, the Sub-divisional Magistrate had jurisdiction to pass the order that he did. The petitioners had the choice under S. 135 of either showing cause against the order under S. 138 or to ask for the appointment of a Jury. They chose the latter alternative and under S. 141 if the Jury failed to return their verdict within the time fixed, the Magistrate had jurisdiction to make the order absolute.

Mr. Mohamed Tahir on behalf of the petitioners points out that the failure of the Jury to return their verdict was not due to any fault on their side and that the order absolute was passed without their knowledge; they did not come to know about it until the notice calling upon them to shew cause whey they should not be prosecuted under S. 188 was received by them. Had they known of the notice they would have applied to the Sub-divisional Magistrate either to extend the time or to allow them to shew cause and produce evidence.

Now, though, as I have said, there is no want of jurisdiction or improper exercise of jurisdiction in this matter, in the circumstances of the case, I think, that the petitioners should be given a chance of shewing cause and producing evidence to show that they had a right to make the encroachments complained about. It was due to no fault of their own that the Jury had failed to perform the task allotted to them I think that the Magistrate might, in the exercise of his discretion under S. 141, have given the petitioners a chance of shewing cause and satisfying himself that there was no reason to make the order absolute The case of *Kishori Lal Panuri* v. *The Emperor* (1), seems to indicate that where the Jury fails to perform its duty through no fault of the person against whom a conditional order has been passed, the person should be allowed to revert to the other alternative given him by S. 135. In this view, I set aside the order passed under S. 141 and direct that the Sub-divisional Magistrate give the petitioners a chance of showing cause under S. 135 and producing such evidence as may seem fit to them. The proceedings taken under S. 188 will be set aside.

Case remanded.

(1) (1903) 13 C. W. N 367.

* A. I. R. 1923 Patna 231.

DAWSON-MILLER, C. J., AND FOSTER, J.

Thakur Tajeswar Dutt---Plaintiff

v

Lakhan Prashad Singh etc. -Defendants.

F. A. No. 204 of 1919 decided on 12th December 1922, from Addl. Sub Judge, Muzaffarpur, dated 19th, November 1918.

(a) *Civil P. C.* (1908), *O. 32, R 4 (3)—C. P. C.* (1882) 443 *did not contain provision of rule 4—Certificated guardian not objecting will be deemed to have accepted guardianship though he might have absented—Breach of rule in S. 448, C. P. C.* (1882) *is not necessarily fatal*

Where the proposed guardian has been served with notice and objects to appear as such on behalf of the ward, the Court ought to appoint some other proper person to act as guardian.

The Code of 1882 contains no provision similar to that found in Order 32, R 4 (3) of the Code of 1908. In the absence of any such provision, where a person, has voluntarily applied to be appointed guardian of the person and property of a minor under the provisions of the Guardians and Wards Act, he is bound to deal with the Ward's property as if it were his own and to do everything which is reasonable and proper for the protection and benefit of the property entrusted to him. This obligation in fact arises under S. 27 of the Guardians and Wards Act If therefore the guardian has been served with notice of his appointment as guardian *ad litem* in a suit against his ward and chooses to take no steps to object to his appointment, the Court may well presume that he consents thereto, and the mere fact that he does not enter appearance or defend the action can afford no presumption that he repudiates his liability. 30 I. A 189, 30 Cal, 1021, Foll. The Court after satisfying itself of the fact of minority is bound to appoint a proper person to act on behalf of the minor in the conduct of the case, but, a defect in following the rules referred to in S. 443 is not necessarily fatal to the proceedings. 34 C. L. J. 302; 30 I. A. 182 F., 18 C. L. J. 18, 20 C L J. 469 *Dist.*

[P. 235, Col 2]

(b) *Contract Act, S. 74—Prior to* 1899 *increased future interest on default was not penal.*

S 74 was enacted in 1899, but under the law as it stood in 1897 a stipulation in a mortgage bond providing for increased interest in case of a breach was not regarded as penal if it referred to future interest only and was not retrospective.

[P. 236, Col. 2.]

S. Ahmad and *H. Prashad*—for Appellant.

C.C. Das and *S. Saran*—for Respondent.

Dawson-Miller, C. J. :—The suit out of which this appeal arises was instituted by the appellant, as plaintiff, on the 18th September 1915 to recover back from the principal respondents in this appeal certain properties purchased in execution of a mortgage-decree, obtained by them against the appellant in the year 1897 on the ground that the decree and the subsequent sale were obtained by fraud and collusion and that the appellant, then a minor, was not properly represented as defendant in the suit. The learned additional Subordinate Judge of Muzaffarpur, before whom the suit came for trial, by his judgment dated the 19th December, 1918, found that the appellant was properly represented as defendant in the mortgage-suit, that no fraud or collusion had been practised and that the present suit was barred by limitation. He accordingly dismissed the suit.

The facts out of which the present dispute arise are shortly as follows: In the year 1892 Thakur Rameshwar Dutt, the father of the appellant, executed a mortgage-bond in favour of Babu Kosal Singh, the father of the first defendant and Dund Bahadur Singh, and Ram Prasad Singh, the second and third defendants, whereby he hypothecated the properties mentioned in the first and second schedules of the plaint to secure a loan advanced by the mortgagees, with interest

In 1893 Thakur Rameshwar Dutt died leaving two widows. A few months later, in September or October 1893, the appellant was born to Musammat Bhagwati Kuer the younger of the two widows. There is a dispute as to the date of the appellant's birth, upon the determination of which the question of limitation depends, and which will be discussed later It is sufficient to say here that I am satisfied on the evidence, that the plaintiff was born in the year 1893 and came of age within 3 years of the date of the institution of the present suit and that it is not barred by limitation as found by the learned Subordinate Judge. After his father's death, and up to the year 1896, the appellant was under the guardianship of Rai Barmand Bahadur, a brother of his father's senior widow Musammat Jagu Kuer. In that year Bhagwati Kuer was appointed guardian of the appellant's person and property under a certificate of guardianship duly granted by the District Judge of Chapra.

On the 3rd August 1897 the mortgagees brought a suit before the Subordinate Judge of Saran to enforce their mortgage impleading as defendant the appellant, then a minor, through his mother and

guardian Bhagwat Kuer. No written statement appears to have been filed on behalf of the appellant in defence to the suit and on the 29th November 1897 the learned Subordinate Judge, after hearing the evidence in support of the plaintiffs' claim in that suit, pronounced judgment in their favour and passed a decree *ex parte* against the appellant. On the 14th May 1898 the decree was made absolute and in due course the mortgaged properties were sold in execution and purchased by the mortgagees. These proved insufficient to satisfy the decree and subsequently other ancestral properties of the appellant mentioned in schedule 3 of the plaint were sold in pursuance of a supplementary decree obtained against the appellant for the unsatisfied portion of the mortgage-debt.

The case made by the appellant in his plaint, and which he endeavoured to support by evidence, was that his mother, who was his certificated guardian in the year 1897, was a young, inexperienced and illiterate woman and entirely in the hands of her amlas who were friendly with the members of the respondents' family, and that the respondents, in collusion with the amlas, instituted the mortgage-suit and obtained an *ex parte* decree against the appellant by suppressing service of notices upon the appellant and his mother and that having won over the Court peon they caused him to make a false return of service. He further pleaded that all the subsequent proceedings, including the sale proclamation and sale, were tainted with fraud and no notices were served and that he, and presumably his mother who has been added as a *pro forma* defendant in the present suit, remained in ignorance of what had taken place until the year 1914 after he came of age. He further contended that the prices fetched at the execution sale were much below the real value of the property. He also pleaded that his mother never consented to be made his guardian *ad litem* in the mortgage suit and consequently he was not properly represented and that on this account the decree and subsequent proceedings were not binding upon him.

The evidence in support of the charges of fraud and collusion and non-service of processes was of the most vague and general character. It was denied by the respondents' witnesses and the learned Subordinate Judge refused, and in my opinion rightly refused, to believe it. The records of the case in so far as they have been preserved shew conclusively that notices were duly served and that all the proceedings were regular, and, although the appellant did not appear to defend the suit, there is no suggestion from first to last that the mortgage-bond upon which the suit was based was not a perfectly proper and valid instrument or that the circumstances were such that the mortgagor was not empowered to hypothecate the family property. In fact the learned Government Advocate, who appeared on behalf of the appellant in this appeal, abandoned the contention put forward in the trial Court that the decree was obtained by fraud or collusion or that the sale prices were inadequate.

He contends, however, first, that the suit is not barred by limitation, and, secondly, that the appellant was not properly represented in the mortgage-suit, as his mother, although appointed by the Court as guardian *ad litem* did not expressly consent to act as such and offered no defence to the action.

The first of the above questions depends mainly upon the evidence of Bhagwati Kuer as to the date of the appellant's birth. The learned Additional Subordinate Judge considered, upon the evidence, that the appellant had failed to make out that he came of age within three years of the 13th September 1915 when the suit was instituted. He was much influenced by the fact that the appellant's horoscope had not been produced and relied upon an answer given by his mother in cross-examination as showing that he was born at an earlier date than he alleged. It is the appellant's case that he was a posthumous son born about 4 months after the death of his father. This is spoken to not only by the widow but by a number of other witnesses and his father's death is stated to have taken place in the year 1893. The appellant explains the non-production of his horoscope by stating that it had been missing for a long period. The verbal evidence alone might perhaps be of no great weight but there are certain documents in the case which appear to my mind to fix the date of the plaintiff's birth beyond all reasonable doubt. In the application for obtaining certificate of guardianship under Act VIII of 1890,

filed by Bhagwati Kuer before the District Judge at Saran in 1896, before the mortgage suit was instituted, and when the present dispute as to the date of the appellant's birth could not have been foreseen, it is stated that the appellant's father died in 1300 F. (1893 A D.) and that on his death the appellant was born to Bhagwati Kuer on the 12th October 1893. There seems no reason why the information there given should have been false as there was apparently nothing to be gained by concealing the truth of the statement so made at a time when the facts must have been fresh in the memory of the applicant. Again, in 1902, on an application made for appointing a new guardian of the appellant in place of his mother, the order of the learned District Judge states that the minor will come of age in 1914 which again fixes his birth as in the year 1893 although the month of his coming of age is said to be September and not October as in the previous application. At a later period, in May 1910, Bhagwati Kuer appears to have stated that her son was then 18 years old. This appears from an order of the District Judge of Saran made two years later in May 1912 when the appellant applied to be released from guardianship. The learned District Judge on that occasion appears to have relied upon the later statement of Bhagwati Kuer rather than upon that which appears in the order made in 1902 and assuming that the appellant was born in September, he calculated that in May 1910, when Bhagwati Kuer said he was 18 years of age, he would in fact be 18 years and 8 months, and that consequently he would come of age in September 1912. He accordingly made an order that he should be released from guardianship on the 14th September 1912. It is not unusual for witnesses in this country to speak of a person as being so many years old, say 18 when in fact he is only in his 18th year, and if Bhagwati Kuer was a year out in her calculation when she made the statement as to her son's age in 1910 it would mean that he was then in his 17th year which would be completed in September 1910. The learned District Judge, however, considered upon the materials he had before him, that the appellant would come of age in September 1912 and released him from guardianship on that day. The appellant has apparently accepted this ever since and pleads that he in fact came of age on that date. Even so the suit was instituted within 3 years of that date. In my opinion the more reliable evidence is that given in 1902 which appears both in the application for appointment as guardian and in the Judge's order and which shews the appellant to have been born in 1893. Apart from the non-production of the horoscope the learned additional Subordinate Judge interpreted an answer given in cross-examination by Bhagwati Kuer as meaning that the appellant was born some 3 years earlier than 1893. It was, as he states, an admitted fact that Rameshwar Dutt, the appellant's father died in 1300 F. (1893 A. D.). It was also alleged that the appellant had a sister born about a year earlier than himself and the evidence was to the effect that Rameshwar Dutt died about 4 years after his marriage to Bhagawati Kuer. The widow in her evidence stated that the daughter died about a year after her birth, which was shortly before the appellant was born. After various questions upon these matters she was asked in cross-examination how many days after the death of her girl her husband died. Her answer was "in the 4th year." It is to my mind quite clear from the context that the witness meant that her husband died in the 4th year of her marriage. The learned Subordinate Judge, however, has taken this to mean that Rameshwar Dutt died 4 years after his daughter and if the appellant was born at or about the time when his sister died he must have been born 3 years or thereabouts before his father's death and as the father admittedly died in 1893 the appellant must have been born 3 years earlier It is quite obvious, to my mind, that the answer given was not intended to, and cannot, bear this interpretation. Such an interpretation would be at variance with the whole of the rest of the witnesses evidence. I am satisfied that the appellant came of age probably in 1914 and certainly not earlier than the 14th September 1912. It follows therefore that the suit is not time-barred.

With regard to the second point, although much of the matter originally upon the record in the mortgage suit has no longer been preserved the order sheet is still in existence and a certified copy has been put in evidence, From this it

appears that the plaint was filed on the 3rd August 1897 and notices were ordered to issue on the minor and his proposed guardian. The notices were duly served and the return of service is recorded. The order appearing on the 17th September is to this effect; "Notices upon the minor defendant and his proposed guardian duly served. No objection made. Let Mussammat Bhagwati Kuer be appointed guardian *ad litem* of the minor defendant and summons be issued upon her fixing the 25th November 1897. Plaintiff to file talbana and form of summons at once." On the 5th November the return of service of summons upon the defendant through his proposed guardian was filed and on the 25th November the entry is "The defendant on due service of summons does not appear. Case will stand *ex parte* against him." After taking evidence judgment was delivered on the same day and the suit decreed *ex parte*. It is quite clear from this that service of summons was duly made both in the first instance and again upon the application to appoint the guardian and that no objection was taken, and that then Musammat Bhagwati Kuer was appointed guardian *ad litem* of the minor by the Court. As already stated the Musammat was at that time the duly certificated guardian of the person and property of the minor appointed by competent authority in that behalf By S. 443 of Act XIV of 1882, the Civil Procedure Code then in force, it is provided that where the defendant to a suit is a minor the Court, on being satisfied of his minority, shall appoint a proper person to be guardian for the suit for such minor. As originally enacted the section proceeded thus, "The guardian for the suit is not a guardian of the person or property within the meaning of the Indian Majority Act, 1875, S. 3." This second paragraph was repealed by the schedule of the Guardians and Wards Act, (VIII of 1890) and by S. 53 of that Act the following paragraph was added to S. 443 of the Civil Procedure Code "Where an authority competent in this behalf has appointed or declared a guardian or guardians of the person or property, or both, of the minor the Court shall appoint him or one of them, as the case may be, to be the guardian for the suit under this section, unless it considers for reasons to be recorded by it, that some other person ought to be so appointed." It was incumbent therefore upon the Court, unless special reasons appeared to appoint Bhagwati Kuer the guardian of the minor for the suit and such appointment was made I am prepared to concede that where the proposed guardian has been served with notice and objects to appear as such on behalf of the ward, the Court ought to appoint some other proper person to act as guardian There is nothing, however, in the Act of 1882 which requires the Court to obtain the express consent of the guardian to act before appointing him in that capacity, and where a certificated guardian has been served with notice that it is proposed to appoint him the guardian *ad litem* of his ward and no objection is taken by the proposed guardian to this course, the Court might properly assume that he has no objection to the proposed appointment and in fact consents thereto. Whether more direct evidence of consent would be necessary under the provisions of the Code of 1882 in the case of the appointment of a guardian *ad litem* who was not the certificated guardian of the minor it is not necessary to consider as Bhagwati Kuer was in fact in 1897 the certificated guardian of the appellant.

There are, however, certain decisions relied upon by the appellant for the proposition that the consent of the proposed guardian *ad litem* is necessary before the Court is competent to make the appointment. *In Narsingh Narain* v *Sheikh Jahi* (1) it was held that where the mother of an infant defendant who was proposed by the plaintiff as guardian *ad litem* of her infant son never consented to act as such, it was not competent to the Court to appoint her as guardian That was a case under the Code of 1882. In that case it appeared that the father of the infant was alive and had been appointed guardian of the person and property of the infant under Act VIII of 1890 before the suit was instituted The appointment of the mother was therefore invalid both under the provisions of S. 443 of Act XIV of 1882, which require the duly constituted guardian to be appointed guardian *ad litem*, unless the Court considers for reasons to be

(1.) (1912) 15 C. L. J. 3.

recorded by it, that some other person ought to be appointed, and under S. 457 which prohibits the appointment of a married woman, and for these reasons the appointment was declared to be invalid. There is, however, a passage in the judgment to the effect that it is an elementary principle that no person can be appointed to act as guardian *ad litem* of an infant without his consent. For this proposition the case of *Judoo* v. *Chhagon* (2) was relied upon. The latter case, however, is merely an authority for the proposition that the Legislature did not intend to force the office of guardian *ad litem* on any person against his will and it appears from the report of the case that the proposed guardian had declined to act as such. Again in *Balkishan Lal* v. *Topeswar Singh* (3) it was held that no person could be appointed guardian *ad-litem* without his consent and that merely because a plaintiff chose to propose a certain person as guardian *ad litem* of an infant defendant it does not follow that such person is bound to accept the office. In that case, however, the person appointed was the father of the infant and his interest was found to be adverse to that of the son. In *Dinabandhu Nandi* v. *Mushuda Khatun* (4) it was also held that where a proposed guardian did not enter appearance, the Court ought to have been asked to appoint one of its officers as a guardian *ad-litem* to the infants. The case of *Purno Chandra Kunwar* v. *Maharaj Dhiraj Bijoy Chand Mahatab Bahadur* (5) is not in point as in that case the minor was sued without a guardian at all. The earlier case of *Narsingh Narain* v. *Sheikh Jahi Mistry* (1) was referred to with approval by the learned Chief Justice but as he pointed out the guardian in the case referred to was a married woman. She was therefore incapacitated from acting as guardian *ad-litem* and this was the only part of the decision in the earlier case which was material to the question before the Court in *Purno Chandra Kunwar* v. *Maharaj Dhiraj Bejoy Chand Mahatab Bahadur*. (5). It was not necessary to consider the question of consent. In *Narendra Chandra Mondal* v. *Jagendra Narain Rai* (6) the Calcutta High Court again expressed the view that a mother could not be appointed guardian *ad-litem* of her infant children without her express consent. In none of those cases was the guardian a person appointed or declared by competent authority the guardian of the person or property of minors within the meaning of S. 443 of the Code of 1882.

The question of the consent of a certificated guardian under the former Code arose directly for determination by the Calcutta High Court in the recent case of *Sarat Chandra Maiti* v. *Bibhabati Debi* (7). It was there held that the previous decisions, to some of which I have referred, did not apply to the case of a person who had already been appointed guardian of the person and property of a minor by competent authority within the meaning of S. 443 of the former Code, and that such a person might be properly appointed although he did not expressly consent thereto. In fact the section itself directs that where such a person exists the Court shall appoint him unless it considers, for reasons to be recorded, that some other person should be so appointed. It must be remembered that the Code of 1882 contains no provision similar to that found in O. 32, R. 4 (3) of the Code of 1908. It seems to me that, in the absence of any such provision, where a person, as here, has voluntarily applied to be appointed guardian of the person and property of a minor under the provisions of the Guardian and Wards Act he is bound to deal with the Ward's property as if it were his own and to do everything which is reasonable and proper for the protection and benefit of the property entrusted to him. This obligation in fact arises under S. 27 of the Guardian and Wards Act. If therefore the guardian has been served with notice of his appointment as guardian *ad-litem* in a suit against his ward and chooses to take no steps to object to his appointment, the Court may well presume that he consents thereto, and the mere fact that he does not enter appearance or defend the action can afford no presumption that he repudiates his liability. In the present case in spite of her disclaimer there is abundant evidence to

(2) (1881) 5 Bom. 306.
(3) (1912) 17 C. W. N. 219=15 C L. J. 446.
(4) (1913) 16 C. L. J. 318.
(5) (1913) 17 C. W. N. 549=18 C. L J 18.
(6) (1914) 19 C. W. N. 557=20 C. L. J. 469.

(7) (1921) 34 C. L. J. 302.

shew that Bhagwati Kuer was interesting herself as guardian of the minor on his behalf. In the execution proceedings it appears that she presented an application to have the sale set aside. Again we find her later, in 1900 and 1901, applying to the District Judge for permission to raise money for the purpose of discharging the encumbrances left on the property by her late husband. Some of these applications are signed on her behalf by her agents or servants but in many cases they are signed by herself in her own name and I have no doubt that both before and at the time of the suit in 1897 she was fully alive to her responsibilities.

The decision of *Walian* v. *Banke Behari Pershad Singh* (8) appears to me to support the view I have already expressed. In that case a minor was sued through his mother as guardian. No formal appointment of the mother as guardian was made by the Court under S. 443 of the Code of 1882. The Court, however, appears to have treated her as the guardian throughout. She did not appear in the suit and an *ex parte* decree was passed against the minor who subsequently sought to have the decree set aside or treated as not binding upon him upon the ground that he had not been properly represented in the suit, no formal order having been passed appointing his mother as guardian *ad litem*. Their Lordships of the Privy Council agreed with the High Court in the view that the Court after satisfying itself of the fact of minority was bound to appoint a proper person to act on behalf of the minor in the conduct of the case and emphasised the importance of following strictly the rules laid down in the section referred to, but differed from the High Court's decision in so far as it had held that a defect in following those rules was necessarily fatal to the proceedings. Although the guardian had not appeared in the trial Court she had subsequently preferred an appeal on behalf of the minor. Their Lordships held that the Court had in effect, although not formally sanctioned the appointment of the mother as guardian by treating her as such and that the defects of procedure alleged in the case were at most irregularities which under S. 578 of the Code then in force would not have furnished grounds for reversing the proceedings in the former suit if they had been raised upon appeal in that suit.

In the present case, in my opinion, there was not even a defect in the procedure but if there had been, the decision of their Lordships last cited would appear sufficient authority for holding that where the interests of the minor had not been prejudiced, and there is nothing to shew any prejudice in this case, the defect is not fatal.

It was suggested during the argument that if Must. Bhagwati Kuer had appeared, she might have asked the Court to treat the stipulation in the mortgage bond providing for increased interest in case of a breach as penal and to refuse the increase, S. 74 of the Contract Act was relied on. This section was enacted in 1899 but under the law as it stood in 1897 a stipulation in a mortgage bond providing for increased interest in case of a breach was not regarded as penal if it referred to future interest only and was not retrospective. This point therefore would not have been open and no other defence has been suggested. In my opinion this appeal should be dismissed with costs to the respondents who have appeared.

Foster, J.—I agree.

Appeal dismissed.

(8) (1903) 30 Cal. 1021=30 I. A. 182=8 Sar 512 (P. C.)

A. I. R. 1923 Patna 286.

BUCKNILL AND KULWANT SAHAY, JJ.

Mohit Narayan Jha—Petitioner.

v.

Kamal Nath Jha etc.—Opposite-Party.

Mis. A. No. 3 of 1922, decided on 1st December 1922 from an order of Sub. J., Darbhanga dated 19th November 1921.

Lease—Specific Performance—Lessee entitled to renewal, being in possession is entitled to specific performance compelling lessor to grant renewal.

In paragraph 1 of the Patta it was provided that the lease was for a term of seven years from 1322 to 1328 Fs. Then paragraph 5 ran as follows; "The period of Thikka under this Patta will expire in 1328 (twenty-eight) Fs. I, the executant, have agreed that I shall execute a fresh Patta for seven years from 1329 (twenty-nine) to 1335 (thirty-five) Fs. with respect to all the Mauzas and the lands leased out on the above amount of Jama and on the condition of this deed and that possession of the Thikadar will continue up to 1335 Fs. etc."

***Held*, there was a clear agreement between the parties that after the expiration of the first period of seven years, the lessee was to continue in possession for a term of another seven years on the same condition as before and therefore the period of the Thika was to extend up to the year 1335 Fs. The lessee being in possession, he could if he liked, enforce specific performance of the agreement to execute a fresh Patta. 24 C. W. N 468 Foll.** [P. 237, Col 2, P. 238, Col 1.]

Jayaswal and *L. K. Jha*—for Appellant

P. N. Sinha and *Murari Prashad*—for Respondents.

Kulwant Sahay, J.—This is an appeal against the order of the Subordinate Judge of Darbhanga dismissing the appellant's objection to the delivery of possession of certain immoveable properties in execution of a decree. The facts leading up to the execution in question are shortly these:—

One Shivanath Jha executed a Thicca patta on January 7th, 1915 in respect of certain properties in favour of the appellant Mohit Narain Jha. Shivanath Jha died in 1917 leaving two widows Mt. Kunto Dai and Mt. Bhawani Dai. In the year 1918, the respondents Kamal Nath Jha and others instituted a suit in the Court of the Subordinate Judge of Darbhanga for declaration of their title as heirs of Shivanath Jha and for recovery of possession of the properties left by him. In this suit the two widows were the defendants 1st party and the lessee (the present appellant) was the defendant 2nd party. This suit was decreed on August 31st, 1920 and the material portion of the decree was in the following terms: "It is ordered and decreed that the suit is decreed and title of the plaintiffs over the property in suit is declared. The plaintiffs will get possession through the Thikadars during the Thika period (*i. e.*, they will get rent from the Thikadar during the period of the Thika) and afterwards they will get Khas possession over the property in suit". The plaintiffs executed the decree and obtained symbolical possession as against the widows in December 1920 and the appellant the lessee continued in possession. On September 17th, 1921 the plaintiffs decree-holders made the application for delivery of possession as against the lessee on the ground that the period of the lease had expired in the year 1328 Fs. and the lessee objected on the ground that the period of lease did not expire in 1328 but extends up to 1335. The Subordinate Judge has dismissed the objection holding that the period expired in the year 1328 and the lessee appeals against this order.

The only substantial question for decision in this appeal is, what was the period of the Thika stated in the decree under execution? In order to determine this point it is necessary to consider the terms of the Patta granted by Shivanath Jha. In paragraph I of the Patta it is provided that the lease was for a term of seven years from 1322 to 1328 Fs. Then paragraph 5 runs as follows: "The period of Thika under this Patta will expire in 1328 (twenty-eight) Fs. 1, the executant have agreed (original torn—Sarat Kiya?) that I shall execute a fresh Patta for seven years from 1329 (twenty-nine) to 1335 (thirty-five) Fs. with respect to all the Mauzas and the lands leased out on the above amount of Jama and on the condition of this deed and the possession of the Thikadar will continue up to 1335 Fs. and at the time of Sir possession (of me, the executant) the said Thikadar or his heirs and representatives will give up his or their possession on the 30th Bhado, 1335 Fs. and at that time whatever rent, Naqdi or in kind, will be payable by the tenants, I, the executant, shall allow a set-off of the same towards the rent."

Now the plain meaning of this paragraph in the Patta is that there was a clear agreement between the parties that after the expiration of the first period of seven years the lessee was to continue in possession for a term of another seven years on the same condition as before and therefore the period of the Thika was to extend up to the year 1335 Fs. It is urged by the learned Vakil for the respondents that under the terms of the Patta the lease for the second term of seven years was to come into effect only on the execution of a fresh Patta and as no such Patta was executed the appellant is not entitled to remain in possession after 1328. In my opinion this contention is not well-founded. There was a clear agreement between the parties that the lessee was to continue in possession for a fresh term of seven years. The lessee is in possession. He can if he likes, enforce specific performance of the agree-

ment to execute a fresh Patta and to this, the respondents can have no defence. In my opinion the position of the appellant is the same as if a fresh document had been executed. I am supported in this view by the principle laid down in the case of *Shyam Kishore Dey* v. *Umeshchandra Bhattacharia*(1). In that view of the case I am of opinion that the respondent decree-holder is not entitled to recover Khas possession until the lease expires in 1335 Fs.

Two other points were taken by the learned counsel for the appellant *viz.*, that the decree having been already executed, the present application for execution could not be entertained and that the execution could not proceed without a notice under O. 21, R. 22, C. P. C. In my opinion there is no substance in these points.

The result is that the appeal is allowed, the order of the lower Court is set aside and it is declared that the appellant is entitled to retain possession under the Thika up to the year 1335 Fs. The respondent will pay the costs of the appellant in this Court and in the Court below.

Bucknill, J. :—I agree.

Appeal allowed.

(1) (1919) 24 C. W. N 463.

*A. I. R. 1923 Patna 238.

MULLICK AND KULWANT SAHAY. JJ.

Gajo Singh and others ... Accused — Petitioners

v.

Emperor ... Opposite-Party.

Cr. Rev No. 684 of 1922, decided on 15th December 1922, from an order of the S. J. Monghyr dated 23rd October, 1922.

(a) *Criminal P. C., S. 298—Circumstances to be considered indicated.*

Whether the evidence has been adequately criticised by the Court must depend upon the special circumstances of each case such as the constitution of the jury, their intelligence and education, the elaboration with which the case has been conducted on both sides, the skill of the defence and a variety of other circumstances. It is open to the Judge to express his own opinion of the evidence, provided he cautions the Jury that they are not bound by that opinion.

(b) *Crimn. P. C., S. 439—In revision against appellate judgment of Sessions Judge applicant can only show how Sessions Judge decided wrongly.*

Although a motion for revision does lie against the Sessions Judge's order, it is not the intention of the law that the motion shall be heard by High Court as an appeal; for if that were the case, then there would be no object in giving a right of appeal to the Sessions Judge at all. All that the petitioners can claim in an application for revision is a right to show that the Sessions Judge has decided wrongly.

[P 239, C. 1]

G. C. Pal and *S. S. Bose*—for Petitioners.

Assistant Government Advocate—for the Crown.

Mullick, J.—This application for revision arises out of the alleged kidnapping of Musammat Bhukni, a Babhan girl, aged 11 or 12 years on the 15th April last. It is alleged that the accused Gajo Singh, Ramtahal Singh, Kuer Singh, Sahu Singh and Baso Singh seized her on the bank of the river Chandail in her village where she had been taken to have a bath in connection with the Mangrore ceremony for her approaching marriage with one Lalbehari of her village which was to take place on the following Monday. She was then carried across the river and the above accused were joined by Chako Singh, Dhako Singh and Jamina Singh of Mauza Pine. It is alleged that the intention of her assailants was to marry her to Chako Singh. Information was given that night by her brother Sheodhari to the Police and Mauza Pine was surrounded by a Police force on the following morning. Bhukni is said to have been detained by her assailants in various places in Mauza Pine till early on Monday morning when she was taken back to her village and left there. Her marriage with Lalbehari was celebrated as arranged on the evening of Monday the 17th.

The Assistant Sessions Judge agreeing with the unanimous verdict of the jury has found the first set of accused guilty under Ss. 147, 363 and 363 read with 149, I.P.C. and sentenced them under Ss. 363 and 363 read with 149 I. P. C. to rigorous imprisonment for two years each. The three accused in the second set have been sentenced under S. 363 read with 114 and 368, I. P. C. to rigorous imprisonment for two years each. There was an appeal to the Sessions Judge on the ground of misdirection. The learned Judge after dealing carefully with the charge of the Assistant Sessions Judge found that there had been no misdirection which had caused a miscarriage of justice and he has dismissed the appeal.

The present application before us is for the revision of the order of the Sessions Judge. The learned Vakil for the

petitioners has taken us through the learned Asst. Sessions Judge's charge and has characterised it as being throughout hostile to the accused. The learned Vakil has also taken exception to the manner in which the learned Judge has expressed his own opinion of the evidence for the prosecution. Now, whether the evidence has been adequately criticised by the Court must depend upon the special circumstances of each case such as the constitution of the jury, their intelligence and education, the elaboration with which the case has been conducted on both sides, the skill of the defence and a variety of other circumstances. Here I find that the trial lasted 10 days before a Jury of two Muhammadans and three Hindus all of whom were apparently intelligent and educated men and some of whom were certainly acquainted with local conditions in rural districts. I cannot, after reading through the evidence and the charge, say that any matter of prime importance has been omitted. It was open to the Judge to express his own opinion of the evidence provided he cautioned the Jury that they were not bound by that opinion, and in the present case this injunction has been carefully observed by the Assistant Sessions Judge. I think, therefore, the application must be rejected.

I desire to observe that the learned Sessions Judge in disposing of the appeal has carefully dealt with all the points of misdirection taken before him and that although a motion for revision does lie against the Sessions Judge's order, it is not the intention of the law that the motion shall be heard by us as an appeal; for if that were the case, then there would be no object in giving a right of appeal to the Sessions Judge at all. I think all that the petitioners can claim in an application for revision in a case of this kind is a right to show that the Sessions Judge has decided wrongly. They start with a heavy onus, and approaching the case from that standpoint I have no hesitation in rejecting the application.

The learned Vakil for the petitioners has made an appeal to us for the reduction of the sentence; but having regard to the fact that the girl belongs to the Babhan caste and that even though she was not molested, her removal for two nights to another village and out of the custody of her guardian is likely to cause considerable social injury. I do not think we should interfere. The object of the petitioners was to marry the girl to Chako Singh, but that is not any ground for mitigation.

Kulwant Sahay, J.—I agree.

Application rejected.

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* **A. I. R. 1923 Patna 239.**

DAS AND ADAMI, JJ.

Sheonandan Chowdhury—Appellant

v.

Debi Lal Chowdhury and others—Respondents.

Appeal No. 161 of 1922, decided on 5th January 1923, from an order of Sub. J., Muzaffarpur, dated 16th May, 1922.

(a) Civil P. C., S 141—Execution-proceedings.

S 141 of the Code does not operate so as to make the provisions of Or. 9, R 4 and all cognate provisions applicable to execution-proceedings. (Case-law discussed). [P. 241, Col. 1.]

(b) Civil P. C., O 21, R 100—O. 9, R 9 applies to application under O 21, R 100 as it is not execution proceeding.

An application under O. 21, R. 100 cannot be regarded as an application in execution; therefore by force of S. 141, O. 9, R. 9 applies to applications under it. [P. 241, Col. 1.]

(c) Civil P C, O 9, R 9; O. 21, R. 100—Applicability.

O. 9, R. 9 applies by force of S. 141 to a proceeding under O. 21, R 100. [P. 241, Col 2.]

S. M Mullick and *S. N. Ray*—for Appellant.

S. C. Mitra and *N. K. Prasad II*—for Respondents.

Das, J—This appeal arises out of an order passed by the learned Subordinate Judge of Muzaffarpur on the 16th of May, 1922. The respondents are the purchasers of the property in dispute at a sale held in execution of their decree. The appellant applied under the provision of O. 21, R. 100 of the Code for being put in possession of the disputed property. He contended that he was in possession of the property on his own account and he complained that he was dispossessed of the property by the respondents in execution of a decree which they had obtained against another person. This application was dismissed for default on two different occasions. Ultimately it was restored under the provisions of O. 9, R. 4 of the Code; and on the 5th August, 1916, the claim of the appellant

was allowed in the absence of the respondents. On the 2nd October 1920, the suit, out of which this appeal arises, was instituted by the respondents for recovery of possession of the property in dispute. The suit was resisted by the appellant on two grounds, first, on the ground that it was barred by limitation; secondly, on the ground that the suit was not maintainable as a previous suit by the plaintiff was allowed to be improperly withdrawn by the Court. The Court of first instance thought that the suit was well within time; but it came to the conclusion that the order allowing the plaintiff to withdraw the suit with liberty to bring a fresh suit was without jurisdiction and in this view it dismissed the plaintiff's suit. On appeal, the learned Subordinate Judge agreed with the view of the Court of first instance that the suit was not barred by limitation, but he differed from that Court as to the effect of the order allowing the plaintiff to withdraw the suit with liberty to bring a fresh suit. He thought that however erroneous that order might have been, it could not be said that the order was without jurisdiction He accordingly allowed the appeal and remanded the case to the Court of first instance for disposal according to law. The present appeal is against the order of the learned Subordinate Judge remanding the case for trial.

The only question which we have to consider is whether the Courts below are right in holding that the suit is not barred by lapse of time. The suit is *prima facie* governed by Art 11-A of the Limitation Act and the period of limitation provided in Art. 11 A is one year from the date of the order. The suit was obviously instituted in order to avoid the effect of the order passed on the 5th August 1916. The suit itself was instituted on the 2nd October 1920 *Prima facie* the suit is barred by limitation; but it was argued on behalf of the respondents that the order of the 5th August 1916 is a nullity and that he is entitled to disregard that order and bring his suit within 12 years from the date he was dispossessed by the defendants. According to the learned Vakil O. 9, R. 4 is not applicable to a proceeding under O. 21, R. 100 of the Code. He accordingly argues that the Court had no jurisdiction to restore the application which was presented under O. 21, R. 100 after it had been dismissed for default. The learned Vakil maintains that, that being so, the order of the 5th August 1916 allowing the claim of the defendants was without jurisdiction and null and void. The argument advanced on behalf of the respondents is supported by the decision of the Calcutta High Court in the case of *Hari Charan Ghose* v. *Manmatha Nath Sen* (1) but is negatived by the decision of this Court in *Satya Narain Lal* v. *Govind Sahay* (2). The learned Vakil argues before us that the decision in *Satya Narain* v. *Gobind Sahay* (2) has been overruled by the decision of the Special Bench in the case of *Bhubaneswar Prashad Singh* v. *Tilakdhari Lal* (3). According to the contention of the learned Vakil we are conclusively bound by the decision in the case of *Bhubaneswar Prashad Singh* v. *Tilakdhari Lal* (3) and that we are bound to hold that O. 9, R 4 is not applicable to a proceeding under O 21, R. 100 of the Code.

It is admitted by Mr. Susil Madhab Mullick on behalf of the appellant that O. 9, R. 4 of the Code of Civil Procedure does not, of its own force, apply to a proceeding under O. 21, R. 100; but he contends that he is entitled to apply O. 9, R. 4 to a proceeding under O. 21, R. 100 by force of S. 141 of the Code. S. 141 of the Code runs as follows :—" The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any Court of civil jurisdiction". In the case of *Thakur Prashad* v. *Fakirullah* (4) the Judicial Committee pointed out that the proceedings spoken of in S 141 of the Code include original matters in the nature of suits such as proceedings in probate, guardianships and so forth and that they do not include executions. It was also pointed out by the Judicial Committee that both from the Code itself and the provisions of the Limitation Act, the legislature contemplated that there might be a succession of applications for execution and that it was unlikely that the

(1) (1914) 41 Cal. 1=19 I.C. 633=18 C. W. N. 848.
(2) (1918) 3 P. L. J. 250=48 I. C. 951=4 P. L. W. 109
(3) (1919) 4 P. L. J. 185=49 I. C. 617 (F. B.).
(4) (1895) 17 All. 106=22 I. A. 44=5 M. L. J. 3=6 Sar. 524 (P. C.).

legislature should make O. 9, R. 4 applicable to an execution proceeding since it was open to the decree-holder to make a succession of applications for execution. I regard the decision of the Judicial Committee in *Thakur Prashad* v. *Fakirullah* (4) as establishing that S. 141 of the Code does not operate so as to make the provision of O. 9, R. 4 and all cognate provisions applicable to execution proceedings.

But this conclusion, in my opinion, does not decide the present case. The question which we have to consider is whether a proceeding under O. 21, R. 100 is a proceeding in execution. As to this I have expressed my opinion very frequently to the effect that an application under O. 21, R. 100 cannot be regarded as an application in execution. I have stated the reasons so fully in a recent case which came up before my learned brother and myself that I do not think it necessary to repeat them. The case of *Hari Charan Ghose* v. *Manmatha Nath Sen* (1) does indeed support the arguments of the respondents; but that case assumed, rather than decided, that an application under O. 21, R. 100 is an application in an execution proceeding. The case of *Haricharan Ghose* v. *Manmatha Nath Sen* (1) is confessedly based on the decision of the Judicial Committee in the case to which I have referred; but all that the Judicial Committee decided is that the proceedings spoken of in S. 141 of the Code original matters in the nature of suits and that they do not include execution. The other ground upon which *Haricharan Ghose* v. *Manmatha Nath Sen* is based is that the order in a proceeding under O. 21, R. 100 is not conclusive, but is subject to the right of the person aggrieved to bring a suit; but it seems to me that the right to apply under O. 21, R. 100 does not stand on the same footing as a right to maintain a suit, if the application under O. 21, R. 100 is dismissed. All that the applicant has to establish in a proceeding under O. 21, R. 100 is that he was possessed of the property on his own account or on account of some other person than the judgment-debtor; but if he is compelled to institute a suit he has to establish the right which he claims to the present possession of the property. The question in my opinion is not solved by a reference to the provision of O. 21, R. 103 of the Code.

The question came up for decision in our Court in *Satya Narain* v. *Gobind Sahay* (2). Mr. Justice Roe in delivering the judgment of the Court very properly pointed out that all that was decided by the Judicial Committee in *Thakur Pershad* v. *Fakirullah* (4) was that O. 9, R. 9 was not applicable to proceedings in execution and the learned Judge thought that the decision of the Judicial Committee did not support the conclusion that O. 9, R. 9 was not applicable to a proceeding under O. 21, R. 100. The learned Judge pointed out that an application under O. 21, R. 100 is in the nature of a summary suit and that in that view the provision of O. 9, R. 9 should apply to such an application. In my opinion, the case of *Satya Narain Lal* v. *Gobind Sahay* (2) was correctly decided and is binding on this Court. It was strongly pressed before us that *Satya Narain Lal* v. *Gobind Sahay* has been overruled by the decision of the Special Bench in the case of *Bhubaneshwar Prashad* v. *Tilakdhari* (3); but I am unable to take the view that it was within the scope of the decision in the Special Bench case to overrule *Satya Narain Lal* v. *Gobind Sahay*. What is actually decided in the Special Bench case is that O. 9, R. 9 does not apply to an application under O. 21, R. 90 of the Code. No doubt the arguments employed by the learned Judges deciding the case of *Bhubaneshwar Prashad Singh* v. *Tilakdhari* (3) apply with equal force to an application under O. 21, R. 100; but, though the decision itself is binding on me, I do not think that I ought to be compelled to accept that which logically follows from that decision as equally binding on me, especially as I consider that the decision in *Bhubaneshwar* v. *Tilakdhari* (3) needs re-examination. The whole problem is whether O. 9, R. 9 applies by force of S. 141 to a proceeding under O. 21, R. 100. Now an application under O. 21, R. 100 is not an application in execution proceedings, but is an original matter in the nature of a suit, and in my opinion the decision of the Judicial Committee in the case cited is an authority for the proposition that O. 9, R. 9 would apply by force of S. 141 to original matters in the nature of suits.

I am unable to look upon the order of the 5th August 1916 as a nullity. That being so, the suit, which was instituted on

the 2nd October 1920, was clearly barred by limitation under the provisions of Art. 11-A of the Limitation Act. I would accordingly allow the appeal, set aside the order passed by the learned Judge in the Court below, and restore the decree passed by the Court of first instance The appellant is entitled to his costs throughout.

Adami, J. : —I agree.

Appeal allowed

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*A. I. R. 1923 Patna 242 (1)

ROSS, J.

Ram Sunder and another —Petitioners

v.

Amrit Pajiyar etc.,—Opposite Party.

Civ. Rev. No. 199 of 1922, decided on 9th January 1923.

Limitation Act, Art 85—Price of goods was to be paid from time to time.—Vendor debited to vendee price on various dates—Occasionally balance was in favour of vendee—This is not mutual account

According to the allegations in the plaint business was conducted between the parties on condition that the defendants purchased grain from the plaintiffs' gomashta and paid the price thereof from time to time. The plaint alleged that the cause of action arose on various dates, these dates being the dates on which the different items were debited in the account *Held* ; this is not mutual account even if there may have been occasionally a balance in the defendants' favour. [P. 242, C. 1]

Manohar Lal—for Petitioners.

Md. Hasan Jan—for Opposite-Party.

Ross, J. :—This is an application by the defendants in a suit brought in the Small Cause Court of Darbhanga. The plaintiffs carry on business in Darbhanga and the defendants carry on business in Allahabad. According to the allegations in the plaint business was conducted between the parties on condition that the defendants purchased grain from the plaintiffs' firm by means of letters and through the defendants' gomashta and paid the price thereof from time to time. The suit was for a sum of Rs. 435 due on the balance of the account. The plaint alleges that the cause of action arose on various dates, these dates being the dates on which the different items were debited in the account. The learned counsel for the petitioners points out that six items on debit side and two items on credit side were barred by time when the suit was brought and that if these items are excluded there is actually a balance in the defendants' favour. The learned vakil for the opposite party did not contest the facts but argued that this was a case governed by Art. 85 of the Limitation Act being a claim on the balance of a mutual, open and current account where there have been reciprocal demands between the parties. It is clear on the authority of *Ram Prasad* v. *Harbans Singh* (1) and *Velu Pillai* v. *Ghose Mohammad* (2) that this is not mutual account even if there may have been occasionally a balance in the defendants' favour as appears from some of the letters. It is unnecessary to discuss the other points and the suit must clearly therefore fail. The application is allowed and the suit is dismissed with costs Hearing fee one gold mohur.

Application allowed.

(1) (1907) 6 C. L. J. 158.
(2) (1894) 17 Mad 293=4 M. L. J. 140.

** A. I. R. 1923 Patna 242 (2).

DAS AND ADAMI, JJ.

Pande Satdeo Narain —Plaintiff-Appellant

v.

Ramayan Tewari and others—Defendants-Respondents.

F. A. No 59 of 1919 decided on 3rd January 1923, from Addl. Sub J., Saran, Dated 14th September 1918.

(a) Civil P. C. O 9, R 13—Suit to set aside ex parte decree lies not for want of or irregularity in service but if the whole suit was a fraud

Though a suit does not lie to set aside a decree and a sale in execution of such decree on the ground that none of the processes in the suit or in execution was served upon the plaintiff, such a suit is maintainable if the allegations in the plaint amount to an attack, not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit in which the *ex parte* decree was obtained as being a fraud from beginning to end 29 Cal. 895 Fol.

[P 244 Col 2]

(b) Decree—Setting aside—Fraud—Absence of service by itself does not indicate fraud but absence of foundation for suit or presence of fair defence indicate fraud.

Although the Court will not regard an allegation that there was a failure on the part of the plaintiff to serve process on the defendant as an allegation of fraud, the case will assume a different aspect if there are allegations in the plaint which suggest that there was no foundation at all for the suit or that there was a fair defence to the suit. Such allegations, if established will instantly raise the presumption that the failure on the part of the plaintiff to serve processes on the defendant or to take steps to have a guardian appointed for the minor, was deliberate and was part of a carefully planned

campaign to snatch a decree in the absence of the defendants, 5 A. C. 697 ; 15 Cal 538 ; Foll [P. 245, Cols. 1, 2.]

(c) *Hindu Law—Partition by mother in favour of daughters—Daughter's son is bound by deed if he does not claim as reversioner.*

Where the daughter's son does not sue as a reversioner but under a deed of partition executed by his maternal grandmother in favour of the daughters, he is bound by the deed. [P. 245, Col. 2]

(d) *Mortgage—Integrity—Redemption of a portion receiving half amount from half owner does not break integrity of mortgage.*

It does not necessarily follow that because the mortgagee received half the mortgage debt from one in whom one half of the equity of redemption became vested subsequent to the mortgage, he necessarily consented to the integrity of the mortgage being broken up [P. 246, Col 1.]

(e) *Erroneous judgment cannot, but irregular judgment can be ignored in collateral proceeding if merits are affected while void judgment is nullity and voidable judgment can be set aside by the Court itself or by a superior Court.*

An erroneous judgment is a voidable judgment, for, the argument that a judgment is erroneous assumes both the regularity of the procedure and the jurisdiction of the Court to render it. An erroneous judgment is one which though regularly rendered, is contrary to law or facts, and is therefore liable to be reversed by an appellate tribunal.

An irregular judgment is also a voidable judgment ; but the distinction between an erroneous judgment and an irregular judgment is this that whereas an erroneous judgment will always be reversed by an Appellate Court, an irregular judgment will be reversed in appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceedings has affected the merits of the case between the parties.

A void judgment, on the other hand, is a judgment where there was a total lack of jurisdiction in the Court to render it. Such a judgment is a mere nullity. It is not necessary to set it aside.

Where there does exist a jurisdiction but, in the exercise of the jurisdiction, the Court has acted illegally or with material irregularity, the judgment is voidable, and it can be vacated in an appropriate proceeding either by the Court which rendered it, or under C P. C. by the Appellate Court, either in appeal or in revision. [P. 247, Cols. 1, 2.]

(f) *Jurisdiction—Kinds.*

Jurisdiction falls under four different heads (1) territorial jurisdiction, (2) pecuniary jurisdiction (3) jurisdiction of the subject-matter, and (4) jurisdiction of the person. [P. 247, Col. 2]

(g) *Jurisdiction—Jurisdiction as to person, if it exists, is not ousted by mode of bringing the person before Court.*

Jurisdiction as to person is conferred on the Court by suing the person in a Court competent to try the cause as against that person, not by the mode which the Court adopts in bringing the person before the Court.

Where the condition for the assumption of jurisdiction as against a person exists, the authority of the Court to try and determine the cause as against him is complete, and the mode which the Court adopts to bring that person before the Court affects the exercise of jurisdiction, and not its existence 21 Cal. 66 ; 25 Bom. 387 ; Foll. [P. 247, Col. 2 ; P. 248, Col 1.]

The fact that the Court disobeyed any particular provision of the statute is not sufficient to establish that there was not jurisdiction in the Court to render judgment in the case. But where the disobedience leads to this result that, as a consequence of the disobedience there is no proper party to the suit, the case is different [P. 249, Col. 2.]

(h) *Civil P. C., O. 32, R. 3 (4)—Representation of minor in Court—Where qualified guardian appears for minor irregularity in his appointment does not justify setting aside decree in another suit unless merits are affected but disqualified guardian renders decree void—Minor,*

Where on the face of the record, a person qualified to act as the guardian, appears as a guardian of the minor for the suit, the Court has no power in another suit brought for the purpose of impeaching the validity of the decree, to examine the evidence in order to see whether notices under O 32, R. 3 (4) were, in fact, served, or whether the person nominated as guardian did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merits of the case.

But where the record, on the face of it shows that the minor was not represented by a guardian for the suit, or was represented by a guardian disqualified, under the express provisions of the statute, from acting as guardian, the position is the same as if the minor were not a party to the suit and the judgment rendered by the Court is without jurisdiction and null and void (Case-law discussed)

Susil Madhab Mullick and *N. N. Sen*—for Appellant.

Ali Imam and *Sambhu Saran, H. Prasad* and *S. N. Bose*—for Respondents.

FACTS—One Bisesear Prasad Pande died sometime in Jeth 1293, leaving behind him a widow Khikhinda Koer and two daughters, Radho Kuer and Lalta Kuer. The plaintiff was the son of Lalta Kuer and the suit out of which this appeal arose, was instituted by him to set aside a decree, dated the 13th December, 1909, and the sale of certain properties held in pursuance of the decree. On the 27th November 1896, Khikhinda Koer executed a mortgage-deed in favour of Polak Tewari, the father of Deonagar, defendant 1, to secure an advance of Rs 1,900 made by the latter to the former. On the 2nd May 1897, Khikhinda Koer divided the estate of her husband between her two daughters by a deed which was referred to as the deed of partition, and expressly provided that all the existing debts shall be paid by her two daughters in equal shares.

On the 19th April 1909 Deonagar, the son of the original mortgagee, sued upon his mortgage and cited various persons as defendants to the action including Khikhinda Koer, Radha Koer and the plaintiff, his mother Lalta Koer having died shortly after the execution of the deed of partition. The plaintiff was cited as the third defendant and was described in the cause-

title as the minor son of Srimati Lalta Koer, daughter of Babu Bisseswar Prosad Singh through his father and guardian Hardeo Narain. The order sheet of the mortgage-suit showed that on the 20th April, the Court directed notice to issue for the appointment of guardian, and that on the 12th May 1909, the Court appointed Hardeo Narain as the guardian *ad litem* for the minor-defendant, the plaintiff in this action.

There was, however, no appearance on behalf of the minor-defendant, and, on the 23rd December, 1909, the Court passed a mortgage-decree in favour of the plaintiff to that suit. On the 6th December 1910, the properties were put up for sale, and were purchased by the decree-holder, Deonagar. Deonagar (defendant 1) conveyed the properties to Baldeo Sahay (defendant 2) and Baldeo Sahay has granted a *sarpeshgi* in respect of some of the properties so conveyed to defendants 3 to 5

On the 1st November 1913, the plaintiff through his father as guardian applied for setting aside the *ex parte* decree That application was refused by the trial Court on two grounds, first, on the ground that the summons had been duly served on the applicant, and secondly, on the ground that the application was barred by limitation.

The plaintiff preferred an appeal from the order of the Court of first instance, and the appellate Court on the 8th February, 1918, dismissed the appeal on the ground that the application was barred by limitation. The present suit was then instituted on the 10th July 1916 for setting aside the *ex parte* decree dated the 23rd December 1909 and the sale held in pursuance of that decree and for consequential reliefs

Das, J.—(After stating facts as above His Lordship proceeded.)

The material allegations in the plaint are, first, that none of the processes in the suit or in execution were served on the plaintiff or on his guardian, secondly, that he was not properly represented in the mortgage-action, and no legal steps were taken for the appointment of a guardian *ad litem*, thirdly, that the proceedings were fraudulent from start to finish, fourthly, that there was no legal necessity in respect of the mortgage bond executed by Khikhinda Koer, and lastly, that his mother Lalta Koer paid her portion of the mortgage-debt together with interest thereon, and that, in spite of such repayment, the mortgagee "prayed for the sale of the properties of Lalta Koer and made the plaintiff defendant No. 3 in that suit."

The learned Subordinate Judge found the issue as to legal necessity in favour of the plaintiff; but he thought that the order of the appellate Court dated the 8th February 1913 operated as *res judicata* so as to prevent him from giving the appropriate relief to the plaintiff. In the result, he declined to consider whether summons had in fact been served on the plaintiff in the mortgage-action, and he dismissed the plaintiff's suit.

The view taken by the learned Subordinate Judge was obviously wrong; for it is settled law that, though a suit does not lie to set aside a decree and a sale in execution of such decree on the ground that none of the processes in the suit or in execution was served upon the plaintiff, such a suit is maintainable if the allegations in the plaint amount to an attack, not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit in which the *ex parte* decree was obtained as being a fraud from beginning to end; *Khagendra Nath Mohata* v. *Pran Nath Roy* (1).

This Court, in appeal, remanded the case to the Court of first instance, for trial of the issue whether notice under O 32, R. 3 was in fact served on the plaintiff and on his proposed guardian. The learned Subordinate Judge has taken further evidence, and his finding is that processes were not served on the plaintiff and on his guardian in accordance with law.

The first question that arises for our consideration is whether, on the allegations made in the plaint the plaintiff is entitled to have the decree of the 23rd December 1909 and the sale held in pursuance of the decree set aside. I have said that a suit is clearly maintainable if the allegations made in the plaint amount to an attack on the whole suit in which the *ex parte* decree was obtained as being a fraud from beginning to end. But the question still arises, whether we have those necessary allegations in the plaint. The word "fraud" does indeed occur in the plaint.

As a matter of fact, as is usual in this class of cases, there is an excessive use of that word; but, as has been

(1) (1902) 29 Cal. 895=29 I. A. 99=6 C. W. N. 473=4 Bom. L. R. 369=6 Sar. 266 (P. C.)

pointed out "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated are insufficient even to amount to an averment of fraud of which any Court ought to take notice"—*Willingford* v. *The Mutual Society* (2). A fair test, which was applied with great success by the Judicial Committee in *Ganga Narain Gupta* v. *Tilukram* (3) is to strike out from the plaint such words as "fraud", "deceit", "illegal and fraudulent acts" and so forth, of which there is always a great superfluity, and to see whether a case of fraud can be founded on what remains. If, after the process of ruthlessly striking out those words, we have nothing but an allegation of certain facts which might be unattended with any fraudulent or illegal purpose or character, it is plainly impossible to investigate a case of fraud.

Now what are the facts alleged in the plaint? First, that none of the processes in the suit or in the execution was served on the plaintiff or on his guardian, and secondly, that he was not properly represented in the mortgage action. I shall come to the rest of the allegations presently; but, the allegations which I am for the moment considering do not, standing by themselves, amount to an averment of fraud. There is nothing necessarily fraudulent in the failure to serve processes on a party to a suit or to take steps to have a guardian *ad litem* assigned to a minor; and, if the allegation does not necessarily raise a case of fraud, there is, in my opinion, no case of fraud to be tried between the parties. But although the Court will not regard an allegation that there was a failure on the part of the plaintiff to serve processes on the defendant as an allegation of fraud, the case will assume a different aspect if there are allegations in the plaint which suggest that there was no foundation at all for the suit or that there was a fair defence to the suit. Such allegations, if established, will instantly raise the presumption that the failure on the part of the plaintiff to serve processes on the defendant or to take steps to have a guardian assigned to the minor, was deliberate, and was part of a carefully planned campaign to snatch a decree in the absence of the defendant. It is necessary then to see, whether there are allegations in the plaint which suggest that there was no foundation for the suit which resulted in the *ex parte* decree or that the defendant (the plaintiff in the present action) had a fair defence to the suit.

The plaintiff asserts that there was no legal necessity in respect of the bond executed by Khikhinda Kuer; but clearly the defence was not available to the plaintiff. The plaintiff claims, not as the reversionary heir of Bissessar Prashad, but, under the deed of partition executed by Khikhinda Kuer, and, as the heir of his mother, Lalta Kuer It will be remembered that Khikhinda Kuer partitioned the estate of her husband betwen her daughters, Radha Koer and Lalta Kuer. Both Radha Koer and Lalta Kuer are parties to the deed of partition, Ex. Y and are bound by the terms of the deed. The deed assumed that the executants had absolute interest in the properties which formed the subject matter of the partition, and it proceeded to give to the executants an absolute interest in the properties allotted to each of them. The 16th clause of the deed provided as follows:—"That all the debts existing up to this time shall immediately after the execution of this deed, be paid up by the second and third parties" that is to say, (by Radha Koer and Lalta Koer) "in equal halves, or they shall execute fresh deeds in favour of the Mahajans in their own names." There can be no room for doubt or controversy that Lalta Koer, the plaintiff's mother, took upon herself half the liability in respect of all the debts that were existing at the time of the partition. The plaintiff, claiming as he does, under the deed of partition, and as the heir of Lalta Koer, cannot repudiate the debt; and it is worthy of note that it is not his case that the mortgage was not executed by Khikhinda Koer, or that she did not receive the full consideration in respect of the mortgage. In my opinion, the plea of "no legal necessity" was not available to the plaintiff as a defence to the mortgage action.

It was then asserted that his mother Lalta Koer paid her portion of the mort-

(2) (1880) 5 A. C 685=50 L. J. Q. B. 49.
(3) (1888) 15 Cal 533=15 I. A. 119=5 Sar. 168 (P. C.).

gage debt to the mortgagee together with interest thereon ; and that, in spite of such payment, the mortgagee "prayed for the sale of the properties of Lalta Koer and made plaintiff defendant No. 3 in that suit." It will be noticed that there is no allegation that the mortgagee accepted the payment from Lalta Koer in full satisfaction of his claim against her, and released the properties which, subsequent to the mortgage, were, by the deed of partition allotted to Lalta Koer. Such an allegation was, in my opinion, essential, if the plaintiff desired to raise a case of fraud against the mortgagee. The fact that Lalta Koer paid half the mortgage debt to the mortgagee was admitted by him in his plaint ; but, it by no means follows that, because the mortgagee received half the mortgage debt from one in whom one half of the equity of redemption became vested subsequent to the mortgage, he necessarily consented to the integrity of the mortgage being broken up. He was entitled to look to every portion of the mortgaged properties for satisfaction, so long as any portion of the debt remained outstanding ; and the fact that Lalta Koer paid her full share of the mortgage debt would be no defence to the mortgage action, unless it was alleged and proved that the mortgagee consented to the integrity of the mortgage being broken up and agreed not to pursue his remedy as against the properties which fell to the share of Lalta Koer.

There is one further point in the plaint filed in this suit which requires notice. It is alleged that there was collusion between the mortgagee on the one hand and Khikhinda Koer and Radha Koer on the other hand, and the suggestion is that Khikhinda Koer and Radha Koer "are secret partners" in the purchase of the properties. No case of collusion was argued in the Court below, and none has been found in favour of the plaintiff. The grounds of appeal do not raise such a case, and, in the arguments before us it was not suggested that there was a case of collusion to be tried between the parties. For the purpose of our decision we may entirely ignore those allegations in the plaint which raise a case of collusion between the mortgagee and Khikhinda Koer and Radha Koer.

In my opinion, there was no defence to the mortgage action ; and, even assuming that processes were not served on the plaintiff and on his guardian and that the plaintiff was not properly represented in the action, it cannot be said that there was fraud from start to finish or that the decree obtained by the mortgagee was obtained by fraud.

It was then argued that the decree obtained by Deonagar Tewari is a nullity so far as the minors are concerned, and that we ought to disregard it in these proceedings. The argument is, based upon two facts, each of which the appellant claims to have established in this suit. These facts are, first, that notice of the appointment of a guardian for the suit was not served on the minor and upon the guardian of the minor in terms of O. 32, R. 3 (4) of the Code ; and, secondly, that there was a distinct violation of the statutory provision contained in O. 32, R. 4 (3) of the Code, in so far as Hardeo Narain was appointed guardian for the suit without his consent. On the evidence, it is impossible to say that the notices were, or could have been, served upon the minor and upon the guardian for the minor in terms of O. 32, R. 3 (4) of the Code.

The learned Subordinate Judge has given good reasons for accepting the case of the plaintiff on this point ; and I entirely agree with the conclusion at which he arrived. Nor am I prepared to say that there was not a violation of the provision of O. 32, R. 4 (3) of the Code. That rule provides that no person shall without his consent be appointed guardian for the suit ; but there is nothing in the rule which requires the Court to record the consent of the guardian in the proceedings of the suit. The order dated the 12th May, 1909, appointing Hardeo Narain as the guardian for the suit runs as follows :—"Notice for appointment of a guardian *ad-litem* served. No objection filed. Hardeo Narain is appointed guardian *ad-litem* for the minor defendant." The order as drawn up by the Court does not show that Hardeo Narain consented to act as the guardian ; but neither does it show that he did not consent ; although the form of the order suggests the inference that he was appointed guardian because he did not file any objection. I have myself little doubt in my mind that the Court proceeded on the assumption that it was competent to it to

appoint Hardeo Narain as the guardian, if there was no objection by him. But such a conclusion must be more or less speculative in the absence of any provision in the Code requiring the Court to record the consent in the proceedings of the suit. But does it follow that, because there were defects in the proceedings of the suit, that the decree rendered by the Court ought to be regarded as null and void? The solution of the question has been rendered difficult by reason of the conflicting decisions of our Courts, and it is necessary to deal with the subject with care

I think that a clear distinction exists between a judgment which is void and a judgment which is voidable. An erroneous judgment is a voidable judgment, for, the argument that a judgment is erroneous assumes both the regularity of the procedure and the jurisdiction of the Court to render it. An erroneous judgment is one which though regularly rendered, is contrary to law or facts, and is therefore liable to be reversed by an appellate tribunal An irregular judgment is also a voidable judgment; but the distinction between an erroneous judgment and an irregular judgment is this, that whereas an erroneous judgment will always be reversed by an appellate Court, an irregular judgment will be reversed in appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceedings has affected the merits of the case between the parties. A void judgment, on the other hand, is a judgment where there was a total lack of jurisdiction in the Court to render it. Such a judgment is a mere nullity It is not necessary to set it aside It can be completely disregarded whenever it is pleaded, either in support of a claim or in answer to a claim.

In order, then to establish that the judgment in the mortgage action is a mere nullity, it must be established that there was total lack of jurisdiction in the Court to render the judgment. But it is exactly in the conception of jurisdiction that there is unfortunately a great deal of confusion of thought. As was pointed out in *Sukh Lal* v *Tarachand* (4) and emphasised in *Hriday Nath* v. *Ram Chandra* (5) we must be careful to distinguish between the existence of jurisdiction and the exercise of jurisdiction Where there does not exist any jurisdiction to try and determine the cause, the judgment is void, and it can be impeached collaterally. But where there does exist such a jurisdiction, but, in the exercise of the jurisdiction, the Court has acted illegally or with material irregularity, the judgment is voidable, and it can be vacated in an appropriate proceeding either by the Court which rendered it, or, under our Code, by the appellate Court, either in appeal or in revision. As was said in the cases cited, jurisdiction is the authority of the Court to hear and determine a cause. Now jurisdiction has been classified under different heads by different judges; but I think that we may take it that it falls under four different heads (1) territorial jurisdiction, (2) pecuniary jurisdiction, (3) jurisdiction of the subject-matter, and (4) jurisdiction of the person.

Now there is no doubt that, in the particular case, the Court had territorial jurisdiction, pecuniary jurisdiction and jurisdiction, of the subject matter. But it was argued that it had no jurisdiction over the appellant, as he was not regularly brought before it. It was contended that a Court acquires jurisdiction over a minor, if appropriate proceedings are taken under O 32 of the Code and that, in so far as the Court neglected to take those proceedings there was a total lack of jurisdiction in the Court to try and determine the cause as against the appellant.

I am wholly unable to accept the contention. Jurisdiction as to person is conferred on the Court by suing the person in a Court competent to try the cause as against that person, not by the mode which the Court adopts in bringing the person before the Court. The Court has authority to try a cause as against a person, if that person is sued, and in cases coming within S. 19, S. 20 and within the proviso to S. 16 of the Civil Procedure Code, if that person, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, within the local limits of its jurisdiction. Where the condition for the assump-

(4) (1906) 33 Cal. 68=9 C. W. N. 1046=2 C. L. J. 241 (F. B.)

(5) A. I. R. 1921 Cal. 34=48 Cal. 198 (F.B.)

tion of jurisdiction as against a person exists the authority of the Court to try and determine the cause as against him is complete, and the mode which the Court adopts to bring that person before the Court affects the exercise of jurisdiction, and not its existence I think this is clear from the numerous decisions which establish that the mere fact that summons is not served on the defendant does not render the judgment null and void. I cannot distinguish a case where summons is not served on the defendant from a case where notice under O. 32, R. 3. (4) is not served on the minor and on the guardian of the minor The service of summons in one case and the service of notice in the other are but modes of exercise of jurisdiction when the Court has already acquired the authority to hear and determine the cause. Nor does the contravention of the express provision of O. 32, R 4 (3) deprive the Court of the jurisdiction which it has already acquired over the cause.

There are numerous decisions in the books which establish that a judgment will not be regarded as a nullity, although it has been rendered in direct contravention of a statutory provision. It was held in *Tasaddik* v *Ahmad* (6), that the non-compliance with the requirement of S. 290 of the Code which provided that no sale shall take place "until after the expiration of at least thirty days in the case of immoveable property, calculated from the date on which the copy of the proclamation has been fixed up in the Court house of the judge ordering the sale", is a material irregularity, but that its effect is not to make the sale a nullity without proof of substantial injury to the judgment-debtor. In *Malkarjun* v. *Narhari* (7), the question which the Court had to decide was whether a sale, which took place after notice had been wrongly served upon a person who was not the legal representative of the judgment-debtor's estate, could be considered a nullity. What happened was that after the death of Nagappa, the judgment-debtor, the decree-holder applied for execution of the decree "against defendant Nagappa, deceased, by his heir and nephew Ramalinga". As it happened Ramalinga was not the heir of Nagappa, and he came and informed the Court that he was not the heir of Nagappa, that the daughters of Nagappa were the heirs, and that he was not in possession of the estate of Nagappa. The Court informed him that the application was not against his property, but against the estate of the deceased, and that, if his property should be attached, he would have his remedy after attachment And so the sale took place, and the property was purchased by the defendants who happened to have a mortgage on the property. The suit in which the question arose was by the heirs of Nagappa, and it was a suit for redemption in which they ignored the fact that a sale had taken place and that, at that sale, the decree-holders had purchased the property In order to succeed, it was necessary for them to establish that the sale was a nullity; and the defendants contended that however erroneous the order of the Court might have been in directing the sale of the property in a proceeding, not against the heirs of Nagappa, but against strangers, the Court acted with jurisdiction, and it could not be said that the sale was a nullity The argument advanced on behalf of the defendants was upheld by the Judicial Committee "It is not disputed" said Lord Hobhouse in delivering the judgment of the Board, "that if the Court took proceedings wholly without jurisdiction the plaintiffs would remain unaffected by them," and two of the learned Judges below go the whole length of affirming that the execution Court had no jurisdiction. But a decree had been made, and partially, though to a minute extent, executed against Nagappa; and his estate was liable to make good the balance To enforce this liability was within the jurisdiction of the Court.

If a judgment-debtor dies before full execution of a decree, the creditor may apply for execution against his legal representative. To receive that application is part of the Court's jurisdiction. In point of fact the application made was against "the estate of Nagappa", and in another column Ramlingappa is named as his heir. The Court had jurisdiction to receive such an application and either to reject it as defective or to order some further proceeding. If Ramlingappa had actually

(6) (1894) 21 Cal 66=70 I. A. 176 (P. C.)
(7) (1902) 25 Bom. 927=27 I. A. 216=2 Bom. L. R. 927=7 Sar 739 (P. C.).

been successor in title nobody could have objected to the regularity of the proceedings. If there had been a dispute who was heir or whether the property had or had not devolved upon the heir, it was for the Court to determine such matters for the purpose of the execution. If it had been found impossible to discover whether any representative of the deceased was in existence, it was for the Court to say what steps should be taken All these matters, which might involve questions of nicety, were for the Court to decide. It is clear that the jurisdiction was not lost for the reason that the form of application might be open to exception How was it lost afterwards? The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramlingappa He contended that he was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution In so doing the Court was exercising its jurisdiction It made a sad mistake, it is true, but a Court has jurisdiction to decide wrong as well as right If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law

Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business, no purchaser at a Court sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do." In *Hridoy Nath* v *Ram Chundra* (5) the question for the consideration of the Court was whether an order for withdrawal of a suit with leave to institute a fresh suit under O. 23, R. 1 of the Code, where there is nothing to indicate that the Court was satisfied that the suit must fail by reason of some formal defect, could be regarded as an order without jurisdiction and therefore null and void Mukharji, A. C. J., in delivering the unanimous opinion of the Full Bench pointed out that what was done in the exercise of jurisdiction could not be regarded as having been done without jurisdiction It is needless to pursue the subject any further; for, though a discordant note has been struck here and there, the Indian Courts have recognised the principle that disobedience of any particular provision of the statute does not necessarily affect the jurisdiction of the Court to try and determine a suit

In England, a judgment against a minor in which the minor did not appear, and no guardian was appointed, is regarded as a judgment irregularly obtained, and the Court which rendered the judgment has power to set it aside and all subsequent proceedings for irregularity without going into the question whether there was a defence on the merits See *Jorman* v *Lucas* (8), *Lustington* v *Sewell* (9), *Hall* v *Scott* (10) But under the Civil Procedure Code, "no decree shall be reversed, or substantially varied, nor shall any case be remanded in appeal on account of any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court". I am not overlooking the fact that S 99, Civil Procedure Code, deals with the power of the Court in appeal when any error, defect, or irregularity in the proceedings is brought to its notice, but I think that our Code had adopted the principle that, where the question is not one affecting the jurisdiction of the Court, but one affecting the regularity of the proceedings, the Court will not interfere unless there is a defence on the merits

I have said that the mere fact that the Court has disobeyed any particular provision of the statute is not sufficient to establish that there was no jurisdiction in the Court to render judgment in the case

(8) (1868) 15 C. B. (N. S.) 474
(9) (1821) 6 Maddock 28.
(10) (1858) 28 L. J. Ex. 85.

But where the disobedience leads to this result that, as a consequence of the disobedience, there is no proper party to the suit, the case is different. It is one thing to say that the Court has not adopted the appropriate procedure to require the attendance of a party before it; it is another and a different thing to say that, as a result of the disobedience of any particular provision of the statute, there is no proper party to a suit. The Court has no jurisdiction to render judgment against one who is not a party to the suit, though it has jurisdiction to render judgment against one who is a party to the suit but who has not been brought before it by reason of the failure on the part of the Court to follow the particular procedure laid down in the Code. The one affects the existence of the jurisdiction of the Court; the other affects the exercise of it. To take a simple case, a minor is not a party to the suit, unless he is represented in the record of the suit by a guardian competent to act as such. Where the record of the suit itself shows that the minor is wholly unrepresented, or that he is represented by a guardian disqualified, from acting as such guardian under the express provision of the statute, the result is that the minor is not properly a party to the suit, and a judgment rendered against the minor is without jurisdiction and null and void. But where he is properly a party to the suit, and he is properly a party if he is represented in the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian.

In my opinion, it is the record of the suit that must decide the question of jurisdiction; and where the record, on the face of it, shows that the minor was properly a party to the suit, the judgment rendered in such a suit will not be declared a nullity in a collateral proceeding brought to impeach its validity; though it may be set aside if it is shown that the defect or the irregularity in the proceedings affected the merits of the case between the parties.

I think this was the view of the Judicial Committee in the case of *Walson* v. *Banke Behari Pershad Singh* (11) which, in my opinion, is decisive of the case before us. The facts were these. In 1873, a mortgage was executed by one Tilakdhari Singh in favour of Wahid Ali to secure Rs. 8,000 advanced by latter to the former. Tilakdhari died in 1880 and in 1881, Mohammad Zahurul Haq the son of Wahid Ali brought a suit upon the mortgage against the sons of Tilakdhari, of whom the plaintiffs were minors. As a question was raised whether the minors were in fact sued, it is material to set out how the defendants were cited in the cause title. They were cited as follows: "Babu Gajadhar Pershad Singh, major son, and Musammat Moti Rani Koer, mother and guardian of Babu Sidhesser Pershad Singh, Babu Banko Behari Singh, Babu Awadh Behari Singh and Babu Braj Behari Singh, minor sons, heirs of Babu Tilukdhari Singh". S. 443 of the Code provided that "where the defendant to a suit is a minor, the Court, on being satisfied on the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence of such minor, and generally to act on his behalf in the conduct of the case". No formal order appointing Moti Rani Koer as the guardian for the minors was drawn up by the Court, and there was no appearance in the suit itself by Moti Rani Koer on behalf of the minors. On the 29th October 1881, Mahammad Zaharul Haq obtained a mortgage decree and subsequently purchased the share now sued for in execution of his decree.

In 1897, the persons who were sued as minors in the mortgage action instituted a suit for a declaration that the mortgage decree and the sale held in pursuance of decree were null and void as against them and for recovery of possession of the share which had passed at the auction sale. The plaint stated that the mortgage in question was improperly executed by Tilakdhari without legal necessity or justification, and for immoral purposes, and that whatever money he received under it was spent for such purposes, none of it being applied for the benefit of the family; that, at the date of the mortgage Tilakdhari and his branch of the family

(11) (1903) 30 Cal. 1021=30 I. A. 182=7 C. W. N. 774=5 Bom. L. R. 892=8 Sar. 512 (P. C.).

formed part of a joint family of which his elder brother, Baiju Singh, was karta or managing member, the plaintiffs being children of seven years and under, that the suit on the mortgage was prosecuted against the present plaintiffs without the appointment or presence in the suit of any guardian on their behalf; that none of the processes in the suit or in the execution of the decree was served upon them, or upon any guardian in their behalf; or even upon their mother; and that all the proceedings in the suit, including the sale were fraudulent. It will be noticed that the plaint raised a defence to the mortgage suit on the merits, and contained an attack on the regularity of the proceedings adopted by the Court in the mortgage suit. The learned Subordinate Judge held that the mortgage was executed for the full consideration of Rs 8,000 and that the money was applied for family purposes and not immorally He disbelieved the evidence of the plaintiffs as to the dissipated character of Tilakdhari and he found that Tilakdhari was not joint with his brothers at the date of the execution of the bonds He accordingly decided the merits against the plaintiffs, and came to the conclusion that there was no defence to the mortgage-suit. On the question whether the minors were at all sued, he held that the suit was "subsantially directed against the minors and they cannot say that they were not parties to it."

On the question whether Moti Rani Koer was a proper person to be the guardian of the minors, he said that the minors were residing with her and that there was evidence that "she preferred an appeal on their behalf." As this passage is open to misconstruction, it ought to be pointed out that the act of Moti Rani Koer in preferring an appeal on behalf of the minors to which the learned Subordinate Judge referred was an act in another proceeding altogether, and not in the mortgage-suit or in any proceedings arising out of the mortgage-suit. As the view has been taken in some of the cases to which I shall presently refer that, though there was no formal order appointing Moti Rani Koer as the guardian of the minors for the suit, she actually appeared in the suit and took various steps for the protection of the minors, I have thought it necessary to examine the original record of the case brought by the minors, to see if there is any justification for the view in the evidence that was adduced in that case. I find that Moti Rani Koer did not enter appearance in the mortgage-suit, and took no part in it either on her behalf or on behalf of the minors. There was no suggestion that she did enter appearance or in any way protected the interests of the minors; but, as the learned Subordinate Judge pointed out since there was no defence on the merits, "it cannot be said that her silence has prejudiced the plaintiffs"

In considering the question whether she was fit and proper person to act as the guardian of the minors, the learned Subordinate Judge pointed out that there was evidence that she had preferred an appeal on behalf of the minors. On examining the record, I find that that appeal was preferred in an execution matter in which Ghamundi Singh, Harshewak Singh and others were decree-holders, and not in the mortgage-suit which was a suit by Mahammad Zahurul Haq. Dealing next with the question whether the minors were properly represented in the mortgage-suit, the learned Subordinate Judge conceded that no formal order appointing the guardian was drawn up," but he thought that "the Court must be deemed to have sanctioned the appointment as it had before it the names of the minors and of their mother as guardian" and he came to the conclusion, that, as there was no defence open to the widow, "it cannot be said that her silence has prejudiced the plaintiff". In the result, he dismissed the plaintiffs suit On appeal, the Calcutta High Court refused to consider the question whether there was any defence on the merits, for it came to the conclusion that, if the minors were not properly represented in the action, the decree was a nullity, and the minors could disregard it.

Dealing with the question whether the minors were properly represented, the High Court said as follows:—"S. 443 of the Code of Civil Procedure is imperative upon this point; the Court after satisfying itself of the fact of minority, is bound to appoint a proper person to act on behalf of the minor in the conduct of the case. From the proceedings in the mortgage-suit, it seems clear to us that the Subordinate Judge never directed his attention to the question of the minority of these defendants or to the appointment

of a proper guardian on their behalf and there is nothing from which we can presume; as the lower Court has presumed, that the Court before which the mortgage-suit was pending, even sanctioned, expressly or impliedly, the appointment of the minor's mother as their guardian *ad litem*." The High Court accordingly allowed the appeal, and made a declaration to the effect that the share of the plaintiffs could not be properly held to be liable under the mortgage decree, or to have passed by the sale. The defendants carried an appeal to the Judicial Committee and the Judicial Committee reversed the decision of the High Court, and restored that of the Subordinate Judge.

The Judicial Committee agreed with the view of the High Court that the rules laid down in S. 443 should be strictly followed but it did not agree with the view that defect in following those rules was necessarily fatal to the proceedings. And dealing with the argument that the minors were not properly represented, the Judicial Committee said as follows: -"It appears to their Lordships that they were effectively represented in that suit by their mother, and with the sanction of the Court . . . There is nothing to suggest that their interests were not duly protected. The only defects that can be pointed out are that no formal order appointing the mother of the now plaintiffs to be their guardian *ad litem* is shown to have been drawn up. It has not been shown that the alleged irregularities caused any prejudice to the present plaintiffs, nor indeed could there be any since it has been found that the original debt was one for which the present plaintiffs were liable. Their Lordships are of opinion that the defects of procedure alleged in this case are at most irregularities which, under S. 578 of the Civil Procedure Code, would not have furnished ground for reversing the proceedings in the former suit, if they had been raised upon appeal in that suit."

I regard the decision of the Judicial Committee as establishing that the failure to comply with the provisions of S. 443 of the old Civil Procedure Code, is a defect of procedure which will not be fatal to the suit, unless it is shown that the defect or irregularity in the proceedings has affected the merits of the case. S. 578 of Act 14 of 1882 corresponds to S. 99 in the present Civil Procedure Code.

If, as the Judicial Committee has held, the failure to comply with S. 443 of Act 14 of 1882 corresponding with O. 32, R. 3 (1) is not fatal to the suit, on what ground can it be urged that the failure to comply with the provisions of O. 32, R. 3 (4) and O. 32 R. 4 (3) will render the decree null and void, although it is shown that the failure to comply with those provisions has not affectdd the merits of the case? It is argued that these are new provisions and that there are distinct prohibitions contained in these provisions. But there was just as much prohibition in S. 443 of Act 14 of 1882 as there is in O. 32, R. 3 (4) and O. 32, R. 4 (3) of the new Code. What reason is there for suggesting that, though the failure to comply with the provisions of O. 32 R. 3 (1), S. 443 of the old Act does not affect the jurisdiction of the Court, the failure to comply with the provisions of O. 32, R. 3 (4) and O. 32 R. 4 (3) does affect its jurisdiction?

All these different provisions stand on the same footing and are intended to secure a fair trial of the case, where a minor is a party to the suit. The argument, in my opinion, proceeds on a fundamental misconception that that which is, or ought to be, an exercise of jurisdiction is prerequisite to the existence of jurisdiction. As a distinguished American writer has said "But if a judgment is rendered by a Court having jurisdiction of the parties and subject, it is held, by the great preponderance of authorities, that it will not be void because the defendant was an infant and no guardian *ad litem* was appointed, although it will be irregular and liable to reversal, or voidable on a proper proceeding for that purpose. The theory is that the appointment of a guardian is not a pre-requisite to the jurisdiction of the Court" -(See Black on Judgment, Vol. I, S. 143). If it were not for the opinion expressed by a learned and distinguished Judge, I should have said without hesitation that the decision of the Judicial Committee in the case to which I have referred is decisive of this case.

In *Balkishen Lal* v. *Toleswar Singh* (12), Mookherji J. (sitting with Carnduff, J.) took the view that a decree passed in a

(12) (1919) 15 C. L. J. 446=14 I.C. 845.=17 C. W. N. 219.

suit to enforce a mortgage executed by the father was a nullity so far as the minor son concerned if the father were appointed guardian *ad litem* without his consent, and he did not appear in the suit and protect the interest of the minor The learned Judge distinguished the case of *Mt. Manke Kuer v Parbati Singh* (11), and thought that the case of *Khairaj v Daim* (13) was applicable to the facts of the case The ground of distinction, according to the learned Judge, is this, that whereas in Walian's case the minor was properly represented, on the face of the record, by a competent guardian, in the case before him the minor was not so represented. With all respect, I am unable to take this view

It is quite true that, in the case before His Lordship, the father did not intimate his acceptance of the office of the guardian *ad litem* ; but neither did the mother in Walian's case The record, in each case, showed, on the face of it, that a guardian *ad litem* had been appointed for the minors, but in neither of the cases did the guardian *ad litem* actually appear and contest the suit on behalf of the minor The only distinction which can be suggested is that in Walian's case it was the mother who was appointed the guardian *ad litem*, whereas in the case before His Lordships the father who had executed the mortgage bond was so appointed Mr. Justice Mookherji thought that, there being a conflict of interest between the father and the son, it was not competent to the Court to appoint the father as the guardian for the minor son With great respect to the learned Judge, I am quite unable to take this view A person is said to have an interest adverse to that of another when one interest is capable of being enforced against the other In a partition action, the interest of the father is clearly adverse to that of the son But in a suit to enforce a mortgage bond executed by the father, it is difficult to see how the interest of the father can be regarded as adverse to that of the son It is quite true that, in such a suit, it is open to the son to question the validity of the mortgage bond, but such a defence is clearly in the interest of the father, for if the defence succeeds, the bond as a whole must fail The case of Khiarajmal is, in my opinion, a different case The facts of that case were these: By certain transactions, certain properties became vested in the following persons in definite shares, Nabibaksh and his brother Alibaksh, Naurez, Bugro, Sanwan, and Khan Muhammad. In 1874, two mortgages were executed by them, one in favour of Tekchand and his partner Kodumal the predecessors in title of the defendants, the other in favour of Tekchand, Kodumal and Walram Between 1874 and 1878, the following changes took place in the family of the mortgagors: Naurez died leaving a widow and four children including Amirbaksh, Khan Muhammad died leaving seven children including Kadurbaksh; and Sanwan died leaving a widow and four children including Sumar

On the 4th June 1878, the following transactions took place first, Nabibaksh on behalf of himself and Alibaksh executed a mortgage of a moiety of the property in favour of Kodumal and Tekchand by which the debts created by ths previous mortgages of 1874 were satisfied so far as Nabibaksh and Alibaksh were concerned; secondly, Kadurbaksh, one of the children of Khan Muhammad purported to convey the share of Khan Muhammad in the property which he described as his share to Bugro in consideration of a sum of money which was taken to be "his share" of the mortgage debts created by the two mortgages of 1874 which Bugro agreed to pay, thirdly Bugro, Sumar, one of the children of Sanwan and Amirbaksh, one of the children of Naurez, purported to mortgage the other moiety of the property to Kodumal and Tekchand, by which the debts created by the mortgages of 1874 were satisfied so far as Naurez Khan Muhammad, Sanwan and Bugro were concerned. It will be noticed, that, by the transaction of 1878, the entire sixteen annas of the property passed into the possession of Kodumal and Tekchand as mortgagees In 1878, some time before the execution of the mortgages, Kodumal and Tekchand commenced a suit (suit 160 of 1878) against "Naurez deceased by his legal representative, Amirbaksh, by his guardian, his uncle Alahnawaz" and certain other persons to recover a sum of money on settled account. It will be noticed that

(13) (1905) 32 Cal. 296=32 I A. 28=1 C. L. J. 584=9 C. W N 201=2 A. L. J. 71=7 Bom. L. R. 1=8 Sar. 784 (P. C.)

the suit was neither in form nor in substance a suit against Amirbaksh. The suit was against the estate of Naurez; and Amirbaksh, as one of the five heirs left by Naurez, could not be said to represent the estate of Naurez; nor could the share of Amirbaksh be proceeded against in the suit, for, as I have said, the suit was not against Amirbaksh personally. That suit was compromised for the sum of Rs. 519, and, default having been made, the land standing in Naurez's name was sold to Ubhuromal who transferred it to Darianomal. One of the questions which the Judicial Committee had to consider was whether the equity of redemption which belonged to the estate of Naurez was effectively sold in a suit to which the estate of Naurez was not a party.

It may be mentioned that Darianomal was the gomasta of the firm of Kodumal and Tekchand and was their benamidar in the purchase. In 1873 another suit was commenced, this time by Waliram against Nabibaksh, Bugro, Sumar, Kadurbaksh, and Amirbaksh described as "a minor aged about 14 years, legal representative of Naurez, deceased by his guardian, his uncle Alahnawaz" to recover a sum of money in respect of his share of the sum due under the mortgage, to him self and his partners, of 1874. It will be remembered that the mortgage in question had been executed by Nabibaksh (on behalf of himself and his brother Alibaksh), Naurez, Bugro, Sanwan and Khan Muhammad. The suit as constituted could not be regarded as a suit against Sanwan, Khan Mahammad and Naurez, since at the date of the institution of the suit, they were already dead, and legal representatives in whom their respective estates had vested were not cited as defendants in the action. So far as Alibaksh is concerned, he was properly represented in the action by Nabibaksh who had executed the mortgage on behalf of Alibaksh as well as of himself. And though Alibaksh was living, and was not cited as a defendant, no objection could be taken to the constitution of the suit so far as he was concerned.

The proceedings in the suit were somewhat extraordinary. The names of Sumar and Kaderbaksh were struck off from the record of the suit, and, on an application by Waliram, Nabibaksh, Bugro and Alahnawaz the matters in dispute were referred to the arbitration of Kodumal, the partner of Waliram. Shortly afterwards Nabibaksh died, and his heirs were properly brought on the record; but the death of Nabibaksh had material effect on the constitution of the suit in regard to Alibaksh. Alibaksh, as I have said, was not a party to the suit; but Nabibaksh had executed the mortgage on his behalf, and, as the Judicial Committee pointed out, it might be possibly held that Nabibaksh's authority extended to representing Alibaksh in Waliram's suit. But by no possibility could it be considered that he was represented by the heirs of the deceased brother. The arbitrator, in due course, made his award by which he directed that Waliram should recover a sum of money from Bugro and from the estates of Nabibaksh, Sanwan, Khan Muhammad and Naurez respectively in certain instalments, and the Judge passed a decree in terms of the award. It will be noticed that there was no decree against Alibaksh, and the decree as against the estates of Sanwan, Khan Muhammad, and Naurez was open to the objection that those estates were never sued. Execution folowed the decree, and the properties, the subject of the mortgage (except a particular item which was taken to belong to Naurez and which was sold in execution of Tekchand and Kodumal's decree herein before stated) were sold to Darianomal, the benamidar of the firm of which Tekchand and Kodumal were the partners. Thus the equity of redemption in the mortgaged properties apparently passed to the mortgagees as a result of the two execution sales.

The suit in which the question of the validity of the execution sales was raised was instituted by Alibaksh, by the heirs of Nabibaksh, by the heirs of Naurez, by the heirs of Sanwan, by the heirs of Khan Muhammad, and by the heirs of Bugro, and the suit was one for the redemption of the mortgages. Bugro, it appears, had died prior to the institution of the redemption action. The question which the Judicial Committee had to consider was whether the equity of redemption not only purported to be, but was in fact, sold under the money decrees. Their Lordships conceded that the sales could not be treated as void on the ground of any mere irregularities of procedure in obtaining the

decrees or in the execution of them, but they were of opinion that the Court had no jurisdiction to sell the property of persons who were not parties to the suit or properly represented in the record. There is no doubt whatever in my mind that what the Judicial Committee did consider was whether the record itself showed that the suit had been brought against the persons against whom the decrees were obtained not whether, apart from the record, the suit could be regarded as a suit against those persons, having regard to the rules of procedure laid down in the Code or recognized by the Courts.

The Judicial Committee considered the case of each of the mortgagors separately, and found that the estates both of Nabibaksh and Bugro were sufficiently represented for the purpose of the suit and that their shares of the equity of redemption in the property sold in execution of the decree obtained by Waliram were bound by the sale and were therefore irredeemable. In regard to Alibaksh, the Judicial Committee pointed out that he was not a party to the suit and that there was no decree against him, and that consequently the Court had no jurisdiction to sell his share. In regard to Sanwan and Khan Muhammad, the Judicial Committee had no difficulty in holding that their shares did not pass by the sale. In the first place their estates were not represented in the action; in the second place, Sumar (one of the heirs of Sanwan) and Kadurbaksh, (one of the heirs of Khan Muhammad) who were sued in their personal capacities, were dismissed from the suit, and they were in no sense parties to the suit when the decree was passed against them. There is no difficulty in understanding the decision so far, but from what their Lordships said in regard to Amirbaksh, one of the heirs of Naurez, it has been assumed that the Judicial Committee has decided that a decree obtained against a minor without a proper appointment of a guardian is a nullity so far as the minor is concerned. In my opinion, no such conclusion can be based on what was actually decided in the case, though there are observations in the judgment of Lord Davey which may support the contention. In order to understand the point, it is necessary to repeat that Amirbaksh was a party to both the suits, not in his personal capacity, but as the legal representative of Naurez. Now Naurez had left a widow and four children all of whom were his heirs under the Muhammadan Law, and by no possibility could it be considered that the estate of Naurez was at all represented in the actions. This, in my opinion, was the basis of the decision of the Judicial Committee, though it was pointed out by Lord Davey that Alahnawaz was not the guardian of Amirbaksh, and had never been appointed as such by the Court.

It was for this reason that the Judicial Committee discussed the question whether the estate of a deceased debtor could be represented by one member of the family. In dealing with this question, the Judicial Committee said as follows —"The Indian Courts have properly exercised a wide discretion in allowing the estate of the deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased no prejudice is shown to the absent minor. But these are usually cases where the person named as defendant is *de facto* manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control." After distinguishing the case of *Malkarjun* v. *Narhari* (7) on the ground that there was a decision in that case, an erroneous decision it is true, but still a decision, in the effect that execution could proceed although the estate of the deceased debtor was not represented in the execution proceedings—their Lordships stated their conclusion in these words: "Their Lordships think that the estate of Naurez was not represented in law or in fact in either of the suits, and the sale of his property was therefore without jurisdiction, and null and void. Nor can they hold that the share of Amirbaksh himself in his father's estate was bound". I think it follows from this passage that what the Judicial Committee actually decided was that the sale of property belonging to person or to an estate in execution of a decree in a suit in which that person or that estate is not represented is without jurisdiction and null and void. As the last sentence in the passage cited is open to some misconception, it

ought to be pointed out that Amirbaksh was not the debtor and that he could not in law, and was in fact, sued in his personal capacity ; and that *qua* his own share in the property inherited by him, he was in the same position as if he was not a party to the suit

It was strongly pressed before us that Lord Davey was undoubtedly impressed by the fact that Alahnawaz was not the guardian of Amirbaksh and was not appointed as such by the Court That undoubtedly is so ; but so far as this point is concerned, the case cannot be distinguished from the case of *Walian* v *Banke Behari* (11) which was cited before their Lordships, but which was not referred to in the judgment of Lord Davey In Walian's case as in Khiarajmal's case a person appeared in the record as the guardian *ad litem* of the minor, but neither in Walian's case nor in Khiarajmal's case was that person appointed as such by the Court. The only difference between the two cases is this that whereas in Walian's case the guardian never appeared in the proceedings to protect the interest of the minor, in Khiarajmal's case, he did appear, in one of the suits, to refer the matter in dispute to the arbitration of a certain person, in the other suit, to compromise the claim for a certain sum of money. In Walian's case, the defect was regarded, not as affecting the jurisdiction of the Court, but as a defect or irregularity in the proceedings in the suit which would not affect the decree unless it affected the merits of the case I cannot read the decision in Khiarajmal's case as laying down the contrary proposition, unless the Judicial Committee has said so in express word. In my opinion, the actual decision in Khiarajmal's case does not support the conclusion at which Mr Justice Mukharji arrived in the case cited.

The only other case which I propose to discuss is the case of *Annada Prasad Ghosh* v. *Upendra Nath DeSarkar* (14). In that case Mr. Justice Mukharji laid down that where a person has been appointed guardian without his consent, in contravention of the express direction of O 32, R. 4 (3), the infant is not represented, and a decree made in a suit so constituted has no binding effect upon him ; and the learned Judge referred to three decisions of the Judicial Committee as supporting his view. The cases referred to by the learned judge are *Khiarajmal* v. *Dasm* (13), *Rashidunnissa* v *Muhammad Ism ul Khan* (15) and *Partab Singh* v. *Bhikhu Singh* (16) I have already dealt with the first of these cases, and it is unnecessary to deal with it again The second mentioned case is an authority for the proposition that a married woman is disqualified under S 457 of the Code from being appointed guardian for the suit and that where a married woman is appointed guardian for the suit, the position is just the same as if the minor were not a party to the suit It is not an authority for the proposition that "when a person has been appointed guardian without his consent the infant is not represented, and a decree made in a suit so constituted has no binding effect upon him". It may be said that the prohibition contained in S. 457 of the old Code stands on the same footing as a prohibition contained in O 32, R. 3 (4) or a prohibition contained in O 32, R 4 (3)

But, as has been pointed out, it is often a matter of some nicety to draw a distinction between the existence of jurisdiction and the exercise of jurisdiction. It may be said that the Court has no jurisdiction to pass any order against a minor unless the minor is represented in the record by a guardian competent to act as such ; and that where the record itself shows that the minor is not properly represented, the effect is the same as if the minor were not a party to the suit The record, in my opinion, is, in each case, decisive of the question There is clearly a distinction between a case where a person disqualified from acting as guardian is so appointed, and a case where a person competent to act as guardian is so appointed, though without the express consent of the guardian. In the one case the record on the face of it shows that the representation is bad ; in the other case, the record, on the face of

(14 (1921) 34 C. L. J. 298=25 C. W. N. 781.

(15) (1909) 31 All 572=36 I A 163=13 C. W. N. 1182=6 A L. J. 822=11 Bom. L R. 1025=19 M L J 631=3 I, C. 864=10 C L. J. 318 (P. C)

(16) (1913) 35 All 487=40 I A. 182=17 C. W. N 1165=(1913 M. W N 785=11 A L J. 901=16 C C 247=19 C L J 884=21 I. C 498=15, Bom. L. R. 1001 (P. C).

it, shows that the representation is complete. In my opinion, the Judicial Committee cannot be taken to have expressed any disapproval of Walian's case which was cited before their Lordships, but which was not referred to in the judgment

The last mentioned case is clearly distinguishable. The facts were these: One Rajah Balbhaddar Singh died leaving two minor sons, Pratab Singh and Abharan Singh who were the plaintiffs in the action The defendant Bhabuti Singh assumed to act as the guardian of the minors and as the manager of their property. Certain persons, who may be conveniently referred to as the vendors sold certain properties to certain other persons who may be referred to as the vendees. Both the plaintiffs and Bhabuti Singh had rights of pre-emption in the properties sold, plaintiffs' rights being superior to that of Bhabuti in one of the properties sold, and in the other, their rights were equal to that of Bhabuti. It is obvious that there was a conflict of interests between the plaintiffs and their guardian Bhabuti On the 26th June 1899, Bhabuti on his own behalf brought a suit to pre-empt, and made the vendors and the vendees defendants to the suit. On the 5th August 1899, Bhabuti Singh caused the now plaintiffs to be added as defendants to his suit. According to the amended plaint, the now plaintiffs, under the guardianship of Hari Pershad, were added as defendants under an order dated the 5th August, 1899 The Judicial Committee found, first, that Hari Pershad was a creature of Bhabuti and acted throughout in the interest of Bhabuti and secondly, that "the amendment of the plaint adding Pertab Singh and Abharan as defendants was not attested by the signature of the Judge." It will be remembered that in Walian's case, as the Judicial Committee took pains to point out, "the Court admitted the plaint in which the mother was described as guardian," and "in its decree it so described her." Now the distinction between this case and Walian's case is this, that whereas in this case, no one appeared in the record itself as the guardian of the minor, for, the amendment of the plaint was not attested by the signature of the Judge, in Walian's case the mother of the minor appeared in the record with the sanction of the Court as the guardian of the minor. Now it is impossible to have recourse to the doctrine that the Court by implication sanctioned the appointment, if the record itself is silent about the appointment, and, as I have shown their Lordships took pains to point out that the amendment of the plaint adding Pertab Singh and Abharan as defendants was not attested by the signature of the Judge The position then is the same as if they were not parties to the suit, and the consent decree which was ultimately passed was a nullity so far as they were concerned

The other matter which the Judicial Committee had to consider was the compromise of another suit which Bhabuti caused Hari Singh to file on behalf of the now plaintiffs. That was also a suit to pre-empt the same properties against the vendors and the vendees, and Bhabuti caused himself to be added as a defendant After the compromise of his own suit, he caused Hari Pershad to present an application on behalf of the minors asking for leave to withdraw the suit on the ground that the matter had already been settled between the parties. The Judicial Committee pointed out that the Court was not informed that in the suit in which the compromise was entered the suit of Bhabuti the minors were not represented in law, nor was it informed that the compromise was entered into without the leave of the Court first having been obtained. According to the decision of the Judicial Committee in the case of *Manohar La v Jagannath Singh* (17) the compromise was entirely void as against the minors, and the Judicial Committee came to the conclusion that on that ground the minors were entitled to have the decree dismissing their suit set aside The whole decision of the Judicial Committee shows that there was fraud from start to finish, and that the irregularities of the procedure affected the merits of the case. It is material to point out that the Judicial Committee made a distinction between the compromise decree in Bhabuti's suit, and the order of dismissal of the plaintiffs' suit The compromise decree they regarded as void on the ground that the minors were not

(17) (1906) 28 All. 585=33 I. A 128=8 Pom. L. R 489=4 C. L. J 8=10 C. W. N 899=9 O.C. 219=1 M. L. T. 210=16 M. L J. 291=3 A L. J. 710 (P. C.)

parties to the suit and were not represented in the record by a guardian. The order of dismissal of the plaintiffs' suit they regarded as voidable on the ground that the Court was not informed of various matters which it was entitled to know when it was asked to sanction the withdrawal of the suit brought by the minors. I cannot regard the decision of the Judicial Committee as a decision to the effect that "when a person has been appointed guardian without his consent, the infant is not represented, and a decree made in a suit so constituted has no binding effect on him."

While the three cases relied on by the learned and distinguished Judge do not support the conclusion at which he arrived, the decision in Walian's case, in my opinion, is conclusive of the matter. With reference to Walian's case, the learned Judge said as follows, —"As appears from the judgment of the Judicial Committee in that case, the mother who had been proposed for appointment as guardian of her minor son had entered appearance and acted throughout the trial of the suit. No trace, however, could be found on the record of a formal order for her appointment as a guardian *ad litem*. The Judicial Committee held in substance that the absence of a formal order of appointment as a guardian is not fatal to the validity of the proceedings, where the proposed guardian has in fact appeared and acted on behalf of the minor." With all respect, this is a wholly inaccurate statement of what was decided in Walian's case. There is no suggestion any where in the judgment of the Judicial Committee that the proposed guardian had entered appearance or had taken any part in the trial on behalf of the minor; nor indeed could there be such a suggestion; for in truth, as the judgment of the Subordinate Judge shows and as an examination of the record of that suit establishes beyond doubt or controversy, the guardian did not enter appearance, nor did she take any part in the trial at any stage. In fact she was wholly "silent", as the Subordinate Judge pointed out, and the only question which the trial Court and the Judicial Committee considered was whether her silence had prejudiced the minors. Their Lordships did indeed say that the minors "were effectively represented in that suit by their mother and with the sanction of the Court," but it is to the state of the record that those observations were directed. That this is so will appear clearly from an examination of the earlier part of the judgment where their Lordships, after agreeing with the Subordinate Judge that no order appointing the mother as the guardian *ad litem* was ever drawn up, proceeded to say as follows "an examination, however, of such proceedings in that suit as are forthcoming, shows that the Court admitted the plaint in which the mother was described as guardian; that in its decree it so described her; and that similar language was used in the execution proceedings." There can be no doubt whatever that all that the Judicial Committee considered was whether she was described as the guardian of the minors in the proceedings of the suit and of the execution. It is one thing to say that the mother appeared in the proceedings of the suit as the guardian of the minors; it is another thing to say that she entered appearance in the suit and acted throughout the trial of the suit as the guardian of the minors.

I have examined the whole subject with some care, because, in my experience, the subordinate Courts, through carelessness or negligence, are constantly disregarding the provisions of O. 32, R. 3 (4) and O. 32 R. 4 (3) to the serious embarrassment of the course of justice, and questions are frequently coming before us whether, in such circumstances, the decree should be regarded as null and void. I cannot overlook what the Judicial Committee pointed out in Walian's case, that it is one thing to impress upon all the Courts in India the importance of following strictly the rules laid down in the sections referred to, and that it is quite another thing to say that a defect in following those rules is necessarily fatal to the proceedings. I have come to the conclusion that the question of jurisdiction stands apart from the question of a defect in following these rules, and that, on a question of jurisdiction, the actual record or the proceedings of the suit should in each case be decisive. In other words, where, on the face of the record, a person qualified to act as the guardian, appears as a guardian of the minor for the suit, the Court has no power, in another suit brought for the purpose, of impeaching the validity of the decree, to

examine the evidence in order to see whether notices under O. 32, R. 3, (4) were, in fact, served, or whether the person nominated as guardian did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merits of the case. But where the record, on the face of it, shows, that the minor was not represented by a guardian for the suit, or was represented by a guardian disqualified, under the express provision of the statute, from acting as guardian the position is the same as if the minor were not a party to the suit, and the judgment rendered by the Court is without jurisdiction and null and void. I think the decisions of the Judicial Committee support the conclusions at which I have arrived.

In the present case, as I have shown, the present plaintiff had no defence to the suit in which he was cited as a defendant He was represented throughout in the proceedings of the suit by a guardian competent to act as such. That being so, it is impossible to hold that the decree passed against him in the mortgage suit and the sale held in pursuance of that decree are null and void.

I would dismiss this appeal with costs. The cross objection is allowed.

Adami J. -I agree.

Appeal dismissed

Objection allowed.

A I. R 1923 Patna 259

DAWSON-MILLER, C. J. AND FOSTER, J

(*Maharajadhiraj Sir*) *Rameshwar Singh Bahadur of Darbhanga* -Plaintiff Appellant

v

Narendra Nath Das and others. Defendants-Respondents

F. A Nos. 96 and 168 of 1919, decided on 3rd January 1923, from the decision of Addl. Sub., J. Darbhanga, dated the 22nd March 1919.

(a) *Limitation Act—Arts. 89 & 90—Articles do not apply to suit against legal representative of agent—Time runs from refusal to account.*

Articles 89 and 90 of the Limitation Act which relate to suits by a principal against his agent do not apply to suits against representatives of a deceased agent. Where there is a continuous and comprehensive agency, time begins to run from the time the agent refuses to render accounts. [P 263, Col. 2, P. 264, Col. 1.]

(b) *Limitation Act—Art. 62 and S. 2—Scope—*

Read in the light of S. 2, Art. 62 would include a claim against the legal representatives form oney received for the plaintiffs used by them or their father through whom they derived their liability to be sued. A. I. R. 1922 C. 499 Foll.

[P. 263, Col. 2.]

(c) *Legal Practitioner—What amounts to negligence—Damages cannot be awarded unless negligence is proved.*

Where it was the duty of the retained pleader to conduct all cases brought to him by the officers of the plaintiff, unless it was shown that there was any special duty cast on the pleader to remind officers of plaintiff that the decrees would be barred, he was not liable for damages for negligence, when those officers had the same knowledge or means of knowledge that the decrees would be time-barred. Having regard to the fact that the plaintiff's sub-managers and other officers at the circle offices had the same knowledge or means of knowledge as the pleader for checking the accounts of Mukhtyar who misappropriated money, the plaintiff cannot be held to have suffered any loss by reason of any neglect of duty on the part of the pleader in this matter. [P. 265, Cols 1, 2]

Sultan Ahmad, P N Sinha and *Mrarari Prasad*,—for Appellant.

C. C. Das, and *Subal Chandra Mozumdar* for Respondents,

Judgment These two appeals, numbered respectively 96 of 1919 and 168 of 1919, arise out of two suits which were tried together before the Additional Subordinate Judge of Bhagalpur and dismissed by him on the 22nd March 1919. Appeal No. 96 arises out of suit No. 470 of 1917 and appeal No. 168 arises out of suit No 471 of 1917.

The plaintiff, who is the appellant in each case, is the Maharajadhiraja of Darbhanga. The defendants in the first suit are Narendranath Das and his seven brothers who are sued as the heirs and legal representatives of their deceased father Kishundhan Das who, during his lifetime, practised as a pleader and was for 30 years the appellant's retained pleader at Madhupura and had the conduct and management of the appellant's law suits in that Sub-division

The claim in the first suit is to recover a sum of Rs. 6,150-14-9 together with interest from the assets of their deceased father in the hands of the defendants on account of the neglect, misconduct and breach of duty of their father and for an account of the amount misappropriated by him and the losses occasioned to the plaintiff by such neglect, misconduct and

breach of duty, and for payment by the defendant of the said sum of Rs. 6,150-14-9 or such other sum as the Court may think fit.

The defendant in the second suit is Narendranath Das, the eldest son of Kishundhan Das, who, on his father's death in August 1913, succeeded him as retained pleader to the plaintiff at Madhupura. The nature of the claim in this case is similar to that in the other except that the negligence, misconduct and breach of duty alleged are those of the son himself during the time when he was the plaintiff's pleader and the amount claimed is Rs. 4,368-12-9

The claim in each case is divided into two heads the items of which are set out in detail in schedules 1 and 2 of the plaint in each case The claim under the 1st schedule is based upon the allegation that certain sums payable to the plaintiff under decrees obtained by him in rent suits against his tenants were realised or withdrawn from Court by the pleader in the ordinary course of his duties and were not accounted for in the accounts rendered by him The claims falling under the 2nd schedule are based on the allegation that certain other decrees obtained by the plaintiff against his tenants were allowed to become time-barred by reason of the neglect of the pleader to present in time applications for their execution

The defence is practically the same in each case. It is admitted that the pleader in each case was engaged under a general retainer and paid a monthly salary by the plaintiff, but it is denied that he was the plaintiff's agent as alleged. It is further pleaded that one Tarini Prasad Das was the plaintiff's law agent at Madhupura and that it was he who received all monies out of Court or from the judgment-debtors, and that it was his duty to remit them to the plaintiff's Sub-Manager at the various circle offices concerned, and that the duty of keeping the accounts rested with the law agent It is denied that the pleader had any duty to realise or receive such sums or to remit them to the circle officers or that such sums were in fact ever realised by him or that he undertook any duties other than those of a pleader. It is denied that the pleader had any liability in connection with the execution of decrees except in cases where he was instructed to apply for execution and that, in such cases, a verified petition was sent to him for that purpose and whenever that was done the petition was duly presented. The liability to submit accounts is denied and it is pleaded that if the pleader was ever liable to submit accounts such accounts have been duly rendered. The alleged loss to the plaintiff is denied and it is pleaded that if any loss occurred, as alleged, it was due to the negligence, default or misappropriation of the said Tarini Prasad Das and other servants of the plaintiff. It was further pleaded in each case that the claim is barred by limitation

The learned Additional Subordinate Judge before whom the case came for trial in a careful and lucid judgment considered at length the evidence and dealt with all the issues Most of the issues were common to both cases and he dealt with them together but where they related to one of the suits only he dealt with them separately. With regard to the first suit, in which the heirs of Kishundhan Das were defendants, he found that they as representatives of their father, were not liable to render accounts. He also found that, in so far as that suit was one for monies received or for damages for negligence, it was governed by the three years rule of limitation under Art 115 of the second schedule of the Limitation Act and was time-barred, having been brought more than three years after the death of Kishundhan Das who died on the 20th August 1913, the suit having been instituted on the 2nd August 1917 He further held that in both suits the pleader incurred no liability for failure to institute execution proceedings whereby decrees became time-barred as the institution of such proceedings was not a matter in which the initiation rested with the pleader but was with the plaintiff or his authorized agents in that behalf. He also found that proper accounts in both cases had been duly rendered and the defendants could not be called upon to render fresh accounts. As to the sums claimed under Sch. 1 of the plaint in each case for monies received by the pleader for the use of the plaintiff he found that the claim had not been proved. On the question of limitation in the second suit he found that Art. 89 of the Limitation Act governed the claim arising under Sch. 1 of the plaint and that it was not

time-barred He also found that Art 90 of the Limitation Act governed the claim arising under the second schedule of the plaint. He further found upon the evidence that the plaintiff, or his officers who had responsibility in the matter, had knowledge that the decrees became time-barred as soon as that event happened in each case, and, therefore, under Art. 90 of the Limitation Act, the claim was barred in respect of any alleged negligence or misconduct in failing to execute decrees which took place more than three years before the institution of the suit.

The plaintiff has appealed in both cases The questions which have been raised for decision on appeal are (1) whether the claim in either of the suits is barred by limitation and which of the articles in the second schedule of the Limitation Act apply, (2) whether the defendants in either suit are liable to render accounts, (3) whether the defendants in either suit are liable in damages for negligence of the pleader in allowing decrees to become time-barred, (4) whether the pleader in either case actually received the sums or any of them setout in the first schedule of the plaint for the plaintiff's use, (5) whether, assuming there was no actual receipt of the money by the pleader, he was nevertheless responsible for the due transmission of the sums received by Tarini Prasad Das to the plaintiff's circle offices, and (6) whether any sums so received were not remitted to the plaintiff's circle offices

Before dealing with these questions in detail it is desirable to state shortly some of the circumstances under which the claims arise. Kishundhan Das, the father of the defendants, was for 30 years, until his death on the 20th August 1913, the retained pleader of the Darbhanga Raj at Madhupura sub-divisional head-quarters and was paid a monthly salary of Rs. 40 for his services. He was succeeded by his son Narendranath Das whose appointment was confirmed on the 30th August 1913. The professional work entrusted to the pleaders consisted mostly in rent suits. The sub-division of Madhupura was divided into 4 circles Naraigar, Jahanjharpur, Birnagar and Ahins. For each of these circles there was a circle office in charge of a sub-manager of the Raj assisted by a lawclerk. The pleader carried on his business in a room rented by the Raj for that purpose. This room happened to be in a house belonging to the pleader but not at his residence. A Raj Muharrir, appointed and paid by the Raj, was provided to act as the pleader's clerk. The scope of the duties of the pleader and the Muharrir is a matter in issue in the suit. During the period with which these suits are concerned the Muharrir under the pleader was Tarini Prasad Das. All monies realised in the suits instituted by the plaintiff, which were very numerous, were remitted from the pleader's office to the office of the circle whose business it was to receive them Sometimes decretal money was paid out of Court by the tenant defendant but more usually the suit proceeded to execution and the decree-holder's dues were either deposited in Court or realised by sale. When money was deposited in Court by the judgment-debtor, an application for a payment order signed by the pleader was presented to the Court by Tarini Prasad.

A payment order directing the treasury to pay the amount deposited was then issued by the Munsif to Tarini Parsad who obtained thereon the signature of the pleader acknowledging receipt from the Treasury Armed with this order, signed by the pleader, it was Tarini Prasad's business to present it at the treasury and draw the money. It was also his business to enter in the account books kept by him such sums as were so withdrawn. From time to time, generally about once a month, sometimes, more often, the sums realised either by withdrawal from Court or from the judgment-debtors out of Court were sent to the circle office concerned together with a chalan in duplicate shewing the details of the sums received during the previous month or whatever the period may have been since the last remittance. One of the chalans was kept at the circle office the other was signed by the sub-manager or the officer responsible and returned to the pleader's office as an acknowledgment of the receipt of the money. These chalans were kept in triplicate and it was the business. Tarini Prasad to keep them. They were printed forms kept in a book, the first one being retained in the book as a counterfoil and the other two detached and sent to the circle office when filled up as already stated. In addition to the chalan register a register of cash account

was also kept at the pleader's office. This cash account appears to have been concerned primarily with the different items of expenditure made by the pleader out of sums sent to him from time to time for defraying out of pocket expenses in connection with suits in which he was engaged Under the rules laid down for the guidance of law officers and others it was the pleader's business to keep the cash account as appears from rule 6 (See Ex. A and Schedule F attached thereto). It was also the duty of the karpardas attached to the Munsif's Court to keep a monthly register of cash account, circle by circle. This appears from rule 7 and schedule G of the rules Although Tarini Prasad Das has been referred to as a muharrir there was no other karpardas attached to the Munsif's Court at Madhupura and he appears to have carried out the duties assigned by the rules to the karpardas there. It is not very clear whether two cash accounts were kept or only one, but, however this may be, the accounts were in fact kept by Tarini Prasad.

It is not suggested that the remittances sent to the pleader for the purpose of making disbursements in the cases conducted by him were not all properly accounted for and no question arises with regard to such sums The monies received out of Court, however, or otherwise paid by the judgment-debtors to Tarini Prasad appear to have been entered in the cash account already mentioned and this was periodically countersigned by the pleader on being presented to him by Tarini Prasad It is the defendants' case that he signed this book merely because the disbursements for which he was responsible were entered therein and that his signature was not necessary for and had nothing to do with the entries relating to sums received out of Court or from the judgment-debtors, a matter which he contends was entirely in the hands of Tarini Prasad. In addition to signing the cash register it appears that the pleader from time to time, as the chalans for money received from the judgment-debtors were forwarded to the circle office, signed a certificate to the effect that all monies received during the past month had been duly forwarded to the circle office. The plaintiff contends that the signing of this certificate cast a duty upon the pleader to see that all monies actually received by Tarini Prasad from the judgment-debtors or out of Court were duly forwarded.

When it was necessary to apply to the Court for execution of a decree, the circle officers concerned with the matter would send to the pleader's office a verified application for execution bearing the signature of the Sub-Manager. On receipt of this at the pleader's office it was counter-signed by the pleader and presented in Court to be filed by Tarini Prasad. It is not the plaintiff's case that any such applications sent were not duly presented but it is contended that it was the pleader's business to remind the plaintiff's agent at the various circle offices that a decree was about to become time-barred and that an application for execution should be sent to him for filing.

On the 8th May 1915 Tarini Prasad, who was then under orders of transfer to another place, disappeared. Certain officers of the Raj were deputed to make an enquiry and the whole of the accounts of the sheristá were overhauled The result of this was that on the 29th June 1915 Abdul Wajid, a circle law clerk of the plaintiff, was deputed by the Raj to lodge a petition of complaint against Tarini Prasad charging him with misappropriation. Tarini Prasad surrendered and was committed to the Sessions. In the meantime his duties as muharrir at the pleader's office were taken over by Jang Bahadur Tarini Prasad was tried in December 1915 and was acquitted in January following. The prosecution having failed Narendranath Das, the defendant, on the 20th July 1916 was called upon to submit accounts. On the 31st July he refused to do so disputing his liability to account and stating that all the accounts had been duly rendered and were in the possession of the Raj. It appears that a few days earlier, on the the 15th July 1916, Narendranath Das had tendered his resignation as Raj pleader but he in fact continued to act until the 30th January 1917 when his office terminated. Both the present suits were instituted on the 2nd August 1917.

With these preliminary observations we propose to deal with the points raised in the order mentioned above.

The first point relates to the question of limitation. With regard to the claim in the first suit the defendants are sued

as legal representatives of their deceased father. It is, we think, well established that the representatives of a deceased agent are not liable to render an account in the sense in which the agent, had he lived, might have been called upon to do so, and this was not disputed by the learned Government Advocate on behalf of the appellant in argument before us. The liability to render accounts is a personal one attaching to the agent and cannot be enforced against his heirs.

This does not mean, however, that the heirs must necessarily escape liability altogether for the defalcation or breach of duty of the agent if the principal can prove that he has suffered loss thereby. The suit is so framed as to include a claim for sums received by the agent for the use of the plaintiff and for the loss occasioned to the principal by reason of the defalcation and breach of duty of the agent and to the extent of the assets of the deceased agent in their hands, the heirs would be liable. The burden of proof, however, in such a case, rests upon the plaintiff. It is unnecessary, however, for the purposes of the first suit to consider to what extent, if at all, the plaintiff may have made out such a case because, even assuming that such a case could be established, in our opinion any cause of action which the plaintiff may have had became time-barred by limitation before the suit was instituted. It is conceded by the appellant that the claim for damages for breach of duty by reason of allowing the decrees to become time-barred is covered by Art. 115 of the second Schedule of the Limitation Act which prescribes a limitation period of 3 years from the date of the breach of contract. As the breach alleged in the first suit must have occurred during the lifetime of Kishundhan Das it follows that the suit having been instituted more than 3 years after his death the claim cannot now be enforced. This covers the items set out in the second schedule of the plaint. But it is contended that the claim for monies received by Kishundhan Das and not accounted for is not covered by any specific article in the Limitation Act and therefore comes under the residuary Art. 120 which governs suits not otherwise provided for and allows six years from the date when the right to sue accrues. If the three years period applies it is conceded that the suit is barred. It is contended by the appellant, and not disputed by the respondents that Arts. 89 and 90 of the Limitation Act which relate to suits by a principal against his agent do not apply to suits against the representatives of a deceased agent and those articles need not be considered. The respondents, however, contend that either Art. 62 or Art. 115 is applicable. Both these articles provide a three years' period of limitation and if either of them applies the suit is barred, as Art. 120 would in that case have no operation. Art. 62 is for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use and the period of 3 years begins from the time when the money is received. If the commencement of the period is to be taken as the date when Kishundhan Das received the money, assuming he ever did receive it or even at the date of his death, when the defendants succeeded to their father's estate, in either case the claim became time-barred before the suit was instituted. The appellant argues that Art. 62 can have no application as the suit against the defendants is not for money received by them for the plaintiff's use at all, they having received it as part of the assets of their father's estate and not for the use of any one except themselves. In other words they never received it at all in the sense intended in the Act. If the Article had stood alone we think there would have been some force in this argument but S. 2 of the Limitation Act provides that unless there is anything repugnant in the subject or context "defendant" includes any person from or through whom a defendant derives his liability to be sued. Read in the light of S. 2, Art. 62 would include a claim against the present defendants for money received for the plaintiff's use by them or their father through whom they derived their liability to be sued and we consider that this article applies.

This was the opinion taken by Mr. Justice Greaves of the Calcutta High Court in *Kumar Gopal* v. *Rohini Kanta Chakravarty* (1), where certain decisions of the Allahabad High Court to the contrary effect were either distinguished or not followed. In our opinion the decision of Greaves, J., was right. We further

(1) A. I. R., 1922 Cal., 499.

consider that, even if Art. 62 should not be applicable, the case is covered by Art. 115 which provides for a suit "for compensation for the breach of any contract express or implied not in writing registered and not herein specially provided for" The liability to remit the sums received arose out of contract and the failure to do so, if any, was a breach of contract and it is for that breach that the suit is brought It follows therefore that in our opinion Appeal No 96 of 1919 is time-barred and for this reason, if for no other, the appeal should be dismissed with costs

With regard to the second suit, No 471 in our opinion Art 89 applies to that part of the claim which falls under schedule I of the plaint. That article provides for a suit for a principal against his agent for moveable property received by the latter and not accounted for. The application of this article is not disputed The only question argued before us was when the period began to run. The learned Counsel for the respondents argued that each case in which the sums were received was a separate subject of agency because a separate *kalalnama* was given to the pleader in each case, but it is common ground that the defendant was appointed to the post of Raj pleader, which his father held before him, in August 1913 It seems to us that the appointment involved a continuous and comprehensive agency and the *vakalatnama* that passed from time to time from the plaintiff to the defendant were merely incidental to that agency and the period began to run from the 31st July 1916 when the defendant refused to render accounts and the suit is not time-barred.

With regard to the claim arising under the second schedule of suit No. 471 this appears clearly to be covered by Art. 90 of the Limitation Act which provides for other suits by principals against agents for neglect or misconduct, and the period of three years runs from the time when the neglect or misconduct becomes known to the plaintiff. Here again the application of this article was not disputed, the only point at issue being a question of fact, namely, at what time the plaintiff had knowledge of the misconduct of the pleader. Upon this question the appellant's contention was that he first obtained such knowledge on the 7th January 1916. This contention appears to us to rest upon no foundation of fact. It has not been explained what happened at that particular time to bring the defendant's neglect to the knowledge of the plaintiff. The learned Additional Subordinate Judge has shown that the plaintiff had ample means of knowledge if not at the time at least very shortly after each of the alleged delinquencies The respondent points to what we consider conclusive evidence showing that the agents and officers of the appellant had exactly the same information as the pleader as to when decrees had lapsed by failure to apply for execution. They had duplicate rent suit registers which shewed the progress of every case under trial, appeal or execution The accounts were sent in at least once a month accompanied by a tabular statement in the form of a chalan shewing details of of the cases in which the money had been paid The accounts of the pleader's office were subject to regular periodical checking and the circle law agent had the duty of comparing at frequent intervals the circle accounts with the accounts and records of the pleader's office Moreover the submanager had estate officers in every village under his control and would surely hear of any delay in realisation of rent decrees by execution. It is unnecessary to pursue this question further The evidence amply convinces us that the appellant's authorised agents would know that an execution of a decree had become time-barred practically as soon as that event happened It follows therefore that in our opinion all claims in the second schedule for negligence arising more than three years before the date of suit are barred. This question is not of material importance, however, having regard to our findings on the third point which will be referred to presently

The second question is whether the defendants in either suit are liable to render accounts In dealing with the question of limitation we have already held that the defendants in the first suit are not liable to render an account as the representatives of their father. With regard to the second suit it appears from the judgment of the trial Court that the point was abandoned by the learned Vakils who then appeared for the plaintiff and who conceded that the evidence of his

own witnesses showed that the pleaders had all along submitted accounts month by month, not only of the advances received by them from the circle offices but also of the sums received in Court and outside the Court on the plaintiff's account. It was further conceded that the only claim which the plaintiff could put forward was to recover the amounts mentioned in the respective schedules of the plaint and the suit, as pointed out by the learned Judge, is not one for accounts strictly so-called but for recovery of monies received for use of the plaintiff and for damages for negligence. It was further forcibly pointed out by the learned Judge of the trial Court that the plaintiff who had all the accounts in his possession, not only those rendered by the pleaders, but those kept by his own servants, and agents, had failed to produce the most material documents which might have been expected to substantiate his case. In our opinion no case has been made out for ordering a fresh account to be taken.

The third point is whether the defendants in their suit are liable in damages for negligence of the pleader in allowing decrees to become time-barred. In the earlier part of this judgment we have referred to the practice in vogue when the plaintiff desired to take out execution of a decree. Admittedly until the verified application for execution of a decree was received at the pleader's office he had no authority to initiate execution-proceedings. Accordingly if any decrees became time-barred it is not easy to appreciate how the pleader could be held responsible provided he did not neglect to present the applications for execution when sent to him for that purpose. It is not shown that he was negligent in that respect. Further it is admitted that the plaintiff's officers at the various circle offices had their own rent suit registers which were frequently compared with the register kept by the pleader and that they had full information as to the dates when execution of the various decrees would become time-barred. It is also shown from the evidence of the plaintiff's own witnesses that the duty of initiating such proceedings rested with those officers and not with the pleader. It was contended before us, however, that the pleader had a duty to remind the circle officers and other agents of the plaintiff if it should appear that they were allowing the time to run short before initiating proceedings. Throughout the evidence which is unusually voluminous in this case there is nothing whatever to shew that there was any express duty cast upon the pleader to remind the plaintiff or his servants that they were not properly conducting their business and no document has been produced to show either that the pleader ever attempted to interfere in this manner or that his conduct was ever called in question for failing to do so. Indeed the evidence was overwhelming to show that it was the duty of the circle officers and their duty alone, to ascertain what progress had been made in any particular case, and the law registers at the circle offices shewed exactly what realisations had been made and it was the duty of the law clerk to report upon such matters to the sub-manager. Nor are we able to find that any implied obligation can, in the circumstances, arise out of the terms of the pleader's employment. His business was to conduct the plaintiff's cases as and when he was instructed and not to instruct the plaintiff or his servants that they ought to take proceedings against their tenants in cases in which for aught he knew, there might be the best of reasons for refraining from such a course. In our opinion the claim for damages for negligence in allowing decrees to become time-barred fails.

The fourth point for consideration is whether the pleader in either case actually received for the plaintiff's use the sums or any of them set out in the first schedule of the plaint. The sums withdrawn from Court were undoubtedly taken out upon the applications signed by the pleader but in every case the payment orders were received by Tarini Prasad Das, the muharrir, and it was he who cashed the same at the treasury. Likewise there is nothing to shew that any one except the muharrir ever received the sums paid by the judgment-debtors out of Court. The only sums actually received by the pleader were the law advances for meeting necessary disbursements and no question arises as to these. We hold therefore that the plead-

ers did not in any case receive the sums claimed in their actual possession.

The fifth question relates to the liability of the pleader for the remittal of the sums received by the muharrir to the plaintiff's circle offices. Various arguments were adduced before the trial Court in respect of the pleader's liability. It was contended first that Tarini Prasad was the pleader's clerk and servant and that the pleader was responsible for his acts: secondly, that the pleader should not have allowed Tarini Prasad to receive these sums and thirdly that it was the pleader's duty to see that the amounts so received were entered in the accounts and promptly remitted to the circle offices. The judgment of the trial Court deals at length with each of these arguments and dismisses them. With regard to the first two of these points no argument has been urged before us in support of them and indeed it would be difficult in the face of the evidence to shew either that Tarini Prasad was the pleader's servant or that the procedure followed whereby Tarini actually received the sums was not authorised and assented to on behalf of the plaintiff. It is urged, however, that the pleader was bound to see that the amounts realised by the muharrir were entered in the accounts and promptly remitted to the circle offices concerned and that the neglect of this duty resulted in a loss to the plaintiff.

The view taken by the learned Additional Subordinate Judge was that, in so far as the claim for the items comprised in the first schedule was concerned, it was a claim for misappropriation of sums received by the pleader and not a claim for damages for neglience and that the plaintiff ought not to be allowed at that late stage to make a new case. He further considered that Tarini Prasad although called muharrir was really the Raj karpardaz at Madhupura and that under the rules already referred to (Ex. A) it was his duty to keep accounts of all sums received by him as well as the register of triplicate chalans for the monies remitted to the circle offices and that the practice followed by him had the approval of the plaintiff's officers. He thought that in these circumstances the pleader could not be blamed or made responsible for not having foreseen the possibility of defalcation by the muharrir and that if anybody was responsible besides the muharrir himself it was the circle submanager and not the pleader. On referring to the rules laid down for the guidance of all law officers of the Raj it appears that by R. 6 District Court and Munsifs' Court pleaders must keep the register in Sch. F in English, where clerks have been given to them and, where no clerks have been givenin the vernacular. The only documents in Sch. F which are material and which the pleader had to keep are the register of rent suits and the register of cash account. The register of cash account would no doubt include such amounts as were periodically sent to the pleader to meet the disbursements in cases under his charge. There is nothing to shew, however, that it would include any sums not actually received into his hands. The register of rent suits would or ought to shew all transactions in connection with such suit and would presumably include monies received out of Court or from the judgment-debtors direct. In a circular letter dated the 20th September, 1910 (Ex. 3) sent by the general manager to all sub-managers, agents, factory managers and treasury officers and which the defendant's father is proved to have received it is stated "I have to remind you that the Raj rules clearly make out that pleaders and mukhtars are responsible for remittances made to them from different offices, for monies received by them from judgment-debtors (the raiyats and others) and for monies drawn by them from Courts and I trust you deal with them accordingly and shall always so deal with them in future. Please explain their duties in this respect afresh to the pleaders and mukhtars and others having monetary transactions and let me have their assurances that they do understand them."

In so far as this refers to monies drawn by the pleaders from Court or received from judgment-debtors it may well be that such monies were actually received by them into their own custody on occasion, as when the muharrir or karpardaz was ill or on leave but there is nothing to shew that it had reference to all monies received out of Court or from judgment-debtors even by the karpardaz himself in accordance with the practice recognised by the Raj. By Cl. 7 of the rules, the karpardaz attachad to the District and Munsif's Court have, amongst other

duties, to keep the registers marked in Sch. G in the vernacular. Sch. G amongst other registers includes the monthly register of cash account circle by circle, the register of triplicate chalans for money sent and the register of rent suits. These documents were in fact kept by Tarini Prasad and it is the opinion of the judge of the trial Court that although referred to as a muharrir he did in fact act as karpardaz of the Munsif's Court, At all events he kept the documents which it was the duty of the karpardaz to keep and there seems to be no reason to quarrel with his finding in this respect. It is true that the triplicate chalans and the cash account were signed by the pleader and he was in the habit also of signing a certificate when the chalans were sent to the circle office to the effect that all monies received during the past month had been remitted. To this he appended his signature when the certificate was presented by Tarini Prasad and he no doubt relied upon the latter's word for its accuracy. If it referred merely to amounts received by the pleader himself its accuracy can hardly be questioned as he in fact received nothing. It does not appear to have been part of the duty of the pleader to keep any account of the sums received from the judgment-debtors or withdrawn from Court and for the accuracy of the chalans, he no doubt had to rely upon the word of Tarini Prasad.

In connection with this matter it is not unimportant to consider certain documents prepared on behalf of the plaintiff in the criminal proceedings against Tarini Prasad. In the complaint lodged in that prosecution (Ex. J) it was stated that one of the accused's duties was to remit to the circle offices the decree monies after having realised the same, and the law clerk Abdul Wajid in his evidence stated that it was Tarini Prasad's duty, amongst others, to realise decree monies either from Court or from judgment-debtors and to remit the amounts so realised to the sub-manager of the circle concerned. These proceedings were taken and the petition of complaint filed after serious consideration between the law clerk, the Raj manager and the sub-manager of the Naredigar circle, and the correctness of the statement then made has not been disputed. The only question is, assuming the point to be open to plaintiff on the the pleadings, whether by certifying when the chalans were sent that all money received had been duly remitted he has rendered himself liable to a suit for damages for negligence. The question is not free from difficulty but having regard to the fact that the plaintiff's sub-managers and other officers at the circle offices had the same knowledge or means of knowledge as the pleader for checking the accounts of Tarini Prasad, we are on the whole of opinion that the plaintiff has suffered no loss by reason of any neglect of duty on the part of the pleader in this matter.

The sixth and last question is whether it has been made out that any of the sums received by Tarini Prasad were not remitted to the plaintiff's circle offices. In view of the findings on the fifth point it might not be necessary to determine this question, but even if our opinion upon the last point should be wrong we consider that it is not sufficiently proved that any of the items claimed in the first schedule were not remitted to the circle offices concerned. In connection with this question it is significant that from the opening of this litigation the plaintiff has been reducing his claim. The plaint as originally filed was amended by striking out a large number of the items claimed. Many more were abandoned in the trial Court and others were also struck out before us. Of those which remain some were proved to have been duly paid to the Raj from the plaintiff's own documents and in respect others there was no evidence to shew that the amounts were drawn out of Court. In the end out of the numerous details in schedule No. 1 in the two cases only items 3 and 23 in the first schedule of the second suit were urged as being supported by the requisite sequence of evidence shewing receipt of the money and failure to remit. The appellant seeks to prove his case by production of certain records from the Munsif's Court shewing that money was paid out to Tarini Prasad and pointing to the fact that such sums found no place in the chalans shewing remittal of the sums at or about the period when they were withdrawn. The chalan counter foils are not produced and the chalans themselves are admittedly imperfect in that some only of them have been produced. The suit registers have not been produced and the

cash account books kept either at the pleader's office or at the circle offices, with a few unimportant exceptions, are not forthcoming, and such documents as are produced refer only to the accounts of one of the circles in question. These documents would have shewn beyond all doubt whether the sums claimed were in fact remitted to the circle offices concerned and as the defendants have no accounts of their own, it is impossible for them to deal adequately with this issue. Again it appears from the evidence that at times monies used to be sent to the circle offices without accompanying chalans. In dealing with this question we cannot do better than quote somewhat fully from the judgment of the learned Additional Subordinate Judge. [After dealing with the question of the onus of proof and finding that it lay upon the plaintiff, his Lordship proceeded] "That being so it was quite incumbent upon him (the plaintiff) to produce these accounts in Court but curiously enough the primary papers are not forthcoming though the defendants raised the point specifically and stated that as all the papers, books and records necessary for the adjustment of the accounts asked for were with the plaintiff, he could not be equitably and legally called upon to render any accounts (*vide* para. 21 of the written defence in suit No. 471). Heaps of papers and documents have been produced in Court on behalf of the plaintiff but not a single copy of the suit registers is forthcoming and excepting three cash account books (*vide* Exs. 14 to 14 *b*) the bulk of those important papers have also been withheld. The first, *viz.* Ex. 14 is for 1912, the second Ex. 14 (*a*) for 1907 to 1908 and the third, (Ex. 14 (b)) from July 1910 to April 1911 and the first and the second refer to trust mehals only. Thus practically speaking there are no cash account registers forthcoming in respect of the Mal villages of the four circles appertaining to the Madhupura Civil Court. Those cash accounts have intrinsic value of their own as they contain item by item and case by case the sums remitted from the pleader's office to the several circle offices and the evidence on the record shews that separate cash account registers have all along been kept for each circle. Some chalans have no doubt been produced but it has not even been attempted to make out that they make up the whole quantity of such documents received from the pleader's office and the value of these documents is somewhat diminished from the fact as disclosed in evidence that at times money used to be sent without such chalans. And again the cash account registers and the chalans would have been sufficient checks one upon the other."

In a later passage he states "Many and numerous are no doubt the documents and papers produced by the plaintiff in these cases but all through the tendency of his officers was to withhold such papers as were in any way helpful to defendants and I cannot but observe that the deliberate policy of the plaintiff's officers and amlas was not to produce documents which might have thrown any light on the real point at issue." It further appears from the evidence that in some cases amounts received by Tarani Prasad were not credited in the subsequent monthly account but found a place in chalans of a later date. Apart from the documentary evidence which is defective as already shewn there is not a single witness who states that any monies received at the pleader's office were not duly remitted to the circles concerned. It is impossible in our opinion in this unsatisfactory state of the evidence upon this vital matter to differ from the findings of the trial Court upon this issue. In our opinion these appeals should be dismissed with costs.

Appeals dismissed.

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* * A. I. R. 1923 Patna 268.

DAS AND ADAMI, JJ.

Kanhai Lal Khemka and others—Plaintiffs-Appellants

v.

Thakur Prasad Singh and others—Defendants-Respondents.

Appeal from original decree No. 68 of 1919, decided on 14th November, 1922.

(a) *Minor—Doctrine—Legal Necessity to be involved only to protect a minor's estate—Lender's duty—He is to enquire only as to the particular transaction—He is not affected by precedent mismanagement unless he is a party to the same.*

The doctrine of legal necessity has application only when the minor has an estate or a fund which it is the duty of the Court of equity to protect as against the improvident act of the guardian.

A minor bought with funds supplied by his aunt a property which had been sold in execution of a mortgage decree. As full purchase money had not been paid to avoid confirmation of sale in execution of mortgage decree, the property was mortgaged by the minor purchaser and the vendors became sureties.

Held, looking at the two transactions as one once it is realized that the minor was not in possession of any estate independently of the transaction which he was seeking to challenge, it becomes manifest that the Court cannot extend its protection to the minor by denying validity to the transaction which had brought the estate into existence. [P. 271, Col. 2, P. 272, Col. 1.]

If the two transactions are regarded as separate then in dealing with a guardian of a minor, the lender is bound to enquire into the necessities for the transaction into which he is invited by the guardian to enter and to satisfy him self that the guardian is acting, in the particular instance, for the benefit of the ward. No authority imposes upon the lender the further duty of enquiring into the necessity for an altogether different transaction which perhaps has made the proposed transaction inevitable. If the law did impose such a duty upon the lender, then it might be said that he is bound to enquire into the antecedent management of the estate. But it is settled law that, provided the necessity for the loan has not arisen from any misconduct to which the lender is or had been a party, he is not affected by the precedent mismanagement of the estate. [P. 272, Col. 2]

(b) *Hindu Law—Joint family—To save properties from sale at execution is legal necessity.*

To save other properties from sale at execution, manager sold the mortgaged property. But full purchase money could not be paid by the purchaser and the manager became a surety to the mortgage executed by the purchaser in order to be able to find money to set aside the execution sale before confirmation.

Held, there was legal necessity for the last transaction and the manager was justified in becoming a surety to the mortgage.

[P. 274, C. 2.]

Hasan Imam, Sultan Ahmad, P. Dayal, Sambhu Saran and *Jadubans Sahay*—for Appellants.

P. K. Sen, S. M. Mullick, A. B. Mukherji, N. C Sinha, T. N. Sahay and *Bhagwan Prosad*—for Respondents.

Das, J.:—This was a suit by the appellants to enforce a mortgage bond as against the respondents. The mortgage bond was executed on the 30th October 1916 by defendant No. 1, who was and still is a minor, through his father and natural guardian defendant No. 7 as principal and by defendants 2 to 6 (of whom defendants 4, 5 and 6 are minors) as sureties to secure an advance of Rs. 34,000 made by the plaintiffs to defendant 1 to enable him to pay the balance of the consideration money due in respect of a property purchased by defendant No. 1 from the defendants 2 to 6. The learned Subordinate Judge has given the plaintiffs a personal decree as against defendants 2 and 3 and has dismissed the suit as against the defendants other than defendants 2 and 3.

The facts are these: On the 11th September, 1916 certain properties belonging to the defendants second party, (defendants 2 to 6) were sold at a sale held in pursuance of a mortgage decree that had been obtained by Tilakdhari Lal and another against the defendants, second party. The mortgage claim was for Rs.1,02,330, and the properties were sold to the decree-holders for Rs. 73,200. It was open to the defendants, second party, to apply, under O. 21, R 89, to have the sale set aside on depositing in Court a sum equal to five per cent. of the purchase money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered; but it was necessary for them to make the application on or before the 30th October, after which date no application for setting aside the sale could be entertained by the Court. The defendants, second party, set about to obtain a loan of Rs. 1,06,011-8-9, the amount which it was necessary for them to deposit in Court under O. 21, R. 89 of the Code. It so happened that the Rani of Jheria, the aunt of defendant 1, had made a promise to defendant 7, the father of defendant 1, to make a gift of money to enable defendant 1 to purchase immoveable properties. Defendant No. 7 entered into negotiation with the defendants, second party, for the purchase of the properties which had already been sold to Tilakdhari Lal, and the defendants, second party, agreed to sell those properties to defendant 1 for Rs. 1,06,011-8-9. Rani of Jheria approved of the transaction, and sent Rs. 79,000 to defendant 7, Rs. 75,000 for the purchase of the properties in question and Rs. 4,000 for the expenses of the family. It is the case of defendant 1 that the Rani never agreed to pay anything more than Rs. 75,000 for the purchase of the properties; but the learned Subordinate Judge has found, and, I think, rightly that defendant 7 expected to procure the balance of the consideration money from the Rani. The sale-deed was executed by the defendants, second party, in favour of defendant 1 on the 24th October 1916, but

the consideration money was not paid that day, as the full consideration money had not been received by defendant 7. The parties, however, had complete faith in the promise of the Rani and they believed that Rs. 32,000, the balance of the consideration money, would be sent by the Rani in time to enable defendant 7 on behalf of defendant 1 to pay off the defendants second party, and the defendants, second party, to make the deposit on the 30th October. They waited till the 27th October, and, then, realizing that it was dangerous to wait any longer, since the sale in favour of the decree-holder would stand confirmed if the deposit was not made on or before the 30th October, approached the plaintiffs, who happened to have been the bankers of the defendants, second party, for a loan for Rs. 32,000 for the short period of three months. The suggestion was made that the plaintiffs should advance Rs. 32,000 to defendant 1 on the security of the properties purchased by him from the defendants second party; but the plaintiffs, who knew the defendants, second party, and did not know the defendant No. 1, agreed to advance the money provided the defendants, second party, joined in the transaction and mortgaged some of their exclusive properties to answer for the claim of the plaintiffs in case the securities offered by defendant 1 proved insufficient. The defendants, second party, readily agreed, and on the 30th October, 1916, the plaintiffs advanced Rs. 32,000 to defendant 1 on the mortgage executed by defendant 1 and by the defendants, second party. It was to enforce this mortgage that the suit, out of which this appeal arises, was brought by the plaintiffs in the Court of the Subordinate Judge of Bhagalpur on the 21st December, 1917.

The learned Subordinate Judge came to the conclusion that there was no legal necessity which justified the adult defendants to enter into the transaction of the 30th October, 1916; and, as he thought that the transaction did not benefit the minor defendants, he declined to give the plaintiffs a mortgage decree on the foot of the mortgage of the 30th October. He thought, however, that the adult defendants 2 and 3 were clearly bound by their promise, and he has given the plaintiffs a personal decree for Rs. 32,000 with interest as against the defendants 2 and 3.

It will be convenient, first, to consider the liability of defendant 1. In starting the enquiry, the learned Subordinate Judge asked himself the question whether the plaintiffs enquired into the necessities for the loan and satisfied themselves, to the best of their ability, in relation to the person with whom they were dealing, that the guardian (it will be convenient to refer to the defendant 7 throughout as the guardian and to defendant 1 as the minor) was acting in the particular instance for the benefit of the minors. He thought that no enquiry was, or could be, made by the plaintiffs. He thought also that, had the plaintiffs made any enquiry, they would have seen that the transaction was not for the benefit of the minor as the income from the parties purchased by him did not exceed Rs. 3,500 per year, whereas the interest payable on the loan (at Re. 1-4. per cent. per month) was Rs. 4,800 per year. The conclusion at which the learned Subordinate Judge arrived may be stated in his own words:—"The minor would not at all have been prejudiced had the proposal of the sale fallen through, for he would have at least got back to him the sum of Rs. 74,000 odd belonging to him and the circumstance that the purchase was made for him by his guardian on payment of an improper price cannot deprive the minor of the benefit of his own money and also legalise an improvident act of the manager."

Speaking with all respect, I think, there is a confusion in the train of reasoning employed by the learned Subordinate Judge. The transaction before him was the transaction of the 30th October or rather the transaction of the 30th October read with the transaction of the 24th October; but he was throughout dealing with the transaction of the 24th October. There was no question of the "proposal of sale" falling through either on the 28th October when the proposal was first made to the plaintiffs for the loan, or on the 29th October, when the negotiation for the loan was concluded, or on the 30th October, when the loan was made and the mortgage executed. The sale was concluded on the 24th October, 1916, and the position on the 24th October, was this: the title in the properties conveyed had passed to the minor subject to the minor paying into Court the sum of Rs. 1,06,011-8-9 on or before the 30th October. This was the

legal position on the 24th October, and what the plaintiffs had to consider when the proposal for the mortgage was made to them on the 28th October, was, not the propriety of the sale, for the sale had been concluded on the 24th October, but the propriety of advancing Rs. 32,000 to the minor on the security of the properties purchased by him.

Now, in dealing with this question, it is necessary first to see what part the Rani of Jheria has played in the matter. It is the case of the minor that he purchased the properties in question from the defendants, second party, for Rs. 75,000 and not for Rs. 1,06,011-8-9, that the Rani of Jheria having paid Rs. 75,000 to him had done all that she had undertaken to do that the recital in the conveyance to the effect that he had purchased the properties for Rs. 1,06,011-8-9 was an untrue recital and that, not requiring any money, he declined to execute the mortgage bond which was presented to him for his signature, and was ultimately coerced into executing it. The learned Subordinate Judge has found that the story told by the guardian on behalf of the minor is an untrue one and that he bought the properties for Rs. 10,06,0-11-8-9, and not for Rs 75,000, and that his execution of the mortgage bond was a voluntary one.

It now becomes material to consider what exactly the Rani of Jheria had undertaken to do for the minor. The guardian describes himself in his evidence in Court as dependent on his sister-in-law, by which he means the Rani of Jheria, and on other relations. The Rani of Jheria is the sister of the wife of the guardian, and undoubtedly maintained the family of the guardian. It is easy to see that either the guardian or his wife must have pressed the Rani to make a permanent provision for their infant son. The evidence both of the guardian and of Rajani Kanta, makes it perfectly clear that the Rani promised to supply the funds for the purchase of a property for the minor. If the story of the guardian that the defendants, second party, agreed to sell the property for Rs. 75,000 is, as it has been, disbelieved, then it must follow that the Rani was perfectly willing to find the entire capital for the transaction. The evidence shows that the guardian duly informed the Rani of what he had done in the matter, and the Rani sent Rs. 79,000 to defendant 7. The evidence of Narendra Narain, one of the plaintiffs, shows that the guardian "expected almost every day that the balance of the purchase money would reach from Jheriah," (P. 157 paper book), and that it was on the 29th (I think the 29th is a mistake for the 28th) that the parties approached the plaintiffs for a short time loan.

Now in order to determine whether the security is enforceable as against the minor, it is necessary to see what were the representations made to the plaintiffs and whether the plaintiffs could safely have acted on these representations. These representations were, 1st, that the Rani of Jheria, who was the mother's sister of the minor, had agreed to purchase the properties in question for the minor for Rs. 1,06,011-8-9, secondly, that she had already sent him Rs. 75,000 and had promised to send the balance soon; thirdly, that the properties which the minor had purchased from the defendants, secondparty had already passed to Tilakdhari Lal at the sale held in pursuance of Tilakdari's mortgage-decree; and, fourthly, that unless the purchase money was deposited in Court on or before the 30th October, the sale in favour of Tilakdari would be confirmed and Tilakdari Lal would still have a claim against the defendants, second party, for a large sum of money. Now there is no doubt that each of these representations was true, and the question which we have to determine is, whether any question of legal necessity arises, and, if it does arise, whether it has been made out.

Now we may look at the conveyance of the 24th October and the mortgage of the 30th October, either as one transaction or as two different transactions. If we look at them as one transaction, then, in my opinion, no question of legal necessity arises. As I understand the doctrine, it has application only when the minor has an estate or a fund which it is the duty of the Court of equity to protect as against the improvident act of the guardian. Now what was the estate of which the minor was in possession? Clearly none, unless it was the estate which his father purchased for him. But then that estate came to him by the very transaction which he is now seeking to challenge, and the question is whether he can be allowed to approbate the transaction in so far as it has given an estate to him and to repudiate the

liability that arises from the transaction. Now, in my opinion we cannot deny validity to the mortgage unless we are able to set aside the transaction as a whole and restore the parties to the position which they respectively occupied prior to the conveyance of the 24th October. But that is manifestly impossible, for Tilakdhari Lal is not a party to the present suit. In my opinion, once it is realized that the minor was not in possession of any estate independently of the transaction which he is now seeking to challenge, it becomes manifest that the Court cannot extend its protection to the minor by denying validity to the transaction which has brought the estate into existence

But it was urged that the infant was in possession of a fund,—Rs. 75,000 in all—which it is the duty of this Court to protect as against the improvident act of the guardian. The argument assumes that the infant was in possession of the fund independently of the transaction which he is now seeking to challenge. But, in truth, there is no substance for the assumption. The Rani did not make a gift of any money to the infant. What she did was to make a gift of this identical estate to him. It is only necessary to carefully read the evidence of the guardian to see what the position really was. The family was in a distitute condition and had entirely to depend on the bounty of the Rani. The Rani had agreed in Chait 1323 to provide funds for the purchase of a property for the infant and had asked the guardian to see if there were any properties available for sale. Subsequently the guardian met defendant 2, (one of the defendants, second party) and ascertained from him that he had some properties to sell. He thereupon went to Jheria and told the Rani all that he had ascertained and gave her all the details. The Rani asked him to conclude the transaction and promised to send the necessary fund. He concluded the transaction with the defendants, second party, and sent a message to the Rani to say that he had done so. Thereupon the Rani sent him Rs. 75,000. The evidence of the guardian establishes beyond doubt that the Rani sent Rs. 75,000 to the guardian in order to enable him to buy for the minor the properties which he had agreed to buy from the defendants, second party. It follows, thefore, that the minor became possessed of the fund, not independently of the transaction, which he is now seeking to repudiate, but as a necessary part of it. In my opinion, no question of legal necessity arises in this case.

But, then, it may be contended, that the conveyance of the 24th October was one transaction, and the mortgage of the 30th October was another, and that there is no foundation for the argument that the two ought to be considered as one transaction only. The contention in my opinion, does not improve the position of the minor. If we look upon the transaction of the 30th October as disdinct and apart from the transaction of the 24th October, then it must follow that the sale was concluded on the 24th October and that there is no warrant for the view of the learned Subordinate Judge that "the minor would not at all have been prejudiced, had the proposal of the sale fallen through." There was no question on the 30th October of "the proposal of the sale" falling through. The sale was as an accomplished fact, and the problem which the plaintiffs had to solve on the 30th October was, not whether the transaction of the 24th October was for the benefit of the minor but whether the transaction of the 30th October would be for the benefit of the minor. I know of authorities which lay down that in dealing with a guardian of a minor, the lender is bound to enquire into the necessities for the transaction into which he is invited by the guardian to enter and to satisfy himself that the guardian is acting, in the particular instance, for the benefit of the ward. But I know of no authority which imposes upon the lender the further duty of enquiring into the necessity for an altogether different transaction which perhaps has made the proposed transaction inevitable. If the law did impose such a duty upon the lender, then it might be said that he is bound to enquire into the antecedent management of the estate. But it is settled law, that, provided the necessity for the loan has not arisen from any misconduct to which the lender is or has been a party, he is not affected by the precedent mismanagment of the estate. As the Judicial Committee has said, "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 opinion,

if we look at the transaction of the 30th October as distinct and separate from the transaction of the 24th October, the question of the propriety of the transaction of the 24th October was not one which the plaintiffs had to consider in entering into the transaction of the 30th October. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, was the thing to be regarded.

Now, when the facts are properly appreciated there can be no doubt that the actual pressure on the estate on the 30th October was undoubted, the danger imminent. The failure to find Rs. 32,000 by the 30th October would have involved, not "the proposal of the sale" falling through, as the learned Subordinate Judge has supposed, but the coming into existence of a large claim against the minor. For what are the facts? The execution-sale which had given the properties to Tilakdhari Lal, had not wiped out the debt of the defendants second party. The total debt, for the recovery of which the properties were sold, was Rs. 1,02,330, and the properties were actually knocked down at the auction for Rs 73,200. The position then was this: that unless the defendants second party could deposit in Court by the 30th October the sum of Rs 1,06,011-8 9, which included, for the payment to the purchaser, a sum equal to five per cent. of the purchase-money, not only would the sale be confirmed, but the defendants second party would still be liable to pay to Talakdhari Lal the sum of Rs. 29,130. At this stage the minor came on the scene through his guardian. He agreed to buy the properties for Rs. 1,06,011-8-9, and actually took a conveyance of the properties on the 24th October. The position on the 24th October was this: that the properties had passed to the minor, subject to his paying to the defendants second party on or before the 30th October the sum of Rs. 1,06,011-8-9. But the minor had only something like Rs. 74,000 in his hand on the 24th October. In order, not only to save the properties but to avoid a claim being made against him by the defendants second party, it was essentially necessary for him to find on or before the 30th October the sum of Rs. 32,000. There was, therefore, not only an actual pressure on the estate, but an imminent danger, and, in my opinion, the plaintiffs were justified in lending the money to him without enquiring into the question whether the transaction of the 24th October was, or was not, beneficial to him.

In the view which I take of the case, it is unnecessary to enter into the question of the value of the properties purchased by defendant 1; but I shall deal with it, as the conclusion of the learned Subordinate Judge is largely based on it. The learned Subordinate Judge was greatly impressed by the fact that the properties were knocked down at the auction-sale for Rs. 73,200. But it is notorious that the price fetched at a forced sale is not a true criterion for determining the real value of the properties sold and that it forms a most fallacious basis for assured conclusions. It is more to the point, as Narendra Narain says, that the Rajah of Nawaggar offered to purchase the properties for Rs. 1,10,000. Narendra Narain explains in his evidence that as the officer of the Rajah wanted a commission of Rs. 10,000 he declined to sell the properties to the Rajah of Nawaggar. There is no reason to disbelieve his evidence, for it seems that he filed the actual letter received by him from the Private Secretary of the Rajah in Tilakdhari, Lal's execution case.

Now, as to the income, the evidence of Narendra Narain is that the income from the properties at the time of the sale was about Rs. 6,000 per year. The learned Subordinate Judge thinks that the net income could not have exceeded Rs. 3,550. The learned Subordinate Judge concedes that the best evidence on this part of the case would be the collection papers and especially the jinsi papers of the estate, but he is under the impression that it was the duty of the plaintiffs to call upon the defendants second party to produce the jinsi papers. But Narendra Narain says definitely that he made over the jinsi papers to defendant No. 7. This evidence is inherently probable, for it is usual to make over all papers and documents connected with an estate at the time of the sale thereof. In my opinion, since the question of the income of the estate was an important question for the consideration of the learned Subordinate Judge, according to the case of the minor as it was presented, on his behalf, to the Court it was the duty of the guardian who was in possession of the materials necessary

to enable the Court to come to a conclusion on this point, to have produced those materials before the Court, and his failure to do so, should have induced the Court to accept the evidence of Narendra Narain.

We are, in the absence of those materials, unable to say definitely what the income of the estate was at the time of the transaction of the 24th October. But there are materials in the record which establish conclusively that the calculation made by the learned Subordinate Judge is untrustworthy and ought not to be accepted. After carefully examining each item, His Lordship concluded as follows:—The income from the different classes of land conveyed does not fall far short of Rs. 6,000 per year which, according to the evidence of Narendra Narain is the income of the estate. It is impossible to say that an investment of Rs. 1,06,011-8-9 which brought an income of Rs. 6,000 per year was an improvident investment. I hold that the mortgage-bond is binding on the minor and is enforceable as against him.

I now come to the question of the liability of the defendants second party. There is, in my opinion, no escape from the conclusion that the transaction of the 30th October was for the benefit of the entire joint family, and that the mortgage-bond is enforceable against them. It will be remembered that, at the auction-sale, held in execution of Tilakdhari Lal's decree, the properties which were the subject-matter of that mortgage and which are substantially the same as those sold to defendant 1, were knocked down for Rs. 73,200. The sale did not wipe out the liability of the defendants, second party, and there was every prospect of what other properties they had, passing into the hands of Tilakdhari Lal. It was, therefore, urgently necessary for them to pay the decretal amount into Court on or before the 30th October not only to rescue the properties which had already passed into the hands of Tilakdhari Lal but to save what other properties they had. It is quite true that the effect of the transactions of the 24th October and 30th October was to rescue these properties from the hands of Tilakdhari Lal and to vest them in defendant 1. But it was important for them to save the remaining properties which they had, and this they did by entering into the transaction of the 30th October.

The argument of the learned Subordinate Judge is this: "The family properties were not all saved, but the upshot was in effect that the properties which would have gone into the hands of the auction-purchasers passed into those of a private purchaser and that the liability under the decree came to an end only to emerge in another form, to fasten the family estate with the liability of Rs. 32,000 at an exorbitant rate of interest by virtue of the bond in suit". And then he comes to this conclusion, "the benefits, if any, which accrued to them", that is to say, to the minor defendants 4, 5 and 6, "by the acts of the defendants Nos 2 and 3 followed not from the contracting of the loan under the bond, but from the sale in favour of defendant 1".

With all respect, I am wholly unable to appreciate the argument. The sale in favour of defendant 1 would have availed them nothing, if the decretal amount could not be brought into Court on or before the 30th October. The defendant No. 1 could not pay the purchase-money, and the decretal amount could not be deposited in Court on or before the 30th October It may be that the defendants, second party, could proceed against defendant 1; but meanwhile the auction sale would be confirmed, and their remaining properties would be proceeded against. I think the mistake is in insisting on looking at the sale of the 24th October and the mortgage of the 30th October as separate transactions, whereas in substance they constitute one transaction. The problem which the managing members of the joint family had to solve on the 30th October was this:—which course was more beneficial to the interests of the joint family to refuse to join in the mortgage of the 30th October and to submit to the auction-sale being confirmed and their remaining properties being immediately sold to answer for Tilakdhari's claim against them, or to join in the mortgage and immediately save the properties and take upon themselves a contingent liability which might never arise? I have no doubt whatever that they acted prudently in entering into the transaction of the 30th October.

"But then", says the Subordinate Judge, "what have you gained? You liability under the decree is gone but yo

liability under the mortgage has emerged". If the argument of the learned Subordinate Judge were at all admissible, the managing member of a joint family would be legally incompetent to borrow money to discharge a prior obligation. The immediate necessity was to save the properties, the properties which were not the subject-matter of the conveyance. The necessity was urgent. and the danger to these properties imminent. Can it be argued for a single moment that the liability which they took upon themselves under the mortgage was merely a substitute for the liability which they had under the mortgage decree? In the first place, they had no reason to doubt that the Rani of Jheria would send the balance of the consideration money to defendant 1. They were told so by defendant 7, and they believed it, and they had good reasons to believe it, since the Rani had already given the defendant No. 1 no less than Rs. 79,000. In the second place under the mortgage-bond, their liability would only arise on a certain event, that is to say, in the event of the security offered by defendant 1 being insufficient to discharge the mortgage-debt. Their liability under Tilakdhari's decree was certain their liability under the mortgage is a contingent one: Their liability under the decree was for the sum of Rs. 29,130; their liability under the mortgage, if it arises at all, will only be for a very small sum of money; for it is inconceivable that the properties which have been mortgaged by defendant 1, which have an annual income of Rs. 6,000 and which were knocked down for Rs. 73,200 at Thilakdhari Lal's auction-sale, can possibly sell for much below the price necessary to satisfy the plaintiffs' claim in the action. I am of opinion that the mortgage bond is enforceable against the defendants second party.

I would allow the appeal, set aside the judgment and decree passed by the Court below, and give the plaintiffs a decree in terms of the reliefs claimed by them, The plaintiffs are entitled to interest at the bond rate up to the date of the decree and also to interest at 6 per cent. on the decree. The defendants will have six months for redemption from the date of this judgment.

The plaintiffs are entitled to their costs throughout.

Adami, J.:—I agree.

Appeal allowed.

A. I. R. 1923 Patna 275.

ADAMI, J.

Bhikhu Mandal—Defendant-Appellant

v.

Bhikehakar Dutta and others—Plaintiffs-Respondents.

S. A. No. 1123 of 1920, decided on 22nd December, 1922, from a decision of Sub-J., Manbhum, dated 18th September, 1920.

Civil P. C, S. 100—Judgment of reversal must show that the evidence and reasons of trial Court are considered.

In a judgment of reversal it is absolutely necessary that good grounds should be shown for coming to the finding of fact. There must be sufficient material in the judgment of Appellate Court to show High Court that Lower Appellate Court has considered the evidence and duly considered the reasons given by the trial Court in its judgment for coming to a contrary decision. [P. 276, C. 2.]

S. N. Dutta, S. K. Mitter and *S. C. Mitter*—for Appellant.

S. C. Mozumdar for *Jotirmoy Chatterji*, —for Respondents.

Adami, J.:—The suit giving rise to this second appeal was a suit for recovery of certain lands which previously had been the joie of one Moheswar Banerji. In execution of a decree against Moheshwar, the lands were sold and purchased by one Punchanan in 1899. Punchanan sold the lands to the wife of Moheswar; and, according to the plaintiffs, Biseswari made the purchase *farzi* on behalf of one of the three sons of Moheswar, namely, Ramsadai.

According to the plaintiff's story, Ramsadai having obtained a deed of relinquishment from Biseswari surrendered the lands to the plaintiffs his landlords in 1325. The plaintiffs, took possession but were subsequently dispossessed by the defendant. "The defendant admitted the case of the plaintiffs up to the point where Biseswari Debi purchased from Punchanan; but, according to his case, Biseswari bought as *farzdar* for her husband Moheswar and the lands devolved, after Biseswari's death, to the three sons of Moheswar. It was asserted that Ramsadai therefore had no power to surrender the entire lands and contended

that the lands in suit were not the lands which had been transferred to Biseswari.

The learned Munsif in a careful judgment held that the lands in suit were the lands transferred as alleged by the plaintiffs and were included within jote Kachulong He held further that the purchase by Biseswari was a purchase on behalf of Moheswar and that therefore Moheswar's three sons would inherit the lands and Ramsadai would not have any power to surrender them to the landlords. He expressed grave doubt as to the *bona fide* character of the surrender by Ramsadai thinking it possible that the landlords knowing that they could not obtain the lands by sale had invented a means of obtaining them by getting a release from one of the three brothers.

The learned Subordinate Judge has agreed with the Munsif with regard to the identity of the lands; but, having come to that finding, he proceeds to discuss the other points in the case and that part of his judgment which deals with law. He has taken a view on very scanty, if any, reasons for disagreement. In fact he merely states that from evidence adduced in the case there cannot be any doubt that the disputed land became the property of Ramsadai by virtue of these transfers. But he does not tell us what that evidence is and why that evidence had a different effect in his opinion to the effect which it had in the opinion of the Munsif. He says "Bepin admits in his evidence that whoever will get Kobala will be sole owner." I cannot see how this affects the case. The Kobala was in the hands of Biseswari. Then, later, he says "Bepin's statement proves plaintiff's case." He does not tell us what that statement of Bepin is or whether it is to be found in the evidence. Further on he says "But it has been satisfactorily proved that the other sons had no interest in the rent-paying lands which came to Ramsadai alone by virtue of the deed of release by his mother." The Munsif had found to the contrary and the learned Subordinate Judge has not shown us how the evidence satisfied him in this direction. Further he says that "no fraud or collusion has been proved in respect of the surrender." Here too he does not give any reasons for differing from the Munsif. The portion of his judgment which deals with the points in dispute is in my opinion not a judgment in accordance with law and is certainly of no help to this Court to come to any finding whether the decision he has come to, in short sentences is correct in law. In a judgment of reversal it is absolutely necessary that good grounds should be shown for coming to any finding of fact. The decision of the learned Subordinate Judge may be right but there is not sufficient material in his judgment to show this Court that he has considered the evidence and duly considered the reasons given by the Munsif in his judgment for coming to a contrary decision.

The decree of the lower appellate Court must be set aside and the case must be remanded for a rehearing of the appeal and for judgment according to law The appellant will get costs in this Court.

Appeal allowed.

A. I. R. 1923 Patna 276.

DAS AND KULWANT SAHAY, JJ.

Kesho Prasad Singh Bahadur—Plaintiff-Appellant v.

Babu Parmeshri Prasad Singh and another—Defendants-Respondents.

F. A. No. 36 of 1920, decided on 9th January 1923, from a decision of S. J., 2nd Court, Sahabad, dated 27th August, 1919.

(a) *B. T. Act, S. 120—Proprietor must prove cultivation as* zerait *for 12 years or village usage—Evidence of assertions of title before 2nd March 1883 is conclusive.*

In order to succeed it is necessary for the proprietor to prove either that the disputed land was cultivated by himself as *zerait* with his own stock or by his own servants or by hired labour for 12 continuous years immediately before the passing of the B. T. Act or that the land is recognised by village usage as proprietor's private land. 17 Cal. 466 Not Foll.

[P. 277, C. 2.]

There is nothing in S. 120 itself to cut down the generality of the expression "any other evidence that may be produced" used by the Legislature in S. 120, para 2 of the B. T. Act. If it were the intention of the Legislature to exclude such evidence as may be furnished by the dealings between landlords and tenants subsequent to the 2nd day of March 1883, it should have expressed that intention in more clear terms. As S. 120 stood at the time when the Act was passed, it allowed the Court to consider "any other evidence that may be produced" in connection with the question whether the land claimed as *zerait* was in fact *zerait* The Evidence Act deals with the question what evidence is relevant evidence, and there is no power in the Court to reject any evidence as irrelevant evidence if the landlord offers that evidence, and the Evidence Act says that it is relevant evidence.

[P. 278, C. 2.]

If there is any evidence of an assertion of a title on the part of the landlord and communicated to the tenant before the 2nd day of March, 1883, the matter is conclusive under the B. T. Act, but if the evidence is to the effect that there was an assertion of a title communicated to the tenant after the 2nd day of March 1883, that evidence will not be conclusive on the question whether the land claimed as *zerait* is in fact *zerait* land, although it is open to the Court to take that evidence into consideration in coming to the conclusion whether the land claimed as *zerait* is in fact *zerait* land.

[P, 279, C. 2.]

The Bengal Tenancy Act has certainly conferred special privileges on the landlords in regard to the *diara* lands; and apart from any other consideration, the community may regard the *diara* land as the proprietor's private land, since it is not land in which any tenancy rights have ever been exercised. Local customs may give such land to the landlord as his *zerait*, if it is not identifiable with previously existing tenancy land. Where there is a request from a lessee that he should be granted occupancy tenant's right, the presumption is the land was *zerait* land, Ordinarily when a landlord purchases occupancy holdings of the tenants, he holds them, not as *zerait*, but to use a term well known to the Revenue Offices *bakasht*; but that is because the landlord is unable to show that the lands were at any time the proprietor's private land; and the law does not permit him to increase his stock of *zerait* land. But the case is entirely different where the lands were initially *zerait*. It may be that for a time they were served from the parent stock; but there is no reason whatever why the land should not come back to the original stock when the proprietor recovers those lands.

[P. 280, Cs. 1&2; P. 285, C. 1.]

(b) *Evidence Act, Ss. 64 and 65—Admission of secondary proof—Objection as to mode of proof cannot be taken after Court has admitted the document.*

Where the objection was to the mode of proof and not to the relevancy, it is the duty of the Judge to reject the document if he thought that the proof was insufficient. If he rejected the document on the ground that there was no proof as to the loss of the original, it would be open to the plaintiff to adduce proper evidence to prove the loss of the original document. Where that course is not adopted by the Judge, and the document is admitted, it is not open to the other side to contend that it was not properly admitted in evidence.

[P. 281, C. 1]

(c) *Evidence Act, S. 18—Minor—Admission necessary to the case though made by minors is binding.*

Defendants, who were the plaintiffs in previous suits, made a case that the lands were recognised by village custom as *zerait* lands.

Held, in any case the admission made on behalf of the defendants, who were then minors, would bind them in this suit, if the allegation was a necessary allegation and was essential to the case of the defendants. [P. 281, C. 2.]

(d) *B. T. Act, Ss. 19, 20, and 21—Occupancy rights are inherent and not the right of landlord to grant.*

There is nothing in either S. 20 or s 21 or in any other section in the Bengal Tenancy Act which provides that a right of occupancy can be acquired either by grant or by contract. An occupancy right is inherent in the status of the raiyat and is not the landlord's right to grant.

[P. 284, C. 2.]

P. K. Sen, A. Sen and *Nirsu Narayan Sinha*—for Appellant.

Parmeshwar Dayal and *Raj Bepin Behary Sharan*—for Respondents.

Das, J:—This was a suit by the appellant to recover possession of certain lands at present in the possession of defendants and for mesne profits. The disputed lands admittedly lie within the plaintiff's zemindari, and it is the plaintiff's case that they are his *zerait* lands in which the defendants could not in law and have not in fact acquired a right of occupancy. The defendants resisted the plaintiff's suit on the ground that they have acquired such a right in the disputed lands. It is not disputed that the Raj, of which the plaintiff is the proprietor, settled the disputed land with Babu Kesho Prasad Singh, the father of the defendants, for 7 years, from 1309 to 1315, by a lease dated the 25th November 1902. It is also not disputed that upon the expiry of the lease the lands were again settled with the defendants by a lease dated the 8th December 1908 from 1316 to 1324. The defendants have accordingly been in possession of the disputed lands for over 12 years and have undoubtedly acquired a right of occupancy therein, unless the plaintiff is right in his contention that the disputed lands are the proprietor's private land within the meaning of S. 120 of the Bengal Tenancy Act. The learned Subordinate Judge has come to the conclusion that the plaintiff has failed to prove the *zerait* character of the lands and has accordingly dismissed his suit.

In order to succeed it is necessary for the plaintiff to prove either that the disputed land was cultivated by the proprietor himself as *zerait* with his own stock or by his own servants or by hired labour for 12 continuous years immediately before the passing of the Bengal Tenancy Act, or that the land is recognised by village usage as proprietor's private land. It is not the case of the plaintiff that he or his predecessors-in title cultivated the disputed lands as *zerait* lands with his own stock, or by his own servants, or by hired labour for 12 continuous years immediately before the passing of the Bengal Tenancy Act.

But the plaintiff contends that the disputed lands are recognised by village usage as proprietor's private land. The Bengal Tenancy Act has laid down certain rules for the guidance of the Revenue Officers for the determination of the question whether the lands claimed as proprietor's private lands are in fact proprietor's private lands. These rules are to be found in S. 120, para. 2 of the Bengal Tenancy Act and are as follows :—

"In determining whether any land ought to be regarded as a proprietor's private land, the officer shall have regard to local custom and to the question whether the land was before the 2nd day of March, 1883, specifically let as proprietor's private land, and to any other evidence that may be produced, but shall presume that land is not a proprietor's private land until the contrary is shown."

In para. 3 it is provided that " if any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in S. 120 for the guidance of Revenue Officers."

It has been the subject of some controversy in our Courts whether the circumstance that a landlord has, subsequent to the 2nd day of March 1883, specifically let out the land as his private land can at all be regarded by the Courts as relevant evidence as coming within the words "any other evidence that may be produced." In *Nilmoni Ohuckerbutti* v. *Bykunt Nath Bera* (1) it was held by the Calcutta High Court that such evidence is wholly irrelevant and should not be considered by the Court. Their Lordships in the course of their judgment stated as follows :—

" It seems to us that in enacting that sub-section, the Legislature had before it the attempts which might be expected on the part of landlords to frustrate the intention of the Legislature, as asserted in the Draft Bill laid before the Council for consideration to extend the occupancy rights of tenants before the measures then declared to be in contemplation became law; and therefore the particular date, the 2nd day of March 1883, the date on which the Draft Bill was published in the Gazette, and leave was obtained to introduce the Bill into the Council, was declared to be the latest date on which there should be free action on the part of zemindars to assert their private rights, so as to prevent the accrual of special tenant rights. It was accordingly declared that it was a material point, in the consideration of such a matter as is now raised in appeal before us, whether the particular lands were before the 2nd day of March 1883, specifically let as the proprietor's private lands. From this, we may take it, that it was intended that regard should be had to any declaration made before that date by the landlord and communicated to the tenants in respect to the reservation of the proprietor's right over the land as his private land In this view, we think that the following words in that sub-section 'any other evidence that may be produced ' must mean any other evidence tending in the same direction that may be produced to show the assertion of any title on the part of the proprietor, and communicated to the tenant before that date."

In my opinion there is nothing in S.120 itself to cut down the generality of the expression "any other evidence that may be produced" used by the Legislature in S.120, para. 2 of the Bengal Tenancy Act If it were the intention of the Legislature to exclude such evidence as may be furnished by the dealings between landlords and tenants subsequent to the 2nd day of March 1883, it should have expressed that intention in more clear terms. As S. 120 stood at the time when the Act was passed, it allowed the Court to consider "any other evidence that maybe produced" in connection with the question whether the land claimed as *zerait* was in fact *zerait*. The Evidence Act deals with the question what evidence is relevant evidence, and in my opinion there is no power in the Court to reject any evidence as irrelevant evidence if the landlord offers that evidence, and the Evidence Act says that it is relevant evidence. This was the view which was taken by Mr. Justice Mitter in the case of *Bhagtu Singh* v. *Raghunath Sahai* (2). He was definitely of opinion that S. 120 does not exclude evidence which under the Evidence Act is relevant evidence.

(1) (1899) 17 Cal. 466.

(2) (1909) 13 C.W.N. 195=1 IC. 571=9 C.L.J 15.

But it is suggested that, quite apart from the question whether Mr. Justice Mitter was right in the view which he expressed in the case of *Bhagtu Singh* v. *Raghunath Sahai* (2) the Legislature by the subsequent amendment of the Act, has specifically stated that such evidence is not to be regarded by the Courts as relevant evidence on the question whether the land claimed as *zerait* is in fact *zerait*. This amendment has been carried out by enacting a new para. in S. 120 of the Bengal Tenancy Act, 2-A which runs as follows:—

"Notwithstanding anything contained in any agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud, a Revenue Officer shall not regard any land as a proprietor's private land, unless it is proved to be such by satisfactory evidence of the nature described in sub-S. (1) or sub-S. (2)."

Now it seems to me that a demise on the footing that the land demised is the proprietor's private land is hardly an agreement or compromise within the meaning of the terms as used in para 2-A, but quite apart from any other consideration, it seems to me that the agreement or compromise which the Revenue Officer is not to regard, is an agreement or compromise made before the Revenue Officer in a proceeding connected with the record of rights and but for the difficulty arising from the comma being placed after the word "compromise" and not after the word "decree" I should feel inclined to hold that before a Revenue Officer disregards an agreement or compromise, he must be satisfied that it was obtained by collusion or fraud.

The object of the new sub-section was, as the report of the Select Committee on the Bill of 1907 makes clear, to assert the principle that agreement or compromises made before a Revenue Officer should not be held to affect the rights of third parties. It was thought that the question whether the land is proprietor's private land, affects not merely a tenant for the time being but also all future occupants of the lands and the Legislature considered it desirable to safeguard their interests as far as possible. But it is one thing to frame rules, for the guidance of Revenue Officers, it is another thing to tell the Civil Courts that they are not to regard as evidence that which is evidence under the Evidence Act. The last para. of S. 120 undoubtedly says that the Civil Court is to have regard to the rules laid down in S. 120 of the Bengal Tenancy Act for the guidance of the Revenue Officer whenever any question arises in a Civil Court as to whether land is or is not a proprietor's private land but there is nothing in S. 120 which tells the Civil Courts definitely and clearly that they are to exclude from their consideration that which is relevant evidence under the Evidence Act, and which they are bound to regard under S. 120 para. 2 of the Act. In my opinion the landlord is entitled to rely upon any evidence that may be produced to show the assertion of any title on his part and communicated to the tenant whether before the 2nd day of March 1883 or after that date. All such evidence is relevant evidence under the Evidence Act and is admissible as such, though it may be that such evidence standing by itself will be of small value and will not induce the Courts to hold that the land claimed as proprietor's private land is in fact the proprietor's private land. If there is any evidence of an assertion of a title on the part of the landlord and communicated to the tenant before the 2nd day of March 1883, the matter is conclusive under the Bengal Tenancy Act, but if the evidence is to the effect that there was an assertion of a title communicated to the tenant after the 2nd day of March 1883, that evidence will not be conclusive on the question whether the land claimed as *zerait* is in fact *zerait* land, although as I suggest, it is open to the Court to take that evidence into consideration in coming to the conclusion whether the land claimed as *zerait* is in fact *zerait* land.

The dealings of the plaintiff or his predecessors-in-title with the disputed lands are as follows :—

In or about the year 1843, the Raj settled certain lands including the lands set out in Sch. A annexed to the plaint with the Government for the purposes of a stud. There is evidence that the Government through its officers used to grow oats on the lands demised and was in possession for about 30 years. In 1873, the Government surrendered these lands to the Raj. In the same year the Raj settled the Sch. A lands with one Mr. Fox by a lease from 1873 to 1884. In 1884 the Raj granted another lease to Mr. Fox from 1884 to

1892. Sometime in 1891, in consideration of valuable services rendered by Mr. Fox to the Raj, the Raj conferred occupancy rights in the lands demised upon Mr. Fox. In 1895, the Raj brought a suit, being suit No. 10 of 1895, against Mr. Fox for arrears of rent from 1299 to 1302. The Raj recovered a rent-decree as against Mr. Fox, and in execution of that decree caused the lands in dispute to be sold, and purchased the lands at the auction sale held on the 2nd of March 1896. The Raj then settled the Sch. A lands with one Akhouri Ram Adaraj Singh, from 1897 to 1901. Meanwhile the Sch. B lands had come out of the water, and had become fit for cultivation, and in 1902 the Raj settled the disputed lands with Kesho Prasad Singh, the father of the defendants for 7 years from 1902 to 1908, and in 1909 the Raj executed another lease in favour of the defendants which expired in 1324.

Now it will appear that though the Raj has not been in actual cultivating possession of the lands from 1843, it has always let out the lands for terms of years and that though the Government was in possession under the leases for about 30 years, it was not suggested that any right of occupancy was acquired in the disputed lands by the Government. In the earlier documents the lands are described as *diara* lands; and though *diara* lands are not by operation of law *zerait* lands, there is sufficient in the literature connected with the Bengal Tenancy Act to indicate that there were local customs in various parts of Bihar under which *diara* lands were recognised as *zerait* lands. Indeed the papers which have been published under the authority of the Government relating to the Bengal Tenancy Act establish that the Bihar Zemindars pressed before the Government the importance of saving such local customs as recognised lands as proprietor's private lands and the provisions in the Act saving the local customs was a concession to the Bihar Zemindars who contended that local customs would in many places support their claim where they might otherwise fail to establish the *zerait* character of the land. The Bengal Tenancy Act has certainly conferred special privileges on the landlords in regard to the *diara* lands; and it seems to me that, apart from any other consideration, the community may regard the *diara* land as the proprietor's private land, since it is not land in which any tenancy rights have ever been exercised. I am of course not considering the case where such land is identifiable with previously existing tenancy lands, and of course I am not suggesting that such land, where it is not identifiable with previously existing tenancy lands, is by law proprietor's private lands. All that I suggest is that it is likely that local customs may give such land to the landlord as his *zerait* if it is not identifiable with previously existing tenancy land. I do not regard the history of the dealings of the disputed lnads by the Raj prior to the passing of the Bengal Tenancy Act as establishing the case of *zerait*, but I think that it makes the case of the plaintiff a probable one. It is quite certain that certainly up to the passing of the Bengal Tenancy Act, no one had claimed a right of occupancy in these lands although they were constantly let out to tenants. Mr. Fox himself was in possession of these lands from 1873 to 1896. In 1891, the Raj solemnly conferred upon Mr. Fox a right of occupancy in these lands. Now it will be noticed that in 1891 Mr. Fox had already been in possession of the disputed lands for over 12 years; and if a right of occupancy could be acquired in these lands, Mr. Fox had certainly acquired it. Now if Mr. Fox was aware of the fact that the lan ls were not the proprietor's private lands, it is certainly remarkable that he should have asked the Raj to confer a right of occupancy upon him in these lands. I shall have to consider the effect of the transaction by which the Raj recognised Mr. Fox as an occupancy tenant, and whether such recognition had the effect of converting the *zerait* lands into raiyati lands, but it is necessary at this stage to point out that the transactions between the Raj and Mr. Fox make the case of the plaintiff antecedently probable.

I now come to the actual evidence produced by the plaintiffs to establish the *zerait* character of the lands. The evidence consists of certain kabuliyats executed in favour of the Raj and of the proceedings in certain suits instituted by the defendants against Parbhu Upadhya and others. Exhibit 5 is the kabuliyat executed by Mr. Fox in favour of the Raj on the 21st June 1883. By this document

Mr. Fox covenanted with the Raj that on the expiry of the lease the Raj would be entitled to the land as its seer *zerait*. In my opinion the declaration made by Mr. Fox before the passing of the Bengal Tenancy Act is important evidence in favour of the Raj, though the covenant would have been conclusive if the demise had taken place on or before the 2nd day of March 1883. The learned Subordinate Judge thought that the document was not properly proved, as only a certified copy was produced and neither the record-keeper nor the *moharrir* who made a search for the original was called to prove the loss of the original document, but the learned Subordinate Judge did not reject the document when it was tendered. P. W. No 5 has given some evidence in support of the plaintiff's case that a search was made for the document. The objection of the learned Subordinate Judge is to the mode of proof and not to the relevancy, and in my opinion it was the duty of the learned Subordinate Judge to reject the document if he thought that the proof was insufficient. If he had rejected the document on the ground that there was no proof as to the loss of the original, it would have been open to the plaintiff to adduce proper evidence to prove the loss of the original document. That course was not adopted by the learned Subordinate Judge, and in my opinion the document having been admitted, it is not open to the defendants to contend that it was not properly admitted in evidence.

The next document is a *kabuliyat* executed by Kesho Prasad Singh, the father of the defendants, on the 25th November 1902. By this transaction the lands were specifically let out as *zeriat* lands, and the tenant acknowledged the demised lands to be *zeriat* lands. The other *kabuliyat* was executed by the defendants through their mother on the 8th December 1908. Here again the lands were specifically let out as *zeriat* land. In my opinion all these *kabuliyats* are undoubtedly evidence in favour of the plaintiff; though I quite agree that if these *kabuliyats* stood by themselves and if there was nothing else in the case, they would be quite insufficient for the purpose of establishing the plaintiff's case. I now come to the most important evidence in favour of the plaintiff. In 1910 the defendants had to institute certain suits against certain persons who were undoubtedly the tenants of the Dumraon Raj and who had encroached upon portions of the disputed lands and asserted a right of occupancy in these lands. There were various criminal proceedings preliminary to the Civil suits, and it appears that in a proceeding under S. 107, Criminal Procedure Code, the present defendants were defeated. They accordingly filed suits to eject these persons from the disputed lands, and they alleged in their plaint that the lands were *zeriat* lands and were recognised as such by village custom. It was argued before us that it was wholly unnecessary for the defendants, who were the plaintiffs in those suits, to make a case that the lands were recognised by village custom as *zeriat* lands, and that in any case the admission made on behalf of the defendants, who were then minors, ought not to bind them in this suit, and it was strongly insisted that a guardian can make no admission so as to bind the minors, if the admission is prejudicial to the interests of the minors. In my opinion the allegation was a necessary allegation and was essential to the case of the defendants. It must be remembered that the persons against whom those suits were brought were undoubtedly the tenants of the Raj, and were actually in possession of the disputed lands. Their case was that they had been properly inducted into the lands, and that they had acquired a right of occupancy in the lands. The defendants, the plaintiffs in those suits were in this difficulty that if those persons proved their settlement, the judgment of the Court would undoubtedly be in their favour, unless it could be shown that the rights of occupancy could not be acquired in these lands. It was, therefore, necessary for them to allege and prove that the lands were *zeriat* lands in which rights of occupancy could not be acquired Nor do I look upon the allegations as admissions which should not bind the minors. An admission which ought not to bind a minor is an admission suggesting an inference which prejudices the case of the minors in the proceeding in which the admission is made. But though the allegations made in those suits are undoubtedly prejudicial to the defendants in this suit, they were made in their interests in those suits and, as I have said, they were essential to the success of their suits.

It was then suggested that those allegations were introduced into the plaints in the interest of the Raj by Brahamdeo Singh who was the tehsildar of the Raj and was the karpardaz of the defendants. Not only is there not an iota of evidence in support of this allegation, but the surrounding circumstances are wholly in favour of the plaintiff. The Raj was then in the charge of the Court of Wards, and it is improbable that the Collector should have entered into a fraudulent conspiracy with Brahamdeo Singh for the purpose of establishing the *zerait* character of the lands. In my opinion, the allegations made by the defendants in those suits strongly support the case of the plaintiff that the disputed lands are recognised by village custom as proprietor's private lands.

Ex. 7 is the judgment of the Subordinate Judge in those suits and it shows, not only that an issue was raised on the question whether the lands claimed in those suits were *zerait* lands, but that the Court held that "at the time of the stud and before that, the lands were strictly *zerait*". No doubt the Court also held that Mr. Fox had acquired a right of occupancy in those lands; but the finding of the Court is definite that the lands were initially *zerait* and were undoubtedly *zerait* at the time of the passing of the Bengal Tenancy Act. I shall presently consider the effect of the transaction by which the Raj recognised Mr. Fox as an occupancy tenant; but it is necessary to point out at this stage that not only did the defendants make the definite case that the lands were the *zerait* of the Raj but that the Court found in favour of the defendants and gave them a decree for possession on the footing that the lands were initially the *zerait* of the Raj. In my opinion the plaints filed by the defendants in those suits Exs. 6, 6a, 6b, and 6c, the judgment delivered by the Subordinate Judge in those suits, Ex. 7 together with the *kabuliyats* Exs. 2, 3 and 5, are sufficient for the purpose of establishing the plaintiff's case that the disputed lands are the proprietor's private lands in which the defendants could not acquire a right of occupancy.

Now how do the defendants meet the case of the plaintiffs? They have adduced no evidence whatsoever, either oral or documentary; but they contend that the transaction by which the Raj conferred the status of occupancy tenant on Mr. Fox operated as a conversion of the *zerait* land into raiyati land, if the land was ever the *zerait* land of the proprietor, which of course they dispute. They strongly rely upon the act of the Raj in conferring the status of an occupancy tenant upon Mr. Fox and upon the fact that the Raj sued Mr. Fox as an occupancy tenant; and they contend that the whole transaction, ending with the purchase of the occupancy holding by the Raj, shows that the Raj lost its title to the land as *zerait* land by treating it as raiyati land.

Mr. P. K. Sen, to whom we are much indebted for his very interesting argument, contends, on the other hand, that an occupancy right is the creature of statute and that such right could not be conferred on Mr. Fox and that the transaction was wholly ineffectual so as to bring that right into existence. He also contends that there is no foundation for the argument that the Raj by its conduct threw the *zerait* land into the stock of raiyati land, and that, assuming that the transaction was valid in so far as it conferred a right of occupancy in the lands upon Mr. Fox, its effect was not to convert the land into raiyati land, though it may be that Mr. Fox and all persons claiming through him might have defended their title as occupancy tenants against any attempt on the part of the Raj to eject them. The argument raises the question whether a grant by the landlord is recognised by the statute as one of the modes by which occupancy rights are brought into existence. The regulations of the Bengal Code dealt with only two classes of raiyats, the *khudkasht* and *paikast*. The *khudkasht* raiyat of the Regulations was a cultivator who held lands as an agriculturist in the village in which he had his fixed residence. It is unnecessary to enter into an investigation as to the origin of these raiyats; but it is more or less accepted now that a *khudkasht* raiyat was a member of the community comprising the village, cultivating land of the village, having his homestead in the village. It is quite certain that his rights were not acquired by the contract between him and the landlord, but were inherent in his status, and that the status was acquired by residence and not by any grant. A *paikast* raiyat on the other hand was a tenant who held the land in one village residing in another.

His rights were such as were conferred on him by contract. He had no status, and the Bengal Regulations did not attempt to afford any protection to him and he was liable to be ejected at the end of any agricultural year, or at the termination of his lease. This was the position when Act X of 1859 came into operation. It abolished the distinction between *khudkasht* and *paikast* raiyats, and brought into existence three classes of tenants, namely, (1)raiyats holding at fixed rent from the time of the permanent settlement, (2) raiyats holding land for periods exceeding 12 years who for the first time were called occupancy raiyats and (3) non-occupancy raiyats holding for periods of less than 12 years The *khudkasht* raiyats fell within either the first or the second class; but it is obvious that, the legislature having deliberately made up its mind not to apply the test of residency, the Act operated as a great hardship on raiyats who were undoubtedly resident raiyats but who had not completed their 12 years of residence or who had been shifted from holding so as to prevent them from acquiring the status of occupancy tenants. But even under Act X of 1859 the rights of occupancy were the incidents of status, the status acquired by cultivating the land for 12 years and paying the rent payable on account of the same. There is no suggestion in Act X of 1859 that such a status could be conferred by grants; and indeed in the long and careful investigation that took place preliminary to the introduction of the Bengal Tenancy Act, it was ascertained that "the law", that is to say the law up to the passing of the Bengal Tenancy Act, "was silent as to the acquisition of such rights by contract" (see paragraph 36 of the Rent Commissioner's report). It is important to remember that provision was made in S. 48 of the Draft Bill of Sir Ashley Eden for acquisition of occupancy rights by grant, but that the Act as finally passed did not contain such a provision. In this connection it is interesting to turn to the letter No. 972-T, dated the 27th September 1883, from the officiating Secretary to the Government of Bengal, Revenue Department, to the Secretary to the Government of India, Legislative Department. This letter will be found at page 215 of the "Selection from Papers relating to the Bengal Tenancy Act, 1885," published by the Bengal Secretariat Press, and the passage which I am reading will be found in para. 12 of the letter, at p. 223. Dealing with S. 48 of the Draft Bill and with the objection to the retention thereof in the statute book, the Bengal Government said as follows:

"With regard to S. 48, the Government of India will perceive from the local reports that some officers oppose the retention of the section in the Bill, because for instance it might be made the means of depreciating the value of an estate sold for arrears of revenue. To this view by itself the Lieutenant-Governor does not attach much importance, because the establishment of a substantial peasant proprietary should enhance, and not depreciate, the value of an estate. There are risks, however, connected with the concession of such a power, inasmuch as it might be used as a means of bargaining by zemindars with parties whom they wished to favour on receipt of valuable consideration, and of defeating accrual of the right of occupancy of the rightful cultivator who may have been in possession for 10 or 11 years. Mr. Rivers Thompson agrees with the Hon. Mr. Reynolds in thinking that the occupancy right, being inherent in the *status* of the raiyat, is not the landlord's right to grant; and further, that no necessity has been made out for introducing into the Bill a principle which is foreign to the law of Bengal".

I now come to the Bengal Tenancy Act and in dealing with the relevant sections of the Bengal Tenancy Act, it will be necessary to bear in mind that the acquisition of occupancy rights by grant was, up to the passing of the Bengal Tenancy Act, foreign to the law of Bengal. S. 19 of the Act runs as follows:

"Every raiyat who immediately before the commencement of this Act or the Bengal Tenancy Amendment Act 1907 has, by the operation of any enactment, by custom, or otherwise, a right of occupancy in any land, shall, when that Act or the Bengal Tenancy (Amendment) Act, 1907, comes into force, have a right of occupancy in that land".

This section does no more than save and preserve such rights of occupancy as were already acquired either by the operation of any enactment, or by custom or otherwise, and it certainly does not provide a new

mode for acquisition of such rights. It was contended before us that the use of the word "otherwise" is sufficient to show that, in the view of the Legislature, there existed modes for acquisition of occupancy rights other than by the operation of any enactment or by custom. The argument in my opinion ignores the method universally adopted by the Legislature when it has to save and conserve rights already acquired before a particular legislation is introduced. The Bengal Tenancy Act does not pretend to enumerate the different modes by which rights of occupancy could be acquired at the time when the Act came into force; it merely saves such rights as had already been acquired. If such rights had been acquired by any person by grant at the time when the Bengal Tenancy Act came into operation, they were undoubtedly saved by S. 19; but in order to determine whether such a right could be acquired by grant, we have to go to the law as it existed prior to the passing of the Bengal Tenancy Act, and I think that I have shown that acquisition of occupancy rights by grant were wholly foreign to the law of Bengal.

S. 19, as I have said, saves and preserves such rights as were in existence at the time when the Bengal Tenancy Act came into operation. Ss. 20 and 21 are an attempt to rehabilitate the *khudkasht* or resident raiyat of the Bengal Regulations. S. 20 brings into existence a new raiyat called the settled raiyat and it provides that "every person who, for a period of 12 years, whether wholly or partly before or after the commencement of the Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village."

The different paragraphs of S. 20 made great changes in the Rent Law as it existed at the time when the Bengal Tenancy Act came into operation; but it is necessary to remember that it is the occupation of the land in the village for 12 years, whether by himself or by his heirs, that conferred upon the person the status of a settled raiyat. S. 21 provided that "every person who is a settled raiyat of a village within the meaning of S. 20 shall have a right of occupancy in all lands for the time being held by him as "a raiyat in that village."

Now there is nothing in either S. 20 or S. 21 or in any other section in the Bengal Tenancy Act which provides that a right of occupancy can be acquired either by grant or by contract. It was insisted that it is part of the general law that a person may make a grant of his property if he chooses, and we were asked to consider whether there is anything in the Bengal Tenancy Act which takes away from the landlord the right to make a grant of his property in favour of a tenant. The reply is that a grant can only operate on property in existence and that until the right itself is acquired there is no property in the contemplation of law on which the grant can possibly operate. In my opinion an occupancy right is inherent in the status of the raiyat and is not the landlord's right to grant.

In this view the transaction between the Raj and Mr. Fox did not operate to bring into existence in favour of Mr. Fox a right of occupancy in this land; but conceding that the status could in law and was in fact conferred on Mr. Fox, I do not think that there is any warrant for the view that by such grant the character of the land was changed. There is certainly no warrant for this view in the Bengal Tenancy Act The argument proceeds, as it must proceed, on the admission that the disputed land was initially *zerait* and was *zerait* at the time when the Bengal Tenancy Act came into operation. The whole object of the Bengal Tenancy Act was to prevent the landlord from increasing the stock of *zerait* land in existence at the time the Bengal Tenancy Act came into operation; but there is no indication in the Act itself that if, as a result of the bounty of the landlord, a person acquires a right of occupancy in the *zerait* land, there is, as a consequence of such bounty, the conversion of *zerait* land into raiyati land It was argued that the Raj purchased the land as raiyati land in execution of its decree against Mr. Fox. That may be so, but the effect of acquisition of Mr. Fox's right by the Raj was that the entire interest of the Raj and of Mr. Fox in the disputed land became united in the Raj and under S. 22 (1) of the Act, the Raj would have no right to hold the land as a tenant but could only hold it as a proprietor. It is quite true that ordinarily when a landlord purchases

occupancy holdings of the tenants he holds them, not as *zerait* but, to use a term well known to the revenue officers, as *baksh'*; but that is because the landlord is unable to show that the lands were at any time the proprietor's private land ; and the law does not permit him to increase his stock of *zerait* land. But the case is entirely different where the lands were initially *zerait*. It may be that for a time they were severed from the parent stock; but there is no reason whatever why the land should not come back to the original stock when the proprietor recovers those lands.

In my opinion whenever the question is raised as to the character of the land purchased by the landlord from the tenant, the enquiry must be directed to ascertain the original character of the land. If it was initially raiyati land, the landlord, in getting khas possession, cannot treat it as his *zerait* ; for to permit him to do so would be to allow him to increase his stock of *zerait* land, which it was the object of the Bengal Tenancy Act to prevent. But where it is proved that the land was *zerait* land within the meaning of S. 120 of the Bengal Tenancy Act, the land, on coming into the khas possession of the landlord, regains the character which it once possessed.

In my opinion the transaction by which the Raj conferred occupancy rights in the disputed lands did not have the effect of converting the *zerait* lands into raiyati lands. That being so, the defendants have not acquired the right of occupancy in these lands as it is conceded that their tenancy began with a lease for years.

I would accordingly allow this appeal, set aside the judgment and decree passed by the Court below, and give the plaintiff a decree for possession of the disputed lands with mesne profits and costs throughout.

Kulwant Sahay, J. :—I agree.

Appeal allowed.

*A.I.R. 1923 Patna 285.

MULLICK AND BUCKNILL, JJ.

The Great Indian Peninsular Railway Company—Appellants

v.

Jitan Ram Nirmal Ram—Respondents

Civ. Rev. No. 236 of 1922, decided on 31st January, 1923, against a decision of Second Sub. J., Gaya, dated 27th March, 1922.

(a) *Contract Act, Ss. 151 and 152—Railway Act, S. 72.*

A suit by consignor for compensation for non-delivery is not a suit in tort ; it is a suit in contract. [P. 286, C. 1.]

(b) *Railways Act, S. 72—Risk note B—Compensation for non-delivery—Question of* onus *discussed.*

Upon the special contract under Risk note B the burden of proof lies in the first instance upon the defendants companies, that is to say, they must first prove that there was such loss as is contemplated by the first part of the risk note, and when they have done so, the onus will be shifted upon the plaintiff to show that the loss is due to the wilful neglect of the defendants or their servants as provided in the latter part. The risk note will apply not only when the goods have been lost by the bailee in the sense that he cannot trace them but also when they are lost to the owner because the bailee fails to deliver them to him in breach of his contract for any reason whatsoever ; by merely suing for compensationfor non-delivery the plaintiff cannot take the case out of the risk note. Risk note B is harsh. But it may perhaps be not inequitable inasmuch as the trader enters into the contract with his eyes open and in consideration of a cheaper rate but it cann t be denied that he undertakes in most instances a crushing and almost insuperable burden. Where the plaintiff admits in his plaint that the goods have been lost and as the defendant does not in any way repudiate the contract but on the contrary sets up the risk note in defence,

Held, no presumption can arise that the goods are still in his possession simply because he says that he cannot give any account of the manner in which they have disappeared. When the question is whether the plaintiff has satisfied the burden which rests upon him to show that the loss has been caused by the wilful neglect of the defendant company, the quantum of evidence required for this purpose must necessarily vary according to the nature of the goods. (Case law discussed.)

[P. 287, Cs. 1, 2 ; P. 289, Cs. 1, 2.]

(c) *Contract—Construction—Exception and proviso—Mode of proof is laid down.*

The general rule is, that where a contract contains an exception and a proviso, the party who desires to take the benefit of the former must not only plead it but prove it, and that when that has been done, the other party who desires to take the benefit of the proviso, which is in reality an extensive covenant by way of defeasance must prove that the subject-matter is not within the exception. [P. 289, C. 2.]

N. C. Sinha and *S. N. Bose*—for Petitioners.

S. Dayal and *Brijkishore Prashad*—for Opposite Party.

Mullick, J. :—The plaintiff filed the suit out of which the present application arises, in the Court of the Subordinate Judge of Gaya, alleging that on the 22nd October 1920, his agent at Bombay delivered to the first party defendants, the Great Indian Peninsular Railway Company, seven bales of twists for despatch by goods train to Gaya, a station belonging to the second party defendants, the East Indian Railway Company, that out of these bales one bale valued at Rs. 406-4-0 was not delivered at Gaya, and that the plaintiff believes that it was lost within the jurisdiction of the second party defendants. He accordingly claims for the value of the goods and for the estimated profits and for interest, a total sum of Rs. 485 as compensation.

At the trial the plaintiff did not press his claim against the second party defendants. The suit therefore proceeded against the first party defendants only who, among other things, pleaded that as the goods were booked at owner's risk under a risk note in form B as prescribed in the Indian Railways Act the plaintiff was not entitled to any compensation at all. They further contended that there was no wilful neglect on their part or theft by any of their servants.

The Subordinate Judge held that as the suit was one for compensation for non-delivery of goods he was bound by the decision of a Judge of this Court in *East Indian Railway Co.* v. *Ajodya Prasad* (1) and he decreed the claim less the sum of Rs. 40 claimed for profits, that is to say, he gave a decree for Rs. 445 exclusive of costs.

The present application is made under section 25 of the Provincial Small Cause Courts Act by the first party defendants.

It is clear that this is not a suit in tort; it is a suit in contract and the only question is what is the liability of the defendant carrier.

Under Ss. 151 and 152 of the Indian Contract Act read with S. 72 of the Indian Railways Act the liability of the Railway Administration for the loss, destruction, or deterioration of goods delivered to the Administration to be carried by railway is that of an ordinary bailee ; that is to say, if the Railway Administration take as much care of the goods bailed to them as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed, they will not, in the absence of special contract, be responsible for the loss, destruction or deterioration of the goods

S. 161 of the Indian Contract Act prescribes that if by the default of the bailee the goods are not returned, delivered or tendered at the proper time, the bailee is responsible to the bailor for any loss, destruction or deterioration of goods from that time.

Further the Indian Railways Act of 1890 by repealing Ss. 7 and 10 of the Carriers Act (Act III of 1865) and by also enacting in S. 72 (3) that nothing in the common law of England or in the Carriers Act of 1865 regarding the responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility of a Railway Administration, leaves no room for doubt that the liability of the Railway Company must be measured and determined solely by the tests formulated in Ss. 151 and 152 of the Indian Contract Act.

The *onus*, therefore, being upon the bailee to show that he is exonerated from the liability for loss to the bailor. The question is whether there is any special contract here which relieves him from such liability.

The bailee pleads such a contract namely the risk note in form B, the execution of which by the consignor has been established. It is in the form prescribed by the Indian Railways Act, and the material portion runs as follows :—

"RISK NOTE FORM B"

I the undersigned do in consideration of such lower charge agree and undertake to hold the said Railway Administration harmless and free from responsibility for any loss, destruction, or deterioration of or damage to the said consignment from any case whatsoever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft

(1) (1919) 1919 P. H. C. C. 150 = 49 I. C. 498.

by or to the wilful neglect of its servants, provided that the term wilful neglect be not held to include fire, robbery from a running train, or any other unforeseen event or accident."

It is clear that upon this special contract the burden of proof lies in the first instance upon the defendants, that is to say, they must first prove that there was such loss as is contemplated by the first part of the risk note, and when they have done so the *onus* will be shifted upon the plaintiff to show that the loss is due to the wilful neglect of the defendants or their servants as provided in the latter part.

An attempt had been made to show that by suing for compensation for non-delivery, the plaintiff has taken the case out of the risk note which applies only to loss by the bailee and involves the notion of an involuntary or unwilling parting with the thing with reference to which the word is used, and that the goods cannot be said to be lost if the carrier detains them wrongfully or wilfully or negligently delivers them to another. Reliance is placed for this view upon *Marrit* v. *North Eastern Railway Co.* (2), *Changa Mal* v. *B. N. W. Ry. Co.* (3).

Now the English decisions do not apply because they are based either upon the common law or the English Carriers' Act and are not in *pari materia* with the Indian Railways Act, and as for *Changa Mal* v. *B. N. W. Ry. Co.* (3) the point for decision there was whether the period of limitation was governed by Art 30 or Art. 31 of Sch. II of the Indian Limitation Act of 1908 which enactment also was not in *pari materia*.

Moreover, *Changa Mal's* case has now been overruled ; in that case a Division of the Punjab Chief Court held that the term "Loss" in Art. 30 of the Indian Limitation Act, Sch. II, contemplates an actual losing of the goods by the carrier himself, and, therefore, when the carrier delivers the goods to a wrong person it cannot be said that he has lost the goods ; and they also held that Art. 31 did not apply because misdelivery was not non-delivery. But the recent Full Bench decision of the same Court in *Hill Sawyers & Co.* v. *The Secretary of State* (4) is authority for the view that misdelivery is loss within the terms of S. 80 of the Indian Railways Act, and it supports the view that the lo s referred to in S. 72 and other relevant sections of Ch VII of the Indian Railways Act is the loss suffered by the consignor or the true owner whether such loss occurred by reason of misdelivery or non-delivery.

To the same effect are *M. & S. M. Ry. Co.* v. *Haridas Banamalidas* (5), *M. & S.M. Ry. Co.* v. *Mattai Subba Rao* (6) and *G. I. P. Ry.* v. *Ramachandra Jagannath* (7).

It has been argued that if loss to the owner was meant, then there was no necessity for any reference to liability for destruction of the goods. This is true. Destruction must always be included in loss and the draftsmen of the risknote has merely availed himself of the device of first stating the generality and then without prejudice thereto reciting the particulars. The word destruction is surplusage but it does not alter the sense. In my opinion, therefore, the risk note will apply not only when the goods have been lost by the bailee in the sense that he cannot trace them but also when they are lost to the owner because the bailee fails to deliver them to him in breach of his contract for any reason whatsoever, and I cannot admit that by merely suing for compensation for non-delivery the plaintiff can take the case out of the risknote. He seeks, however, to ground an argument on Art. 31 of Sch. II of the Indian Limitation Act and points out that if "non-delivery" had been included in "loss" there would have been no necessity for amending this article in 1899, so as to cover both non-delivery and delay in delivery. Apart from the objection that the Indian Limitation Act can afford no guide for construing the Indian Railways Act, there was clearly some necessity for the amendment as the object of the legislature was to prescribe the same period of limitation for claims for non-delivery as Art. 30 which referred to suits against carriers for losing goods

(2) (1876) 1 Q B.D. 302 = 45 L J.Q.B. 289 = 34 L.T. 940=24 W. R. 386.
(3) 6 P. R. 1897.
(4) A I.R 1921 Lah. 1=2 Lah. 133.
(5) (1918) 41 Mad. 871=35 M.L J. 35=24 M.L.T. 38=49 I. C. 69=8 L. W. 340.
(6) (1920) 43 Mad. 617=38M L.J. 360=(1920) M. W. N. 198=11 L.W. 358=55 I.C. 754= 28 M.L T. 49.
(7) (1919) 43 Bom. 386=21 Bom. L. R. 6=49 I. C. 396.

and which could not cover suits for non-delivery.

Although in the present case the English authorities cannot be of great assistance, there is one recent case which is both pertinent and instructive. I refer to *Smith, Ltd.* v. *Great Western Railway Co.* (8). In that case six pairs of boots were forwarded in a package weighing 19 lbs. for carriage by railway from Birmingham to Wilton The parcel was consigned to the defendant railway company but was not delivered. The risknote ran as follows: "In consideration of your charging such lower rate we agree to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods except upon proof that such loss, damage, misconveyance, misdelivery, delay, or detention arose from the wilful misconduct of your servants". The Railway Company declined to account for the loss, and the appeal Court held that such refusal did not justify the Court in inferring that the loss arose from the wilful misconduct of the defendant's servants. That decision was approved by the House of Lords and the following passage in the judgment of Lord Buckmaster in (1922) A.C. 178 might almost have been delivered in respect of the present risknote. "It has been suggested on the part of the appellant that it must be read as though it contained exceptions in favour of the Railway Company with a proviso reserving to the consignor rights in a certain event and that it was consequently incumbent upon them to prove that the goods had disappeared owing to the specified facts and when that was proved it would become necessary for the consignor to establish that he had the benefit of the proviso, or in other words that the loss had arisen owing to the wilful conduct of the company's servants. I am unable so to regard this clause ; it is in my opinion a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the company's servants. It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the railway company's servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the Railway Company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. Nonetheless, that is the burden that he has undertaken, and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the Railway Company". Both in the Court of Appeal and in the House of Lords the plaintiffs Smith & Co. strongly relied on *Curran* v. *Midland Great Western Railway Co. of Ireland* (9) and contended that there was a *prima facie* presumption that the goods were in the possession of the carrier till he showed the contrary and that the unexplained detention would be wilful misconduct for which an action would lie. Now, in Curran's case the Railway Company undertook to carry some pigs from Sligo to Manchester and failed to deliver some of them. There was a risknote which recited that the company shall be free from liability including liability for loss, injury or delay unless such injury or delay shall be occasioned by the intention or wilful neglect or misconduct of their servants and the Court held that burden of proof was on the defendant and the inference from non-delivery and refusal to give any explanation was that the pigs were still in the possession of the defendant and that there was wilful misconduct. In discussing this case Lord Buckmaster proceeded as follows:—"Now, my Lords in that case there had been no answer given at all on the part of the Railway company to the request for information as to what had happened, but in the present case the evidence that was before the learned County Court Judge included the answers to interrogatories, in which the defendant company had said that they had no knowledge as to whether the goods had been handed to them at Wilton, and

(8) (1921) 2 K. B. 237.

(9) II Irish Reports 183.

they believed that the same were lost and never arrived at Wilton It is impossible to place such evidence on an exact parallel with the evidence which warranted the Chief Baron in assuming the possession of the pigs as a fact in the custody of the defendants, and then inferring from that possession that the refusal to give any explanation of their whereabouts or their existence was an act of wilful misconduct. My Lords, I desire to say nothing further about that authority, because for these reasons I do not think that it deals with the same facts as those in the present case, and it may be that on some later occasion the actual words of that judgment may come up for consideration." Lord Sumner and Lord Wrenbury following Lord Buckmaster agreed that if it were necessary to discuss Curran's case on any future occasion it would have to be examined with great care.

In my opinion Risk note B is no less harsh than that to which Lord Buckmaster was referring. It may perhaps be not inequitable inasmuch as the trader enters into the contract with his eyes open and in consideration of a cheaper rate but it cannot be denied that he undertakes in most instances a crushing and almost insuperable burden.

The learned Vakil for the plaintiff next takes a point for which there is some recent authority. He urges that it is not sufficient for the defendant to plead, he must call evidence to satisfy the Court that the goods are not still in the possession of the defendant and in support, he cites *Ghelabhai Punsi* v. *E. I. Ry. Co.* (10) and *Jamanadas Baldevalas* v. *Burma Railway Co., Ltd.* (11). It is true that in both these cases the Court held that a mere pleading was not sufficient, but with very great respect I think that the decisions were based on the authority of Curran's case which was distinguished if not doubted by the House of Lords in *Smith* v. *The Great Western Railway* (8). Indeed the matter really does not turn on evidence. It is a question of the construction of the Risk note, and if, loss due to non-delivery is covered by the document then there is an end of the matter and nothing further is required from the defendant. The general rule is, that where a contract contains an exception and a proviso, the party who desires to take the benefit of the former must not only plead it but prove it, and that when that has been done, the other party, who desires to take the benefit of the proviso, which is in reality an extensive covenant by way of defeasance, must prove that the subject-matter is not within the exception. That, however, is not the position in the present case.

Moreover, in the present case the plaintiff admits in his plaint that the goods have been lost and as the defendant does not in any way repudiate the contract but on the contrary sets up the risk note in his defence, no presumption can arise that the goods are still in his possession simply because he says that he cannot give any account of the manner in which they have disappeared.

The question that remains, therefore, is has the plaintiff satisfied the burden which rests upon him to show that the loss has been caused by the wilful neglect of the defendant. The quantum of evidence required for this purpose must necessarily vary according to the nature of the goods, and it has been observed elsewhere that the loss of an elephant might be difficult to explain except on the hypothesis that there had been wilful neglect; but in the present case our task is simplified because there is clear and apparently reliable evidence that while the goods were lying on the platform at Bombay the plaintiff's agent asked a subordinate in the service of the first party defendants to remove them into the godown but was told in reply that after a railway receipt had been given to the consignor he had no business to make any such request. There is also evidence that after the institution of the suit a goods clerk informed the plaintiff that one of the bales had not been despatched. There is no rebutting evidence on the side of the defendants and, in my opinion it has been established that there was wilful neglect on their part and therefore the plaintiff is entitled to a decree.

The application will, therefore, be dismissed with costs. As this is a case which has been argued at more than ordinary length, we assess the hearing fee at 10 gold mohurs.

Bucknill, J.:—I agree.

Application dismissed.

(10) (1921) 45 Bom. 1201=63 I. C. 241=23 Bom. L. R. 525.
(11) 64 I. C. 395.

* A. I. R. 1923 Patna 290.

DAS AND KULWANT SAHAY, JJ.

Lal Bihari Singh and others—(Plaintiffs) Appellants.

v.

Gur Prasad Singh and others—(Defendants) Respondents.

F. A. No. 101 of 1920, decided on 31st January, 1923, from the original decree, 2nd Court, Sub. J, Monghyr, dated 21st January 1920.

Civil P. C., S. 11—Same parties—Prior mortgagee impleaded by puisne mortgagee asserting himself to be prior—Deft. filing written statement only—Decree operates as res-judicata.

Defendant puisne mortgagee made plaintiff prior mortgagee a party to his mortgage suit and set up a plea that he was the prior mortgagee. Plaintiff did nothing beyond making a written statement, to prove that he was prior mortgagee. Decree directed that, in the event the defendants in that suit including the present plaintiff failed to pay the decree amount, the property be sold.

Held the decree operated as *res judicata* against plaintiff in his suit on his mortgagee.

[P. 291, C. 1.]

S. M. Mullick for *Guru Saran*—for Appellants.

K P Jayaswal and *Bimlacharan Sinha*—for Respondents

Kulwant Sahay, J.:—This is an appeal by the plaintiffs against a decree of the Subordinate Judge of Monghyr dismissing their suit to enforce a mortgage bond. The bond is dated the 1st November, 1903 and it was executed by the defendants Nos. 1 and 2 and one Hargobind Prasad Singh father of the defendants Nos. 5 and 6 in favour of Amrit Singh and Uzir Singh whose heirs and representatives the plaintiffs are, for a sum of Rs. 2,000. The property mortgaged therein was a 2 annas 7 dams 10 cowries 11 bouris share of village Asthawan. Defendants 3 to 6 are the members of the family of defendants 1 and 2 and defendants 7 to 15 are alleged to be subsequent purchasers or mortgagees. The suit was contested by the defendant No. 11 and by the guardian *ad-litem* of defendant No. 6. The other defendants did not appear. We are in this appeal concerned only with the defendant No. 11 who raised various pleas in bar of the suit, the principal pleas being that the suit was barred by *res judicata* and that the suit was bad for non-joinder of parties. The learned Subordinate Judge has dismissed the suit holding that it was barred by *res judicata* and that it was bad for non-joinder of parties. Three points have been taken by the learned Vakil for the plaintiffs-appellants: First, that the Court below was wrong in holding that the suit was barred by *res judicata*; second, that it was wrong in holding that the suit was bad for non-joinder of parties; and thirdly, the Court below was wrong in dismissing the whole suit, whereas it ought in any event to have passed a decree for sale of the share of the mortgaged properties not covered by the mortgage of the defendant No. 11.

The first point of *res judicata* arises under the following circumstances: It appears that Babu Bihari Lal a cousin of defendant No. 11 had a mortgage dated the 26th January, 1908 over 1 anna 8 dams 10 cowris of Mauza Asthawan executed in his favour by the predecessors of defendants Nos. 1 and 2 for a sum of Rs. 9,625 After the death of Babu Bihari Lal, the defendant No. 11 brought a suit on the said mortgage. That was suit No. 78 of 1914 and a certified copy of the plaint of that suit has been produced and marked as Ex. 5 in this case. In that suit Amrit Singh and Kamta Prasad Singh, who are plaintiffs Nos. 1 and 7 in the present action, were impleaded as defendants and in the plaint it was alleged that they were subsequent mortgagees inasmuch as the plaintiff's (the present defendant No. 11) mortgage was executed to satisfy a prior mortgage of the year 1895 and therefore he acquired a priority over mortgage of the present plaintiffs. Kamta Prasad Singh did not appear in that suit, but Amrit Singh filed a written statement which is marked Ex. 4 in this case and in that written statement Amrit Singh alleged that his mortgage was prior to the mortgage of defendant No. 11 and the latter could claim no priority over him. After filing this written statement Amrit Singh or Kamta Prasad Singh never appeared in this suit and never took any steps to prove their priority over the mortgage of the defendant No. 11.

The learned Subordinate Judge, who decided that suit, in his judgment dated the 5th May 1916, which is marked Ex. 7 in this case, proceeded on the assumption that Amrit Singh and Kamta Prasad Singh were subsequent mortgagees and the decree in that suit which is marked Ex. 6 in this case, directed "That the defendants do pay the decretal amount within four months

and that in case of default the same be realized by sale of the mortgaged property." Thereafter Amrit Singh filed a petition on the 20th July 1916 for a rehearing of the suit under O. 9, R. 13, C. P. C. but this application was also dismissed. Therefore the position was that in the suit No. 78 of 1914 the defendant No. 11 clearly alleged that his mortgage was prior to that of the present plaintiffs and the decree in that suit directed the sale of the property in the event of the defendants in that suit, including the plaintiffs in the present suit, failing to pay up the decretal amount. The decree was executed in due course and the mortgage property 1 anna, 8 dams, 10 cowris in Asthawan was sold and purchased by the defendant No. 11. The plaintiffs in the present suit contend that as their mortgage was in fact prior to that of the defendant No. 11, they were not necessary parties in the suit of the defendant No. 11 and that it was not necessary for them to prove their priority in that suit and therefore the decree passed in that suit does not operate as *res judicata* in the present suit. This contention cannot be sustained. It may be that as a matter of fact the plaintiffs' mortgage was prior in time to that of the defendant No. 11. It is very likely that the allegation of the defendant No. 11 in his plaint of the suit of 1914 that he was entitled to priority on account of the money advanced under his bond being used in satisfying a prior debt, was false. But it was on the allegation, true or false, that the plaintiffs' in the present action had a subsequent mortgage that they were impleaded as parties in that suit. It was their duty in that suit to prove that that allegation was incorrect. The mere filing of the written statement in that suit was not sufficient. It was no proof of priority but a mere allegation of priority, and once their mortgage was attacked as being subsequent to that of the defendant No. 11, it was their bounden duty to prove that it was not so. Having failed to appear and prove their priority in the suit of 1914, the plaintiffs in my opinion are now estopped from claiming their priority in the present suit. Reliance has been placed by the learned Vakil for the appellants on the case of *Lachmi Narain Marwari* v. *Chaudhri Bhagwat Singh* (1), but in that case it does not appear that in the suit of the subsequent mortgagee wherein the prior mortgagee was made a party there was any allegation disputing his priority and from the report of the judgment of that case it does not appear what was the form of the decree passed in that case. As a matter of fact from the extract of the judgment of the Deputy Commissioner Subordinate Judge given in the report of that case it appears that the question of priority was left open. In any event Mr. Justice Sultan Ahmad in that case clearly says "At the same time the puisne mortgagee may make a prior mortgagee a party to the suit. If he does so, the purpose of making a prior mortgagee party should be clearly stated; but, if no purpose is given in the plaint or provided for in the decree, the prior mortgage will not be affected by the judgment in any way. Where no relief is claimed, the subject-matter of the action is the interest of the mortgagor minus the interest of the first mortgagee, and in such a suit, in my opinion no investigation as to the validity or extent of the prior mortgage can possibly be made." In the case now before us the purpose of making the present plaintiffs a party in the suit of defendant No. 11 was clearly stated and the decree clearly directed the present plaintiffs to pay up the decree and in the event of their failure, a sale of the mortgage property was ordered. This case therefore does not help the appellants. Mr. Sushil Madhab Mullick, for the appellants, also relies upon the case of *Radha Kishun* v. *Khurshed Hossein* (2). That case far from supporting the plaintiffs is an authority in favour of the proposition that where a prior mortgagee is impleaded as a defendant in an action on a subsequent mortgage and it is sought to displace the prior title and to postpone it to the title of the plaintiff it is the duty of the prior mortgagee to prove his prior mortgage. In that case the prior mortgagee was joined as a defendant, but it did not appear whether any and what relief was sought against him. The plaint of the prior suit, was not produced and their Lordships held that in the absence of any proof as to the allegation upon which the prior mortgagee was made a party it must

(1) (1920) 1 P. L. T. 649=58 I. C. 83.

(2) (1920) 47 Cal. 662=55 I. C. 959=47 I A 11=38 M. L. J. 424=(1920) M. W. N. 308 =11 L. W 518=22 Bom. L.R 557=18 A.L.J. 401 (P. C.).

be assumed that he was made a party as a prior mortgagee and the case came within the terms of S. 96 of the Transfer of Property Act. Sir Lawrence Jenkins in delivering the judgment observed as follows: "Consequently, to sustain the plea of *res judicata* it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bukhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bukhtaur Mull's priority." In the present case, the defendant No. 11 in the former suit did allege a distinct case in the plaint in derogation of the present plaintiffs' priority. Therefore this case supports the view taken by me and it does not help the plaintiffs appellants. In this connection reference may be made to the case of *Mahomed Ibrahim-Hussain Khan* v. *Ambika Prasad Singh* (3), where their Lordships of the Judicial Committee of the Privy Council in dealing with a case similar to the present case held that it was incumbent on the prior mortgagee to set up his rights under the prior mortgage and not having done so, S. 13, Expl. 2 of the Code of Civil Procedure, 1882, applied and that the claim of the plaintiffs was barred. Reference may also be made in this connection to the case of *Sri Gopal* v. *Pirthi Singh* (4) where a similar view was taken. I therefore agree with the Subordinate Judge in holding that the present suit in so far as it relates to 1 anna. 8 dams, 10 cowris of Asthawan is barred by *res judicata*.

As regards the second point taken by the learned Vakil for the appellant, it appears that Gopal Saran, the defendant No. 3 has a minor son named Chinta Saran who has not been made a party in this suit. The learned Subordinate Judge has held that the whole suit is bad inasmuch as Chinta Saran is a necessary party and that on account of this defect the whole suit ought to be dismissed. The learned counsel for the respondent does not support this part of the judgment and in my opinion, having regard to the circumstances of the case, it can safely be held that Gopal Saran represents the interests of his son and that the suit ought not to fail on his ground.

As regards the third point, as I have already stated the property mortgaged in the bond of the plaintiffs was a 2 annas, 17 dams, 15 cowris, 11 bouris share of the village Asthawan and only one anna, eight dams, ten cowris was mortgaged in the bond of the defendant No. 11 and purchased by him. There is no reason why the plaintiffs should not get a mortgage decree for the sale of the remaining share of 1 anna, 9 dams, 5 cowris, 11 bouris of Asthawan.

The result therefore is that the decree of the Court below will be modified and an ordinary mortgage decree will be passed in favour of the plaintiffs for the sum that may be found due on an account being taken for principal and interest at the bond rate up to the date of decree and for four months thereafter. The defendants other than the defendant No. 11 must pay up the amount within four months from this date, failing therein 1 anna, 9 dams, 5 cowris, 11 bouris share of mauza Asthawan will be sold for realization thereof. The principal amount is to carry interest at the bond rate up to the date of decree and for four months thereafter and after that the entire amount will carry interest at 6 per cent. per annum. The defendant No. 11 (respondent) is entitled to the costs of this appeal.

Das, J.—I agree.

Decree modified.

(3) (1912) 39 Cal. 527=14 I. C 496=39 I. A. 68=11 M. L. T 265=(1912) M. W. N. 367=9 A. L. J. 332=14 B L. R. 280=16 C. W. N. 505=15 C. L. J. 411=22 M. L J. 468 (P C)

(4) (1902) 24 All. 429=29 I. A. 118=6 C.W. N. 889=4 Bom. L. R. 827 (P. C.).

A. I. R 1923 Patna 292.

ROSS, J.

Baijnath Sahay and others—Petitioners.

v.

King Emperor—Opposite Party.

Cr. Rev. No. 3 of 1923, decided on 19th January, 1923, from an order of Deputy Magistrate, Hazaribagh, dated 1st September, 1922.

(a) *Criminal P. C. S. 342—Failure to examine vitiates trial.*

If the accused are not examined under S. 342 at the trial, the proceedings are vitiated.

(b) *Cattle Trespass Act, S. 22—Loss not proved—Compensation not asked for in petition—Compensation order is illegal.*

If no compensation was claimed in the petition of complaint and no allegation was made as

to the loss caused by the seizure of the cattle, the order directing payment of compensation cannot stand. The person under whose orders the cattle were seized is liable to compensate the complainant, equally with those who directly seized them under his orders.

[P. 293, C. 1]

S. K. Mitra—for Petitioners.

Ross, J.—This is an application against an order of the Sub-Deputy Magistrate of Chapra affirmed on appeal, on the petitioners to pay Rs. 40 to the opposite party as compensation under S. 22 of Act I of 1871. The first ground taken is that the petitioners were not examined under S. 342 at the trial and consequently the proceedings were vitiated. This ground is, in my opinion, a good ground and the order consequently cannot stand. It is further urged that no compensation was claimed in the petition of complaint and that no allegation was made as to the loss caused by the seizure of the cattle. For this reason also the Magistrate was not justified in awarding compensation which was not prayed for. The third ground that the person under whose orders the cattle were seized is not liable to compensate the complainant is, in my opinion, not a good ground. He is equally one of the persons who seized the cattle with those who directly seized them under his orders

But on the first two grounds the application must succeed. The order for compensation is set aside. The fine, if paid, will be refunded.

A. I. R. 1923 Patna 293.

DAS AND KULWANT SAHAY, JJ.

Shahdeo Shukul and others—Appellants

v

Jageshar Prasad Shukul and others (Plaintiffs) *and others*—Defendants-Respondents.

F. A. No. 81 of 1920, decided on 12th January, 1923, from a decision of Sub. J. of Saran, dated 3rd September, 1918.

Civil P. C., O. 9, R. 13—Compromise—Filing of amended deed—Court cannot pass decree beyond compromise without notice to defendants.

Where the petition of compromise is filed on a case being compromised by some of the defendants, the Court is not competent to partition the properties which were not included in the petition of compromise without notice to the defendants who compromised.

[P. 294, Cs. 1 & 2]

L.N. Singh and *Ram Prasad*—for Appellants.

Akbari, Sultanuddin Hussain, Hardeswar Prasad Sinha and *S. P. Varma*—for Respondents.

Das, J.—It is quite impossible to support the decree passed by the Court below. The suit was one for partition and the appellants who were some of the defendants in the Court below contended in their written statement that some of the properties stated in the plaint to be joint properties did not exist and could not therefore be partitioned. The suit was compromised between the plaintiffs, defendants 1 to 4, defendant No. 6 and defendants 9 to 12, it being assumed that the defendants other than those who had entered into the compromise were benamidars and were therefore not interested in the action. The compromise petition, after stating that the dispute in the suit had been compromised between the parties, proceeded to allot the properties to the different parties according to certain shares. It then stated that the claim for naqdi, etc, had been settled privately among the parties and then it prayed that the suit may be decided and decreed in terms of the petition of compromise.

Now whatever may have been the real facts, there is no doubt that on a construction of the compromise petition the whole suit was settled between the parties and that no portion of it was left outstanding for the determination of the Court. This was undoubtedly the position when the petition of compromise was filed in Court on the 23rd of May 1918. As some of the defendants were not parties to the compromise, the suit had to be heard as against them and the Court adjourned the hearing of the suit from time to time in order to enable the plaintiffs to take steps as against them. On the 24th August 1918 the plaintiffs filed a petition for amendment of the compromise petition; they stated that some of the properties of which they gave a list were left joint by the settlement and that as they had not been mentioned in the petition of compromise it was necessary to amend the petition so as to include those properties in the petition. Now it does appear that many items of properties which were claimed by the parties as joint properties were in fact not dealt with in the petition of

compromise. This may have been due to an oversight or to the fact that the claim as to those properties had been settled amicably between the parties, and it was thought that it was wholly unnecessary to mention them in the petition of compromise. The Court summarily rejected the application without giving notice of it to the defendants and then proceeded to hear the suit, and taking the view that it was competent to it to partition the properties which were not mentioned in the petition of compromise, it gave the plaintiffs an *ex parte* decree in respect of those properties to the extent of their shares therein. His decision on this point is as follows :—

"There are certain properties, however, which are mentioned in the plaint but they have not been included in the petition of compromise. With respect to those properties the defendants are free to contest. But they have not been appearing before me although the suit has been postponed from day to day. Plaintiff has therefore proved his case against them and also against those defendants who have not appeared and on whom the service of summons has been proved."

Now it ought to have struck the learned Subordinate Judge that it was not fair to pass a decree against the defendants in their absence. The learned Subordinate Judge does say that the defendants did not appear before him, but a little reflection would have convinced him that the suit having been compromised and the defendants having put their signature on the petition of compromise, it was not necessary for them to appear in Court from day to day to meet a case which had never been made by the plaintiffs to their knowledge. The petition of compromise on the face of it was a complete settlement and as the defendants had no notice of the case which was made by the plaintiffs it was not competent to the Court to partition the properties which were not included in the petition of compromise. The petition of compromise itself showed that the claim as to certain properties had been settled amicably and it may well have been that those properties were not mentioned in the petition of compromise because the claim in regard to those properties was not settled amicably. The defendants had the right to put forward their case before the Court but the course adopted by the Court below gave them no opportunity to place their case before the Court. The decree passed by the Court cannot for a moment stand and we must accordingly set it aside.

But then the question arises as to what we should do in the circumstances. As I have said before the petition of compromise, on the face of it, is a complete settlement of the dispute between the parties and there is much force in the argument of the appellants that the claim as to the properties not included in the petition of compromise was settled amicably between the parties, especially as in their written statement they set out a list of properties mentioned in the plaint which, according to the appellants, were no longer in existence. If this view be correct then there ought to be a decree in terms of the petition of compromise. But it is pointed out by Mr. Varma on behalf of the respondents that many properties admitted by the appellants in their written statement to be joint properties have not been dealt with in the petition of compromise, and the learned Counsel has made out a strong case to the effect that the petition of compromise as drawn up does not represent the actual settlement at which the parties arrived. Both the parties agree that the petition of compromise should stand but they differ on the question whether the Court should investigate the claim of the parties in regard to the properties not included in the petition of compromise.

I have come to the conclusion that the fairest course would be to remand the case to the Court below for disposal according to law. It is agreed between the parties that the petition of compromise, so far as it goes, should stand In regard to the claim of the plaintiffs as to the properties not included in the petition of compromise, the Court will try the question whether there was an amicable settlement between the parties in regard to those properties. If he agrees with the contention of the defendants on this point, then he will merely pass a decree in terms of the petition of compromise ; if on the other hand he does not agree with the contention of the defendants, then he will proceed to try the case in regard to the properties not included in the petition of compromise, and in trying the case he will have to consider whether the defendants are right in

their view that some of the properties, and if so which of the properties, are no longer in existence.

We allow the appeal, set aside the judgment and decree passed by the Court below and remand the case to that Court for disposal according to the observations made in this judgment. The appellants are entitled to their costs in this Court; the costs incurred in the Court below will abide the result and will be disposed of by the lower Court.

Kulwant Sahay, J.:—I agree.

Suit remanded.

A. I. R. 1923 Patna 295.

Ross, J.

Ramparichan Singh—Defendant Petitioner

v.

Biranji Prasad Singh and others—Plaintiffs-Opposite Party.

Civ. Rev. No. 325 of 1922, decided on 24th January, 1923, from a decision of Sub-J., Muzaffarpur, dated 5th June, 1922.

(a) *Civil P. C., S. 115—Wrong view as to burden of proof—No opportunity to discharge it—Revision lies.*

Revision will lie where the Appellate Court takes a different view as to burden of proof but does not give the party on whom it places the burden, opportunity to produce evidence. [P. 295, C. 2.]

(b) *Landlord and tenant—Trees, right to—Evidence produced by tenant—Burden shifted on landlord*

The tenant has to prove an exception to the general law, in the form of a local custom entitling him to the timber of the trees If he does this by producing the record-of-rights, this throws the burden on the landlord. [P. 296, C. 1.]

P. C. Rai—for Petitioner.

L. N. Singh and *Harnarain Prasad*—for Opposite Party.

Ross J.:—This is an application by the defendant for revision of the decree of the Subordinate Judge of Muzaffarpur reversing the decision of the Munsif of Motihari in a suit brought by the plaintiffs, opposite party, for damages. The plaintiffs claimed to recover half the price of the timber of certain trees cut by the defendants. The defendants pleaded that they were entitled to the timber. They relied on the entry in the record-of-rights which showed that they had the entire rights in the timber, and also on the village note. The grounds of the present application are that the learned Subordinate Judge erred in disregarding the village note and in throwing the burden of proof of the custom alleged by the defence on the defendants in spite of their production of the record-of-rights. But the learned Vakil for the opposite party argues that even if the learned Subordinate Judge was wrong, revision will not lie on such grounds as these; and that in fact he is right in the view he has taken of the law.

With regard to the village note I see no reason why it should not have been considered as a piece of evidence and given such weight as the Court was prepared to attach to it and the Subordinate Judge in my opinion was wrong in leaving it out of consideration altogether. But on this ground alone it would not be proper to interfere in revision. In this case, however, the view that the Subordinate Judge has taken has in my opinion involved him in an error in procedure. The Munsif held that as the record-of-rights was in favour of the defence in recording their rights in the trees; it was for the landlord to establish his claim. The Subordinate Judge was of opinion that as the general law was in the landlord's favour the entry in the record-of-rights was not enough to establish the custom alleged by the defence in view of the fact that it was for them to prove the custom. He therefore rightly observed that "there can be no doubt that the procedure adopted was faulty" and that "the respondents (that is the defendants) should have been called upon to prove the custom of appropriating the entire timber. That was not done."

Now if the Subordinate Judge took that view he ought clearly to have remanded the case in order to give defendants an opportunity to adduce evidence sufficient to discharge the burden of proof which he thought lay upon them. The Munsif had taken a different view of the burden of proof, and the proof tendered by the defence was according to that view When the Subordinate Judge threw the burden otherwise, he ought certainly to have given the defence a further opportunity to discharge it. He therefore erred in procedure and this is a sufficient ground for revision of his judgment. But in my opinion he was clearly wrong in his view of the burden of proof. The general law is in the landlord's favour. The tenant has to prove an exception to the general

law in the form of a local custom entitling him to the timber of the trees. He does this by producing the record-of-rights and this throws the burden on the landlord. (See *Janki Kuer* v. *Vali Muhammad* (1).) In my opinion the view taken in this case by the Munsif was correct and that of the Subordinate Judge was wrong. This application must therefore be allowed and the decree of the Subordinate Judge set aside and the appeal remanded for rehearing. The hearing fee is assessed at one gold mohur. Costs will abide the result.

Appeal remanded.

(1) (1921) 61 I C. 420.

A.I.R. 1923 Patna 296.

ROSS, J.

Lakurka Coal Co., Ltd. — Defendant Petitioner.

v.

Biseswar Chatterji and others—Plaintiffs Opposite Party.

Civ. Rev. No. 311 of 1922, decided on 18th January, 1923, from an order of Small Cause Court Judge, Dhanbad, dated 22nd July, 1922.

Mines and Minerals—Mining lease—Damages, measure of, cannot be fixed.

Neither twenty times annual rent of a plot included in the mining lease nor one year's rent is the measure of damages to be awarded for letting down the surface for cultivation purposes. [P. 296, C. 2.]

Susil Madhab Mullick for *Subal Chandra Muzumdar* and *P. C. Roy*—for Petitioner.

Abani Bhusan Mukharji for *B. B. Mukharji*—for Opposite Party.

Ross, J. :—This is an application by the defendant company for revision of a decree of the Small Cause Court Judge of Dhanbad awarding the plaintiffs Rs. 370 as damages for letting down the surface of 1 bigha 17 kathas of land under which the defendant company has mining rights.

Three points were argued on behalf of the petitioner : (1) that the suit should not have been tried as a Small Cause because the questions involved were complicated questions of the rights of the parties under the terms of the mining lease ; (2) that there is absolutely no evidence as to the actual damage suffered by the other side ; and (3) that having regard to the contract between the parties, subsidence was the inevitable result of the grant and unless there be anything in the grant expressly reserving the right to recover damages for such inevitable subsidence, the plaintiffs cannot recover. Having regard to the terms of the rule granted in this case, I shall not consider the first and third points because in my opinion it is only open to the petitioner to argue on the question of damages. On this point it is said that there is no evidence of actual damage ; that the plaintiff must prove the extent of the damage and there must be some evidence to show the loss that he has suffered and that there is no material for assessing damages ; that the only way to assess damages is to find out the market value or the letting value of the land that has been let down and the only evidence on this point is in Cl. (5) of the lease where it is said that "if the demised land be more than 99 bighas by correct measurement then (the lessors) will be entitled to have rent at Rs 1-8-0 as rent and Rs 3 as bonus per bigha for the excess area." It is contended that the true measure of damages in the present case is twenty times the annual rent plus the bonus. In my opinion that is not the true measure of damages because it cannot be inferred from paragraph 5 of the lease what the actual value of culturable land is : nor is it correct to say that there is no evidence on which the Subordinate Judge could have arrived at his finding. The plaintiffs' witness No. 1 said that he claimed Rs. 10 per katha as compensation. There was no cross-examination of this statement and no rebutting evidence. There was therefore evidence on which the Subordinate Judge could have come to his decision and his decision therefore cannot be disturbed.

The application is dismissed with costs Hearing fee one gold mohur.

Application dismissed.

A. I. R. 1923 Patna 297 (1)

Ross, J.

Jagarnath Chaubey—Petitioner

v.

King-Emperor—Opposite Party

Cr. Rev. No. 744 of 1922, decided on 9th January, 1923, from a decision of Addl. S. J., Patna, dated 4th December 1922.

Penal Code, S 411—Reformatory Schools Act, S. 31.

A boy of 14½ years, convicted under S. 411, I. P. C cannot be let off after mere admonition though 6 months' rigorous imprisonment isnot proper on a youthful first offender [P. 297, C. 1.]

A security for good behaviour for 1 year was thought to be sufficient in the case. [P. 297, C. 1]

P. C. Roy—for Petitioner.

Ross, J :—This is an application on behalf of one Jagarnath Chaubey, a boy of 14½ years who was sentenced to six months' rigorous imprisonment on conviction of an offence under S. 411 of the Indian Penal Code and whom the Additional District Magistrate ordered to be detained in a Reformatory School for 3½ years instead of being imprisoned. It is contended that in view of the youth of the accused he ought to have been dealt with under S. 31 of the Reformatory Schools Act. The sentence of six months' rigorous imprisonment on a youthful first offender in a case of this kind appears to me to have been improper and therefore this Court has jurisdiction to alter the order for detention in a Reformatory School *Sheikh Reasut* v *Courteney* (1).

I do not think that the case is one in which it would be proper that the boy should be discharged after admonition. But if the parent or the guardian or the nearest adult relative of the boy is willing to enter into a bond in Rs. 100 to be responsible for the good behaviour of the youthful offender for a period of twelve months then such a bond will be accepted and the order of detention in the Reformatory School will be set aside. If no bond is given the sentence will stand. The bond should be given to the Additional District Magistrate.

Order accordingly

(1) (1902) 5 C.W.N. 211.

A. I. R. 1923 Patna 297 (2).

Ross. J.

Kabir Shah—Petitioner

v.

King-Emperor—Opposite Party.

Cr. Rev. No 7 of 1923 decided on 26th January 1923 from a decision of Sub-Deputy Magistrate, Jamui, dated 19th December, 1922.

(a) *Criminal Trial—Appeal—Appellant absent—Judgment if signed before pleader appeared, nothing can be done.*

Petitioner stated in his petition that he was not aware that his appeal was transferred and on the date, the Court to which the appeal had been transferred called out the case and dismissed and on petitioner's pleader's coming to know of this, he asked the Court to hear him in support of the appeal but was refused.

Judgment of the Appellate Court was to the effect that the appellant was absent and unrepresented ; that he had been through the judgment and thewhole record and the petition of appeal and could see no substance in any of the grounds of appeal. *Held*, if this judgment was signed by the Magistrate before the pleader appeared, the Magistrate could not have done anything in the matter. [P. 298, Col. 1.]

(b) *Criminal P. C., S. 562—Section does not apply in a case I. P. C., S. 411.*

S. 562, Cr. P. C , cannot be applied in a case under S. 411, I. P. C. [P. 298, C. 2].

G. C. Pal—for Petitioner.

The Govt. Pleader for the *Asst. Govt. Advocate*—for Opposite Party.

Ross, J.—This is an application on behalf of one Kabir Shah who has been sentenced to three months' rigorous imprisonment on conviction on a charge under S. 411 of the Indian Penal Code. The case for the prosecution is that the accused was found selling a bullock belonging to the complainant for a sum of Rs. 55 The defence was that the bullock had grazed the petitioner's field and that he was taking the animal to the pound when the complainant's party met him on the way and asked him to release the bullock and on his refusal to do so they took him to the police station. The grounds for the application are that the judgments of the Courts below are not in accordance with law that the defence evidence is reliable and that in any case in view of the age of the accused the Magistrate ought to have proceeded under

S. 562. It is stated in the application that the appeal was transferred to the file of the Sadar Sub-divisional Magistrate of Monghyr and that the petitioner was not aware of the transfer and on the date fixed the Sub-divisional Magistrate called out the case and dismissed the appeal and on the petitioner's pleader's coming to know of it he asked the Sub-divisional Magistrate to hear him in support of the appeal but that was refused. There is no answer to this statement in the Magistrate's explanation. But I do not see that the Magistrate could have done anything in the matter. His judgment is to the effect that

"The appellant was absent and unrepresented; that he had been through the judgment and the whole record and the petition of appeal and could see no substance in any of the grounds of appeal. The case was perfectly a clear one under S. 411 of the Indian Penal Code and was proved by a mass of reliable evidence."

If this judgment was signed by the Magistrate before the pleader appeared I do not see that the Magistrate could have done anything in the matter. The learned vakil for the petitioner, however, requested me to go through the evidence myself and consider the case on its merits. I have done so and can see no reason to doubt the correctness of the conviction It is not denied that the bullock was the property of the complainant and this has been amply proved. The evidence of Nilkant Sahu, Dalip Sahu and Punit Sahu proves that the petitioner was trying to sell the complainant's bullock. Somar Sahu proves that the accused gave conflicting accounts of his residence. Dwarka Singh the daffadar, proves that he attempted to escape when the bullock was identified as belonging to Iswar Singh.

Two witnesses were examined by the defence to prove that the field of the accused was grazed. These are both boundary witnesses but one of them has enmity with the owner of the bullock and the evidence does not seem to me to be of much weight. But even if it was true, the fact that the field of the accused was grazed is no justification for his attempting to sell the bullock. The two witnesses who say that the accused was taking the bullock to the pound are men of no substance and the evidence of the Police officer who investigated the case shows sufficiently that this part of the defence is untrue. I hold, therefore, that the conviction of the accused is right.

The question remains as to the sentence. It is strongly urged that in view of the youth of the accused he should be dealt with under S. 562. The Magistrate has recorded his age as 19 years. It is true that this is first offence and that the petitioner is a young man. But S. 562 cannot be applied in a case under S. 411. The sentence of three months' rigorous imprisonment is not excessive and I must dismiss this application. The petitioner will surrender to his bail to undergo the rest of his sentence.

Petition dismissed.

A I. R. 1923 Patna 298.

Ross, J.

Rameshwar Dass Mali Ram — Plaintiff Petitioner

v.

The East Indian Railway Company, Ltd Defendant-Opposite Party.

Civ. Rev No. 322 of 1922, decided on 11th January 1923 from an order of Sub-J. Dhanbad, dated 14th July 1922.

Limitation Act, Art. 30—Loss of portion of consignment—Time runs from loss.

A case of loss of portion of consignment undelivered is equivalent to a case of short delivery and time begins to run when the loss occurs *i e.*, when the short delivery which constituted the loss is made [P. 299, C. 1.]

Janak Kishore and *B. Prasad*—for Petitioner.

N. C. Sinha and *B. B. Ghosh*—for Opposite Party.

Ross, J.—This is an application by the plaintiff for revision of an order of the Small Cause Court Judge of Dhanbad who dismissed his suit against the East Indian Railway Company as being barred by time. It appears that 250 bags of flour were consigned to the North-Western Railway Company at Lyallpur on the

15th of October, 1920, for delivery at Jharia on the East Indian Railway Company's line. The consignment was delivered short by five bags and on the 11th of February 1922, the plaintiff brought this suit alleging that the cause of action arose in November, 1920, when the short delivery was made. A letter had been received from the Acting Divisional Traffic Manager, Howrah, which was dated the 7th of September, 1921, informing the petitioner that the five bags received short were lost and regretting that all enquiries to trace them had been of no avail.

The question is one of limitation. The learned Vakil for the petitioner contends that the case is governed by Art. 115 of the Limitation Act, or, if by Art. 30, then the date when the loss occurred must be proved by the Railway Company and in this case must be taken to be the date of the Company's letter, namely, the 7th of September, 1921.

In support of the argument that Art. 115 applies, reference was made to the decision in *Radhasham Basak* v. *Secretary of State* (1). But that was a case where the receipt of the consignment was denied and is therefore no authority in the present case. It is quite clear that the present case is governed either by Art. 30 or by Art. 31.

The learned Vakil for the defendant Company contends that this is a case of non-delivery and that time will run from the date when the goods ought to have been delivered and that date is fixed by the actual delivery of part of the consignment in November, 1920. It was held however, by the House of Lords in *Great Western Railway Company* v. *Wills*, (2) that "non-delivery of the consignment means non-delivery of the Consignment as a whole as contrasted with short delivery." This is a case of short delivery which is equivalent to loss of the portion of the consignment undelivered and the limitation is that prescribed in Art. 30. Then the question is when this loss occurred. It seems to me evident that the loss occurred when the short delivery which constituted the loss was made, that is to say in November, 1920. The suit is therefore clearly out of time.

It was further argued that there had been an acknowledgment of liability in the letter from the Divisional Traffic Manager about the loss. Apart from the fact that the Divisional Traffic Manager has not been shown to be authorised to make any acknowledgment of liability, the letter itself so far from acknowledging liability expressly repudiates it.

The application is dismissed with costs. Hearing fee one gold mohur.

Application dismissed.

(1) (1916) 44 Cal. 16=20 C. W N. 790=34 I C. 180=28 C. L. J. 547.
(2) (1917) A. C 148.

A. I. R. 1923 Patna 299.

ROSS, J.

Gajadhar Singh and others — Petitioners

v.

King-Emperor—Opposite Party.

Cr. Rev. No. 718 of 1922, decided on 4th January, 1923, from the decision of Sessions Judge, of Monghyr, dated 10th November, 1922.

Penal Code, S. 147 — Possession of the accused —Accused can enforce their right to crops and so cannot be guilty.

Where the accused were in the actual possession of the land, though some years back the land was sold at a rent sale, the accused were held not to be guilty of the charge under S. 147 of being members of an unlawful assembly, their object being to enforce their right to the standing crops. [P. 800, C. 2.]

S. P. Varma, H. P. Sinha and *Raghunandan Prasad*—for Appellants.

Asst. Govt. Advocate—for Respondents.

Ross, J.—The petitioners have been sentenced to six months' rigorous imprisonment and a fine of Rs. 30 each on conviction under S 147 of the Indian Penal Code and they have also been bound down to keep the peace. The charge was that they were members of an unlawful assembly the common object of which was to enforce their right or supposed right to the standing crops of Gulam Kutubuddin. It is evident that the true question in the

case is the question of possession of the crops. It was admitted by the accused Gajadhar Singh as soon as the Police appeared in the village that he had cut the crops and he produced the bundles. He asserted that the land was in his possession. The case for the prosecution is that the land was formerly the holding of Gajadhar Singh but was sold by the malik Kutubuddin for arrears of his share of the rent and was purchased by him in execution and that it has been in his possession since then. The Magistrate observed in his judgment that he did not attach much importance to the fact of actual possession and actual sowing I am at a loss to understand this observation as the question of possession is the essential question for decision in the case. The learned Sessions Judge has considered the documents and has come to the conclusion that they are in favour of the complainant's case. He has also referred to the defence evidence in some detail and has briefly remarked that the documentary evidence of the prosecution is supported by the oral evidence. The principal contention of the learned Council for the petitioners, and the only point which I think it necessary to discuss, is that the true effect of the documents is in favour of the possession of the accused.

The learned Sessions Judge has relied on the delivery of possession after the Civil Court sale and on an order under S. 144 of the Criminal Procedure and on the judgment in a case in connection with a claim made by a co-sharer malik Mst. Kamiz Khatun against Gajadhar Singh. Now the first two of these documents are of the year 1913 and the third is of the year 1916. Thereafter there come the two judgments of the Criminal Court which are relied upon by the defence. Ex. C is a judgment dated the 20th March 1917 in a case brought by Raghunandan, the Barahil of Kutubuddin, one of the witnesses in the present case, against Mukhram Singh and two others. The charge was under ss. 147 and 379 and the Magistrate said that the question to be decided was whether the crop was grown by the complainant and whether the occurrence really took place as alleged by him. He examined the evidence of the witnesses in detail and relying on the boundary witnesses called by the accused held that the crop was grown by the accused. This is a strong piece of evidence in favour of the accused and in my opinion the considered judgment of the Criminal Court on the question of possession cannot simply be ignored. The other judgment is of the following year and was delivered in a case between Bhim Dusadh, the *gorait* of Kutubuddin, one of the witnesses in the present case and Gajadhar Singh. Although the case was a case under S. 323 and was treated as such, it is clear that it was about the taking of crops of this land and that the Magistrate disbelieved the prosecution.

In my opinion, therefore, the effect of the documentary evidence, in view of the recent decision of the Criminal Court, is in favour of the possession of the accused. I have therefore thought it necessary to examine the oral evidence to see whether this establishes the prosecution case more effectually than the documents. The prosecution witness No. 1 speaks to possession but his evidence seems to be contradicted by the criminal judgment above referred to, as he speaks of possession in the year 1324 the year in which the Criminal Court decided against the complainant's possession. The next witness is Raghunandan Barahil; P. W. 3 is the doctor, P. W. 4 is the constable who was deputed to the land and consequently knows nothing of possession P. W. 5 is Bhim Dusadh, Gorait, already referred to, P. W. 6 is a chance witness who is not a witness on the point of possession. P. W. 7 speaks to possession and admits that he was one of the witnesses in the case of Raghunandan against Mukram Singh. The next witness is the Sub-Inspector who also was not a competent witness on the point of possession. P. W. 11 is the Civil Court peon who delivered possession and P. W. 12 was a putwari of the village up to 1320 and therefore not competent to speak to recent possession. On the side of the defence the first witness is a putwari who has land on the boundary of the disputed land. The second witness is also a boundary witness. The third witness has land in the neighbourhood and the 5th witness proves receipts granted to Gajadhar Singh by the other mailks. The oral evidence given for the defence seems to be more credible and substantial than that given by the prosecution. Both on the documents and on the oral evidence therefore, in my opinion, the prosecution

has failed to prove possession of Kutubuddin. But, on the other hand, the conclusion to be drawn is that the accused who evidently are countenanced by the other maliks have continued to hold possession of the land. The result is that the prosecution must fail and the convictions and sentences must be set aside. The petitioners will be acquitted. The fines if paid will be refunded. The bonds to keep the peace will also be discharged.

Petition allowed.

A. I. R. 1923 Patna 301.

BUCKNILL, J.

(*Adelaide Christiana*) *Lish* — Plaintiff

v.

(*David*) *Lish and others*—Defendants.

Matrimonial Suit No. 3 of 1922, Decided on 30th January 1923.

Letters Patent (Patna), Cl. 27—Suit for declaration not valid—Divorce Act, S. 4.

The jurisdiction of the High Court in matters matrimonial is only such jurisdiction as is comprised within the provisions of the Indian Divorce Act. A suit therefore for a declaration that marriage was a valid and lawful marriage does not lie. [P. 302, C. 2.]

Yunus—for Plaintiff.

Baikuntha Nath Mitter—for Defendants.

Bucknill, J.—This was a suit purporting to be a matrimonial suit entered as No. 3 of 1922 brought by one Adelaide Christiana Lish asking that this Court might be pleased to declare that her marriage with one Charles Lish on the 10th July 1916 was " a perfectly valid and lawful marriage ;" she does not ask for any other relief except the usual formal alternative prayer that the Court might be pleased to grant such other relief as it might think fit and proper.

Now, it is not here necessary for me to dilate upon the circumstances in connection with which this litigation was commenced. It is, I think, sufficient to state that they appear to be unusual : the plaintiff having, apparently, first married one Thomas Lish in 1868, then one Horace John Wilson in 1894 and finally Charles Lish in 1916. This Charles Lish was, it is said a brother of her first husband. All these gentlemen are deceased having died respectively in 1890, 1902, and 1917. The question which has, of course, at once arisen is as to whether a suit of this kind can be brought in this Court.

Now, the learned Counsel for the plaintiff has argued, with much ingenuity, that by virtue of cl. 27 of the Letters Patent constituting this High Court of Judicature (*i.e*, that of Patna) which were dated 9th February 1916, it would appear that a suit of this nature can be instituted in this High Court. This clause of the Letters Patent runs as follows :—

"And we do further ordain that the High Court of Judicature at Patna shall have jurisdiction, within the Province of Bihar and Orissa, *in matters matrimonial* between our subjects professing the Christian religion : Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said province, which is lawfully possessed of that jurisdiction."

Now it is obvious that the first point which has to be considered is as to what is meant by the phrase "matters matrimonial" and, I think, it is possible that if these words were to be construed in their widest conceivable meaning it may be that they might cover jurisdiction over a suit asking for a declaration that a marriage was valid. The learned Counsel refers here to what may be termed the *matrimonial matters* within the jurisdiction of the Probate, Divorce and Admiralty Division of the High Court of Justice in England. That Court under its jurisdiction (which that Division inherited from the Court of Divorce and Matrimonial Causes) was entitled to pronounce decrees, in connection, amongst other matters with the dissolution of marriages, the nullity of marriages, and the establishment of the legitimacy and the validity of marriages.

The learned Counsel for the plaintiff suggests that when the first Supreme Court were established in India (namely,

in Calcutta) they possessed a similarly unrestricted jurisdiction in connection with matrimonial questions and under which there could have been rightly entertained a suit for a declaration that a particular marriage was legal and valid. He points out that by Clause 35 of the Letters Patent of 1865, under which the High Court of Judicature at Fort William in Bengal was re-established, (which whilst revoking previous Letters Patent of the year 1862 continued that High Court), it was declared that the High Court of Judicature at Fort William in Bengal should have jurisdiction within the Bengal Division of the Presidency of Fort William, "*in matters matrimonial between our subjects professing the Christian religion.*"

The learned Counsel urged that at that date it was probable that there existed in that High Court an unrestricted matrimonial jurisdiction and that at that date a suit such as the present one brought in this Court could have been there entertained. However that may be the Indian Divorce Act (IV of 1869) clearly altered the position as to jurisdiction so far as High Courts established prior to the date of the enactment are concerned. This Act, which came into operation on the 1st of April 1869, declared in its Preamble that it was expedient to amend the law relating to the divorce of persons professing the Christian religion and to confer upon certain Courts jurisdiction *in matters matrimorial* and it proceeds later to define the nature of those matters which are to be regarded as matrimonial and in respect of which Courts are to have jurisdiction In Cl. 4 it is laid down as follows :

" The jurisdiction now exercised by the High Court in respect of divorce *a mensa et toro* and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and the District Courts subject to the provisions in this Act contained, *not otherwise* except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed."

It is not contended here (indeed it is a matter of common ground) that there is anything in the Indian Divorce Act which definitely contemplates that a suit asking for a declaration of validity of a marriage comes within its purview. My attention has however been tentatively drawn to S. 7 of the Act which reads thus :

" Subject to the provisions contained in this Act the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts, are, as nearly as may be, conformable to the principle on which the Court for divorce and matrimonial causes in England for the time being acts and gives relief."

This section, however to my mind merely indicates the principles upon which the Court shall generally act and in no way enlarges the scope of the jurisdiction as defined in those sections of the Act where jurisdiction is expressly categorized. It is, I gather, admitted that had the Letters Patent establishing the Patna High Court been promulgated in the year 1868 there could have been no doubt whatever that its jurisdiction (whatever it may have been before) would have been limited by this S. 4 of the Indian Divorce Act ; but it is suggested that as the Letters Patent establishing this Court only came into effect in 1916, the words " matters matrimonial" as used in Cl 27, may be construed as contemplating a larger jurisdiction than that to which at any rate High Courts existing prior to the Indian Divorce Act of 1869 were by that Act restricted. I have very little hesitation in coming to the conclusion that they cannot. In my view, although it is possible to read into the phrase " matters matrimonial" a very broad meaning, yet when we find that that expression is identical with that used in the Indian Divorce Act, it is not unreasonable to suppose that the meanings in both the Act and the Letters Patent should be properly construed as consonant and identical.

For this reason, therefore, I think, that the jurisdiction of this High Court in matters matrimonial is only such jurisdiction as is comprised within the provisions of the Indian Divorce Act. The consequence of this view is that in my opinion this suit cannot be instituted in this Court.

The only case bearing upon the matter to which my attention had been drawn is that of *Gasper* v. *Gonsalves* (1) decided by Pontifex, J. in 1874 and I see that it is referred to in certain text books relating to the Law of Divorce in India as an authority. The suit in that case was for a declaratory decree that the plaintiff was a *feme sole* and not the wife of the defendant and for an injunction that he might be restrained from asserting that she was his wife and from attempting to enforce as against her any right as her husband. The circumstances were certainly curious and it appears that the suit was undefended, nobody representing the reputed husband.

The learned Judge seems with some diffidence to have come to the conclusion that it was not competent under the provisions of the Indian Divorce Act of 1869 for an individual to ask the High Court for a decree that her or his marriage was invalid on such grounds as were in that case sought to be put forward but only on the grounds directly prescribed in the Indian Divorce Act itself. I should add that the grounds in the case in question were, substantially, that the wedding ceremony had not been properly carried out, that no civil officer had been present at the marriage and that no notices thereof had been given in accordance with the requirements of the French law as it existed at the Settlement of Chanderanagore in which the marriage was solemnised.

A second question was raised as to which however, I do not think that it is perhaps strictly necessary that I should express any definite opinion but which I do not like to leave entirely unmentioned in view of that fact that it was actually argued. It was at first suggested that it was not possible for a suit to be brought at all for a bare declaration of the validity of a marriage without an application for some consequential relief.

The point, however, has really disappeared as a result of the argument and it is not now contended that in view of the provisions of section 42 of the Specific Relief Act such a suit is not maintainable, before an appropriate tribunal; even though the only matter in respect of which relief is asked is simply that a certain marriage may be declared as having been legally and validly contracted.

The result, therefore, in this case will be that the plaint will be returned for the purpose of presentation before the appropriate court.

The defendant who has appeared, namely, David Lish, the first defendant, is entitled to his costs.

Plaint returned.

(1) (1874) 13 B.L.R. 109.

A. I. R. 1923 Patna 303.

COUTTS AND DAS, JJ.

Rampati Raut and others—Plaintiffs-Appellants

v.

Mahanth Hanuman Saran—Defendant-Respondent.

A. Nos. 624, 113 and 114 of 1920 decided on 26th June, 1922, from the Appellate decrees of Dt. J., of Patna, dated 14th April, 1920.

(a) Benami—*Onus lies on plaintiff.*

When the deed is in the name of the Defendant, the onus is on the plaintiff to show that it was a *benamai* transaction. [P 304, C. 2.]

(b) *Evidence Act, S. 18—Suggestion is no admission.*

Where the admission is merely a suggestion made in the course of a negotiation and is not even unconditional it is no admission at all. [P. 304, Col. 2.]

Kulwant Sahai—for Appellants.

Sharoshi Charan Mitter—for Respondent.

Coutts, J.—These three appeals arise out of suits which were tried together. Suit No. 110, out of which appeal No. 624 of 1920 arises and in which Rampati Raut and others were plaintiffs was a suit for a declaration of the plaintiffs' raiyati right to and possession of certain land in *chak* Raudraman. They claimed to have derived their title in the following way:—

One Mani Sah had two annas share in this village, his share was sold for arrears of road-cess and was purchased by

Gaya Prasad. Out of the two annas purchased by Gaya Prasad, the plaintiff and his brother Aklu purchased one anna 18 dams the remainder of the two annas being purchased by Judagi and Ram Gulam who were distant relatives.

There was however, only one deed of sale which was dated the 22nd of December 1899. Subsequent to this there was another sale for arrears of road-cess at which the two annas share was purchased by Mahabir Singh who in his turn sold it to Agnu Sah by two deeds, one for one anna 18 dams and another for two dams making in all two annas.

On the 16th June, 1906, Agnu Sah sold by a deed of sale to the defendant Mahanth Hanuman Saran. The plaintiff's case, however, is that so far as one anna eighteen dams share was concerned the transaction was a *benami* one and the purchase was by the plaintiff himself.

In the record of rights the plaintiff is recorded in respect of only one anna 12½ dams in two villages Nathopur and Chitna out of the four villages which constitute the *chak*.

There was a subsequent partition which followed record-of-rights and the plaintiff was given one anna 12½ dams only in the two villages. He accordingly brought the suit for a declaration of his title to one anna 18 dams in the four villages.

At the same time the Mahanth brought a suit No. 109 for a declaration that Rampati Raut had no share in the *chak* and that he was a purchaser of the whole of the two annas.

The Mahanth also brought suit No. 1183 against Rampati Raut for rent. So far as the rent suit is concerned, it depends upon the decision of the other two suits.

In the Court of first instance the record-of rights was followed, Rampati Raut was given a decree for one anna 12½ dams and the Mahanth was given a decree for nine dams and odd only.

On appeal to the District Judge, the suit of Rampati Raut has been dismissed and the Mahanth has been given decree in both the suits which were brought by him.

The learned District Judge has found on a consideration of the whole of the evidence that the Mahanth paid the consideration money for the whole of two annas share and that since then he has all along been in possession.

This is a finding which has been come to after a consideration of the whole of the evidence on the record and it is a finding of fact with which we cannot interfere in second appeal.

It has been urged, however, that the Court has come to this conclusion first by wrongly placing the onus on the plaintiff, and secondly that the Mahanth has made an admission that Aklu was a part owner of the property and that he made promise to execute *ladavi* deed in favour of Rampati Raut.

So far as the first contention is concerned I fail to see how the onus has been wrongly placed on the plaintiff.

Admittedly the deed is in the name of the Mahanth and the onus was certainly on Rampati Raut to show that it was a *benami* transaction.

The learned District Judge has found that he has failed to show this and this is a finding of fact with which we cannot interfere.

In so far as the second point is concerned the learned District Judge has considered this and he says that the supposed admission was not an admission at all on the part of the Mahanth, but was merely a suggestion made in the course of negotiation and was not even unconditional.

In these circumstances there can be no doubt that the decision of the learned District Judge is correct and I would dismiss whole of these appeals with costs.

Das, J.—I entirely agree.

Appeals dismissed.

* A. I. R. 1923 Patna 305.

ADAMI, J.

Kunj Lal—Plaintiff—Appellant

v.

Kanhai Mahto—Defendant—Respondent.

Appeal No. 826 of 1920, decided on 31st July, 1922, from the appellate decree of the Sub. J., Muzaffarpore.

* *Adverse possession—Mortgagee not entitled to possession is not affected by acquisition of title by adverse possession against mortgagor.*

When after a simple mortgage has been granted, a third person commences to acquire title by adverse possession against the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. But in the case of the grant of a mortgage by a person previously dispossessed the adverse possession which had commenced to operate against the mortgagor would not by the grant of the mortgage be arrested but would operate equally against the mortgagee. 5 A 1 (P.C.); 39 M. 811 (F B.); 44 Cal. 925; 23 M.37 and 4 W.R. (P.C.) 37 Rel. on. [P. 305, Cs. 1, 2]

S. C. Mitra and *S. K. Mitra*—for Appellant.

Janak Kishore—for Respondent.

Judgment.—The land in dispute in the suit giving rise to this second appeal was originally the kasht land of the defendant, but in 1898 was sold in execution of rent decrees obtained by the 16 annas proprietor of the village, the Mohunt of Patepur, to Sheonandan Prasad Singh and Raghunandan Prasad Singh, who, on the 3rd January 1899, mortgaged the land under a simple mortgage-bond to the plaintiff.

In 1906 the plaintiff obtained a decree on his mortgage and at the sale in execution of his decree purchased the land, and a few days after delivery of possession, on the 29th January 1914, leased it to the Bahuara Opium Factory. When the Factory sought to take possession the defendant resisted, and there was a dispute which culminated in section 145, Criminal Procedure Code proceedings and on order declaring the Factory to be in possession on 18th July 1914. After that the Factory surrendered its lease to the plaintiff who, however, owing to the resistance of the defendant, was unable to get possession. The plaintiff then brought this suit for a declaration of his title and for recovery of possession dating his dispossession from the 2nd November 1914 In the alternative he prayed that a fair rent might be fixed as payable by the defendant, and that he should be awarded a decree for arrears of rent from 1322 to 1325 Fasli.

The defendant pleaded that the suit was barred by limitation since the plaintiff had never held possession of the plaint lands. He denied that Raghunandan and Sheonandan had been in possession after purchase in a sale under a decree for rent; or that the plaintiff had bought the land and taken possession in execution of mortgage-decree. He claimed title by adverse possession.

The Munsif in a very short judgment, and for reasons which are quite unconvincing, found that the plaintiff was not entitled to obtain khas possession of the land, and, for some unexplainable reason, held that the plaintiff was entitled to rent from the defendant, as his tenant. He held that the defendant was not entitled to the land by adverse possession.

On appeal and cross-appeal the Subordinate Judge held that the defendant was admittedly an occupancy tenant originally and, if he remained in possession of the disputed land after the sale in execution of the rent decree, he was a trespasser, and the plaintiff must come to Court within 12 years from the date of sale under the rent decree, unless he could prove possession within 12 years. He upheld the Munsif's finding that the writ of delivery of possession made to the plaintiff after his purchase in the mortgage-decree could not have any bearing upon the question of the defendant's actual possession, as the defendant was not a party to the mortgage-decree. He held also that the order passed under section 145, Criminal Procedure Code, did not necessarily amount to an ouster of the defendant, and that the admission of the plaintiff in a title suit in 1919 showed that the defendant was in possession all along. He relied also on certain rent receipts granted

by the Mohunt of Patepur to the defendant. He found that the defendant had been in possession of the land since 1898 as a trespasser, and that his possession was adverse to the predecessors-in-interest of the plaintiff and to the plaintiff himself for more than 12 years. He decided that the plaintiff's suit was time barred.

Now, it appears that the sale under the rent decree was in 1898, and the mortgage to the plaintiff was executed in 1899, so that if in spite of the sale to Raghunandan and Sheonandan, the defendant remained in possession of land. The commencement of his adverse possession as against the purchasers was prior to the mortgage to the plaintiff. The learned Subordinate Judge appears to be in error in thinking that, for the purposes of computing the duration of adverse possession against a mortgagee who has, under a simple mortgage bond, brought the property to sale and purchased it himself, the duration of adverse possession held against the mortgagor before the sale can be tacked on to the duration of adverse possession against the mortgagee after his purchase in execution of the mortgage-decree.

Mr. Mitter has cited the cases of *Karan Singh* v *Baker Ali Khan* (1), *Vijapuri* v. *Sonamma Bai Ammani* (2) and *Priya Sakhi Debi* v. *Bireshwar Samanta* (3). These cases clearly show that when, after a simple mortgage has been granted, a third person commences to acquire title by adverse possession against the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land.

A careful consideration of these cases shows, however, that the decisions do not relate to a case where adverse possession against the mortgagor has commenced prior to the execution of the simple mortgage, and in fact in the case of *Priya Sakhi Debi* v. *Bireshwar Samanta* (3), Sanderson, C. J. points out that, if in the case of *Karan Singh* v *Bakhar Ali Khan* (1) the possession by the Collector previous to the mortgage could have been treated as possession by the defendant who claimed adversely, the operation of adverse possession would not have been affected by the subsequent grant of the mortgage security.

The case of *Nallamuttu Pillai* v. *Betha Naicken* (4) was distinguished on this very ground. Mukerjee, J. in the same case points out that in the case of the grant of a mortgage by a person previously dispossessed "the adverse possession which had commenced to operate against the mortgagor would not, by the grant of the mortgage, be arrested, but would operate equally against the mortgagee, for in the words of Lord Kingsdown in *Pramath Roy Chowdry* v. *Rookea Begum* (5), 'a cause of action is not prolonged by mere transfer of the title.'"

If, then, the defendant was not in possession as against Sheonandan and Raghunandan prior to the mortgage by them to the plaintiff in 1899, the period during which they were in possession up to 1913 or 1914 when the plaintiff executed his decree and obtained writ for delivery of possession, cannot be counted as against him in respect of adverse possession.

In 1914, the Factory, the lessee, was declared to be in possession, and, if the Factory was in possession as lessee, that possession would count as possession of the plaintiff.

Both the lower Courts have failed to appreciate the questions to be decided in the case, and have failed to come

(1) [1883] 5 All 1=9 I. A. 99=4 Sar. 352 (P. C.)

(2) [1915] 39 Mad. 811=2 L. W. 1030=29 M. L. J. 65=18 M. L. T. 436=(1915) M. W. N. 927=31 I. C. 412 (F.B.)

(3) [1917] 44 Cal. 425=27 C. L. J. 212=37 I. C. 277=21 C. W. N. 177.

(4) [1900] 23 Mad. 37=9 M. L. J. 258.

(5) [1857] 7 M. I. A. 323=4 W. R. (P. C.) 37=1 Suther. 367=1 Sar. 692 (P. C.)

to a distinct finding necessary for the answer to those questions. It was necessary to find whether the defendants were in possession adverse to Raghunandan and Sheonandan prior to the mortgage. It is true that the learned Subordinate Judge has stated that the plaintiff admitted in a written statement in a suit instituted in 1919 that the defendant had been all along in possession, but the learned Subordinate Judge's statement is based on no evidence. What the plaintiff stated in his written statement was that defendant was in possession of the land at the time the written statement was drawn up, that is to say, in 1919. There is no statement there that the defendant had all along been in possession.

With regard to the order under section 145, Criminal Procedure Code, a finding should be come to whether the Factory was in fact in possession, if such a finding is possible on the evidence.

It is clear to me that the Subordinate Judge has misconceived the points to be decided in the case, and I, therefore, set aside his decree and remand the case for a re-hearing of the appeal and disposal according to law.

The appeal is allowed, costs will abide the result.

Appeal allowed.

A. I. R. 1923 Patna 307.

JWALA PRASAD, J.

Lakshmi Prasad ... Petitioner

v.

Emperor ... Opposite Party.

Criminal Ref. No. 70 of 1921, decided on 5th Jan. 1922 by the S. Judge, Darbhanga.

Penal Code, Ss. 417 & 477 (a)—Books wherein entries were changed by accused not having left accused's hands—Act of accused does not amount to attempt but only to preparation-Difference between attempt and preparation pointed out—Penal Code, S. 511.

There is a wide difference between the preparation and an attempt to commit an offence. The preparation consists in devising or arranging means necessary for the commission of an offence, an attempt is the direct movement towards the commission after the preparations are made.

Where a clerk, in charge of weighing the sugar-canes which were brought to the sugar company for sale, entered in the register higher weight of the sugar-cane but the register had not left his hands

Held, that his action had not passed from the stage of preparation into that of an attempt to cheat. 8. A. 501 and 3 M. 1 Rel. on. [P. 308, C. 1.]

The Assistant Government Advocate—for the Crown.

Judgment.—This is a reference by the Sessions Judge of Darbhanga recommending that the conviction of and the sentence passed upon the accused under section 420/511, Indian Penal Code by the Sub-Divisional Magistrate of Samastipore be set aside.

The accused was a clerk employed at the Samastipore Cental Sugar Company and as such in charge of weighing the carts of sugar-canes upon the machine and to enter the weights thereof in the Weighment Register prescribed for the purpose. That register contains a column headed "Weighment" and is divided into three sub-columns (1) Gross, (2) Tare, and (3) Net. Carts with sugar-canes loaded thereon used to be weighed upon the machine and the gross weight of the sugar-canes and the cart used to be entered in sub-column (1). The carts were then emptied and were again weighed and this weight entered in sub-column (2). In sub-column 3 was shown the net weight of sugar-canes by subtracting the weight of empty carts noted in sub-column (2) from the gross weight entered in sub-column (1). Upon the net weight of sugar-canes mentioned in column No. 3 payments used to be made to the sellers according to the current market rate of sugar-canes.

The accused went on leave for three days towards the end of February 1921 and one Hirdi Narain acted for him during those days. Hirdi Narain suspected that the accused was showing more weight of the carts in the Register than the actual weight with a view to cause loss to the factory and that this he used to do in collusion with the suppliers of sugar-canes probably on receiving illegal gratification from them. Hirdi Narain (P. W. No. 6) reported his suspicion to the Head Clerk, Kanto Choudhury (P. W. No. 2) who in his turn reported the matter to the Assistant Superintendent (P. W.

No 1). Under the directions of the Assistant Superintendent, the Head Clerk awaited the arrival of the cart of one Nathuni on the 2nd of March. Nathuni's cart was weighed by the accused and the gross weight thereof was entered in the register as 16 maunds, 30 seers As the cart passed, the Head Clerk stopped it from being emptied and took it back to the weighment machine and re-weighed it. He found that the weight was 14 maunds, 20 seers. While the Head Clerk was weighing the cart, the accused changed the figure "16" in the register into '12' by altering '6' into '2'. The matter was then reported to the Assistant Superintendent who sent the letter (Exhibit 1) to the Sub-Inspector of Police. After investigation, the accused was put on his trial.

The Magistrate found the facts summarised above as having been satisfactorily proved by evidence. The learned Sessions Judge also has accepted the facts as having been proved, but he is of opinion that upon the facts the accused is not guilty of an attempt to cheat. He has accordingly referred the case to this Court, under section 438 of the Code of Criminal Procedure, for quashing the conviction of the accused.

The case appeared to be somewhat important and intricate, and I, therefore, requisitioned the assistance of the learned Assistant Government Advocate, which he has very gladly rendered to me.

I have considered the authorities relied upon by the learned Sessions Judge : *Hurjee Mull* v. *Imam Ali Sircar* (1) and *Queen-Empress* v. *Dhundi* (2) and those cited by the learned Assistant Government Advocate *Regina* v. *Padala Venkatarami* (3) and *Queen-Empress* v. *Paku* (4).

There is no doubt that the accused did enter false figures in the register showing a greater quantity of sugarcanes than was actually supplied by Nathuni. There is also no doubt that by so doing he intended to cheat the Company by making it pay a higher sum to Nathuni than he was entitled to. The clerk was in charge of writing the Register and making entries in all the columns. He had written the first sub column under the heading 'Weight' namely, the gross weight of the sugarcanes along with the cart. He had still to find out the net weight of the sugar canes for which the Company was liable to pay the price to the supplier.

This, no doubt, was a mere matter of arithmetic, inasmuch as the weight of Nathuni's cart, namely, 5 maunds and 30 seers, was a constant quantity as found from the entries on the previous dates for the whole of the month of February up to the 1st of March. Before the remaining two subcolumns, that is, "Tare" and 'Net' weight were filled in, the Head Clerk intercepted and the accused was not able to write those columns. It is not known when the clerk was to make out this net weight, whether after the close of the weighment for the whole day of all the carts of sugar-canes supplied or at the end of the month, or as each cart was being weighed. The evidence on this point is not sufficient. At any rate, the time had not come and nothing was done by the accused to show that he was going to carry out his intention of cheating by entering those sub-columns of 'Tare' and 'Net' weight and fixing the liability absolutely upon the Company. Until that was done, the Company could not be said to have been cheated. Again, until that was done and the register had passed out of the control of the clerk and submitted to the Company as evidence of the liability of the Company, there was yet time for the clerk to change his mind or intention and, as put by Broadhurst, J., in the case of *Queen-Empress* v. *Dhundi* (2) 'from prudence, if not from penitence.'

We have to assume that better reasons would prevail at any moment and the man would change his intention to commit a sin or crime before the actual consummation thereof; and until he has done all in his power to let his action be out of his control, so that the commission of the sin or the crime would be a natural

(1) (1903) 8 C. W. N. 278=1 Cr. L. J. 124.

(2) (1886) 8 A 304=(1886) A. W. N. 125.

(3) (1881) 3 M. 4=1 Weir 543.

(4) (1900) 24 B 287=1 Bom. L. R. 678.

effect of the actions already committed, there is still a mere preparation for the commission, and not an attempt to commit the offence or the sin. That learned Judge, in the decision referred to above, says: "It is to be noted that the act or omission must be one that causes, or is likely to cause, to such person, damage or loss, etc. But here the mere certificate by itself and until endorsed, and until further action had been taken upon it, could not possibly have caused loss or damage to any person." This is also the view supported by the decision in the case of *Regina* v. *Palula Venkatasami* (3). Mr. Mayne in his commentary has also laid down the dictum of an American Jurist that there is a wide difference between the preparation and an attempt to commit an offence. He says the preparation consists in devising or arranging means necessary for the commission of an offence, an attempt is the direct movement towards the commission after preparations are made.

I, therefore, agree with the view taken by the learned Sessions Judge that the writing of the false figure in the register had not passed from the stage of preparation into that of an attempt to commit the offence of cheating. It appears to me that the accused was tried under a wrong section. The accused came clearly within the purview of section 477 (*a*) of the Indian Penal Code, which relates to the falsification of an account-book by a clerk or a servant and I wonder why this section was not taken advantage of.

In view, however, of the age of the accused and of its being the first offence, I do not think any advantage will now be gained by re-trying the accused. The Magistrate, while giving a lenient punishment to the accused, observed that the accused is a young man and does not appear to belong to a class of confirmed criminals. The accused has already been in jail for about five or six days, and I hope this will be a warning to him and he will reform himself and really repent for what he did and would try to lead an honest life.

I accept the reference and set aside the conviction and the sentence.

Conviction set aside.

* A.I.R. 1923 Patna 309.

DAS AND BUCKNILL, JJ.

Raghunath Das—Plaintiff—Appellant

v.

Sheo Kumar Missir—Defendant—Respondent

Appeal No. 137 of 1919, decided on 25th May, 1922, from the decision of the Sub. J., Muzaffarpur, dated 18th December, 1918.

(a) Hindu Law—Religious Endowment—Succession—Custom, as to, not proved—Practice maintained for 300 years should not be departed from.

Where for 300 years the succession to the *mohuntship* had been maintained strictly within the family by the adoption by the reigning *mohunt* of his agnatic nephew it would be contrary to good sense to depart from the practice though a custom to that effect was not proved. [P. 312, C. 2.]

(b) Civil P. C., S. 100—New Plea—Existence of custom not challenged in lower Court cannot be challenged in appeal.

Where before the Subordinate Judge the whole case proceeded on the common ground that there did exist a definite custom that the *mohuntship* and possession of the properties of the Asthal were limited primarily to *Chelas* who were blood relatives of the deceased or the outgoing incumbent

Held, that it is not possible to allow the respondent to raise the question as to the validity of this custom at the stage of appeal. [P. 313, C. 1.]

(c) Evidence Act, S. 101—Proof of relationship is to be given by him who sets it up.

Where the plaintiff's right to succeed depends upon his being an agnatic relation of the defendant, the onus is on him to prove that he is so related. [P. 311, C. 2.]

(d) Civil P. C., S. 92—Claim based on plaintiff's personal right of possession, mingled with a claim based on breach of trust—S. 92 does not apply.

Where, what the plaintiff claimed in his plaint did not altogether contemplate merely matters comprised in section 92, but he also claimed, as in his own right of succession, possession of the properties as well as the position of *mohunt* on the ground that the defendant had forfeited them owing, amongst other reasons, to the fact that he had married

Held, that a claim for ejectment and possession of this character, being based upon an alleged personal right of the plaintiff, cannot be regarded as falling within the purview of section 92. [P. 316, C. 2, P. 317, C. 1.]

(e) Word—"Brakt Bairagi" may not necessarily mean non-marriagable state.

The word "Bairagi" means withdrawn from worldly affairs and perhaps in its primary sense it was intended to convey the idea of complete asceticism, that is to say, an hermetic life in which the individual cut himself off from his worldly desires and environments and retreated into a condition of isolated contemplation of things divine; but there is no doubt that this word has long since ceased to have any such restrictive meaning and it would seem that it now almost only has the significance of a person devoted to religion and does not itself in any way contemplate the necessary incidence of celibacy. It is not sure that "Birakt" even with the conjunction of the word "Bairagi" now necessarily contemplates a non-marriageable state. [P. 319, C. 2.]

(f) Hindu Law—Religious Endowment—Marriage of mohunt *does not necessarily entail forfeiture of office.*

The marriage of a *mohunt* does not necessarily entail a forfeiture of his office as *mohunt*. [P. 321, C. 2.]

S. C. Mitra, S. M. Mullick, C. C. Das, L. N. Singh and *Jadubans Sahay*—for Appellant.

Hasan Imam, K. P. Jawasyal, K. Sahay and *H. N. Prasad*—for Respondent.

Bucknill, J.—This is an appeal from the decision of the Subordinate Judge of Muzaffarpur, dated the 18th December 1918.

The circumstances under which this litigation has taken place are in themselves simple enough but raised somewhat difficult questions. The defendant is the *mohunt* of an Asthal of considerable historic importance which has been referred to throughout the proceedings as the Sitamarhi Astal. It appears to have been founded in the year 1599 and to have been situated near a water from which the goddess Sita is believed to have emanated. The first *mohunt* appears to have been one Hiram and since him there have been seven more; the last being the defendant.

It is common ground that, ever since the foundation of this establishment, each *mohunt* has appointed as his successor his nephew, and that all the *mohunts* have hitherto been unmarried. What has happened up till now is that each successive *mohunt* has taken his nephew as his *chela* and has been succeeded by him, Although in the plaint in the suit brought by the plaintiff against the defendant there are various allegations, such as of illegal dealing with property attached to the Asthal, the only matter which has been brought before this Court on this appeal is the admitted fact that the defendant has married, and it is alleged by the plaintiff that by having contracted a marriage the defendant has incurred forfeiture of his *mohuntship*; in addition to this question arises the further point as to whether the plaintiff has any legal status for bringing this suit.

The plaintiff was admittedly a *chela* of the defendant's predecessor whose name was Bhagwat Das and he claims to be an agnate relative of the defendant; he does not claim to be the defendant's nephew but to be the nephew of one of the second cousins of the defendant; he also is admittedly *guru bhai* of the defendant, they both having been *chelas* of the defendant's predecessor.

In 1915 the plaintiff brought his action against the defendant and he asked, *firstly*, that it might be declared that the plaintiff was entitled to the *mohuntship* and *gaddinashini* of the Asthal; *secondly*, that the right of the defendant thereto has become extinct; that he is not entitled to keep the property appertaining thereto and that his possession is unlawful; *thirdly*, that a decree might be passed in his favour awarding him possession and dispossessing the defendant; and, *fourthly*, that an enquiry should be made as to the mesne profits from the date of the defendant's marriage.

The defendant raised various defences; *firstly*, that the suit was barred as it had not been brought under the provisions of section 92 of the Civil Procedure Code; *secondly*, that marriage did not entail forfeiture and that the defendant was entitled to marry without incurring any disability; *thirdly*, he denied having dealt illegally with or wasted or mismanaged the property; *fourthly*, he denied that the plaintiff belonged to the family of his predecessor or that he was a *Gotia* or blood relation, and, *lastly*, he disputed, in any case, the claim made by the plaintiff to the succession on the ground that he (the defendant) had

initiated several *chelas* who were relatives of the family of previous *mohunts*.

A very large quantity, both of oral and documentary evidence, was produced before the Subordinate Judge, who, in the course of a long and elaborate judgment, came to findings to the following effect:—

1. That the fact that the provisions of section 92 of the Code of Civil Procedure relative to the procedure to be adopted where litigation is contemplated in connection with public charities had not been adopted was a bar to the plaintiff's suit, in so far as the question of wastage of the Asthal properties was concerned but did not debar him from obtaining relief if the defendant by his marriage had put himself under such disability as would prevent him from continuing to hold his *mohuntship*.

2. That there had in fact been no wastage by the defendant of the Asthal properties.

3. That the properties in suit were all properties attached to the Asthal and that if the defendant lost his post as *mohunt* he would lose the properties also.

4. That the plaintiff was not an agnatic cousin or even an agnatic relative of the defendant.

5. That the defendant had initiated Bairagic *chelas*.

6. That the defendant's marriage did not result in forfeiture of his office.

The Subordinate Judge on these findings dismissed the plaintiff's claim with costs. Some of these findings, such as, for example, that on the question of waste, have not been argued before this Court and indeed the case has, I think, been presented to this Court in a somewhat different way to that in which it was placed before the Subordinate Judge. To my mind there are really but two points which have to be considered. These are:—

1. Has the plaintiff any *locus standi* to bring this suit in its present form?

2. If he has, then does the fact, that the defendant has married, result in his having to give up office as *mohunt* of the Asthal?

Now, with regard to the first question, it is very important to see in what way the plaintiff himself placed his claim in his plaint. He says in paragraph 3 "that for the purposes of appointment of a successor to the reigning *mohunt* the said Asthal is a *maurusi* one, that is to say, that the reigning *mohunt* has the right to appoint one of his Bairagi *chelas* as his heir, representative and successor, under a deed or without it by giving him *tilak*, *konthi*, *chaddar* and *pagri*. It has been the custom of the said Asthal that the reigning *mohunt* has been appointing one of his Bairagi *chelas* belonging to his *girhasti* family as his heir, representative and successor."

Now, so far, the defendant admits this and that the statements made by the plaintiff are substantially correct, specifically doing so in paragraph 10 of his statement of defence. The plaintiff, however, then proceeds to say, "it is also the custom of the said Asthal that if the reigning *mohunt* die without appointing his successor or heir or do any act which renders him unfit to remain as such, the eldest of an Vaishnab Bairagi *chelas* who is also his agnate by descent or in case of there being no such Vaishnab Bairagi *chela*, the eldest of his Vaishnab Bairagi *guru bhais* who is his agnate by descent, would be the *gaddinashin* of the said Asthal and would take possession of the properties appertaining thereto."

This part of the claim is stoutly denied by the defendant. In paragraph 7 of his plaint the plaintiff claims that, as a *chela* of the defendant's predecessor and as the only *girhasti chela* of that *mohunt* he is the only person who is entitled to become the *mohunt*, on the forfeiture, owing to his (the defendant's) marriage, of the post and the appurtenant properties.

It has been pointed out how it would appear that, so long as it was possible all *mohunts* of this Asthal have taken as their *chelas* and nominated as their successors their agnate nephews; but there is no evidence whatever, in my opinion, to show (and indeed there could

be none to show) that if, as in this case, there was no nephew, there was any custom of the Asthal as to who should succeed the *mohunt*; for no occasion has occurred on which any question of what was the proper method of succession had arisen.

It seems, therefore, to me to be impossible that there should have been any evidence of custom as is alleged by the plaintiff as to what was the nature of succession where a *mohunt* had no Bairagi *chela* belonging to his agnatic *girhasti* family.

The primary question which has to be carefully considered is, who is the proper successor to the *mohunt* of this Asthal. As has been mentioned before, the matter hitherto has given rise to no difficulty for the simple reason that each *mohunt* has in fact adopted, as his *chela* and successor, his agnatic nephew Out of this fact arise several questions: *firstly*, does this fact constitute a custom which excludes the succession to the *mohuntship* of any one who is not an agnatic relation to the outgoing *mohunt*? What is the proper method of succession?

I think that it is here of very great importance to see if there is anything in the documentary evidence which helps in a decision upon this point and here must be noted a document [Exhibit E which is dated 13th of Kartik 1007 F. S. (1599 A.D)] which constitutes a grant, from one Sri Nirpati Singh in favour of the first *mohunt*, who is described as Fakirana Gosain Sri Hira Ram *Mohunt*, of certain Mouzas, in the following terms :—

"You shall cultivate, grow corn and settle the said Mouza and with your disciples and disciples of disciples shall enjoy the entire produce thereof. The Mouza should be treated as *kharie jama* and no resistance should be offered."

Now, it is perfectly clear that, at any rate, with regard to this endowment it was thought that not an unusual practice would be followed, namely, that each *mohunt* would be succeeded by his *chela*. There is no idea in the mind of the donor that the *chela* successor must necessarily be a relative of the *mohunt*. It is quite intelligible that, as a matter of family interest, it has been the practice very naturally to keep the valuable properties appertaining to this Asthal in the hands of the *mohunt's* family, but it is very difficult to say that it is possible to assert that any exclusive custom has been established which would prevent a *mohunt*, should he so wish, from appointing as his successor a *chela* who is not necessarily a member of his *girhasti* family The question is whether, if a *mohunt* chose to appoint as his successor one of his *chelas* who is not a relative, the family of the *mohunt* could successfully oppose such an appointment.

This point, namely, that there can be no exclusive custom in this Asthal that the devolution of the *mohuntship* must fall upon a blood relative, has been very forcibly urged before this Court by Mr. Hasan Imam, Counsel for the respondent. It is contended by him that, as it is possible here to trace the nature of the original grant of, at any rate, a portion of what now forms the Asthal properties and that as in that document the usual succession from *mohunt* to *chela* is contemplated it is not competent for the donee and his successors to graft on to the conditions of this grant any custom which would restrict the devolution of the incumbency to the family. And it is also pointed out that in numerous other documents which indicate the manner in which other properties became appurtenant to the Asthal there is nothing to indicate any form of restrictive devolution.

I am bound to say that it seems to me that this argument possesses considerable force but when one considers that for 300 years the incumbency has been maintained strictly within the family by the adoption by the reigning *mohunt* of his agnatic nephew, I am inclined to think that it would be contrary to good sense to depart from that practice.

But there is more than this to be said about the matter. It would appear quite clear that this point was not raised before the Subordinate Judge and is raised now by the respondent as what is practically a new case on appeal and one which the plaintiff has never had a proper opportunity of meeting. The Subordinate

Judge writes in his judgment.

"It is an admitted fact that the *mohunt* of Sitamarhi Asthal must be a Gour Brahmin connected with their natural family."

Again, in paragraph 20 of the statement of defence it is definitely stated that—

"The custom and usage alleged by the plaintiff in the first part of paragraph 3, to wit, that the Sitamarhi Asthal is a *maurusi* (one that goes by descent) Asthal and a *chela* related by blood to the reigning *mohunt* succeeds on the demise of reigning *mohunt*, are substantially correct."

It is also quite clear from the defendant's own evidence that the tradition and the method of devolution was in fact always normally to be followed if possible and he states.

"In case I had died immediately after Bhagwat Das's death, Raghubir Das who is a *chela* of Bhagwat Das and who is my agnate's cousin's son (*mohunt* Janki Das's son) would have become the *mohunt* after me."

The plaintiff's own case is, of course, based upon the necessity for maintaining the agnatic tradition. To my mind, therefore, there is no doubt that before the Subordinate Judge the whole case proceeded on the common ground that there did exist a definite custom that the *mohuntship* and possession of the properties of the Sitamarhi Asthal were limited primarily to *chelas* who are blood relatives of the deceased or the outgoing incumbent I do not think therefore, that it is possible to allow the respondent to raise this question at this stage.

Having now disposed of this point, I think, before proceeding to the next, it is desirable to endeavour to ascertain what is really meant by the use of certain phrases which seem to have been somewhat loosely utilized. We see the words "natural family" "*girhasti* family" and "blood relation," and the question really is, whether they are used as intended to have the same meaning; can they be utilized in the ordinary way to denote cognatic as well as agnatic relationship?

Here, again, I think that the case before the Subordinate Judge proceeded on the assumption that an agnatic *chela* of an out-going *mohunt* would take preference over any other *chela*; and it would seem from what the defendant himself states that if *he* had died *without* having appointed any *chela*, an agnatic *chela* of his *predecessor* would succeed to the post. This, coupled with what I have stated above, shows, I think that the belief of those connected with the Asthal, of whatever party they may be, was that, in the event of there being no agnatic *chela* of an out-going *mohunt* any agnatic relative who had been a *chela* of any *mohunt* of the Asthal would succeed.

But the matter has to be followed out a little further; the question is whether this insistence on the agnatic succession would, in the event of the out-going *mohunt* having appointed *chelas* who though not agnates were cognatic relatives or who perhaps were not even relatives at all, have the effect that such *chelas* of the out-going *mohunt* would be preferred in the succession to an agnatic relative who was a *chela* of an earlier *mohunt*. This is the natural question which is the next one in this case which arises for consideration, for it is here admitted that the defendant has appointed *chelas*, that these *chelas* are not agnatic relatives but some, at any rate, of them are cognatic relatives.

There is really nothing much which can possibly guide one in coming to a definite decision upon this point and perhaps it is unnecessary to say more than that whilst, on the one side, one sees the principle (indicated in the grant) that the *mohuntship* should descend to a *mohunt's chela*, on the other side, one has the strong impression of traditional necessity for keeping the incumbency in the agnatic family.

If a cognatic *chela* of the out-going *mohunt* would not be preferred to an agnatic *chela* of a prior one, it is obvious that a *chela* of an out-going *mohunt* who was not even a cognatic relative could not have any priority over a *chela* who was an agnatic relative of a prior one; and, if one cared to explore this matter still further it might be of importance to ascertain whether *any agnatic* relative who was properly trained and qualified to be a *mohunt*, would not be preferred to any one else even though he may not have been a *chela* of any of the *mohunts* of the Asthal,

But in addition to this, *i.e.*, a claim as an agnatic relative, the plaintiff also bases his claim not only on being an agnatic relative but also on being a *guru bhai* of the defendant. There is nothing, however, which I can see in the evidence, which can possibly substantiate his claim to succeed to the incumbency merely as a *guru bhai* of the present holder of the position and his status must, apart from any other question, be, in my opinion, dependent upon whether he is or is not in fact an agnatic relative.

Now, on this very important question there was a great deal of evidence of an extremely contradictory character and the two stories put forward respectively by the plaintiff and the defendant are completely in conflict. The plaintiff maintains that he is, what I suppose in English terminology would be called, a third cousin of the defendant on the father's side.

The defendant on the other hand alleges that the plaintiff is not an agnatic relative at all but that he is connected with him by the fact that his (plaintiff's) brother's son married the defendant's niece's daughter. The Subordinate Judge has examined the voluminous evidence at considerable length and with considerable care. He comes to the conclusion that the plaintiff has failed to prove that he is an agnatic relation.

I think that it is conceded by the defendant and certainly there is ample evidence to show that the plaintiff was not only a person of considerable importance in the affairs of the Asthal but was connected in some way with him; he was undoubtedly a *chela* of the defendant's predecessor and a *guru bhai* of the defendant.

There is however, very little documentary evidence in support of the plaintiff's claim to relationship of an agnatic character. In Exhibit I, which is a deed dated the 8th December 1904, executed by the *Mohunt* Bhagwat Das in favour of the plaintiff's brother and others, a certain passage occurs which is thus translated," " but Ramautar Missir (this person is admittedly the plaintiff's brother) and others are related to the *girhasti* family of me, the declarant."

The important word here is the word 'related' and the Subordinate Judge, who gives the passage in the vernacular, does not consider that the word there used necessarily connotes any agnatic relationship. The learned Subordinate Judge in coming to this conclusion has taken into account also a passage in Exhibit D which is a deed also made by the *Mohunt* Bhagwat Das on the 9th of December 1904 in which a word occurred which is again translated as "related". The two words in the two documents are in fact connected, that in the first being "*rishtamand*" whilst in the latter the word is "*rista*".

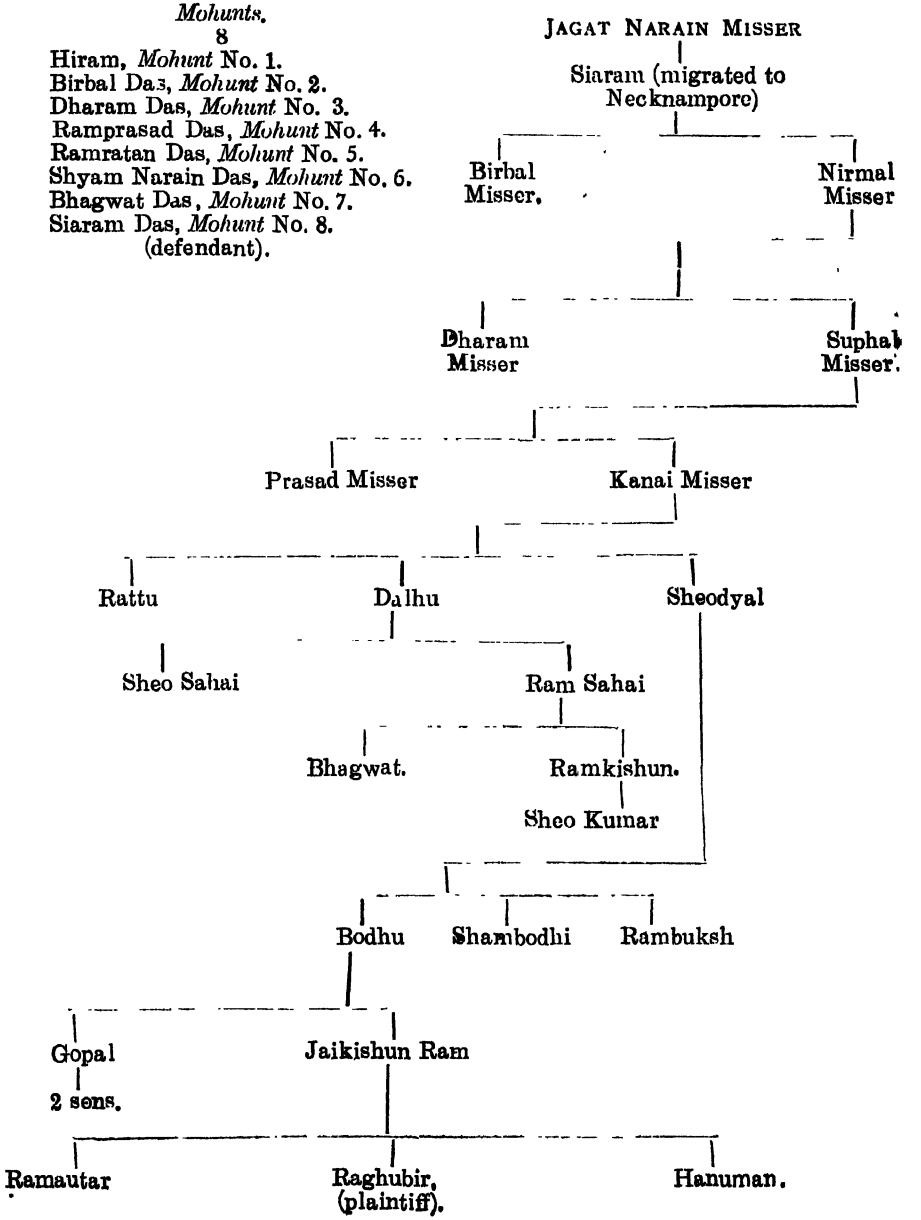
All that the learned Subordinate Judge can decide on this point with regard to these documents is that the word "*rishtamand*" might include either agnatic or cognatic relatives. However, there is another way in which this document, Exhibit 1, has been utilised by the defendant; it is to attempt to destroy the statement by the defendant that the only relationship between the plaintiff and the defendant is through the plaintiff's brother, Ramautar Missir by the latter's son's marriage to the defendant's niece's daughter; it is utilised in this way:—

It is said by the defendant in his evidence that this marriage took place some 12 or 13 years ago; the defendant gave his evidence in August 1918 and it is pointed out, therefore, that it would seem that Exhibit No. 1, which was dated the 8th December 1904, was probably executed before the marriage and that, if that was really so there was some connection other than that through the marriage between the plaintiff and the defendant or otherwise he would not have used in that deed the word translated as "related." I am not at all sure, even supposing that it was clearly proved that the marriage took place after the execution of this deed that the expression in the deed proves anything conclusive, although I think it is not at all improbable that in some way or other the plaintiff was connected with the family of the *mohunts*. But the onus upon him of course, is to prove his agnatic connection without any doubt.

The Subordinate Judge goes through the oral evidence given in favour of the plaintiff at some length and with

one or two exceptions specifically refers, I think, to all those witnesses who speak as to the relationship. I have myself made an independent analysis. There is, first of all, the plaintiff himself who says that Bhagwat Das the *mohunt* who was the defendant's predecessor was cousin to the plaintiff's father and he gives a detail of relationship which can be worked out in the following table :—

Mohunts.
8
Hiram, *Mohunt* No. 1.
Birbal Das, *Mohunt* No. 2.
Dharam Das, *Mohunt* No. 3.
Ramprasad Das, *Mohunt* No. 4.
Ramratan Das, *Mohunt* No. 5.
Shyam Narain Das, *Mohunt* No. 6.
Bhagwat Das, *Mohunt* No. 7.
Siaram Das, *Mohunt* No. 8.
(defendant).



His brother supports him, but the Subordinate Judge does not feel that he can accept their evidence as in any way reliable or trustworthy as they are such deeply interested parties. (Here His Lordship deals with the evidence for and against agnatic relationship of plaintiff, with defendant.) The Subordinate Judge has weighed the evidence given on both sides. He has seen the witnesses and he has come to the conclusion that the weight of evidence is undoubtedly in favour of the defendant. Unless I could see very strong reasons for saying that the Subordinate Judge was wrong, I think it would be altogether improper to disagree with the conclusion to which he has come; and indeed, on reading through and considering carefully the evidence on both sides, I have come to the conclusion that the Subordinate Judge was quite right; I think that the plaintiff by his evidence succeeded in giving to his claim to be an agnatic relation of the defendant some semblance of plausibility; I do not, however, think that the evidence put forward on his behalf is, when it has been so seriously challenged and strongly met, sufficient to prove conclusively his story. If the plaintiff is not an agnatic relative, he, whatever may be the other circumstances or whatever may be the other questions for decision, clearly has no *locus standi* for bringing the present suit.

The matter is, therefore, substantially disposed of by the view which I take of this point. As however, it is possible that the case may go further it is perhaps desirable that I should express my opinion upon certain other points which have been raised. The first of these is whether the plaintiff is debarred from bringing this action because he has not taken the steps which, under certain circumstances, are laid down by section 92 of the Code of Civil Procedure.

This section reads as follows :—

"(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree;—

"(*a*) removing any trustee;

"(*b*) appointing a new trustee;

"(*c*) vesting any property in a trustee;

"(*d*) directing accounts and inquiries;

"(*e*) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

"(*f*) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;

"(*g*) settling a scheme; or

"(*h*) granting such further or other relief as the nature of the case may require.

"(2) Save as provided by the Religious Endowments Act 1863 no suit claiming any of the reliefs specified in sub section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

The Subordinate Judge thought that a *mohunt* of an Asthal being merely a sort of trustee can be removed from his office if he is guilty of violation of his trust and that the plaintiff was barred by section 92 from claiming any relief against the defendant on account of the alleged waste of the trust property but, on the other hand the Subordinate Judge thought that section 92 did not debar the plaintiff from obtaining the relief which he sought on the ground that by the defendant's marriage he (the defendant) had forfeited his office.

It should be observed that what the plaintiff claims here in his plaint does not altogether contemplate merely matters which are comprised in section 92; for he claims, as in his own right of succession, possession of the properties as well as the position of

mohunt on the ground that the defendant has forfeited them owing, amongst other reasons, to the fact that he has married. Although it may be that, mingled with this application, there is also a claim based upon an alleged breach of trust such as is contemplated under section 92, I hardly imagine that a claim for ejectment and possession of the character made in the present case, such claim being based upon an alleged personal right of the plaintiff, is one which can be regarded as falling within the purview of section 92.

I do not think that it is necessary to comment in any way upon the question as to whether the defendant was guilty of any of the charges which were brought against him in connection with waste for misappropriation of the property appertaining to the Asthal, for the point has not been raised here in this Court although before the Subordinate Judge it was strongly urged but decided by him in favour of the defendant.

The only other question for consideration is as to what, if any, is the effect upon the position of the defendant in relation to his *mohuntship* produced by the admitted fact that he has contracted a marriage alliance. It must be confessed that, when entering upon this question, one finds oneself confronted with considerable difficulties. These difficulties present themselves from more than one direction. In the first place, one is plunged into the extremely intricate sea of observances and traditions which surround the hierarchy of the Hindu priesthood; secondly one is met with a mass of evidence much of which appears to be entirely contradictory although in some cases adduced by witnesses whose character and credibility one would think were normally beyond criticism.

I am trying, however, to think that to a large extent much of what appears to be the conflict between what is stated by some of the witnesses on the part of the plaintiff and some of those on behalf of the defendant is due to the fact that some of the technical religious or semi-religious words which are used by them are not always used in precisely the same sense; and from what I have been able to gather during the hearing of this appeal, it is certainly the case that some of these phrases are in ordinary parlance often utilized in a somewhat loose fashion. So far as it is of any value, however, in the plaintiff's favour, a start in the consideration of the question may be made by the admitted fact that, from the commencement of the foundation of this Asthal in 1599, all the *mohunts* have been celibates until the defendant, the 8th *mohunt*, chose to marry.

There is also no doubt that the fact of his having done so has been the, or one of the, causes which has given rise to this expensive and protracted litigation and has given umbrage to some of those who are connected with the Asthal. It must not, however, be lost sight of that the incumbency of this Asthal is a valuable and coveted possession and probably one from which the incumbent can derive possibly both for himself, his family and his adherents and, for all I know properly, a comfortable livelihood. There is nothing, so far as I can ascertain, in the documents which have been produced in this case to show that any condition of celibacy was extrinsically imposed upon the holders of the *mohuntship*.

It may, however, be contended, with some force, that if the custom or usage or tradition of succession by agnatic *chelas* (mentioned at an earlier stage of this judgment as obtained since the foundation of the Asthal) is to be regarded as a definite custom now binding upon the institution and which cannot properly and legally be departed from (unless, of course, no agnatic relation qualified for the post existed) and one to which effect must be given, it is difficult to see why this tradition of celibacy extending over a like period should not also be recognised as a custom equally obligatory upon the incumbents of the Asthal.

Indeed, in some respects it may be thought that the presumption, in favour of the tradition of celibacy being obligatory, might be considered as stronger than that of the agnatic succession; for whilst the latter can be clearly comprehended owing to the natural desire to retain the benefits derived from the Asthal in the hands

of the family the former is, speaking generally, a departure from the normal and is a self-imposed condition which essentially is not usual in ordinary human life.

I have, however, at an earlier stage of my observations already dealt at considerable length with the question as to the binding character and the usage of agnatic succession. I have pointed out that it was a custom which, so far as this case is concerned, had, in my opinion, not been in issue between the parties and that, although I was inclined to think that after so long a period it might be regarded as a tradition which should rightly and properly be always followed, a decision as to this point did not arise in this litigation and should not perhaps be allowed to be raised in this Court. The position with regard to the necessary celibacy of the *mohunts* of this Asthal has, on the other hand, always been, together with the relationship between the plaintiff and the defendant, the principal point at issue between the parties to this litigation.

I must admit that in my mind I think that the very fact that none of the *mohunts* of this Asthal have ever married hitherto presents the plaintiff with a strong *prima facie* case; but, on the other hand, it must be remembered that up till now the adoption by each incumbent *mohunt* of his nephew as his *chela* and successor has presented no difficulties. The defendant himself states in his evidence that his predecessor, the *mohunt* Bhagwat Das, observing that this tradition of nepotic succession was in most serious danger of coming to an end desired that the defendant should marry in order, presumably to retain the *mohuntship* and the benefits derived from the properties appertaining to the Asthal in close agnatic succession contemplating that the devolution would descend upon a son who might be born to the defendant.

This testimony may or may not be true but it sounds plausible and, if credit should be attached to it, it shows that the tradition of celibacy was not thought to be more than a self-denying ordinance in no way inviolable and one the practising of which did not affect the tenure of any incumbent who so contracted a matrimonial connection.

Although, therefore, at first sight, one would be inclined to think that the fact that for over three centuries no *mohunt* of this Asthal had in fact married constituted a strong presumption in favour of ecclesiastically obligatory celibacy of the holders of the office, I think that it is legally necessary to look at the matter from a somewhat broader point of view and to consider whether as a fact there is any clear reason to think that marriage by a *mohunt* would necessarily result in the extremely grave effect that he should in law be compelled to abdicate or be capable of ejection from his position.

I feel very great diffidence in venturing to enter into the tangled paths of the doctrinal and dogmatic rules which govern the priests of the Hindu religion, or in particular, of all those sections of it to which it is supposed that the *mohunt* of this Asthal must adhere, and I am afraid that my efforts so to do must of necessity appear to those who are thoroughly familiar with the subject as somewhat elementary; and I cannot help feeling that in matters of this kind it might be advantageous if the Legislature could devise some tribunal composed of *clerse* assisted possibly by some chosen from the laity which could deal with questions of this character in a more complete manner than they can be dealt with by persons who may be of a different faith, unversed in such religious or sectarian practices and only schooled in the original principles of jurisprudence.

However, the matter has to be faced and I accordingly venture to give a short summary of what I assume to be a real issue between the parties. The position may roughly be recorded thus:—

A *guru*, a holy man, who was the ancestor of the defendant, migrated from Misraulia, his family home in the Shahabad District in this Province, about the end of the 16th century and took up his station near a tank of water at a place then known as Sulochini but now called Sitamarhi. This locality was a very famous one in Hindu mythology because the belief was that, after the conclusion of the ancient Sages of Hindu folk and

religious lore, the goddess Sita who had been there transported arose from a crucible unearthed where this water now stands. This archaic legend seems to correspond to some extent with the western Aryan myth of the birth of Aphrodite. This worthy *guru* evidently succeeded in attracting interest from the great personality of the neighbourhood, for he obtained the grant in November 1599 of the Mauza now known as Sitamarhi to which reference has already been made; and eventually, a building was erected near the tank where the principal deity of the Hindu pantheology worshipped was Sri Jankiji Maharani; this goddess is regarded as the daughter of the God Janaka and the goddess Sita. Prosperity and accretions of property gradually came and the Asthal is now a very important one.

Now, it is agreed that, in connection with the worship of the great god Ram, there have been several revelationists; one of these was named Ramanand whose work lay in the 12th century: a later teacher who appears to have been of a more liberal type was Ramanuj.

According to the theory which is put forward on behalf of the plaintiff, the followers of Ramanand are more ascetic than the followers of Ramanuj; and I think that, broadly speaking, this may be regarded as correct. The former, it is said, may not, the latter may, marry.

We see the same kind of difference in the priesthood of various branches of the Christian Church in which, though Roman Catholic Priests must be single, the Greek Catholic Clergy need not be so although a Bishop of the Greek Catholic Church cannot be a married man although he may be a widower; whilst, in the Anglican community there is nothing in the nature of enforced celibacy of any kind.

We here come to several moot points relating to phraseology. It is said on behalf of the plaintiff that a *mohunt* who belongs to the Ramanandi sect cannot marry; whilst in regard to the Ramanuji sect it is said that there are two classes the first being called "Acharya," who are what may be described as, lay teachers and upon whom celibacy is not imposed, the other portion consisting of what are called "Bairagis," who are ascetics, and who having cut off their connection with all worldly matters, must be celibate. It is here that we begin to experience confusion with regard to the use of particular vernacular expressions and it is quite obvious after reading through the evidence, that many of the witnesses did not mean with precision exactly the same when they were using the same words.

The principal controversy arises with regard to several vernacular words with which, to the best of my ability, I shall now try to deal The first of these is the word "Bairagi"; I suppose that this word means "withdrawn from worldly affairs" and perhaps in its primary sense it was intended to convey the idea of complete asceticism, that is to say, an eremitic life in which the individual cut himself off from his worldly desires and environments and retreated into a condition of isolated contemplation of things divine; but there is no doubt from the evidence before me that this word has long since ceased to have any such restrictive meaning and it would seem that it now almost only has the significance of a person devoted to religion and does not itself in any way contemplate the necessary incidence of celibacy.

The next word which gives rise to some difficulty is the word "Birakt." This word is found prefixed to the word "Bairagi" and it would be seen to connote a more rigid asceticism than is indicated by the word "Bairagi" alone. I gather that it essentially means "one who has renounced the world"; but whatever may have been its original meaning, it now seems to be like the word "Bairagi" used somewhat loosely and I am not sure that "Birakt", even with the conjunction of the word "Bairagi", now necessarily contemplates a non-marriageable state.

The Subordinate Judge, Mr. B. K. Biswas, who is a Hindu himself, has dealt with this matter in very great detail and with a wealth of knowledge of Hindu religious matters with which it is quite impossible for me to compete. He gives the whole history of the Ramanandi and Ramanuji

movements; and he comes to the conclusion that the Sitamarhi Asthal was not a Ramanandi but a Ramanuji foundation. He considers the term "Bairagi" as simply denoting one who can restrain his passion and that it is not a phrase descriptive of any particular religious order of which a man must be member in such a fashion that his property can be inherited by others than his blood relations.

Like myself, in my groping enquiry he attaches little legal importance to the expression "Bairagi" which he regards merely as of a loosely descriptive character. It is said, next, that when an individual became a *mohunt* of the Sitamarhi Asthal he changed his family *gotra* whatever it may have been into the celestial *gotra* of "Achyut" that is to say, he became one of the deity's chosen people He does not attach any great importance to this question because he does not think, that as a matter of fact, any such change took place nor does he think that, at any rate, the last *mohunt* prior to the present defendant ever disassociated himself from his *grihasti* family.

I have already said that there is on both sides in this case a great deal of documentary and oral evidence which bears upon the question of fact as to whether the *mohunts* of this Asthal are condemned or not to celibacy.

The documentary evidence is not very convincing; there is some to show that, when an outlying property which appears, perhaps, originally to have belonged to or to be appertaining to the Sitamarhi Asthal (and there are several outlying properties of this big institution), went out of the possession of its incumbent, one of the *mohunts* of Sitamarhi (the 4th) took steps, at the instigation of the widow of the *mohunt* of his outlying temple, to recover the property and to bring it back under the control of the Sitamarhi Asthal; that Sitamarhi *mohunt* does not seem in any way to have been affected by the fact that the incumbent of the Subordinate Institution (admittedly under the control of the Sitamarhi Asthal) had married but on the contrary appears to have made provision for the maintenance of his widow.

The 7th *mohunt*, as I have previously mentioned, appears pretty clearly not to have been a supporter of any necessary obligation of celibacy.

When we come to the oral evidence we get much divergence of opinion and much evidence which, although possibly in the main of no doubt honest character, indicates how differently different persons construe religious tenets.

The Subordinate Judge has dealt with these witnesses very carefully and with a knowledge which I do not profess to own. He comes to the conclusion that the Sitamarhi Asthal does not belong to the Ramanandi sect but is a Ramanuji foundation and that the *mohunts* of the Sitamarhi Asthal did not altogether, and need not altogether, cut off their connection with their *girhasti* family. He also deals with the important question as to whether under the Hindu Law a property once vested in an individual can be divested on account of subsequent disability. This aspect of the case, I must confess is to me somewhat novel but at any rate there are possibilities under section 92 of our Civil Procedure Code which seem to enable the difficulty initiated by the Subordinate Judge to be overcome in many respects, particularly with regard to a concern which may be considered as in the nature of a public religious institution.

The Subordinate Judge quotes numerous Hindu authorities to show that there is nothing in the Hindu Law to prevent a *mohunt* from contracting a matrimonial alliance and he had no authority produced before him to indicate that by so doing a *mohunt* must necessarily abdicate his incumbency. He points out that it is admitted that no vow of celibacy is taken by any bairagi *chela* of the *mohunt* of this Asthal; he also says that there are many monastic or religious institutions in this Province the heads of which are, as a matter of fact, celibate; but he does not conclude that the fact of marriage of a *mohunt* necessarily entails a forfeiture of his position. He then proceeds to point out, as is undoubtedly the case that there are a large number of religious institutions in this Province where the *mohunts* have been married men; he indicates that some of the

immediate apostles of Ramanandi of whom, notably, is Sur Siranand Pipe, were married; he also indicates as an important factor that a certain Totadri Swami, who is a witness for the defendant and who is a man of admittedly very great importance in the Ramanuji hierarchy, came from the Deccan, where he occupies a position of the utmost importance, being styled as His Holiness, and visited recently the Sitamarhi Asthal. He thinks that had this Asthal belonged to the Ramanandi sect or its *mohunt* become *patit* (outcaste) by his marriage it would have been altogether impossible for him to pay it a visit.

I think that the evidence of this gentleman, whose testimony shows the broad-minded aspect of religion adopted in modern days by most great prelates, is of the utmost importance in this case and I am sure that it will be useful if I quote some portion of what he says. His name is Swami Ranga Acharya Koil Kandhare Gobardan and he is a Tamil Brahmin residing at Gobardhan and Brindaban in the United Provinces; he is a Hindu priest. He is a man of very high religious rank; he takes the view that there are no real differences of doctrine or should not be between the Ramanandi and Ramanuji sects. He is quite satisfied that the *mohunt* of the Sitamarhi Asthal is an Acharya of the so-called Ramanuji portion of his sect.

It is obvious from his evidence that this cleric was a man of high position and of very considerable knowledge; a broad-minded modern priest. He says that the Sitamarhi Asthal was founded indeed by a disciple of his own ancestor Gangaram and he definitely states that a *mohunt* of Sitamarhi Asthal can continue as a *mohunt* and perform the *puja* of the idols in spite of his having been married. He confirms the suggestion that Birakt and Bairagi should be construed as meaning the same thing and states that the *mohunts* of Sitamarhi Asthal are not of that category. He is himself a married man which in no way interferes with the tenure of his high and important office.

The Subordinate Judge, then, comes to the conclusion that the Sitamarhi Asthal is a Ramanuji Asthal and that the *mohunts* did not dis-associate themselves from their family; he goes on to point out what is the real meaning of the word Bairagi and states that there is no Sastric religious prohibition against the marriage of either Ramanandi or Ramanuji Bairagis and, finally, he considers the question whether, in view of the long tradition of celibacy, the fact that this *mohunt* (the defendant) has married entails upon him burden of forfeiture of his office. He appreciates very fully the fact of the tradition for so many years and he then proceeds to examine in detail the evidence which has been adduced on both sides with regard to what happened to a *mohunt* who was not a celibate.

He says, and I think rightly, that the plaintiff has failed to show any direct instance where a *mohunt* has been compelled to forfeit his office on account of his subsequent marriage: but, on the other hand, he shows also that the defendant has adduced evidence of the marriage of many *mohunts* of different places some of whom appear to have been even of Ramanandi sect and others of the Ramanuji persuasion.

He, therefore, comes to the conclusion, in which I think he is right that the plaintiff has failed to show in this case that the marriage of a *mohunt* (and that is to say, of the defendant) necessarily entails a forfeiture of his office and he accordingly on that ground amongst others dismissed the plaintiff's suit.

I must congratulate the Subordinate Judge upon an extremely able judgment upon matters of Hindu religion upon which it is difficult for a Christian unversed in these subjects to express any very confident opinion: but it is impossible, unless very cogent argument is produced before this Court to show that the Subordinate Judge was wrong, that this Court should upset his finding upon questions which after all are merely questions of fact. No one realises more than I do the importance, which to those interested, is attached to the possession of this undoubtedly valuable property and position; I should have personally thought, as a matter of abstract opinion, that the traditions

of agnatic succession and celibacy ought, if possible, to have been maintained. That, however, is one of those views which have nothing to do with the legal aspect of any case but which cannot but compel one to think, as I have said before, that the most suitable solution of questions such as this would better be entrusted to the consideration not of the ordinary Civil Courts but of a tribunal composed of ecclesiastical personages (assisted no doubt by some legal chairman) which would decide matters of the nature on lines and with knowledge which might be more satisfactory and more certain than those upon which the High Courts in this country can ordinarily proceed.

In my opinion, therefore, this appeal must be dismissed with costs.

Das, J.—I entirely agree.

Appeal dismissed.

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* A. I. R. 1923 Patna 322.

JWALA PRASAD AND ROSS, JJ.

T. Barclay—Judgment-debtor—Appellant

v.

Mt. Dhandei and another—Decree-holders—Respondents.

M. A. No. 226 of 1921, decided on 19th Dec., 1923, against the order of Sub-Judge of Muzzaffarpur, dated 8th June 1921.

(a) Compromise decree—Part-payment accepted by decree-holder—Right to interest is not lost.

In a compromise decree, the decree was to be paid up in instalments. On failure to pay within the date fixed, the decree-holder was to get interest at 1 per cent per mensem from the date of default and he was at liberty to execute the decree. After the due date the judgment-debtor made payments to the decree-holder who claimed appropriation first towards interest and then towards the decretal sum. *Held*, that the decree holder was entitled to interest and the clause as to executing the decree was for the benefit of the decree-holder. The acceptance of part-payment did not amount to waiver of the right to interest.

[P. 323, C 2]

** b, Contract Act, Ss. 60, 61—Instalment decree—Payment is to be appropriated first towards interest.*

The decree-holder in the case of an instalment decree has the right to appropriate the payments first towards satisfaction of the interest due to him, under sections 60 and 61, Contract Act. There is no distinction between an ordinary decree and an instalment decree.

[P. 324, C. 1]

P. C. Ray—for Appellant.

Roy Guru Saran Prasad and *Brij Kishore Prasad*—for Respondents.

Jwala Prasad, J.:—This appeal arises out of an order passed by the Subordinate Judge of Muzaffarpore, dated the 8th June 1921. The judgment-debtor filed an application under Order XXI, rule 2 of the Civil Procedure Code, stating that the entire decree was satisfied and that there was nothing due under the decree to the decree-holders. The decree-holders opposed the application and submitted an account stating that Rs. 258-6-11 was still due to them. The learned Subordinate Judge held that Rs. 248-8-3 was still due to the decree-holders, and to that extent he refused the application of the judgment-debtor. The judgment-debtor has now, therefore, come to this Court in appeal.

The decree in question was a mortgage decree and was passed in terms of a compromise petition filed by the parties. Under the terms which were incorporated into the decree, the entire decretal amount was fixed at Rs. 9,625, out of which Rs. 4,000 was to be paid to the plaintiffs, the decree-holders, by the defendant 1st-party appellant within two months from the date of the decree. This sum was paid off and we are not concerned with it. As to the balance of Rs. 5,625 which was stated as being due by the defendant 2nd party to the defendant 1st party, the terms settled were as follows:—

"The defendant 1st party will see that the said sum is deposited in Court by the defendant 2nd party in the name of the plaintiffs in satisfaction of a portion of the decretal amount in this suit within one month from this date (the date of the decree) and on failure of the defendant 1st party to deposit as aforesaid the said amount of Rs. 5,625 within the said period of one month, the defendant 1st party will himself pay the said amount to the plaintiffs within the said period of 2 months from this date."

The compromise decree is dated the 30th March, 1920. The defendant 2nd party did not deposit the amount within the period mentioned above, and therefore under the aforesaid clause defendant 1st party was liable to pay to the plaintiffs, the decree-holders, the said sum of Rs. 5,625 within the

period of two months from the date of the decree. On the 30th of September 1920, the defendant 1st party paid to the plaintiffs, the decree-holder, Rs. 4,841-5-1 and on the 21st of February, 1921, he paid Rs. 784. These two payments make up Rs. 5,625 which was payable by the judgment debtor appellant within two months from the date of the decree. The decree-holders, however, claim interest at the rate of one rupee *per cent. per mensem* from the date of default after the expiry of two months of the date of the decree within which period the entire amount had to be paid. The judgment-debtor disputes the right of the decree-holders to claim interest.

The question for determination, therefore, is whether the decree-holders are entitled to any interest. Now, the 5th clause of the compromise petition runs as follows:—

"That until the payment of the entire decretal amount the said annuity will remain attached. That if any portion of the decretal amount remains unpaid at the expiry of the said period of two months it will be open to the plaintiffs to execute the decree for the unrealised amount with interest at the rate of Re 1 per cent. per month from after the date of the expiry of the said period of two months."

Now, there was a fixed date within which the full amount of Rs. 9,625 was to be paid. This was not done. The decree-holders are, therefore, entitled to compensation for the loss caused to them on account of the default of the judgment-debtor in the payment of the said amount within the time fixed for payment. Under the 5th clause of the compromise petition quoted above, it is clear that the decree-holders were entitled to execute the decree after two months of the expiry of the date of the decree, with interest at the rate of of Re. 1 per cent. per mensem, if the entire sum was not paid off. There was clearly the intention of the parties that the unpaid balance after two months will carry interest at the rate aforesaid.

The execution is a mode of realization and the failure to execute does not disentitle the plaintiff to get interest from the date of default. The fact that the decree-holders accepted amounts paid to them in part payment of their decree does not show that they waived their right to claim interest after the default made by the judgment-debtor. From the account submitted by them it appears that they appropriated the payments first towards interest due on date of payment and the balance towards principal. There is nothing to show that they waived their right to interest. They did not even file satisfaction petition in the Court, apparently because they thought that they were entitled to interest. They kept their right to the interest alive after the date of default.

The authorities quoted by the learned Vakil on behalf of the appellant are not on all fours with the present case. *Thaithotta Thil Pokkar* v. *Ramchandra Shenoy* (1); *Chhagan Chunilal* v. *Suka* (2); *Mumford* v. *Peal* (3); *Sukhawat Hussain* v. *Gajadhar Prasad* (4) and *Radha Prasad* v. *Bhagwan Rai* (5). On the other hand, the modified decree passed by the High Court of Allahabad in the case of *Sukhawat Hussain* v. *Gajadhar Prasad* (4) shows that interest was allowed to the decree-holder on two kists in respect of which default had occurred from the date fixed for payment of the same. The case seems to be governed by the principle deducible from the following authorities:—*Murlidhar* v. *Mulchand* (6); *Malayappaiyar* v. *Pichai Asari* (7) and *Chamandi Lal* v. *Kanhaya Lal* (8).

The principle seems to be that when a date is fixed for payment of a sum the creditor is entitled to interest by way of compensation even if there is no express agreement to pay interest from the date of

(1) [1914] 16 M. L. T. 478=26 I. C. 124.
(2) [1911] 35 Bom. 511=12 I. C. 384, =13 Bom. L. R. 891.
(3) [1880] 2 All. 857.
(4) [1906] 28 All. 622=3 A. L. J. 469.
(5) [1883] 5 All 289=(1883) A. W. N. 33.
(6) [1919] 52 I. C. 953.
(7) [1915] 2 L. W. 236=28 I. C. 195 =(1915) M. W. N. 208.
(8) [1919] 52 I. C. 320.

default under the Interest Act, and from the 5th clause of the compromise petition quoted above it is clear that there was in the present case a clear intention to charge interest at the rate of Re. 1. The charge of Re. 1 *per cent. per mensem* is not unreasonable compensation with regard to the circumstances of the case as was observed in the case of *Murlidhar* v. *Mulchand* (6).

The decree-holders had a right under clause 5 of the compromise petition to realize it summarily by execution of the decree instead of by a separate suit or any other proceeding, and consequently they had a right to appropriate part payments after the due date first towards interest and the balance, if any, towards principal. This is the general rule of appropriation; vide *Parr's Banking Company, Ltd.* v. *Yates* (9).

The rule had been adopted in India from the earliest time. Vide *Goverdhan Das* v. *Waris Ali* (10); *Bamundass* v. *Umesh Chander* (11); *Luchmeshwar Singh* v. *Syed Lutf Ali* (12); *Guroo Das Dutt* v. *Ooma Charan* (13); *Maharaja of Benares* v. *Har Narain Singh* (14); *Biswanath Bhattacharjee* v. *Someswar Sarma* (15); *Venkatadri Appa Row* v. *Parthasarathy Appa Row* (16), and *Seth Nemichand* v. *Seth Radha Kishen* (17) and Sections 60 and 61 of the Indian Contract Act. This is so whether the decree be an ordinary decree or an instalment decree, as in the present case, provided the interest is payable under the decree. We have already seen that under the terms of the decree interest was payable though the right for realizing it by execution proceedings was mentioned in the decree for the benefit of the decree-holders.

There is no substance also in the contention of the appellant that the calculation of interest is unreasonable or that compound interest was charged in the account. Such a calculation was upheld in the aforesaid case of *Biswanath Bhattacharjee* v. *Someswar Sarma* (15).

For all these reasons we dismiss the appeal with costs.

Ross, J.:—I agree.

Appeal dismissed.

(9) [1898] 2 Q.B.D. 460.
(10) [1827] 4 Sal. Rep. 330.
(11) [1856] 6 M.I.A. 289=1 Sar. 542 (P.C.).
(12) [1871] 8 B.L.R. 110=2 Sar. 700 (P.C.).
(13) [1874] 22 W.R. 525.
(14) [1905] 28 All. 25=(1905) A.W.N. 167=2 A.L.J. 585.
(15) [1917] 21 C.W.N. 1055=41 I.C. 348.
(16) A.I.R. 1922 P. C. 233=44 Mad. 570=48 I.A. 150=19 A.L. J. 465=23 Bom L. R. 644=40 M.L.J. 549=33 C.L J. 457=L W. 25=(1921) M. W. N. 317=26 C.W.N. 33 (P. C.).
(17) A.I.R. 1922 P.C. 26=C. W. N. 153=30 M. L. T. 39=(1921) M.W.N 411=14 L.W. 391 (P.C.)

A. I. R. 1923 Patna 324.

COUTTS AND DAS, JJ.

Maharaja Bahadur Kesho Prasad Singh —Appellant.

v.

Ramjas Pande—Respondent.

Appeal Nos. 544 and 546 of 1921, decided on 20th July, 1922, from Appellate decrees of Sub.-J. of Shahabad, dated 11th December, 1920.

(a) *Bengal Tenancy Act, Sects.* 50 (2), 115—*Scope—Payment of fixed rate for even 25 to 33 years—No presumption of fixity from permanent settlement arises.*

The tenants are in view of Sect. 115 not entitled to the benefit of the presumption under Sect. 50 (2) after the publication of record of rights; and in order to establish that they are tenants at fixed rent in perpetuity, they would have to establish by evidence that they have been holding at the rate of rent which has not been changed since the time of the permanent settlement. The fact that the tenants have proved that they have paid rent at a fixed rate for from 25 to 33 years does not entitle the Court to presume that they have been paying at fixed rate from the time of the permanent settlement. [P. 325, C 1 & 2.]

Kulwant Sahey and *Nirsu Narain Sinha*—for Appellant.

Parmeshwar Dayal—for Respondent.

Coutts, J.—These appeals arise out of suits for enhancement of rent. The suits have been dismissed in both the Courts below and the plaintiff has appealed.

The first point that arises is whether, in view of the provisions of section 115, the tenants are entitled to

the benefit of the presumption which arises under section 50 (2) of the Bengal Tenancy Act. Both the Courts below, on the authority of *Gulab Misser* v. *Kumar Kalanand Singh* (1) and *Prithi Chand Lal Choudhury* v. *Sheikh Mohammad Tahir* (2), have held that the tenants are entitled to the benefit of the presumption.

These decisions, however, have been overruled by a number of decisions both in the Calcutta High Court and in this Court and I need only refer to the following cases : *Prithi Chand Lal Choudhury* v. *Basarat Ali* (3), *Harihar Persad Bajpai* v. *Ajub Missir* (4), *Har Lal* v. *Mussammat Gohri* (5), *Gurucharan Nand* v. *Sarab Ali* (6) and *Jagdeo Narain Singh* v *Bhagwan Matho* (7). In view of these decisions which, in my opinion, embody the correct view of the law, the tenants are not entitled to the benefit of the presumption ; and, in order to establish that they are tenants at fixed rent in perpetuity, they would have to establish by evidence that they have been holding at the rate of rent which has not been changed since the time of the permanent settlement.

It has been urged that the learned Subordinate Judge has found as a fact that the tenants have established this. It is true that the learned Subordinate Judge has said in his judgment that :

"apart from any presumption under section 50 of the Bengal Tenancy Act, it can be safely held that the defendant's status is Sharahmoyan at rent fixed in perpetuity."

How he arrives at this conclusion, he does not say, but it would appear that he comes to this conclusion because the tenants have produced rent-receipts covering a period of from 25 to 33 years. It is contended by the learned Vakil for the respondents that in view of the fact that the tenants have proved that they have paid rent at a fixed rate for from 25 to 33 years the Court is entitled to presume that they have been paying at fixed rate from the time of the permanent settlement.

I am unable to accept this contention. If it were correct it would lead to this—that a tenant, although he was not entitled to the presumption which arises under section 50 (2) of the Bengal Tenancy Act, would be entitled to prove that he had paid rent at the same rate for say 21 years and would then be entitled to what has been called a natural presumption in his favour. This could clearly not be so. No such presumption arises. The decision of the Court below is clearly wrong and must be set aside.

I would accordingly set it aside and remand the cases for rehearing and for decision as to what the amount of enhancement should be. The appellant is entitled to the costs of these appeals.

Das, J.—I agree.

Cases remanded.

(1) (1910) 14 C. W. N. 884 = 6 I. C. 217 = 12 C. L. J. 107.
(2) (1916) 1 Pat. L. J. 67 = 35 I. C. 427 = 3 Pat. L. W. 427.
(3) (1910) 37 Cal. 30 = 13 C.W.N. 1149 = 3 I. C. 449 = 10 C. L. J. 343 (F.B.).
(4) (1918) 45 Cal. 930 = 22 I. C. 604.
(5) 3 P. R. 1910 = 6 I. C. 942.
(6) (1919) 23 C.W. N. 1041 = 52 I. C 79 = 30 C. L. J. 9.
(7) (1920) 1 Pat, L.T. 27 = 54 I. C. 672.

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* A. I. R. 1923 Patna 325.

ADAMI, J.

Badri Das—Plaintiff—Petitioner

v.

The East Indian Railway Co.—Defendant—Opposite Party.

Civil Rev. No. 212 of 1922, decided on 4th December, 1922, against the decision of Add. Sub.—J. of the Court of Small Causes, dated 12th May, 1922.

Railways Act, S. 72—Risk note B signed—Consignor must prove wilful neglect or theft by Ry. servants—Owner cannot allege want of authority to his servant or agent who delivers goods to railway to sign the risk note.

Where the consignor signs the Risk-note form B the onus is upon him to prove wilful neglect or theft by Railway servants and it is not sufficient to prove that the loss must have occurred while the bags were in its custody, and if a man comes forward and delivers goods for carriage and signs a risk note, it cannot afterwards be complained by the owner of the goods that the man had no authority to sign the risk-note. [P. 326, Cs. 1 & 2.]

Ragho Prasad—for Petitioner.

Naresh Chandra Sinha—for Opposite Party.

Adami, J.—The petitioner sued the opposite party, the East Indian Rail-

way Co., in the Court of the Small Causes to recover possession for the loss of three bags of sugar and portion of another bag which had been consigned from Howrah to Patna to the address of the petitioner.

It appears that 125 bags of sugar were delivered to the Railway Co. at Howrah and a risk-note in form B was signed to cover the consignment. It is admitted that the bags were delivered to the Railway Co. and it is also admitted that on arrival of the consignment at Patna three bags were found to be missing and one bag had been cut and some of the contents abstracted.

In the trial Court the suit was dismissed as the Court found that under the terms of the risk-note the Railway Co. were not liable. The learned Vakil for the petitioner argues that as three complete bags were lost, the Railway Co. would be responsible for the loss and would be bound to pay compensation. The terms of the risk-note form B are well known; they excuse the Railway Co. from all responsibility for any loss, destruction or deterioration of, or damage to a consignment from any cause whatever except for the loss of a complete consignment of one or more complete packages forming part of a consignment due either to wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers.

Now in the present case it is quite true that there were three complete packages missing, but even so, the Railway Co. under the terms of the risk-note, would not be responsible for the loss, unless the Court were satisfied that such loss was due to the wilful neglect of the servants of the Company, or to theft by its servants, or to wilful neglect of the Railway Administration. It fell, as has been settled by many decisions, on the petitioner to prove that the theft was due to wilful neglect or to theft by the servants of the Railway Administration, or wilful neglect of the Railway Administration.

It is argued that the petitioner produced all the evidence that was possible for him to produce to show that the loss must have occurred during the time which the Railway Co. had the consignment in its custody, and it is not denied by the Railway Co. that the loss must have occurred while the bags were in its custody. But this was not sufficient, the petitioner had to prove either wilful neglect or theft by the Railway servants. It is true that it is almost impossible in a case like this for a plaintiff to prove wilful neglect, but while the terms of the risk-note are such as they are, the Railway Co. will be absolved unless wilful neglect of theft by its servants is proved, and in this case the petitioner failed to prove wilful neglect. It has to be remembered that the goods were consigned at a cheaper rate in consideration of the risk-note, so that the petitioner must be held to have entered into the bargain with his eyes open.

It is then contended that the terms of the risk-note cannot apply because there is no satisfactory evidence that the man who signed the risk note form was authorised by the petitioner to sign it. I do not think that this argument can affect the matter at all.

It is not necessary for a Railway Co., when a person comes to consign goods, to enquire whether that person has been authorised to make the consignment. If a man comes forward and delivers goods for carriage and signs a risk-note, it cannot afterwards be complained by the owner of the goods that the man had no authority to sign the risk-note, and that the Railway Co. must be, therefore, held liable for any loss in spite of the terms of the risk-note. If it was not one of the petitioners who consigned the goods under the risk-note, then it seems difficult to understand how the petitioners can claim that the goods were theirs and that the liability of the Railway Co. was to them. Such cases as these are hard on the consignee, but while the risk notes remain in their present form, the hardship must still endure.

The application must be rejected. Hearing fee two gold *mohurs*.

Application rejected.

* A. I. R. 1923 Patna 327.

DAS AND BUCKNILL, JJ.

Damodar Prasad and others—Defendants—Appellants

v.

Ram Sarup Kumar—Plaintiff—Respondent.

Appeal No. 46 of 1920, decided on 20th December, 1922, against the decision of Sub—J. of Monghyr, dated 29th August, 1919.

(a) *Decree—Fraudulent decree—No re hearing is allowed at the instance of decree-holder.*

If a decree obtained by decree holder is a fraudulent decree the decree-holders are not entitled to have the suit re-heard. [P. 327, C. 2]

(b) *Decree—Setting aside—Fraud—Onus is on party alleging fraud to show that there was no foundation for the suit.*

The test as to whether a suit lies to set aside a decree is whether there was fraud practised in relation to the proceedings in Court by which the defendant in the original suit was prevented from placing his case before the Court. In order to establish that there was fraud in relation to the proceedings of the suit, judgment debtor would have to show that there was no foundation for that suit at all. There is no onus upon the decree-holders to establish the validity of the decree obtained by them. [P. 328, Cs. 1 & 2]

(c) *Civil P. C., O. 5, Rr. 18 & 19—Presumption as to service is that summons is served as stated in the peon's report.*

It can be assumed until the contrary is proved, that the summons is in fact served in the mode stated in the report of the peon, and, therefore, the person who wants to attack a decree on that ground must prove that the statements made in the report are untrue.

[P. 329, C. 1]

* (d) *Pleadings—Fraud—Evidence consistent with plaintiff's and defendant's story—Fraud cannot be said as established—Decree setting aside.*

Where a case of fraud is attempted to be made out and the evidence adduced in the case is equally consistent with the allegations of the plaintiff as with the denial of the defendants a case of fraud is not established.

[P. 329, C. 2.]

S. M. Mullick and *Siva Narayan Bose*—for Appellants.

Saroshi Charan Mitra and *Shiveswar Dayal*—for Respondents.

Das, J.—On the 29th January, 1912 the defendants first party, who are the appellants before us, instituted a suit being Suit No. 55 of 1912, for recovery of Rs. 4,065 as against one Bisheshar, who is the defendant 2nd party, and also against Ramsarup, the plaintiff respondent. On the 9th May 1912, the defendants first party obtained a decree for the sum claimed by them as against Bisheshar and Ramsarup. On the 10th August 1918, the present suit was instituted by Ramsarup for declaration that the decree obtained by the defendants first party in Suit No. 55 of 1912 was fraudulent and that it was not binding on them.

The learned Subordinate Judge has come to the conclusion that the decree was a fraudulent one and he has accordingly set aside that decree and restored that suit to its file. On the facts found by the learned Subordinate Judge the order passed by him was far too favourable to defendants first party, for, if the decree obtained by them was a fraudulent decree, they were not entitled to have the suit re-heard as against Ramsarup and Bisheshar.

The circumstances in connection with Suit No. 55 of 1912 are these: One Saudagar died leaving two sons Sheodhari and Ramsarup and a widow Bhojlo Kuar. On the 14th July, 1907, Sheodhari took a *Mustajiri* lease from the defendants first party of 49 *bighas* of land in Sikandarpur. It is the common case that at the time when he took this lease Sheodhari was the *kurta* and manager of the joint family. Between January to August 1910, Sheodhari borrowed several sums of money from the defendants first prty on *chittis*.

On the 27th January, 1911, Sheodhari executed in favour of the defendants first party what purported to be a mortgage bond for Rs. 5,000. It is undisputed that he purported to execute the document for himself and as guardian of Ramsarup. The document showed that there was due to the defendants first party Rs. 1,900 on the *chittis* and Rs. 2,100 as rent in respect of the lease.

These debts were discharged by the execution of the mortgage bond and the bond on the face of it shows that Sheodhari took a cash advance of Rs. 998-14-0. But Sheodhari died soon after the execution of the bond and it is not denied that this sum of Rs. 998-14-0 was not paid to Sheodhari, although it also appears that Rs. 64 was paid to him. The mortgage bond could not be registered owing to the death of Sheodhari, and, as I have said, on the 29th January,

1912, the defendants first party brought a money suit for recovery of Rs. 4,065 as against Bisheshar, the son of Sheodhari, and Ramsarup, the brother of Sheodhari.

The learned Subordinate Judge has examined the evidence which has been recorded in this case with a view to find out whether there was sufficient evidence of legal necessity for the loan which was taken by Sheodhari and Ramsarup. He came to the conclusion that the defendants first party failed to prove that there was any legal necessity for the debt incurred by Sheodhari on behalf of the joint family. He also came to the conclusion that summons was not served upon Ramsarup. He thought that there was collusion between Bisheshar, the son of Sheodhari. and the defendants first party and he came to the conclusion that the decree was wholly inoperative so far as Ramsarup was concerned.

In my opinion, the learned Subordinate Judge should not have considered the evidence recorded in the case before him in order to enable him to come to the conclusion that there was no evidence to support the decree in Suit No. 55 of 1912. As has been pointed out the test as to whether a suit lies to set aside a decree is whether there was fraud practised in relation to the proceedings in Court by which the defendant in the original suit was prevented from placing his case before the Court.

It is quite true if the Court comes to the conclusion that summons was not in fact served upon the defendant, he is at liberty to examine the evidence with a view to find out whether there was any foundation for the previous suit. But that is only for the purpose of enabling him to decide whether the failure to serve summons was accidental or deliberate. Now, in this case the learned Subordinate Judge threw the entire onus upon the defendants first party.

It is quite true that in the suit in which the defendants first party were the plaintiffs, namely, Suit No. 55 of 1912 it was necessary for them to establish that there was legal necessity for the debt incurred by Sheodhari as the *karta* of the joint family; but the Subordinate Judge in Suit No. 55 of 1912 gave the defendants first party a decree as against Bisheshar and Ramsarup. That decree operates as *res judicata* between the parties. No doubt it is open to Ramsarup in this suit to show that the decree obtained by the defendants first party in Suit No. 55 of 1912 was a fraudulent decree.

In order to establish that there was fraud in relation to the proceedings of the suit Ramsarup would have to show, if he could, that there was no foundation for the suit at all; but then the onus was upon Ramsarup to show that there was no foundation for that suit. There is no onus upon the defendants first party to establish the validity of the decree obtained by them. Now, this course was not adopted by the learned Subordinate Judge. He examined the evidence in the case with a view to find out whether the defendants first party in this case have established that there was legal necessity in respect of the debt incurred by Sheodhari.

In my opinion, the procedure adopted by the learned Subordinate Judge is wholly erroneous. It was for Ramsarup, the plaintiff in this action, to show that there was no foundation for Suit No. 55 of 1912. It was, therefore, for Ramsarup to establish that there was no legal necessity for the debt incurred by Sheodhari as the *karta* of the joint family.

The foundation of the judgment of the learned Subordinate Judge is that there was collusion between Bisheshar and Ramsarup. In order to see whether this finding is a legal finding it is necessary to examine the evidence on the record. Now, summons was undoubtedly served upon the defendants in the suit. Exhibit (F) is the report of the peon, Mahbub Hassain, relating to the service of summons and the report shows that as Bisheshar had declined to take the summons and as Ramsarup was a minor he "hung up two of the summons with a copy of plaint on the house covered with tiles facing east."

Apart from the general evidence given by Bhojlo Kuar, the guardian of Ramsarup, the plaintiffs have not examined either the peon or the identifier or any person connected in

any way with the service of summons to show that the statements in the report of the peon are untrue. We must assume, until the contrary is proved, that the summons was in fact served in the mode stated in the report of the peon, and, it was necessary for the plaintiffs to prove that the statements made in the report are untrue. It was, in my opinion, absolutely necessary for them to call either the peon or the identifier or any of the witnesses mentioned in the report of the peon. The evidence of Bhojlo Kuer is wholly unconvincing and for my part I can place no reliance upon it.

But there are materials in the record which, to my mind, show conclusively that Bhojlo Kuer was aware of the suit itself. On the 6th March, 1913, Bhojlo Kuer entered appearance as the guardian of Ramsarup through a pleader named Hito Roy. She is alleged to have given *vakalatnama* to Hito Roy to conduct the defence on behalf of Ramsarup. Now, there is no dispute that a *vakalatnama* was in fact given to the pleader, but it is suggested by the plaintiff that the *vakalatnama* was given by Bisheshar without the knowledge or the authority of Bhojlo Kuer. The learned Subordinate Judge has found that the *vakalatnama* was given.

"on her behalf without her knowledge by Bisheshar"

and as the learned Subordinate Judge also came to the conclusion that the plaintiff's mother Musammat Bhojlo Kuer, is a literate lady, he found as a fact that the *vakalatnama* was filed fraudulently by Bisheshar in the case. Now, I accept the finding of the learned Judge that the *vakalatnama* was given to the pleader by Bisheshar on his behalf and on behalf of *Musammat* Bhojlo Kuer. But I am not prepared to accept his finding that because *Musammat* Bhojlo Kuer is a literate lady and because the *vakalatnama* was given by Bisheshar and not by *Musammat* Bhojlo Kuer that there was collusion between Bisheshar and the defendants first party. There is nothing else in the judgment of the learned Subordinate Judge from which it can be inferred that there was collusion between the defendants first party and Bisheshar. The learned Subordinate Judge says:—

"This one fact alone goes to show that the *vakalatnama* was filed fraudulently by defendants second party. We have evidence in this suit that defendants second party and defendants first party are in collusion with each other."

Now, in my opinion, where a case of fraud is attempted to be made out and the evidence adduced in the case is equally consistent with the allegations of the plaintiff as with the denial of the defendants, a case of fraud is not established. Now, what was the object of Bisheshar, who, it must be remembered, was a defendant in Suit No. 55 of 1912, to collude with the plaintiff in that action?

The learned Subordinate Judge has found that at the date of the execution of the bond the family was joint. We have examined the evidence very carefully and in our view the evidence does not establish that there was a separation at any time between either Sheodhari or Ramsarup or between Bisheshar and Ramsarup. The case of the plaintiff on the question of separation has been entirely disbelieved by the learned Subordinate Judge. The case of the defendant is not, as the learned Subordinate Judge has erroneously supposed, that there was a separation between Bisheshar and Ramsarup at any time.

It is quite true that one of the witnesses on behalf of the defendants says that they were messing separately for the last two years, but the witness himself explained that he does not suggest that the joint family properties have in any way been separated. Now, if that be so, and if the plaintiff's evidence as to separation is wholly disbelieved, then a case of separation has not been established between the parties. That being so, it must be assumed that Bisheshar and Ramsarup were joint not only at the time of the execution of the bond but also at the time of the institution of Suit No. 55 of 1912. Now, what reason prompted Bisheshar to collude with the plaintiffs in Suit No. 55 of 1912? If there was no motive at all to induce him to enter into a conspiracy with the defendants first party, who

were the plaintiffs in that action, then in my opinion, a case of fraud ought not to be found against him. He was a defendant to that action, so was Ramsarup.

Now, the case of the plaintiff in this action is that there was no legal necessity in respect of the debt incurred by Sheodhari. If there was no legal necessity for the loan then it was obviously to the advantage of Bisheshar to put forward Ramsarup to urge the point that there was no legal necessity for the loan. If it was established in that action that there was no legal necessity for the loan incurred by Sheodhari then obviously the plaintiffs in that action could not get any decree either against Ramsarup or against Bisheshar. Now, the positive case of the plaintiff in this action is that there was no legal necessity in respect of the loan incurred by Sheodhari.

Now, if Bisheshar was aware of the fact that there was no legal necessity, then, as I say, it was to his advantage to put forward Ramsarup to put forward the plea that there was no legal necessity. If, on the other hand, there was legal necessity for the loan, then obviously there was no defence to the suit at all. In either case it would be to the advantage of Bisheshar to have Ramsarup to actively defend the action brought by the defendants first party.

In my opinion, there was absolutely no motive for Bisheshar to collude in the matter with the defendants first party, and if there was no motive at all, the act of Bisheshar in giving the *vakalatnama* on his behalf and on behalf of *Musammat* Bhojlo is explainable on the hypothesis that there was no fraud on his part. After all *Musammat* Bhojlo Kuer was a *pardanashin* lady. The duty of defending the suit would fall entirely upon Bisheshar. It was purely a formal matter for him to go to Bhojlo Kuer and to get the *vakalatnama* signed by her. No doubt it was improper on the part of Bisheshar not to get the signature of Bhojlo Kuer on the *vakalatnama* but the fact that Bisheshar was guilty of impropriety does not lead to the conclusion that he was colluding with the plaintiffs in that action. As I have said before, where the facts established are equally consistent with the allegation of the plaintiff as with the denial of the defendant, a case of fraud will not be found by the Court.

In my opinion, the evidence does not establish that Bisheshar in any way colluded with the defendants first party. There are in the record of the suit no less than two petitions ostensibly filed both on behalf of Bisheshar and on behalf of Ramsarup. It is impossible to find a case of fraud against the defendants first party without coming to the conclusion that Bisheshar was a party to that fraud, because both the petitions show that Bisheshar as well as Ramsarup were applying for time on the ground that there was a talk of settlement between the parties going on. Now, as I have said before, if there was no reason at all for thinking that Bisheshar would collude with the defendants first party in the matter, there is no reason at all for finding a case of fraud as against Bisheshar and, as I have also said before, it is impossible to find a case of fraud as against defendant first party without finding a case of fraud as against Bisheshar

In my opinion, the evidence does not establish that Bisheshar in any way colluded with the defendants first party in Suit No. 55 of 1912. The summons was properly served on the minor. It is not suggested in the pleadings of the suit that the procedure laid down in Order XXXII was not complied with. The evidence shows that Bisheshar certainly entered appearance not only on his own behalf but also on behalf of the minor defendant and there is, in my opinion, no ground whatever for suggesting that the decree obtained in Suit No. 55 of 1912 was a fraudulent decree.

I would accordingly allow the appeal, set aside the judgment and decree passed by the Court below and dismiss the plaintiff's suit with costs in both the courts.

Bucknill, J.—I agree.

Appeal allowed.

* A.I.R. 1923 Patna 331.

BUCKNILL, J.

Mt. Ayodhya Kuar—Defendant—Petitioner.

v.

Durga Prasad—Plaintiff-Opposite Party

Civil Revn. No. 213 of 1922, decided on 22nd November 1922, against the order passed by the Sub-Judge 2nd Court Patna dated Nov. 3rd November 1922.

** (a) Civil P. C. O. 9, R. 13—Both appeal and application—Appeal disposed of—Hearing of application is incompetent.*

Trial Court may perhaps be entitled to consider an application made to it to review its decision even where an appeal has been lodged; but where such an appeal has been actually decided the trial Court has no power to entertain such an application. The applicant before the trial Court having appealed from its *exparte* decree and the appellate Court having considered the case on its merits and dismissed the appeal, the case for re-instatement goes out of its hands and it has no further seisin of it. [P. 333, C. 2 and P. 337, C. 1]

K. P. Jayaswal and *Bimala Charan Sinha*—for Petitioner.

Rai Guru Sharan Prasad—for Opposite Party.

Bucknill, J.—This was an application in civil revisional jurisdiction made by one *Musammat* Ajodhya Kuwar widow of the late Munshi Negi Prasad asking that an order dated the 11th March 1922 passed by the Subordinate Judge of the 2nd Court of Patna should be set aside or otherwise dealt with. The circumstances which have given rise to this application are in themselves very simple, but raise an interesting though well defined point of law, which has been ably placed before me by the learned Counsel for the petitioner.

In order to understand exactly how the question which has been argued before me arises, it is necessary shortly to refer to the facts in this case and to the somewhat lengthy course which the litigation has already passed through.

A certain Durga Prasad, who is the respondent to this application brought an action against the petitioner and other defendants claiming that certain land belonged to him as his *bakasht* as the result of a partition. The present petitioner, who was a defendant, as I have said, in that suit was a *pardanashin* lady. The plaint was admitted in May of 1919 and there were frequent applications for time, not, I may point out, entirely made by the petitioner or the other defendants. However on the 8th September 1919 the plaintiff was, according to the Munsif's order sheet, ready for trial, although the defendants still prayed for time to adduce evidence. The last of November was fixed for the trial and on that date the defendant was not ready and prayed for time for calling for certain papers from the Collectorate and the District record room.

The Munsif, after shortly discussing the delays which had already taken place, came to the conclusion that this petition for time made on behalf of the defendant was frivolous and he accordingly rejected it. The Munsif then proceeded with the case and I am sorry to see that those who represented the defendant stated that they had no instructions other than to apply for adjournment and withdrew from the suit.

Although this conduct has very little to do with the point in this case, I think it is not out of place to indicate that to take up such an attitude, which often greatly embarrasses one who desires to try, and to retreat from the position in which this behaviour puts him, is a mistake. It is far better, if in any way possible so to do, for those representing a litigant in such circumstances to continue the conduct of the case as far as may be possible and then to intimate clearly the reasons for which it is found that the case can be at that stage carried no further by him. If his petition for adjournment under such circumstances is then rejected, it may well become a matter for serious consideration as to whether the rejection of such an application was appropriate or the reverse.

To return now to the course which this litigation has pursued; the Munsiff's order in this suit made on the 1st of November 1919 was that,

"the suit be decreed *ex-parte* with costs and Rs. 253 mesne profits, and future mesne profits to be ascertained hereafter in execution department. The plaintiff's title to the suit be declared and he do recover possession of the same on ousting the defendant",

Now apparently on the 29th of November the defendant filed an application for review before the Munsif of this order and on or about the same date an appeal was also entered against this decision. On the 5th of January, 1920, the Munsif notes in his order sheet that an intimation had been received from the appellate Court calling for the record and he accordingly ordered the record to be sent to the higher Court and stayed the proceedings for setting aside the *ex parte* decree which had been put forward before him and of which he had then fixed provisionally the hearing for the 17th of January.

The matter seems to have come before the Subordinate Judge of Patna a good many months later; for it is found that by a judgment dated the 18th January, 1921, that Judge disposed of the appeal. He went into the merits of the case and came to the conclusion that on the merits the Munsif was right and he affirmed the Munsif's decision. He states, however, at the conclusion of his decision that he observes that an application for rehearing under Order IX, rule 13 of the Civil Procedure Code was still pending before the Munsif. He adds that although in the appeal before him no case had been made out for remitting the suit for a fresh trial upon the merits and that, therefore, he found himself unable to accede to the appellant's request for a remand, yet he thought that the learned Munsif might re-consider this matter if he (the Munsif) thought that it was a fit case for setting aside the *ex parte* decree which he had made.

On the 14th July, the record having been received back by the Munsif, he, guided presumably by what had fallen from the Subordinate Judge, decided to consider whether or not he ought to set aside his *ex parte* decree made on the 1st November, 1919; and, accordingly, he fixed a date for the hearing of the application.

After some delay the matter came up for his decision on the 6th September and the learned Munsif then dealt with the case somewhat exhaustively. He points out in a careful judgment that the application before him had been opposed on two grounds: firstly on legal grounds and secondly on merits. Dealing with the former ground of opposition he came to the conclusion, on the authority of the case of *Mathura Prasad* v. *Ram Chandar Lal* (1) that the order of the Court of appeal was final and that the applicant before him having appealed from his *ex parte* decree and the appellate Court having considered the case on its merits and dismissed the appeal, the case for reinstatement had gone out of his (the Munsif's) hands and that he had no further seisin of it. He, therefore came to the decision that on this legal ground the application must be rejected; but in addition to thus deciding the matter on this ground of objection he also considered the merits of the case; and after having given a lengthy summary of what had taken place before him and the causes which had given rise to the substantial delay between the date when the plaint was entered and the hearing of the suit, he was of the view that he saw absolutely no ground for restoration of the matter.

The defendant appealed from this decision to the Subordinate Judge and on the 11th of March of this year that Judge decided against the appellant. The Subordinate Judge did not think that it was worthwhile to go into the question of the merits because he was satisfied that the legal grounds upon which the Munsif had dismissed the appellant's application were sound and should be affirmed. He held, therefore, that the Munsif was right in refusing to restore the suit.

It may perhaps, in passing, be desirable to mention that it apparently suggested to the defendant that a second appeal should have been presented from the judgment of the Subordinate Judge of the 10th January 1921.

The time, however, for filing such an appeal had expired; an application to this Court was made in June of this year asking that under the circumstances the time should be extended so as to allow the entry of the appeal. The application, however, was rejected on the 31st July by Mr. Justice Das and Mr. Justice Adami, on the ground that under the provi-

(1) (1915) 37 All. 208; 28 I. C. 261; 3 A. L. J. 283.

sions of the Limitation Act the circumstances under which extension of time was sought had no application in a case of this nature.

As a last resort the defendant has now brought this matter before this Court, asking that it should exercise its revisional jurisdiction.

I need not, I think, refer, for it is strictly speaking hardly material so to do more than casually, to the allegations of the hardship which have been suggested in this application: it is sufficient to state that it is now said that principally owing to fact that the applicant is a *pardahnashin* lady and on that account unacquainted with legal or business affairs, certain important documents of title, which would have assisted her most materially in connection with her contention, which she would have desired to adduce in defending herself in the original suit, had been mislaid and had not been discovered in time for their presentation before the Munsif in 1919, I can only say in comment upon this statement that it does not, so far as I can see, appear clearly from any of the records which have been placed before my notice that the exact nature of these documents was explicitly characterised.

The only point which has been pressed before me is that in this matter it was incumbent upon the Subordinate Judge to have considered the decision of the Munsif so far as it related to the reasons why he had originally decided to hear the case *ex parte* and to reject the application originally made for further time and to refuse to set aside the application for re-instatement on questions relating to the facts of the case; and that the Subordinate Judge should not have dealt solely with the question of law and affirmed the decision of the Munsif on the legal ground alone, because, so it is argued, both the Munsif and the Subordinate Judge were wrong in thinking that the Munsif was debarred by what had taken place from re-instating the case before him.

This contention formed the subject matter of spirited argument; and there seems little doubt that, unless one looks very carefully into the present position of the law as referred to in the recent decisions, there has been some discrepancy of opinion.

Put very broadly the position may thus be stated: the Munsif may perhaps be entitled to consider an application made to him to review his decision even where an appeal has been lodged; but where such an appeal has been actually decided the Munsif has no power to entertain such an application. The line of cases to which reference has been made in this case to me may, for practical purposes, be regarded as commencing with that of *Ramanadhan Chetti* v. *Narayan Chetti* (2). In that case in 1904 it was held that it must on principle be considered that after the due filing of an appeal and during its pendency the power of the inferior Court in any way to deal with the litigation is completely in abeyance other than in connection with the carrying out of its decree. This case was followed by that of *Sankara Bhatta* v. *Subraya Bhatta* (3) where it was held that after an appeal had been filed against the decree of a lower Court the power to set aside the original decree on an application under section 108, Civil Procedure Code (new Order IX, rule 13,) becomes vested in the appellate Court.

In the other direction, however, were cited the case of *Zendulal Nandlal* v. *Kishorilal Mehtehrai* (4) where it was held that when an *ex parte* decree had been satisfied there was still nothing to disentitle a defendant from applying successfully to a Court to set it aside under Section 108 of the Civil Procedure Code. Far more important however than this case was that of *Chenna Reddi* v. *Peddaobi Reddi* (5). In that case it was held in 1909 that where an application for review had been presented by a party to a suit and an appeal had afterwards been preferred, the Court to which the application for review is made

(2) [1904] 27 Mad. 602; 14 M. L. J. 321.

(3) [1907] 30 Mad. 535; 17 M. L. J. 436.

(4) [1899] 23 Bom. 716; 1 Bom. L. R. 213.

(5) [1909] 32 Mad. 416; 6 M. L. T. 135; 2 I C. 802; 19 M. L. J. 388

was not thereby deprived of jurisdiction to entertain the application. The case of *Ramanathan Chetti* v. *Narayan Chetti* (2) to which I have already made reference was overruled; whilst that of *Sankara Bhatta* v. *Subaya Bhatta and others* (3) was there distinguished. Now in the course of their Lordships' judgment, which was that of a Full Bench consisting of Mr. Justice Wallis, Mr. Justice Munro and Mr. Justice Sankaran Nair, their Lordships referred to the intention of the framers of the Civil Procedure Code. Their Lordships say:—

This reference raises the question whether when an application for review of judgment has been made prior to the filing of an appeal, and an appeal is filed subsequently, the Court is precluded from proceeding to hear the application for review. Section 623, Civil Procedure Code provides for making an application for review before an appeal has been filed, and sections 624 and 630 provide that the Court is either to reject the application or to grant it and re-hear the case. The Legislature has thus conferred upon the party a right to apply for review and upon the Court jurisdiction to entertain the application, and has directed how it shall be dealt with. When a right and a jurisdiction are conferred expressly by statute in this way it appears to me that they cannot be taken away or cut down except by express words or necessary implication. There are no express words and the question, therefore, is: Is there any necessary implication?

Their Lordships continue to consider why they regard implication as being absent, and after expressing their disapproval of the decision in the case of *Ramanathan Chetti* v. *Narayan Chetti* (2) they go on to add:—

"Now after an appeal has been filed the appellate Court is seised of the case and should no doubt be applied to rather than the Court of First Instance; but it is a very difficult thing to press this principle so far as to say that the act of a party in filing an appeal deprives the Court of First Instance of power to dispose of an application which has been properly made to it in the exercise of its jurisdiction. Such a notion would never, I think, have occurred to the framers of the Code."

Their Lordships then go on to consider what was the attitude of mind in which the English lawyers who were drawing up this Code must have been and they then make use of an expression (referring to the position under English law) upon which the learned Counsel for the applicant before me has very rightly laid great stress.

Their Lordships say:—

"They were English lawyers engaged in conferring upon Indian Courts subject no doubt, to modifications and restrictions, jurisdictions to grant relief by way of review of judgment similar to that which had been exercised by Courts of Equity in England and by the Supreme Courts in the exercise of their equitable jurisdiction. It is only necessary to refer to what is said in Mitford's Pleadings in Chancery, 5th edition, page 101, on bills of review or to the observations of Cozens Hardy, L.J., in *Bright* v. *Sellar* (6) to see that section 623 contains an adaptation of the practice as to bills of review in equity. Not only is there no warrant for the notion that the filing of an appeal deprived the Court of jurisdiction to proceed further with a bill of review but it was even held that a bill of review might be filed after the affirmance of the decree by the appellate Court. If the framers of the Code had intended to introduce any such rule I think they would have said expressly not only that an application for review should not ordinarily be made after the filing of an appeal but also that filing of an appeal should determine the jurisdiction to dispose of an application made before the filing of the appeal. On the whole it seems to me impossible to hold that there is any necessary implication that the filing of an appeal operates as a stay of proceedings on an application for review, especially as section 623 itself provides for making certain applications for review even after the filing of an appeal"

Now, it does certainly appear at first sight that these remarks con-

(6) [1904] 1 K. B. 6.

stitute some foundation for the contention which has been urged upon me by the learned Counsel for the applicant here. There are, however, later cases, the trend of all of which appears to point in a somewhat different direction. The first of these is to be found in the decision in the case of *Brij Narayan* v *Tejbal Bikram Bahadur* (7). It is not necessary to refer in detail to the facts in that case, save to indicate that there was an order passed by the Subordinate Judge of Moradabad amending a decree of his Court and that previous to the order of amendment that decree had been affirmed on appeal by the High Court.

The High Court of Allahabad has observed that the Subordinate Judge had no jurisdiction under such circumstances to amend his order, and their Lordships of the Privy Council in commenting upon a peculiar anomaly which was observable between the position of two separate decree-holders, one of whom had succeeded in obtaining an amendment of his order originally made by the Subordinate Judge, and the other of whom had not, remarked:—

"Their Lordships have not had the advantage of hearing the case argued for the respondent, but they think the High Court have themselves said enough to make it clear that if the decree of the First Court was made without jurisdiction as altering a decree after it had been affirmed on appeal in the case of one of joint decree-holders, so also the alteration in the case of another of joint decree-holders was equally ineffectual."

The observations to which their Lordships referred as having been made by the High Court of Allahabad were to the following effect:

"A Bench of this Court on the application by Lachman Das allowed the first application, holding that the Subordinate Judge had no power to modify his decree after it had been confirmed by the High Court and set aside the order complained of. In the other application, the Bench made an order rejecting it, holding that, under all the circumstances of the case, this was not a case in which they should exercise their discretionary power in revision. The consequence is that there are now two joint decree holders, as to one of whom the decree contains a provision for future interest the value of which is Rs. 19,000 odd, whilst as to the other this provision does not exist. The provision of the decree, therefore, seems to be apparently inconsistent, as out of two joint decree-holders one can execute the decree plus future interest, whilst the other cannot."

It would certainly seem from their Lordships' observations in that case that their Lordships did not necessarily associate themselves with the position which had been taken up by the High Court of Allahabad in their view that the decree of the inferior Court had been made without jurisdiction in altering that decree after it had been affirmed on appeal. The case was followed by that of *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury*, (8) and decided in 1911. In that case, which was heard by Mr. Justice Mookerjee and Mr. Justice Teunon, it was declared that an original Court can entertain an application to set aside an *ex parte* decree although an appeal by the contesting defendant is pending in the appellate Court.

This decision may not, as I have just quoted it, appear to carry the matter in any way further; but there are words used in the judgment of the Court to which my attention has been drawn by the learned Vakil for the respondent before me, and which certainly seem to assist in a proper consideration of the point which is now before me for my decision. Their Lordships say at page 400:—

"In so far as the second point is concerned it has been argued by the learned Vakil for the respondent that the Subordinate Judge had no jurisdiction to entertain the application to set aside the *ex parte* decree, because the contesting defendants had preferred an appeal to this Court against the

(7) (1910) 32 All 295; 37 I. A. 70; 14 C. W. N. 667; 7 A. L. J. 507; 11 C. L. J. 560; 12 Bom. L. R. 444; 8 M. L. T. 57; 20 M. L. J. 537; 6 I.C. 669; (1910) M. W. N. 392 (P. C.)

(8) (1911) 38 Cal. 394; 13 C. L.J. 221; 9 I. C. 189; 15 C. W. N. 399.

decree.....In our opinion, the objection by the respondent must be overruled."

Then their Lordships after referring to cases which were quoted before them and to which I have here already for the most part made some reference go on to remark:—

"It has been broadly contended, however, by the learned Vakil for the respondent, upon the authority of expressions to be found in the judgments in *Dhonai Sardar* v. *Tarak Nath Chowdhury* (9); *Ramanathan Chetti* v. *Narayanan Chetti* (2) and *Sankara Bhatta* v. *Subraya Bhatta* (3) that the immediate effect of the presentation of an appeal to the superior Court against the decree of a subordinate Court, is to destroy the jurisdiction of the latter Court to deal with the judgment in controversy in any way. We are not prepared to accept this proposition as well-founded on principle and it is, as a matter of fact, opposed to the decision of the House of Lords in *Mellish* v. *Richardson* (10) in which it was ruled, that where the Court would otherwise have the authority to amend the judgment, it may be done after an appeal has been taken This view is entirely inconsistent with the theory that the mere presentation of an appeal puts it beyond the power of the original Court to deal in any manner with the judgment under appeal."

and then their Lordships use word here of considerable importance. They add:—

"The position is obviously different after the adjudication of the appeal, when the original judgment has been superseded by the judgment of the Court of appeal: *Brij Narain* v *Jejbat* (7)

The matter does not, however, altogether remain there. In the case of *Mathura Prasad* v *Ram Charan Lal* (1) the question here seems to have been considered by Mr. Justice Chamier and Mr. Justice Piggott. Their Lordships there held that when once the High Court had confirmed a decree on appeal it was not open to the Court which passed the decree to entertain an application to set the decree aside and it made no difference that the application to set the decree aside was filed before the appeal was disposed of. Their Lordships in that case had cited before them practically all the cases to which I have referred, and in their judgment they remarked.

"This case was decided by the Court of first instance on the 20th September 1911. On the 30th of November, 1911, present appellant presented his application to have the decree set aside as against him. When the application was called on for hearing it was discovered that the file of the original suit had been sent to this Court in consequence of an appeal which had been filed by other defendants. The hearing of the application was put off from time to time, the Court apparently being of opinion that it was unnecessary or impossible to take up the application until after the appeal had been disposed of by this Court. The appeal was disposed of by this Court on the 24th February 1913, and after the record had been returned to the Court below the applicant's application was taken up. It was dismissed by the Subordinate Judge on the ground that he had no jurisdiction to alter or set aside the decree passed by him inasmuch as it had been confirmed by, and become, as he says, merged in, the decree passed by this Court. We have been referred to several decisions bearing on the question whether a Court of first instance has power to alter or set aside its decree after an appeal has been filed against that decree. There seems to be some difference of opinion on the question whether a lower Court can entertain an application for review or to set aside or alter its decree while an appeal against the decree is pending in a superior Court, but all the authorities seem to be agreed that when a decree has been passed by the superior Court the lower Court cannot alter, or amend its decree."

Now, when their Lordships make use of the expression "all the authorities" they are evidently referring to the cases which were quoted before them by the respondents to the

(9) [1910] 12 C. L. J. 53=5 I. C. 525.
(10) (1832) 36 R R. 111.

appeal which they were hearing. Those cases as set out in the report are: *Brij Narain* v. *Tejpal Bikram Bahadur* (7), *Sankar Bhatta* v. *Subrava Bhatta* (8), *Dhonai Sardar* v. *Tarak Nath Chowdhury* (9) and *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (8) to which I have just referred.

I have now completed the review of this legal point which has been placed before me. I think there can be no doubt that on a proper survey of the result of the decisions to which I have been referred and to which I have referred, the contention put forward by the learned Counsel for the applicant here must fail.

I am of opinion that the Munsif and the Subordinate Judge were both right in the legal decision to which they came, namely, that after the original appeal to the Subordinate Judge from the Munsif's *ex parte* decree had been dealt with by the Subordinate Judge and decided by him on the merits as well as on the question of the Munsif's decision refusing the application of the defendant for further time, it was not open to the Munsif to entertain the application which had been made to him to set aside his *ex parte* decree. I think further that the Subordinate Judge was in no way incorrect in view of the opinion which he had formed as to the correctness of the Munsif's attitude in refusing to entertain the application to re-open his order, in dismissing the appeal which was made to him solely on the ground that the Munsif was right in considering that the decision of the appeal in the original suit had debarred him from exercising further jurisdiction over the matter.

This application to me must, therefore, fail with costs, and I must decline to interfere. Hearing fee three gold *mohurs*.

Rule discharged.

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* **A. I. R. 1923 Patna 337.**

DAS AND KULWANT SAHAY, JJ.

Baidyanath and others—Petitioners

v.

Bholanath Roy and others—Opp. Party.

Civil Rev. No. 234 of 1922, decided on 17th Feb., 1923, against the order of the Sub-Judge, Dhanbad, dated 19th June, 1922.

Civil P.C., O. 11, R. 14—Production of documents—Order for, must follow one under O 11, R. 12.

An order for production of documents must follow an order as to affidavit, of documents under O. 11, R. 12 When that order would be passed against a party it would be open to him to say that so long as the opposite party had not established his title to the property in respect of which that order was sought, it was not open to the Court to compel him to disclose his documents. [P. 338, Cs 1 & 2.]

P. K. Sen, S. C. Mozumdar and *A. B. Mukerjee*—for Petitioners.

S. M. Mullick and *S. N. Bose*—for Opp. Party.

Das, J. :- This application is directed against an order of the learned Subordinate Judge of Dhanbad, dated the 19th June 1922. The learned Subordinate Judge directed the defendants Nos. 2 and 3 to produce the account books of certain collieries which are the subject-matter of the dispute between the parties.

Now the suit is for a declaration that a certain compromise to which the plaintiff was a party was fraudulently entered into and for partition of the joint family properties. The plaintiff is a step-brother of defendant No. 1; the defendant No. 2 is the son one Bireshar the brother of defendant No. 1, and defendant No. 3 is the wife of defendant No. 1. It appears that there was a suit by Bireshar and Butto Kristo Roy, defendant No. 1, as against the members of a Committee that were appointed to manage the joint family properties by the will of their father. In that suit a Receiver was appointed to take charge of the joint family properties.

The petitioners allege that in September 1914, Ramkanali colliery which is one of the properties in dispute in this litigation was settled with Bireshar, the father of defendant No. 2 and with one Barat, defendant No. 4. Subse-

quently it appears that a formal lease was granted to Bireshar and it is alleged by the petitioners that Baidyanath, the son of Bireshar, who has been cited in this litigation as defendant No. 2 has taken a conveyance of Barat's interest. As regards the other colliery which is referred to as Ganshdiha colliery the facts are these.

In 1916 there was a suit for partition by the plaintiff against the defendants and that suit was compromised upon terms that the colliery should be sold to the wives of Bireshar and Butto Kristo. The colliery was in fact sold subject to certain incumbrances to Satya Devi, the wife of Bireshar and Asokalata Devi, the wife of Butto Kristo. Satya Devi is dead and her interest has devolved on defendant No. 2. Asokalata Devi has, as I have already mentioned, been cited as defendant No. 3 in the action. Now it is obvious that in order to succeed, the plaintiff must first of all get rid of two transactions, firstly, the transaction of September 1914 by which the receiver settled Ramkanali colliery with Bireshar and Barat, and secondly, the compromise decree in the suit of 1916.

The order which is complained of was passed in an application by the plaintiff to compel the defendants to produce the account books relating to Ramkanali colliery and Ganshdiha colliery. The learned Subordinate Judge thought that there was no reason why defendants 2 and 3 should not produce the account books of the collieries in question and he has passed an order upon them to produce those books without delay.

Now in my opinion the order of the learned Subordinate Judge cannot for a moment be supported. The question of production of documents is dealt with in Order 11, rule 14, C. P. C. Now an order as to production of documents must follow an order as to an affidavit of documents which is dealt with in Order 11, rule 12 of the Code.

There is, so far as I am aware, no order upon the defendants compelling them to file an affidavit of documents, and if an order had been passed upon the defendants, it would have been open to them to say that so long as the plaintiff had not established his title to the collieries in question it was not open to the Court to compel him to disclose his account books relating to those collieries. But it is contended before us on behalf of the plaintiff that he has grave apprehension that the defendants may tamper with these account books Mr. P. K. Sen on behalf of the defendants agrees to produce the account books from 1916 to 1922 before the Court so that the Court may affix the seal of the Court on every page of these books of account. We therefore order by consent of the parties that the defendant do produce these books of account from 1916 before the Court in order to enable the Court to affix its seal upon every page of these books of account. That being done, the books of account will be returned to the defendants It is understood that the plaintiffs will not be entitled to an inspection of these books of account until they succeed in establishing their title to these collieries which they can only do by inducing the Court to hold that the compromise decree was fraudulent and that the transaction of September 1914 does not bind them.

There will be no order as to costs.

Let the record be sent down at once

Kulwant Sahay, J. :—I agree.

Application allowed.

A. I. R. 1923 Patna 338.

ROSS, J

Jairam Sahu and others—Accused—Petitioners

v.

King-Emperor—Opposite Party.

Criminal Rev. No. 750 of 1922, decided on 24th January, 1923, against a decision of Judicial Commissioner of Chota Nagpur, dated 16th October, 1922.

Income Tax Act (1922), *S.* 46 (3) *and* (4)—*Distress warrant by Collector to Police Officer is illegal—Penal Code, S.* 353.

Where a Police Officer attached monies in a shop in pursuance of a distress warrants issued by the Collector for recovery of income tax, and was assaulted by the accused *Held*, the Collector may on receipt of a certificate from the Income Tax Officer recover the amount specified therein as if it were an arrear of land revenue, and in areas notified by the Commissioner arrears may also be recovered by any process enforceable for the recovery of an arrear of any Municipal tax or local rate. But in the absence of orders under S. 46 (3) (4), the Collector cannot issue distress

warrant for realisation of arrears of income-tax. The Collector has no authority to issue distress warrant for the realisation of arrears of income tax under S. 46 (3) to an officer of the Police and the police officer executing such a warrant cannot be said to be acting in execution of his duty as a police officer. On this ground therefore the charge under section 353 must fail if there was resistance to the police officer. If it was a fact that the money belonged to the petitioners Nos 2 and 3 and that they were separate from petitioner No. 1 against whom distress warrant was issued, then clearly the seizure of the money was illegal.
[P. 399, C. 2].

P. K. Sen and *S. C. Dey*—for Petitioners.

L. N. Singh, Government Pleader—for the Crown.

Ross, J.:—Petitioners Nos. to 3 have been sentenced on appeal to two months' rigorous imprisonment each under Section 353 of the Indian Penal Code, and petitioners Nos. 4 to 6 to six weeks under the same section. The case for the prosecution was that on the 20th June 1922, a market was being held at Pathalgatha, and that the petitioners Nos. 1 to 3 with other shop-keepers were keeping a stall jointly. The Sub-Inspector of Jidhour police station appeared with a warrant for the realisation of income-tax from petitioner No. 1. Petitioners Nos. 2 and 3 were present and the Sub-Inspector attached bag of money which was lying in front of them in execution of the warrant.

The petitioners Nos. and 3 protested that it was their money and that the Sub-Inspector had no right to take it. A disturbance followed and the Police Officer and the party accompanying him retired; a mob collected and chased them, but no personal injury was inflicted. The defence was that the warrant was illegal and that in executing it the Sub-Inspector could not be said a 'public servant' executing his duty as such. It was further urged on behalf of the accused that the petitioners Nos. 2 and 3 were separate from petitioner No. 1; and that even if the warrant was good the Sub-Inspector was not entitled to take their money.

The warrant is a distress warrant issued by the Income Tax Collector on the 3rd April, 1922. It is in the old form and purports to be under Section 26 of Act VII of 1918. The new Act (XI of 1920) came into force on the 1st April, and the corresponding section is Section 46. That section describes the mode of recovering income-tax. The Collector may on receipt of a certificate from the Income Tax Officer recover the amount specified therein as if it were an arrear of land revenue, and in areas notified by the Commissioner arrears may also be recovered by any process enforceable for the recovery of an arrear of any Municipal tax or local rate. This latter provision corresponds to Section 36 (4) of the old Act, except that there the local Government is the authority in place of the Commissioner. In Mazumdar's 'Commentary on the law of Income Tax' published in 1924, it is stated that no orders had been issued by the Lieutenant-Governor of Bihar and Orissa in Council under Section 36 (4) and it was intended that the Collector should recover arrears by his own agency and not by the Municipality.

No order passed by the Commissioner under Section 46, clauses (3) and (4) have been produced, and it would appear that this arrear of income-tax should have been recovered as if it had been an arrear of land revenue. But even supposing that a distress warrant could legally be issued, the Collector had, in my opinion, no authority to issue it to an officer of the Police and the police officer executing such a warrant could not be said to be acting in execution of his duty as a police officer. On this ground, therefore, the charge under Section 353 must fail.

There is a defect in the judgment in this case, in that no finding has been come to as to whether petitioners Nos. 2 and 3 were separate from petitioner No. 1 against whom the warrant was issued. It appears from the judgment of the Judicial Commissioner that one of the prosecution witnesses had agreed with the defence evidence on this point and if it was a fact that the money belonged to the petitioners Nos. 2 and 3 and that they were separate from petitioner No. 1, then clearly the seizure of the money was illegal. The petitioners could not be convicted without a finding on this part of the case.

On both these grounds, therefore, I set aside the conviction and sentence passed on the petitioners and direct that they be acquitted and released from bail.

Rule made absolute.

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* A. I. R. 1923 Patna 340.

DAS AND KULWANT SAHAY, JJ.

Stonewigg and another —Defendants—Appellants

v.

Kameshwar Narayan Singh and others—Plaintiffs—Respondents.

F. A. Nos. 53 and 61 of 1920, decided on 10th January, 1923, against a decision of the Add. Sub. J. of Darbhanga, dated 12th November, 1919.

(a) *T. P. Act, S 106—Tenant holding over—Assent of proprietor—Tenancy can be put an end to only by notice to quit.*

If a tenant on the expiry of the lease continues possession of the property with the assent and sanction of the proprietors, then there is by the operation of law a tenancy from year to year in favour of the tenant and if there is a tenancy from year to year, that tenancy can be put an end to only by a notice under Sec 106. [P. 341, C. 1]

(b) *Record-of rights—Presumption as to correctness of entry exists and no further evidence to prove the same is necessary.*

Under the general law the landlord is entitled to claim rent from every one shown to hold land within the ambit of his zemindari. That is the general law and if any one relies upon any exception to the general law it is for him to prove that he comes within the exception. To that extent there is a conflict between the record-of-rights and the general law. But the case of an occupancy tenant is entirely different. There is no denial of the right of the landlord to recover rent from the tenant and there is no conflict whatever between the record-of-rights and the case that he the tenant has an occupancy holding within the ambit of his zemindari. The decision of the Judicial Committee in A. I R. 1922 P. C. 272=2 Pat. 38 does not support the extreme proposition that although the record-of-rights is in favour of the tenant, it is still necessary for the tenant to establish by clear evidence that the entry in the record-of-rights is correct.

[P 342, C. 1]

Jayaswal, S.K. Mitra and *Janak Kishore* for Respondents in Appeal No. 53 and for Appellants in Appeal No. 61.

S M. Mullick, Sambhu Saran and *D. N. Sircar*—for Appellants in Appeal No. 53 and for Respondents in Appeal No. 61.

Das, J. :—These analogous appeals arise out of a suit instituted by Kameshwar Narayan Singh, the Respondent in F. A. No. 53 of 1920, against the Appellant in that appeal. The suit was for recovery of certain lands specified in the plaint. Prem Narain, Nem Narain and Bindeshwari were three brothers who had certain shares in Mouzah Siroli. The plaintiff is the son of Nem Narain. It appears that some time in 1885 Prem Narain, Nem Narain and Bindeshwari gave a *thicca* lease to the proprietors of Dowlatpore concern for seven years from 1292 to 1298.

The plaintiff's case is that after the expiry of the lease, the defendants first party who represented the interest of the factory held over on paying rent to the proprietors. The plaintiff asserts that he asked the defendants to make over possession of the disputed lands to him and as the defendants refused to make over possession of the lands to the plaintiff, he instituted the suit out of which this appeal arises on the 16th March 1918, claiming possession of the properties which are specified in two schedules, Sch. I comprising the *milkiat* property, and Sch. II comprising the *zeraiti* lands within the *milkia*.

The Defendants first party resisted the suit on various grounds. It is unnecessary to enter into the defence of the defendants because, before us, the only point that had been argued by Mr. Sushil Madhab Mullick on their behalf is, that the plaint filed on behalf of the plaintiff discloses no cause of action. Mr. Mullick argues that, if the defendants first party held over on paying rent to the proprietors, the effect in law was to create in their favour a tenancy from year to year, and if the factory were tenants from year to year that tenancy could only be terminated by a notice under sec. 106 of the Transfer of Property Act.

Now Mr. Mullick points out that there is no suggestion at all in the plaint that any notice under sec. 106 was served on the defendants first party. There is, in my opinion, considerable force in the arguments which have been advanced before us. It is undoubted law that, if a tenant

on the expiry of the lease continues in possession of the property with the assent and sanction of the proprietor, then there is, by the operation of law, a tenancy from year to year in favour of the tenant and if there is a tenancy from year to year, that tenancy can be put an end to only by a notice under S. 106 of the Transfer of Property Act. But the difficulty is that this point was not taken in the written statement and the learned Subordinate Judge has not gone into the question at all, nor has the point been taken in the grounds of appeal in this Court; and after all it will still be open to the Plaintiff to serve a notice upon the Defendants first party at once and determine the lease. Having regard to this difficulty, the Defendants first party have agreed to surrender possession of Sch. I properties to the Plaintiff and pay to the Plaintiff the *thicca* rents for three years prior to the institution of the suit and also all rent up to the time they do surrender possession of the properties to the Plaintiff.

The Defendants first party undertake to surrender these lands forthwith to the Plaintiff. So far as the Sch. I properties are concerned, there will therefore be a decree, by consent of the parties, that the Defendants first party will forthwith surrender the properties enumerated in Sch. I to the Plaintiff and also pay the Plaintiff his share of the *thicca* rent from the 16th March 1915 up to the date they make over possession of the properties to the Plaintiff It is also agreed that the Defendants first party will be entitled to recover rent from the tenants for this period.

I now come to the other appeal, namely, Appeal No. 61 of 1920. We are concerned in this appeal with certain *raiyati* lands specified in Sch. II of the plaint. The learned Subordinate Judge has come to the conclusion that the factory has established its right to hold the lands which are the subject-matter of this appeal as occupancy tenants.

Now the record-of-rights is undoubtedly in favour of the factory and there is no evidence worth the name on either side. In my opinion the plaintiff has not rebutted the presumption of the correctness of the record-of-rights.

Mr. Jayaswal, arguing on behalf of the Plaintiff-Appellant, contends before us that it is still necessary for the Defendants first party to prove that they hold the lands as occupancy tenants and he relied upon a decision in the case of *E. Stonewigg* v. *Dwarka Singh*(1) But that was a different case altogether. The learned Judge found on the facts that the evidence on behalf of the Plaintiffs was reliable and showed clearly that the Defendant No. 1, who claimed occupancy rights, was not in possession of the lands previous to the lease in question and the learned Judges had no difficulty in showing that, so far as the record-of-rights itself was concerned in that case, it completely demolished the case of Defendant No. 1.

In other words, the record-of-rights in the case cited, far from supporting the case of the Defendants who claimed to be occupancy tenants, completely demolished it. The other case upon which Mr. Jayaswal relied is the case of *Jagdeo Narain Singh* v. *Baldeo Singh* (2). The Judicial Committee, in deciding that case did indeed say as follows:—

"Sec. 106-B declares that 'every entry in a record-of-rights so published shall be presumed to be correct until the contrary is proved.' Considerable stress has been laid on this presumption on behalf of the Respondents. Once, however, the landlord has proved that the land which is sought to be held rent-free lies within his regularly assessed estate or *mahal*, the onus is shifted. In the present case, the lands in dispute lie within the ambit of the estate, which admittedly belongs to the Plaintiffs and the *pro forma* Defendants, and for which they pay the revenue assessed on the *mouza*. In these circumstances it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence

(1) (1917) 4 P. L. W. 178=45 I. C. 706.
(2) A. I. R. 1922 P. C. 372=49 I. A. 399=2 Pat. 38=3 P. L. T. 605=36 C. L. J. 499=32 M. L. T. (P.C.)

that they have been relieved of this obligation, either by contract or by some old grant recognised by Government"

But it will appear that the Judicial Committee did rely upon some evidence which showed clearly that there was a very careful enquiry made by the Government in the course of certain resumption proceedings which established that there was no one upon the lands with a rent-free title; and apart from any other consideration it does seem to me that there is a distinction between a case, where a person claims a rent-free title and a case where a person claims a title as an occupancy tenant. Under the general law the landlord is entitled to claim rent from every one shown to hold land within the ambit of his zemindari. That is the general law and if any one relies upon any exception to the general law it is for him to prove that he comes within the exception. To that extent there is a conflict between the record-of-rights and the general law which allows a landlord to recover rent from every one shown to occupy land within the ambit of his zemindari. But the case of an occupancy tenant is entirely different. There is no denial of the right of the landlord to recover rent from the tenant and there is no conflict whatever between the record-of-rights and the case as put forward on behalf of the tenant that he has an occupancy holding within the ambit of his zemindari.

In my opinion the decision of the Judicial Committee in the case to which We were referred by Mr. Jayaswal does not support the extreme proposition which was argued by him before us, namely, that although the record-of-rights is in favour of the tenant it is still necessary for the tenant to establish by clear evidence that the entry in the record-of-rights is correct.

I must dismiss Appeal No. 61 of 1920 with costs.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

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*A. I. R. 1923 Patna 342.

DAS AND KULWANT SAHAY, JJ.

Ranjit Sahi and others—Plaintiffs—Appellants.

v.

Maulavi Qasim and others—Defendants—Respondents.

F. A. No. 72 of 1920, decided on 29th January, 1923, from the decision of Sub. J., Second Court of Muzaffarpur, dated 17th December, 1919.

(a) Practice—Dismissal of suit after preliminary decree for partition is bad—Partition.

A Court is completely wrong in dismissing a suit after a preliminary decree for partition has been passed on the ground that the lands which were partitioned by the Commissioner were different from the lands ordered to be partitioned under the preliminary decree. [P. 343, C. 1.]

(b) Court Fees Act, S. 7 (iv).—Partition suits—No question of plaintiff's title or share involved—Valuation must be of the whole of the properties and not only of plaintiff's share.

There is a distinction between suits for partition pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share, and suits where the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. In the latter case, it is the value of the plaintiff's share which will determine the jurisdiction of the Court and not the value of the entire property. Where there is no question as regards the title of the plaintiff's, and the only question before the Court is as regards partition, the value of the whole of the properties sought to be partitioned must be the value for the purpose of jurisdiction. 1 P. L. T. 595 Dist. [P. 343, C. 2.]

L. N. Singh and *Hareshwar Prasad Singh*—for Appellant.

Niyamutullah and *A. P. Upadhaya*—for Respondents.

Kulwant Sahay, J:—This is an appeal against a final decree in a partition suit. The plaintiffs brought the suit for partition of certain lands which were left common in the previous Collectorate partition and in the plaint the survey numbers, *khata* numbers and *khasra* numbers of the lands sought to be partitioned are set out. There was a preliminary decree by consent as against the defendants Nos. 16 to 20 and *ex parte* as against the other defendants, and by that decree the learned Subordinate Judge ordered a Commissioner to be appointed to effect the partition as amongst the parties under the terms of the judgment of the 11th August 1919. It appears

that in conformity with the preliminary decree a Commissioner was appointed and he effected the partition and submitted his report upon which objections were taken by the plaintiffs as well as by the defendants. The learned Subordinate Judge has now dismissed the suit entirely on the ground that the lands which were claimed to be joint lands in the plaint are not the lands which have been partitioned by the Commissioner. In this the Subordinate Judge appears to be completely wrong. A preliminary decree for partition having been passed it was not open to the learned Subordinate Judge at a later stage to dismiss the suit altogether. It was no doubt open to him to come to a decision as to what were the lands which were ordered to be partitioned by the preliminary decree and to effect a partition of those lands, but it was not open to him to dismiss the suit altogether on the ground that the lands which were partitioned by the Commissioner were different from the lands ordered to be partitioned under the preliminary decree. The case must go back to the learned Subordinate Judge in order that he may cause the lands which were ordered to be partitioned under the preliminary decree to be partitioned by the Commissioner.

A preliminary objection has been taken to the hearing of this appeal by the learned Counsel for the Respondents on the ground that the value of the plaintiff's share of the properties sought to be partitioned is below Rs. 5,000 and therefore the appeal ought to have been filed before the District Judge; and he relies upon a decision in the case of *Dukhi Singh* v. *Harihar Sah* (1).

The facts of that case are clearly distinguishable from the present case. In that case there had been a previous compromise decree for partition during the minority of the plaintiff who challenged the validity thereof and brought the suit for an adjudication that the compromise partition decree was not binding upon him and that he was in joint possession with the defendants of the ancestral properties and for a declaration of his 1/8th share in the entire properties and of his right to effect a partition thereof. It was held that the suit was one for declaration and with consequential reliefs and was governed by Sec. 7, clause (*iv*) (*c*) of the Court Fees Act and not by Art. 17, clause (*vi*) of Sch. II of the Act. Their Lordships held that having regard to the nature of the suit and the reliefs asked for, the value of the suit for purposes of jurisdiction was the value of the plaintiff's share in the properties and not the value of the entire joint family property. No doubt in considering the question as to whether the appeal in that case lay to the High Court or to the District Court their Lordships considered the broad question as to the value of suits in partition cases, but to my mind there is a distinction between suits for partition pure and simple where the plaintiff is in joint possession of his share and there is no dispute as to his title or share, and suits where the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. In the later case, it is the value of the plaintiff's share which will determine the jurisdiction of the Court and not the value of the entire property. In the present case there is no question as regards the title of the plaintiffs; the only question before the Court was as regards partition; therefore, the value of the whole of the properties sought to be partitioned must be the value for the purposes of jurisdiction. This view is supported by the fact that in a suit for partition, the Court does often, on the application of the defendants, effect a partition of the shares of the different defendants also amongst themselves, and therefore in such a case the value, for the purposes of jurisdiction, cannot be the value of the plaintiff's share because the Court deals with the entire estate and effects partition not only of the plaintiff's share but of the defendant's share also. Moreover a decree in a partition suit is engrossed on a stamped paper required by Art. 45 of the Indian Stamp Act, the stamp duty being payable not only on the value

(1) (1900) 1 P. L. T. 505 = 5 P. C. J. 540 = 38 I C. 336.

of the plaintiff's share but on the value of all the shares separated and this clearly shows that the value of the plaintiff's share alone cannot determine the jurisdiction of the Court. The Calcutta High Court has uniformly adopted this view and I feel inclined to follow the same. In my view the preliminary objection fails and the appeal was properly presented to this Court.

The result is that the decree of the learned Subordinate Judge is set aside and the case is sent back to him for disposal. The appellants are entitled to their costs from the respondent No. 2 alone; hearing fee two gold *mohurs*.

Das, J. : —I agree.

Case remanded.

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*A. I. R. 1923 Patna 344.

DAS AND KULWANT SAHAY, JJ.

Jagnarain Dubey—Plaintiff—Appellant

v.

Bidapat Dubey—Defendant—Respondent.

F. A. No 139 of 1920, decided on 29th Jan., 1922, from the decision of Sub. J., Second Court of Arrah, dated the 23rd April, 1920.

(a) Malicious prosecution—Conviction in first Court and acquittal in appeal—Presumption is against the absence of reasonable and probable cause.

The true rule is that if the plaintiff has been convicted in the first instance and ultimately acquitted on appeal the presumption is against the absence of reasonable and probable cause unless the original conviction is proved to have proceeded on evidence known by the defendant to be false or on the wilful suppression by him of material information. [P. 345, C. 1.]

(b) Civil P.C., O. 14, R. 2—Issue requiring evidence is not a preliminary issue.

The first and second issues were as follows:—

1. Has the plaintiff any cause of action against the defendant?

2. Is the suit as framed tenable?

Judge made the following addition to the second issue—

"Was the complaint, if any, made by the defendant maliciously and without any reasonable and probable cause?

***Held*, that issues 1 and 2, as they stood, before the Judge made the addition to the second issue could be regarded as preliminary issues, but the second issue, after the addition could not be regarded as a preliminary issue. [P. 345, C. 2.]**

S. M. Mullick, *Kailashpati* and *Dhanindra Nath Verma*—for Appellant.

N. C. Sinha and *N. C. Ghosh*—for Respt.

Das, J. :—This appeal arises out of a suit instituted by the appellant for recovery of Rs. 10,900 as damages for false and malicious prosecution of himself by the defendant.

It appears that the plaintiff was in possession of certain land by virtue of a yearly settlement from the canal authorities. The settlement for 1916 to 1917 expired on the 31st March 1917, and it also appears that the plaintiff made no fresh application for settlement to the canal authorities. On the 5th of March 1917, the defendant applied for settlement and on the 7th of May the land was settled with the defendant. The defendant entered upon possession of the land on the 7th August, and it is the case of the defendant that on the 8th of August the plaintiff came upon the land and ordered the defendant to leave the land and called upon his men to beat him. Thereupon the defendant went and told the canal authorities of all that had happened and the canal authorities informed the police of the occurrence of the 8th of August. The Police ultimately recorded the first information of the defendant in which he clearly asserts that he was making a complaint against the plaintiff The plaintiff was tried under Sections 143 and 447 of the Indian Penal Code. He was acquitted of the charge under Section 143, but was convicted under section 447, I. P. C., by the Court of first instance. That conviction was upheld on appeal but was set aside in revision by this Court. The plaintiff thereafter commenced the proceedings out of which this appeal arises for recovery of the sum of Rs 10,900 as damages for false and malicious prosecution of himself.

The learned Subordinate Judge framed four issues of which the first and second issues were as follows:—

1. Has the plaintiff any cause of action against the defendant?

2 Is the suit as framed tenable?

On the date of the hearing, however, that is to say, on the 21st of April, 1920, the learned Subordinate Judge made an addition to the second issue and the added portion runs as follows:—

"Was the complaint, if any, made by the defendant malicious and without any reasonable and probable cause"?

He tried the first and second issues as preliminary issues, and he says in the order-sheet that the parties did not adduce any oral evidence on the preliminary points. He decided these issues without any oral evidence against the plaintiff and dismissed the plaintiff's suit with costs. In my opinion, it was quite impossible for the learned Subordinate Judge to decide this case without any oral evidence. It is quite true, as has been observed more than once, that the very fact that a Court of competent jurisdiction convicted the plaintiff shows that the defendant had a foundation for the prosecution; but as was laid down by Mookerjee, J. in the case of *Shama Bibee* v. *Chairman of Baranagore Municipality* (1), the true rule is that, if the plaintiff has been convicted in the first instance and ultimately acquitted on appeal, the presumption is against the absence of reasonable and probable cause, unless the original conviction is proved to have proceeded on evidence known by the defendant to be false or on the wilful suppression by him of material information.

It was, therefore, open to the plaintiff to adduce evidence to establish that the original conviction was based on evidence known by the defendant to be false or on the wilful suppression by him of material information. The learned Subordinate Judge having decided the case on arguments and without any oral evidence, it was plainly impossible for the plaintiff to adduce any oral evidence to establish that there was want of reasonable and probable cause in lodging the information against him.

It has been strenuously contended before us that the plaintiff declined to give any evidence in the case and that it was open to the Subordinate Judge to decide the case in the way in which he has done. The argument does not impress me. The order sheet is quite clear that the learned Subordinate Judge tried the first and second issues as preliminary issues; but in my opinion the second issue as amended by him could not be regarded as a preliminary issue. No doubt, issues 1 and 2 as they stood, before the learned Subordinate Judge made the addition to the second issue, could be regarded as preliminary issues, but the second issue, after the addition made to it by the learned Subordinate Judge, could not, in my opinion, be regarded as a preliminary issue.

The plaintiff was obviously misled by the circumstances that the learned Subordinate Judge insisted on dealing with the most important issue on facts as a preliminary issue. I cannot agree that the case has at all been properly tried by the learned Subordinate Judge in the Court below. On the second point, namely, whether there was any cause of action against the defendant, the learned Subordinate Judge has come to the conclusion that the plaintiff has no cause of action as against the defendant. According to him the canal authorities were the real prosecutors in the case, and that the plaintiffs should have proceeded against the canal authorities.

In discussing this point, the learned Subordinate Judge refers to the decision of the Judicial Committee in the case of *Jaya Prasad* v. *Bhagat Singh* (2). In that case the Judicial Committee laid down that the question in all cases must be, who was the prosecutor, and that the answer must depend upon the whole circumstances of the case. It is quite impossible for a Court to say who the real prosecutor is, unless there is evidence before the Court to assist it in the investigation of the important question. As I have said, the case has not been properly tried, and I must allow the appeal, set aside the judgment and decree passed by the Court below and remand the case to that Court for a decision according to law.

The costs will abide the result and will be disposed of by the learned Subordinate Judge.

(1) (1910) 12 C. L. J 410=6 I. C. 675.

(2) (1908) 30 All. 525=35 I. A 189=10 Bom. L R. 1030=5 A L J 665=14 Bur. L. R. 818=11 C. C. 871=4 M. L. T. 201=18 M L.J. 324=8 L. J 337=12 C. W. N. 1017 (P. C.).

We grant the appellant a certificate under Section 3 of the Court Fees Act entitling him to a refund of the Court-fee paid by him on the memorandum of appeal.

Kulwant Sahay, J. :—I agree

Appeal allowed.

A. I. R. 1923 Patna 346.

Ross, J.

Ram Das Sah -Defendant -Appellant

v

Damodar Prasad and others -Plaintiffs —Respondents.

S A Nos. 51 and 248 of 1921, decided on 25th Jan., 19 , against the decree of the Add. Sub-Judge of Saran, dated 1st Oct., 1920.

Specific Relief Act, S. 42—Custom of using another's land for performing Ram lil as not invalid—Custom

A custom , which the villagers without interruption by the *malik* have been using the land for performing Ram-lilas, for putting up marriage processions, for keeping *Khalihans* and for tying cattle during the rainy season from time immemorial, is not invalid A declaration of such right can be given 23 B. 666, 17 All 87 and 8 C.W.N. 475 Ref. [P 347, C. 2.]

Nagsu Narain Sinha -for Appellant.

Sarbhu Saran for Respondents.

Ross, J : These are two appeals against the decrees of the Additional Subordinate Judge of Saran reversing the decisions of the Munsif of Chapra in two suits brought by the plaintiffs with regard to small plots of land. Second Appeal No. 51 of 921 relates to title suit No. 538 of 9 the subject of which was 14 *cattas* of land bearing survey plot No. 772. Second Appeal No. 248 of 19 relates to title suit No. 539 of 1918 which was concerned with a plot of land measuring 1 *kathas* 6 *Dhurs* and bearing survey plot No. 724 The allegations in the plaints in the two cases were similar and both cases were dealt with in a single judgment on appeal by the Subordinate Judge and I shall deal with both in this judgment.

The case for the plaintiffs was that the land was *Gairmajrwa am* and that the people of the village used the land for the purpose of *Khalihan* and for putting up marriage processions coming to the village, and for playing Ram-lila and for tying cattle in the rainy season The defence was that the land was waste land which the defendant No. 1, the landlord, was entitled to and that she had in fact settled it with defendant No. 2. The plaintiffs sought a declaration of their rights to and recovery of possession of the land and in suit No. 539 a mandatory injunction on the defendant No. 2 to remove certain structures which he had built on the land

The Munsif dismissed both the suits, the Subordinate Judge passed a decree declaring the rights of the plaintiffs and restoring them to possession. The finding of fact on which his decision is based is that the villagers, without interruption by the *malik* have been using the land for performing Ram-lilas, for putting up marriage processions, for keeping *Khalihans* and for tying cattle during the rainy season from time immemorial. Now an objection is taken to the form of the decree. It is conceded by the learned vakil for the respondents that this finding of fact does not entitle the plaintiffs to a decree for possession. The land belongs to the landlord and the plaintiffs have certain rights over it This does not entitle them to the possession of the land but only to a declaration of their rights. It is said that there should also be an injunction, but no injunction was prayed for in suit No. 538 while the mandatory injunction asked for in suit No. 539 was not apparently pressed in the Courts below because there is no finding that the houses said to have been built on this plot of land make it impossible for the plaintiffs to exercise their customary rights. The only decree, therefore, that can be passed in this case is a decree declaring the rights of the plaintiffs.

The grounds on which the decree passed by the Subordinate Judge is attacked are, first, that the rights found cannot be an easement; that even if they do amount to an easement they will not prevent the landlord from developing and settling the land; and, lastly, that the issue of limitation has not

been tried and, therefore, the case must go back. With regard to the last point, it is true that an issue of limitation was raised but there is nothing to show in the judgment of the Courts below that this point was pressed; nor does there seem to be any substance in the issue because according to the defendant's own case the land was settled in 1326, the year in which the suit was brought, and as this is plainly a suit in which the period of limitation is 12 years there can be no substance in the argument and I think it unnecessary to direct a remand of the case for a determination of the issue.

I now turn to the substantial question in this case It is conceded by the learned vakil for the respondents that it is not a case of easement. The argument on behalf of the appellants is therefore admitted The plaintiff's rights do not amount to an easement and they do not prevent the landlord from developing and settling the land. Effect has been given to this argument by removing that part of the decree which gave the plaintiffs possession. There is nothing to prevent the landlord from settling the land and developing it, so long as he does not interfere with the rights which the plaintiffs have acquired

The learned vakil for the respondents puts his case on the basis of custom. That such customs as are here claimed have been recognised in India is clear from the reported cases. Thus in *Mohidin* v *Shivlingappa* (1) the right of burial within a limited area of land was recognised as a good custom. Similarly in *Kuar Sen* v. *Mamman* (2) the custom of exhibiting *Tazias* and *Alums* and using a certain Chabutra as a sitting place during Moharram was recognised as a good custom. In *Bhola Nath Nundi* v. *The Midnapore Zemindary Company, Limited* (3) the right of pasturage in the land of another was recognised. It is said that the case has not been treated as a case of custom; that the learned Subordinate Judge has alternated between two views : in one part of his judgment he seems to treat the land as village common in which the plaintiffs had proprietary rights and in another part he has treated their rights as an easement, but he has nowhere directed his attention to a consideration of the essentials of custom. It is true that the Subordinate Judge is not very clear in his treatment of the case, but he says distinctly enough that it is not a case of easement. His finding, which I have already quoted, contains all the necessary elements. He finds what rights the plaintiffs have been exercising from time immemorial. It is contended on behalf of the appellants that this custom is not a good custom because it is unreasonable and uncertain. There is no uncertainty about it, because the elements have been specifically set forth in the plaint and specifically found in the judgment. It is said to be unreasonable because it excludes or may exclude the landlord from the use of his land altogether.

A similar objection was taken in the case of *Hall* v. *Nottingham* (4) where the custom set up was the custom for the inhabitants of a parish to enter upon certain land in the parish, and erect a may-pole thereon, and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any times in the year ; but there it was found that such a custom was neither too general nor uncertain nor unreasonable. I see nothing unreasonable about the custom claimed in this case.

The result is that the appeals must substantially fail, but there must be a variation in the form of the decree. The suits are decreed with costs to this extent that the rights of the plaintiffs to perform the Ram-lila and to put up marriage processions and to have their *baratians* and tie cattle during the rainy season on the land in suit are declared There will be no costs of the appeals.

Decree varied.

(1) (1899) 23 Bom 666=1 Bom L. R. 170.
(2) (1895) 17 All. 87=(1895) A. W. N. 10.
(3) (1904) 31 Cal. 503=31 I. A. 75=8 C. W. N. 425=14 M. L. J. 152=8 Sar. 611 (P. C.).

(4) (1876) 1 Exch. Dn. 1=45 L. J, Ex. 50.

* **A. I. R. 1923 Patna 348 (1).**

ROSS, J.

Saraj Kumar Mukherjee and others—Accused—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Misc. A. No. 79 of 1921, decided on 28th October, 1921.

Criminal P. C. S. 345—Several accused—Compounding with one—Whole case will be deemed compounded.

Where a complaint has been compounded as against one of several accused charged with the same offence, the whole case is deemed at compounded. 1 P. L. T. 32 Foll. [P. 348, C. 1]

S. P. Sen—for Petitioners

Manohar Lall, Assistant Government Advocate—for Opposite Party.

Judgment:—This is an application to quash the proceedings in the Court of the Sub-Divisional Magistrate of Purnea against the petitioners. The complainant alleged that holding a second class ticket he was entering a first class compartment owing to the crowd of passengers but was obstructed by a peon, who turned out to be the pay clerk's peon. He succeeded in getting in, but the peon abused and insulted him so that the complainant gave him a blow whereupon he was attacked by the petitioners. Five persons were named as accused and three sections were specified—Sections 323, 147 and 342, but summonses were issued under section 323 only. In his petition of complaint the complainant goes on to say that "the pay clerk's peon begged pardon of me and I gave him word that I would not proceed against him, so he is not included among the accused."

The inference to be drawn from this statement is that if the peon had not been pardoned he would have been included among the accused. The whole proceeding was one transaction arising out of the attempt of the pay clerk's peon to prevent the complainant from entering the first class compartment. Apparently if the peon had not apologised his name would have been among those who were entered in the petition of complaint as accused persons. His name was not so entered because the complainant had compromised the case within him. The case is, therefore, on the authority of *Shyam Behari Singh* v. *Sagar Singh*(1) one in which the whole offence has been compounded. The proceedings are, therefore quashed.

Proceedings quashed.

(1) (1919) 1 P. L. T. 32=53 I. C. 824.

* **A. I. R. 1923 Patna 348 (2).**

DAWSON-MILLER, C. J., AND FOSTER, J.

Miss C. K. H. Stoney—Appellant.

v.

Miss Myrtle Stoney—Respondent.

F. A. No. 232 of 1921, decided on 8th March 1923, from an order of Dt. J., Manbhum, dated 16th July, 1921.

(a) *Succession Act, S. 246—Petition not giving details but materials otherwise present before Court—Section is sufficiently complied with.*

If the petition does not contain all the details but there is other material before the Court to acquaint it with all the details mentioned in the section, the application is sufficient compliance with S. 246. [P. 350, C. 2]

(b) *Succession Act—Joint and sole administration—Persons equally entitled to administration quarrelling with each other—One only can be appointed—Court prefers sole administrator.*

It is well established according to the English cases that the Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased, it is the rule to select one only, the selection being made according to certain recognized principles. The interest of the estate which has to be administered and the interests of the parties entitled thereto must be primarily looked to and, other things being equal, a person with business experience and capacity will be preferred to one who has none. A son as a rule will be preferred to a daughter and where none of the usual tests can be applied, the Court frequently appoints the applicant who is first in the field. Where the applicants for administration are quarrelling between themselves and are antagonistic to each other, the administration of the estate is likely to suffer. As they must act jointly, one of them, if obstinate, could defeat the proper administration of the estate. This has also undoubtedly been held to be the practice in this country where administration has frequently been refused to more than one person even where the claimants by reason of kinship are equally entitled to it. 5 C. Li R. 368 Foll [P. 350, C. 2.]

(c) *Succession Act, S. 204—Joint administration—Persons equally entitled to administration need not be jointly appointed.*

Section 204 does no more than state that those who are in equal degree of kindred to the deceased are all, from that point of view

alone, equally entitled to be appointed administrators, but that Section nowhere says that they are entitled to be appointed jointly. There is nothing in this Act which makes it obligatory upon the Court to grant letters of administration to all the persons who may be entitled thereto merely by reason of their equal nearness of kin to the deceased. [P 351.C. 2.]

B. N. Mitter—for Appellant.

Bankim Chandra Mitter and *A. N. Das* -for Respondent.

Dawson-Miller, C. J :—This is an appeal on behalf of Miss Clara Katherine Helen Stoney otherwise Kathleen Stoney from an order of the District Judge of Manbhum granting to the appellant jointly with her sister Myrtle Stoney letters of administration to the estate of their deceased father. The appellant Kathleen contends that she alone ought to be appointed administratrix of the estate

George Edwin Blackburn Stoney, the father of the parties, was a Guard in the employment of the Bengal-Nagpur Railway Company and died intestate on the 30th December 1920 He left a small estate valued at about Rs. 4,000. Rs. 1,480 of this represents the sum payable by the Railway Company to his nominees or representatives after his death from the Railway Provident institution to which the deceased contributed during his lifetime The balance consists of furniture and other moveables and a small interest in immoveable property.

It appears from the evidence that the deceased during his lifetime in December 1914, presumably in conformity with the rules of the Railway Provident institution, signed a nomination form addressed to the Railway Company declaring his daughter Kathleen, the appellant, to be the person who, in the event of his death, would be entitled to receive the sum due to him from the provident fund. The nomination paper was produced in Court it having been obtained from the Railway Company direct by the District Judge himself. It was sent in a letter of the Railway Company to the District Judge. It was not strictly proved in evidence, if strict proof were required, but it was relied upon by the learned Judge and referred to, and it has been suggested to-day for the first time that this document ought not to be accepted in evidence. There can, to my mind, be little to be gained by remitting the case for proper proof of this document and the learned Vakil for the respondent has not insisted upon the case going back for that purpose. I think he has exercised a very wise discretion.

On the 16th March 1921 the appellant, who appears to have resided with her father during his lifetime, as Chakradharpur, filed an application before the District Judge of Manbhum for letters of administration of her father's estate. In her petition she alleged that she was the sole heir to her father and that her sister Myrtle whose address she gives as Jamshedpur was an illegitimate daughter. It also appears from her petition that Myrtle, the other sister, had made some attempt to get hold of the deceased's property shortly after his death, and there can be no doubt that the relation between these two sisters is considerably strained. After the appellant's application for letters of administration was filed, namely, on the 5th April 1921, the respondent Myrtle Stoney obtained an *ex parte* order from the Deputy Commissioner of Singbhum for a succession certificate in respect to the assets of the deceased's estate When the application for that succession certificate was made has not been disclosed; nor do I think it is material for the purpose of determining the matters in dispute in this case. The appellant was not served with notice of that application, and on the 30th April, when she came to hear of it, she petitioned the District Judge of Manbhum to transfer the succession certificate case from the Court of the Deputy Commissioner to his own Court.

The District Judge on the 2nd May consequently requested the Deputy Commissioner to withhold the certificate pending the disposal of the appellant's application for letters of administration. The Deputy Commissioner thereupon stayed further proceedings in that matter then before him and it does not appear that the succession certificate was actually issued. In fact the order granting a certificate was afterwards set aside on appeal. By

that time the respondent had appeared in the letters of administration case and applied for an adjournment which was granted.

In due course the appellant's petition came on for hearing before the District Judge and on the 16th July judgment was delivered. The respondent produced in support of her legitimacy, which had been challenged, a baptismal certificate showing that she was baptised on the 5th June 1889 and she was therein stated to have been born on the 16th February 1889. Her parents' names are also given. The marriage certificate of her parents was also produced showing that they were married at Lahore on the 16th August 1885. The parents of both parties are, I understand, the same. The respondent also filed a petition dated the 18th June 1921 contending that she was entitled to a half share in her father's estate and praying that letters of administration should be granted jointly to herself and the appellant.

The learned District Judge found that the certificate of baptism and marriage, the authenticity of which was not challenged, sufficiently proved the legitimacy of the respondent. He quite properly, in my opinion, refused to decide whether the nomination form signed by the deceased constituted a gift in favour of the nominee or merely gave her power to collect the money due after his death from the Provident Fund for whomsoever might be entitled to it, and what the effect of that document may be is a matter which cannot be determined in the present proceedings.

The learned Judge considered, however, that the proper course was to make a grant in the name of the two sisters and ordered accordingly that letters of administration should be granted to both.

From this decision Miss Kathleen Stoney has appealed. It is contended on her behalf, in the first place, that the petition of the respondent of the 18th June is not an application made in conformity with section 246 of the Indian Succession Act which requires certain particulars to be stated in the application. The learned District Judge considered that the respondent's application under the Succession Certificate Act which was before him and her objection petition of the 18th June praying for joint administration were a sufficient compliance with the section. Moreover there was already the petition of the appellant before the Court which gave the Court all the necessary particulars and the respondent was, I think, entitled to accept this and ask the Court to act upon it except in so far as she challenged the allegation as to her illegitimacy. In my opinion the appeal upon this ground fails.

It was next contended that separate letters of administration should in any case be granted to the appellant in respect of the Rs. 1,480 payable from the Provident Fund and in support of this contention sections 27 and 228 of the Indian Succession Act were relied upon. Had the deceased made a will as to this part of his property and died intestate as to the rest, the case might have required that letters of administration should be granted to the person legally entitled except as to the property dealt with in the will. That might arise if an executor appointed under the will was not legally entitled to the administration of the rest of the estate but there are not, in my opinion, any circumstances arising here which require that an exception should be made within the meaning of those sections.

It was lastly contended that special circumstances should be made out before granting joint letters of administration and, even where the claimants are equal in degree of kindred to the deceased. Only one should be appointed according to the established practice. This contention is, in my opinion, well founded. It is well established according to the English case that the Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased it is the rule to select one only, the selection being made according to certain recognised principles. The interest of the estate which has to be administered and the interests of the parties entitled thereto must be primarily looked to and, other things being equal, a person with business experience and capacity will be preferred to one who

has none. [See *Warwick* v. *Greville* (1).] Again where two persons are equally entitled by consanguinity preference will frequently be given to the one chosen by the majority of those entitled to distribution of the assets although other considerations may be sufficient to overrule the wishes of the majority of those interested. A son as a rule will be preferred to a daughter and where none of the usual tests can be applied the Court frequently appoints the applicant who is first in the field. -See *Cox* v. *Trasler* (2)]. Moreover, the Court never forces a joint administration upon unwilling parties. *Bill* v. *Timewood* (3), *In the goods of Beeby* (4) and it is obvious that where the applicants for administration are quarelling between themselves and are antagonistic to each other the administration of the estate is likely to suffer. As they must act jointly, one of them, if obstinate, could defeat the proper administration of the estate This has also undoubtedly been held to be the practice in this country where administration has frequently been refused to more than one person even where the claimants by reason of kinship are equally entitled to it.

In the Calcutta High Court in the case of *Nathu Lal Kabeer* v. *Sealar Nath Chatterjee* (5) where two widows of a deceased Hindu gentleman applied for administration of his state the High Court supported the decision of the District Judge refusing to grant a joint administration following as he said the practice of his Court. The learned Judges in that case when it came on appeal to the High Court said:

"We are of opinion that the Judge is perfectly entitled to follow the practice of his Court, which is a usual and reasonable practice, that administration should be granted to one person only".

That case was decided in 1879 and although the Indian Succession Act of 1865 was at that time in force certain of the sections including section 204 did not apply to the case of Hindus, but I refer to this case, and there are others of a similar nature, to show that even in this country the practice has been only in very special circumstances to grant administration to more than one person

The respondent relies upon the provisions of section 204 of the Succession Act which states that those who stand in equal degree of kindred to the deceased are equally entitled to administration. He argues from that that where you have got two or more persons, and in some cases it may be considerably more, who stand in equal degree of kinship the Court is bound to grant letters of administration to them jointly In my opinion such an interpretation ought not to be given to the section. That section and some of the preceding sections beginning with section 200 indicate who are the proper persons to be appointed administrators of the estate of a deceased person and lay down certain rules which had guide the Court in selecting the people to whom letters of administration should be granted It deals first of all with the case of a widow and then refers to certain exception in which the widow should not be appointed

Then it deals with the case in which there is no widow or the cases in which the Court sees cause to exclude the widow and in such cases the person to be appointed is the person or persons who would be beneficially entitled to the estate in accordance with the rules for the distribution of an intestate's estate. Then comes Section 204 which states that those who stand in equal degree of kindred are equally entitled to administration It then refers to the case of a husband surviving his wife. He has the same right of administration of the estate as the widow has in respect of the estate of her husband.

Then it refers, in the absence of the persons already described, to the rights of creditors Section 204, in my opinion, does no more than state that those who are in equal degree of kindred to the deceased are all, from that point of view alone, equally entitled to be appointed administrators, but the section nowhere says that they are all entitled to be appointed jointly and

(1) (1803) 1 Phill 145=161 E R 934
(2) (1865) 4 Sw & Tr 48=34 L J P. 127
(3) (1812) 2 Phill 2=161 E R 1066
(4) (1867) L. R. 1. P & D. 235=36 L J. P. 14.
(5) 5 C. L. R. 868.

when one turns to Section 225 of the Act it seems quite clear that the Court is given very wide powers, where it considers it necessary or convenient, to appoint some person to administer the estate other than the person who in ordinary circumstances would be entitled to the grant There is, therefore, in my opinion nothing in this Act which makes it obligatory upon the Court to grant letters of administration to all the persons who may be entitled thereto merely by reason of their equal nearness of kin to the deceased. In the present case the applicants have quarrelled between themselves. They are apparently living apart and it would be very difficult, in my opinion, for them to work together in harmony. The estate has to be administered, and although it is a small one, there may be creditors whose claims have to be satisfied.

We are asked by the respondent to appoint her jointly with her sister in order to protect her interests but it seems to me quite clear that her interests will be sufficiently protected by the operation of Section 256 of the Succession Act which requires a bond to be executed by the person to whom a grant is made for the due administration of the estate and if she should fail to provide such a bond then the other applicant has means within her power of applying herself for an appointment or preventing the appointment of the appellant. The only question to determine is which of the claimants should be appointed administratrix. The appellant was the first to apply for letters of administration It is true that the respondent made an application for a succession certificate which she was not entitled under the law to obtain but it is not in evidence whether the application was before or after the application for letters of administration made by her sister.

At all events so far as the application for letters of administration is concerned the appellant was first in the field. She was living with her father before he died and as long ago as 1914 it appears the deceased appointed her as the proper person to receive the sum due to him on his death from the Provident Fund. Although this document is not a will it is an indication of the deceased's wishes and I think that the considerations which I have mentioned are sufficient to turn the scale in favour of the appellant for, in my opinion, there are in this case insuperable objections to granting a joint administration.

In the result the order granting letters of administration to the appellant and the respondent jointly, made by the learned District Judge will be set aside and in lieu thereof an order will be made directing letters of administration to be granted to the appellant Kathleen Stoney otherwise Clara Katherine Helen Stoney. In so far as the costs of this appeal and of the proceedings in the Court below are concerned I think that the respondent, having regard to the fact that her legitimacy had been attacked, was perfectly entitled to come before the Court and endeavour to prove her legitimacy, and once she did prove that, she had an equal chance at the outset with the appellant in obtaining letters of administration, and in these circumstances I think that the whole of the costs of this litigation including the costs of this appeal should come out of the estate. Having regard to all the circumstances I think a hearing fee of Rs. 150 would be proper in this case.

Before I conclude this judgment I wish to say that I think that it is a deplorable thing that these two young ladies whatever terms they may have been upon in the past should be so foolish, to put it upon no higher basis, as to quarrel between themselves as to their right to inherit their father's property It would appear from the baptismal certificate that Miss Myrtle Stoney is, what she alleges she is, the legitimate daughter of her parents and one thing is perfectly obvious that if she in fact is the legitimate daughter she is entitled equally to a half share in her father's property with her sister.

The estate is a very small one and if merely for personal reasons these parties are going to quarrel between themselves on a matter of this sort they will find that before very long the whole of the estate will be swallowed up in litigation and there will

be nothing left for either of them in the end. I therefore earnestly suggest for their consideration that they should without any further delay come to an amicable settlement about the matter instead of foolishly wasting their substance which is very small in litigation.

Foster J. : -I agree.

A. I. R. 1923 Patna 353.

BUCKNILL, J.

Kunja Singh — Decree-holder-Petitioner

v.

Barho Ray—Opposite Party.

Civil Rev. No. 336 of 1922, decided on 27th Feb., 1923, against a decision of Munsif, 2nd Court of Begusarai, dated the 18th July, 1922.

Civil P. C., O. 21, R 89—Application under—Notice must be given to judgment-creditor

Where an application is made under R. 89, it is necessary that notice must be given to the judgment-creditor of the application and that a definite adjudication must be given as to whether the deposit can or cannot be made by those who desire to make it. [P 353, C 2.]

Nawal Kishore Prasad No. 2—for Petitioner.

Satyadeva Sahay—for Opposite Party

Bucknill, J. :—This was an application in Civil Revisional Jurisdiction. It is a very simple matter. The applicant was a lessee of certain property from one Babu Sukhraj Ray of a mauza called Pipra. On this property there was a tenant named Babu Hira Lal Singh, who was recorded in the recent Survey Record-of-Rights as the occupancy tenant. The applicant brought a rent suit against this man and obtained a rent decree in 1921. He executed this decree and the 18th July last was the date fixed for sale. On the 17th of that month a petition was filed on behalf of two persons named Barhamdeo Ray and Sita Ram for permission to deposit the decretal amount on the ground that they, by a compromise effected in connection with some litigation with Babu Hira Lal Singh, had obtained a transfer from him to them of his holding. Now, no authority is, I think, really needed, although, as a matter of fact, there is ample authority to that effect for the proposition that in circumstances such as these it is necessary that notice must be given to the judgment-creditor and to the judgment-debtor of an application of this nature, and further that an adjudication must be given as to whether the deposit can or cannot be made by those who desire to make it. Now, the Munsif of 2nd Court of Begusarai seems to have dealt with this matter on the 18th July last year. But it is now common ground and admitted, both by the learned Vakil for the respondents here as well as by the learned Vakil for the applicants, that it would appear that the Munsif dealt with the matter *ex-parte*. His order simply reads :—

"Barhamdeo Ray and Sitta Ram alleging themselves to be interested persons apply for permission to deposit the decretal amount. Heard pleader. Ordered-permitted to deposit.

No notice seems to have been given either to the applicant or to judgment-debtor and certainly no adjudication has been made as to whether it was proper that the deposit of this decretal amount should be accepted. As a matter of fact a very serious question is in issue as to whether the holding was transferable by custom or not. Under these circumstances, obviously the only course open to me is to send the matter back to the Munsif. The necessary notices must be given and the matter must be investigated and adjudicated upon in accordance with law. The order of the Munsif of the 18th July 1922 will be set aside, the costs of this case will abide the result of the investigation.

Rule made absolute.

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* A. I. R. 1923 Patna 354

DAS AND KULWANT SAHAY, JJ.

Rameshwardhari Singh and another Defendants-Petitioners

v.

Sadhu Saran and another —Plaintiffs-Opposite Party.

Civil Rev. No. 361 of 1922, decided on 7th March 1923, from an order of Sub J. of Shahabad, dated the 28th October, 1922.

(a) *Civil P C., S. 151, O. 7, R. 11 (c)—Suit dismissed under* O. 7, R. 11 (c), *cannot be restored under inherent powers.*

There is no power in the Court to restore the suit under Section 151 of the Code where the suit is rejected under O 7, R 11 (c). Once an order of the Court is perfected, there is absolutely no power in that Court under its inherent jurisdiction either to alter or add to that order, save as provided by Section 152 or on review.

[P 355, C. 1.]

(b) *Civil P.C., O. 47—R. 1, Order of rejection of plaint, under* O. 7, *R.* 11 (c) *is open to review.*

There is complete power in the Court under Order 47, Rule 1 to review the order passed by it in rejecting the plaint under Order 7, Rule 11 (c). [P 355, C. 1.]

Sultan Ahmad, S. M. Mullick and ***Jalgobind Sinha***—for Petitioners.

P. K. Sen and *P. Dayal*—for Opposite Party.

Das, J.:—This application is directed against an order passed by the learned Subordinate Judge of Shahabad, dated the 28th October, 1922.

The petitioners were the defendants in a suit filed against them by the opposite party in the Court below. On the 16th of March, 1922, the Court came to the conclusion that the Court-fees paid by the plaintiffs upon the plaint were insufficient and the Court directed the plaintiff to pay the deficit Court-fees on or before the 19th April, 1922. On the 19th April, 1922, the plaintiffs were unable to comply with the order of the learned Subordinate Judge and they asked for time and the Court gave them time till the 20th of May only. On the 20th of May they again applied for time and the Court gave them till the 22nd of June. On the 22nd of June the plaintiffs made another application for further time to enable them to pay the deficit Court fees. The Court declined to accede to their application and rejected their plaint under the provisions of Order 7, rule 11 (c) of the Civil Procedure Code. Thereafter the opposite party presented an application under Order 9, rule 9 and Section 151 of the Code for restoration of the suit.

It was contended before the Court by the petitioners that the only remedy of the plaintiffs was to apply under Order 47, rule 1 of the Civil Procedure Code and that neither Order 9, rule 9 nor Section 151 gave any power to the Court to restore the suit after it had rejected the plaint and had signed the decree. The learned Subordinate Judge conceded that an application under Order 9, rule 9 was not maintainable. He also thought that the plaintiffs could not apply under Order 47, rule 1 of the Code. The reason that he gives for this opinion may be stated in the words of the learned Subordinate Judge. It is as follows:—

"It is clear from the language of the order of dismissal that the plaint was rejected under the provisions of Order 7, rule 11 (c) though it is not clearly stated there. There is no special provision in the Code for an aggrieved party to get an order made under that rule to be considered and reviewed."

Having rejected the contention of the petitioners that the only remedy of the plaintiffs was to apply under Order 47, rule 1 of the Code, the Subordinate Judge proceeded to consider whether he could give the plaintiffs any relief under Section 151 of the Code. He came to the conclusion that there was power in the Court to restore the suit under Section 151 of the Code and that in the circumstances he should exercise that power. He accordingly ordered that upon the plaintiffs depositing the deficit Court-fees and paying Rs 100 as costs to the defendants, the suit would be restored.

In my opinion, there was no power in the learned Subordinate Judge to restore the suit under Section 151 of the Code. The order rejecting the plaint under Order 7, rule 11 (c) of the Code operated as a decree, and Order 20, rule 3 provides:—

" that a judgment once signed shall not afterwards be altered or added to save as provided by Section 152 or on review."

There can be no doubt, in my opinion that once an order of the Court is perfected there is absolutely no power in that Court under its inherent jurisdiction either to alter, or add to, that order, save as provided by Section 152 or on review. The order passed by the learned Subordinate Judge must accordingly be set aside.

It is, however, contended by Mr. P. K. Sen on behalf of the opposite party that in coming to the conclusion that an application under Order 47, rule 1 of the Code was not maintainable, the learned Subordinate Judge declined the jurisdiction which was vested in him by law.

Mr. Sultan Ahmad on behalf of the petitioners contends before us that in point of fact there was no application under Order 47, rule 1, before the Court and that, therefore, we are at liberty to disregard the view of the learned Subordinate Judge expressed on this point. There is, in my opinion, no doubt that the learned Subordinate Judge had power to review its order rejecting the petition under Order 7, rule 11 (*c*). I do not say whether in the circumstances of the case the learned Subordinate Judge would have been right in reviewing the order. That point is not before us and it is not right that we should express our opinion on it; but all that we do say is this, that there was complete power in the Court under Order 47, rule 1 of the Code to review the order passed by it in rejecting the plaint under Order 7, rule 11 (*c*) of the Civil Procedure Code. It is quite true that there was no application on behalf of the opposite party asking the Court to deal with the application as an application under Order 47, rule 1 of the Code; but the Court having taken the view that it had no jurisdiction whatever to review its own order in rejecting the plaint, it was plainly impossible for the opposite party to ask the Court to deal with that application as an application for review.

In the circumstances, I think, that the opposite party should have an opportunity to ask the Court to deal with his application as an application for review under Order 47, rule 1 of the Code.

We set aside the order of the learned Subordinate Judge and direct that upon the opposite party paying the proper Court-fees upon his application as an application for review the learned Subordinate Judge will proceed to deal with the application of the opposite party as an application for review.

The petitioners are entitled to the costs of this application; hearing fee three gold *mohurs*.

The learned Subordinate Judge will proceed to deal with this application within a month from the time he receives the record from this Court. If within that time the Court-fees are not paid by the opposite party upon the application considered as an application for review, his application will stand dismissed. If within the time allowed the Court-fees are paid, the learned Subordinate Judge will proceed to dispose of the application without any further adjournment.

The record will be sent down forthwith.

Kulwant Sahay, J.—I agree.

Case remanded.

A. I. R. 1923 Patna 355.

Ross, J.

Dhobi Roy—Petitioner

v.

Mahadeo Singh and others—Opposite Parties.

Civ. Rev. No. 410 of 1922, decided on 5th March, 1923, against the order of the District J. of Monghyr, dated 28th July, 1922.

Civil P. C. (*V of* 1908), *S.* 65—*Execution—Sale of land—Crops go along with the land—Transfer of property.*

The sale of a tenure would apparently pass all that was growing upon the land unless the growing crops were excepted by the notification of sale or else a custom was proved that the outgoing *ryot* should have the crops subject to a payment for use and occupation of the land while they remained on the land. 4 Cal 814 Foll [P. 356, C. 1.]

Haresawar Prasad—for Petitioner.

Ross, J :— This is an application against an order of the learned Dis

trict Judge of Monghyr upholding an order of the Munsif of Jamui permitting the opposite party to take away the paddy crop on land which formerly belonged to them but which had been sold in execution of a decree on the 16th of March 1921 and of which delivery of possession had been given on the 31st of July 1922. In *Afatoolla Sardar* v. *Dwarka Nath Mootry* (1) it was held that the sale of the tenure would apparently pass all that was growing upon the land, unless the growing crops were excepted by the notification of sale, or else a custom was proved that the outgrowing ryot should have the crops, subject to a payment for use and occupation of the land while they remained on the ground. In the present case apparently the opposite party were tenants continuing on the land and any crop that they raised must be taken to have been raised for the benefit of the owner of the land.

The application is allowed and the order of the District Judge is set aside and the crops will be delivered to the petitioner. As the opposite party did not appear there will be no order as to costs.

Application allowed.

(1) (1878) 4 Cal. 814=4 C. L. R. 95.

A. I. R. 1923 Patna 356.

DAWSON MILLER, C. J., AND MULLICK, J.

Thibu Bhogta and another—Accused-Appellants

v.

King-Emperor—Respondent.

Criminal Ref. No. 8 and Cr App. No. 25 of 1923, decided on 16th March, 1923, from the Judgment of J. C. Chota Nagpur, dated 17th February, 1923.

Criminal P. C. (V of 1898), S. 164 (3)—Power to record confession—No rule as to form of questions to be put, can be laid down.—If accused confess Court must see if it can be relied upon.

It would be a very dangerous rule to lay down that any particular form of questioning is necessary. Whilst it is clearly desirable that a Magistrate should always put such questions as may be necessary to enable him to determine whether the confession is voluntary, there is no reason why a comprehensive question such as asking him that he might make a statement if he so wished, should not be sufficient. A. I. R. 1923 Pat. 1 Foll; 40 I. C. 721 Not Foll; 2 I. C. 681, 65 I. C. 619, 25 Bom. 518, Ref. [P 360, C. 1.]

If, in a murder case, the accused have confessed, the Court has to see whether it can rely on the confessions and this involves a consideration of whether the evidence in the case affords corroboration of the matters alleged by themselves before the Magistrate in their confessions. [P. 357, C 1]

Sivaswar Dayal—for Appellants.

The Assistant Government Advocate—for the Crown.

Dawson Miller, C. J.—In this case Phasur Bhogta was tried before the Judicial Commissioner of Chota Nagpur assisted by two assessors in February last on a charge of murdering Sukru Bhogta and Musammat Pandari his wife by poisoning on the 22nd of October last year. Thibu Bhogta was tried at the same time on a charge of abetment of the murder of Sukru Bhogta who was his elder brother. The learned Judicial Commissioner as well as the assessors found both the accused guilty and they were sentenced to death.

The proceedings have been submitted to this Court for confirmation of sentence under section 374 of the Code of Criminal Procedure and the convicted men have appealed.

The appellants and the deceased persons belonged to the same village. Aidega, in the Simdega sub-division of the Ranchi district in Chota Nagpur. The date upon which the alleged crime took place was the Sohrai Basi, that is the day after the Sohrai festival, which is observed as a holiday in that part of the province and is devoted to feasting and drinking throughout the village, the residents going from house to house for that purpose. But shortly the case for the prosecution is that the appellant Thibu Bhogta was on bad terms with his brother, a blind man with whom he had quarrelled as to the division of their land. The quarrel was one of long standing and Thibu had on a previous occasion purchased poison for the purpose of poisoning his brother. On the 22nd of October last he procured some poison which he made over to Phasur Bhogta promising him a reward of Rs. 10 and two bullocks if he would administer it to his brother Sukru. The same evening Phasur invited Sukru to his house where he went accompanied by his little daughter Jamni. As Sukru was blind either

Jamni or one of his other children usually accompanied him when he went out. At Phasur's house he partook of Handia, a spirit distilled from rice, and Konhara Chakna, a preparation of pumpkin and chillies used as a sort of relish apparently to induce thirst. This was offered to him by Phasur.

Shortly afterwards Sukru's wife Pandari also accompanied by their small daughter Gangi, a twin of Jamni's, arrived and she also was offered and partook of the same food and drink. The time was in the evening about sunset. Shortly after they returned home, both Sukru and his wife were attacked with symptoms of poisoning from which they died, Sukru the same night and Pandari in the early hours of the next morning.

The principal evidence against the appellants consists of confessions made by each of them on the 2nd of November before Mr. Walze, Magistrate of the first class, at Simdega. The confessions so made were repeated with slight additions, but substantially to the same effect, before Committing Magistrate on the 8th of December. At the trial before the Judicial Commissioner on the 3rd of February they withdrew their confessions, stating that they had been asked to confess by the *daroga*, and pleaded not guilty.

Apart from the confessions of the appellants themselves, the evidence is purely circumstantial, and although it might be sufficient to raise great suspicion against the accused, we should not be prepared to convict them upon that evidence alone.

The main question for determination is whether we can rely upon the confessions. This involves a consideration of whether the evidence in the case affords corroboration of the matters alleged by the accused themselves before the Magistrate in their confessions. According to the evidence called on behalf of the prosecution, it would appear to be clearly established that the two brothers were on bad terms. [After discussion of evidence about enmity judgment proceeded as follows :—] There is no evidence of any quarrel between Phasur the other appellant and Sukru : in fact it is stated by at least one of the witnesses that they were not on bad terms.

I have referred in some detail to the evidence as to the quarrel between the two brothers as it is a matter alleged in both the confessions as the motive for the poisoning.

I now come to the evidence of the actual occurrence which took place on the 22nd of October. There is evidence to show that both Sukru and his wife had been at the house of Phasur eating and drinking about noon or a little earlier on the same day. Other persons were also present on that occasion and it would seem clear that if poison was in fact administered by Phasur it was not on that occasion.

It was urged on behalf of the appellants that there was in fact no reliable evidence that the deceased couple were at the house of Phasur on the later occasion in the afternoon, but I am satisfied from the evidence, which I shall refer to, that it has been proved that they were there shortly before sundown. [His Lordship then dealt with the evidence of witnesses in detail and continued as under.] A *post-mortem* examination was made on the bodies but no poison was found in the viscera and unfortunately none of the matter vomitted was preserved for chemical analysis. The bodies were those of healthy persons with no signs of injury, and it would appear that the actual cause of death was asphyxiation. The internal organs were much congested.

According to Colonel Murray, the Civil Surgeon of Ranchi, who gave evidence at the trial and who had received the *post-mortem* examination report, it could not definitely be said from the indications appearing from the reports that death was due to poisoning but that a suspicion of poisoning arose from the absence of any injury or organic disease. He stated that poison could be entirely evacuated by vomitting and that the condition of congestion of the internal organs

brain, lungs, etc., may appear in the case of persons who had taken poisons such as aconite, *dhatura*, or yellow Oleander. He also stated that vomitting might lead to asphyxia by particles of vomitted matter being drawn into the respiratory passage. The *post-mortem* examination, therefore, is of a negative character which shows symptoms consistent with poisoning or other causes It is well known, however, as reference to books on Medical Jurisprudence will show that certain poisons, such as aconite, do produce the symptoms which were observed in the present case.

In Lyon's Medical Jurisprudence, 7th edition, 691, the action and symptoms of aconite poisoning are described. It first produces tingling and then paralysis, the sensory nerve-terminals causing numbness. It produces similar effects on the motor nerves and centres of the *medulla* and cord. The motor *ganglia* of the heart are paralysed, the respiratory centre is slowed being usually due to arrest of respiration. Amongst the other symptoms it is there stated that the tingling is followed by numbness and great muscular weakness, the patient staggors, if he attempts to walk, respiration becomes slow and weak, and death may occur from shock or syncope but usually occurs from asphyxia due to paralysis of the respiration. Most of these symptoms were observed in the present case.

At page 696 the importance of examining the vomitted matter as well as the viscera in fatal cases is insisted on, and several instances are given of this kind of poisoning where no poison was found in the stomach or its contents or the liver or other organs but was found in the vomitted matter.

I now turn to the confession of the appellants on which the conviction was mainly based. It would appear that they were both arrested on the 30th of October and sent to Simdega where they arrived on the following day. The Magistrate understanding that they wished to make confessions gave them time for reflection and committed them to the local jail until the 2nd of November, so that they might have time for reflection freed from police influence.

The Magistrate informed them that he was a Hakim and asked Phasur Bhogta "do you like to make any statement before me of your own free will". He answered "yes" and on being asked " what do you want to state", replied that there was a quarrel between Sukru and Thibu in the month of Jeth and both brothers were ready to fight armed with arrows and *baluas* ; that Sukru Bhogta had ploughed the land and that there was enmity between the brothers. In Asar last Thibu one evening had asked him to do away with Sukru but he refused; that on Sunday about 12 days ago Thibu called him to his house and gave him Handia to drink and some poison like *maida* flour on a leaf of a green colour and asked him to administer it to Sukru. He first declined and Thibu said that he would pay him Rs. 10 and give him a pair of bullocks and any other thing he would demand. This took place at noon.

He then describes how the same day he met Sukru returning after drinking and took him to his house and having mixed the posion given by Thibu with Chakna made him eat it and also gave him Handia to drink ; that Sukru's wife Pandari also came and ate the Chakna into which poison was mixed and also took Handia. They then went way and he adds that Sukru died at 10 p. m. and his wife at cock crow. He also adds that Thibu did not tell him that the medicine was *sahur* (poison) but told him that it was *bish* (poison) and that if it was taken by any man he would emaciate and die within two or three months.

In the case of Thibu the Magistrate stated to him "I am a Hakim you may make your statement if you so wish". He states in effect that he had a quarrel with his brother in Asar last over their land and there was an altercation between them. He told the landlord Chandrabhan who said that he too had enmity with Sukru because he did not pay his rent, and advised Thibu to kill him but he refused. Later, in the

month of Bhádo, he again complained to the landlord that Sukru was cutting his Gondli and asked him to expostulate and again the landlord advised him to kill his brother and offered to give him poison for the purpose, suggesting that if Thibu could not administer it he should get Phasur Bhogta to do so. He got the poison on a Friday and gave it to Phasur Bhogta on the following Sunday, the day after the Sohrai and told him that Chandrabhan had given him the poison to kill Sukru ; that as he, his brother, could not administer it to him Phasur had better do it. The same day in the evening Phasur called Sukru to his house and gave him the poison mixed with *Chakna*. When doing so his wife Pandari also came to the house and took the *Chakna* with her husband and they both died. The Magistrate recorded that he believed the confessions to be voluntarily made.

It was strongly urged before us that the confessions ought not to have been recorded by the Magistrate at all because he did not comply with the provisions of Section 164 of the Criminal Procedure Code, the third clause of which provides " that no Magistrate shall record any such confession unless upon questioning the person making it he has reason to believe that he has made it voluntarily."

It was contended that the question put to Phasur was not sufficient to enable the Magistrate to arrive at the conclusion that the confession was made voluntarily, and that in the case of Thibu no question in fact was put but he was merely told that he might make a statement if he so wished. I may say at once that with regard to the last contention, I can see no material difference between asking a person if he wishes to make a voluntary statement and stating to him that he may make a statement if he so wishes. It is contended, however, that even if a general question of this sort should be put, that is not enough within the provisions of the section to entitle the Magistrate to record the confession.

Certain cases were relied upon in support of this contention : *Ragho Laya* v. *Emperor* (1), *Jagishun Ghose* v. *Emperor* (2), *Faril* v. *Emperor* (3), *Queen-Empress* v. *Narain* (4) and *Jiubodhan* v. *King-Emperor* (5). In the last mentioned case the Court found that the confessions were improperly induced by the police and recorded in the presence of a police officer and they refused to accept them. One of the learned Judges, Chapman, J., did not deal with the question of Magistrate's jurisdiction. The other learned Judge, Roe J., who agreed with him added

"As I understand Section 164, clause (3), a Magistrate is bound to question the accused closely as to his motives in making the confession and if he fails to do so he has no jurisdiction to say that he is satisfied with the confession as voluntarily made. He has therefore no jurisdiction to record it as a Magistrate "

In the case of *Ragho Laya* v. *Emperor* (1) the same learned Judge refers with disapproval to the invariable practice of Deputy Magistrates in this province of ignoring entirely the provisions of Section 164 (3), and expresses the view that it is not sufficient for the Magistrate merely to inform the accused person that he is a Magistrate and tell him that he may make a statement of his own accord if he so chooses but not to make any statement which he had been tutored by others to make, and adds that what is meant by the Code is that the Magistrate should ask the accused some questions as " why are you confessing, are you sorry for your crime, or is it that some one has told you that you will gain something by a confession," and that he should refuse to proceed with the recording of the confession until he has a satisfactory answer to his question.

In a more recent case, *King-Emperor* v. *Dewan Kahar* (6), the *dictum*

(1) (1917) 18 Cr. L. J. 721=40 I C 721.
(2) (1909) 9 C. L. J. 669=13 C. W. N. 861=2 I. C. 681=10 Cr. L. J. 125.
(3) A. I. R. 1922 Lah. 237=2 Lah.395=5 P. W. R. 1922 Cr.=23 Cr. L. J. 149
(4) (1901) 25 Bom. 548 =3 Bom L. R. 122
(5) 1 P. L. W. 398=39 I. C. 991=1917 Pat. 149.
(6) A. I. R. 1923 Pat. 13=4 P. L. T. 186.

of Roe, J., was criticised and dissented from if it was meant to lay down a proposition of law; but if it was merely a rule of prudence it was unobjectionable. All that the section requires is that the Magistrate on questioning the person making the confession shall have reason to believe that it was made voluntarily. No express form of question is prescribed, and, in my opinion, the extent to which a Magistrate should question the person making the confession must largely depend upon the particular facts of each case. As pointed out by Mr Justice Das in the case last mentioned, there are cases which on the face of them attract the suspicion of a Magistrate and there are others which do not attract suspicion at all, and it is quite impossible to lay down any hard and fast rule on the subject.

The Court must in each case satisfy itself that the Magistrate honestly believed and took steps to ascertain that the confession was a voluntary one. I think it would be a very dangerous rule to lay down that any particular form of questioning is necessary Whilst it is clearly desirable that a Magistrate should always put such questions as may be necessary to enable him to determine whether the confession is voluntary, I can see no reason why a comprehensive question such as that objected to by Roe, J., in the case of *Ragho Laya* v. *Emperor* (1) should not be sufficient in certain cases In the present case the persons confessing had not been in police custody for more than 24 hours. They were then given two days for reflection freed from police influence and came again voluntarily to make their statements.

There was primarily no reason why the Magistrate should expect any undue pressure although he was bound to satisfy himself by a proper enquiry that the statements were voluntary, and I can see no reason why the confessions as taken down by the Magistrate should be inadmissible under the Section.

The question is not whether, having regard to all the circumstances and the other evidence in the case, we should accept the confessions as true but whether the Magistrate, in the circumstances shown, exceeded his jurisdiction in recording them at all. Even if they were properly recorded, there always remains the further question of whether the Court should accept them as statements of the truth.

In the present case although the questioning was meagre, the circumstances were not such as to create any suspicion in the mind of the Magistrate and he may well have been satisfied from the demeanour of the persons making the statement as well as the questions put and the manner in which the statements were made, that they were voluntary.

In my opinion the confessions recorded are not objectionable on the ground that the provisions of Section 164 of the Criminal Procedure Code were not complied with. The real question is whether on the rest of the evidence in the case there is sufficient corroboration of the facts mentioned in the confessions to enable us to judge of their truth. The evidence, as already stated, clearly shows that there was a feud between these two brothers of long standing and that their quarrel was cropping up from time to time. It is suggested that the motive was really inadequate to induce Thibu and certainly Phasur to commit a crime of this magnitude It must be remembered however that all the parties in this case are Mundas descended from aboriginal tribes and one cannot apply to them the same tests of conduct as one would in the case of more cultured people, and what might well appear to be no adequate inducement to commit a crime in the case of people of a higher standard of intelligence and morals, might appear to them to be more than adequate. There seems to be no reason why these confessions should have been made if they were not in the main true.

One feature which is frequently observable in confessions amongst people of a low standard of intelligence is present in this instance. It will be observed that in both cases whilst confessing their crime, they introduced circumstances which probably appeared to them to show a certain amount of extenuation. In the case of Thibu he seeks to excuse his action on the ground that he

was influenced and urged thereto by the landlord. In the case of Phasur he alleges, which was no doubt true, that Thibu was the prime instigator and further that he told him that the poison was such that the man would not die immediately but would emaciate and die later and in his examination before the Committing Magistrate he puts the extenuating circumstances even higher by saying that Thibu told him that Sukru would not die if he took the poison but would only be emaciated. It is impossible however to accept this part of his statement as it was clearly an afterthought.

After considering the whole of the evidence it seems to me ample to support the truth of the confessions made and I have no reasonable doubt that they were true in so far as they disclosed the guilt of the appellants. In my opinion this appeal should be dismissed and the sentences confirmed.

Mullick, J.—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 361.

KULWANT SAHAY, J.

Tanak Chaudhry—Accused—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Rev. No. 65 of 1923, decided on 22nd March 1923, from the order of the S. J. Machubani.

Penal Code, S. 147—First party in possession—2nd party dismantling disputed house—2nd party is guilty of offence under S 147

Where there is a finding that the first party never parted with possession of the disputed house and that the second party was not given actual possession of the house, the men of the second party who dismantled the disputed house and plonga it up in the absence of the servants of the first party are guilty of an offence under S 147, I P C. A.I.R. 1922 Pat. 197 Dist. [P 362, C. 2]

Manohar Lal and *A. P. Upadhya*—for Petitioner.

The Assistant Government Advocate—for the Crown.

Kulwant Sahay, J.—The petitioner has been convicted by the Sub-Divisional Magistrate of Machubani for rioting under section 147, I. P. C. and has been sentenced to six months' rigorous imprisonment. The conviction and sentence has been upheld on appeal by the Sessions Judge.

The facts shortly stated are that in village Mukhiapati one Ramchander Babu and Sunder Babu had each eight annas share and each had a *kutcherry* house situated therein, the *kutcherry* of Ramchander Babu being to the north of that of Sunder Babu. The two *kutcherries* were surveyed in plots 2432, 2433, and 2437, in the Cadastral Survey The entire sixteen annas of the village were sold to Babu Mahanti Lal and others in the following shares: Babu Mahanti Lal and others 8 annas, Babu Anrudh Singh and others 4 annas and Babu Prayag Singh and others 4 annas. There was Collectorate partition of the village and in that partition all three plots whereupon the two *kutcherries* were built fell to the share of Babu Anrudh Singh.

An objection was filed by Babu Mahati Lal who was in possession of one of the *kutcherries*, and subsequently there was a compromise between the parties whereby it was agreed that one of the *kutcheries* with the lands and trees standing thereon be allotted to Mahanti Lal and in exchange thereof Mahanti Lal should make over certain *zirait* lands to Anrudh Babu This compromise was filed before the Collector and on the 16th of July 1919 the Collector gave effect to this compromise and made the final order in the partition case. Delivery of possession was given on the 27th April 1920, and since then disputes have been going on between Mahanti Lal's party and Anrudh Singh's party as regards the possession of the *kutcherry*. In 1921 there was a case under section 447, I.P C. about dismantling the cook-shed attached to the *kutcherry*.

In 1922, there was a proceeding under section 144, Cr P.C, relating to the *kutcherry*. The occurrence giving rise to the present case took place on the 19th June 1922 On that date at 9 A. M. the complainant, who is a servant of Babu Mahanti Lal, lodged a Sanha before the Police to the effect that on the morning of that date while he was alone in the *kutcherry* Anrudh Babu's men came and threatened him and that there was a likelihood of the breach of the peace. The Sub-Inspector deputed a constable to see that no breach of the peace occur-

red and the complainant with the constable returned to the village at about, 2 P.M. when he found that the *kutcherry* was no longer existing and the land had been ploughed up The Sub-Inspector arrived in the village at about 5 P.M. and then the complainant lodged his first information in which the present petitioner was named for the first time. The information was to the effect that in the absence of the complainant the petitioner came there with a mob, dismantled the *kutcherry* and ploughed up the land. An investigation was made by the Sub-Inspector with the result that the petitioner and others were placed on their trial and convicted as stated above

The defence story was that the exchange was never given effect to and that the delivery of possession on the 17th April 1920 was in accordance with the original allotment whereby the three plots of land upon which the two *kutcherries* stood were allotted to petitioner's master and that the petitioner's master continued in possession throughout.

It has been found by both the Courts below that the petitioner's master was not in possession of the *kutcherry* which was given to Babu Mahanti Lal under the compromise; that the compromise was given effect to by the Collector and although in the petition of compromise it was stated that a regular deed of exchange would be executed between the parties, yet title passed to Mahanti Lal under the Collectorate partition which gave effect to the compromise.

Having regard to the finding of both the Courts below that Mahanti Lal never parted with the possession of the *kutcherry* and, that Anrudh was not given actual possession of that *kutcherry* house, the argument of the learned Vakil for the petitioner that in dismantling the *kutcherry* house, the petitioner was not guilty of any criminal offence inasmuch as the *kutcherry* house belonged to his master, cannot be accepted. The learned Vakil relies on the case of *Ramkrishna Singh* v. *King Emperor* (1) and argues that the petitioner by destroying the property belonging to his master did not cause any mischief, and therefore he could not be convicted of the offence of rioting the common object of which is stated to be "to commit mischief to Mahanti Lal and his co-sharers by dismantling their *kutcherry* house and by means of criminal force or show of criminal force to obtain possession of its site and thus to enforce right or supposed right of Anrudh Singh" The facts of that case are quite distinguishable from those of the present case In that case there was a delivery of possession under Order XXI, rule 95 of the Civil Procedure Code and the complainant who was the judgment-debtor still asserted his possession after delivery of possession by the Civil Court.

It was held that the delivery of possession by the Civil Court had the effect of making the possession of the judgment-debtor that of a trespasser and the accused in that case was justified in taking possession of the property by ousting the judgment-debtor, and the property being his own it could not be held that he committed mischief by causing damage to that property.

In the present case the findings of both the Courts below are clear that the *kutcherry* house in question was the property of Mahanti Lal and he was in possession and therefore there was no justification for the petitioner to dismantle the house which amounted to a mischief under section 425 of the Indian Penal Code.

The second point taken by the learned Vakil for the petitioner is that there is no finding as regards the common object stated in the charge His argument is that the Court cannot infer the common object but it must find it upon the evidence adduced in the case He says that it must be found that the mob was actuated by common object alleged in the charge, and reliance is placed on the case of *Jadubar Singh* v. *King Emperor* (2). On reading the two judgments of the Courts below it is quite clear that the finding as regards the common object stated in the charge is based upon the evidence on the record and is not a

(1) A. I. R. 1922 Pat. 197 = 3 P. L. T. 385 = 23 Cr. L. J. 321.

(2) (1919) 20 Cr. L. J. 670 = 52 I. C. 494.

mere surmise. There is no substance in this contention also.

The third point taken is that the accused *bona fide* believed the *kutcherry* to be the property of his master and therefore he committed no offence. Having regard to the circumstances proved by the evidence there can be no reasonable ground for the petitioner to entertain a *bona fide* belief that the property belonged to his master. There had been previous cases in which the possession of Mahanti Lal was declared. This contention also must therefore be disallowed.

As regards the sentence it is said that no bodily injury was caused to any person, there was no assault or beating, and all that the accused did was to dismantle the *kutcherry* house and plough up the land and the sentence of six months' rigorous imprisonment is unduly severe. Having regard to the circumstances of the case I am of opinion that three months' rigorous imprisonment would meet the ends of justice.

The conviction is accordingly upheld but the sentence is reduced to three months' rigorous imprisonment

Sentence reduced.

A. I. R. 1923 Patna 363.

Ross, J.

Mt. Mahodra Koer and another— Petitioners

v.

Khuban Panday and others Opposite Parties.

Criminal Rev. No. 68 of 1923, decided on 8th March 1923, from an order of Deputy Mag. of Chapra, dated 5th Dec. 1922.

Criminal P C. (V of 1898) S. 146—First party and her mortgagee in possession but not 2nd party—Subject of dispute could not be attached.

Where the first party, a widow and her mortgagee are found to be in possession of the disputed garden and the second party is not found to be in possession, a Magistrate is not entitled to attach the subject of dispute merely on the ground that the widow had, in her written statement, stated that she was not in possession but the mortgagee was, because the possession which she had may be exercised through her mortgagee. (P. 363, C. 2).

Hareshwar Prasad Sinha and *J. N. Sahai*—for Petitioners.

B. P. Sinha for *Nirsu Narayan Sinha*—for Opposite Parties.

Judgment.—This is an application in revision against an order passed by the Deputy Magistrate of Chapra, attaching two orchards under Section 146 of the Criminal Procedure Code.

The dispute is between a widow and her mortgagee on the one side and the next heirs of the last male owner on the other. The first party, the widow and her mortgagee, claimed to have been in possession since the death of the last male owner. The Magistrate has definitely disbelieved the evidence of possession offered by the second party. With regard to the evidence of possession on behalf of the first party, he has accepted the evidence of Babu Shew Protap Narain who deposed that the widow Mahodra Koer was in actual possession of the disputed orchards and that they were never in possession of the second party. As the widow herself, however, in her written statement had said that she had ceased to be in possession and that she had mortgaged the property to Mathura Lal, the learned Deputy Magistrate thought that he could not hold that she was in possession, and as he was of opinion that the mortgage was a collusive transaction inasmuch as the title of the second party as heirs of the last male owner had been declared in another litigation, he thought that he could not accept the evidence of possession offered on behalf of Mathura Lal

Now in coming to this conclusion the learned Deputy Magistrate was in error. There is no dispute between the widow and her mortgagee. The evidence of Babu Shew Protap Narain does not necessarily mean that the widow is actually in physical possession of the land. The possession which she had may be exercised through her mortgagee, and the question whether the mortgage is a collusive transaction or not is not one which has any bearing on the question of possession under the mortgage when the widow herself does not dispute it.

In view of the findings in this case, it was, in my opinion, not open to the Magistrate to attach the property, as there is no real doubt on his finding

as to possession. I therefore set aside the order attaching the p operty under Section 146 of the Cr. P. Code.

Order set aside.

A. I. R. 1923 Patna 364.

ADAMI, J.

Kedar Nath Chaubey and others—Petitioners

v.

Jaleswar Ram Tewari and other.—Opposite Parties.

Crl. Rev. No. 69 of 1923 decided on 13th March 1923, against an order passed by the Sub-Divisional Officer of Bettiah.

Criminal P. C., S. 145—Procedure—Decree of Civil Court—Value of, must depend upon circumstances of each case.

It is true that a Magistrate in proceedings under S. 145 is bound to maintain the decision as to title passed, and possession delivered by a Civil Court in execution of its decree, if such possession has been given within a reasonable time from the initiation of the proceedings under section 145. But this is not an invariable rule and the evidentiary value to be attached to the fact that the Civil Court has given possession to one party must depend upon the particular circumstances of the particular case. 33 Cal. 33 Foll.

(P. 365, C. 2.)

G. C. Pal and *S. S. Bose*—for the Petitioner.

L. N. Singh and *S. Saran*—for Opposite Parties.

Adami, J.:—This application is directed against an order passed by the Sub-Divisional Magistrate of Bettiah in proceedings under section 145 of the Code of Criminal Procedure. The dispute related to 23 bighas of land in village Baudhbarwa. It appears that Mr. Coffin the *thekadar*, after his lease had expired, sued the recorded tenants of the holdings for rent and obtained an *ex parte* decree. At the sale held in execution of the decree he purchased the holdings and obtained delivery of possession on the 13th March 1921. At the end of the year, *i. e.* 8th December, 1921 Mr. Coffin sold the holdings to the first party to the proceedings.

It appears, too, that in 1912 the second party purchased 23 *bighas* from the recorded tenants and thereafter redeemed certain usufructuary mortgages which the tenants had previously executed in favour of other persons and then obtained *khas* possession of the holdings. The dispute, therefore, between the parties was whether the first party were in possession under their purchase in December 1921 or the second party had remained in possession since their purchase in 1912 on their redemption of the usufructuary mortgages.

The learned Sub-Divisional Magistrate went to the locality and examined certain witnesses produced by the first party, but the second party had no chance of cross examining them. On return to the head quarters the learned Sub-Divisional Magistrate perused the documents put forward by the first party and thereupon without hearing either the witnesses of the second party or looking into such documentary evidence as the second party wished to produce, passed the order against which this application was made. Shortly stated, that order is to the effect that after perusing the documents put forward by the first party, the learned Magistrate found that the first party had been put in possession by the Civil Court under O. 21, rule 95 in 1921 and that being so, he was bound to uphold and maintain the possession of the first party. His order runs as follows:

"All that remains for this Court is to uphold first party in possession. Following the ruling of 8 Calcutta Law Reports 217. I hold that I have no jurisdiction to pass an order under section 145, Cr. P. C. Proceedings are accordingly stayed under section 145, Cr. P. C The Police to release the crop from attachment and make over to the first party. No order for costs."

Now in the first place, in my opinion the order passed was wrong. The learned Sub-Divisional Magistrate holds that after proceedings have been taken under section 145 and it is found that the Civil Court found title of, and delivered possession to, one party, the Magistrate has no jurisdiction to pass an order under section 145. I do not consider that this is right. Proceedings may be taken with jurisdiction under section 145 before the Magistrate comes to know that one party has a decision of the Civil Court in his favour and the proceedings will not be without jurisdiction. But when in the course of proceedings he finds that there is such an order of the Civil Court it is his

bounden duty to maintain that order and possession granted under that order. It will then be proper for him not to stay the proceedings, but to pass an order under section 145 declaring the party which has the Civil Court decree in his favour, or which has been put in possession by the Civil Court, to be in possession and to forbid the other party to interfere with the possession of that party.

The present order does not contain any provision against the second party forbidding them to enter upon the land until a decision has been come to by a competent Civil Court.

Apart from this, the procedure followed by the learned Magistrate appears to me to be wrong. The petitioners complained that they had no opportunity of either showing their documents or of proving their possession through their witnesses. It appears from the order of the Magistrate that the decree in execution of which the land was sold to Mr. Coffin was a money decree and there can be no doubt, I think, that the decree was of that nature Under the decree only the right, title, and interest of the judgment-debtors in the decree would pass. But it appears that the decree-holder made an application to the Munsif for the annulling of all incumbrances, but his application was refused on the ground, I suppose, that the decree was merely a money decree.

Thus it is practically admitted that there were incumbrances and those incumbrances were the prior usufructuary mortgages which the present petitioners have in part redeemed. That being so, the Court could only give possession to the decree-holder or the auction-purchaser to the extent of the judgment-debtors' interest and the judgment-debtors had by that time lost their interest.

The mere fact that possession was delivered to the auction-purchaser under Order 21, rule 95 would not affect the persons who were not subject to the decree. It is to be remembered that the suit is a rent suit; it was not a suit for declaration of title and recovery of possession and there had been no decision of the Civil Court on the question of title and possession. It further appears that one of the judgment-debtors who was represented as a major was in fact a minor and that the Munsif in proceedings under Order 21, rule 90 came to the conclusion that this minor was not bound by the decree or the sale. It might well be that delivery of possession was given to the auction-purchaser, but it is to be remembered that about nine months afterwards this auction-purchaser transferred the land by sale to the first party.

There is nothing to show whether that first party actually got possession of the land under their sale. The difficulty is that the documents which the second party wished to produce before the Magistrate were not considered and this Court can only have regard to the allegations made on behalf of the petitioners as to what those documents contained. It may have been that since the delivery of possession to the predecessor of the first party, the second party had obtained possession of the land or had never been ousted from the possession they held under their purchase or after redemption of the mortgages and I think the Magistrate should have considered both the documents and the oral evidence of their witnesses as to possession before passing the order he has done.

It is quite true that a Magistrate in proceedings under section 145 is bound to maintain the decisions as to title passed, and possession delivered by a Civil Court in execution of its decree if such possession has been given within a reasonable time from the initiation of the proceedings under S. 145. As has been shown in *Rulada Kumar* v. *Dinesh Mir* (1) this is not an invariable rule and the evidentiary value to be attached to the fact that the Civil Court has given possession to one party must depend upon the particular circumstances of the particular case.

As the Magistrate has not considered the documentary and other evidence produced by the second party and such evidence is not before this Court it is impossible to say whether the cir-

(1) (1906) 33=Cal. 33=10 C. W. N. 1057=2 Cr. L. J. 670=2 C.L.J. 271.

cumstances were such that the Magistrate was bound to uphold possession given by the Civil Court in this present case.

The order must be set aside and the case must be sent back to the learned Sub-Divisional Magistrate with directions that the second party should be given an opportunity of cross-examining the witnesses of the first party and of producing evidence, oral and documentary, on their own behalf.

Order set aside.

A. I. R. 1923 Patna 366.

KULWANT SAHAY, J.

Abdul Hamid—Petitioner

v.

Hasan Raza and others—Opposite Parties.

Cr. Rev. No. 89 of 1923, decided on 23rd March 1923, against order passed by Deputy Magistrate of Monghyr, dated 19th December 1922.

(a) *Criminal P. C., Ss. 192, 528—Transfer of cases under 145 and Ss 147 is within Magistrate's powers.*

Proceedings under Ss. 145 and 147 are criminal cases and a Magistrate has power to transfer such cases under sections 192 and 528 of the Code of Criminal Procedure [P 367 C. 2.]

(b) *Criminal P C S. 148, 147—Local inspection—Investigation by Magistrate himself is within his powers provided he notes down what he saw and does not act on hearsay evidence.*

Section 148 clearly provides for local inspection whenever such enquiry is deemed necessary for the purposes of Chapter XII of the Code. Such enquiry can be made either by any Magistrate subordinate to the Magistrate before whom the case is pending or by that Magistrate himself. Although as a rule it is better to have such an investigation made by some other person, there is nothing in law to prevent the presiding Magistrate from making the investigation himself provided he records what he saw and does not act upon hearsay evidence It is a salutary principle of law that the finding of a Court must be based upon evidence duly recorded by it and not upon the impression formed by the Judge on a local inspection of the locality. He can in order to elucidate the evidence make a local inspection and the object of a local enquiry would be only with a view to understand the evidence actually adduced in the case. Moreover it is absolutely necessary that if a Magistrate makes a local enquiry he must make a note of what he saw and must place it on the record so that the parties may be in a position to know what impression the Magistrate had got by the local enquiry. 15 C. L. J. 267 Foll. [P. 366, C 2; P. 367, C 1.]

Nirsu Narain Sinha and *Bhuvaneshwar Pd. Sinha*—for Petitioner.

Kulwant Sahay, J.—The petitioner was the second party in a proceeding under Section 147 of the Criminal Procedure Code. The dispute related to the right of taking water from Bhonria Ahar in village Jamuara belonging to the first party to the Kunda Ahar belonging to the second party. The case of the second party was that there is a river known as Husainabad river towards the south from which water used to come to Ek-ari Ahar through a channel and from that Ahar the water used to be taken to the Bhonria Ahar in Jamuara, and from this Ahar the water passed through a channel to Khurumpur Ahar from where it was taken to the Kunda Ahar of the second party. The case of the first party was that the second party had no right to take the water from the Bhonria Ahar to the Kunda Ahar.

The proceeding was initiated upon a report of the Sub-Inspector of Sheikhpura as regards the likelihood of a breach of the peace between the first party and the second party with regard to their right to irrigate the lands from the Bhonria Ahar. On the 7th November, 1922, Mr. Lee, the District Magistrate, on receipt of the police report, made an order to draw up proceedings under Section 147, Cr P. C., and to serve notices on the parties by a special peon. The order of that date is as follows :

" The parties to appear with their witnesses and show cause at Sheikhpura Dak Bungalow before Second Lieutenant, Ram Prasad Narain Sahi on the 20th November. The case is transferred to his file for disposal. Evidence should be heard and the case decided on 20th November and 21st November at Sheikhpura".

On the 20th November, 1922, written statement and the Fard-ab-pashi were filed by the parties before the Second Lieutenant, Ram Prasad Narain Sahi, and on the same date after perusing the written statement and examining the Sub-Inspector at Sheikhpura, the learned Deputy Magistrate went to the locality, made a local inspection, and, after noting the fact of his having made the local inspection, he recorded in the order-sheet of the 20th November the following order.

"I do not think it is necessary to examine any witnesses because they will not be able to say anything beyond what I have already seen. I have also "perused the Fard-ab-pashi of Ekasari" and, then upon the application of the Mukhtear for the second party, who wanted to place certain law points and other record of rights before the learned Deputy Magistrate, he made the following order.

"Put up in Monghyr, on 24-11-22 for hearing parties about law points."

On the 23rd November, 1923 the following order is recorded in the order sheet :

"A law point is raised that evidence must be recorded. I shall do so on 27th November 1922. I shall also consider this point in the meantime. A petition is put up that I did not visit the locality at a place from which the channel comes from the river. I had been as far as it was pointed out to me. I could not go indefinitely. So this is rejected. Put up on 27th November, 1922."

A petition was thereupon filed before the learned District Magistrate for transfer of the case on the ground that the Deputy Magistrate did not make the local enquiry as requested and that he had already made up his mind that the petitioner was in the wrong. The learned District Magistrate, however, rejected the application for transfer and on the case being taken up by the Deputy Magistrate on the 13th of December, 1922, he examined some witnesses for the parties and on the 19th December, 1922, he made the final order in favour of the first party.

The first point taken by the learned Vakil for the petitioner is that the learned District Magistrate's order of 7th of November, 1922, directing the parties to appear and show cause before the Deputy Magistrate at Sheikhpura was without jurisdiction. He relies upon the case of *Misri Chaudhury* v. *Narsingh Tewari* (1). In that case it was held that Section 147 as well as Section 145 of the Code require that the Magistrate drawing up the proceeding shall require the parties concerned to attend *his* court; and, therefore, when the Magistrate, who draws up the proceeding, orders the parties to appear before another Magistrate, he acts against the clear direction in the Code and Acts without jurisdiction. Now, it has been held in a number of cases that proceedings under Sections 145 and 147 are criminal cases and a Magistrate has power to transfer such cases under Sections 193 and 528 of the Code of Criminal Procedure If that is so, I see no ground for holding that the order for transfer made in the present case was without jurisdiction. Indeed it was conceded in the case just cited that the Magistrate had the power to transfer the case, but it was held in that case that the Sub-Divisional Magistrate, who had drawn up the proceedings, did not transfer the case expressly or by implication to another Magistrate. In the case now before us, there is a clear order in the order sheet of the 7th November, 1922, transferring the case to the file of Second Lieutenant, Ram Prasad Narain Sahi. I am, therefore, of opinion that the Deputy Magistrate to whom the case had been transferred, had jurisdiction to deal with the case, and the Magistrate, who drew up the proceedings, had power to transfer the case.

The second point urged by the learned Vakil for the petitioner is that the learned Deputy Magistrate acted without jurisdiction in making the local inspection prior to taking evidence in the case. In my opinion, there is no substance in this objection, Section 148 clearly provides for local inspection whenever such enquiry is deemed necessary for the purposes of Chapter XII of the Code. Such enquiry can be made either by any Magistrate subordinate to the Magistrate before whom the case is pending or by that Magistrate himself, as was held in the case of *Dowlat Koer* v. *Siva Prasad* (2). The rule that in criminal cases the Court is only justified in holding a local inspection in order to explain the facts appearing in the evidence does not apply to Section 147 of the Criminal Procedure Code. Special provision is made in the Code for local inspection in these cases ; and, in cases, where rights

(1) (1921) 2 P. L. T. 186=62 I. C. 179=22 Cr. L. J. 488.

(2) (1911) 15 C. L. J. 267=10 I. C. 615=12 Cr. L. J. 319.

of irrigation and rights of taking water through particular channels from particular reservoirs are concerned, a local inspection is imminently necessary. It was also laid down in the same case that although as a rule it is better to have such an investigation made by some other person, there is nothing in law to prevent the presiding Magistrate from making the investigation himself provided he records what he saw and does not act upon hearsay evidence. This objection, therefore, must be disallowed.

The third objection taken by the learned Vakil for the petitioner is that in deciding the case the learned Magistrate has relied upon the result of his own local inspection and not upon the evidence on the record. This objection appears to be of substance and ought to be allowed. On a reference to the judgment of the learned Deputy Magistrate it is quite evident that his finding is based upon the results of his own local inspection. It is a salutary principle of law that the finding of a Court must be based upon evidence duly recorded by it and not upon the impression formed by the Judge on a local inspection of the locality. He can in order to elucidate the evidence make a local inspection and the object of a local enquiry would be only with a view to understand the evidence actually adduced in the case.

Moreover, it is absolutely necessary that if a Magistrate makes a local enquiry he must make a note of what he saw and must place it on the record so that the parties may be in a position to know what impression the Magistrate had got by the local enquiry. It is possible that the Magistrate, may have formed a wrong impression, and, if the results of his inspection are recorded, the parties would be in a position to know if there has been an error and will be in a position to remove the wrong impression formed by the Magistrate. In the present case the learned Deputy Magistrate made no note of his local inspection and there is no record of it either in the order sheet or anywhere else in the records.

This objection ought, in my opinion, to prevail and the order of the learned Deputy Magistrate is set aside and the case remanded to him for disposal according to law. *Case remanded.*

A. I. R. 1923 Patna 368.

KULWANT SAHAY, J.

Newa Lal Rai and others—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Rev. No. 95 of 1923, Decided on 14th March 1923, from a decision of Dt. Mag. of Monghyr, dated 23rd January 1923.

Cr. P. C. S. 423—Appellate Court cannot dispose of appeal summarily without writing a judgment.

After an appeal from conviction was admitted the appellate Court dismissed the appeal making a note in the order sheet that it had gone through the record.

***Held*, that an appeal having once been admitted, it could not be disposed of summarily without considering the whole evidence in the case and writing out a judgment.** [P. 368, C. 2.]

S. N. Bose—for Petitioners.

Government Advocate—for the Crown.

Kulwant Sahay, J.—The petitioners were convicted by the Sub-Deputy Magistrate of Begusarai under Section 147, I. P. C. and sentenced to one month's rigorous imprisonment each. They preferred an appeal which was admitted on the 11th December 1922. On the 5th January, when the appeal came on for hearing, the petitioners filed a petition for time to get copies of certain documents. This petition was rejected, and thereupon it appears that the appeal was not argued before him; but the learned Additional District Magistrate went through the record and in the order sheet he made a note to the effect: "I have been through the record and judgment of the lower Court together with the grounds of appeal. The conviction and sentence appear to be fully justified. Appeal dismissed under section 423, Cr. P.C. Convictions and sentences "upheld"

The appeal having been once admitted it could not be disposed of summarily without considering the whole evidence in the case and writing out a judgment under section 423, Cr. P. C. If the pleader of the appellants did not appear it was the duty of the Magistrate then to go through the record and write out a proper judgment according to law. The order is set aside and the case is remanded to him for hearing according to law. The order of bail passed by the District Magistrate on the 11th December 1922 will stand.

* A. I. R. 1923 Patna 369.

KULWANT SAHAY, J.

Ramjharia and another—Petitioners.

v.

Piar Koeri—Opposite Party.

Criminal Rev. No. 103 of 1923, decided on 22nd March 1923 against an order of Honorary Mag. of Arrah, dated 5th of February 1923.

Criminal P. C. S. 145—Non-filing of written Statement does not take away jurisdiction of Magistrate to try case—Case ready for trial can be transferred—Parties claiming exclusive plots—Proceedings are maintainable.

In order to give jurisdiction to a magistrate to proceed under S. 145 all that is necessary is that he should be satisfied of there being likelihood of a breach and he should make a note stating his grounds of his so being satisfied and require the parties to attend and to put in written statements of their claims. If a party fails to put in written statement that would not take away the jurisdiction of the Magistrate to proceed with the case; 11 W. R. Cr Rulings, p. 9, Ref. It is not illegal for a magistrate to transfer the case when the parties are ready for trial and some have even filed written statements 2 P. L. T 186 Dist. Where each party claims exclusive possession of half of the plot in dispute and not joint possession of the whole together proceedings under S. 145 are maintainable. 1 P. L. T. 594 Dist. [P. 370, C. 1, P. 371, C. 1.]

S. P. Varma—for Petitioners.

Kulwant Sahay, J. :—The petitioners were the second party in a proceeding under section 145 of the Criminal Procedure Code The dispute relates to the possession of three plots of land bearing survey Nos. 1100, 1106 and 1153 in village Parbatpur. These plots formed the raiyati holding of two brothers Singar Koeri and Piar Koeri. Singar Koeri died about four years ago and Musst. Ramjharia of the second party is his widow. The surviving brother Piar Koeri is the first party in these proceedings and his case is, that the two brothers were joint and since the death of Singar Koeri he has been in exclusive possession of the three plots by right of survivorship

Musst. Ramjharia of the second party claims that her husband was separate from the first party and that she has been in exclusive possession of half of the three plots in dispute as the heir of her husband. Mukhan Ahir, the other member of the second party claims actual possession of a part of the land in dispute as a mortgagee from Musst. Ramjharia.

On the 13th October 1922, the first party filed a petition before the Sub-Divisional Officer of Arrah setting out the above facts and stating, that on the 10th October 1922 he was obstructed by the second party when he went to sow *Khesari* crops in the lands; that there was a likelihood of the breach of the peace and he prayed for proceedings under section 107 of the Criminal Procedure Code.

The Magistrate thereupon made an order upon the Police to enquire and report by the 7th November 922 and to see that no breach of the peace takes place. The Police submitted a report and on the 7th of November 1922 the Magistrate ordered the proceedings under section 145 of the Criminal Procedure Code to be drawn up fixing 23rd November 1922 as the date for filing written statement and adducing evidence. After some adjournments the second party filed written statement on the 21st December 22. The first party prayed for time and the case was adjourned to the 16th January 1923. On the 16th of January, it appears that no written statement was filed by the first party, but he was present in Court with his witnesses and was ready to go on with the case. The Magistrate thereupon made the following order on the 16th January 1923; " Case ready; transferred to Moulvi Abdul Gafoor for favour of disposal ".

On the same date the case was taken up by Moulvi Abdul Gafoor; some witnesses were examined on behalf of the first party, and on the petition of the first party the case was adjourned to the 29th of January in order to enable the first party to produce more witnesses. On the 29th of January three more witnesses were examined for the first party and three witnesses were examined for the second party, and on the 5th of February 1923, the Magistrate made his final order declaring the first party to be in possession and forbidding disturbance of such possession. The second party now applies for revision of this order.

The first point taken by the learned counsel on behalf of the second party

is that as no written-statement was filed by the first party, the learned Magistrate had no jurisdiction to make an order in favour of the first party. Sub-section 1 of section 145 provides that "whenever a District Magistrate, Sub-divisional Magistrate or Magistrate, of the First Class is satisfied from a police report or other information that a dispute likely to cause the breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and require the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the facts of actual possession of the subject of dispute,"

In order to give jurisdiction to a Magistrate to proceed under Section 145, Cr. P. C. all that is necessary is that he should be satisfied of there being a likelihood of a breach of the peace and he should make a note stating his grounds of his being so satisfied and require the parties to attend and to put in written statements of their claims. This was done in the present case. The Magistrate was satisfied upon the police report and he made an order requiring the parties to put in written statements.

Now, if a party fails to put in a written statement that would not take away the jurisdiction of the Magistrate to proceed with the case. The proceeding being properly initiated it was incumbent on the Magistrate to make the enquiry and to take such evidence as the parties offered irrespective of the fact that one or other of the party failed to put in a written statement. The Magistrate would not be justified in refusing to proceed with the case because the parties neglected to file a written statement on the date fixed; he has to take evidence, if offered by any of the parties, and to decide the case upon such evidence.

Reference in this connection may be made to the case of *In re Goluck Chander Mytee* (1). This case was undoubtedly decided under the Act of 1861 but the principle enunciated therein is applicable to proceedings under the present Code.

The learned counsel for the petitioner argues that the written statement is the basis upon which a case under section 145 proceeds and it is upon the allegations contained in the written statement that the parties know what the case of their opponent is, and have to adduce evidence accordingly; but in my opinion the basis of a proceeding under section 145 is not the written statement but the police report or other information from which the Magistrate is satisfied about the fact of the likelihood of a breach of the peace. In the present case we find that the case sought to be made by the first party was clearly set out in his petition of the 13th of October 1922 and when he appeared on the date fixed for hearing and adduced evidence the Magistrate was bound to receive such evidence and to decide the case.

The learned counsel relies on sub-section 4 of section 145 which provides that the Magistrate shall, without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, and receive the evidence produced by them, and contends that if no written statement is filed, the Magistrate cannot proceed further, or, in any event, cannot make any order in favour of the party failing to file a written statement; but this sub-section does not say that if no written statement is filed the Magistrate cannot make the order. If no written statement is put in he certainly cannot peruse it, but all the same he is bound to hear the parties and to take the evidence produced by them. I am therefore of opinion that the not filing of the written statement by the first party did not take away the jurisdiction of the Magistrate to make an order his in favour.

The second point taken is that as no written statement had been filed on the 16th of January 1923 the learned Sub-divisional Officer had no jurisdiction to transfer the case to any other Magistrate for disposal, and reliance is placed upon the case of

(1) 11 W. R. Cr. R. 9.

Misri Chowdhury v. *Narsing Prasad* (2). In that case the proceeding was drawn up by the Sub-divisional Magistrate and in the order initiating the proceeding the learned Magistrate directed the parties to appear before another Magistrate on the 28th of August 1920 and to file their written statements there. This Court held that it was illegal for the Sub-divisional Magistrate to direct the parties to appear before another Magistrate and to file their written statement there, inasmuch as section 145 requires the Magistrate to draw up proceeding calling upon the parties concerned to attend his Court and to file written statements. In the present case the case was not transferred until the parties were ready and one of the parties had filed his written statement. This objection therefore also must be disallowed.

The third objection taken is that the second party claims possession of the plots in dispute jointly with the first party, and, where the dispute is between two parties, one of whom claims joint possession, proceedings under section 145 cannot be maintained, and reliance is placed on the case of *Sham Lal Mander* v. *Rajendra Lal* (3). That was a case of admitted joint proprietors. In the present case each party claims exclusive possession of one half of the plots in dispute. This objection is without any foundation and cannot be allowed.

The result is that this application is dismissed.

Application dismissed.

(2) (1921) 2 P. L. J. 186=22 Cr. L. J. 483 =62 I. C. 179.
(3) (1920) 1 P. L T. 534=21 Cr. L. J. 790= 58 I. C. 518.

* A. I. R. 1923 Patna 371.

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

Basanta Kumari Last—Defendant Appellant.

v.

Balmakund Marwari and others—Plaintiffs-Respondents.

Mis. A. No. 144 of 1922, decided on 13th Nov. 1922, against an order of Sub. J., of Purulia, dated 29th May 1922.

(a) *Execution — Mortgagee-auction-purchaser stands in no better position as against strangers, than his mortgagors.*

There is no difference between a person who purchases, by private treaty and a person who acquires by a sale under a mortgage decree property from the mortgagor. The mortgagee, auction-purchaser stands in no better position against a stranger than the mortgagor himself.
[P. 373, C. 1.]

(b) *Civil P. C. S. 144 —Art. Lim. Act applies to applications under s. 144, C. P. C.*

An application for restitution is an application for execution under the present Civil P. C. just as it was under the old Procedure Code, and art. 182 of the Limitation Act applies to such applications.
[P. 374, C. 1]

Atul Krishna Ray—for Appellant.

Abani Bhusan Mukherjee—for Respondents.

Dawson-Miller, C. J.:—This is an appeal from an order of the Subordinate Judge of Purulia, dated the 29th May 1922, refusing the Appellant's application for restoration under Sec. 144 of the Civil Procedure Code. It appears that a suit was instituted on behalf of Abinash Chandra Karmakar and Satish Chandra Karmakar, the Respondents Nos. 2 and 3 against the Appellant and her brother claiming to eject them from the house in question.

In that suit a decree was passed *ex parte* on the 10th January 1917 and on the 29th March in the same year the Plaintiffs in that suit got possession of the house.

On the 18th June in the same year the *ex parte* decree was set aside and the suit was restored for hearing. It came on for hearing, and in the following year on the 7th March 1918 the suit which was one claiming rent and ejectment of the Defendants was dismissed, and on the 13th July 1918 an appeal from that

decision to the District Judge was also dismissed on the ground that the plaintiffs had no title to the house. The defence of the appellant in that suit was that the house had been acquired by her husband from one Dwarka Nath Karmakar and on her husband's death devolved upon her son and that she and her brother were living in the house and were in possession with the consent of her son. The *ex parte* decree having been set aside and the suit after being restored having been dismissed, the appellant preferred an application on the 29th June 1921 under S. 144 of the Civil Procedure Code asking that she might be restored to possession of the house and put in the same position as she would have been, had the original *ex parte* decree which was set aside not been passed. At that time it appears that the plaintiffs in the suit were no longer in possession but the respondent No. 1 Balmakund Marwari, was in possession.

I ought to mention here how it was that Balmakund came into possession of the house. Sometime in the year 1914 the respondents Abinash and Satish had mortgaged the house to Balmakund, the respondent No. 1, and on the 25th February 1916 Balmakund having brought a suit upon his mortgage obtained a preliminary decree against the respondents Nos. and 3. In execution of that decree the house was put up for sale and purchased by Balmakund himself That was on the 16th April 1918.

On the 24th May in the same year Balmakund got delivery of possession from the other respondents, who, as already pointed out, had dispossessed the appellant in March 1917. Both Balmakund and his mortgagors were made parties to the present application.

Before the learned Munsif who tried the application originally two points were argued. It was contended that sec. 144 had no application in the circumstances of the present case as it could not be contended that Balmakund was the representative-in-interest of the other two Respondents and that any rights which the appellant might have as against the other two respondents after their *ex parte* decree was set aside could not be enforced against Balmakund who had got possession of the house at a subsequent period in pursuance of the execution of his mortgage decree. The learned Munsif was of opinion that restitution might be granted even against Balmakund but on the second point which was raised before him which was one of limitation he came to the conclusion that the appellant's application was barred by limitation. It is not disputed that the period of limitation for an application of this sort is three years. A question has arisen whether it comes under Art. 181 or under Art. 182 of the Limitation Act and I shall deal with that point presently, but the learned Munsif came to the conclusion that at the plaintiff's right to make the application accrued on the 18th June 1917 when the *ex parte* decree was set aside and as the application was not made until just over four years later, her right to apply was barred by limitation.

From that decision the appellant appealed to the Subordinate Judge. The learned Subordinate Judge took a different view upon the first point from that taken by the Munsif and came to the conclusion that no application under S. 144 could be made by the Appellant against Balmakund.

The learned Subordinate Judge apparently took the view that the Appellant was never in possession of the house in her own right but was only claiming to be in possession through the right of another, namely, her son, and, therefore, as far as I understand his judgment, he arrived at the conclusion that the appellant was not entitled to regain possession from anybody. Having arrived at that conclusion he thought it was unnecessary to deal with the question of limitation. In fact he says no question of of limitation arises when it is found that the petition under S. 144 of the Civil Procedure Code is not maintainable.

From that decision the appellant has applead to this Court and the first question to be dicided is whether the application is maintainable against Balmakund or not. I ought, perhaps, to mention that Balmakund obtained his possession of the house

as mortgagee from the other two Respondents and although that possession was obtained in execution of a decree in his mortgage suit at a sale by the Court, I cannot see how that fact can give Balmakund any better rights than those which his mortgagors originally had When the *ex parte* decree was set aside on the 18th June 1917 it seems to me that the Appellant who before the decree was in possession of the house and living there with her brother had a right to be restored to the same position as she would have been in, if that decree had never been passed.

Therefore the rights as between the Appellant and the Respondents Nos. 2 and 3, the plaintiffs in the suit originally, were crystallised from that moment and the Appellant was entitled clearly at that time and within the period of limitation to be restored to the possession of which she had been wrongfully deprived under the *ex-parte* decree of the Plaintiffs. The only question therefore which arises is whether Balmakund having derived his title under the mortgage from the Plaintiffs can set up any better defence to an application under S. 144 than his predecessors could It has been argued before us that Balmakund is not the representative of the judgment-debtors whose property he purchased.

I myself can see no difference between a person who purchases by private treaty and a person who acquires by a sale under a mortgage decree property from the mortgagor No authority has been cited to us in support of the proposition that the mortgagee auction-purchaser stands in any better position against a person in the place of the present Appellant than the mortgagor himself, and, in my opinion, I confess I can see no reason why he should be treated as having any better rights than the person whose property he has acquired

Therefore whatever the rights may be that were determined as between the Respondents Nos. 2 and 3 and the Respondent No. 1 in the mortgage suit, those rights cannot, in my opinion, deprive the Appellant of the rights she acquired under S. 144 to be restored to the same position as she was in previously namely, in possession of the house when the *ex parte* decree was set aside on the 18th June 1917. As a matter of fact although perhaps it is unnecessary to refer to this for the purposes of my judgment it was found when the suit was restored and re-tried that the Respondents Nos 2 and 3 who were claiming to eject the Appellant had no title to the house in question, the title being not in them but in the Appellant's husband originally, and subsequently in her son. I think therefore that apart from the question of limitation which must be considered presently the decision of the learned Subordinate Judge cannot stand.

On the question of limitation it is not very easy for us, sitting here in second appeal, to determine that question. The facts which were before the Munsif appear to some extent from his judgment but it is not quite clear from that how far any application for execution of the decree was made or how far that application included a claim to be restored to possession of the property.

The learned Subordinate Judge as I have already pointed out, did not deal with this matter at all. He, however, would be entitled to go into the evidence upon this matter and arrive at a conclusion about it, an advantage which we sitting in second appeal have not got. Before, however, sending back the case for determination upon this question by the lower appellate Court we must be satisfied that even upon the facts so far as we know them, the Appellant really has a case to present upon this part of the appeal.

Assuming that an application under S. 144 of the Civil Procedure Code is to be treated as an application in execution, then I think that there is sufficient reason in the learned Munsif's judgment to indicate that the facts of this case might bring it within the provisions of Art. 182 of the Limitation Act so as to extend the time of limitation beyond the three years from the date of the decree or order, that is to say, the order setting aside the *ex parte* decree. If, on the other hand, an application under S. 144 cannot be treated as an application in execution, then it is quite

clear that the cause of action having arisen on the 18th June 1917 and the present application having been presented some four years later the application would be barred by limitation.

We have been referred to the case of *Somasundaram Pillai* v. *Chokkalingam Pillai* (1), where it was laid down, following an earlier case of the Madras High Court, that an application for restitution is an application for execution under the present Civil Procedure Code just as it was under the old Procedure Code. In my opinion that case was properly decided. Although an application under S. 144 is not included in O. 21 which lays down the rules of procedure in execution cases still in substance I think that an application asking for restitution in consequence of a decree having been set aside is just as much an application in execution of that decree as any other application which seeks to have the actual declarations in the decree enforced. It is true that the decree only deals with it in a negative sort of way but in fact the result of setting aside a decree in favour of one party is to give the other the right to be restored to the same position as he was in before that decree was passed and to set aside any advantage that the decree-holder might have obtained by executing the decree.

In the present case the Appellant had been deprived of possession and the effect of setting aside that decree which gave the Respondents the right to possession was, to my mind, just the same in effect as if the order setting aside the decree had in the circumstances ordered that possession should be delivered to the Appellant. I think, therefore, that it is only right and proper to regard an application under S. 144 as an application made in execution of a decree.

If I am right in that view, then although it is more than three years since the decree was set aside giving rise to the present claim of the Appellant, still I find from the Munsif's judgment that on the 12th June 1918, that is to say, about a year after the decree was set aside, an application for execution was made by the Appellant, and we are told that on the same day a stay of that application was granted for two weeks in order to allow an application to the District Judge for the purpose of staying this very execution because there was at that time an appeal pending to the District Judge from the decision in the principal suit.

The principal suit on appeal was decided by the District Judge on the 13th July 1918 and therefore from that date one must take it that the stay was removed so that if one deducts the time between the 1st June 1918 and the 13th July 1918 from the period allowed for bringing execution proceedings within the meaning of Art. 182 of the Limitation Act, it would follow that the present application having been made on the 29th June 1921 was within three years of the time when the last application for execution was made deducting the time during which that application was stayed.

Whether there was in that previous execution application an application for possession is not absolutely clear but it does appear from the judgment of the Munsif that when the application for execution was made the applicant obtained a *parwana* for possession. Therefore one is entitled to assume, unless it is clearly shown to the contrary, that at that time the Appellant was asking the Court to assist her by giving her possession of the property of which she had been deprived. If in fact that application was made, then I think it being, as I have already said, an application in execution and governed by Art. 182 of the Limitation Act, the present application must be regarded as in time. This, however, is to some extent a question of fact which the learned Judge of the lower appellate Court will have to consider.

In the result we set aside the decision of the Subordinate Judge refusing the Appellant's application but as the Appellant's right to succeed in that application must still depend upon the question of limitation we direct that the learned Subordinate Judge before finally disposing of the appeal to consider

(1) (1916) 40 Mad. 780=38 I. C. 806=5 L. W. 207.

the question of limitation and come to a decision thereon in the light of the facts already before him. For this purpose he will be entitled of course to consider any orders in the case that have been made and that appear in the order sheet in the Court records or in the record before him. The costs of this appeal will be governed by the final decision of the lower appellate Court.

Jwala Prasad J.—I agree to the order proposed.

Case remanded.

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* A. I R. 1923 Patna 375.

MULLICK AND KULWANT SAHAY, JJ.

Ishan Chandra Kundu and another — Appellants.

v.

Nilratan Adikari and others.— Respondents.

Mis. Ap. Nos. 188, 192, and 204 of 1921 decided on 21st March 1923 from an order of Sub. J., Purulia, dated the 22nd August 1921.

(a) *Civil P. C. O. 32, R. 7—Permission, mode of granting—No special form is necessary-Though leave of Court is not expressly recorded, decree is not a nullity and cannot be objected to in execution.*

In order to attract the provisions of Order XXXII, rule 7 it is enough to show that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian to the Court asking for leave to enter into the compromise and the Court makes a note of that application and passes a decree in terms of the compromise, it must be held that the leave of the Court was expressly recorded within O 32 R. 7 of the Code. (6 P. L. J. 190 Dist; 28 All. 535 P. C. Foll).

Assuming that the leave of the Court was not expressly recorded that would not make the decree a nullity. It would only make the decree voidable at the option of the minor and so long as it is not avoided in a proper proceedings, no objection can be taken in the execution proceedings as regards the validity thereof. (26 B. 109 Ref).

[P. 377, C. 2; P. 378 C. 1.]

(b) *Civil P. C. S. 34, R. 5—Mortgage suit compromised and final decree passed by consent without a preliminary decree—Decree is valid.*

Where the compromise petition upon which the decree in a mortgage suit was made, expressly stated that the decree will be considered as final and absolute.

***Held* that it is always open to the parties to a litigation to waive a particular procedure and to agree to final decree being passed without a preliminary decree being passed in the first instance. A consent decree, directing payment by instalments, is a perfectly valid decree and it is not covered by order XXXIV, rule, 4 and therefore it is not necessary to make a final decree under rule 5 of the said order. (10 C. L. J. 91 Ref.)**

[P. 378; C. 1]

(c) *Contract Act, S. 62—New contract.*

A compromise decree passed in the suit based on a mortgage, does not create a new contract. 46 C. 76 and 19 C. W. N. 1228 Dist.

Bose and *C. C. Das*—for Appellants (in 188)

B. N. Mitra—for Appellants (in 192)

B. C. Rai and *P. K. Mukerjee*—for Appellants (in 204).

N. C. Sinha and *A. B. Mukerjee*—for Respondents in all appeals.

Kulwant Sahay, J.—These are three appeals by the judgment-debtors against two orders of the Subordinate Judge of Purulia dated the 22nd August 1921, disallowing their objections to the execution of a decree. The decree under execution was passed on the basis of a mortgage bond, dated the 4th of October 1909, executed by Beni Madhava Kundu, Dina Nath Kundu and Ishan Chandra Kundu for a principal amount of Rs 31,518/12/-, carrying interest at Rs. 7/8/- per cent per annum, and the properties mortgaged were the *raiyati* holdings of the mortgagors. A suit upon the basis of the above mortgage was brought in the year 1919, against the three mortgagors who were defendants 1 to 3 in the suit and against Surja Kant De who was impleaded as defendant No. 4 on the allegation of his being a subsequent mortgagee. The defendant No. 1 Beni Madhava Kundu, died after the institution of the suit, and his three sons Atul Chandra Kundu, Gokhul Chandra Kundu and Lalit Mohan Kundu were substituted in his place. Lalit Mohan Kundu was a minor and Babu Gokhul Chandra Ghosal, Pleader, was appointed as his guardian-*ad-litem*.

The defendant No. 4, Surja Kant De, was also a minor and he was represented in the suit by his mother. Srimat

Kishori Mohan Dasi, as his guardian *ad litem*. The defendants 1,2 and 3 filed a written statement, but no written statement was filed on behalf of the defendant No. 4 although time was once taken by his guardian for the purpose. After various adjournments, the case was taken up on the 31st of March, 1920, when the defendants filed an application praying for time, as a talk of compromise was going on, and the Court adjourned the case to the next day with the direction that if the dispute was not settled amicably, the parties must be ready to go on with the case.

On the next day *i. e.*, on the 1st of April 1920, the plaintiffs and the defendants other than the defendant No. 4 filed a petition of compromise and Babu Gokhul Chandra Ghosal the guardian *ad litem* of the minor defendant Lalit Mohan Kundu filed an application for permission to compromise the case on behalf of the minor. There was no appearance on behalf of the defendant No. 4; the Court examined one witness and decreed the suit on compromise as against the defendants 2 and 3 and the heirs of the defendant No 1, and *ex parte* as against the defendant No. 4.

The terms of the compromise were that the suit was decreed for the total amount of Rs. 32,542/8/-, payable in 12 annual instalments from 1327 to 1328 B. S. and it was provided that if any instalment be in default the amount of all the instalments will be considered as in default, and the plaintiffs will be entitled to realize the decretal amount *i. e.* the entire amount, with interest at 6 per cent per annum by execution of the decree and the sale of the mortgaged property It was declared also that the mortgaged property will stand pledged for the satisfaction of the decretal amount, and the decree will be considered as final and absolute No payment was made, and the decree-holder applied for execution of the decree whereupon two petitions of objections were filed under section 47 of the Code of Civil Procedure: one on behalf of defendants 2 and 3 and the heirs of the deceased defendant No. 1; and another on behalf of defendant No. 4.

The principal objections raised by the defendants were (1.) that there was no valid decree against the minor Lalit Mohan Kundu as there was no permission granted by the Court to his guardian-*ad-litem* to enter into the compromise on which the decree was made, (2) that the decree under execution being a mortgage decree could not be executed unless a final decree was passed, and (3) that the properties sought to be sold being part of raiyati holdings could not be sold under the provisions of sections 46 and 47 of the Chota Nagpur Tenancy Act. A further objection was taken by the defendant No. 4 to the effect that the execution could not proceed as no notice under Order XXI, rule 22 of the Civil Procedure Code was served upon him ; the execution petition having been filed more than a year after the date of the decree.

The learned Subordinate Judge has disallowed all the objections except the last objection of the defendant No. 4, namely, that the execution could not proceed for want of notice under Order XXI, rule 22 of the Civil Procedure Code Three appeals have been preferred against the orders of the Subordinate Judge. Appeal No. 204 is on behalf of Lalit Mohan Kundu, the minor judgment-debtor; appeal No 188 is by the adult judgment-debtor, appeal No. 192 is by the defendant No. 4, the subsequent mortgagee.

As regards the first objection, it is argued by the learned Vakil for the appellant that the compromise decree cannot be executed as against the minor Lalit Mohan Kundu in as much as the provisions of Order XXXII, rule 7 of the Code of Civil Procedure were not complied with and no leave of the Court was granted to the guardian to enter into the compromise on behalf of the minor, and in support of his argument he has relied upon a number of rulings of the Privy Council as well as of the various High Courts.

He argues that the decree, in so far as the minor is concerned, is a nullity and is incapable of execution. From the documents on the record, it is true that it does not appear that any order was recorded in the order-sheet granting leave to the

guardian to enter into the compromise on behalf of the minor, but the fact that the attention of the Court was expressly directed to the fact that there was a minor concerned and that the compromise was being entered into on his behalf, is evident from the order of the 1st of April 1920, where it is expressly stated that the guardian of the minor defendant applied for permission to compromise the case on behalf of the minor and there can be no doubt that the Court did apply its mind and sanction the compromise on behalf of the minor.

Reliance has been placed by the learned vakil for the appellant on the case of *Ramgulam Sahu* v. *Durga Prasad* (1) where it has been held by this Court that it cannot be inferred that the Court has under Order XXXII, rule 7 of the Code of Civil Procedure sanctioned a compromise from the mere fact that the petition of compromise gave notice to the Court that the interest of the minor parties was intended to be affected by the compromise and that the Court passed a decree in accordance with the compromise. In that case a suit had been brought by one Gaya Prasad on his own behalf and on behalf of his minor sons for partition of joint family properties.

That suit resulted in a consent decree passed on a petition of compromise filed by Gaya Prasad. Subsequently another suit was brought by the minors for a partition of the same joint family properties ignoring the previous consent decree, and one of the questions raised was whether the previous consent decree operated as a bar to the plaintiff's right to maintain the subsequent suit. Their Lordships on a reference to the petition of compromise filed in the suit and the entire evidence on the record came to the conclusion that there was nothing in the petition to suggest that the minors were parties to the compromise.

No doubt the compromise affected the interests of the minors but as they were not parties to the compromise petition, the Court would not be called upon to exercise its judgment on the question whether the compromsie was for their benefit. No leave was asked for by the guardian *ad litem* to enter into the compromise on behalf of the minors and their Lordships were of opinion that the attention of the Court was not directed to the fact that there were minors whose interests were being affected by the compromise, and that the Court did not apply its mind as to whether or not the compromise was for the benefit of the minors.

Their Lordships on the evidence in that case came to the express finding that there was evidence on the record suggesting an inference that the Court never intended to exercise its judgment on the question whether the settlement was for the benefit of the minor and under those circumstances it was held that the compromise decree was not binding on the minors.

In the present case before us, it is clear from the order sheet that the attention of the Court was expressly drawn to the fact that the compromise was being effected on behalf of the minors inasmuch as a petition for leave to enter into the compromise was filed by the guardian and noted by the Judge. In order to attract the provisions of Order XXXII, rule 7 of the Code of Civil Procedure, it is enough to show that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian to the Court asking for leave to enter into the compromise and the Court makes a note of that application and passes a decree in terms of the compromise, it must be held that the leave of the Court was expressly recorded within the meaning of Order XXXII, rule 7 of the Code.

This was the principle laid down by their Lordships of the Privy Council in the case of *Manohar Lal* v. *Jadunath Singh* (2), and the case now before us comes directly within the principles so laid down.

(1) A. I. R, 1921 Pat. 14.

(2) (1906) 28 All. 585=33 I. A. 128=8 Bom L. R 489=4 C. L. J. 8=10 C. W. N. 893=9 C. C 219=1 M. L. T. 210=16 M. L J 991=3 A. L. J. 710 (P. C.).

Then, in the next place, it is to be noted that assuming that the leave of the Court was not expressly recorded that would not make the decree a nullity. It would only make the decree voidable at the option of the minor and so long as it is not avoided in a proper proceeding, no objection can be taken in the execution proceedings as regards the validity thereof. Reference may be made in this connection to the case of *Virupakshappa* v. *Shidappa* (3).

The second objection raised on behalf of the appellant is that the decree under execution being a mortgage decree it could not be executed unless it was made absolute and a final decree for sale was passed. As I have already stated, the compromise petition upon which the decree was made expressly stated that the decree will be considered as final and absolute (*vide* para. 4 of the petition dated the 1st of April 1920).

The suit was no doubt a mortgage suit and had there been no compromise the ordinary procedure laid down in Order XXXIV, Civil Procedure Code, would have been followed and a preliminary decree ought in the first instance to have been passed, and in that case it would be necessary to make a final decree at a subsequent stage. But this is a mere rule of procedure and it is always open to the parties to a litigation to waive a particular procedure and to agree to a final decree being passed without a preliminary decree being passed in the first instance. A consent decree, directing payment by instalments, is a perfectly valid decree and it is not covered by Order XXXIV, rule 4 of the Civil Procedure Code, and therefore it is not necessary to make a final decree under rule 5 of the said order.

This view is supported by the judgment of their Lordships of the Calcutta High Court in the case of *Bechu Singh* v. *Bechuram Sahu* (4). Reference may also be made in this connection to the case of *Arunbati Kumari* v. *Ram Niranjan Marwari* (5). In my opinion, there is no substance in this objection and the learned Subordinate Judge was right in disallowing the same.

The third objection is based on the provisions of sections 46 and 47 of the Chota Nagpur Tenancy Act. Now, the mortgage in suit is dated the 4th October 1909. The Chota Nagpur Tenancy Act was introduced in the district of Manbhum in December 1909, and therefore the mortgage of October 1909 was not affected by the provisions of sections 46 and 47 of the Chota Nagpur Tenancy Act.

But, it is argued that the compromise was effected at a time when the Act was in force and it was by the compromise that the property now sought to be sold was mortgaged, and the present sale is based on the contract entered into in the compromise petition of the 1st of April 1920. This argument proceeds on the assumption that the compromise was in effect a fresh contract which was the origin of the rights between the parties, and although it came into existence in consequence of the mortgage of 1909 yet for the purpose of enforcement and for the purpose of the application of sections 46 and 47 of the Chota Nagpur Tenancy Act, this fresh contract must be taken to be the transaction between the parties which was the foundation of their rights. Reliance has been placed by the learned Counsel on the case of *Narayan Ganesh Ghaiate* v. *Lali Ram* (6) and *Kusodhar Bhakta* v. *Brojo Mohan Bhakta* (7).

But those cases have no application to the facts of the present case. In the first case it was held on a consideration of the facts of that case and on an interpretation of the conciliation award that the original mortgages and the decree based thereon were extinguished by the subsequent award which was duly

(3) (1904) 26 Bom. 103=3 Bom. L. R. 565.
(4) (1909) 10 C. L. J. 91=1 I. C. 677.
(5) (1920) 2 P.L.T. 38=58 I. C. 299.
(6) (1918) 46 Cal. 76=45 I. A. 179=24 M. L. T. 345=14 N. L. R. 165=28 C.L.J. 247=(1918) M.W.N. 835=23 C. W. N. 297=48 I. C. 141=21 Bom. L. R. 58 (P. C.)
(7) (1916) 43 Cal. 217=31 I. C. 13=19 C. W. N. 1223

registered and which had the same legal effect as an entirely fresh contract. In the second case all that was held was that a contract of parties is none-the-less a contract because there is superadded to it the command of a Judge. Here there was no fresh contract in the year 1920.

The suit was based on the mortgage of 1909, and the decree was passed on the basis of that mortgage. On a true construction of the petition of compromise it cannot be held that a fresh contract of mortgage was entered into between the parties in 1920. What was intended was that the original mortgage of 1909 will stand; only payment was to be made by instalments as agreed to between the parties. In this view of the case, sections 46 and 47 of the Chota Nagpur Tenancy Act have no application to the facts of the present case.

The objections taken by the defendant No. 4 (who is the appellant in appeal No. 192) in the Court below, were, first, that the decree could not be executed as no final decree in the mortgage suit had been made against him and that the execution could not proceed as no notice under Order XXI, rule 22 had been served on him. As regards the objection of there being no final decree it has already been held that the decree in execution is itself a final decree and no fresh final decree was necessary to be passed. The other objection, as regards the want of notice under Order XXI, rule 22 has been allowed by the Court below.

In this Court a fresh objection was sought to be taken on behalf of this appellant to the effect that as he was not a party to the compromise petition no final decree could be passed against him. That may be so, but the decree as it stands is a final decree. It may be bad in law so far as he is concerned, but so long as it is not set aside in a proper proceeding, this defendant cannot be allowed to take the objection in the execution proceedings, and his objection taken for the first time here in appeal cannot be entertained.

The result is that all the three appeals must be dismissed with costs.

Mullick, J.:—I agree. In my opinion the Subordinate Judge did not violate the provisions of Order XXXII, rule 7 of the Civil Procedure Code. The leave of the Court has been expressly recorded in the proceedings although there are no words expressly stating that the guardian is the grantee of such leave. *Manohar Lal* v. *Jadu Nath Singh* (2) was decided in 1906, that is to say two years before the present Civil Procedure Code came into operation, and in my opinion the Code did not make any alteration in the law as interpreted by their Lordships of the Judicial Committee in that case. Their Lordships observed that there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order or petition or in some way not open to doubt that the leave of the Court was obtained. In the present case it has been shown in a manner not open to doubt that the leave of the Court was obtained.

I am further of opinion that even if the decree is bad on the ground that the leave of the Court was not taken, it is not a nullity and that it can only be avoided by a properly constituted proceeding. It cannot be called in question by way of objection to any proceeding taken in execution of it.

With regard to the objection that the decree is a nullity because it was not made in accordance with the provision of Order XXXIV of the Civil Procedure Code, in my opinion it was open to the parties to dispense with a preliminary decree; the making of a final decree payable in instalments was not illegal much less was it a nullity and in any event such a decree could not be challenged in execution proceedings.

Appeals dismissed.

A. I. R. 1923, Patna 380.

DAWSON-MILLER, C. J., AND ROSS, J.

Ramcharan Singh—Defendant-Appellant

v.

Sheo Dutta Singh—Plaintiff-Respondent.

S. A. No. 761 of 1920, decided on 7th Nov., 1922, from a decision of J. C., of Chota Nagpur, dated 14th June, 1920.

Court Fees Act, S 7 (xi) (cc)—Tenant holding against landlord's will—Suit to eject is governed by section.

The word 'tenant' used in clause (xi) (cc) seems to include a person to whom the description would apply immediately before the commencement of the suit but whose tenancy has terminated entitling the landlord to eject him. A tenant, who was the *thikadar* and whose *thikadari* interest has expired but who refuses to quit, whatever the reason may be, comes within the clause (cc) of paragraph (xi) of the section, and that section applies where in such circumstances the landlord brings a suit to eject him. [P. 381, Cs. 1 & 2.]

Bankim Chandra De—for Appellant.

Sheonandan Rai—for Respondent.

Dawson-Miller, C. J.:—This is an appeal on behalf of the defendants from a decision of the Judicial Commissioner of Chota Nagpur, dated the 14th June, 1920 affirming a decision of the Munsif of Chatra.

The respondents are the *jagirdars* of *mauza* Kedli Khurd. The appellant Ramcharan Singh was until just before the date of this suit the *thikadar* of the *mauza*. The suit was instituted in 1917 to eject the defendant on the expiry of his lease. Several defences were set up by the appellant, the main one being that his interest had not terminated but was a permanent interest created by the predecessors of the plaintiffs It is not disputed that the plaintiffs who are the respondents before us were the owners of the property and it is not disputed that the appellant was the *thikadar*. The only question between them with regard to that part of the case was whether the appellant had a permanent interest or merely a temporary interest which expired, as the respondents say, shortly before the institution of the suit. In addition to the main defence which was decided in favour of the respondents by both the Munsif and the Judicial Commissioner on appeal, whose decision on that point is not now questioned, the appellant raised a question which went to the jurisdiction of the Munsif to try the suit. In filing their plaint the respondents treated the case as one governed by section 7, paragraph (xi), clause (*cc*) of the Court Fees Act, namely, a case for the recovery of immoveable property from a tenant including a tenant holding over after the determination of the tenancy. The court-fee payable in such a case is the amount of the rent of the property in suit payable for the year before the presentation of the plaint. Acting upon that they valued the suit at Rs. 300 which was one year's rent and treated it as a suit in which the Munsif had jurisdiction.

The appellant questioned that course and said that the case was not governed by paragraph (xi) of section 7 but came under one of the earlier paragraphs of the same section, namely, paragraph (v), clause (*c*) or (*d*) and that it ought to be either fifteen times the net profits or the market value of the property in suit. Before us to-day it has been contended that the proper valuation for the purposes of jurisdiction ought to be the market value of the property and that if the market value is ascertained it will appear that the suit is one which ought to be valued at something over Rs. 1,000, the limit of the jurisdiction of the Munsif, and, therefore, the suit ought not to have been tried by the Munsif and ought to be dismissed as being without jurisdiction.

The first question to determine, and if that is decided in favour of the respondents it puts an end to this appeal, is whether the case is covered by paragraph (xi) of section 7 of the Court-Fees Act. That paragraph in so far as it is material for the purposes of this case reads as follows:—

"7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:—

(*xi*) In the following suits between landlord and tenant:—

(*cc*) for the recovery of immoveable property from a tenant, including a

tenant holding over after the determination of a tenancy ;

According to the amount of the rent of the immoveable property to which the suit refers, payable for the year next before the date of presenting the plaint."

The appellant's contention is that in the present case he is not, upon the findings of the lower Court, a tenant at all, and that, his tenancy having in fact terminated before the institution of the suit, he is no more than a trespasser and the suit should have been valued for the purposes of jurisdiction as in other cases where a person seeks to recover immoveable property, namely, the market value of the property. It is quite clear, to my mind, from reading the paragraph to which I have referred, that it relates to suits for the recovery of immoveable property from a person who has been a tenant but whose tenancy has expired and he is holding over even against the will of his landlord because, as pointed out by the learned Judicial Commissioner, it cannot be assumed that the clause only refers to cases where the tenant is holding over with the consent of his landlord.

It can hardly be expected that provision would be made for cases of a suit for ejectment where the landlord really is consenting to the tenant remaining on. If he is consenting to the tenant remaining and holding over, then it is hardly likely that he would bring a suit, so that one is driven to the conclusion that this clause at all events relates to some cases in which the tenancy has in fact come to an end and the landlord is entitled to re-enter.

Once one arrives at that conclusion I cannot help thinking that the clause was intended to refer to all cases where the landlord seeks to recover the property from a person who has been his tenant and whose tenancy has come to an end or where the landlord by reason of some breach of covenant is entitled to re-enter. The word 'tenant' as there used seems to me to include a person to whom the description would apply immediately before the commencement of the suit but whose tenancy has terminated entitling the landlord to eject him. If the section applies only to cases where the defendant is still the tenant of the landlord it is difficult to conceive any case to which the section would apply except where the landlord is entitled to re-enter by reason of a breach of covenant or to cases where the landlord must necessarily fail.

The majority of cases in which a suit to eject a tenant is brought are cases where the tenancy has terminated and the tenant refuses to quit and I consider that the word 'tenant' as used in the section was intended to cover such cases. In my view the circumstances of the present case, namely, a tenant who was the *thikadar* and whose *thikadari* interest has expired but who refuses to quit, whatever the reason may be, comes within the clause (*cc*) of paragraph (*x*) of the section, and that section applies where in such circumstances the landlord brings a suit to eject him.

For these reasons I think that the decisions both of the trial Court and of the learned Judicial Commissioner on appeal were right and ought to be affirmed and the appeal dismissed with costs.

Ross, J. : I agree.

Appeal dismissed.

A. I. R 1923 Patna 381.

DAWSON MILLER, C. J. AND MULLICK, J.

Janki Ray and others Defendants - Appellants.

v

Raja Kalanand Singh and others— Plaintiffs - Respondents.

S. A. No. 839 of 1920, decided on 27th July, 1922, from a decision of Sub. J., Monghyr, dated 16th June, 1920.

Civil P. C., O 9, R. 9—Application under B. T. Act—S. 158 is not a suit—O. 9, R. 9 does not apply —B. T. Act, S. 158.

The suit was instituted in 1919 by the plaintiffs as landlords against the defendants as tenants claiming compensation for occupation of certain land for the last three years and a determination of the annual amount of rent payable by the tenants. The only question in the appeal was whether the suit for assessing the rent at a certain rate according to the nature of the land was barred by reason of Order IX, rule 9. It appeared that a claim for assessment of rent was preferred by the same plaintiffs against the same defendants in respect of the same land in the year 1915. That application failed for default and was dismissed.

***Held*, the rule applies only to the case of suits and the relief sought in the present case in so far as it is for past rent is clearly not a relief which is barred by any previous**

suit for past rent in the year 1915 and in so far as the relief sought is for assessment of fair rent in a case where no rent has been paid previously it is not a suit at all an application under section 158, clearly cannot be regarded as a suit within the meaning of Order IX, rule 9. (18 C. W. N. 466 Ref.) [P. 382, C 1; P. 384, C. 1]

Kulwant Sahay and *Santa Prasad* for Appellants.

C. C. Das for Respondents.

Dawson Miller, J.: This is an appeal brought on behalf of the defendants against a decision, of the Subordinate Judge of Monghyr affirming with slight modifications the decree of the Munsif. The suit was instituted in 1919 by the plaintiffs as landlords against the defendants as tenants, claiming compensation for occupation of certain land for the last three years and a determination of the annual amount of rent payable by the tenants. The only question which arises in this appeal is whether the decree of the lower appellate Court assessing the rent at a certain rate according to the nature of the different plots of lands is barred by reason of Order IX, rule 9, of the Civil Procedure Code.

It appears that a claim for the assessment of rent was preferred by the same plaintiffs against the same defendants in respect of the same land in the year 1915. That application failed for default and was dismissed. The defendants contend that under the provisions of Order IX, rule 9, the previous suit having been dismissed under rule 8 of that Order, the plaintiffs are precluded from bringing a fresh suit in respect of the same cause of action. The question which we have to determine in the present appeal is whether Order IX, rule 9, applies to a case like the present at all. The rule applies only to the case of suits, and the relief sought in the present instance in so far as it is for past rent is clearly not a relief which is barred by any previous suit for past rent in the year 1915 and that indeed is not suggested.

In so far as the relief sought is for assessment of fair rent in a case where no rent has been paid previously or where no rent has been agreed previously it is not a suit at all. The only provision for asserting a claim of that sort is under section 158 of the Bengal Tenancy Act which provides that the Court having jurisdiction to determine a suit for the possession of land may on the application of either the landlord or the tenant determine certain matters, amongst others the rent payable by the tenant at the time of the application.

But for that section the plaintiffs would have no cause of action at all. They would certainly have no right to bring a suit for the assessment of rent merely on the ground that the tenant was in possession and that no agreement had been come to between him and the landlord as to the proper amount of rent payable. That must primarily be a matter of contract between the parties and no Court will make a contract for the parties or give enforcement to a contract which has not in fact been made between the parties. But under the special provisions of section 158 of the Bengal Tenancy Act, the plaintiffs have a right in such a case to apply for assessment of rent. Therefore in so far as the matters now under appeal concern, merely an application under section 158 of the Bengal Tenancy Act they clearly cannot be regarded as a suit within the meaning of Order IX, rule 9.

It is contended, however, on behalf of the appellants that section 158 of the Bengal Tenancy Act has no application in the particular circumstances of the present case. It is said that that section at the most only applies to cases where the landlord asks that it may be determined what is the rent payable by the tenant at the time of the application and therefore if there is already in existence an agreement between the parties as to the rent payable the Court has no power to disregard that agreement and make a new agreement for the parties even if it considers that the rent payable is not fair and equitable, because that would be in fact enhancing the rent which the Court has no right to do under section 158.

I entirely agree that if there is already in existence an agreement between the par-

ties as to the amount payable the Court in an application like the present has only to consider what was the amount payable under that agreement and cannot substitute therefor some other amount even if it should think that that would be more equitable. If, however, it should turn out that there is in fact no agreement between the parties as to the amount of rent payable, then I think that the case is governed by the decision in *Barhamdutt Misser* v. *Krishna Sahai* (1) where it was laid down that in such a case, that is to say, where there is no existing agreement between the parties, the Court has power under section 158 (1) (*d*) to ascertain, in the absence of such agreement, what is the proper rent payable and to determine that under the provisions of the section. In the present case the defendants say that it is shown by the evidence that there was in fact an agreement between the parties to pay rent for the land in suit upon the same basis as they had previously held the lands.

It appears that some years ago in the year 1896, the landlords obtained a decree for rent against the defendants or their predecessors and having put up the land for sale purchased it themselves. Some time later the defendants applied for a fresh settlement and they were in fact settled on the land by the plaintiffs, and their contention is that at that time the agreement between themselves and the plaintiffs was that they should pay the rent which they had previously paid when they had formerly held the lands.

If that case could be made out I entirely agree that the only function of the Court could be to ascertain what the previous rent was but it seems to me that in the judgment of the lower appellate Court there is a distinct finding that there was no such agreement as that contended for. First of all the record-of-rights which was finally published in the year 1908 after the defendants were re-settled on the lands records this land as *belagan kabil lagan* which means that no rent has been settled for the land but it is the class of land for which rent is assessable.

(1) (1918) 19 Cal W. N. 466=20 I. C 910.

The presumption, therefore, was that no rent had been settled between the parties for this land and, therefore, when the matter was before the trial Court and again before the Subordinate Judge on appeal they had to consider whether the evidence called by the parties was sufficient to rebut that presumption. The conclusion they came to was that the presumption had not been rebutted and that the land was in fact, as recorded in the record-of-rights, *kabil lagan*. The suggestion put forward by the defendants was that they had approached the plaintiff's manager and that he had offered them the land upon paying a *salami* of Rs 500 at the old rental and issued a *parwana* to that effect, the terms being that the lands were to be settled at the old rental, 4½ *bighas* at a *naqdi* rental and the remainder on a produce rent and that the defendants were to execute a *kabuliat* in respect of the settlement The evidence showed that the defendants never did execute a *kabuliat* in respect of this land and it further shows that they never did in fact pay a *salami* of Rs. 500, although they paid a sum of Rs. 250 and they say that they agreed to pay the rest by instalments, but there is no evidence that it was ever paid. Further there was no evidence at all to indicate that the defendants have accepted the terms put forward by the manager in the *parwana* or agreed to pay the rental which was offered to them and in fact from that day to this as far as the evidence goes they have never paid any rent at all and there has been a dispute going on between the parties as to the exact amount of rent payable. In these circumstances the Judge, even if we had any power to interfere with his finding, was perfectly justified in arriving at the conclusion that the record-of-rights had not been rebutted.

He therefore, found in favour of the plaintiffs and assessed the land as I have already said at various rates as being the rent payable at the time of the application.

In my opinion the appellants' contention fails and this appeal should be dismissed with costs.

Mullick, J.: I agree. So far as

the claim for an assessment of fair and equitable rent is concerned the plaint must be treated as an application under section 15 of the Bengal Tenancy Act and the present proceeding is not barred under the provisions of Order IX, rule 9, of the Civil Procedure Code which is only applicable to suit

Appeal dismissed.

A I R. 1923 Patna 384.

ADAMI AND DAS, JJ

Juanendra Nath Ghosh—Decree-holder-Appellant

v.

Kumar Jogendra Narain Sinha—Judgment-debtor Respondent.

A. A. O. No. 8 of 192 , decided on 7th November, 1922, from an order of the Dt. J. of Santal Parganas, dated 29th Sep. 1921.

Limitation Act, Art. 182—*Step-in-aid—Application to Court which transferred a decree is not a step-in-aid*

After a decree is transferred by one Court to another for execution, any application made to the former Court cannot be a step in-aid. 39 M, 640 (P. C.) Foll. [P. 384, C. 2]

S. K. Mitter for *Sarosh Charan Mitter*—for Appellant.

Kulwant Sahay and *N. C. Roy*—for Respondent.

Das, J :—The only question which arises in this appeal is whether the Court below has rightly dismissed the execution petition of the appellant on the ground that it was presented beyond time.

The appellant obtained a decree as against the respondent so far back as the 8th of July 1921, in the Small Cause Court in Calcutta. It appears that the execution case was first transferred to the Pakaur Court and then transferred to the Small Cause Court sometime between 1912 and the 10th January, 1916. On the 10th January 1916, the decree-holder obtained another transfer of the execution case to the Pakaur Court.

Now it is admitted that between the 10th January, 1916, and the 4th of April 1921, no steps were taken by the decree-holder for execution of his decree in the Pakaur Court. On the 4th of April, 1921, however, he did present an application for execution of his decree in the Pakaur Court.

The learned Judge in the Court below has come to the conclusion that that application could not be entertained by him as it was clearly barred by limitation. But it appears that the decree-holder some time in September, 1918, applied to the Small Cause Court in Calcutta for the issue of a sealed warrant in connection with the decree which had been obtained by him against the respondent. Nothing seems to have come out of that application, but the appellant contends that if the application which was made by him in September 1918, in the Small Cause Court in Calcutta was an application asking the Court to take some step-in-aid of execution then his present application is within time.

It seems to me that the contention advanced before us on behalf of the appellant must fail. Section 38 of the Civil Procedure Code provides that a decree may be executed either by the Court which passes it or by the Court to which it is sent for execution. Section 39 gives power to the Court to send the decree for execution to another Court on the happening of certain conditions which are specified in that section. It seems to me that on a consideration of these two sections it must follow that the decree cannot be executed simultaneously in two Courts. This view was taken by the Judicial Committee in the case of *Nehar Singh v. Bibbi* v. *Nar Narain Deo Baiju Simanta* (1). In my opinion the decision of the learned Judge in the Court below is right and must be affirmed.

I would dismiss this appeal with costs.

Adami, J. :—I agree

Appeal dismissed.

(1) (1916) 39 Mad. 640=43 I. A. 238=31 M. L. J. 300=18 Bom. L. R. 909=14 A. L. J. 1129=20 M. L. T. 472=24 C. L. J. 478=4 L. W. 558=1 M. W. N. 541=21 C. W. N. 162=36 I. C. 682=1 Pat. L. W. 26 (P. C.).

*A. I. R. 1923 Patna 385

DAS AND ADAMI, JJ.

(*Sri Thakur*) *Radha Gopal Lalji and others*—Decree-holders-Appellants.

v.

Lakshmi Narayan—Judgment-debtor—Respondent.

Mis. A. No. 225 of 1921, decided on 30th Nov., 1922, against an order of Sub. J, 1st Court, Muzafferpore, dated 26th July, 1921.

(a) *Civil P.C., O. 32, R. 3 (4)—Notice to minor after appointment is not necessary.*

There is no provision in the Code which requires the Court to give any notice to a minor of the appointment of a guardian *ad litem* after such appointment. [P. 385, C. 2.]

(b) *Civil P.C., O. 32, R. 3 (3)—Mother not proposed but brother proposed and appointed—Decree is not thereby a nullity.*

A decree is not a nullity where the Plaintiff instead of nominating the mother, nominates the brother (of the minor) who is undoubtedly the *karta* of the joint family and would represent the minor in all joint family transactions as guardian *ad litem*. [P. 385, C. 2.]

(c) *Civil P. C., O. 32, R. 11—Notice to minor is not necessary.*

There is nothing in the Code which requires the Court to give notice to the minor before making the order under R. 11. 2 P. L. T. 116, Dist. [P. 386, C. 1.]

S. M. Mullick and *N. N. Sen*—for Appellant.

C. C. Das, *S. K. Mitra* and *Bhagwan Prasad*—for Respondent.

Das, J:—This is an appeal on behalf of the decree-holder against an order of the learned Subordinate Judge of Muzafferpore dismissing the execution on the ground that the minor judgment-debtor was not properly represented in the action. The material facts are these:—

The plaint was admitted on the 17th November 1913. On the 9th January 1914, the Plaintiff applied to the Court for the appointment of Ram Bahadur, the eldest brother of the minor, as the guardian *ad litem* for the minor Defendant. It is not disputed that Ram Bahadur and the minor Defendant formed a joint family and that Ram Bahadur was managing member of the family. On the 4th of March 1914 Ram Bahadur appeared in Court and expressed his disinclination to act as the guardian *ad litem* for the minor Defendant. On the 30th April 1914 the Court appointed one Goodar Nath Pandey as the guardian *ad litem*. On the 20th May, 1915 Goodar Nath Pandey being absent, the Court appointed one Nirbhay Singh as the guardian *ad litem* for the minor Defendant. The suit was then compromised and a consent decree was passed in the suit.

The grounds upon which the learned Subordinate Judge has proceeded are these: First, that there is nothing to show that notice or summons was served on the minor after the appointment of Goodar Nath Pandey as the guardian *ad litem*; secondly, that the Plaintiff should have proposed the mother of the minor as the guardian *ad litem* and thirdly, that no notice was served on the minor informing him of the intention of the Court to discharge Goodar Nath Pandey as the guardian *ad litem*. On these grounds the learned Subordinate Judge came to the conclusion that the decree against the minor was void *ab initio* and that he could disregard the decree in the execution proceedings.

In my judgment the view taken by the learned Subordinate Judge is erroneous and cannot be supported. In the first place there is no provision in the Civil Procedure Code which required the Court to give any notice to a minor of the appointment of a guardian *ad litem* after such appointment. Mr. Das contended before us that what the Court intended to find was that the notice was not served on the minor in accordance with the provision of the 4th paragraph of O. 32, r. 3; but that is certainly not the finding of the learned Subordinate Judge and on the materials before him he could not have come to the conclusion that notice was not served in accordance with the provisions of the Code.

On the second point, I certainly think that the proper person to be appointed as guardian *ad litem* was the mother of the minor, that is to say, the natural guardian of the minor; but I am unable to say that the decree is a nullity because the Plaintiff instead of nominating the mother nominated his brother who

was undoubtedly the *karta* of the joint family and would represent the minor in all joint family transactions.

The third point raises a question of some difficulty but I have come to the conclusion that though the Court should in every case consult the wishes of a minor before appointing any person as guardian *ad litem* in the suit, there is nothing in the Code which requires it to do so in a case contemplated by O. 32, r. 11. It will be noticed that paragraph 4 of O. 32, r. 3 applies only to a case contemplated, by r. 3, that is to say, to a case where an application is made for the appointment of a guardian in the name or on behalf of a minor or by the Plaintiff. R. 11 gives the Court power to appoint any guardian where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, and there is nothing in the Code which requires the Court to give notice to the minor before making the order under r. 11.

The case of *Rajendra Prasad* v. *Prabodh Chandra Mitra* (1) is not an authority for the view that an order under r. 11, if made without notice to the minor, is a nullity. In that case the order of the learned Subordinate Judge appointing a person as guardian against the express wishes of the minor was challenged in the same proceedings and the Court had no difficulty in setting aside the order. But it is one thing to say that an order is without jurisdiction within the meaning of the terms as used in S. 115 of the Code, it is another thing to say that the order is void in the sense that the decree which is ultimately made may be disregarded by the Court executing the decree.

I would allow the appeal, set aside the order passed by the learned Subordinate Judge, and direct the execution to proceed.

The Appellants are entitled to the costs of this Appeal.

Adami, J.—I agree.

Appeal allowed.

(1) (1920) 2 P. L. T. 116=6 P. L. J. 82=59 I. C. 986.

A. I. R. 1923 Patna 386.

DAWSON MILLER, C. J. AND FOSTER, J.

Satyataran Chaudhury — Plaintiff-Appellant

v.

Raja Sri Sri Jyoti Prosad Sinha Deo and others—Defendants-Respondents.

F. A. No. 120 of 1920, decided on 27th February, 1923, from a decision of Sub. J., of Manbhum dated the 7th April, 1920.

(a) *Practice—English Rules*]—*Summary remedies of plaintiff on default of pleading by defendant—do not apply in India.*

The English practice under order 27 of the rules of the Supreme Court in case of default of pleading by the defendant gives the plaintiff certain summary remedies but they are not provided for in our rules in C. P Code.
[P. 389, C. 2]

(b) *Decree—Form of—Relief not asked for—C.P.C., O 7, R. 7—But facts pleaded in plaint which would cover the relief—Court can grant the relief though not prayed for—Practice.*

Where the plaintiff landlord in a suit for royalty and arrears of rent against tenant claimed a decree for ejectment and immediate possession and also for money due and set out in the plaint facts which showed that he was entitled to another relief also namely sale of the lease-hold property;

Held that a decree for sale of the lease-hold property, though not specifically asked for, was within the scope of the suit as framed. The facts which sustain the relief granted are pleaded and not traversed and though there was no prayer for general relief, the Court can always give general or other relief as it may think just. [P. 390, C. 1.]

S. C. Das and *S. M. Bose*—for Appellant.

S. M. Mullick, *P. C. Rai*, *B N. Mitter* and *A. B. Mukherji*—for Respondents.

Dawson Miller, C. J.:—This is an appeal on behalf of the plaintiff from a decree of the Subordinate Judge of Manbhum dismissing the suit.

The suit was instituted on the 12th August 1919 by the appellant claiming a declaration of his title to, and possession over, certain lease-hold property in *mauza* Dhekbera of which he claimed to be the sub-lessee under a mining lease granted by the proprietor, Raja Jyoti Prosad Singh Deo, the first defendant, to Ram Charan Sinha, the father of the third defendant and sub-let by the latter to him. He further claimed a declaration that the property had not been sold or affected by a sale of the Court in pursuance of a decree granted in Suit No. 104 of 1913, instituted

in the Court of the Subordinate Judge of Purulia. The appellant contends that the decree and the subsequent sale thereunder were without jurisdiction and were null and void and not binding upon him. It is admitted that if the decree and the subsequent sale are binding, the present appeal must fail and this is the only question for determination.

The circumstances out of which the present dispute arises are as follows:—

By an instrument dated the 5th April 1909 the defendant No. 1, who is the Raja of Kashipur, granted a lease of the coal mining rights in *mauza* Dhekbera, measuring 121 bighas, within his Zamindari for a term of 999 years to Ram Charan Sinha. On the 31st May 1909 Ram Charan Sinha granted to the plaintiff Satyataran Chaudhury what purported to be a sub-lease of the same property, but which the defendants contend amounted to an assignment. The original lease stipulated that the tenant should pay Rs. 4,840, Salami and a commission of 7 annas per ton on all species of coal raised with a minimum royalty of 10 rupees per bigha. By clause 12 of the *kabuliat* executed by the lessee, and which admittedly contains the terms of the lease, it is provided that the leasehold land and the colliery together with the machinery, colliery houses, etc, shall stand pledged as a security for the realisation of commission and minimum royalty payable by the lessee. The commission and royalty were payable by half yearly kists.

The translation of the *kabuliat* printed with the papers on the record is not quite accurate in some respects and we have had an accurate translation of clauses 30 and 31, which are important, made by the Peshkar of the Court. When properly rendered, these clauses in effect provide that if any commission or royalty or any part thereof be not paid by the appointed time and for 60 days thereafter, the landlord shall be entitled to enter upon the leasehold land, and shall be competent to attach or remove into his own possession the machinery, tools, animals and other articles brought upon the land so long as the amount of arrears is not realised with costs. Clause 31 in effect provides that if the tenant does not pay, according to the terms of the *kabuliat* commission or royalty for six months from the date on which it is due and if the terms relating to non-payment are not complied with, whether a demand is made or not, or if any other terms of the *kabuliat* be violated, the landlord shall serve a notice stating the amount due for commission, or for compensation by reason of the breach of any other term of the contract, and if the tenant shall pay the amount within the time appointed by the notice, the landlord shall not exercise his right of retaking possession.

By the sub-lease granted to the plaintiff on the 31st May 1909 the plaintiff undertook to be bound by the terms of the head lease. The term demised under the said lease is also for 999 years expiring on the same date as the head lease. The other terms and conditions are similar with regard to Salami and minimum royalty but the rate of commission per ton on the coal raised is 9 annas instead of 7.

On the 17th March 1913, the royalty having fallen into arrears, the landlord brought a Suit No 104 of 1913 against his lessee Ram Charan Sinha claiming a sum of Rs. 4,105-10-0 royalty from the year 1909 after giving credit for certain payments on account. He also claimed interest until realisation and prayed to be put in possession over the lease hold property according to the terms of the *kabuliat*. On the 5th May 1913 the plaintiff was added as a defendant in the suit upon a petition filed by the landlord, the plaintiff in that suit, alleging that he had come to know that the property had been transferred to Satyataran Chaudhury and that he was in possession, and as difficulty might arise in future in selling the lease hold land, he asked that Satyataran Chaudhury should be added as a defendant.

The original defendant did not enter appearance but the appellant filed a written statement on the 17th September 1913. Therein he pleaded payment and a tender of the money due which had been returned. He further pleaded that the claim for *khas* possession was untenable in law and that such a claim being a penal clause in the lease was not enforceable. He also objected to the interest charged and pleaded that he was ready to pay the amount which was justly due.

At the trial the appellant produced no evidence in support of his plea and the learned Judge framed two issues for trial :—

(1) Are the defendants liable to ejectment ?

(2) Is the plaintiff's plea of payment true ?

On the first point he said "The Plaintiff does not press the prayer for ejectment, although there is a stipulation for it in the *kabuliat* executed by the defendant No. 1. So the prayer for ejectment is rejected." On the second point he said "The defendant No. 2 cannot produce any evidence to-day in support of his plea. In fact the payments alleged by him have been credited in the plaint. The plea is disallowed" and he ordered that.

"The suit be decreed with costs and interest at the stipulated rate till date for payment; defedants shall pay into Court the decretal money in six months. In default the decree be made final and satisfied by sale of the mortgage property. Add *post diem* interest at 6 per cent. per annum. *Exparte* against defendant No. 1."

By the decree drawn up in pursuance of this order it was ordered.

"That the suit be decreed for Rs. 4,105-10-0 with costs and interest at 12 per cent. per annum on the principal money till date of payment. The defendant shall pay into Court the decretal money in six months. In default the decree be made final and satisfied by sale of the mortgaged property. Add *post diem* interest at 6 per cent. per annum."

The rest of the decree deals with the costs and interest at 6 per cent. per annum from the date of the decree until realisation. The appellant did not appeal from that decision. The decretal amount was not paid, and on the 13th May 1915, the final decree was passed ordering a sale of the property and in due course the property was sold and purchased by the first defendant in the suit. Before the sale the appellant endeavoured to have the case reinstated under Order 9, rule 13 of the Civil Procedure Code but his application was dismissed for default in December 1914. He attempted to have it revived but again his application was struck off for default. In the course of the execution proceedings to recover the unsatisfied balance of the decree after the sale, he filed an objection contending that he was not personally liable under the decree and further that the decree was without jurisdiction, *ultra vires*, null and void and could not be executed. His objection, brought under section 47 of the Civil Procedure Code, was dismissed by the executing Court on the ground that the decree could not be questioned in execution, and that order was confirmed on appeal to the District Judge and a further appeal to the High Court was likewise dismissed. The appellant then instituted the present suit challenging the decree passed in Suit No. 104 of 1913 as null and void and claiming possession of the lease-hold property.

The learned Subordinate Judge was of opinion that the sub-lease to the appellant being for the whole term but subject to a power to re-enter on non-payment of royalty operated as an assignment and not as an under lease. He further considered that the previous decision under section 47 of the Civil Procedure Code when the appellant attempted to have the decree set aside as a nullity operated as *res judicata*. He was further of opinion that the Court in the original suit was entitled to pass a decree for sale although there was no prayer for such relief.

From that decision the present appeal is brought. The only point which has been urged before us and which it is necessary to decide, is that the decree in Suit No. 104 of 1913 was a nullity. It is contended that the decree which was passed was in effect a mortgage decree and that the suit was not so framed as to permit of such a decree. In considering this question it is necessary to revert to the plaint in that suit. It recites the material terms in the *kabuliat*. Paragraph 3 of the plaint alleges "That it is stated in paragraph 12 of the said *kabuliat* that if the defendant does not pay the said commission or minimum royalty in the aforesaid manner, the lease-hold land together with all other properties including

the colliery, machinery, tools etc., thereon shall remain pledged as a security for any money which will remain due in the said manner." The fourth paragraph provides as follows:—

"That it is further stipulated in the said bond that if the defendant keeps any dues of the plaintiff on the basis of this lease, *viz.*, the amount of commission or minimum royalty, etc. unpaid for more than 60 days, the plaintiff or his agent shall be competent to enter into the lease-hold land sell or remove any machineries, tools and any other articles and realise his own dues and if the said dues of the plaintiff remain unpaid for more than 6 months he shall be competent to take the lease-hold property into his *khas* possession again."

It then refers to certain payments on account and the balance which still remains due. The 6th paragraph is as follows:—

"That as the defendant did not pay the minimum royalty from Chaitra 1315 B. S. to Aswin Kist of 1319 B. S. the plaintiff has become entitled to *khas* possession of the lease-hold property" and it asks as already stated for a decree for the sum claimed and for *khas* possession over the lease-hold property according to the terms of the *kabuliat*.

It will be observed that the plaint alleges that the lease-hold property was pledged as security for the unpaid commission or royalty and although no specific prayer is inserted for enforcement of that charge the facts upon which an enforcement of the charge might have been asked for are stated, and the plaintiff does in fact pray for a much wider remedy, namely, possession of the lease-hold property according to the terms of the *kabuliat* which gave him a right to re-enter.

In my opinion the decree in fact passed was not a mortgage decree but was what is in form similar, namely, a decree enforcing a charge, and although the learned Judge in his judgment speaks about the "mortgage property" this does not, in my opinion convert it into a mortgage decree. We are not concerned with the question whether the learned Judge was right or wrong in rendering the appellant personally liable for the decretal amount, nor is it material to consider whether by the terms of the *kabuliat* he was right in assuming that a valid charge had been created upon the property to secure the unpaid royalty. If he was wrong in deciding these points against the appellant the proper remedy was by way of appeal, and, even assuming that the decision could not have been supported on appeal about which I offer no opinion, the learned Judge had jurisdiction to decide these questions one way or the other even if his judgment should turn out to be wrong. The only question is whether the form of decree which he passed was one which it was within his competency to pass having regard to the scope of the suit and the manner in which the pleadings were framed.

The appellant relied upon certain English decisions to the effect that if the defendant makes default in pleading or does not appear at the trial, the plaintiff cannot obtain any relief which is not expressly asked for. (See *Tacon* v. *National Standard Investment Co.*, (1). *Faithful* v. *Woodly* (2). The English practice under Order 27 of the rules of the Supreme Court in case of default of pleading by the defendant gives the plaintiff certain summary remedies which are not provided for in our rules, and in such cases different considerations may well apply. But even assuming that the Court should not allow an amendment, or grant a relief not specifically asked for in the plaint in cases in which the defendant does not appear, in the present instance he did enter appearance by filing a written statement and the decree was passed in the presence of his pleader as appears from the decree itself. Had a formal amendment of the prayer in the plaint been asked for there seems no reason why it should not have been granted as the facts were pleaded in the plaint and not traversed in the written statement upon which such relief might be founded. Moreover, as the plaintiff did not press for ejectment, it might perhaps reasonably be inferred from

(1) (1887) 56 L. T. 165=56 L C.J H. 529.
(2) (1890) 43 C H.D 287=59 L.J.C.H. 304.

the order made that he did ask for the lesser remedy, namely, an enforcement of the charge, which the Court granted. But be this as it may, I prefer to rest my judgment upon the broader ground that upon the facts pleaded in the plaint a case was made which would lay the foundation for the relief granted although not specifically asked for, whilst at the same time a decree for ejectment and immediate possession, a much wider relief, was claimed. In my opinion the relief granted was within the scope of the suit as framed. As long ago as 1806 Lord Erskine, L. C. where a bill was preferred in Chancery to enforce an equitable mortgage by deposit of title deeds in priority to a purchase with notice where the relief granted had not been specifically claimed, stated the rule thus :—

" As to that the rule is, that, if the bill contains charges, putting facts in issue, that are material, the plaintiff is entitled to the relief, which those facts will sustain, under the general prayer; but he cannot desert specific relief prayed; and under the general prayer ask specific relief of another description; unless the facts and circumstances, charged by the bill, will consistently with the rules of the Court maintain that relief: *Hern* v. *Mill* (3)."

In the present case the facts which sustain the relief are pleaded and not traversed. It must therefore be assumed that the right to a charge was not challenged if the pleas raised in the written statement should fail which was the case. It is true there was no prayer for general relief, but now, under Order 7 rule 7 of the Civil Procedure Code, this is no longer necessary, and the Court may always give general or other relief, as it may think just, to the same extent as if it had been asked for.

In none of the cases relied upon was a decree treated as a nullity but reliance was placed upon a dictum of James L. J. in *Robinson* v. *Duleep Singh* (4). The question under consideration there was whether the verdict of the jury in a previous suit between the predecessors-in-title of the parties amounted to *res judicata*. The verdict taken alone and without regard to the pleadings, or the order directing the issues, or the mode in which the decree afterwards dealt with them, might be so interpreted and James, L. J. observed.

" The issues are only a proceeding in a case for the purpose of ascertaining a fact for the guidance of the Court in dealing with the right; and what determines the right between the parties is decree, and in order to determine what the decree really decides it is essential to see what were the rights which were in dispute between the parties and which were alleged between them. Because if the Court had gone beyond the rights which were properly in issue between the parties the decree of the Court would be absolutely null and void."

It can hardly be supposed that James, L. J. intended to lay down a broad rule that unless relief is specifically asked for it can in no case be granted, even where such relief was within the scope of the suit viewed in the light of the facts pleaded, but rather that if no issue was raised and no averment made upon which the relief could be based the Court was not competent to grant it.

In my opinion the decree impugned in this appeal was one which the Court was competent to make and cannot be treated as a nullity. It is unnecessary in view of my finding on this point to consider whether the decision in the previous proceedings in execution, where the same point was raised, operates as *res judicata*, but for the reasons already given I think that this appeal fails and should be dismissed with costs.

Appeal dismissed.

(3) (1806) 13 Vesey 114=33 E.R. 237.
(4) (1878) 11 C.H.D. 798=48 L.J. Ch. 758.

A. I. R. 1923 Patna 391.

JWALA PRASAD, J.

Bhola Pandey and others—Defendants-Appellants

v.

Ram Bilas Pandey and others—Plaintiffs-Respondents.

A. No. 531 of 1920, decided on 31st January 1922 from the appellate decree of the Dt. J, Shahabad.

Record-of-Rights—Estates Partition Act and B. T. Act—Difference—Presumption is that it is accurate and that rent payable by tenant to proprietor is that entered in Batwara papers—But presumption is rebuttable.

The difference between the two records, the one prepared under the Estates Partition Act, and the other under the Bengal Tenancy Act, is this that, while the latter records the status of the landlord and tenant, the former records the status of a proprietor and the other persons, who need not necessarily be landlords or tenants. In the Bengal Tenancy Act Records, the rent stated by the landlord and that stated by the tenant and as attested by the Survey Settlement Officer is recorded. In the Record of Rights prepared under Chapter VI of the Estates Partition Act, in addition to the above, the assets of all other lands are recorded. The Record of Rights prepared under Chapter VI of the Estates Partition Act raises a presumption in favour of its accuracy in the same way as the Record of Rights prepared under the Bengal Tenany Act, and every presumption as to its having been carried out according to the rules and of its having been duly published will arise in its favour The Record of Rights raises a strong presumption that the rent payable by the tenants to the recorded proprietor with respect to the land in question must be that entered in the *batwara* papers. The *batwara* Record of Rights is not conclusive. It raises a presumption and a rebuttable presumption. Where the plaintiff's landlords had got in their favour the presumption of the entries in the *batwara* papers as to the rate of rent payable by the defendants to them and also the presumption of the Survey Record of Rights of their liability to pay rent

Held that it is open to the defendants to rebut that presumption or they must pay a fair and equitable rent for the use and occupation of the lands under the plaintiffs who are the recorded proprietors and are liable to pay revenue to the Government. Where the Survey Record of Rights has determined a certain rate of rent with respect to a part of the land in dispute and in the vicinity, the defendants, no doubt, can succeed if they are in a position to show that they are not liable to pay, under any express provision of law, any rent in excess of the proportionate revenue upon these lands, but in case of failure to do so, they must accept the entries in record of right. [P. 394, C 2; P. 395, C. 1; P. 396, C. 1.]

K. Sahai, S. Dayal and *Brij Kishor Prasad*—for Appellants.

Parmeshwar Dayal—for Respondents.

Judgment.—The defendants are the appellants. They are aggrieved by the decision of the District Judge of Shahabad, dated the 19th March 1920, who in agreement with the decision of the Munsif, dated the 28th April 1919, has decreed the plaintiffs' Suit No. 9 of 1918 for arrears, of rent.

The area concerned in the suit is a holding of 5 *bighas*, 2 *kathas*, 14 *dhurs* in a village Sabbalpur (Touzi No. 818). The holding bears *Khata* No. 1641 in the last Survey Record of Rights and *Khasra* Nos. 2421, 1494 and 1454. The rent claimed is with respect to the year 1324 *Fasli* at the rate of Rs. 4 per *bigha*. The defendants-appellants contend that the plaintiffs are not entitled to recover rent at a rate exceeding 14 annas 6 pies per *bigha*. The only question, therefore, before us is what is the rate of rent for the holding in question. The point raised in the present case is extremely difficult and has no authority or precedent to guide us in the determination thereof.

In order to appreciate the point raised in the case it is necessary to give briefly the history of the land in question. The estate Sabbalpur to which the land in question appertains belonged at one time to Bhai Haran and Ajit Singh each owning 8-annas share in it. Bhai Haran mortgaged his Zemindari rights to certain persons keeping his possession over 141 *bighas* odd of *zarait* land.

Subsequently, the mortgagees came to purchase the mortgage interest of Bhai Haran and 141 *bighas* of *zarait* land also, by transfer came, to be held by different persons. The defendant's father came to hold 4 *bighas* 15 *kathas* of the *zarait* land which is the subject-matter of dispute in the present case. The Government revenue of the entire estate used to be paid by the transferees of the Zemindari interest, inasmuch as they got their names registered in Register D of Collectorate. The holders of the *zarait* land aforesaid did not pay in Government revenue and their names were not registered in Register D, inasmuch as they did not hold any aliquot part of the estate but only small parcels of land in *bighas* and *kathas*, there being no provision in the Land

Registration Act for the registration of parcels of land.

The defendants hold the land in question by virtue of a sale-deed (Exhibit C) dated the 17th November 1878 in favour of their ancestors with respect to 12 *bighas* of land of which the disputed 4 *bighas* odd is a part.

The result was that the holders of the *zarait* land including the defendants never paid revenue to Government or rent to the proprietors whose names were registered in the Collectorate. The entire revenue used to be paid by the recorded proprietors. On behalf of the recorded proprietors, therefore, a suit was brought in the year 1898 to recover from the holders of the *zarait* land, including the defendants proportionate revenue with respect to the land held by them by way of contribution; that litigation ended with the judgment of the High Court of Calcutta, dated the 22nd April 1904, confirming those of the Munsif and the District Judge of Shahabad.

The reason for refusing the recorded proprietors a decree for contribution was stated by the High Court to be that there was "nothing whatever to show that the assessment of Government revenue was made on any basis or that at the time of the Permanent Settlement there was any such calculation by which the revenue for which *zarait* land was liable was held to bear to the total revenue assessed the same proportion as the area of these lands nor to the total area of lands then under calculation".

Their Lordships of the Calcutta High Court further held that the calculation on such a basis "is entirely contrary to the principles under which the revenue was assessed on estates at the Permanent Settlement".

"The High Court dismissed the appeal leaving it to the appellants to take steps as they may be advised in the Revenue Courts in order to have the revenue assessed on their share in the estate or on the *zarait* land held by the defendants".

Following up the suggestion of the High Court, some of the recorded proprietors, who were plaintiffs in that litigation, instituted proceedings before the Collector for a partition of the estate. Objections of various character were made by different persons objecting to the partition of the estate. We are, however, not concerned with all of them, except those which relate to the objections to the partition of the estate on the ground that the original proprietors had alienated their *zarait* land without specifying the Government revenue payable by them. That objection was disposed of by the Deputy Collector on the 17th of January 1915 (Exhibit K) and by the Commissioner on the 17th June 1916 (Exhibit 7). The objection was treated as one under section 14 of the Estates Partition Act (Act V of 1897) and was overruled and the partition of the estate continued. The Commissioner does not refer to this point at all, but the following observation of the Deputy Collector appears to relate to the *zarait* lands in question. Says the Deputy Collector:—

"What is the present condition of the 141 *bighas* and 13 *kathas* of *zarait* lands alluded to above. Nearly 40 *bighas* 11 *kathas* and 12 *dhurs* have already been consolidated with the tenancy lands with attested rents and the remaining 101 *bighas* and 1 *katha* and 8 *dhurs* are held by no less than 43 men. The next question is what should be the status of these men. Are they to be treated as *putni* proprietors, of tenure-holders or tenants? Apparently they do not appear to have paid any rent or revenue since the transfer of those lands but when they were served with notices by this Court at the instance of Babu Mahanand Sahay calling on them to state if they had any objection to contribute the proportionate revenue in the shape of rent through the existing proprietors of Bhai Haran Singh's *patti*, they generally expressed their willingness to pay rent up to the extent of the proportionate revenue. The fact that the holders of over 40 *bighas* of such lands have already allowed themselves to be treated as tenants in the recent Record of Rights is also a significant one. When Babu Mahanand Sahay and others sued them for the recovery of the revenue paid for them by them and the case went up on appeal before Mr. Justice

Brett and Mr. Justice Woodroffe they stated that they had no objection to pay rent up to the proportionate revenue. Thus it is quite clear that the holders of the 101 *bighas* and odd *kathas* of the *zarait* lands have no objection to pay *lagan* to the proprietors up to the extent of the proportionate revenue, which has been ascertained at Rs. 92-1-9 of 101 *bighas* 1 *katha* and 8 *dhurs*, the calculation being made at the total assets due from them, *viz.*, Rs. 423-2-6. Some of these lands have been settled by the *farzidars* with the tenants, the rents paid by whom have already been alluded to in the recent Record of Rights, and in these cases the alluded rents have been taken on the assets of those lands: in the case of lands which are still in the *khas* possession of the *farzidars* the rate of assessment has been fixed at Rs 4 per *bigha* on an average, regard being had to the rents paid for similar lands with similar advantages in their vicinity. The details of 101 *bighas* 1 *katha* 8 *dhurs* are given below.

Total assets Rs. 395-2-6; area 101 *bighas* 1 *katha* 8 *dhurs*. The proportionate revenue per *bigha* works out to 14 annas 6 pies at which the *farzidars* shall have to pay the proprietors of Bhai Haran Singh's *patti* for the lands held by them. To me it seems that the status of the present *erazidars* is just like that of *mokarraridars* when they will pay a small rent equivalent to the proportionate revenue on the lands held by them, as at the time of the creation of the *mokarrari* leases a handsome *salami* is taken by the land-lords. In the present case also a sum of Rs. 10,000 was paid by Janki Prasad Singh at the very outset. Thus it will appear that these *erazidars* are not independent of the proprietors and their lands from part of the Touzi, the entire revenue on which has been hitherto paid by the registered proprietors without intermission.

"Thus again for the safety of the Government revenue and its punctual realisation it would be most unwise to treat such a large number of men each holding one or two *bighas* of lands as *putni* proprietors, specially when they had hitherto betrayed by their action and without utter reluctance to be brought under the category. In the circumstances stated the proprietors of the *patti*, Bhai Haran Singh and Lachmi Narain Singh, cannot further for the purposes of the partition be considered as out of possession of 101 *bighas* 1 *katha* and 8 *dhurs* of the *zarait* lands when they have kept their proprietary title by paying the entire revenue all along."

The plaintiffs also who were defendants in the litigation referred to above, which was finally concluded by the judgment of the High Court, in paragraph 3 of their written statement (Exhibit E) gave an idea of what the proportionate revenue should be namely, 9 annas 8 *dams* Government revenue and 2 annas 4 *dams* road-cess (Total 11 annas 12 *dams*).

In the year 1901, on behalf of the plaintiffs a Road Cess Return (Exhibit E) was filed showing the rate of rent of the *zarait* land, held by them as well as by the defendants to be Re. 1 per *bigha*. The Survey Record of Rights, which was published on 9th of August 1912 (Exhibit I. J. and 14) shows that the defendants were recorded as tenure-holders and the land in suit was shown as *bakasht erazidars*. No rent was mentioned in the column provided for it.

The *batwara raibandi* and the *khasra* showed that the lands in suit were assessed at the rate of Rs. 4 per *bigha* and that they were allotted to the *patti* of the plaintiffs. The plaintiffs thus became, after the partition in which delivery of possession was effected in 1917, the 16 annas proprietors of the estate in which the lands in suit are situate.

The present suit was instituted soon after the *batwara dakhaldehani* for the arrears of rent for the year 1324 *Fasli*. The claim of the plaintiff is, therefore, based entirely upon the *batwara khasra* and the *khatian*.

The defendants' case is that they were proprietors in this estate to the extent of the *zarait* lands held by them and they are not liable to pay to the plaintiffs anything beyond the proportionate revenue, and their case is based upon the remarks of the Deputy Collector in his order of the 15th of January 1915, in which he said that the proportionate revenue per *bigha*

of the *zarait* lands would be 14 annas 6 pies. The defendants have accepted their status to be that of tenants, and have abandoned the position of proprietors which they originally claimed. They may be proprietors within the definition of the term in section 3, clause (*v*) of the Estates Partition Act, as being owners of the land in dispute, whether or not they were recorded proprietors of the estate.

The word "recorded-proprietor" had a peculiar meaning in the Partition Act as being a person whose name is registered on the Collectorate's General Register of the revenue paying lands as proprietor of an estate or of any share or interest therein [clause (*vi*) of section 3]. The defendants were certainly not the recorded proprietors and as such they were not entitled to claim partition of their share in the estate to the extent of the *zarait* lands held by them (*vide* section 5). They were also not entitled to have a separate estate allotted to them on partition at the instance of the other recorded proprietors (*vide* section 5).

"An estate" means all lands which are borne on the Revenue Roll of a Collector as liable for the payment of one and the same demand of land revenue. The lands held by them were certainly responsible for the payment of Government revenue, inasmuch as they were included in the estate, and when an estate is declared to be partitioned all the lands appertaining thereto have to be taken into account and must be alloted to the recorded proprietors of the estate.

The proceedings start with a survey of all the lands and a preparation the Record of Rights under Chapter VI of the Act. Under section 45 of the Deputy Collector is bound to make a survey and prepare a record of existing rents and other assets of all lands included in the estate. Similarly, under section 46, clause, (*d*), the assets of the land in question had to be dermined and stated. Under section 47 the Record of Rights prepared is published, and that record shows not only the existing rents but also the other assets of the estate. The Record of Rights prepared under the Chapter is then locally published under section 48 of the Act, and a copy thereof is given to each landlord and tenant of the entries relating to the estate, tenure or holding. These provisions are similar to those contained in the Bengal Tenancy Act, Chapter X which relates to the preparation and publication of the Record of Rights between the landlord and the tenant.

The difference between the two records, the one prepared under the Estates Partition Act and the other under the Bengal Tenancy Act, is this that, while the latter records the status of the landlord and tenant, the former records the status of a proprietor and other persons who need not necessarily be landlords or tenants. In the Bengal Tenancy Act Records, the rent stated by the landlord and that stated by the tenant and as attested by the Survey and Settlement Officer is recorded. In the Record of Rights prepared under Chapter VI of the Estates Partition Act, in addition to the above, the assets of all other lands are recorded. There was no relationship of landlord and tenant between the plaintiffs and the defendants before the partition of the estate

In the partition proceedings the defendants could not be allotted a separate estate representing the interest owned by them in the estate, inasmuch as they did not hold any share of the estate but only some parcels of lands The lands held by them, as observed above had necessarily to be taken into account and those lands were allotted to the share of the recorded proprietors. The assets of those lands had to be determined in order to effect the partition of the different interests held by the several recorded proprietors.

The word "assets" has been defined in section 3 clause (xv) to be "in the case of land held by cultivating *raiyats* the rent payable by them," and "in the case of land which is occupied by a proprietor the rent which might reasonably be expected to be payable by cultivating *raiyats* if the land were occupied by them."

The lands in the present case were held by the defendants as proprietors and the assets mentioned in the partition Record of Rights is the rent which might reasonably be accepted to be payable by the occupancy *raiyats*; in other words, Rs. 4 per *bigha* mentioned

as assessment of the land in question by the *batwara* records is one which the holders would have, therefore, to pay to the proprietors for the use and occupation of the land. The Record of Rights prepared under Chapter VI of the Estates Partition Act raises a presumption in favour of its accuracy, in the same way as the Record of Rights prepared under the Bengal Tenancy Act, and every presumption as to its having been carried out according to the rules and of its having been duly published will arise in its favour. From the fact that the publication of the Record of Rights has not been questioned in the present case and as held by the Courts below, the defendants must be presumed to have knowledge of the partition proceedings. The Record of Rights raises a strong presumption that the rent payable by them to the recorded proprietor with respect to the land in question must be that entered in the *batwara* papers.

The Survey Record of Rights, which was finally published in the year 1912, also defined the status of the defendants as that of tenure-holders and not of proprietors. Whatever the position of the holders of the *zarait* lands might have been originally when the *zarait* lands and the Zemindary rights with respect to the lands held by the tenants were separately treated by the original proprietor of the estate, Bhai Haran Singh, it is clear that during the survey and the partition proceedings, that is, during 1912 to 1916, the defendants gave up their status, if any, of holding the lands as proprietors and accepted the position of tenure-holders or tenants, in other words, they accepted their liability to pay rent to the recorded proprietors of the estate. Had they been recognised as proprietors of the estate they would have been made liable to pay revenue to Government and the only proceeding in which their status as proprietors could be recognized was the partition proceeding which prepared the *khewats*, that is, the interest held by the proprietors, the Record of Rights, that is, the interest held by the intermediate holders of lands, namely, the tenure-holders and tenants and others.

The Estates Partition Act has not recognised them, and in fact could not recognize the defendants as proprietors of the estate. This liability to pay rent is also not disputed before me. It has not been disputed in the Courts below also.

The only question raised by the defendants is that they should pay rent calculated at the rate of the proportionate revenue payable with respect to the lands in suit. The Deputy-Collector, no doubt, at one place observed on the 15th of January 1915 that the proportionate revenue of the *zarait* lands would be 14 annas 6 pies.

This, no doubt, the defendants admitted and they were willing to pay and are still willing to pay. The plaintiffs, on the other hand, say that the responsibility to pay revenue directly to the Government is now borne by them and for the default of even a pice in the payment of revenue made by them, the entire interest of the estate held by them would be jeopardized and sold up by the Collector. The revenue sale will not in any case affect the interest of the defendants, but they will continue to hold the lands in suit as intermediate holders, namely, tenure-holders or tenants.

Therefore the plaintiffs contend that the risk that they have now undertaken, or which has been imposed upon them by the partition proceedings by being directly liable to the Government for the payment of revenue, must be compensated by allowing them the rate of rent of the lands from the defendants in the same way as that payable by the tenants of similar lands in similar circumstances. It may be, on the other hand, contended by the defendants that the assets determined by the Collector in the partition proceedings and the Record of Rights prepared by him are for the purpose of the partition and cannot be a binding and conclusive document determining the relationship between the plaintiffs and the defendants, or for the matter of that between the proprietors and the tenants.

There is a good deal of force in this contention. It is true that the *batwara* Record of Rights is not conclusive. It raises a presumption and a rebuttable presumption. The plaintiffs,

therefore, had got in their favour the presumption of the entries in the *batwara* papers as to the rate of rent payable by the defendants to them. They have also the presumption of the Survey Record of Rights of their liability to pay rent. It is open to the defendants to rebut that presumption. They must pay a fair and equitable rent for the use and occupation of the lands under the plaintiffs who are the recorded proprietors and are liable to pay revenue to the Government. What must be that fair and equitable rent? The Civil Court will not have the same advantages as the Revenue Court had in the partition proceedings to determine the fair and equitable rent of the lands in consideration of the rent payable by the lands in the vicinity and with similar advantages.

The Deputy Collector in his order of the 15th of January 1915 has also referred to the rate of Rs. 4 as payable by the tenants. The Survey Record of Rights has also determined the rate of Rs. 4 with respect to 40 *bighas* of the lands out of 141 *bighas* of *zarait* lands. The rate of rent of the other lands in similar circumstances has also been found by the *batwara* to be Rs. 4 a *bigha*. Therefore the rate now claimed by the plaintiffs based upon the entries in the *batwara* proceedings cannot be said to be inequitable and must be presumed to be fair. The defendants, no doubt, could succeed if they were in a position to show that they are not liable to pay under any express provision of law any rent in excess of the proportionate revenue upon these lands but they have failed to do so.

Nowhere in the Partition Act has it been stated that the original proprietor of certain parcels of land should pay rent to the recorded-proprietor, in whose *takhta* his lands fall, proportionate to the revenue. If they were to pay rent proportionate to the revenue they will acquire the same status as a proprietor; but under the partition their position is now to be derogated to that of a tenant. In the case of land which has fallen to the *patti* of one proprietor, and is allowed to remain in occupation of another proprietor, Chapter IX, sections 64 to 66 declare that the rent payable by the latter to the former would be on the basis of the assets recorded by the Deputy Collector.

On that principle also the defendants in the present case should pay to the plaintiffs rent in accordance with the Survey Record of Rights. As to the value of the Records of Rights prepared under the Estates Partition Act, *vide*, *Raziuddin Hussain* v. *Taharat Hussain* (1) *Janakdulari Kuar* v. *Bindeswari Gir* (2), *Nandkishore Singh* v. *Mathura Sahu* (3), *Gulab Chand* v. *Salek Hussain* (4), *Debi Lal Sah* v. *Ram Bibeki Singh* (5), *Jagdeo Narain Singh* v. *Bulaki Gope* (6). The principle may also be deduced from the decision in the case of *Nawab Begum* v. *Rustum Khan* (7).

Therefore, it appears to me that there is no error in law in the decision of the Courts below. I have already said that the case is of first impression. I am also alive to the principle that the rate of rent payable by a tenant depends upon the contract, expressed or implied, between the landlord and the tentant.

In the present case, there is no such contract. A contract may be implied by a course of conduct evidencing the payment of a particular rate of rent. This is not a case of this kind. No rent was previously paid by the defendants to the plaintiffs. The rate of rent payable by a tenant to the landlord may also be determined in a suit and the decree passed in the suit may be the foundation determining the contract between the parties to pay rent at the rate embodied in the decree.

This also is not the case here. The position claimed by the defendants was that of a proprietor of certain *zarait* lands. This, of course, is a case where by the operation of law the defendants occupy the land within the ambit of the Zemindari of the plaintiffs and they are liable to

(1) (1912) 16 C.L.J. 19=13 I.C 498
(2) (1920) 1 P L.T 374=57 I.C. 828=5 P L.J. 456.
(3) A I R 1922 Pat 193=3 P.L.T. 13=65 I.C. 586.
(4) (1916) 5 P.L.W. 6=36 I C. 513.
(5) (1921) 63 I.C. 194.
(6) (1921) 2 P.L T. 343=63 I.C 226.
(7) 2 Agra. H C.R. 149.

pay rent for the use and occupation of the same. The rent has been determined in the proceedings under the Estates Partition Act to be that payable by the lands of similar nature in the vicinity. The defendants must, therefore pay the fair and equitable rent as embodied in the Record of Rights. On these principles I have been able to overcome the difficulty which I felt in the beginning in the case, and I confirm the decrees passed by the Courts below with costs.

Mr. Parmeshwar Dayal points out with respect to *Khata* No. 752, in Suit No. 9, that there has been a mistake in the preparation of the decree in the Court below, inasmuch as that decree is not in accordance with the judgment. The judgment mentions Rs. 1-8. for the entire holding whereas in the decree the rent has been calculated at the rate of Rs. 1-8 per *bigha*. The mistake, if any, should be corrected by the Court below and the decree must be brought in accordance with the judgment.

Decree confirmed.

A.I.R. 1923 Patna 397.

COUTTS AND DAS, JJ.

Maharaja Kesho Prasad Singh—Plaintiff-Appellant

v.

Ramdeni Singh — Defendant-Respondent.

A. Nos. 928 and 929 of 1920, decided on 27th July, 1922, from the appellate decree of Add. Dt. J., of Shahabad, dated the 28th April, 1920.

(a) *B. T. Act S. 52(1) (b)—Abatement, claim for—All landlords not parties—Suit will not fail by reason thereof.*

In a suit for rent by a co-sharer, landlord; who, under an arrangement between himself, his co-sharer landlord and the tenants, is entitled to make separate collection of his share of rent, the defendants can claim an abatement of rent under section 52 (1) (b) of the Act, although all the landlords are not parties to the suit. [P. 399, C. 2.]

(b) *B. T. Act S. 188—Operation against tenants—Section does not apply to tenants.*

Section 188 applies to joint landlords and applies only where the landlord is required or authorized by the Bengal Tenancy Act to do something. But it has no direct application to the tenants; and it certainly does not touch the question whether the tenants being authorized to claim a right as against the landlords and acting together can put forward that claim in a suit by a co-sharer landlord. The principle that underlies Section 188 is that where two or more persons have a joint right, they cannot assert that right except jointly. 21 C.L.J. 315 Dissent. [P. 398, C. 2.]

Kulwant Sahay and *Nirsu Narayan Sinha*—for Appellant.

Kailas Pati—for Respondent.

Das, J.:—These appeals arise out of suits for rent by a co-sharer landlord who, under an arrangement between himself, his co-sharer landlord and the tenants is entitled to make separate collection of his share of rent. The defendants in their written statement claimed an abatement of rent under section 52 (1) (b) of the Bengal Tenancy Act. The Courts below have concurrently found that there is a deficiency in the area of the holding of the defendants as compared with the area for which rent has been previously paid by them.

The Court of first instance being of opinion that a claim for abatement could not be put forward in a suit in which all the landlords and all the tenants are not parties, refused to give effect to the plea. The lower appellate Court has taken a different view and has given the defendants a decree for abatement of rent.

In this Court it was urged by Mr. Kulwant Sahay on behalf of the appellant-landlord that the view of the learned Judge in the Court below is erroneous and that he was conclusively bound by a decision of this Court in the case of *Barhamdayal Singh* v. *Maharaja Kesho Prasad Singh* (1). The decision referred to undoubtedly supports the argument of Mr. Kulwant Sahay. That decision is, however, a decision of a single Judge; and though it is entitled to great weight, it is necessary for us to examine the principle upon which that decision rests.

The view of the learned Judge in the case cited is this; that a claim under section 52 of the Bengal Tenancy Act is subject to the limitation imposed by the Legislature in section 188 of that Act, and that the claim cannot be given effect to

(1) S. A. 2797 of 1915.

except in a properly constituted suit between all the landlords and all the tenants. The arguments employed by the learned Judge receive considerable support from certain observations made by the learned Judges in *Bhoopendra Nath Dutt* v. *Krishna Dutt* (2), but are negatived by the decision in *Khettermani* v. *Krishna Jiban* (3). The decision in the last mentioned case, however, is confessedly based on the decision in the first mentioned case ; and in so far as it clearly misstated the rule laid down in *Boopendra Narain Dutt* v. *Krishna Dutt* (2) it can scarcely be regarded as an authority of much force.

Section 52 (1) (b) of the Bengal Tenancy Act provides that every 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, unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenure or holding by alluvion or otherwise, and that an addition has not been made to the rent in respect of the addition to the area.

It is not disputed that all the circumstances are present in this case entitling the tenants to claim an abatement of rent under section 52 (1) (b) of the Act ; but it is urged before us that section 188 of the Act effectively prevents the tenants in this case from claiming the benefit of section 52 (1) (b) of the Act. Section 188, upon which reliance is placed by Mr. Kulwant Sahay provides that where two or more persons are joint landlords, anything which the landlord is under the Bengal Tenancy Act required or authorized to do must be done either by both or all those persons acting together, or by an agent authorized to act on behalf of both or all of them.

It will be noticed that section 188 applies to joint landlords and applies only where the landlord is required or authorised by the Bengal Tenancy Act to do something. The section has no direct application to the tenants ; and it certainly does not touch the question whether the tenants being authorized to claim a right as against the landlords and (as in this case) acting together can put forward that claim in a suit by a co-sharer-landlord. The principle that underlies section 188 is this that where two or more persons have a joint right, they cannot assert that right except jointly.

But here the defendants are the only tenants of the holdings in respect of which these suits have been brought, and they are certainly acting together in putting forward their claim for abatement of rent in these suits. Even if section 188 were to apply to a case of tenants asking for abatement of rent, a proposition to which, as at present advised, I do not assent, I can see nothing in its operation which would prevent joint tenants from putting forward a claim for abatement of rent in a suit against them by a co-sharer land-lord. Section 52 (1) (b) is expressed in the widest terms ; and, in my view, we cannot take away or add to the express provision of the Legislature by having recourse to an alleged principle on which section 188 is said to rest.

I have now to consider the cases which were cited before us. In the case of *Gopal Chunder Das* v. *Umesh Narain Chowdhury* (4) the Calcutta High Court held that having regard to the provisions of section 188 of the Bengal Tenancy Act, 1885, where two or more persons are joint proprietors, they must all join in a suit for enhancement of rent under section 30 of the Bengal Tenancy Act or for additional rent under section 52 (1) (a) of that Act. So far as a suit under section 30 is concerned, it is clearly a suit which the landlord is authorized by the Bengal Tenancy Act to bring.

That being so, section 188 must be read as importedin to section 30 with the result that a suit for enhancement of rent by a

(2) (1900) 27 Cal. 417=4 C. W. N. 107 (F. B.)
(3) (1915) 21 C. L. J. 315=28 I. C. 510=19 C. W. N. 546.

(4) (1900) 17 Cal. 505

co-sharer landlord would be barred under the provisions of section 188 of the Act. A suit for additional rent by a co-sharer landlord stands on a somewhat different footing. Section 52 differs from section 30 in so far as section 52 declares the liability of the tenant to pay additional rent, but does not expressly authorize the landlord to bring a suit or import the provisions of section 188. The learned Judges, however, took the view that the same principle applies alike to a claim for enhanced rent and to a claim for additional rent. This decision, in no way, throws any light on the case before us.

The next case is that of *Bhoopendra Narain* v. *Krishna Dutt* (2). The question raised in that case was whether in a suit for rent brought by some of the several joint landlords against one of several joint tenants for recovery of the plaintiff's share of the rent payable on the defendant-tenants' share of the tenure under a previous arrangement, the tenant-defendant could claim abatement under the provisions of section 52 (1) (b) of the Bengal Tenancy Act. The learned Judges answered the question in the negative.

So far as the actual decision is concerned, it is undoubtedly right; but in deciding the case Sir Francis Maclean expressed the opinion that the principle underlying section 188 applies to the converse case of a co-sharer tenant claiming the benefit of section 52 in a suit such as that which that learned Judge was considering, and that a relief under section 52 could not be granted except in a suit between all the co-sharer landlords and all the co-sharer tenants.

In my opinion, it was not necessary to have recourse to section 188 for the purpose of deciding the case; it was sufficient to say, as the learned Judges did say, that the expression "tenant" in section 52 did not include the case of a mere co-sharer tenant who had only a fractional share in the tenure; but that it meant the tenant of the tenure, not one of many tenants.

The only principle which underlies section 188 of the Act is that where two or more persons have a joint right between them, they cannot assert it except jointly. That principle is recognized in s. 52 of the Act and I quite accept that if two or more co-sharer tenants have a joint right for abatement of rent, they can only assert that right in a suit to which all the tenants are parties. In the case before us all the tenants, are parties to the suit and the actual decision in the case cited does not prevent them from asserting that right as against a co-sharer landlord.

The last case to which I need refer is that of *Khettermani Dasi* v. *Jiban Krishna Kundoo* (3). The learned Judges in that case held that section 188 has no reference to joint tenants and cannot apply by analogy to a co-sharer tenant who brings a suit authorized by the Act; *e.g.*, a suit for abatement of rent. As I have said before, section 188 need not be imported into section 52 of the Act; for the expression "tenant" in section 52 must mean the tenant of the holding and not one of the tenants of the holding. The decision is also open to the objection that it is expressly based on the decision last discussed which undoubtedly lays down a contrary proposition.

These are all the cases which were cited before us. Except the decision of this Court, to which I have referred there is no decision which expressly decides that it is not open to the tenants of a holding in a suit by a co-sharer landlord to claim abatement of rent. The section is in very wide terms and there is nothing in section 188 to control it. In my opinion the defendants are entitled to claim an abatement of rent in the suit brought against them by the co-sharer landlord.

The case may be put in another way. A co-sharer landlord has no absolute right to maintain a suit for his share of rent. He may be allowed to bring such a suit under an arrangement between all the landlords and all the tenants; but that arrangement must be consistent with the continuance of the original lease of the entire holding [See *Guni Mahamed* v. *Moran* and *Doorga Proshad Mytee* v. *Joynarain Hazra* (5)]. It has been held that though the co-sharer landlords may

(5) (1879) 4 Cal. 96 = 2 C. L. R. 370. (F. B.)

have the right under such an arrangement to collect their portion of the rent separately, there is nothing to prevent them from reverting to their original condition if they are all agreed, and that a suit brought by all the co-sharers for the recovery of the entire rent is maintainable [See *Raja Promodanath Roy* v. *Ramoni Kant Roy* (6) and *Shyama Charam Bhattacharya* v. *Akhoy Kumar Mitter* (7)].

In the last mentioned case Pratt, J. came to the conclusion that an arrangement for separate collection of rents is an arrangement for mutual convenience and cannot bind the parties for all time; but may be put an end to by the tenants or by the landlords collectively, though not by one of the landlords against the consent of the others.

All these cases were reviewed by Rampini and Woodroffe, JJ., in *Akhoy Kumar Mitra* v. *Gopal Kamini Debi* (8). The learned Judges approved of all the decisions to which I have referred and came to the conclusion that there is nothing to prevent the co-sharer landlords at any time from putting an end to the arrangemen under which they have been collecting their rents separately. If that be so it is equally open to the tenant to put an end to the arrangment and to refuse to pay rent separately to the landlords. The tenant may, at any time, take up the position that circumstances have arisen which would make it impossible for him to pay his rent separately to the landlords and the circumstances of the present case are certainly such as would entitle the tenant to take up that position.

Section 52 (1) (*b*) of the Bengal Tenancy Act gives the tenants a right to claim abatement for rent under certain circumstances. The case for the landlord is that though all the circumstances exist which would entitle the tenant to claim abatement of rent, still he cannot do so having regard to the fact that the suit is by a co-sharer landlord and not by the whole body of landlords. The tenants may retort by saying: "If that be so, we refuse to pay you your share of rent and require you to bring a proper suit for rent by you and your co-sharer landlords in which case it would be open to us to claim abatement for rent".

There is in my opinion, no doubt that the tenants could take up that position and compel the landlord to consent to an abatement of rent in his suit for his share of the rent.

It has been urged before us that to allow the tenant to claim abatement of rent in a suit to which the co-sharer landlords are not parties is to affect the integrity of the rent without giving any opportunity to the other co-sharer landlords to be heard. It is argued that rent is one and entire and that to affect that one and entire sum called rent payable by the tenants jointly to the joint landlords in a suit to which they are not all parties is to invite complications. The argument assumes that what is paid by a tenant to a co-sharer landlord under an arrangement, is, in fact, rent; but it is nothing of the kind. No doubt it has been referred to as rent in the decisions of our Courts, but that it is only for want of a better term.

"Rent" under the Bengal Tenancy Act means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the holding by the tenant. That which is payable by a tenant not to his landlords, which must mean the whole body of landlord, but only to one of them is not rent. A suit by a co-sharer landlord for that which is payable to him by a tenant on account of the use or occupation of his share of the land is not a suit contemplated by the Bengal Tenancy Act; the decree passed in such a suit is not a decree under the Bengal Tenancy Act and such a decree is executed under the Code of Civil Procedure and not under the Bengal Tenancy Act. It may be urged that if what is payable by a tenant to a co-sharer landlord is not rent then section 52 is clearly inapplicable. That may be so; but the principle underlying section 52 is undoubtedly applicable and it would entitle the tenant to take up the attitude either that as he is no longer

(6) (1904) 9 C.W.N. 34.
(7) (1905) 10 C. W. N. 787 = 3 C. L. J. 627.
(8) (1906) 33 Cal. 1010 = 10 C.W.N. 952.

in possession of the landlord's share of the land held by him there ought in equity to be an apportionment of that which was hitherto payable by him to the landlord on account of the use or occupation of his share of the land; or that the condition under which he agreed to pay to the landlord his share of the rent no longer exists and that he would not pay to the landlord his share of rent unless all the landlords join in bringing a suit as against him or unless the co-sharer landlords consent to an apportionment of rent.

A relief given to the tenant in a suit by a co-sharer landlord for his share of the rent does not in any way touch the integrity of the rent, subject matter of the suit is not rent but that which is payable to the co-sharer landlord by the tenant on account of the use or occupation of the co-sharer landlord's share of the land.

In my opinion there is no answer to the claim put forward on behalf of the tenants in these cases. The decision of the learned Judge in the Court below is, in my opinion, right and I would dismiss these appeals with costs.

Coutts, J.—I agree.

Appeals dismissed.

✱ A. I. R. 1923 Patna 401

ADAMI, J.

Mt. Jantra Koer—Plaintiff—Appellant

v.

Ali Jan Darji and others—Defendants—Respondents.

Appeal No. 1010 of 1920, decided on 13th December, 1922, from the appellate decree of the Sub. J., Shahabad, dated 30th June 1920.

Criminal P. C., S. 145—No presumption against loser will be drawn, in Civil proceedings.

A decision in proceedings under section 145 Cr. P. C. does not throw the *onus* on the loser in those proceedings. The decision in proceedings under section 145, Cr. P. C. is not of such a nature as to give rise to a presumption in the Civil Court in favour of the winning party in those proceedings [P. 402, C. 2.]

Sambhu Saran—for Appellant.

Siveswar Dyal—for Respondents.

Judgment.—This second appeal arises out of a suit for a declaration of the title of the plaintiff No. 1 to the northern half of Survey plot No. 216 in *khata* No. 134. It appears that one Isri Lal had three sons, Rambhanjan, Rambahadur and Girwardhari. Rambhanjan had a son-in-law Mahadeo Lal, who sold the whole of the plot No. 216 to the defendants. The plaintiff, as wife of Rambabadur, claimed that she was entitled to possession of the northern half of the plot.

According to the plaintiff, the three brothers separated, and on Rambahadur's death she obtained his share which was a half It is not explained why Rambahadur should get a half in this plot, seeing that they were three brothers; but it has been found by the Munsif that it may well have happened that the other brothers got shares in other properties and in the arrangement between the three brothers half of this plot was given to Rambahadur and the other half to Rambhanjan.

The defendants' case was that Rambahadur died joint with his two brothers and after his death Rambhanjan and Girwardhari separated and, therefore, the plaintiff would only be entitled to maintenance and would have no claim to the property in suit.

The Munsif decreed the plaintiff's suit finding that there was no evidence of a partition of the land between Rambhanjan and Girwardhari only. He held that the burden of proving that the separation took place after the death of Rambahadur lay on the defendants and they had failed to prove it. In the Survey Record the names of plaintiff and Rambhanjan only are entered, each having a half share, and the Munsif held that the presumption attached to the Survey Record had not been rebutted. He held that the two witnesses of the plaintiff had proved possession and that the case of possession set up by the defendant had failed entirely. With regard to the sale by Mahadeo Lal to the defendants, it could not be enforced since Mahadeo Lal was only a *farzidar* for Rambhanjan and had no power to sell the land to the defendants.

The learned Subordinate Judge on appeal has taken a different view

He holds that, since the Record of Rights had not been produced, it, therefore, could not be taken in evidence, and, since there had been proceedings under section 145, Criminal Procedure Code, between the parties, in which the defendants had been found to be in possession, that fact must weigh very heavily in favour of the defendants, and he seems to have considered that this threw the burden of proof on the plaintiff, for he only examines the plaintiff's evidence as to possession. With regard to separation, he remarks that the plaintiff herself did not give evidence and her witnesses failed to prove separation previous to the death of Rambahadur. He was of opinion that it was likely that the surviving male members of the family wanted to get back the property which had been transferred to strangers and, therefore, the plaintiff had been put up to institute the suit.

The learned Subordinate Judge has said that there is nothing on the record to show that there was separation in the family in the lifetime of Rambahadur, but in this he is evidently wrong, for the learned Munsif pointed out in his judgment that the defence witness No. 2 stated in evidence that there was a partition 35 years before the suit and that Rambahadur had died 25 years before. It is true that the Munsif found the defence witness No. 2 to be unreliable; but, at the same time, the statement of the learned Subordinate Judge is shown to be incorrect. The finding, too, of the learned Subordinate Judge as to Record-of-Rights cannot be upheld.

It is true that the Record-of-Rights has not been marked as an exhibit in the case, but the pleadings of both the parties admit that in the Record-of-Rights the plaintiff and Rambhanjan are shown to be in possession each of half a share. Thus, the Record-of-Rights is admitted, and, that being so, it was for the defendants to rebut the presumption which the Record-of-Rights gave rise to, and I think that the learned Subordinate Judge has clearly laid the *onus* on the wrong party.

Taking the Judgments of both the Courts, it appears that while one Court held that the defendants' evidence as to separation and as to possession was unsatisfactory, the other Court held the plaintiff's evidence was equally unsatisfactory, and that being so, the learned Subordinate Judge should have given weight to the entry in the Record-of-Rights. I do not think that he was justified in finding that a decision in proceedings under section 145, Criminal Procedure Code, threw the *onus* on the loser in those proceedings. The decision in proceedings under section 145, Criminal Procedure Code is not of such a nature as to give rise to a presumption in a Civil Court in favour of the winning party in those proceedings. Moreover, the learned Subordinate Judge has not considered the finding of the Munsif that Mahadeo Lal, being a mere *farzidar* had no power to sell the property to the defendants. This is a point which he should have considered.

The only course, I think, is to direct that the decree of the lower appellate Court should be set aside and the case be remanded to the learned Subordinate Judge for a re-hearing of the appeal. Costs will follow the result.

Case remanded.

A. I. R. 1923 Patna 402

ROSS, J.

Chaturgun Bind and others—Defendants—Appellants

v.

Tilakdhari Singh—Plaintiff—Respondent.

A. No. 1215 of 1920, decided on 9th Jan., 1923, from the appellate decree of the Dt. J., Saran, dated 7th Sep. 1920.

(a) *Deed—Construction*—Zurpeshgi *lease by* raiyat—*Transferee to hold directly under landlord—Transferor ceases to be a* raiyat *for the period of the transferee's occupancy.*

In consideration of Rs. 975 the *raiyat* of land put the plaintiff in possession and occupation of the land for a term of nine years. The plaintiff was to appropriate the produce and pay the rent to the landlord, that is to say, the plaintiff was to hold directly under the landlord and not by way of sub-lease under the *raiyat*. The term of the lease was to be extended automatically until the *peshgi* money was paid.

Held that by this instrument the original *raiyat* transferred his *raiyati* right to the plaintiff who thereby acquired the right to hold the land for the purpose of cultivating it; and the defendant consequently ceased to be *raiyat* as long as the lease was outstanding against him. He had only the reversion of the *raiyati* interest

on the expiry of the term of the lease, but during the term of the lease the *raiyati* interest was in the plaintiff. [P. 403, C. 2.]

(b) *B. T. Act, S. 48*—Raiyat *executing* zarpeshgi *lease and then taking land from* zarpeshgidar *under* kabuliat *is an under-*Raiyat*—Rent recoverable from him is governed by S. 48 of B. T. Act.*

Wgere defendant who had ceased to be a *raiyat* by the execution of *zarpeshgi* lease, executed a *Kabuliyat* by which he was given a lease for a period of nine years by the *zarpeshgidar*.

Held defendant cannot be deemed to be a *raiyat* because he does not hold the land either immediately under a proprietor or immediately under a tenure-holder, he is on under-*raiyat* and the rent recoverable by the plaintiff must, therefore, be regulated by section 48 of the Bengal Tenancy Act. The legal relation between the parties after the execution of the *kabuliyat* was that of landlord and tenant and that the mere fact that the lands were let out to the mortgagor would not alter the relation between the parties. [P. 404, C. 1 & 2]

Jadubans Sahay—for Appellant.

B. N. Mitter—for Respondent.

Judgment.—The facts of this case are these. On the 16th January 1917 the defendants executed a *zarpeshgi* lease of 2 bighas 7 kathas and 12 dhurs of kasht land in favour of the plaintiff in consideration of Rs. 975. On the 18th January 1917 the defendants executed a *kabuliyat* in favour of the plaintiff for a term of nine years from 1324 to 1333 in respect of the same land, the rent reserved being Rs. 75-5-0 a year. As they defaulted in payment of the reserved rent the plaintiff brought this suit for 1325 and part of 1326.

The defence was that the *kabuliyat* was executed by the defendants' father when he was old and incapable of understanding the transaction; that during the revisional Survey the rent was recorded as Rs. 24-7-0 and that the plaintiff is not entitled to claim more. The Munsif decreed the suit at a rental of Rs. 24-7-0. With regard to the allegation that the defendants' father was unable to understand the transaction into which he entered no definite finding was arrived at.

The learned District Judge on appeal did not discuss the question whether the defendants' father was able to understand the transaction or not, but holding that the tenancy created by the *kabuliyat* was a new tenancy and that the defendant, while executing the *zarpeshgi* lease, did not lose his original status of a *raiyat* decreed the suit in full. The defendants appeal.

In order to decide the question involved in this case it is necessary to refer to the terms of the documents. The *zarpeshgi* lease was executed on the 16th January 1917 by Ram Piyar Bind. It recites that the executant gave in *zarpeshgi* 2 bighas 7 kathas 12 dhurs of quaimi kasht, hitherto held and possessed by him, for a term of nine years from 1324 to 1333 to Tilakdhari Singh and put him in possession and occupation thereof in consideration of Rs. 975, received by the executant; that the *zarpeshgidar* should have and hold possession of the *zarpeshgi* property and appropriate the produce thereof and pay Rs. 16-14-0 annually to the proprietor of the village on account of rent or the *zarpeshgi* property.

On re-payment of the *peshgi* money to the *zarpeshgidar* by the end of Jeth 1333 Fasli, or any time in the month of Jeth of a subsequent year, the executant should re-enter into possession of the mortgaged property. In the event of failure to pay the *peshgi* money on the due date the above stipulations were to stand and in case of dispossession of the *zarpeshgidar* the amount of the *peshgi* money would be realised with interest from the executant. Now, what is the effect of this instrument. It is both a lease and a mortgage. In consideration of Rs. 975, the *raiyat* of 2 bighas 7 kathas of land puts the plaintiff in possession and occupation of the land for a term of nine years. The plaintiff is to appropriate the produce and pay the rent to the landlord, that is to say, the plaintiff is to hold directly under the landlord and not by way of sub-lease under the *raiyat*. The term of the lease is to be extended automatically until the *peshgi* money is paid.

It seems clear that by this instrument the original *raiyat* transferred his *raiyati* right to the plaintiff who thereby acquired the right to hold the land for the purpose of cultivating it; and the defendant consequently ceased to be *raiyat* as long as the lease was outstanding against him. He had only the reversion of the *raiyati* interest on the expiry of the term of the lease, but during the term of the lease the *raiyati* interest was in the plaintiff.

The *kabuliyat* was executed on the 18th January 1917 by the same Ram Piyar Bind in favour of the same Tilakdhari Singh. It recited that by the *zarpeshgi* lease the executant had received the *zarpeshgi* money and had put Tilakdhari Singh in possession of the lease-hold property and the said *zarpeshgidar* had been in possession and occupation since then. But as the executant desired to keep the said mortgaged land under his cultivation and to pay Rs. 75-5-0 annually as rent to the said *zarpeshgidar*, the said *zarpeshgidar* had granted a simple lease for a term of nine years from 1324 to 1333 to the executant. The executant was to cultivate the land, appropriate the produce thereof from year to year till the expiry of the term of the *kabuliyat* and pay the fixed rent of Rs. 75-5-0 annually to the said *malik*, that is, Tilakdhari Singh, the *zarpeshgidar*. When the term of the *kabuliyat* expired at the end of Jeth 1333 the executant was to give up possession of the lease-hold property.

Now, this is clearly not a lease of the *raiyati* interest of land to the original *raiyat*. The defendant is not to pay rent to the proprietor but to the *zarpeshgidar*. He becomes the tenant of the *zarpeshgidar* at a rent of Rs. 75-5-0. He cannot be deemed to be a *raiyat* because he does not hold the land either immediately under a proprietor or immediately under a tenure-holder; he is an under-*raiyat* and the rent recoverable by the plaintiff must, therefore, be regulated by section 48 of the Bengal Tenancy Act. That these two transactions are separate is established by the authority of *Chamman Lal* v. *Bahadur Singh* (1) and the decision quoted in the foot-note to that report and also by *Khuda Bakhsh* v. *Alimunnisa* (2).

The effect of the second transaction in such a case is stated in the Full Bench decision in *Uttam Chandra Daw* v. *Raj Krishna Dalui* (3), where Mr. Justice Chatterjee observed that the legal relation between the parties after the execution of the *kabuliyat* was that of landlord and tenant and that the mere fact that the lands were let out to the mortgagor would not alter the relation between the parties.

It follows, therefore, that the decision of the Munsif in this case was right and that the appeal must be decreed with costs and that the decree of the District Judge be set aside and the decree of the Munsif restored.

Appeal decreed.

(1) (1901) 28 All. 338 = (1901) A. W. N. 95.
(2) (1904) 27 All. 313 = (1904) A. W. N. 273 = 1 A. L. J. 715.
(3) (1920) 57 Cal. 877 = 25 C. W. N. 229 = 55 I. C. 157 = 31 C. L. J. 98 (F. B.).

✱A. I. R. 1923 Patna 404

ROSS, J.

Dasi Chamar—Defendant — Appellant

v.

Ram Autar Singh—Plaintiff—Respondent.

Appeal No. 6 of 1921, decided on 12th Jan., 1923, from the appellate decree of the Sub. J., Saran, dated the 29th Sep. 1920.

(a) *Appeal—One defendant not made party in appeal—His rights will stand unaffected by appeal.*

Where the decree of the Munsif was in favour of defendant No. 2 and, therefore, he could not appeal, and in the first appeal by plaintiff defendant 2 was not made a party.

Held as defendant 2 was not made a party to the first appeal by the plaintiff his rights could not be determined in that appeal nor could they be determined in second appeal, and his right stood unaffected [P. 405, C. 1.]

(b) *Stamp Act, S. 36—Document admitted—Objection on the ground of insufficiency of stamp.*

Where the documents were admitted in evidence and exhibited and subsequently when it was pointed out that they were not properly stamped the Judge removed them from the record of the evidence.

Held S. 36 of the Stamp Act prohibits such a procedure, enacting that where an instrument has been admitted in evidence its admission shall not be called in question at any stage on the ground that it has not been duly stamped. [P. 405, C. 2 & 406, C. 1.]

Narsu Narain Sinha—for Appellant.

K. P. Jaiswal and *Baikuntha Nath Mitter*—for Respondent.

Judgment.—This is an appeal by the defendant No. 1 against the decree of the Subordinate Judge of Saran reversing the decree of the Munsif of Chapra in a suit brought by the plaintiff for possession of 1 *bigha* 1 *katha* and 7 *dhurs* of land. The plaintiff alleged that one Palak Chamar was the cousin of defendant No. 1 and that two of them together owned 1 *bigha* 10 *katha*

and 5 *dhurs* of land. Three years before, Palak died without heirs other than defendant No. 1 who on the 24th of June 1915 sold the property in suit to the plaintiff for Rs. 200, which the plaintiff paid to Kawaldeo Narayan Singh, the landlord of the defendant to whom the defendant was indebted in that amount.

But during the Survey operations the defendant No. 1 set up defendant No. 2 as the son of Palak Chamar and got his name recorded in the Record of Rights for Palak's share. The defence was that the defendant No. 2 was the son Palak Chamar, that the defendant No. 1 did not owe anything to the landlord Kawaldeo Narayan Singh but that, on the contrary, he had agreed to sell his share of the property to Kawaldeo Narayan Singh for Rs. 200, but the latter had fraudulently got the sale-deed drawn in respect of the whole property and executed in the name of the plaintiff who is his *benamidar* with a false recital as to the payment of the money.

The Munsif found that the plaintiff was a nominal purchaser and dismissed the suit on this and other grounds. The Subordinate Judge, however, held that Palak and Dasi, the defendant No. 1, were indebted to the landlord, that the plaintiff was the real purchaser, and that consideration passed, and he decreed the suit in appeal. It may be noted that the defendant No. 2 was not a party to that appeal.

In the present appeal the first point taken is that, in the absence of defendant No. 2, the plaintiff's title cannot be determined so far as the share of the defendant No. 2 is concerned. It is argued that the decree of the Munsif was in favour of defendant No. 2 and, therefore, he could not appeal and, as he was not made a party to the appeal by the plaintiff, his rights could not be determined in that appeal and cannot be determined now. This contention is undoubtedly sound and the rights of the defendant No. 2, if any, stand unaffected by this appeal.

The second contention is, that the judgment of the appellate Court is not in accordance with law on the question of the *farzi* nature of the plaintiff's purchase. It is contended that the Munsif has dealt elaborately with the question of *benami*, he has considered the evidence and has given several reasons for his conclusion, whereas the Subordinate Judge has not dealt with the evidence at all but has based his decision on one single consideration.

I do not think that this is a fair description of the judgment of the Subordinate Judge. He begins by saying that the lower Court had overlooked a very important piece of documentary evidence. This implies that he had considered what the Munsif has said on this subject and he came to the conclusion that the really decisive consideration was the inference to be drawn from this particular document. With that inference and its soundness I am not concerned. But I cannot hold that the treatment of the case by the Subordinate Judge on this point is not in accordance with law.

Then, it is argued that the sale was without consideration, because the debt which it purported to pay off was barred at the time when it was acknowledged and there was no promise to pay it. This argument might have required consideration, if it had been found that Kawaldeo Narayan Singh, to whom the debt was due, was the real purchaser, although even in that case it could hardly be said that the sale was without consideration. But here it has been found as a fact that the plaintiff was the purchaser, no question of the debt of Kawaldeo Narayan Singh being barred arises. It must be taken on the findings that consideration was paid by the plaintiff as an independent and real purchaser of the holding by his parting with Rs. 200 to Kawaldeo Narayan Singh. Consequently, in no view can the sale be without consideration.

Lasty, it is argued that the learned Subordinate Judge erred in admitting certain *chithas* in evidence which the Munsif had refused to admit on the ground that they were not stamped according to law. What happened exactly was, that the documents were admitted in evidence and exhibited and subsequently when it was pointed out that they were not properly stamped the Munsif removed them from the record of the evidence. But

section 36 of the Stamp Act prohibits such a procedure, enacting that where an instrument has been admitted in evidence its admission shall not be called in question at any stage on the ground that it has not been duly stamped. On this point, therefore, the Subordinate Judge was undoubtedly right. The *chithas* were evidence and he was entitled to rest his finding on them.

The appeal must, therefore, fail and is dismissed with costs.

Appeal dismissed.

A. I. R. 1923 Patna 406

ROSS, J.

Harnaraian Pandey — Plaintiff—Appellant

v.

Nand Keshwar Pandey and others—Defendants—Respondents.

Appeal No. 9 of 1921, decided on 11th Jan., 1923, from the appellate decree of Add. Sub. J. of Saran, dated 28th Sep. 1920.

Decree—Exparte decree—Court finding in later suit that summons was not served on defendant in former suit—No fraud is established thereby—Fraud—Civil P. C., S 11.

The main allegation in this suit was that the defendant 1 did not receive summons in the previous suit and that the *exparte* decree was got fraudulently behind his back. The evidence discussed by the Judge was only the evidence of the service of summons. The finding was non-service.

Held that is not evidence of fraud and the dogmatic statement that the previous decree was obtained fraudulently does not amount to a proper finding that the decree has no effect because of fraud. If there is nothing to indicate that the Court which tried the first suit had not satisfied itself of the service of summons it must be presumed that the Court was satisfied before the decree was made [P. 507, C. 1.]

Manohar Lal and *S. K. Mitter*—for Appellant.

Hareshwar Prasad Sinha—for Respondents.

Ross, J.—This is an appeal by the plaintiff against the decree of the Additional Subordinate Judge of Saran affirming the decision of the Munsif of Siwan, dismissing the plaintiff's suit. The subject-matter of this litigation is a plot of land measuring 4 bighas 14 kathas and 2 dhurs. The plaintiff and the three defendants are brothers. The plaintiff alleges that they separated long ago and that after the separation he acquired this property now in suit; that during the previous survey operations the land was recorded under the names of all the brothers jointly whereupon the plaintiff brought a suit for declaration of his title and got a decree on the 16th of December 1909; not withstanding that decree the lands have again been entered in the same of all the brothers jointly in the recent Settlement proceedings and consequently the plaintiff has brought this suit for confirmation of his possession; or, if he be considered to have been dispossessed, then for recovery of possession.

The defence was that the defendants and the plaintiff were separate in mess only but joint in business. With regard to the previous suit all that the defendant No. 1, (who was the contesting defendant and is now the respondant,) said was that he had no knowledge of the suit and received no summons, that the defendants Nos. 2 and 3 were in concert with the plaintiff and that if they had done any act in concurrence with each other it could not be injurious to the defendant.

The Munsif in dealing with that previous litigation referred to the evidence of the service of summons on the defendant and discovered certain discrepancies in it. At the end of his judgment he said that "the defendant No. 1 is not bound by the *exparte* decree set up the plaintiff." The learned Subordinate Judge in dealing with the same question says that the plaintiff obtained an *exparte* decree but probably without the knowledge of defendant No. 1. He then refers to the evidence of the service of summons and concludes that "the *exparte* decree was obtained fraudulently behind his back" and it was never put into execution; it was therefore of no consequence and could not bind the defendant No. 1.

The main ground taken in the present appeal is that as the title of the plaintiff was declared by the decree of 1909 and that decree has not been impugned on the ground of fraud, effect must be given to it and the present appeal must be decreed. The learned Vakil for the respondent says that in paragraph 5 of the written statement fraud has been alleged and the Subordinate Judge has found fraud. Now paragraph 5 of the written statement, in my opinion, does not amount to a proper pleading of the

fraud. The main allegation is that the defendant did not receive summons. He also alleges that the defendants Nos. 2 and 3 are in concert with the plaintiff evidently meaning, in the present litigation. The written statement then says. "If they had done any such act in concurrence with each other it cannot be injurious to the defendant." This is not even an allegation of fraud. The evidence discussed by the Subordinate Judge is only the evidence of the service of summons. The finding is non-service; but that is no evidence of fraud and the dogmatic statement that the decree was "obtained fraudulently" does not to my mind amount to a proper finding that the decree has no effect because of fraud.

It was contended on behalf of the respondent on the authority of *Ram Lochan Soor* v. *Nitya Kalee Debia* (1) that no legal decree can be passed *exparte* without the Court being satisfied of the due service of the summons. There is no doubt about the proposition; but in the present case what we have is that the Court in the present litigation is not satisfied that the summons was properly served in the suit in which the *exparte* decree was passed; but there is nothing to indicate that the Court which tried the suit of 1909 had not satisfied itself of the service of summons and it must be presumed that the Court was satisfied before the decree was made. In my opinion the decree of 1909 concludes the matter.

The appeal must be decreed, with costs, the decree of the Court below set aside and the plaintiff's suit decreed with costs throughout.

Appeal allowed.

(1) 12 W. R. 210.

A. I. R. 1923 Patna 407

DAS AND KULWANT SAHAY, JJ.

(*Maulvi*) *Jamil Ahmad—Judgment-Debtor*—Petitioner—Appellant

v.

Kesho Das and others (*Decree-Holders*) *and Ali Fatma and others* (*Judgment-Debtors*)—Opposite Parties—Respondents.

Mis. A. No. 41 of 1921, decided on 21st March, 1923, from an order of Sub. J., 3rd Court Patna, dated 8th Jan. 1921.

Execution—Award of damages for a future uncertain event is illegal and cannot be executed—Even if executable, subsequent orders of Court without application by decree-holder cannot save limitation.

In execution proceedings the Court, while allowing postponement of sale on the application of judgment-debtor, ordered for payment of damages in the event of a fresh application for postponement being made at some future date Later on after the judgment-debtor applied for postponement again, the court directed the damages to be incorporated in the main decree, and in the objection of the judgment-debtor the court excluded it from the general account and directed that the damages may be recovered by separate execution.

Held the Court had no jurisdiction to make an order awarding damages for an event which might or might not occur at some future time. [P. 409, C. 1.]

Neither the order of the executing Court directing a certain sum as damages to be incorporated in the general account of the main decree, nor the further order that the damages should be excluded from the general account, is an order awarding damages and capable of execution, nor could these orders save limitation for the purpose of executing the order awarding damages assuming that the order could be executed. [P. 409, C. 2.]

Md. Hasan Jan and *S. Sultan Ahmad*—for Appellant.

S. M. Tahir, P. N. Sinha, N. C. Ghose, N. C. Sinha, K. Hassain and *B. N. Ghose*—for Respondents.

Kulwant Sahay, J.—This is an appeal against the order of the Subordinate Judge of Patna, dated the 8th January 1921 dismissing the appellant's objection to the execution of a decree. On the 4th of September 1905 a mortgage decree was passed against Musst. Bibi Fasihan. Execution was once taken out of the decree in the life-time of Bibi Fasihan in the year 1908, which was dismissed in March 1910. Bibi Fasihan died, and fresh executions were taken out against her heirs. The fourth application for execution was filed on 14—10—1912 which was registered as Execution Case No. 115 of 1912. In the course of this fourth execution an application was made on the 27th of November 1912 by Saiyid Abul Fateh *alias* Mohammed Umar one of the heirs of Bibi Fasihan, praying for postponement of the sale and on that date an order was passed upon that application to the following effect.

"It is ordered that the sale be postponed on payment of Rs. 100 as cost but if the judgment-debtor will take further time after fresh proclamation they will have to give damage at the rate of 6 per cent. per annum in addition to the interest given in the decree as the decree-holder had been much troubled with frivolous objections."

The cost of Rs. 100 awarded

under this order was paid and the sale was adjourned. In the course of the said execution proceeding, a petition was filed by Mohammad Kalimuzzafar, another judgment-debtor, on the 16th June 1913, praying for postponement of the sale of one of the properties, and the Court allowed the prayer and postponed the sale of that property which was lot No. 3. That execution case was ultimately dismissed on 22nd July 1914. Fresh execution was taken out on the 17th September 1914, which was dismissed on the 30th of July 1915. On that very day, *i. e.* 30th July 1915, another application for execution was filed, and it was registered as Execution Case No. 115 of 1915.

On the 25th September 1915 two of the judgment-debtors, Musst. Bibi Habiba and Mohammad Abul Fateh *alias* Mohammed Umar, again applied for postponement of the sale, and the Court was on that date again pleased to postpone the sale on payment of Rs. 100 as cost to the decree-holders. The order of the 25th September 1915 after postponing the sale and awarding Rs. 100 as cost to the decree-holders proceeded as follows :

"It has been brought to my notice by the decree-holder's pleader that in accordance with the Order No. 7, of 27th November, 1912, passed in Execution Case No. 115 of 1912, they are entitled to get damages at 6 % p. a. on the decretal amount should the judgment-debtors again apply for time. I have seen that order today and I find that the order directs damages at 6 % p. a. to be given to the decree-holders in addition to the usual interest allowed in the decree. It appears that the judgment-debtors again applied for time and so the order should be now put in force.

The Vakils for the aforesaid judgment-debtors raised no objection to the above order being enforced. I direct accordingly that a fresh proclamation be issued fixing the 24th November after incorporating the damages at the above rate in the account if it is not already included in it, the date from which the damage is to be calculated being the 16th June 1913 which was the next sale day after the passing of the order referred to above".

Thereafter, it appears that two objections were filed on behalf of Bibi Habiba and Abul Fateh *alias* Umar to the effect that they were not bound by the order of the 27th November 1912 under which damages were allowed in Execution Case No. 115 of 1912 and that the amount of the damages should not be included in the account of the decree which is a mortgage decree. By an order dated the 23rd February 1916 the Court disallowed the first objection but allowed the second objection and ordered that "the item of damages be excluded from the account, which the decree-holders are at liberty to realize by a separate execution."

On the 21st February 1919, the decree-holder applied for execution of the order of the 27th of November 1912 for realization of the damages awarded under that order. This application was dismissed on the 26th of March 1919. A second application for execution of the same order was made on the 17th April 1919, which was dismissed on the 26th November 1919. The present application for execution of the order of the 27th of November 1912 was made on the 9th of December 1919.

In the meantime sometime in the year 1918, the estate of Bibi Fasihan was placed in the hands of a receiver who now represents all the judgment-debtors, the heirs of the original debtor Bibi Fasihan. The receiver filed an objection to the execution of this decree on the ground that the Court had no jurisdiction to award damages and even if it had, all the parties being not represented, the receiver is not bound thereby; secondly, that the execution was barred by limitation, and thirdly that the order awarding damages is in the nature of penalty and that order should not be executed.

The learned Subordinate Judge by his order dated the 8th of January 1921 has disallowed the objections, and the present appeal is preferred by the receiver against this order. The points taken by the learned Counsel on his behalf are: (1) that the order awarding the damages was illegal and is not binding on the receiver (2) that there is no order which is capable of execution

and (3) that in any event the application for execution is barred by limitation.

As regards the first objection, it is argued on behalf of the decree-holders respondents that the Court had power to put the parties to terms on granting adjournment of the sale. On reference to the order of the 27th of November 1912, it appears that the Court did, as a matter of fact, award Rs. 100 as cost before postponing the sales. The further direction for payment of damages was in the event of a fresh application for postponement being made at some future date. Now, the sale was postponed on the 27th of November 1912 at the instance of only one of the judgment-debtors. The other judgment-debtors did not apply for postponement and the application of Abul Fateh of the 27th of November 1912 related not to all the mortgaged properties but only to the property with which he was concerned.

In my opinion the Court had no jurisdiction to make an order awarding damages for an event which might or might not occur at some future time. On the 16th of June 1913, the sale of one of the properties, namely, lot No. 3, was postponed on the application of another judgment-debtor Kalimuzzaffar. The other judgment-debtors did not on that date apply for postponement of the sale of their properties, and assuming that the order of the 27th of November 1912 awarding damages was a good order so far as Abul Fateh was concerned, the fresh application for postponement made by Kalimuzzafar on the 16th of March could not bring into operation the effect of the order of the 27th of November 1912.

The next order, which is of importance, is that of the 25th of September 1916. Now, that order was passed on the application of only two of the judgment-debtors, Musst. Bibi Habiba and Mohammad Abul Fateh *alias* Mohammed Umar. By that order the Court merely ordered that the damages awarded by the order of the 27th November 1912 should be calculated and incorporated in the account for the sale of the mortgage properties. This order of the 25th of September 1915 did not independently award any damages; it simply ordered the damages to be incorporated in the general account under the mortgage decree. It has been argued that this was a consent order and, therefore, all the judgment-debtors are bound by it, but on reference to the order sheet it would appear that the consent was given only by the two judgment-debtors Musst. Habiba and Mohammad Umar; the other judgment-debtors do not appear to be parties to this order and it does not appear that this order was passed in their presence or that they were consenting party thereto.

The next order which it is necessary to notice is the order of 23rd February 1916. Now, this order again was made on the application of the said two judgment-debtors Bibi Habiba and Abul Fateh, and by this order the order of the 25th of September 1915 was cancelled and it was ordered that the damages should not be incorporated in the general account under the mortgage decree, and the decree-holders were at liberty to realize the damages by separate execution. This order also is not an order which awarded damages and which is capable of execution. The order of the 25th of September 1915 directed the damages to be incorporated in the general account, while the order of the 23rd February 1916 directed that the damages should be excluded from the general account.

Therefore, there is, as a matter of fact, no order awarding damages at 6 % p. a. which is binding on all the judgment-debtors and which is capable of execution; and, in my opinion, the objection of the receiver who now represents all the judgment-debtors is valid and it must be held that the order of the 27th of November 1912, if it be held to be an order which is capable of execution, is not binding on all the judgment-debtors, and the orders of the 25th of September 1915 and 23rd February 1916 are not orders awarding damages which are capable of execution.

In the next place the order sought to be executed is the order of the 27th of November 1912. I have held

that this is not an order which is capable of execution inasmuch as it does not award damages independently but it makes a conditional order that in the event of any future application for adjournment the judgment-debtors will have to pay damages, and no order has yet been made, as a matter of fact, awarding the damages. But, assuming that the order of the 27th of November 1912 is capable of execution, the application which was for the first time made for the execution of that order, on the 21st February 1919 was barred by limitation. It is said that the order of the 23rd February 1916 saves limitation, but that order was made on the application of two of the judgment-debtors, and it merely directed that the damages should not be included in the general account of the mortgage decree. There was no application by the decree-holders on that date and it cannot be said that that order gave a fresh start to the period of limitation. If the order of the 27th of November 1912 be held to be a valid and binding order it came into operation on the 16th of June 1913 when application for postponement of the sale was made for the first time after that order and the application of the 21st February 1919 being beyond three years from that date was barred by limitation.

In this view of the matter the objection of the receiver must be allowed and the order of the Court below set aside. The result is that this appeal is decreed with costs.

Das, J.—I agree.

Appeal allowed.

A. I. R. 1923 Patna 410

MULLICK AND BUCKNILL, JJ.

Jharu Lal—Petitioner

v.

Mahanath Madan Das—Accused.

Criminal Ref. No. 66 of 1922, decided on 7th Nov., 1923, by Sess. J. of Purnea, dated 8th August 1922.

Criminal P. C., S 195—Public Demands Recovery Act—Officer directing refund of surplus is not a Court—Forgery in proceedings before such officer—No sanction is necessary.

An officer in the collectorate directing refund of the surplus sale proceeds, is not a Court and no sanction is necessary to prosecute persons who forge the signature of co-debtors on a *Mukhtearnama* empowering the *mukhtear* to withdraw the surplus. [P. 411, C. 1.]

K. N. Chowdhury and *S. P. Sen*—for Petitioner.

H. L. Nandkeolyar, Assistant Government Advocate—for the Crown.

Mullick, J.—Mahanth Madan Das and his wife and the petitioners Jharu Lal and Baijnath Chowdhury were co-sharers in Mahal Amirpur Hardas which was sold by the Collector of Purnea for arrears of road cess under the Public Demands Recovery Act and after paying the Government demand a surplus of Rs. 126 was lying in deposit in the Purnea Collectorate to the credit of the certificate debtors. On the 5th September, 1921, a *mukhtear* named Basdeo Narain filed a *mukhtearnama* purporting to have been executed in his favour by all the debtors including Madan Das and his wife and he drew out the whole amount of Rs. 126 from the Collectorate. On the 12th June, 1922, Madan Das lodged a complaint before the Magistrate of Purnea, stating that Jharu Lal and Baijnath had forged his name and that of his wife on the *mukhtearnama* and praying that process should issue against them for offences under sections 468 and 471, Penal Code.

The Magistrate after calling for a report from the Certificate Officer issued process as prayed for. Thereupon Jharu Lal and Baijnath moved the Sessions Judge in order that the case might be referred to this Court under section 439, Criminal Procedure Code, and the Sessions Judge has done so on the ground that there being no sanction by the Certificate Officer under section 195, Criminal Procedure Code, for the prosecution of the petitioners the proceedings must be quashed.

Apart from the objection that S. 439 does not seem to authorize the Court to direct a subordinate Court to refrain from trying an accused against whom he has issued process, I think on the merits, the present application must fail. The application of the 29th June, 1922, was not, in my

opinion, made to the officer entrusted with the custody of the surplus sale proceeds in his capacity as a Court The certificate proceedings terminated after the sale of the property and the deposit of the money, and thereafter it seems that it was open to any ministerial officer of the Court to return the money to the person entitled under proper safeguards. The only proceeding of a judicial nature which the Public Demands Recovery Act contemplates after the deposit of the money is an inquiry by the Certificate Officer under section 32 (2) where the certificate debtor disputes a claim made by the certificate holder to receive any amount which might be due to him under section 32 (1) (*c*).

It does not seem that it was necessary for the *mukhtear* to institute any proceeding at all for the withdrawal of the money. A verbal application would have sufficed and in the present case the officer who directed the refund of the money was not, in my opinion, acting as a Court or disposing of any proceeding required by the Act.

In these circumstances the sanction required by section 195 was not necessary and the reference cannot be accepted.

Bucknill, J.—I agree.

Reference not accepted.

A. I. R. 1923 Patna 411

MULLICK AND KULWANT SAHAY, JJ.

Ramjas Agarwala and another—Petitioners

v.

Linton Molesworth and Co., and others—Opposite Party.

Civil Rev. No. 120 of 1922, decided on 13th March 1923, against an order of Sub. J. of Dhanbad, dated 9th March 1923.

(a) *Civil P. C., Or. 1, R. 3—Two plaintiffs—Two causes of actions—Defendants same—Joinder cannot be allowed.*

Where the claim of the plaintiff No. 1 was based upon an agreement entered into by and between the defendants 3 to 20 and himself for sale of the land and the colliery and the claim of the plaintiff No. 2 was based upon his purchase of part of the same land from the defendants 10 to 20.

Held that the plaintiff No. 1 has absolutely nothing to do with the claim of the plaintiff No. 2 so far as possession and partition of the plaintiff No. 2's share is concerned and *vice versa*, that if the two plaintiffs had brought the suits separately there would not be question of law or fact which would be common to the two suits that the rights to the reliefs claimed by the two plaintiffs did not arise out of the same act or transaction or series of acts or transactions, therefore the joinder of the two plaintiffs and the causes of action alleged by them is not authorized by any law or principle. The fact that the plaintiff No. 2 agreed to give up his interest in favour of the plaintiff No. 1 if he succeeded in establishing his agreement and therefore the interest of the two plaintiffs are not antagonistic, would not give them a right to join two totally dissimilar claims in the same action.

[P. 412, C. 1 & P. 413, C. 1.]

(b) *Civil P. C., S. 115—Interlocutory order—No revision lies.*

The High Court will not interfere in revision with interlocutory orders unless some irreparable injury is caused to any party thereby. [P. 413, C. 1.]

A. B. Mukherjee—for Petitioners.

P. C. Rai, S. C. Mazumdar and *P. K. Sen*—for Opposite Party.

Kulwant Sahay, J.—This is an application by the plaintiffs against an order dated the 9th March, 1922, passed by the Subordinate Judge at Dhanbad, whereby he has held that the suit was bad for misjoinder of parties and causes of action. The material allegations of the plaintiffs as set out in the plaint are shortly these:—

Defendants 3 to 20 entered into a partnership and acquired 66 bighas 11 cottas of land and started a colliery therein. In August 1918 they negotiated for sale of the land and the colliery with the plaintiff No. 1 and in June 1919, the terms of the alleged sale were settled between plaintiff No. 1 and the defendants Nos. 3 to 20 It was agreed that the defendants 3 to 20 would attend the office of the plaintiff's solicitor the next day, to execute a formal agreement and receive a sum of Rs. 5,000 as earnest money, but that the defendants 3 to 20 failed to do so, that thereafter the defendants 3 to 20 carried on negotiations for sale with others, and ultimately they negotiated with the defendents 1 and 2, and on the plaintiff No. 1's coming to know of this fact, he served a notice through his solicitor upon the defendants 1 & 2. and 3 to 20 imforming them of the agreement with him and calling upon the latter to carry out the agreement.

The defendants 3 to 9, however, sold 13 annas odd share in the land and the colliery to the defendants 1 and 2 in November 1919, and the defendants 10 to 20 sold the remaining share to the plaintiff No. 2 in September 1919. Thereupon, in December 1919, the present suit was brought by both the plaintiffs and the reliefs asked for in the plaint are as follows:—

(1) That a decree be passed for specific performance of the agreement with the plaintiff No. 1; (2) that a declaration be made that the defendants 1 and 2 cannot retain possession of the property in suit; (3) for possession of the entire property; (4) for damages and mesne-profits; (5) for dissolution of partnership and appointment of a receiver pending the dissolution; (6) that if a decree for specific performance be not passed then a decree for partition may be passed; and (7) for recovery of profits after taking accounts.

Issues were settled on the 8th of March 1922, and issue No. 2 was to the effect "Is the suit bad for misjoinder of parties and causes of action?."

The learned Subordinate Judge tried this issue, and by his order dated the 9th of March 1922 held that the suit was bad for misjoinder of parties and he gave an opportunity to the plaintiffs to elect as to which of them should proceed with the suit and for which relief and to amend the plaint accordingly, and he gave them time till the 27th of March within which the plaintiff should make the election and make the necessary amendment, and it was ordered that in the event of their failure to do so, the suit should stand dismissed. The plaintiffs apply for revision of this order.

In my opinion the order of the learned Subordinate Judge is perfectly right and cannot be interfered with. It will appear that upon the allegations made in the plaint the two plaintiffs cannot properly join in the present action. The claim of the plaintiff No. 1 is based upon an agreement alleged to have been entered into by and between the defendants 3 to 20 and himself for sale of the land and the colliery. The claim of the plaintiff No. 2 is based upon his purchase of September 1919 from the defendants 10 to 20. The plaintiff No. 1 has absolutely nothing to do with the claim of the plaintiff No. 2 so far as possession and partition of the plaintiff No. 2's share is concerned. Similarly the plaintiff No 2 has no concern with the relief claimed by the plaintiff No. 1. If the two plaintiffs had brought the suits separately there would not be any question of law or fact which would be common to the two suits. The rights to the reliefs claimed by the two plaintiffs did not arise out of the same act or transaction or series of acts or transactions, and the joinder of the two plaintiffs and the causes of action alleged by them is not authorized by any law or principle.

The learned Vakil for the petitioner relies on the cases of *Fakirapa* v. *Rudrapa* (1) and *Pinapati Mrutyunjaya* v. *Pinapati Janakamma* (2) but these two cases have absolutely nothing to do with the facts of the present case. In the first case the suit was brought by the widow and the alleged adopted son of one Irapa for a declaration that a certain property attached in execution of a decree against one Rudrapa belonged to them and not to the judgment-debtor, and the suit was brought to set aside the attachment. The Court of first instance decreed the plaintiff's suit, but on appeal by the defendant the lower appellate Court was of opinion that the interests of the two plaintiffs were antagonistic and it held that the suit was bad for misjoinder of parties.

On second appeal to the High Court it was held that there was no misjoinder; the two plaintiffs were both jointly interested in disproving the defendant's title and their claims were in no way antagonistic and that they could therefore sue jointly. In the second case the widow and the adopted son of a deceased person joined together as plaintiffs and brought a suit to recover a certain sum of money payable by the defendants to the deceased. The money was undoubtedly due to one or the other of them and they were agreed that either

(1) (1892) 16 Bom. 119.
(2) (1903) 26 Mad. 6-7 (F. B.)

should take it. The widow joined as plaintiff because the right of the adopted son was questioned. It was held that the suit was not bad for misjoinder of plaintiffs.

It is argued by the learned Vakil for the petitioner that in the present case the plaintiff No. 2 agrees to give up his interest in favour of the plaintiff No. 1 if he succeeds in establishing his agreement, and therefore the interest of the two plaintiffs are not antagonistic; but that would not give them a right to join two totally dissimilar claims in the same action.

In my opinion the right to relief claimed by the two plaintiffs is not in respect of or arising out of the same act or transaction, nor is there any common question of law or fact arising out of the separate claims of the two plaintiffs and therefore the joinder of the two plaintiffs and their causes of action in the present case is not authorized by the provisions of Order I, rule 1 or any other provision of the Code of Civil Procedure.

Moreover, the present application is made against an interlocutory order passed by the Subordinate Judge and it is settled law that the High Court will not interfere in revision with such orders unless some irreparable injury is caused to any party thereby. Here we are informed that the plaintiff No. 2 has paid no court-fee upon the reliefs claimed by him and there is no irreparable injury caused to any party by the order passed by the learned Subordinate Judge.

The application is therefore dismissed with costs, two gold mohurs. The plaintiffs may make the election and the necessary amendment of the plaint within two weeks of the arrival of the record in the Court below, failing which the suit shall stand dismissed.

Mullick, J.—In my opinion the frame of the suit is bad, both under Order I, rule 3 and Order II, rule 3 of the Civil Procedure Code. I am also of opinion that this Court cannot interfere in this case in exercise of its powers of revision and that no case has been made out for the exercise of our powers of superintendence.

Application rejected.

A. I. R. 1923 Patna 413

MULLICK AND KULWANT SAHAY, JJ.

Ramjit Ahir—Appellant

v.

King Emperor—Respondent.

Criminal A. No. 166 of 1922, decided on 15th December, 1922, from a decision of Officiating Sess. J. of Shahabad, dated 16th Sep. 1922.

(a) *Practice—Witness — Interested—Toddy shop-keepers will be interested in saying nothing against their own customers.*

Where a fight takes place in a shop it is scarcely likely that the shop-keeper and his family members would give evidence against their own customers. Their inclination would be to say that nothing disorderly had taken place at their shop, which they hold under a licence from Government. [P. 415, C. 2.]

(b) *Evidence Act, S. 114—Failure to call all witnesses is no ground for disbelieving the witnesses produced or for drawing adverse inference against prosecution—Criminal Trial.*

If the witnesses called by the prosecution are otherwise worthy of credit, the Court is not entitled to disbelieve them simply because some persons, who could have thrown light upon the case, have not been put before the Court by the prosecution. The proposition that it is the duty of the prosecution to call all the witnsses who prove their connection with the transactions connected with the prosecution and who must be able to give important information, and if such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution, is too wide (16 A. 8 = F. B.) if the police consider a witness to be a false witness or that his evidence is unnecessary, they would be justified in not sending up that witness for the prosecution and his absence at the trial ought not to be a reason for disbelieving the prosecution witnesses if they are otherwise worthy of credit. It is of course not for the police or for the Public Prosecutor to champion a particular theory and to suppress the evidence of a reliable witness simply because his testimony is inconsistent with it. [P. 416, C. 1.]

(c) *Evidence—Appreciation of—Injury said to be caused by brick mark—Absence of external mark does not disprove case.*

The absence of any external mark of injury is not necessarily destructive of the case that the injury was caused by a brick. It is possible that a blow in the abdomen is less likely to leave a mark than one on a less elastic and resilient part of the anatomy. [P. 416, C. 2.]

S. M. Yusuf, S. Bashiruddin, Guru Saran Prasad and *Sant Prasad*—for Appellant.

H. L. Nandkeolyar, Assistant Government Advocate—for the Crown.

Mullick, J.—The appellant Ramjit Ahir has been sentenced to rigorous imprisonment for eighteen months under section 325, Penal Code, for

having, on the 4th May, 1922, struck Japit Ahir with a brick or a piece of a brick and thereby caused his death.

The occurrence took place about an hour before sunset on the 4th May. Japit was taken to the Arrah Police-station about 4-30 *p. m.* on the 5th May. He complained of pain in the abdomen, but the Sub-Inspector in charge did not think it necessary to record a first information and after making an entry in the station diary sent him to the hospital.

On the 6th May at 6-25 *p. m.* in consequence of a report made by the Assistant Surgeon, Japit's dying declaration was recorded by a Deputy Magistrate. On the 7th at 1 *p. m.* the Sub-Inspector having come to hear of Japit's condition recorded a formal first information, Japit died that evening in hospital and a *post mortem* report made on the following day disclosed the fact that his bowel was ruptured and that death had taken place owing to acute peritonitis. The appellant, Ramjit, was arrested on the 7th May. The record does not show on what date the remaining accused Deoraj Ahir, Ramdas Ahir, Lachmi Ahir, Sheobalak Ahir, Ramlopit Ahir, Chandrika Ramavatar and Mangal were arrested.

The learned Sessions Judge of Shahabad, agreeing with one assessor and disagreeing with the other has acquitted all the accused except Ramjit. The latter assessor was of opinion that all the accused should be convicted of an offence under section 147.

The case made in the Session Court by the prosecution was that the appellant's party were drinking in the toddy shop of Ramlagan Passi when the complainant Nathuni Ahir and five other Ahirs of Badka Chanda arrived and purchased a pitcher of toddy for four annas; that when they sent Ramlagan's wife into the room, in which the appllant's party were drinking from a cup, Ramjit got angry with the woman for having sold toddy to men from Badka Chanda, who had the previous day impounded the cattle of the men of Chotka Chanda, and he came out and carried into the shop the pitcher of toddy which the complainant's party had purchased; that thereupon an altercation took place with the result that the ten men from Chotka Chanda, reinforced by Deoraj Ahir of the same village, who had been standing at his door close by, attacked the Badka Chanda men with bricks which they took from a stack near a well which was under repair. The complainant's party while retreating appear to have retaliated in like manner with the result that Japit, who had run up from his *kalihan*, was struck in the abdomen, as stated above, by Ramjit. On the same side were injured Jhulan, Nathuni, Sarwan and Sitaram. On the other side were injured Ramdas, Lachmi and Ramjit. The injuries of all, with the exception of Ramjit, were slight and are consistent with the allegation that they were caused by pieces of bricks. The evidence shows that Jhulan, who was Japit's cousin, ran up towards the end of the fight and struck Ramjit with a *lathi* on the head on finding Japit on the ground.

The defence at the trial was that the occurence had taken place not at the toddy shop but in the sugarcane field of Jeobodhan about one hundred yards to the south-east of the shop because some cattle belonging to Nathuni and four others of Badka Chanda had been seized by the accused for trespass and were rescued by Kobari, Jhulan and other men of that village. A complaint to this effect was lodged before a Deputy Magistrate at Arrah on the 5th and there is evidence that the village *chaukidar*, Gotahul, gave certain information to the Officer-in-charge of the police-station at 10-30 *a. m.* on the 5th. The contents of the police officer's memorandum are not legal evidence in this case.

The learned Sessions Judge has accepted the case put by the defence and disbelieved the whole story as to the occurrence over the pitcher of toddy. It is difficult in the circumstances to understand why he has, while acquitting nine of the accused, convicted Ramjit. His finding seems to be that Ramjit did strike Japit in the course of the cattle rescue. He does not find whether the blow was inflicted with a brick or with a *lathi*, nor whether there was any right of self-defence. There is also no finding as to the circum

stances under which Japit's death was caused and it is difficult to understand how the sentence under section 325 can be sustained in the absence of a decision on these essential points.

But in my opinion the learned Sessions Judge is wholly wrong in the view he took of the evidence. The story told by the prosecution appears on the face of it to be more natural than that told by the defence. It is impossible to conceive that the scene would have been laid at the *pasi khana* if there had not been some occurrence there. The bricks were found by the police on the morning of the 8th, scattered about over an area of 5' x 5.' The defence gives no explanation for the death of Japit; the bricks certainly corroborate the prosecution. The prosecution witnesses have no doubt made contradictory statements as to the exact place where Japit fell, but it seems quite clear, on a careful examination of the whole evidence, that Japit fell in a *bujra* field about ten yards from the verandah of the toddy shop. A *bujra* crop had been grown upon the site, but at the time of the occurrence it was waste and on the evidence it is spoken of either as *parti* or a pathway. There is no substance in the suggestion that the prosecution have laid the scene at a place two or four *rassis* from the shop.

Then, as regards Japit's presence, it is clear that he was not there when the quarrel originated but arrived when it was going on.

The learned Sessions Judge has been considerably influenced by the discrepancies as to the course of the earlier part of the quarrel. It appears that on the 7th May, when examined by the Sub-Inspector, Nathuni stated that he and four others were drinking below the verandah when Ramjit came and joined a number of his co-villagers who were drinking inside the shop and that Ramji straightaway began to abuse the Badka Chanda men for having come to drink there. This story is certainly inconsistent with that told at the trial which was to the effect that Ramjit was in the inner room from the beginning and that the complainant's party had not begun to drink but had merely asked for a cup when Ramjit began the abuse. In my opinion no very great importance ought to attach to this discrepancy. There was no object in telling a different story in Court and it may well be that the statement recorded under section 161, Criminal Procedure Code, by the Sub-Inspector was in no sense exhaustive and that the more detailed and accurate sequence of events has been elicited in the trial. If the case had been a concocted one, I should have expected no variation in this part of the story.

Then as to the weapon with which Japit was struck, Ramkishun said to the Sub-Inspector that Ramjit struck Japit with a *lathi* and Jhulan states that Japit had a *lathi* in one hand and was throwing bricks with the other. The balance of evidence is entirely in favour of the witnesses who state that Japit was struck with a brick. Jhulan may be right in saying that Japit had also a *lathi* but it is certain that the injuries upon Japit and those on his side were inflicted not with *lathis* but with bricks.

The learned Sessions Judge next draws attention to the fact that neither Ramlagan Passi nor his two brothers nor his wife, nor some strangers from other villages who were proved to have been present in the shop, have been called by the prosecution.

With regard to Ramlagan and members of his household, it is scarcely likely that they would give evidence against their own customers. Their inclination would be to say that nothing disorderly had taken place at their shop which they hold under a licence from Government. With regard to the men from other villages it has not been shown that the police had information as to who these persons were.

The seven eye-witnesses called for the prosecution are certainly men of the same party and all of them had a fued with Ramjit's party and the Court was entitled to take this fact into consideration in weighing their evidence and to draw an inference adverse to the prosecution on the ground that independant eye-

witnesses had not been called, but I do not think that if the witnesses called by the prosecution are otherwise worthy of credit, the Court was entitled to disbelieve them simply because some persons, who could have thrown light upon the case, have not been put before the Court by the prosecution. It has sometimes been said that it is the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution and who must be able to give important information: if such witnesses are not called without sufficient reason being shown the Court may properly draw an inference adverse to the prosecution. But this statement of the rule is, in my opinion too wide and has been qualified by a Full Bench of the Allahabad High Court in *Queen-Empress* v. *Durga* (1). The Court there observed as follows:

"In our opinion a Public Prosecutor should not refuse to call or put into the witness-box for cross-examination a truthful witness returned in calendar as a witness for the Crown merely because the evidence of such witness might, in some respects, be favourable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness-box, he is not bound to call that witness or to tender him for cross-examination."

It would seem also to follow that if the police consider a witness to be a false witness or that his evidence is unnecessary, they would be justified in not sending up that witness as a witness for the prosecution and his absence at the trial ought not to be a reason for disbelieving the prosecution witnesses if they are otherwise worthy of credit. It is of course not for the police or for the Public Prosecutor to champion a particular theory and to suppress the evidence of a reliable witness simply because his testimony is inconsistent with it; but that proposition does not, in my opinion, affect the present case. The sole question is whether the witnesses called can be believed on the main points and, in my opinion, the answer should be in the affirmative.

The learned Sessions Judge has drawn attention to Japit's delay in lodging information. The explanation given by the prosecution is that Japit was waiting for the return of Kobari, the head of the family, who was absent from home that night. The defence allege that Japit was in his house all along and that he took part in the cattle rescue which is the subject of their counter case; but there is no reliable evidence on the record to support these allegations.

On the following day Japit was started off in a cart just before Kobari returned and Kobari overtook him before Japit had left the village. In the circumstances I do not think the omission to go straight away to the *thana* immediately after the occurrence is evidence that a false story was being concocted.

Having regard to the fact that no external injury was visible and that Japit was only complaining of pain in the abdomen, the probability is that if the accused's party had not set out for Arrah for the purpose of lodging a complaint, Japit would not have gone to the police at all. Even the Sub-Inspector who saw him did not consider the case serious and declined to record a first information. The absence of any external mark of injury is not necessarily destructive of the case that the injury was caused by a brick. The Medical Officer was not examined upon this point and it is possible that a blow in the abdomen is less likely to leave a mark than one on a less elastic and resilient part of the anatomy.

I think, therefore, on a careful review of the evidence, that the appellant should have been convicted of the charge of rioting with the common object of beating Nathuni and others. But as he has been acquitted of that charge, the only question is whether the conviction under 325 can be sustained. Now, having regard to the fact that the brick was hurled from a distance of a few paces there could have been no difficulty in recognizing the person who hurled it. There was no doubt a free fight, both sides using bricks, but for all that there does not seem to be any reason for disbe-

(1) (1894) 16 All. 84=(1894) A. W. N. 7 (F. B.)

lieving the allegation that Japit fell on being struck by Ramji in the stomach. There is no evidence, however, as to the size of the missile and it is difficult to believe that Ramjit acted with the knowledge that he was likely to cause death.

An offence under section 325, however, has been made out, but having regard to the circumstances and to the fact that each party was pelting the other with whatever they could pick up, I think a sentence of six months' rigorous imprisonment will meet the ends of justice. The sentence is accordingly reduced to that period.

Kulwant Sahay, J.—I agree.

Sentence reduced.

✱ A. I. R. 1923 Patna 417

COUTTS AND DAS, JJ.

Mt. Bibi Khozaima and others—Defendants—Petitioners

v.

The Official Liquidator of the Kayestha Trading and Banking Corporation Ltd.—Plaintiff—Opposite Party.

Civil Rev. No. 189 of 1922, decided on 24th July, 1922, against an order of Sub. J. of Chapra, dated the 4th May 1922.

Limitation Act, Ss. 5 & 14—Sufficient Cause—Court holding that defendant was dead—Plaintiff instead of setting aside abatement—Appealing against order, and after its dismissal, applying for substitution of Legal Representatives—No sufficient cause Civ. P. Code, O. 22, R. 4, 9 (3)

One K brought a suit against one Abdul Jabber. On the 5th March, 1918, K obtained an *ex parte* decree, and made an application for execution against the heirs of Abdul Jabber who was then dead, but was met with the objection that Abdul Jabber had died on the morning of the 5th March before the decree was passed. The executing Court allowed the objection, against which the plaintiff appealed to the High Court. The appeal was dismissed and the order of the first Court was confirmed, on the 15th July 1921. On the 11th August 1921 the plaintiff applied to the Subordinate Judge to substitute the legal heirs of Abdul Jabber in the original suit without applying for setting aside the abatement.

Held that an application for substitution instead of one for setting aside the abatement is not maintainable and that the plaintiff could not possibly be allowed any benefit of section 5. [P. 418, Cs. 1 & 2]

Sultan Ahmed with *Md. Hasan Jan*—for Petitioners.

Siva Saran Lal—for Opposite Party.

Coutts, J.—This application arises out of an order by the Subordinate Judge of Chapra allowing an application for substitution. The case is a somewhat curious one. It appears that the Kayestha Trading and Banking Corporation brought a suit against one Abdul Jabber. On the 5th March, 1918, they obtained an *ex parte* decree. They then made an application for execution against the heirs of Abdul Jabber who was then dead, but they were met with the objection that Abdul Jabber had died on the morning of the 5th March before the decree was passed. The executing Court allowed the objection, holding that the decree was null and void and incapable of execution. Against this decision the plaintiff appealed to the High Court.

The appeal was dismissed and the order of the first Court was confirmed on the 15th July, 1921. On the 11th August, 1921, the plaintiff applied to the Subordinate Judge to substitute the legal heirs of Abdul Jabber in the original suit. This has been allowed and it is against this order that the present application has been made by Abdul Jabber's heirs.

I am not quite clear as to the reasons of the learned Subordinate Judge for allowing substitution, but he refers to section 14 of the Limitation Act and says that the decree was obtained and executed against a dead person owing to a *bona fide* mistake, and that under these circumstances the plaintiff is entitled to an exclusion of the whole period during which he was proceeding against the dead man from the period of limitation in applying for substitution. He further says that as the decree against Abdul Jabber is null and void there is no decree in the case and the plaintiff is in the same position as if the decree had been set aside. The suit has, therefore, not abated and the plaintiff is entitled to succeed.

I will first deal with the last proposition of the learned Subordinate Judge. He is entirely wrong when he says that the suit has not abated and he has evidently not studied the provisions of Order XXII on this point.

Order XXII, rule 4, provides that:

"Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."

and in sub-clause (3) it is provided that:

"Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

The period of limitation is three months so that in the present case the decree being null and void the suit abated after the expiry of three months from the date of the death of the defendant.

We now come to Order XXII, rule 9. This rule provides for setting aside an abatement, and under sub-clause (2) an abatement is to be set aside when it is proved that the plaintiff was prevented by sufficient cause from continuing the suit. The period of limitation under this sub-clause is sixty days under Article 177 of the Limitation Act, but under sub-clause (3) of Order XXII, rule 9, section 5 of the Limitation Act is made applicable so that even after the expiry of sixty days the abatement might have been set aside if the plaintiff had satisfied the Court that he had sufficient cause for not making the application within the period of limitation. The abatement must, however, be set aside before the substitution can be made and in making the substitution without setting aside the abatement, the Court certainly acted without jurisdiction.

The learned Subordinate Judge has not considered the question of "sufficient cause" in this case and it is clear that there was no sufficient cause. It may be that when the plaintiff first applied to execute the decree against the heirs of Abdul Jabber he believed that the decree was good as against the heirs, but when the objection was allowed he should at once have applied for setting aside the abatement and for substitution. He chose, however, to appeal and even after the decision of the High Court against him he waited for nearly a month before making any application. Furthermore he made an application for substitution instead of for setting aside the abatement.

In the circumstances it is difficult to see how the plaintiff could possibly be allowed any benefit from section 5. The order of the learned Subordinate Judge is manifestly wrong and without jurisdiction and should be set aside.

I would accordingly allow this application and set aside the order of the learned Subordinate Judge.

Das, J.—I agree.

Appeal allowed.

A. I. R. 1923 Patna 418

DAS AND MACPHERSON, JJ.

Sham Sundar Singh and others—Petitioners

v.

Munshi Mushaheb Lal and another—Opposite Party.

Civil Rev. No. 304 of 1922, decided on 21st March, 1923, from an order of Dt. J. of Monghyr, dated 6th July, 1922.

Civil P. C., O. 21, R. 90—Compromise of petition under—Deposit to be made by petitioner—Deposit made with condition but condition withdrawn—Deposit is valid—Contract Act, S. 38—Tender.

When a deposit is made with a condition that the sum may be retained in Court until a certain event has happened, it is not a good deposit within the meaning of the rule. Where however, the deposit was accepted by the Court without any question, and as soon as objection was taken by the decree-holder, the petitioner withdrew the condition, so that the money became available for payment to the decree-holder before he had made any attempt to withdraw the money from Court.

Held the deposit cannot be held as invalid and not sufficient for reversal of the sale. 10 I. C. 880 Foll. [P. 419, C. 2 & P. 420, C. 1.]

A. B. Mukerjee—for Petitioners.

Ram Prasad, D. C. Varma and *Janak Kishore*—for Opposite Party.

Das, J.—I am unable to agree with the view taken by the learned District Judge. On the 22nd December, 1920, a sale of a certain property took place in execution of a certain decree obtained by the opposite party as against the petitioners. On the 21st January, 1921, the petitioners applied for setting aside the sale under the provision of Order XXI, rule 90, C. P. C. On the 23rd January, 1921 the parties entered into a compromise, the terms of the compromise

being that if the judgment-debtors paid the sum of Rs. 2,695 to the decree-holders on or before the 23rd September, 1921, the sale would be set aside, but that if the sum of Rs. 2,695 was not paid to the decree-holders within the time allowed, the application for setting aside the sale would stand dismissed and the sale would be confirmed. That was the position on the 23rd January, 1921. On the 19th September, 1921, the petitioners deposited the sum of Rs. 2,695 in Court and invited the Court to set aside the sale. The petitioners also applied to the Court that that the money should not be paid to the decree-holders until the decision of a regular suit which the judgment-debtors were about to institute against the decree-holders. It appears that such a suit was in fact instituted on the 24th September, 1921.

On the 23rd September, 1921 the decree-holders filed a petition praying that the sale should not be set aside as the deposit made by the judgment-debtors was a conditional deposit which had in effect prevented them from withdrawing the money from Court. The learned Subordinate Judge came to the conclusion that the payment of the money to the decree-holders could not be withheld, and on the 9th November the learned Subordinate Judge, set aside the sale. It appears that while the matter was being argued before the learned Subordinate Judge, the judgment-debtors through their pleader, intimated to the Court that they had no objection to the money being withdrawn by the decree-holders. The question which the Courts below had to consider was whether the deposit made by the judgment-debtors on the 19th September, 1921 was an unconditional deposit or a conditional deposit

The learned Subordinate Judge came to the conclusion that the deposit was an unconditional one, whereas the learned District Judge in appeal has taken the contrary view.

I am not, as at present advised, prepared to assent to the proposition that the deposit was a conditional one. It is in my opinion one thing to make the deposit subject to a particular condition; it is another thing to make the deposit and to apply to the Court that the party entitled to withdraw the money from Court should not withdraw it until a particular decision is reached in a particular case.

I will, however, assume that the deposit on the 19th September, 1921 was conditional deposit. The question still remains whether there was anything which happened afterwards which prevented the Court from giving the appropriate relief to the judgment-debtors. The judgment-debtors through their pleader intimated to the Court that they would not object to the money being withdrawn by the decree-holders, and as a matter of fact they took up that position before the decree-holders made any application for withdrawal of the money from Court.

The case, in my opinion, is governed by the decision of the Calcutta High Court in *Dulhin Mothura Koer* v. *Bansidhar Singh* (1). In that case the judgment-debtor made the deposit under Order XXI, rule 89, C. P. C. on the last day for making a deposit, and the petition by which he made the deposit prayed that the money was not to be paid out to the decree-holder auction-purchaser till the disposal of a suit which had been commenced by the petitioner in another Court but it appeared that when objection was taken by the decree-holder that the deposit was not an unconditional deposit the judgment debtor withdrew the objection Mr. Justice Mookerji in delivering the Judgment of the Court said as follows:

"Now, it is perfectly true that a deposit under Rule 89 of Order XXI, in order that it may be a valid deposit, must be unconditional, because the deposit is to be made for payment to the purchaser and the decree-holder. When, therefore, a deposit is made with a condition that the sum may not be drawn out at once but may be retained in Court until a certain event has happened, it is not a good deposit within the meaning of the rule.

(1) (1923) 38 C. L. J. 83 = 10 I. C. 88 = 15 C. W. N. 89.

....It appears, however, that the deposit was accepted by the Court without any question, and as soon as objection was taken by the decree-holder, the petitioner withdrew the condition, so that the money became available for payment to the decree-holder before he had made any attempt to withdraw the money from Court.

Under such circumstances, we are not prepared to hold that the deposit was invalid and not sufficient for reversal of the sale. The position might have been different if, upon objection taken by the decree-holder, the petitioner had persisted in her effort to annex a condition to the deposit. The decree-holder was not prejudiced in any manner by the insertion of the prayer in the application of the petitioner that the money should be retained in Court, and he substantially was in the same position in the end as if such prayer had never been made.

We must consequently hold that there was substantially a valid deposit within the time limited by law, sufficient for reversal of the sale."

In my opinion in the circumstances which have happened, we must regard the deposit made by the judgment-debtors on the 19th September, 1921 as a valid deposit. That being so, the order of the learned District Judge must be set aside and the order of the Court of first instance must be restored. There will be no order for costs.

Macpherson, J.—I agree.

Appeal allowed.

A. I. R. 1923 Patna 420

DAS AND BUCKNILL, JJ.

Mahomed Waheb Hussain and others—Plaintiffs—Appellants

v.

Syed Abbas Hussain and others—Respondents.

F. A. Nos. 190 and 191 of 1920, and Civil Rev. No. 194 of 1920, decided on 6th Dec., 1922, against the order, passed by the Dt. J. of Muzaffarpur, dated 10th July 1920.

(a) Civil P. C., S. 92—Court has power to disregard arrangement in Wakfnamah but should not do so as a general rule—Decree form of—Liberty should be reserved for parties to apply for directions from time to time.

It must not be understood that the Court has no power to depart from the arrangement contemplated in the *Wakfnamah*. The institution of a suit under section 92 attracts the jurisdiction of the Court, and the Court has complete power to make such appointment as it considers proper though the appointment may involve a departure from the arrangement contemplated in the constitution of the trust. There is no legal restriction in the power of the Court; but although there is no legal restriction, the Court ought not to depart from the arrangement contemplated by the settlor except for a very strong reason. Where the deed of trust vested the power of appointment in the respectable *Shiahs* of Muzaffarpur and, they by a majority of votes, elected one, A as the *mutwalli* of the endowment.

Held the Court should have been more careful in enquiring whether it was necessary that the election of A be set aside, merely on the unwarranted suggestion of the other party, that A had procured his election by offering bribes to the electors. It cannot be said that because the trust-deed, does not contemplate a scheme, a scheme should not be framed by the Court [P. 421, Cs. 1 & 2; P. 422, C 2.]

(b) Civil P. C., S. 35—Discretion—Suit rendered inevitable by consent of party—Costs are rightly awarded against him

Where it was found that the suit was rendered inevitable by reason of the gross mismanagement of the trust estate by the Appellant the lower Court was held to be right in directing the Appellant to pay the costs of the suit.

Sultan Ahmad, S. M. Tahir and *Syed Ali Khan*—for Appellants in F. A. No. 191 of 1920.

W. D. Akhari and *Hasan Jan*—for Appellants in F. A. No. 190 of 1920.

Bhagwan Prasad and *Sultanuddin Hussain*—for Petitioner.

Manohar Lal and *Saroshi Charan Mitter*—for Respondents.

Das, J.—These appeals raise three important questions; first the validity of the appointment of Abbas Hussain as the *mutwalli* of the endowment; secondly, the propriety of the order of the learned District Judge in directing Haji Syed Ali Nawab, appellant in first Appeal No. 191 of 1920, to pay to the plaintiffs the cost of the suit; and thirdly, the necessity of framing a scheme for the administration of the trust funds. The cross-objection presented on behalf of Abbas Hussain raises the question whether the learned District Judge should not have directed Haji Syed Ali Nawab to

render an account of his dealings with the trust estate.

It will be convenient, first, to dispose of the cross-objection. I think there was more or less an understanding between the parties that, if Haji Syed Ali Nawab voluntarily tendered his resignation of his office, the plaintiffs would waive the question of accounts as against him. The order of the 10th December, 1919, suggests that there was such an arrangement between the parties. I must assume that the learned Judge, in declining to direct an account as against Haji Syed Ali Nawab, had in his mind the existence of such an arrangement.

The cross-objection must be dismissed.

Coming now to the appeals, the question most seriously pressed before us is, that the learned District Judge should not have set aside the election of Ahmed Nawab by the respectable *Shiahs* of Muzaffarpur, and appointed Abbas Hussain as the *Mutwalli* of the endowment. As Abbas Hussain is now dead, I do not think that it is necessary for us to determine this question. If it was necessary for us to determine this question, I would find it difficult to maintain the order of the learned District Judge.

I must not, however, be understood to assent to the proposition that the Court has no power to depart from the arrangement contemplated in the *wakfnamah*. The institution of a suit under the provision of section 92 of the Civil Procedure Code attracts the jurisdiction of the Court, and the Court has complete power to make such appointment as it considers proper in the circumstances though the appointment may involve a departure from the arrangement contemplated in the constitution of the trust. There is no legal restriction in the power of the Court; but, although there is no legal restriction, the Court ought not to depart from the arrangement contemplated by the settlor except for a very strong reason. The deed of trust vests the power of appointment in the respectable *Shiahs* of Muzaffarpur. The respectable *Shiahs* of Muzaffarpur, by a majority of votes, elected Ahmed Nawab as the *mutwalli* of the endowment. Although the power of the Court was in no way restricted, still, the Court should have been more careful in enquiring whether it was necessary that the election of Ahmed Nawab be set aside, and another appointment made by it.

The learned Judge thought that Ahmed Nawab had procured his election by offering bribes to the electors. If he is right in his view that bribes were offered by Ahmed Nawab, we could not interfere with the exercise of his discretion in the matter. But I have anxiously considered the evidence in the case, and I have come to the conclusion that the evidence, even if believed, does not establish the guilt of Ahmed Nawab in the matter. It is unnecessary to pursue the subject any further; for, in my opinion, Abbas Hussain being dead, the question does not arise for our consideration in these appeals.

The learned Government Advocate, indeed insisted that we ought to hold that Ahmed Nawab was properly elected in a constitutional way; but, as I have said before, the power of the Court, in the matter of the appointment, was unrestricted; and though if we had to decide the question for the first time, we might say that there was nothing in the case which would induce us to set aside the election of Ahmed Nawab; we could not, on the materials before us, go further and hold, that the Court should have appointed Ahmed Nawab as the *mutwalli*.

All that we need say at this stage is this that, in the fresh election which must be held it will be open to Ahmed Nawab to offer himself as a candidate, and that the Court, in making the appointment, ought to give due weight to the wishes of the respectable *Shiahs* of Muzaffarpur. The considerations which weighed with the learned District Judge are not, in my opinion, sufficient to disregard the arrangement contemplated in the constitution of the trust. I am, of course, not accepting his finding that Ahmad Nawab secured his election by offering bribes.

The next question is, whether the Court was right in directing Haji

Syed Ali Nawab to pay the costs of the suit. The costs were, in the discretion of the learned Judge, and I am not prepared to say that the learned Judge exercised his discretion unreasonably. It is quite true that Haji Syed Ali Nawab tendered his resignation of his office, and that his resignation was accepted by the Court. But on the finding of the Court, the suit was an entirely proper one, and was rendered inevitable by reason of the gross mismanagement of the trust estate by Haji Syed Ali Nawab.

First Appeal No. 191 of 1930 fails and must be dismissed.

There is an additional question raised in First Appeal No. 190 of 1930, namely, the question whether the learned Judge should have framed a scheme to safeguard the interest of the endowment. The appellant has raised the question in the memorandum of appeal; but Mr. Akbari appearing on behalf of the appellant did not press it before us, but since the trust estate is before us, we think it right that we should express our opinion on this point. The view of the learned Judge may be stated in his own words.

"The trust deed does not appear to contemplate any scheme. It says that every trustee is bound to keep accounts of the income and expenditure, so that he may show them in case they are demanded for inspection by the family members or the gentry of the town, or the Court. A suggestion has been put forward that a managing committee should be appointed, but such a body is not contemplated in the deed, and I could not get the names of any three persons willing to act and commanding the confidence of the parties. In the high state of tension now existing in the local *Shiah* community even if such a committee could be established, it would be liable to develop only into a faction fight. In my opinion, it will be sufficient if a direction is given to the *mutwalli* to frame a budget for each year and to file it and also accounts for the past year in Court where they will be open to inspection and criticism."

It is too late in the day to assert that because the trust-deed does not contemplate a scheme, a scheme should not be framed by the Court. In refusing to frame a scheme, the learned Judge declined a jurisdiction which clearly it was his duty to assert. It is not, in my opinion, sufficient to direct the *mutwalli* to file his accounts in Court. There ought to be a small committee consisting of three respectable of *Shiahs* of Muzaffarpur to check the accounts, as filed in Court, of the *mutwalli*, and to exercise, not control, but superintendence, over the *mutwalli*. I think that this committee should be appointed by the learned District Judge.

The decree is defective in another respect. The suit is one for the administration of a public trust, and it is necessary that liberty to apply should be reserved to the parties. The effect of making such a provision is that the suit is kept alive and it is possible for the parties to take the direction of the Court from time to time and so often as may be necessary.

To take the present case there is no power in the Court to appoint a successor to Abbas Hussain or to direct a fresh election since the decree has made no provision for such a contingency. It is to prevent a multiplicity of suits that the Courts in administrative action, reserve a liberty to the parties to apply from time to time and so often as may be necessary.

First Appeal No. 190 of 1930 succeeds in part. I would vary the decree passed by the Court below by providing that a committee of three respectable *Shiahs* of Muzaffarpur be appointed by the learned District Judge to check the accounts of the *mutwalli* as filed in Court and to exercise superintendence over the *mutwalli*, and that liberty be reserved to the parties to apply from time to time and so often as may be necessary.

It will now be open to the parties to apply to the learned District Judge for appointment of a new *mutwalli* in the place of Abbas Hussain and to take immediate steps for the protection and preservation of the trust

estate. It will also be open to the parties to apply to the learned District Judge for the appointment of a committee to examine and check the accounts of the *mutwalli* as filed in Court and to exercise supervision over the *mutwalli*, and for the framing of rules in this connection.

There will be no order as to costs.

Civil Revision No 199 of 1920.—This application fails and must be refused. There will be no order as to costs

Bucknill, J.—I agree.

Order accordingly

✱ A. I. R. 1923 Patna 423

DAWSON MILLER, C. J.,

AND FOSTER, J.

Raja Makund Deb—Defendant—Appellant

v.

Sri Jagannath Jenamoni—Plaintiff—Respondent.

F. A. No. 7 of 1921, decided on 17th Feb., 1923, against a decision of Addl. Sub. J. of Cuttack, dated 2nd March 1921.

(a) Practice—New plea—Question of law requiring no further evidence can be heard in second appeal

Where the points raised for the first time in the first appeal to High Court, raised questions of law requiring no further evidence and affected the status of the Respondent the High Court consented to hear the argument of the learned Counsel for the Appellant on those points [P. 427, C. 1.]

(b) Hindu Law—Adoption—Age of adoptee—Kalika Purana—Adoption of boy over 5 years is valid

The passage attributed to the *Kalika Purana* which restricts the age of the adoptee cannot be relied upon as authentic and the adoption of a child over five years of age is therefore permissible 9 A. 253 App. [P. 429, C. 1.]

(c) Hindu Law—Adoption—Ceremonies—Putreshti Jag or sitting upon the bedi is not absolutely necessary for validity of adoption.

The ceremony of *Putreshti Jag* is not essential to the validity of an adoption even amongst the regenerate classes. (Sir Thomas Strange's Hindu Law Vol. 1 P. 95 Ref.) There must be gift and acceptance manifested by some over act Beyond this, legally speaking, it does not appear that anything is absolutely necessary There is no authority to support the view that the giver should actually sit upon the *bedi* during the *datta homa* ceremony. [P. 430, C. 1, 2.]

(d) Hindu Law—Adoption—Giving by widowed mother—Husband's consent need not have been obtained.

It appears to be well settled that a mother may give her son in adoption even without her husband's express consent in cases where such consent cannot be obtained, as where he is dead or has joined a religious order. [P. 431, C. 2.]

(e) Hindu Law—Adoption—Bribe to adopter—Motive of adopter will not invalidate adoption—Public policy does not concern itself with motives of persons

Where it was alleged that the adoption by appellant was induced by a bribe *Held* that the mere fact that the adopter has mixed motives for the adoption would not be sufficient in law to render it invalid. Where the adopter has a right to adopt a son no question of fraud or coercion arises If the adopter's own object in making the adoption is the perpetuation of his family and other sufficient reasons, and if in addition there are other motives of a worldly nature which also induced him to do that which he has an absolute right to do, there is no reason why, where the rights of no other person are infringed, this should in any way affect the validity of his act. 35 B. 169 (22 B 199, 22 B. 558 (F. B.) and 1 M. 174 (P. C.) Ref Public Policy does not concern itself with the motives which induce a person to exercise his lawful rights without risk of injury to Society. [P. 431, C. 2.]

S. C. Mukherji—for Appellant.

Jarulal Nath Bose—for Respondent.

Dawson Miller, C J.—The suit out of which this appeal arises was instituted on the 30th May 1919 by the Respondent Sri Jagannath Jenamoni against the Appellant Sri Raja Makund Deb Gajapati Maharaj to obtain a declaration of the Respondent's status as the adopted son of the Appellant and a further declaration that Jagadananda Deb was not the appellant's adopted son, Jagadananda Deb was also impleaded as a Defendant in the suit but he died on the 23rd July 1920 after filing a written statement but before the case came to trial. In the plaint there was also a prayer for a further declaration that the Appellant was the trustee on behalf of the Respondent of the sum of Rs. 1,00,000 made over to the Appellant by the Plaintiff's older brother, the then Raja of Bamra, at the time of the adoption, namely, on the 2nd October 1918.

The Respondent, who was the Plaintiff in the suit, is the third son of the late Raja Sachidananda Tribhuban Deb, Chief of the Feudatory State of Bamra in Orissa. Before his adoption his name was Lal Mohini Mohan Deb.

The Appellant, the surviving Defendant in the suit, is the Raja of Puri and as such is the Superin-

tendent of the celebrated temple of Jagannath at that place.

The deceased defendant Jagadananda Deb was the younger son of the zemindar of Bada Khemidi in the district of Ganjam and popularly known as the Raja of Ganjam.

It is the Respondent's case that ever since the year 1905, when he was a child of six years of age, negotiations had from time to time taken place between his family and the Appellant, or those acting on his behalf, with a view to bring about his adoption by the Appellant. No definite agreement was for sometime arrived at and in the year 1914 the negotiations were temporarily allowed to drop. In 1918, after his father's death, the negotiations were renewed with his mother and his eldest brother, the then Raja or Chief of Bamra with the result that after many interviews between the parties or their representatives an agreement in writing, dated the 23rd September 1918, was executed by the Appellant whereby he undertook to take in adoption the Respondent and to perform the *datta homa* ceremony.

During the negotiations the Respondent's brother, as head of his family, had insisted upon certain conditions being agreed to before he would consent to the adoption. These related mainly to the completion of the education of the Respondent, then 18 years of age, and provision for his separate residency and freedom from restraint over his movements, and these terms were incorporated in the agreement signed by the Appellant. The Raja of Bamra had also insisted that the proposed adoption should be notified to the Local Government and its consent obtained.

The Local Government was consequently informed of the proposed adoption and their consent thereto was solicited and on the 16th July 1918 the Government intimated that they had no objection to the proposed adoption. A further question arose with regard to a settlement which the Raja of Bamra had promised to make at the time of the adoption. It appears that a sum of Rs. 80,000 in Currency Notes had been set aside by the Respondent's late father as his younger son's portion of the estate but no formal settlement of this sum appears to have been made. There was a further sum of Rs. 20,000 in War Bonds which had been purchased in the Respondent's name by his brother, the then Raja of Bamra. The Raja of Bamra wished to settle this money for the benefit of his brother making the Appellant the trustee.

The Appellant, on the other hand, wished to have a free hand in the disposal of the money as he thought fit. No definite agreement appears to have been come to as to the settlement of this money but it was arranged that the matter should be left in the hands of Babu Dhanapati Bannerji, the retained pleader of the Puri Raja, who had taken a prominent part throughout in the negotiations. Dhanapati Bannerji would appear to have felt some embarrassment in settling this matter of difference between his client and the Bamra family and up to the time of the adoption nothing definite had been settled by him or agreed to between the parties concerned, and the fund, forming one each of rupees, was in fact handed over to the Appellant at the time of adoption.

The Raja of Bamra undoubtedly was under the impression that the money was to form a trust fund in the hands of the Raja of Puri as trustee for the benefit of his brother and this impression finds support from the fact that in two telegrams, dated the 25th and 27th September sent by Dhanapati Bannerji from Puri to the Private Secretary of the Raja of Bamra the Bamra family was urged to come immediately to Puri for the celebration of the ceremony as all the terms had been assented to unconditionally. In the agreement of the 23rd September 1918 the only mention of this question of a settlement is that which appears in Cl. 1 of the agreed terms which provides.

"That I, Shri Raja Makund Deb taking my seat on the *data homa bedi* shall take the amount settled with the pleader Babo Dhanapati Bandopadhya from him at the time of *datta homa* and at the same time shall take in adoption Lal Mohini Mohon Deb

from your respected *rajmata* and shall duly perform the *datta homa*.

One of the issues in dispute between the parties at the trial was whether Appellant was a trustee on behalf of the Respondent in respect of this fund. With regard to this issue the learned Additional Subordinate Judge found that the Rs. 80,000 which were paid in Currency Notes, at the time of the adoption, to the Appellant were transferred to him absolutely in consideration of the adoption without any conditions being attached and, further, that there could be no trust regarding the War Bonds amounting to Rs. 20,000 as they stood in the Respondent's name and Rs 5,000 thereof had been paid to Dhanapati as his remuneration under the directions of the Puri Raja.

There is no longer any dispute upon this issue as the Respondent has not challenged the propriety of the Judge's finding in this respect. The matter is only important in so far as it has any bearing upon the question raised by the Appellant and agreed before us in this appeal to the effect that the adoption is invalid by reason of the Appellant having been induced to consent thereto by a bribe

In order to complete the story upon this part of the case in so far as it appears from the evidence it will be convenient to state here that on the 2nd October 1918 the date when the adoption took place, a postscript was added to the deed of agreement of the 23rd September and signed by the Appellant to the following effect:—

"Be it further stated that I received the money to my satisfaction from Dhanapati Babu as agreed upon and I sat on the *datta homa bedi*. Be it further stated that I adopted the son for the perpetuation of my family, for offering *pinda* and water to my ancestors, for the management of the *seba* of Jagannath Mahaprabu and for the preservation of the family prestige"

The story of the negotiations, and the agreement finally come to, and the journey of the Respondent with his brother and his mother, the *rajmata*, together with a numerous retinue to Puri, and how they were received there with great pomp and ceremony together with the details of the adoption ceremony which took place at the Appellant's house on the following day before a large gathering and the subsequent life of the Respondent at Puri are set out at length in the plaint.

A vast mass of evidence both oral and documentary was adduced at the trial in support of the case pleaded, but the most remarkable feature of this litigation is that the Appellant, by his written statement pleads that the whole story is a pure invention from beginning to end. He denied that he ever entered into any negotiations with the Raja of Bamra, or that anybody acted on his behalf or with his authority, and he denies all knowledge of the matters alleged in the plaint. He repudiates his signature to the various documents which he is alleged to have signed. He denies that any adoption ceremony took place or that any money was received by him on that occasion. He further pleads that, at some previous date not definitely stated, but which appears from the written statement of the deceased Defendant to have been the 2nd March, 1916, in the presence of a select company he took in adoption the second Defendant who was then about one year old and that he had never adopted any body else. In addition he pleads that the Respondent's mother had no authority from her deceased husband to give her son in adoption and that his Upanayana ceremony had already been performed before the date of alleged adoption, a fact which amongst the twice-born classes, to which the parties in this case belong, would render the adoption void and inoperative.

The written statement of the deceased Defendant Jagadananda Deb was not printed in the record before us but we allowed a copy of it to be added to the file. That Defendant, besides traversing the allegations in the plaint, pleaded that he was adopted by the Raja of Puri on the 2nd March, 1916. He further pleads that even if a form of adoption was gone through as alleged by the Respondent, it is invalid for the following reasons. (1) because of the previous adoption of himself, (2) because of the age of the

Respondent who had attained majority and was incapable of being given in adoption (3) because the Respondent's Upanayana ceremony had already been performed (4) because of the want of consent of the Respondent's natural father, and (5) because the Appellant was induced by a bribe of a lakh of rupees to receive the Respondent in adoption.

Six issues were framed for determination at the trial:—

(1) Whether the first defendant executed the agreement of the 23rd September 1918 and is it valid and binding?

(2) Whether the Plaintiff was adopted by the first Defendant on the 2nd October 1918 as alleged by the Plaintiff, and is the adoption valid and legal and not (?) against public policy?

(2) (a) Is the Defendant estopped from questioning the validity of Plaintiff's adoption on the ground of deceased Defendant's alleged adoption, now that that defendant died (added on the 24th July 1920)?

(3) Whether the second Defendant was adopted on the 2nd March 1916 and if so, is the adoption valid?

(4) Whether Defendant No 1 was paid one lac of rupees as alleged by the Plaintiff? Is he a trustee on behalf of the Plaintiff in respect of the same?

(5) To what relief, if any, is the Plaintiff entitled?

All these issues except the second part of No. 4 were found in favour of the Respondent and a decree was passed declaring that the Respondent and not the deceased defendant, was duly adopted by the Appellant and, consequently, the Respondent was entitled to all the rights and privileges of an adopted son. The prayer for the declaration regarding the money was refused.

From this decision the Raja of Puri has appealed. The story told by the Respondent was supported by numerous witnesses and much documentary evidence. The learned Judge found that the Plaintiff's case in this respect was amply proved and that the evidence in support of the Appellant's story was thoroughly unreliable.

So clear and overwhelming is the evidence put forward on behalf of the Respondent as to the fact of an adoption ceremony having taken place that the learned Counsel for the Appellant has not asked us to question the finding of the learned Additional Subordinate Judge upon this point, nor did he contend that the story of a previous adoption could be supported. He has, however, questioned the validity of the adoption upon certain legal grounds. In the first place he contends that the age of the Respondent namely, 18 years, at the date of adoption renders the ceremony invalid according to Hindu Law amongst families of the twice-born classes; secondly he contends that certain ceremonies essential to the validity of adoption under the *datttaka* form were not complied with; thirdly, he objects that the Respondent's mother had no authority from her deceased husband to give her son in adoption and that this want of capacity on her part is fatal to the validity of the ceremony. The fourth and last point taken is that the passing of money as a consideration for the adoption is forbidden by Hindu Law and is contrary to public policy and renders the transaction void.

No specific issue was raised at the trial as to any of these points although the second issue may be regarded as wide enough to cover them.

It further appears that none of the points was raised in the written statement of the Appellant except that dealing with the want of capacity of the *rajmata* to give her son in adoption. In the written statement of the deceased Defendant the points relating to the age of the Respondent and the passing of a bribe as well as the capacity of the *rajmata* are, however, taken. It is further to be noticed that the learned Additional Subordinate Judge in dealing with the second issue, which he does at great length, nowhere mentions any of the points now taken before us in appeal except in so far as he deals with the evidence of the fact of adoption and I can only conclude that they were not urged before him at the trial nor has it been suggested in argument before us that he omitted to deal with any

point that he was asked to decide. As these contentions, for the most part raise questions of law requiring no further evidence and as they affect the status of the Respondent we consented to hear the argument of the learend Counsel for the Appellant.

In support of the first point, reliance is placed upon a passage in the Kalika Purana quoted with approval by the author of the Dattaka Mimansa (S. 4. verse 22). The authority of the Kalika Purana is unquestionable and the treatise known as the Dattaka Mimansa of Nanda Pandit is also regarded both in Bengal and amongst the followers of the Benares School of Hindu Law as of great authority. It may be stated here that the parties belong to the Kshatriya caste and are governed by the Benares or Mitakshra School of Hindu Law. If the quotation from the Kalika Purana, as it appears in the Dattaka Mimansa, is to be accepted as authentic and binding, there is much to be said for the Appellant's contention. In Setlur's translation of the Dattaka Mimansa the passage is as follows:—

"22. Another special rule is propounded in the Kalika Purana: sons given and the rest though sprung from the seed of another, yet being duly initiated under his own family name, become sons. O Lord of the earth, a son having been initiated under the family name of his father, unto the ceremony of tonsure inclusive, does not become the son of another man (anyatas). The ceremony of tonsure and other rites (chudaya) of initiation, being indeed performed, under his own family name, sons given, and the rest may be considered as issue: else, they are termed slaves. After their fifth year O King, sons given, and the rest are not sons. But having taken a boy five years old, the adopter should first perform the sacrifice for male issue. But the son of a twice-married woman, immediately on being born, he should duly take as a son. Having performed positively (*vai*) for such, immediately on being born, the burnt sacrifice for the son of a twice married woman, the man should complete every initiatory rite, the ceremony for a male born (*jatakarma*) and the rest. The burnt sacrifice for the son of a twice married woman, being completed, from these (*tatas*) a son of that description, is filially related."

The exact meaning of this passage is somewhat obscure, and the rest of the section consisting in all of 79 verses is given up to its elucidation. The effect of the passage as explained by the author of the *Dattaka Mimansa* appears to be that a son whose tonsure ceremony has been performed in the family of his natural father cannot validly be adopted as a son given, and, as this ceremony ought to be performed (according to the author) not later than the fifth year, no boy above that age is capable of being so adopted.

Much controversy has raged round this passage and much ingenuity has been expended in endeavouring to explain away a rule which appears to be at variance with actual practice. In the earliest *smritis* there is no such prohibition. The only restriction imposed by Manu is that the adopted son should belong to the same class or caste as his adoptive father.

"He whom his father or mother with her husband's assent, gives to another as his son, provided that the donee has no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water" [Manu, Chap. IX, 168, Jones' translation, see also Mitakshara, Chap. I, section XI, verse (9).]

As Dr. Gour has pointed out in a recent work (The Hindu Code, P. 337).

"In ancient times neither age nor marriage was a bar to adoption and an instance is frequently cited of the adoption of *Sunah Cepha* by *Vishwamitra* in the vedic age. The restrictions consequent on age and marriage are unquestionably innovations of a later age."

In this respect there is no reason to suppose that the learned author is not accurate. Apart from the passage quoted from the Kalika Purana and adopted by the *Dattaka Mimansa* and a few other treatises there is no ancient authority for the proposition that a child over five years of age cannot be validly adopted in the *dattaka* form. The authenticity of the passage in question was questioned

even before the date of the *Dattaka Mimansa* itself, if we accept the view that the Dattaka Chandrika, a work of equal authority, is of earlier date. The Dattaka Chandrika quotes the disputed passage and adds:

"As for what they quote thus from the *puranas*, that is unauthentic" (Dattaka Chandrika, Sec. 2, verse 25). It then proceeds to state that "were it even authentic, the interpretations given by some, that one initiated in ceremonies down to that of tonsure under the family name of the natural father bears no filial relation to the adopter, but such relation obtains where the ceremonies commencing with that of tonsure are performed by the adopter only, and if a child whose tonsure has been completed by the natural father or one past five years of age be adopted, in that case the filial relation does not accrue, are inaccurate."

Alternative interpretations are then given and in verse 30 the reference to the fifth year is said to apply only to Brahmins seeking the fruit of holiness resulting from a study of the *vedas*. The translator of these two commentaries, Mr. Setlur, points out that the text of the Kalika Purana on which the limitation as to age of the adopted son is based, has been held to be spurious by the author of the Dattaka Chandrika and that all the High Courts and many of the modern text writers are agreed in holding that the Hindu law imposed no restrictions as to age and whatever be the age of the adopted son, it is now settled that his adoption is valid if made before *Upanayana*, if he belongs to any of the regenerate classes, and before marriage if he belongs to the *sudra* caste, (See Setlur's Complete Collection of Hindu law Books on Inheritance, P. 388). Nilkantha, the author of the Vyavahara Mayukha (Chap IV, Sec. 5, para. 20) points out that not much reliance is to be placed on the disputed passage as it is not found in two or three copies of the Kalika Purana. Sir Thomas Strange says:

"The affiliation of one, whose coronal locks have not been reduced to the form of his patriarchal tribe is constantly inculcated. The age for this operation is the second or third year after birth, but it may be extended to the eighth which among Brahmins is the general period of the investiture except for such as are destined for the priesthood upon which it is performed at five. The stipulation therefore of five years as the extreme age for adoption may have reference to Brahmins of this description" (Hindu Law, Vol. 1,89.)

Rai Sahib Vishvanath Narayan Mandlik, a Sanskrit scholar of repute, in his work on the Mayukha (P. 471) says:

"As regards age there is no restriction whatever. The only text restricting age is the one said to be from the Kalika Purana." He then refers to the authorities who have disputed the genuineness of the passage including Krishna Bhatta who regards the passage as spurious but even assuming it to be genuine explains it as referring to a son to be adopted by a King as his successor. W. H. Macnaughten, a recognised authority, says the authenticity of the passage is doubtful (Hindu Law, P. 74). None of the modern text writers so far as my research goes, places any reliance on the five years limit and some of them go so far as to say that there is no valid authority for limiting the age at all.

The late Shastri Golab Chandra Sarkar in his Tagore Law Lectures strongly advocates this view and contends that even the performance of the *Upanayana* ceremony in the family of the natural father is no bar to a subsequent adoption.

"It should however be observed" says the learned Author "that if you leave aside the passage in the Kalika Purana the authenticity of which is doubted then there is no authority in Hindu law for the proposition that any of the initiatory ceremonies must be performed in the adopter's family in order to cause filial relation, in other words, that if all or any of the initiatory rights for a person have been performed in the family of his birth, he becomes incapable of being adopted into any other family. The passage of Vasishta relied upon by the author of the Dattaka Chandrika does not lay down the rule that the *Upanayana* ceremony must be performed in the adopter's family, nor can such a rule be fairly inferred from

it. Nor is there any passage of law declaring that in the case of *sudras*, marriage is a bar to adoption."(Sarkar's Hindu Law of Adoption, 2nd Edn. P. 361).

The early case-law on the subject affords little or no guidance for the decision of the present case, but in 1887 Mr. Justice Mahmood of the Allahabad Hight Court in a learned and elaborate judgment, in which Straight, J. concurred, reviewed the authorities at great length and arrived at the conclusion that the disputed passage in the Kalika Purana could not be relied upon as authentic and that the *Upanayana* ceremony, which, in the case of Kshatriyas, may be performed as late as the 22nd year, was the limit of age for a valid adoption [See *Ganga Sahai* v. *Lakhraj Singh* (1)]. I see no reason to differ from the decision of the Allahabad High Court arrived at after careful consideration, in so far as it decided that the passage attributed to the Kalika Purana cannot be relied upon as authentic and that the adoption of a child over five years of age is impermissible

The question whether, after the *Upanayana* ceremony has been performed a person belonging to the Kshatriya caste can be adopted does not arise in the present case as it is now admitted that the Respondent's *Upanayana* ceremony had not been performed at the date of his adoption. In my opinion the adoption of the Respondent is not invalidated by reason of his age.

The second point urged before us raises the question whether the adoption ceremony was performed according to the correct ritual. The omissions urged were—(1) that the Rajmata did not sit upon *bedi* at the time when the *datta homa* was performed, (2) that the *charu homa* was not performed, (3) that the *sankalpa* was not performed, and (4) that *putreshti jag* ceremony was not performed and that this was essential as the Respondent's tonsure ceremony had already taken place in the family of his natural parents. With regard to each of these points except the last no difficulty presents itself as there is evidence on the record from which a decision can be come to. With regard to the question of the *putreshti jag* ceremony there is no direct evidence from which it can be said whether that particular ceremony was performed or not.

No point was raised as to this either in the pleadings or issues and no question was asked about it in cross-examination although the evidence of Raj guru Raghu Nath Brahma, the *purohit* of the Puri Raja, whose fathers were Raj *gurus* before him and who took the leading part in the performance of the ceremony, stated that the *kulachar* (family customs) of the Puri Raja were performed at the adoption. Moreover the point was not taken before the trial Court nor was it raised amongst the 75 grounds of appeal set out in the Appellants memorandum of appeal. For these reasons I consider that we should not allow this question to be argued before us now, but in case this appeal should go further I propose to state shortly my opinion on the assumption that this particular ceremony was not in fact performed The foundation upon which its performance is claimed as a necessary adjunct to a valid adoption is the disputed passage in the Kalika Purana already referred to.

The view that it was necessary in cases where the tonsure ceremony had already been performed appears to be based upon the explanation of the passage given in verses 49 and 52 of S. 4 of the Dattaka Mimansa which has been interpreted by some authorities as meaning that adoption even after tonsure may be validated by the performance of the *putreshti jag* or sacrifice for male issue, but not otherwise. If, however, the text upon which it is founded is not authentic the explanation can have no greater authority.

The only case quoted in support of the Appellant's contention on this point is *Luchman Lal* v. *Mohan-Lal* (2) in which Dwarka Nath Mitter, J. is reported to have said that the performance of the *putreshti jag* is essential to the validity of an adoption in the Dattaka form amongst the

(1) (1886) 9 All. 255.

(2) (1871) 16 W. R. 179.

three superior classes. In the later case of *Katki* v. *Lak Pati Pujari* (3), the Calcutta High Court expressed the view that the words *putreshti jag* in the former judgment were inadvertently used for *datta homa* and on this assumption refused to follow it in the case of an adoption of a son belonging to the same *gotra* as his adopted father. Again in this Court in the case of *Sheo otan Rai* v. *Bhirgun Rai* (4) it was held that the *putreshti jag* ceremony was a matter of form and not essential to an adoption. It is true that in that case the parties belonged to the same *gotra*, and in so far as the view expressed applies to parties belonging to different *gotras* it was obiter.

In *Asita Mohan* v. *Nirode Mohan* (5) the Calcutta High Court also held that the *putreshti jag* was not an essential element in the ceremony of adoption, but this was in the case of Sudras. Apart from the dictum attributed to Dwarka Nath Mitter, J., in *Luchman Lal* v. *Mohan Lal* (2) which has been characterised as a *lapsus linguae* in a later case in the same High Court there is no direct authority in the Appellant's favour on this point. Although the question is not free from doubt, I should be prepared to hold, if necessary, that the ceremony is not essential to the validity of an adoption even amongst the regenerate classes. In this connection I would refer to the view of Sir Thomas Strange who in dealing with the mode and form of adoption says

"There must be gift and acceptance, manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary..... And even with regard to the sacrifice of fire, important as it may be deemed, in a spiritual point of view, it is so with regard to the Brahmins only; according to a constant distinction in the texts and glosses upon matters of ritual observance, between those who keep consecrated and holy fire, and those who do not keep such fires, *i.e.*, between Brahmins and other classes."

He then refers to the decision of Sir John Anstruther, C. J., in the case of the Raja Nobkissen and continues

"And even with regard to Brahmins, admitting their conception in favour of its spiritual benefit it by no means follows that it is essential to the efficacy of the right for civil purposes, but the contrary is to be inferred and the conclusion is that its validity for these consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only or the eldest son of the giver, the prescribed ceremonies not being essential. Not that an unlawful adoption is to be maintained, but that a lawful one, actually made, is not to be set aside for an informality that may have attended its solemnization." (Hindu Law, Vol. 1. 95).

Indeed, I think, it may be said that once it is determined that an adoption is valid, provided the Upanayana ceremony, the culminating point of second birth, has not been performed, although the other initiatory rights including tonsure have already taken place in the natural family of the adopted son, the necessity for the *putreshti-jag* ceremony disappears. The necessity for its performance appears to be founded upon an ingenious interpretation of the questionable passage in the Kalika Purana as a means of explaining away that which did not commend itself as acceptable.

It is significant also that in a case arising in one of the very centres of Hindu religious worship no one has suggested until the case was argued in appeal that the omission of the *putreshti jag* was a bar to the validity of the adoption. It was left to the ingenuity of Counsel to raise the point for the first time in argument before us although it finds no place amongst the various grounds of appeal formally taken.

With regard to the other matters arising under the second question for decision, they do not appear to me to present any difficulty. That the *rajmata* did not sit upon the *bed* when the *datta homa* was performed is admitted. She was a few feet

(3) (1914) 20 C. L. J. 319=27 I. C. 39=20 C. W. N. 19.
(4) (1917) 2 P. L. J. 481=41 I. C. 875=1 P. L. W. 784.
(5) (1916) 20 C. W. N. 901=36 I. C. 127.

away behind the pardah but in a position to hear and see what was going on. The *adan prolan*, or giving and taking, which is the most essential part of the ceremony and the *sankalpa* or vows, were carried out behind the pardah, and in these she took a leading part. The Respondent and the Appellant having subsequently left the pardah, hand in hand, and taken their seats upon the *bedi*, the *datta homa* was performed by the Brahmins who officiated, the *bedi* being in the quadrangle where the guests were seated.

No authority has been cited to us to support the view that the giver should actually sit upon the *bedi* during the *datta homa* ceremony. Being a pardanashin lady of high estate it is hardly likely that the *rajmata* would appear in public before so large an assembly of strangers and there is no reason based on principle or authority why it should be essential for her to do so. Again it has been left to the ingenuity of Counsel to suggest this as a defect in the ceremony.

The evidence as to the *sankalpa* was discussed by the learned Judge of the trial Court but the only question raised in this connection was the credibility of the witnesses and he accepted their evidence. The evidence was that of those best qualified to speak of it, as it was that of the persons who took part in the ceremony. Their evidence was corroborated by other witnesses who were near enough to hear what was going on and the Appellant was not called to contradict them. I can see no reason for differing from the findings of the learned Judge.

As to the *charu homa* no special point appears to have been made of this at the trial but one of the witnesses, Mahant Gadadhar Ramanuj Das, a guest at the ceremony, states that he saw *ghee* and *charu* and twigs passed into the sacred fire. Other witnesses speak in general terms of the performance of the *datta homa*. The officiating priest Raghunath Brahma who was cross-examined at great length as to the *datta homa* also speaks to the offerings of *samid* (firewood) *ghee* and *charu*. There can be no doubt that these ceremonies were duly performed and I so find.

The third point can be disposed of shortly. It is admitted that a widow can give her son in adoption if her husband during his life-time has consented. In my opinion there is evidence sufficient to establish such consent. Further it appears to be well settled that a mother may give her son in adoption even without her husband's express consent in cases where such consent cannot be obtained, as where he is dead or has joined a religious order. The text of Manu has already been quoted in an earlier part of this judgment. In Colebrook's translation the words "with her husband's assent" do not appear. Vijnaneswara's comment is as follows:

"He who is given by his mother with her husband's consent while her husband is absent or incapable, though present, or without his assent after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given becomes his given son (dattaka). (Mitakshara, Ch. I. S c. 11, verse 9).

Sir Thomas Strange says: "Of her own mere authority the mother cannot, in general, give her son to be adopted, any more than she can adopt, her husband living, unless he has emigrated, or entered into a religious order. But his assent may be presumed, and after his death, she does not want it, a widow having this power, and a wife, also if the distress be urgent." (Hindu Law, Vol. I, Pp. 81 and 82).

The Dattaka Mimansa and the Dattaka Chandrika both recognise the right of a widow to give her son in adoption on account of the impossibility of obtaining her husband's consent. (Dattaka Mimansa, IV, 12, Dattaka Chandrika I. 31). The case-law is all to the same effect and no authority has been quoted in support of the contrary view. This question must be determined against the Appellant.

The fourth and last point, *viz.*, that the adoption was induced by a bribe is one which was not pleaded by the Appellant and it is difficult to see how he can be heard to urge it. But even were the plea now permissible the mere fact that the Appellant had

mixed motives for the adoption would not be sufficient in law to render it invalid. The Appellant had a right to adopt a son and no question of fraud or coercion arises. It also appears from the Appellant's own statement in the postscript to the agreement of the 23rd September 1918 that his object in making the adoption was the perpetuation of his family and other sufficient reasons. It is true that in the case of adoption by a widow a corrupt motive has in one case at least been held to be contrary to the *shastras: Sitaram Pandit* v. *Harihar Pandit* (6). That was not a case where the adoption was called in question but one where the point arose whether the payment of a bribe to a Hindu widow as an inducement to her to adopt a son to her deceased husband could be regarded as a valid consideration for a subsequent transfer by the adopted son of a portion of the estate of his deceased adoptive father.

In the same High Court in an earlier case it was held that the receipt of money by a widow as an inducement to adopt a son was not sufficient to rebut the presumption that she also made the adoption from motives of duty. The fact that her motives were of a mixed character did not render the adoption invalid *Mahableshvar Fowba* v. *Durgabai* (7).

In a later case in the same Court it was held by the majority of the Full Bench that in the Bombay Presidency a widow having a power to adopt and a religious benefit being caused to her deceased husband by the adoption, any discussion of her motives in making the adoption was irrelevant. *Ramchandra* v. *Mulji Nanabhai* (8).

This appears to be in accordance with the observations of their Lordships of the Privy Council in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (9), where it was said: Their Lordships think it would be very dangerous to introduce into these cases of adoption nice questions as to the particular motives operating in the mind of the widow."

In the present case the Appellant's right to adopt is not disputed. It must be presumed that his motive was the ordinary one which operates in such cases and this is what he himself has said. If in addition there were other motives of a worldly nature which also induced him to do that which he had an absolute right to do, I can see no reason why, where the rights of no other person are infringed, this should in any way affect the validity of his act One ground upon which the Appellant's argument was based was that of public policy, but public policy does not concern itself with the motives which induce a person to exercise his lawful rights without risk of injury to society.

Before concluding this judgment two further matters should be mentioned. The learned Counsel for the Appellant wished to contend that the Appellant was mentally incapable of understanding the effect of his actions, and that the adoption was invalid on that account. This point was not taken in the written statement and was not raised in the issues. Nor was there any evidence which would support the contention. The evidence at the most shows that he was childish and perhaps eccentric and we refuse to permit the question to be raised in appeal.

Further the learned Counsel for the Appellant after completing his argument in opening the case and after the reply on behalf of the Respondent in replying to the whole case wished to raise the point that there was no evidence that the Upanayana ceremony had been performed as a part of the ceremony of adoption and that this was in itself sufficient to invalidate the adoption ceremony. As this question had nowhere been raised and had not even been put before us in the opening of the learned Counsel for the Appellant, we refused to hear him upon this point at that stage of the case.

In my opinion this appeal fails and should be dismissed with costs.

Foster, J.—I agree.

Appeal dismissed.

(6) (1910) 35 Bom. 169=8 I. C. 625=12 Bom. L. R. 910.

(7) (1896) 22 Bom. 199.

(8) (1896) 22 Bom 558 (F. B.)

(9) (1876) 1 Mad. 174=4 I. A. 1=26 W. R. 21=3 Sar. 669 (P. C.)

*A. I. R. 1923 Patna 433

JWALA PRASAD AND ROSS, JJ.

Mt. Najmunnissa—Applicant—Appellant

v.

Jagmohan Lal and others—Objectors—Respondents.

M. A. No. 56 of 1921, decided on 18th December 1922, against the decision of Sub. J. of Gaya, dated 1st Feb. 1922.

Civil P. C., O. 5, R. 17—Pardanashin lady—*No adult member of family or agent to receive summons—affixture to outer door is enough.*

Where a *pardanashin* lady is not able to accept service personally and has no agent empowered to accept service on her behalf and has also no adult member in her family on whom service may be affected, a valid service is effected under the provisions of rule 17 if the serving officer affixes a copy of the summons on an outer door or some other conspicuous part of the house in which the lady ordinarily resides [P. 33, C. 2.]

S. M. Tahir and *Hassan Jan*—for Appellant.

S. M. Mullick, S. Dayal and *Brij Kishore Prasad*—for Respondents.

Ross, J.—This is an appeal against an Order of the Subordinate Judge of Gaya dismissing an application to set aside an *ex parte* decree passed in a suit on a mortgage. The appellant is one Bibi Najmunnissa and the mortgage bond in suit was executed by her in the pen of her husband and general attorney, Mazharul Haq. In her present application she alleges that she has been residing in Mouza Narhat for the last 4 or 5 years and no summons was served upon her in the suit. She further alleges that the opposite party No. 10, that is, her husband Muzharul Haq, has been acting in collusion and concert with the opposite party Nos. 1 to 9, the plaintiffs in the suit.

The opposite party allege in reply that summons was duly served and deny the allegation of collusion with the petitioner's husband. The learned Subordinate Judge held that Mazharul Haq was the Am-Mokhtar of the petitioner and that service through him was good. He further held that the residence of the petitioner was at Kazichak.

The evidence of service of summons given on behalf of the opposite party consists of the statements of Raghu Nath Singh, the peon and Shankar Singh, the identifier. The peon says that he met the defendant's husband Mazharul Haq in her house at Makhdumpur Kazichak and he refused to accept his summons as well as the summons on Bibi Najmunnissa. Then the peon affixed the summons and copies of plaint on the house facing east. This evidence is corroborated by the identifier. It is objected to the evidence that this is no proper service under Order V, rule 17.

It is contended in the first place, that service could only be made by affixing the summons to the house when, after using all due care and diligence, the peon had been unable to find the defendant; and, in the second place, that the summons was not affixed to the house where the defendant ordinarily resided.

With regard to the first objection, it is suggested on behalf of the respondents that the husband was an agent empowered to accept service and that the service on him was therefore good under rule 12. The petitioner says that she had withdrawn the power of attorney from her husband I shall deal with this point later. But the power of attorney itself has not been produced. An abstract from the register has been proved, and it does not show that Mazharul Haq had authority to accept service of summons. He must, therefore, in this matter be regarded merely as a male member of the family of the defendant. As to the first objection, that it is not shown that the petitioner could not be found, it is sufficient to say that the petitioner is a *pardanashin* lady and therefore not directly approachable.

It was held in *Khiroda Sundari* v. *Nabin Chandra* (1) that where a *pardanashin* lady is not able to accept service personally and has no agent empowered to accept service on her behalf and has also no adult male member in her family on whom service may be effected, in such a case a valid service is effected under the provisions of rule 17 if the serving officer affixes a copy of the summons on an outer door or some other conspicuous part of the house in which the lady ordinarily resides. The question is thus reduced to the second objection as to whether in fact the petitioner

(1) (1915) 21 C. L. J. 653 = 30 I. C. 64 = 19 C. W. N. 1231

was ordinarily residing at Kazipur or not.

On this part of the case, the appellant points out in the first place that in the plaint she and her husband are described as at present residing in Qasba Sahebganj, but this is not the case of either side that at the time of the service of summons she was residing there. It is further argued that the return to the summons shows that it was served in the presence of Pancha Rajwar, Chaukidar and this witness has not been examined. There may have been many reasons for not examining this witness and the case must be decided on the evidence that was actually given. Finally it is argued that the lady has given her evidence as to her residence in Narhat and has been corroborated by a witness Nawab Ali Khan and there is no rebutting evidence.

The learned Subordinate Judge's judgment on this part of the case is not altogether satisfactory. He says that it is admitted by the lady that the house at Kazichak belongs to her and her husband and the members of his family lived in that house at the time of her marriage and it belonged to her husband and she repaired it, and that there can therefore be no doubt that her residence is at Kaz chak. The conclusion does not seem to follow from the premises.

The question is whether the evidence of the petitioner and her witness is to be believed. The lady's evidence deals with two main points: (1) that she lives at Narhat and not at Kaz chak and (2) that her husband Mazharul Haq is no longer her agent and that she withdrew her power of attorney from him.

In examination-in-chief she suggests, and in cross-examination she expressly states, that she withdrew the power because he married second time 8 years ago. On the second point, she admits that she does not remember whether she took back the Mokhtarnama after or before the second marriage or when or on what occasion she took it back. She further says that she has not seen her husband since the second marriage and does not know where his second wife's home is, nor her father's name, nor indeed anything about it. She further says that she does not remember who receives processes from Court on her behalf.

Now, in this part of her evidence there is one definite faleshood, because she admits that she has a child aged 1½ years. The evidence about the withdrawal of the power of attorney and the second marriage is altogether vague. Nor is her witness able to say who looks after her affairs. I am unable to believe this part of her evidence that she has been estranged from her husband by reason of a second marriage and that he no longer looks after her affairs. As to the first point, while her general unreliability makes it less likely that there is any substance in it, the story itself does not stand cross-examination. She says that she left Makdumpur Kazichak 16 or 17 years ago and has never been there since and that she lives at Narhat since 4 or 5 years. She says further that she has given the house in Kazichak to Nawab Mian to live in.

In cross-examination she says that Nawab Jan has no connection with her family and, although he also makes the same statement, the lady herself later on admits that he is related to the family of her father. She says that she receives no rent from him and he repairs the house. But according to Nawab Jan, during the last 10 or 11 years her men repaired the house and he also performed ordinary repairs. The main contradiction between the two witnesses is that whereas the lady says that she resides at Narhat for the last 4 or 5 years, her witness says that she has resided there for 12 or 13 years. This is a fatal contradiction which goes at the root of the whole evidence.

The learned Subordinate Judge saw the witness Nawab Ali Khan and he did not believe him. The discrepancies and improbabilities in this evidence are so great that, in my opinion, no reliance can be placed upon it. Moreover there is no evidence of collusion between Mazaharul Haq and the plaintiffs. There is no dispute that the summons on the petitioner was tendered to her husband, and in the absence of collusion it is exceedingly improbable that he would not have denied her presence in Kazichak if she had in fact been residing at Narhat.

On a consideration of the whole

evidence, therefore, I am of opinion that the learned Subordinate Judge is right in his decision in this case and that the appeal should be dismissed with costs.

Jwala Prasad, J.—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 435

ROSS, J.

Mahabir Ram—Petitioner

v.

Rambahadur Dubey and another—Opposite Party.

Civil Review No. 358 of 1922, decided on 16th March, 1923, from an order of Dt. J. of Muzaffarpur, dated 18th Sept. 1922.

(a) *Civil P. C., O. 21, R. 90—Setting aside sale—Fraud need not be alleged against auction purchaser.*

It is plain from the terms of rule 90, which empowers the Court to set as de a sale on the ground of material irregularity or fraud in publishing or conducting it, that it is not necessary that fraud should be alleged against the auction-purchaser. He has in fact no existence at the time of publishing or conducting the sale; and it will seldom be possible. 18 I. C. 715, Foll. [P. 35, C. 2.]

(b) *Limitation Act, S. 18—Onus of proof that continuing effects of fraud had been removed, is on the party guilty of fraud*

The party guilty of fraud must show that the continuing effects of the fraud had been removed. Where the judgment debtors were kept from knowledge of the sale by the fraud of the decree-holder and consequently must also have been kept from knowledge of their right to apply to set aside sale so long as that fraud continued and its effect was not removed.

Held: unless the decree-holder shows that the effect of that fraud was removed, the judgment-debtors were entitled to the benefit of section 18. 17 B. 341 P. C. and 19 C. W. N. 553 Foll. [P. 36, C. 1]

A. P. Upadhya—for Petitioner.

Shiveshwar Dayal and *Brijkishore Prasad*—for Opposite Party.

Judgment.—This is an application by the auction-purchaser at a sale in execution of a decree, against an order of the District Judge of Muzaffarpur reversing the decision of the Munsif of Bettiah and setting aside the sale.

Two points are urged in support of the application. The first is that as there is no allegation of fraud against the auction-purchaser, the sale cannot be set aside. Reference is made to the decision in *Mohesh Chundra Bagchi* v. *Dwarka Nath Moitra* (1).

All that was said in that case was that however fraudulent the conduct of the plaintiff may have been, if the purchaser is not implicated in the fraud, the validity of the sale would not be affected by the badness of the decree under which the sale took place. There is no question of the decree being vacated in the present instance. We are now concerned with the question of setting aside the sale under Order XXI, rule 90, C. P. C.

Now it is plain from the terms of that rule which empowers the Court to set aside a sale on the groumd of material irregularity or fraud in publishing or conducting it that it is not necessary that fraud should be alleged against the auction-purchaser who had no existence at the time of publishing or conducting the sale; and it will seldom be possible.

There is also direct authority in the decision in *Bipin Bihari Befali* v. *Kanti Chandra Mandol* (2) that a sale in execution may be annulled on the ground of fraud, even if it were not proved that the auction purchaser had been a party to the fraud. The second ground taken is that there is no allegation or proof that the judgment-debtor was kept out of knowledge of his right to make the application by any fraud of the decree-holder and consequently section 18 of the Limitation Act cannot apply, and unless section 18 does apply, the application is out of time because it was not made until the 16th December, 1921, whereas the sale took place on the 15th September, 1921.

Now the finding of the District Judge is that there was a gross under-valuation in the sale proclamation where the property which was probably worth Rs. 1,400 was valued at Rs. 80 only. He further found that everything pointed to the conclusion that the processes were fraudulently suppressed by the land-lord's servant and the judgment-debtors were kept in the dark about the sale until it was over, and that they made their application under Order XXI, rule 90, C. P. C., when they came to know of the sale owing to the auction-purchaser applying for

(1) (1875) 24 W. R. 260.
(2) (1913) 18 I. C. 715 (Cal.)

delivery of possession.

The learned District Judge found that they were kept in the dark by fraud and so their application was not barred by limitation. In support of his argument, the learned Vakil referred to *Kailash Chandra Haldar* v. *Bissonath Pramanik* (3), *Das Narayan Shingh* v. *Mir Mahamad Yusuf* (4), *Abbubakar, Sahib* v. *Mohiuddin Sahib* (5), *Pyadanna* v. *Lakshminarasamma* (6).

The principle however, has been laid down by the Judicial Committee in *Rahimbhoy Habibbhoy* v. *Charles Agnew* (7) and it is that in order to make limitation operate when a fraud has been committed by one who has obtained property thereby it is for him to show that the injured complainant had had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought.

It seems clear that the party guilty of fraud must show that the continuing effect of the fraud had been removed. The judgment-debtors were kept from knowledge of the sale by the fraud of the decree-holder and consequently must also have been kept from knowledge of their right to apply to set aside the sale so long as that fraud continued and its effect was not removed. There is direct authority on this point in *Jotindra Mohan Rai* v. *Brojendra Kumar* (8).

It is true that the under-valuation would not have this effect and mere non-publication of the notices would also not have this effect; but the finding is that there was a fraudulent suppression of service and unless the effect of that fraud was removed, the judgment-debtors were entitled to the benefit of section 18 of the Limitation Act.

In my opinion, therefore, both grounds of this application fail and it must be dismissed with costs. Hearing fee one gold *mohur*.

Application dismissed.

(3) (1896) 1 C. W. N. 67.
(4) A. I. R. (1921) Pat. 145=2 P. L. T. 401=6 P. L. J. 319.
(5) (1896) 20 Mad. 10.
(6) (1914) 38 Mad. 1076=29 I. C. 314=28 M. L. J. 525.
(7) (1892) 17 Bom. 341=20 I. A. 1=6 Sar. 256 (P. C.)
(8) (1914) 19 C. W. N. 553=24 I. C. 249.

A. I. R. 1923 Patna 436

MULLICK AND ROSS, JJ.

Arjun Sahu—Defendant—Appellant

v.

Kelai Rath and others—Plaintiffs—Respondents.

Appeal from Remand Order No. 1 of 1922, decided on 24th November 1922, from a decision of Dt. J. of Cuttack, dated the 3rd March 1922.

Evidence Act, S. 70—Admission of executant is not sufficient as against strangers.

It is clear that under section 70, the admission of the execution of the document is sufficient proof as against the executant himself, but there is no authority for the proposition that the document is for that reason binding upon strangers, who were not parties to it. It must be proved according to law as against them unless section 58, Evidence Act applies to the case and relieves the plaintiffs from the burden of proving attestation. [P. 436, C. 2; P. 437, C. 1.]

B. N. Sinha—for Appellant.

B. R. Choudhuri—for Respondents.

Mullick, J.—The plaintiffs brought a suit against defendant No. 1 on a mortgage bond alleging that it had been executed by defendant No. 1. The remaining nine defendants are alleged to be transferees from the plaintiffs.

The Munsif found that the witnesses who were alleged to have attested the deed had not really attested it according to law but had signed their names on the document before the executant had signed it. He accordingly dismissed the whole suit.

There was an appeal to the District Judge who was of opinion that inasmuch as the executant had in his written statement admitted the execution of the document, no further proof of attestation was necessary, and he has remanded the suit to the Munsif for the trial of the remaining issues in the suit. The present appeal has been preferred against that order of remand by defendant No. 2 only.

Now it is clear that under section 70 of the Indian Evidence Act, the admission of the execution of the document is sufficient proof as against the executant himself, but there is no authority for the proposition that the document is for that reason binding upon the other defendants who were not parties to it. The document

must be proved according to law as against them unless section 58 of the Indian Evidence Act applies to the case and relieves the plaintiffs from the burden of proving attestation in respect of any of the defendants who have admitted the fact of attestation.

The learned District Judge must find on the evidence whether the Munsif's finding on the question of attestation is correct, and in considering this question he will no doubt refer to the written statement of the defendant No. 2 which is alleged by the respondents before us to contain an admission that there was attestation.

The result is that the appeal will be decreed and the case remanded to the District Judge in order that he may dispose of it according to law. Costs will abide the result.

Ross, J.—I agree.

Case remanded.

✱ A. I. R. 1923 Patna 437

KULWANT SAHAY, J.

Rambarai Rai—Petitioner

v.

Sagina Rai and others—Opposite Party.

Criminal Rev. No. 41 of 1923, decided on 23rd March, 1923, against order passed by Deputy Mag., Arrah.

Criminal P C., S. 145—Title questions and validity of decrees are beyond scope of inquiry —Recent delivery of possession by Civil Court—Magistrate should normally give effect to it

Objections as regards the validity or otherwise of the decree or the proceedings to annul the encumbrance which give rise to the dispute, are matters beyond the scope of an enquiry in a proceeding under section 145. Although a Magistrate in deciding the question of possession under section 145 of the Code is not in every case bound by the previous order of a Civil Court or Criminal Court relating to the possession of the subject matter of dispute and the weight to be attached to any such previous order depends upon the facts and circumstances of the particular case, yet when there is a recent order of a Civil Court delivering possession to a particular party, that order ought ordinarily to be respected and given effect to by a Magistrate under section 145, unless and until there is something shown which might induce the Magistrate to hold that subsequent to the delivery of possession something had happened which had the effect of dispossessing the party to whom possession had been delivered by the Civil Court, A. I. R. 1922 Cal. 364; 33 Cal. 33 and 1 P. L. J. 336, Cons.

[P. 438, Cs. 1 & 2.]

G. C. Pal and *Shiveshwar Dayal*—for Petitioner.

S. M. Mullick and *S. N. Bose*—for Opposite Party.

Judgment.—This is an application by the second party in a proceeding under section 145 of the Code of Criminal Procedure. The dispute related to the possession of about ten plots of lands lying in *mauzas* Kudaria and Parasrampur. Babu Hit Narayan Singh of the first party is the admitted landlord and one Otar Rai was the raiyat of these plots. At the time of the Survey the lands in dispute were found in the possession of Ganpat Sao and others, mortgagees of Otar Rai. Ganpat Sao assigned the mortgage to one Ganendra Prasad in August 1911 and Ganendra Prasad in his turn assigned one plot bearing plot No. 485 to one Ramkaran Rai and the rest to Rambarai Rai of the second party.

The landlord, Babu Hit Narayan Singh, brought a suit for rent against Srikishun Rai, the heir of Otar Rai. He obtained a rent decree, took out execution thereof, sold the holding and purchased it himself in March 1922. Delivery of possession was given to him by the Civil Court in April 1922 and since then he claims to have been in possession. Babu Hit Narayan Singh had applied to annul the encumbrance against Hira Sao and others, the heirs of the original mortgagee Ganpat Sao.

The second party raised various objections in the Court below as regards the decree and sale being illegal inasmuch as Srikishun Rai against whom the rent decree was obtained was not the heir of Otar Rai; and as regards Ganendra Prasad and the assignees from him not being parties to the proceeding for annulling the encumbrance, they also stated that after the delivery of possession, Ramkaran Rai, the assignee of plot No. 485, had made an application to the Civil Court under Order XXI, rule 100 of the Code of Civil Procedure and he was restored to possession by order of the Civil Court of plot No. 485, and therefore, in so far as Ramkaran Rai was con-

cerned he was in possession and he was entitled to retain possession of the said plot No. 485.

The learned Deputy Magistrate carefully considered the case of the parties and he held that the objections as regards the validity or otherwise of the decree or the proceedings to annul the encumbrance were matters beyond the scope of an enquiry in a proceeding under section 145 of the Criminal Procedure Code; and, in my opinion, he was right in the view taken by him. He gave effect to the delivery of possession of the Civil Court and declared the first party to be in possession of the plots other than plot No. 485 in respect whereof he made an order in favour of Ramkaran Rai.

It has been argued by the learned Vakil for the petitioners that the learned Deputy Magistrate was wrong in giving effect to the delivery of possession without coming to an independent finding upon the evidence adduced before him as regards the fact of actual possession. He argues that it is not always incumbent upon the Magistrate to give effect to a decree or a proceeding of a Civil Court relating to delivery of possession but that it was his duty to consider the evidence produced before him in order to find as to which party was in actual possession on the date of the initiation of the proceedings. He relies on the cases of *Shahabaj Mandal* v. *Bhajo Hari Nath* (1) *Kuada Kinkar Rai* v. *Danesh Mir* (2) and *Parmesher Singh* v. *Kailashpati* (3).

Now all that these cases lay down is that a Magistrate in deciding the question of possession under section 145 of the Code is not in every case bound by the previous order of a Civil Court or Criminal Court relating to the possession of the subject matter of dispute; and that the weight to be attached to any such previous order depends upon the facts and circumstances of the particular case before him.

In my opinion, when there is a recent Order of a Civil Court delivering possession to a particular party, that order ought ordinarily to be respected and given effect to by a Magistrate under section 145 of the Code of Criminal Procedure, unless and until there was something shown which might induce the Magistrate to hold that subsequent to the delivery of possession something had happened which had the effect of dispossessing the party to whom possession had been delivered by the Civil Court.

In the present case there is no such allegation. The learned Vakil argues that as a matter of fact there was no actual delivery of possession, but the finding of the Court is that there was actual delivery of possession. In this view of the case the learned Magistrate had full jurisdiction to make the order that he has made.

This application is, therefore, dismissed.

Application dismissed.

(1) A. I. R. 1922 Cal. 364=49 Cal. 177=25 C. W. N. 743.
(2) (1905) 33 Cal. 33=10 C. W. N. 257=2 C. L. J. 271=2 Cr. L. J. 670 (F.B.)
(3) (1916) 1 P. L. J. 336=1 P. L. W. 95=35 I C. 801=17 Cr. L. J. 369 (F.B.)

✱ A. I. R. 1923 Patna 438

BUCKNILL, J.

Bansidhar Marwari—Petitioner
v.
Indar Narain Singh and others—Opposite Party.

Criminal Rev. No. 144 of 1923, decided on 6th April, 1923, from an order of Dt. Mag., Bhagalpore, dated 23rd February 1923.

Criminal P. C., S. 439—Series of errors committed by Lower Courts—Orders were set aside.

Where, in orders, there has been irregularity of form but no harm would be done to the parties and, although by a wrong method, a right result may perhaps have been reached, it is undesirable that the High Court should exercise its discretionary jurisdiction in revision, but the case is otherwise when there is a series of errors committed, ignoring, the formalities prescribed by the code.

[P. 440, C 1]

Where Sub-divisional Officer without concluding his investigation under the provisions of section 144 and at any rate making some order which would indicate what had happened to those proceedings initiated proceedings under S. 107, Cr. P. C, and the District Magistrate quashed the proceedings which had been initiated by the Sub-divisional Officer under the provisions of section 107 and ordered the Sub-divisional Officer to initiate proceedings

under section 145; and the Sub-divisional Officer started proceedings under the provisions of section 145 simply on the ground that he was told so to do by the District Magistrate.

Held: that if such a series of errors were passed over without comment and the orders which have been wrongly made were allowed to stand simply because it may possibly be that no harm will eventuate to either of the parties as a result of such orders, those, who have to administer the criminal law in subordinate capacities might perhaps feel that any close adherence to the formalities prescribed by the Cr. P. C is unnecessary [P. 440, C. 2]

G. C. Pal and *S. C. Majumdar*—for Petitioner.

The Assistant Government Advocate—for Opposite Party.

Judgment.—This is an application in criminal revisional jurisdiction. The matter is a very simple one. The Sub-divisional officer of Bhagalpur on the 25th January, 1923, as the result of the perusal of a police report and under the belief that there was an imminent danger of a breach of the peace, made an order restraining both parties from going upon certain lands about which there was a dispute between them; this he did under the provisions of section 144 of the Criminal Procedure Code. He ordered that notices should be issued on the parties accordingly and that they should show cause before him on the 7th February last.

On the 7th February, the matter came before him. His order sheet reads: "Cause shown by both parties. Draw proceedings under section 107, Cr. P. C. against second party. Fix 26th February, 1923, for showing cause by the second party why they should not be ordered to execute a bond of Rs. 200 each to keep the peace for the period of one year with a surety of like amount."

Now, I think that it is common ground here that the Sub-divisional Officer seems to have made a mistake. He does not clearly round off or finish the proceedings under section 144 of the Criminal Procedure Code which were actually before him. Presumably he intended to conclude the proceedings under section 144, and, after having closed them down, to initiate proceedings under section 107, but at any rate he passed no order under the provisions of section 144.

I think that I should mention that, in coming to the conclusion to which he did, the Sub-divisional Officer had the advantage of seeing the written statements which had been filed in response to his notice of the 25th January by both parties. Now, on the 23rd February, it would appear that the second party, (that is the respondent here) applied, it is said *ex parte*, to the District Magistrate of Bhagalpur to set aside the Sub-divisional Officer's order.

The Dist. Magistrate on that date and it is alleged, without any notice having been given to the 1st party, made an order which is the principal subject matter of the application now before this Court. In this order, after reciting that he had read the records and the police report and after commenting upon the fact that the Sub-divisional Officer did not appear to have made any order absolute under the provisions of section 144 and assuming that it had been intended that those proceedings under section 144 had been in some fashion or other dropped, the District Magistrate writes: "The petitioner has questioned the propriety of a proceeding under section 107, Cr. P. C. The dispute, he says, is a dispute concerning land and this is admitted by the Police report on which the Magistrate relies".

He then expresses the view that, on the materials which were available before him, it could hardly be said that the claim which was put forward by the second party could be regarded off hand as not *bona fide* and, then, makes the following order:

"This is therefore a case in which section 145 should be applied. Therefore under section 435 of the Criminal Procedure Code I set aside the preliminary order under section 107, Cr. P. C. and direct that proceedings be taken up under section 145, Cr. P. C." Now it is admitted here that each part of this order is bad. In the first place, had the District Magistrate desired to deal in any way with the order which had been made by the Sub-divisional Officer under the provisions of section 107 of the Criminal Procedure Code, he might possibly have referred the matter to this Court; but he certainly had no power to set aside the order which had been made by the Sub-divi-

sional Officer.

In the second place, it is also similarly admitted that the District Magistrate had no jurisdiction to direct the Sub-divisional officer to take proceedings under section 145 of the Criminal Procedure Code. Now, when the District Magistrate's order was sent down to the Sub-divisional Officer, he, obeying the directions which had been given to him by the District Magistrate, made the following Order on the 26th February, "Perused District Magistrate's order. Draw proceedings under section 145 Cr. P. C. and fix the 16th March 1923."

"In the meantime the land is attached under section 145, clause (4), Cr. P. C. Send copy of this order to Police for attachment." This series of errors was brought to the attention of this Court on the 5th March and a rule was obtained from Mullick and Adami, JJ., all further proceedings being stayed pending the hearing of the application. The matter has now come before me.

What has actually taken place is not defended or excused by the learned Assistant Government Advocate who appears for the opposite party. Indeed, the District Magistrate himself, in his reply to the communication from this Court asking him whether he had any cause to show why his order should not be set aside, does not, so far as I understand his explanation, seem now to contemplate that he can justify his having made an order of this character.

What, however, is urged, very sensibly, by the learned Assistant Government Advocate is that in many cases where in Orders there has been irregularity of form but where it would seem, on such investigation as is possible in this Court, that no harm would be done to the parties and that although by a wrong method a right result may perhaps have been reached, it is undesirable that this Court should exercise its discretionary jurisdiction in revision.

Whilst I am in full accord with that proposition I must say that in this case I think it can hardly be said that it is one in which it is not more important to draw attention to the series of errors which has taken place than to take up the attitude that formalities have not been observed which should be condoned. It was, I think, quite obvious that the Sub-divisional Officer ought to have concluded his investigation under the provisions of section 144 and at any rate to have made some order which would indicate what had happened to those proceedings which seem to have been left by him in the air.

It is also equally clear that the District Magistrate had neither power to quash the proceedings which had been initiated by the Sub-divisional Officer under the provisions of section 107, nor to order the Sub-divisional Officer to initiate proceedings under section 145.

Lastly, as, a corollary, it was doubtless irregular for the Sub-divisional Officer to have drawn up proceedings under the provisions of section 145 simply on the ground that he was told so to do by the District Magistrate. I fear that, if such a series of errors were passed over without comment and the orders which have been wrongly made were allowed to stand simply because it may possibly be that no harm will eventuate to either of the parties as a result of such orders, those who have to administer the criminal law in Subordinate capacities might perhaps feel that any close adherence to the formalities prescribed by the Criminal Procedure Code is unnecessary.

In this case, therefore, I feel that a sense of the irregularity of what has taken place should be marked by setting aside these orders. I direct therefore that the order of the District Magistrate of the 23rd February last and the order of the Sub-divisional Officer of the 26th January last be set aside. The result will be that the Sub-Divisional Officer will be left with the proceedings which were commenced by him on the 7th February under the provisions of section 107 of the Code of Criminal Procedure. In order to place his order sheet upon a proper footing, he ought, strictly speaking, to pass some order indicating what has happened to the proceedings under section 144 which he initiated so long ago as the 25th January.

I wish, however, specifically to mention that it does not necessarily follow

that other proceedings in addition to or in lieu of those taking place under section 107 may not also be desirable or even necessary. With that, however, I have here nothing whatever to do. Whether such steps are desirable or necessary must depend upon circumstances as they arise.

Order set aside.

A. I. R. 1923 Patna 441

JWALA PRASAD, J.

Narsingh Thakur and others—Defendants—Appellants

v.

Bishun Pargash Singh and others—Plaintiffs—Respondents.

Appeal No. 338 of 1919, decided on the 16th June, 1922, against the Appellate decree of D. J. Muzaffarpur, dated 6th March 1923.

(a) Bengal Estates Partition Act, S. 57—Evidence of partition—Enjoyment of separate shares from time immemorial is sufficient to establish partition.

Where it is shown that the parties have acquiesced in the result of a partition it must be presumed that they or their predecessors-in-interest were parties to the partition. Where the parties have been holding their estates in separate shares from time immemorial, the fact that the original partition proceedings were lost in antiquity is no reason for disturbing divisions which existed for a long period Although no deed of partition can be produced and from lapse of time no direct evidence of partition could be given yet very long possession and acquiescence in the separate holding of the lands in the estate are sufficient to prove that there was a complete partition. 3 P. L. J. 188 Foll. [P 443, C 1.]

(b) Bengal Estates Partition Act, S. 25—Declaratory suit that private partition has taken place—Section does not apply.

Section 25 of the Act has no application to a suit for a declaration that there was such a partition as is contemplated by section 7 of the Act and that the Collector be restricted from taking further action to make the partition. [P. 443, Cs. 1 & 2.]

Hassan Imam, G. D. Singh Kulwant Sahay and *Sheonandan Roy*—for Appellants.

S. Sinha, Jaigobind Prasad Singh and *L. K. Jha*—for Respondents.

Judgment.—This is an appeal against the decision of the District Judge of Muzaffarpur, dated the 6th March, 1919 affirming that of the Munsif, dated the 5th Sept. 1917.

The defendants are the appellants. They are part proprietors of an estate called Mauza Bhadai bearing T. No. 8146 in the Collectorate of Muzaffarpur. They instituted proceedings before the Collector for partition of their interest under the Estates Partition Act (V of 1897). The plaintiffs who are also co-proprietors in the said estate ojected to the partition by the Collector under section 7 of the Act which enacts that where the lands of an estate have been divided by private arrangement formally made and agreed to by all the proprietors, and each proprietor has, in pursuance of such arrangement, taken possession of separate land to be held in severalty as representing his interest in the estate, no partition of the estate shall be made under this Act, except on the joint application of all the proprietors, or in pursuance of a decree or order of a Civil Court. Their objection was disallowed by the Collector on the 3rd February 1913. The order of the Collector was confirmed by the Commissioner on the 5th June.

The plaintiffs instituted the present suit out of which this appeal has arisen for a declaration that there was already a separate partition among the proprietors of the estate as required by section 7 of the Act and hence the partition by the Collector under Act V of 1897 cannot proceed.

Both the Courts below have upheld the contention of the plaintiffs and have held that on account of private partition, among the proprietors of Bhadai, of their respective interests therein, the Collector has no jurisdiction to proceed with the partition under Act V of 1897.

Mr. Hassan Imam on behalf of the appellants contends that the finding of the Court below does not amount to a finding of there being a formal and complete private arrangement between the proprietors, as is required by section 7 of the Act. The Munsif has recorded the following finding upon this point:—"After an

anxious consideration and on weighing the evidence as a whole I cannot but infer that there has been a *bona fide* and thorough partition between the Maliks privately and with the consent of all the landlords and that they have been in possession accordingly." However it is conceded that this is a sufficient finding under section 7 of the Act.

The learned District Judge has affirmed the decision of the Munsif. He has also agreed with the reasons by which the Munsif arrived at the above conclusion. No doubt he has not used the expressions employed by the Munsif or those that occur in section 7, but there can be no manner of doubt from the tenor of his findings throughout the judgment that the learned Judge meant to hold that there was a complete and formal private partition between the proprietors, as contemplated by section 7 of the Act.

He was fully alive to the requirements of that section, which he sets out in the beginning of his judgment for the purpose of determination. He has arrived at the conclusion that these requirements of the section were satisfied by the gradual process of reasoning. He holds that there was a suggestion of private partition as early as 1847 and although there was no trace of any partition between 1847 and 1869, yet from 1870 up to date there have been a number of documents which mention the three *pattis* and seem to take them for granted from the litigation in the Civil Court regarding the shares of the different proprietors in the year 1866, the learned Judge concludes that their shares were adjusted and that the co-sharer Maliks came to an arrangement and partitioned the village privately. He says that he is confirmed in this belief by a series of transactions dating from 1870 onwards in which the three *pattis* have been recognized, and he holds that although there was no document about the private partition between the proprietors, yet the arrangement to hold their lands separately was formal.

To the argument on behalf of the defendants that the arrangement was only for the purpose of convenience in order to enjoy the Ijmal property in the most convenient way, the learned Judge has replied that the evidence on the record shows that there was some partition, and not merely a mutual arrangement.

From the rent suits instituted by the proprietors in respect of the 16 annas rent for the land falling into their respective *pattis* and from the entries in the survey record-of-rights showing the shares of the proprietors separately, the learned Judge has come to the conclusion that there was a complete private partition among the proprietors.

Thus the learned Judge was ultimately confirmed in his belief and came to definite conclusion about there being a private partition of the nature contemplated by section 7 of the Act. The finding of the Court below is therefore not defective in law. I accept the concurrent findings of the Courts below that there was a formal and complete partition among the co-sharers.

Although there has been no document regarding the partition nor any direct evidence as to when and how the partition between the proprietors took place, yet the evidence standing over a very long period from 1870 up to date clearly shows that the parties have been holding their lands separately in accordance with their shares in the village. The documents executed by the defendants themselves (Exhibits 5, 8, 7, 9, 11 and 17) clearly use the expression *patti taksimba khudha* (the *Patti* partitioned by mutual arrangement). The entries in the survey record-of-rights finally published some 20 years ago show by metes and bounds the lands appertaining to the different *pattis* and the proprietors thereof. These entries were based upon the possession of the parties according to the private arrangements amongst themselves and the parties have all along acquiesced in the separate entries recorded in the survey Khatian and are in possession in accordance with these entries.

It was pointed out in the case of *Manoo Choudhry* v. *Munshi*

Choudhry (1) that the parties having acquiesced in the cadastral Survey for such a length of time is a conclusive proof that they had acquiesced in the original partition of the estate among their predecessors-in-interest and that they have been holding their lands in accordance with original partition. In these circumstances similar to the present case it was observed as follows: —

"As a point of law we take it that where it is shown that the parties have acquiesced in the result of a partition, it must be presumed that they or their predecessors-in-interest were parties to the original partition."

It was further pointed out in that case that if the parties have been holding their estates in separate shares from time immemorial, the fact that the original partition proceedings were lost in antiquity is not a reason for disturbing divisions which existed for such a long period.

In that case, as in the present case, no deed of partition was produced and indeed from lapse of time no direct evidence of partition could be given. Yet very long possession and acquiescence in the separate holding of the lands in the estate were held sufficient to prove that there was a complete partition between the predecessors-in-interest of the present proprietors. I therefore on a careful consideration of the evidence in the case hold that the view taken by the Courts below is correct and that the Collector had no jurisdiction to proceed with the partition under Act V of 1897.

It was faintly suggested that the suit having been brought more than 4 months after the order of the Collector made under section 29 declaring the estate to be under partition was barred by limitation under section 25 of the Act. This section has no application to a suit of this nature. The proceedings adopted by the Collector under Act V of 1897 being *ultra vires*, there can be no bar to the present suit for a declaration that there was such a partition as is contemplated by section 7 of the Act and that the Collector be restricted from taking further action to make the partition.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

(1) (1918) 3 P. L. J. 188=5 P. L. W. 97=43 I. C 393.

A. I. R. 1923 Patna 443

DAS AND KULWANT SAHAY, JJ.

Dukhit Ojha and others—Defendants—Appellants

v.

Janki Singh and others—Plaintiffs—Respondents.

F. A. No. 48 of 1920, decided on 9th January, 1923, against the decision of 1st Sub-Judge of Muzaffarpur, dated 31st May 1919.

Hindu Law—Debts—Necessity—Long series of transactions—Details of necessity need not be proved—Debt borrowed to pay a decree debt is prima facie for necessity

Where there has been a long series of transactions it is not always possible to prove exacly the purposes for which any particular item was borrowed, and, in such a case, it is sufficient for the creditor to show that the family was in chronic need of money and that the moneys were advanced on the representation of the manager that they were needed for such objects Moreover, where the necessity arises from the pressure of a judgment-debt, the person dealing with the manager of a joint family is entitled to treat the judgment as *prima facie* proof of necessity and he is under no obligation to go behind the judgment in order to enquire whether the debt covered by the decree was for legal and binding necessity of the family. [P. 445, C. 1.]

Saroshi Charan Mitra—for Appellants.

Lakshmi Narayan Singh and *Nirsu Narain Sinha*—for Respondents.

Kulwant Sahay, J.—The suit out of which the present appeal arises was instituted by the plaintiffs-respondents to enforce two mortgage-bonds, dated 6th March, 1905 and 15th July 1908, executed by three brothers, Dukhit Ojha, Mahgu Ojha and Kuldip Ojha, who are defendants Nos. 1 to 3

in this case. Defendants Nos. 4 and 5, Ramdeo Ojha and Ramasis Ojha are the minor grandsons of Dukhit Ojha and they have been joined in the suit on the allegation that all the five defendants form members of a joint Hindu family and the mortgages were executed for the necessities of the family. Defendants Nos. 6 and 7 are subsequent purchasers and mortgagees of some of the mortgaged properties and they did not appear and contest the suit.

The defence of the defendants Nos. 1 and 3 was that they were separate from the defendant No. 2; that the bonds in suit were not read over to them and they did not know the contents thereof; that the debts for the satisfaction whereof the mortgages in suit were executed were the personal debts of the defendant No. 2, Mahgu Ojha, and they merely signed the bonds in suit as sureties, and received no consideration for the same. Defendant No. 2, also alleges separation and denies receipt of the whole of the consideration money.

The real defence in the suit was by the minor defendants Nos. 4 and 5, who did not admit the execution of the bonds and alleged that they were not benefited thereby, and that the same were not binding on the family property. They further alleged that their father Rupdawan Ojha, the son of Dukhit Ojha, was living separate from his father, and that there was no legal necessity for the mortgages in suit.

The learned Subordinate Judge held that the family was not separate as alleged; that the bonds were executed by the defendants Nos. 1 to 3 with full knowledge of their contents and on receipt of the consideration money; that the loans advanced were for legal and justifying family necessities; that one of the minor defendants was not born on the date of the bonds in suit; and that the other minor defendant was born before the second bond but the transaction for which that bond was executed took place before his birth, and therefore, the minors could not object to the validity of the mortgages; and he accordingly made the usual preliminary decree for sale.

The defendants Nos. 1 to 5 appeal and the contentions raised on their behalf in this appeal are:—

That there was no legal necessity for the mortgages in suit and that the minors, although not born on the date of the bonds, were still entitled to question the validity thereof as their father Rupdawan Ojha was then living and he could question the validity thereof.

As regards the first contention raised on behalf of the appellants it will be observed that the defendants Nos. 1 to 3 being the executants of the mortgage cannot raise the question as regards the validity thereof or the existence of legal necessity and the question can only be raised on behalf of the minor defendants. Here the judgment gave the details of the two bonds in question and proceeded as follows:—From the above statement of the transactions between the parties it appears that the transaction which the plaintiffs began sometime in the year 1901 and the bonds in suit were executed mostly to pay off prior debts incurred by Mahgu Ojha and Dukhit Ojha.

It has been contended that the prior debts were mostly the personal debts of Mahgu Ojha, but it has been found by the learned Subordinate Judge, and the finding has not been challenged before us, that the three brothers, Dukhit, Mahgu and Kuldip, were joint and the defendants Nos. 4 and 5 are still joint with them; and the fact of Dukhit and Kuldip joining in the execution of the bonds in suit is, in my opinion, sufficient to hold that they having accepted the validity of the prior debts agreed to mortgage the family properties for payment thereof, which is sufficient indication of the fact that the prior debts were for family necessities.

The earliest of these debts is of the year 1901, and it appears that there have been a long series of borrowings by the family of small sums of money, and the plaintiffs appear to be the family Mahajan who used to advance money from time to time as occasion arose. Plaintiff No. 1 has given his evidence

in the case and he says that on every occasion he made enquiries about the necessities for the loan, he enquired from the defendants first party and from other people in the village and other creditors of the defendants first party.

There is evidence on the record to show that there was a real pressure upon the estate and that money was required for the marriage of the daughters of Dukhit and Mahgu Some of these loans were incurred to pay off the decrees of creditors at a time when the family property was about to be sold in execution of those decrees.

Where there has been a long series of transactions it is not always possible to prove exactly the purposes for which any particular item was borrowed, and, in such a case, it will be sufficient for the creditor to show that the family was in chronic need of money and that the moneys were advanced on the representation of the manager that they were needed for such objects. Moreover, where the necessity arises from the pressure of a judgment-debt, the person dealing with the manager of a joint family is entitled to treat the judgment as *prima facie* proof of necessity and he is under no obligation to go behind the judgment in order to enquire whether the debt covered by the decree was for legal and binding necessity of the family.

The evidence adduced in the case is, in my opinion, sufficient to prove that the debts covered by the mortgages were for valid and justifying family necessities and that the plaintiffs advanced the loans after a careful and *bona fide* enquiry and honest belief in the existence of the necessities. In my opinion, the learned Subordinate Judge has come to a correct finding on these points, and the minor defendants are equally liable with the defendants Nos. 1 to 3 for the debts covered by the mortgages in suit and the properties mortgaged thereunder are liable to be sold.

In this view of the case, it is not necessary to consider the question as to whether the minor defendants, who were not born at the time of the mortgages, can question the validity thereof or whether the mortgages in suit were executed for debts which under the law can be treated as antecedent debts. The debts having been found to have been incurred for valid family necessities, the mortgages are valid and binding on the family properties, and the decree made by the Court below must stand.

The appeal is, therefore, dismissed with costs.

Das, J.—I agree.

Appeal dismissed.

✱ A. I. R. 1923 Patna 445

DAS AND MACPHERSON, JJ.

Damrupat Singh and others—Petitioners—Appellants

v.

Rameswar Singh—Opposite Party—Respondent.

Appeal No. 168 of 1921, decided on 21st March, 1923, against an Order of Sub-Judge of Darbhanga, dated the 29th of July 1921.

Civil P. C., O. 21, Rr. 66, 90—Decree-holder's valuation also inserted in proclamation—Proclamation is bad.

Where the sale proclamation settled by the Court gave the valuation of the Court and also that of the decree-holder, the sale was set aside. The insertion of any valuation in sale proclamation other than the valuation fixed by the Court is calculated to mislead intending bidders and it is therefore wrong. 4 P. L. J. 37 Foll. [P. 446, C. 1.]

K. P. Jayaswal—for Appellants.

P. N. Sinha and *Murari Prasad*—for Respondent.

Das, J.—Mr. Jayaswal, on behalf of the Appellants, has no objection to the sale of the villages other than village Prasad but he contends that we ought to set aside the sale of village Prasad. It appears that the Court fixed the valuation of village Prasad at Rs. 16.112. The decree-holder did not accept this valuation and he assessed it at Rs. 3,664-3-0.

The sale proclamation settled by the Court gave the valuation of the Court and also that of the decree-holder and it is contended before us by Mr. Jayaswal on the authority of

Beni Prasad v. *Edal Singh* (1) that the insertion of any valuation in sale proclamation other than the valuation fixed by the Court is calculated to mislead intending bidders and that it is therefore wrong.

We set aside the sale of village Prasad and direct that the valuation stated by the decree-holder in the sale proclamation be struck off and that the sale do proceed on the valuation already fixed by the learned Subordinate Judge. There will be no order as to costs.

Macpherson, J.—I agree.

Appeal allowed.

(1) (1918) 4 P. L. J 37 = 91 C. 195.

✱ A. I. R. 1923 Patna 446

DAS AND BUCKNILL, JJ.

Jai Krishna and another—Appellants

v.

Mt. Soghra and others—Respondents.

F. A. No. 77 of 1920, decided on 15th December, 1922, against a decision of the Sub-Judge, 1st Court of Patna, dated 22nd December, 1919.

(a) C. P. Code, O. 21, R 57—Decree-holder agreeing to give time to debtor on part satisfaction—Dismissal thereon by Court is one for default, and attachment ceases.

O. 21, R 57 is new and the dismissal of an application for execution involves this result that the attachment comes to an end by reason of such dismissal. No doubt the Court has no power to dismiss an application for execution unless there is default on the part of the decree-holder, but, default means a failure to do what one is legally bound to do 35 I. C. 2.0 Dist. [P. 447, C 1]

A decree-holder is not bound to consent to an application made on behalf of the judgment-debtor for four months' time By consenting to that application, he puts it entirely out of his power to proceed with the execution of his decree. That being so, the Court can dismiss the application for default, and, there is no doubt that upon such dismissal the attachment ceases. [P. 447, C. 2; P. 450, C. 2.]

(b) C. P. Code. O. 41, R 27—No inherent defect or lacuna—Additional evidence cannot be allowed.

There is no jurisdiction in the Appellate Court to admit additional evidence unless on examining the evidence as it stands some inherent *lacuna* or defect becomes apparent, 31 B. 381 (P. C) Foll. [P. 448, C. 2.]

S. M. Mullick and *Raglo Prasad*—for Appellants.

Sultan Ahmad and *Siva Narain Bose*—for Respondents.

Das, J.—On 23rd of February 1915, one Jai Krishna, who was cited as defendant No. 3 in the suit out of which this appeal arises, and who is the appellant before us, obtained a money decree for Rs. 9,373-3-0 against *Musammat* Noorjahan Begum. On the 9th of June 1915, Jai Krishna started proceedings to enforce the decree of the 23rd of February 1915 and he attached a house belonging to *Musammat* Noorjahan Begum.

We are concerned in this appeal mainly with the question whether *Musammat* Noorjahan Begum had any title to execute a mortgage in respect of this house subsequent to the attachment of the 9th of June 1915. On the 20th of July 1915 the Court directed the house to be sold in execution of Jai Krishna's decree and fixed the 20th of September 1915 for the sale of the property.

On the 11th of September 1915, the following order was passed by the Court: "Judgment-debtor files petition stating that she has paid Rs. 250 to the decree-holder and prays for four months' time. Decree-holder consents to the time given. Ordered, dismissal on part satisfaction." On the 29th of November 1915 *Musammat* Noorjahan Begum and *Musammat* Nasiran Bibi joined in executing a mortgage of the house, with which we are mainly concerned in this appeal, and another property in favour of *Musammat* Bibi Soghra.

The important question which we have to determine in this appeal is, did the attachment cease because the execution case was dismissed on part satisfaction on the 11th of September 1915? *Musammat* Bibi Soghra was the plaintiff in the action and her suit was a suit to enforce the mortgage executed in her favour on the 29th of November 1915.

The appellant resisted the suit on three grounds; first, on the ground that the mortgage executed by *Musammat* Noorjahan Begum and *Musammat* Bibi Nasiran on the 29th of

November 1915 was subject to the attachment of the property effected in the previous suit and that, accordingly the title of *Musammat* Bibi Soghra to the mortgaged property is subject to the claim of the appellants as against *Musammat* Noorjahan Begum; secondly, on the ground that the mortgage conveyed no interest in the house to *Musammat* Bibi Soghra; and, lastly on the ground that the transaction of the 29th of November 1915, was a collusive and a fraudulent transaction for the purpose of defeating the claims of the creditor of *Musammat* Noorjahan Begum. The learned Subordinate Judge has answered all these questions in favour of the plaintiff.

So far as the first point is concerned, the position is this: On the 11th of September 1915, *Musammat* Noorjahan Begum seems to have paid Rs. 250 to the appellants and to have asked for four months' time. The decree-holders consented to give time whereupon the Court dismissed the execution case on part satisfaction.

O. XXI, R. 57, Civil Procedure Code, runs as follows: "Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

It has been pointed out that the object of the rule is to put an end to the doubts which have arisen from time to time as to the continuance of an attachment by reason of the practice of "striking off proceedings" or "removing proceedings" from the file for which there was no justification under any of the earlier Codes.

The provision contained in O. XXI, R. 57, Civil Procedure Code, is a new provision and it appears to me that the dismissal of an application for execution involves this result that the attachment comes to an end by reason of such dismissal. No doubt the Court has no power to dismiss the application for execution unless there is default on the part of the decree-holder, but as has been held more than once, default means a failure to do what one is legally bound to do.

The position is this: On the 11th of September 1915, the decree-holder put it out of his power to proceed with his execution. There was, in my opinion a default on his part and the learned Subordinate Judge was entitled to dismiss the application on the ground that there was a default on the part of the decree-holder. That being so, the attachment came to an end. Mr. Sushil Madhab Mullick, appearing on behalf of the appellants, strongly relies upon the case of *Valikath Puthiah* v. *Manakkal Parameswaran* (1).

In that case after the respondents had got the property attached the sale was stayed by an appeal preferred by the judgment-debtors. Thereupon the District Munsif dismissed the application. Clearly, that was not a case where there was any default on the part of the decree-holders, for they in no way consented to the order staying the sale. They had not put it out of their power to proceed with the execution case and accordingly the Madras High Court came to the conclusion that the order of dismissal did not involve the removal of the attachment.

Now, in this case as I have already said, the facts are entirely different, the Order of the 11th of September 1915, passed by the learned Subordinate Judge being a consent Order. The decree-holder was not bound to consent to the application made on behalf of the judgment debtor. By consenting to that application he put it entirely out of his power to proceed with the execution of his decree. That being so, the learned Subordinate Judge was right in dismissing the application for default; and, if he was right in dismissing an application for default, there is no doubt that upon such dismissal the attachment ceased.

Mr. Sushil Mahadeo Mullick argues before us that it is impossible to understand the Order of the 11th of September 1915, unless we have the petition upon which the order was made before us, and he tendered the petition in evidence before us. This document was not filed in the Court below, and, under the decision of the Judicial

(1) (1914) 3 L. W. 601 = 35 I. C. 240.

Committee in the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Company*(2), there is no jurisdiction in the Appellate Court to admit additional evidence unless on examining the evidence as it stands some inherent *lacuna* or defect becomes apparent.

Now, there is no inherent *lacuna* or defect apparent in the evidence. That being so, it is impossible to receive the document tendered by Mr. Mullick in evidence in this Court. The document is accordingly rejected.

It was next argued that the mortgage executed by *Mt.* Noorjahan Begum and *Mt.* Bibi Nasiran conveyed no interest in the house to *Mt.* Bibi Soghra. The point arises in this way. By a deed of sale executed on the 14th of October 1912, *Mt.* Noorjahan Begum conveyed this house to *Mt.* Bibi Nasiran. Upon the attachment of the house by the appellants in execution of their decree against *Mt.* Noorjahan Begum, *Mt.* Bibi Nasiran put in a claim to the house. That claim was disallowed. *Mt.* Bibi Nasiran thereupon brought a title suit, being Suit No. 133 of 1917, and it appears that her suit has been dismissed not only by the Court of first instance but by this Court.

Upon these facts Mr. Sushil Madhab Mullick argues that *Mt.* Bibi Nasiran had no title to the house which she purported to mortgage in favour of *Mt.* Bibi Soghra. Now, in my opinion it is not open to the appellants to raise this point at all. In the mortgage bond of the 29th of November 1915, *Mt.* Noorjahan Begum makes an admission that the house belongs to Bibi Nasiran.

Now, that admission may be true admission or a false admission; but, unless the appellants have some title or interest in the house itself by virtue of some transaction to which Noorjahan Begum is a party, there is clearly no right in them to object to any statement that might have been made by *Mt.* Bibi Nasiran and *Mt.* Noorjahan Begum in the mortgage deed.

The whole question is: is the attachment effected by the Court in the appellants' execution proceedings a subsisting attachment? If that attachment still subsists, no doubt it is open to the appellants to argue that this Court ought not to rely upon the admission made by *Mt.* Noorjahan Begum in the mortgage deed. But if the attachment has ceased, then clearly it is of no importance to the appellants whether *Mt.* Bibi Nasiran or *Mt.* Noorjahan Begum mortgages the property.

But apart from any other consideration it sems to me that the point does not arise. The critical passage in the bond is as follows: "As security for the said loan, principal and interest and compound interest, we have mortgaged and hypothecated the whole and entire 16 annas of the house, rooms and two storied *pacca katra* consisting of several *kitas* of houses together with all materials appertaining to the house and land situate at *Mahalla* Gazai appertaining to *Thana* Khajekallan, one of the quarters of Patna City, belonging to and occupied by me, the executant No. 1 as my dwelling house and constituting my purchased property under a registered deed of absolute sale, dated the 14th October 1912, executed by me, *Musammat* Noorjahan Begum executant No. 2, and which is owned and possessed by me, the executant No. 1 without the copartnership and interference on the part of any other individual."

Now, the mortgage is undoubtedly by the two ladies, although Bibi Nasiran states that she alone has a title to the house and *Musammat* Noorjahan Begum agrees with that statement. The argument of Mr. S. M. Mullick is that the mortgage is only by Bibi Nasiran who had no title to the house and accordingly the mortgage executed by her conveyed no title whatever in the house to *Musammat* Bibi Soghra. In my opinon, this argument is not correct, for the document shows that the mortgage was both by *Musammat* Bibi Nasiran and by *Musammat* Noorjahan Begum. I must accordingly overrule the argument on this point by Mr. Mullick.

The last point argued before us is, that the transaction by which

(2) (1907) 31 Bom. 381=34 I. A. 115=9 Bom. L. R. 671=11 C. W. N. 721=6 C. L. J. 5 =4 A. L. J. 461=17 M. L. J. 347 (P. C.)

Mt. Bibi Nasiran and *Musammat* Bibi Noorjahan Begum mortgaged the house to *Musammat* Bibi Soghra is a fraudulent and a collusive transaction did not operate to convey any interest in that house to *Musammat* Bibi Soghra.

The mortgage was undoubtedly executed by the two ladies in favour of *Musammat* Bibi Soghra. There was accordingly an apparent transaction by which a title has been created in favour of *Musammat* Bibi Soghra, and we must assume that the apparent transaction was the real transaction until the contrary is established by the appellants.

Now, the mortgage document shows that the ladies borrowed Rs. 6,000 from *Musammat* Bibi Soghra in order to pay Rs. 3,777 to *Mahanth* Ram Kishun Das, who was a creditor of the ladies and Rs. 1,000 to Shah Gopi Saran Saheb who appears to have had a decree against *Musammat* Noorjahan Begum. Noorjahan Begum appears to have taken before the execution of the document Rs. 500 for the expenses of the *Moharrum* and Rs. 723 appears to have been paid to her in cash on the date of the execution of the mortgage. What happened was that Rs. 3,777 was paid to *Mahanth* Ram Kishun Das by *Musammat* Bibi Soghra and *Mahanth* Ram Kishun Das remitted Rs. 300 which accordingly was paid to *Musammat* Noorjahan Begum.

The evidence of Adit Prasad is that after remission he got Rs. 3,400 from Hyder Khan. Hyder Khan, it may be mentioned, is the husband of *Musammat* Bibi Soghra, and Muhammad Hyder giving evidence says that Rs. 3,777 was given to *Mahnath* Ram Kishun Das on account of mortgage-debt of which Rs. 3,000 was principal and that the *Mahanth* remitted Rs. 300. Exhibit 2 is an entry in the account book of *Mahanth* Ram Kishun Das. The entry runs as follows:—

"Credited to Noorjahan Begum, widow of Syed Mohammad Hassan Khan *alias* Mahommad Nawab deceased, and Bibi Nasiran, daughter of Sheikh Amir Jan, deceased, resident of Goodri Masoom Khan, on account of bond, through Soghra and Haider Ali Khan, husband of *Musammat* returned the bond and the deed of sale . . . Rs. 3,000."

This is an entry of Rs. 3,000 and then there is an item of Rs. 4 00 which appears to have been entered in the book as payment on account of interest after deduction of remission. The entry, Exhibit 2, strongly supports the case of the plaintiff and establishes conclusively that Rs. 3,777 was in fact paid by *Musammat* Bibi Soghra to *Mahanth* Ram Kishun Das.

As regards the payment of Rs. 1,000 to Gopi Saran Shah, the petition of satisfaction filed in Shah Gopi Saran's execution case appears to me to be conclusive on this point. That petition after stating that it was necessary for the judgment-debtor to pay Rs. 1,000 that day goes on to say as follows:—

"So on receipt of Rs. 1,000 in notes as per details given below from Muhammad Haider Khan, husband of *Musammat* Bibi Soghra, your petitioner judgment-debtor, paid it to the decree-holder, the receipt of which is acknowledged by the decree-holder on the back of this petition. It is, therefore, prayed that the entry of payment of the said sum of Rs. 1,000 may be made; and it may be ordered in terms of the said petition that your petitioner-judgment-debtor's property will be sold on the sale day in January for the highest bid including the bid of the decree-holder."

There is no reason to doubt that at any rate Rs. 4,777 was paid by *Musammat* Bibi Soghra on behalf of *Musammat* Bibi Nasiran and *Musammat* Noorjahan Begum to *Mahanth* Ram Kishun Das and to Gopi Saran Shah in satisfaction of their debts to them. There then remains the question of balance *viz.*, Rs. 773. With regard to this amount we have only the oral evidence, but there is no reason to doubt the evidence, specially as we accept the evidence adduced on behalf of the plaintiff that Rs. 3,777 was paid to *Mahanth* Ram Kishun Das and Rs. 1,000 was paid to Gopi Saran Shah.

The plaintiff has, then, established that the mortgage upon which the suit has been brought was a real transaction and not a collusive transaction. The appellants, on the other hand, have given evidence to show that the transaction was not a real one and that *Musammat* Bibi Soghra

did not pay the consideration for the bond and that it was purely a fraudulent device in order to defeat the creditors. But the witnesses upon whom Mr. S. M. Mullick relies are themselves witnesses to the transaction and their case is that they signed this document in order to save the house which belonged to *Musammat* Noor Jahan Begum.

In my opinion, it is quite impossible to place any reliance upon the testimony of these witnesses. When we are considering a question such as this, the important point is, did *Musammat* Bibi Soghra have any fund out of which she could have lent Rs. 6,000 to *Musammat* Bibi Nasiran and *Musammat* Noor Jahan Begum. Now, Exhibit 5 is a sale-deed executed by *Musammat* Bibi Soghra in favour of Babu Matukdhari Singh.

This document shows that *Musammat* Bibi Soghra acquired the property sold under a *Tamliknamah* executed by her mother in her favour and that by sale of the property she received Rs. 15,000 in cash from Babu Matukdhari Singh and a mortgage-bond for Rs. 5,000. The evidence is that out of this money she lent Rs. 6,000 to *Musammat* Bibi Nasiran and *Musammat* Noor Jahan Begum.

Now, there is no reason to doubt that *Musammat* Bibi Soghra did in fact have a property which she sold and there is no reason to doubt that she got Rs. 15,000 in cash by the sale of this property. This transaction took place on the 25th of February 1915 and the mortgage in suit was executed on the 29th of November 1915. In my opinion, it has been established that *Musammat* Bibi Soghra had a fund out of which she could have advanced Rs. 6,000 to *Musammat* Bibi Nasiran and *Musammat* Noor Jahan Begum.

The decree passed by the learned Subordinate Judge is right and ought to be affirmed. I would accordingly dismiss this appeal with costs.

Bucknill, J.—I agree. I consider it was perhaps rather unfortunate that the order of the 11th September, 1915, was passed. I am inclined to think that if I had been the Subordinate Judge I should probably have adjourned the case. But one cannot say that, as it stands it is a wrong order or illegal in any way or one which the Subordinate Judge had no jurisdiction to make. It is quite clear what it means. The petition for execution was dismissed on part satisfaction. No objection was taken by the decree-holder to this order. There is indeed evidence that he started fresh execution proceedings in 1917. If he had thought that the old execution proceeding was alive he would presumably have proceeded under that.

In this order it is stated that the judgment-debtor is said to have prayed for four months' time and to have paid Rs. 250 and that the decree-holder agreed to the time being granted. But nothing was done at the end of four months so far as we know. If the decree-holder wished to object to the plain terms of the order of the 11th of September 1915, he should and could have done so in that proceeding, but he did not.

It is difficult to say how in this collateral matter the decree-holder could object to the terms of that order; but it is argued, whilst not actually objecting to its terms, that order must be construed properly as keeping the attachment alive notwithstanding that the petition is stated to be dismissed; as a dismissal, unless under the provisions of O. XXI, R. 57, Civil Procedure Code, does not, it is argued, release the attachment.

But even if one can properly enquire into the intention of the order (which seems doubtful here) there is nothing whatever to show that there was the least intention in the minds of the Judge or parties that the order meant to keep the attachment alive.

On the contrary, everything points to the opposite conclusion and the fact remains that the decree-holder consented not to proceed with his execution at that time but prayed for time. Having done so, he naturally takes his risk. He was in no way bound to agree to the judgment-debtor's application and his agreement to waive his right to proceed is, one cannot but think, in a sense a failure within the meaning of the language used in the provisions of O. XXI, R. 57, Civil Procedure Code.

Then, subsequently, as against the mortgage, he is, with his decree, in no strong position and his claim is presumably

subject to the mortgage. It was further suggested that the mortgage was fraudulent, but there is no satisfactory proof of any such allegation.

The Subordinate Judge does not believe the evidence which, certainly flimsy, was brought forward in the endeavour to support the suggestion. Considering it myself, I can see no ground for differing from the conclusion at which he arrived.

Appeal dismissed.

A. I. R. 1923 Patna 451

DAS AND KULWANT SAHAY, JJ.

Medni Prasad Singh and others—Plaintiffs—Appellants

v.

Nand Keshwar Prasad Singh and others—Defendants—Respondents.

F. A. No 82 of 1920, decided on 16th January, 1923, from a decision of Sub. J., Second Court, Monghyr, dated 11th March, 1920.

(a) Civil P. C., O. 21, R 90—Joint owner not made party to suit, need not apply under the rule to set aside the sale of his interest also, but may bring a suit

Where under cover of a decree obtained by the defendants as against plaintiffs 1 and 2, they had seized and taken possession of property which was the joint family property in which plaintiff No. 3 had an interest.

Held that Plff. No. 3 has a right to enforce his claim by a suit and it was not at all necessary for him to apply under the provisions of Order 21, rule 90. [P. 452 C. 1]

(b) Hindu Law—Alienation—Co-parcener—Purchaser of co-parcener's share cannot enter into possession but must bring a suit to ascertain his share.

A member of a Mitakshara Hindu family has an interest which is capable of being attached in execution of a decree as against him. But though a creditor can attach and purchase the interest of such a member it is not open to him to take possession of that interest. He only acquires a right to compel a partition. [P. 452, C. 2.]

P. K. Sen (with *Susil Madhab Mullick* and *Sivanandan Roy*)—for Appellants.

Guru Saran Prasad—for Respondents.

Das, J.—Sometime in 1917 the defendants instituted a suit against the plaintiffs 1 and 2 to recover a sum of money upon a *chitta* and obtained a decree for money as against plaintiffs 1 and 2. They put the decree in execution and put up to sale the right, title and interest of plaintiffs 1 and 2 in certain properties which it is now alleged by the plaintiffs were the joint family properties of all the plaintiffs. On the 14th of December 1918, the defendants purchased a 10 annas 13 dams proprietary interest in the properties which in their view was the share of the plaintiffs 1 and 2 in the properties. Plaintiffs 1 and 2 thereupon applied under the provision of Order 21, rule 90, C. P. C., for setting aside the sale. That application was dismissed for default and the plaintiffs 1 and 2 thereupon applied for restoration of that application under Order 9, rule 9, and it appears that that application was ultimately dismissed.

On the 3rd of March 1919 the suit out of which this appeal arises was instituted by the plaintiffs for recovery of possession of the properties which, as I have mentioned, were taken possession of by the defendants in execution of their decree against plaintiffs 1 and 2. Plaintiff No. 4 is the son of plaintiff No. 1 and plaintiff No. 3 is the brother of plaintiffs 1 and 2.

The allegations in the plaint are the necessary allegations which an applicant in an application for setting aside a sale under Order 21, rule 90 is required to make; but in the 12th paragraph of the plaint, the plaintiffs did allege that plaintiffs 1 and 2 had no specific share in the joint family properties and that no definite share in the joint family properties could in law be purchased by the defendants.

The defendants in their written statement contended that the plaintiffs had no cause of action and resisted the plaintiffs' suit on the merits. They also alleged that the plaintiffs were all separate from each other and that all that they had purchased was the right, title and interest of plaintiffs 1 and 2 and that the plaintiff No. 3 could not join them in recovering possession of the share purchased by the defendants.

The learned Subordinate Judge has come to the conclusion that the plaintiffs have no cause of action as against the defendants and in that view has dismissed the whole suit without discussing the other issues which were framed by him.

It has been pointed out by the Judicial Committee over and over again that the Courts in India ought to decide all the issues in order to save a remand, and in my opinion the learned Subordinate Judge should certainly have recorded the evidence in the case and decided all the issues that arose in the case. Had he adopted

that course, it would not have been necessary for us to remand the case to him.

On the question whether the plaintiffs have a cause of action as against the defendants, I agree with the learned Subordinate Judge that the plaintiffs 1, 2 and 4 have no cause of action as against the defendants; but I entirely differ from him on the question whether the plaintiff No. 3 has a cause of action as against the defendants. The view of the learned Subordinate Judge is this:

"The plaintiff No. 3 is a person whose interests are affected by the sale. He could have come under Order 21, rule 90, C. P. C. to have the sale set aside. He did not do so. Rule 92 provides that where no application is made under Rule 90 and where such an application was made and disallowed, the Court is to confirm the sale and no suit would lie to set aside the order confirming the sale, or in other words the sale. Thus the case of the plaintiff No. 3 comes under the provision where no application is made."

In my view it was not necessary for the plaintiff No. 3 to apply under the provision of Order 21, rule 90, C. P. C.; he was not a party to the suit and his case is that under cover of a decree obtained by the defendants as against plaintiffs 1 and 2, they have seized and taken possession of property which was the joint family property and in which he has an interest. Clearly he has a right to enforce his claim by a suit and it was not at all necessary for him to apply under the provision of Order 21, rule 90. That being so, the case must go back to the learned Subordinate Judge in order that he may determine the other issues that arise in this case.

But in order to avoid a failure of justice it is necessary to point out what the plaintiff No. 3 would be entitled to if he succeeds in his contention that the family was joint at the time when the interest of plaintiffs 1 and 2 were attached in execution of the decree obtained by the defendants as against them. It is quite clear that a member of a joint Hindu Mitakshara family has an interest which is capable of being attached in execution of a decree as against him. In this view the attachment and the sale of the interest which was of plaintiffs 1 and 2 would be good and binding upon the joint family. But though a creditor can attach and purchase the interest of a member of a joint Mitakshara Hindu family, it is not open to him to take possession of that interest.

The position is clearly indicated in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1). In that case their Lordships of the Judicial Committee pointed out the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale. They said that just as a partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of all the partners although the purchaser at the execution sale could acquire the interest sold, with the right to have the partnership accounts taken in order to ascertain and realise its value, so also though a member of a joint Hindu family could not himself have sold his share so as to introduce a stranger into the joint family, the purchaser, by purchasing at an execution sale, acquires the right to compel the partition which his debtor might have compelled had he been so minded, before the alienation of his share took place.

In other words the purchaser of the share of a member of a joint Mitakshara Hindu family acquires the right to compel a partition but not a right to enter into joint possession with the other members of the joint family.

If the learned Subordinate Judge comes to the conclusion that the family was joint at the time when the defendants purported to purchase the right, title and interest of plaintiffs 1 and 2 in the joint family properties, he will give a decree for possession to plaintiff No. 3 but he will make a declaration that;

(1) (1877-78) 3 Cal. 198=4 I. A. 247=1 C.L. R. 49=3 Sar. 730=3 Suth. 468 (P. C.)

the defendants as purchasers at the execution sale have acquired the share and interest of plaintiffs 1 and 2 in the property and that they are entitled to take such proceedings as they shall be advised to have that share and interest ascertained by partition.

We are unable ourselves to pass a decree to that effect because there is a contention of the defendants that the family was separate. This is an issue which it is necessary for the learned Subordinate Judge to try.

We allow the appeal of Plaintiff No. 3, set aside the judgment and decree passed by the learned Subordinate Judge, and remand the case to the learned Subordinate Judge for disposal according to law in accordance with the observations made in this judgment.

The decision of the learned Subordinate Judge with regard to the plaintiffs 1, 2 and 4 will, however, stand. I think that in the circumstances the defendants are entitled to their costs of this appeal. The costs incurred in the Court below will abide the result and will be disposed of by lower Court.

Kulwant Sahay, J.—I agree.

Case remanded.

A. I. R. 1923 Patna 453

DAWSON MILLER, C. J. AND FOSTER, J.

(*Thakurain*) *Fulbati Kumari*—Plaintiff—Appellant

v.

(*Maharaj Kumar Rao*) *Maheshwari Prasad Singh*—Defendant—Respondent.

F. A. No. 112 of 1920, decided on 17th April, 1923, from a decision of Sub. J., Monghyr, dated 20th February 1920.

(a) *Land Tenure—Ghatwali Tenure in Taluka Dumri—Distinction between Kharagpur and Birbhum Tenure—Former are alienable with consent of zemindar but latter only with consent of Government.*

The *ghatwali* tenure in *Taluka* Dumri is in no way comparable to the Birbhum *ghatwali* tenures, and Reg. XXIX of 1814 does not apply to it, but in its origin it is rather of the nature of the Kharagpur *ghatwalis*. One of the main distinctions between these two classes is that the former are inalienable except with the consent of Government by whom the settlements were made and to whom the revenue is paid direct, whereas the latter are alienable subject to the consent of the landlord to whom the rent or revenue is paid. The incidents that are proved to attach to the tenure are:—(1) that it is impartible and permanent (2) that it descends by lineal primogeniture, and (3) that it is alienable at least with the consent of the Zemindar. [P. 457, Cs. 1 & 2.]

(b) *Impartible estates—Ghatwali tenures—Succession—Hindu Law (Mitakshara)—Devolution is under Hindu Law subject to incident of impartibility—Males exclude females—Estate is not* ipso facto *the separate property of the owner*

Where the family of the tenure holder was governed by the Mitakshara Law,

Held, that the devolution of immoveable property in the family must be governed by that law subject to the question of impartibility, unless either there be some special custom of the family to the contrary or unless there be some peculiar feature inherent in *ghatwali* tenures which prevents the operation in the case of impartible property. In a Mitakshara family living in commensality, the inheritance even of impartible estates is confined to male members to the exclusion of females unless the estate itself is separate or self-acquired property The fact that a Raj is impartible, does not, in a case, governed by the Mitakshara Law, make it separate or self-acquired property It may be self-acquired or it may be the property of a joint undivided family. In the latter case, succession will be regulated according to the rule of survivorship but as one person alone can hold the estate at a time, the person designated is the eldest member of the senior branch of the joint family.

[P. 457, C 2; P 459, C. 2; P. 462, C. 1.]

N. C. Sinha and *A. P. Upadhya*—for Appellant.

S. Ahmad and *J. Prasad*—for Respondent.

Judgment.—The dispute in this case concerns the title to two villages and certain lands in third comprised in *taluka* Dumri, *kismat* 4 annas, which it is alleged is a *ghatwali* tenure formerly belonging to Ghanasyam Singh as *Ghatwali* who died childless in the year 1880 (1287 F. S.) leaving two widows. The senior widow, Thakurain Kishori Kumari, succeeded to her husband's estate in circumstances which will be referred to later and died in the year 1916. The junior widow, Thakurain Fulbati Kumari, who survived her co-widow is the plaintiff in the suit and appellant in this appeal. She claims the property as the reversionary heir of her husband on the death of the senior widow.

The defendant Maharaja Kumar Maheshwari Prasad Singh, the respondent in this appeal, is the son of the late Maharaja Bahadur of Gidhaur and brother of the present holder of that title. His title to the property

is based upon a conveyance from the senior widow, Kishori Kumari under a *kobala* dated the 13th October 1898 in which Pairu Singh the younger brother and next male heir of Ghanasyam Singh, joined.

The appellant disputes Kishori Kumari's right to alienate the property in question and contends that the estate is inalienable. The respondent on the other hand disputes the appellant's right to inherit contending that her sole right in the property is that of maintenance.

By her plaint the appellant alleges that the 4 annas share in *taluka* Dumri was settled upon Thakur Jungle Singh the ancestor of her husband as a *ghatwali* service tenure by Captain James Brown, the Sardar of the jungles, and *tarais* of Gidhaur, Kharagpur, Birbhum and the adjacent tracts in 1776 under a *sanad* dated the 17th December of that year, the other 12 annas share being settled with other *ghatwals* and that Rs. 142-12-0 together with cess is payable as perpetual *mukarrari* rent to the *zemindar*, the Maharaja Bahadur of Gidhaur, the entire income from the *ghatwali* interest being appropriated by the *ghatwal* for the time being.

She pleads that by the custom of her husband's family the estate descends to the eldest son of the *ghatwal*, the remaining sons, if any, getting maintenance and if the *ghatwal* dies without issue, his widow becomes proprietor and if there be more than one widow the eldest succeeds and after her the second widow takes. She alleges that except for the properties in dispute she came into possession of the remaining properties of the estate in 1916 on the death of Kishori Kumari. She further pleads that there was no legal necessity which would justify the transfer by Kishori Kumari to the respondent.

The respondent by his written statement denies that the estate is a *ghatwali* tenure and pleads that it was a *mukarrari* interest held by Ghanasyam Singh and his ancestors from the Maharaja of Gidhaur at the rent named and cesses. He admits that by the custom of the family the eldest son succeeds and if there be no issue the first widow succeeds and the second gets maintenance but he denies that the second widow succeeds on the death of the first and alleges that the eldest son of the nearest *gotia* of the last male holder inherits on the death of the senior widow, the second widow continuing to get maintenance and having no rights of inheritance.

By this is apparently meant that the eldest member of the most direct line of descent succeeds in preference to those nearer in blood but less direct in descent from the common ancestor, that is according to the rule of primogeniture. He further alleges that in the year 1900 by a *bazidawa* deed dated the 8th February that year after the death of Pairu Singh (who died in 1899) Kishori Kumari relinquished the whole of her interest to Pairu's eldest son, Mukhtar Singh, the next male agnate thereby accelerating the succession and that Mukhtar Singh got his name registered as *Mukarraridar* and took possession and has continued in possession as ostensible owner ever since. He denies that the appellant ever got possession of any portion of the property. He also pleads that the property was not inalienable and that in any case the transfer to him was justified by legal necessity.

The learned Subordinate Judge found all the issues in favour of the respondent and dismissed the suit. From that decision the plaintiff has appealed.

It will be convenient in the first place to consider, as far as can be gathered from the evidence, the origin and incidents of the estate of which the property in suit forms part. The earliest document relied on by the appellant is the *Sanad* of the 17th December 1776 granted by Capt. James Brown. Its genuineness is not questioned nor is Captain Brown's authority.

From 1774 to 1778 he was actively employed under the East India Company in quelling disturbances and establishing order in what was known as the jungle *terai* or jungle *terry* which included most of the country now comprised in the Santal Parganas and much of the land to the north and west in the Bhagalpur, Monghyr and Hazaribagh districts. He granted many *ghatwali* tenures and confirmed many more to

the previous *ghatwals* for services in guarding the *ghauts* and *chowkies*.

The *sanad* is addressed to the *Chowdhries*, *Kanoongoes*, *Zemindars* and *Muksaddis* of *mauza* Dumri. It recites that Kanchan Singh, Jungle Singh, (the ancestor of the appellant's husband), Ragho Singh and Manorath Singh, *ghatwals* of the aforesaid *mouza*, have been in accordance with old standing practice enjoying *ghatwali* fees for their services as *ghatwals* out of *sayer* or *rahdari* of the *mauza* and declares that from 1184 F. (1777 A. D.) in conformity with the old standing practice the fees for *ghatwari* have been granted to them. It directs the *Chowdhries* and others to allow them to enjoy the fees and enjoins upon the *ghatwals* the duty of keeping watch and going the rounds of the *ghats* and *chowkies* in their *elakas* and holds them accountable and liable to dismissal for any murders, thefts, highway robberies, night attacks or other disturbances in their *elakas*.

This document is not a grant of land, but an authority to the persons named to collect as formerly *ghatwari* or *ghatwali* fees or tolls from those using the roads and passes which the *ghatwals* undertook to protect. It is relied upon in the plaint as the basis of the appellant's title but it is not and cannot be regarded as the grant upon which the title of Ghanasyam Singh and his ancestors to the land in suit is based.

It does appear, however, that a tenure comprising 8 annas in *Mauza* Dumri was granted by Raja Gopal Singh of Gidhaur to Jungle Singh and Nain Singh (the son of Kanchan Singh, one of the *ghatwals* mentioned in the *sanad* of 1777) in the year 1780 (1187 F.) with the sanction of Captain Brown. This can be gathered from certain proceedings which were tried in the year 1798 before the Dewani Adaulat of Ramgarh and which went on appeal to the Patna Provincial Court of Appeal in the following year.

Copies of the judgments in both Courts have been produced in evidence by the appellant. From these it appears that in the year 1780 Jungle Singh and Nain Singh as *ghatwals* of the *mauza* were granted a *patta* of 8 annas share in the *mauza* by the Raja at the instance of Captain Brown and that this share formerly constituted their *ghatwali* interest.

About 1796 the Raja had attempted to raise the rent contending that the *patta* of 1780 was a grant for one year only. The grantees had refused to accept a new *patta* or grant a *kabuliat* at an enhanced rent and the Raja had thereupon endeavoured to dispossess them by letting the lands to other tenants. Jungle Singh and Nain Singh then sued the Raja claiming a *patta* at the old rent the object being apparently to establish their title to a permanent interest at the former rent. They proved that they had been in occupation paying rent at the same rate for over 12 years.

The Ramgarh Court found in favour of the plaintiffs and ordered the *patta* to be granted by the Raja at the old rent. The Court referred to section 49 of Regulation VIII of 1793 which provides that "*Istimradars* (*mocurrarydars*) of the nature of those described in section 18 who have held their lands at a fixed rent for more than 12 years are not liable to be assessed with any increase either by the officers of Government or by the *zemindar* or other actual proprietor of land should he engage for his own lands."

To appreciate the effect of this section it is necessary to refer to the earlier sections of the Regulation more particularly sections 18 and 19. The former provides that *mocurrarydars* holding lands of which they are not actual proprietors and whose grants have been obtained since the Company's accession to the dewani and have not received the sanction of Government are to be dispossessed and a settlement is to be made with the proprietors as provided in the Regulation. Section 19 provides that *Istimradars* who have not got possession of their lands to the exclusion of the proprietors or without their consent, as the *mocurrarydars* under section 18 are supposed to have done, but held them of the proprietors on *pottah* or lease are to be considered as a species of *pottah talookdars* and the settlement is to be made with them as afterwards provided in the Regulation.

Section 49 is one of the provisions relating to the new settlement by the

zemindar in cases contemplated under sections 18 and 19. Although there is nothing to show that any permanent settlement had been made with the proprietors of the Gidhaur Raj at that time, some sort of settlement appears to have been made with the Raja of Gidhaur and his brother in 1775 of some villages including Dumri as appears from a *sanad* of that date (Ex. A) signed by Captain Brown. It may be assumed that this was confirmed and made permanent in 1790 by Regulations I and VIII of that year.

It appears from the judgments of the Ramgarh Court in 1798 and the appellate Court at Patna in the following year that the Collector had confirmed the rent reserved in the grant of the half share of Dumri to the *ghatwals* by the *zemindar* in 1780. After the permanent settlement of 1793 the Raja had sued Nam Singh and Jungle Singh to compel them to execute a *kabuliat* at a higher rent but in 1796 the Court had rejected his claim and ordered him to execute a *patta* at the old rate. The *patta* was prepared and withdrawn from Court by the Raja but apparently not executed and when he again attempted to obtain a higher rent the *ghatwals* brought the suit of 1798 with the result already mentioned.

An appeal by the Raja Gopal Singh from that decision was dismissed by the appellate Court which found that the Raja had knowingly put a false construction on the previous decree and fined him Rs. 25 for having preferred a litigous appeal. From that time to the present the interest enjoyed in the estate by the appellant's family has been described in documents sometimes as a *ghatwali* tenure, sometimes as a *mukarrari* tenure, and more often as a *mukarrari ghatwali* tenure. It is undoubtedly of a permanent nature and held at a fixed rent payable to the *zemindar*, and it would appear to be a settlement made by him with the tenure holders by force of the provisions of Regulation VIII of 1793.

The learned Subordinate Judge considered that the estate was a *ghatwali mukarrari* tenure which was originally granted as *ghatwali* and in respect of which the *ghatwals* afterwards at about the time of the permanent settlement get a *mukarrari* lease from the *zemindar*, thereby fixing the rent in perpetuity.

In the absence of the instrument under which the grant was created, it is impossible to know whether it was in fact a service tenure granted in consideration of performing the duties of *ghatwal*. That the grantees of the 8 annas share in question were *ghatwals* together with others is conclusively proved by the *sanad* of 1776; but the remuneration for their services referred to in that *sanad* is not a grant of land but a right to collect certain tolls from those using the roads.

In the Bengal District Gazetteer, Volume XVII, at page 168 there is a passage which throws some light upon what happened at Dumri when Captain Brown took over charge of the operations in the jungle *terry* tracts. The passage states:

"About 1774 the lawless state of this tract led the British to place it in charge of Captain James Browne, who settled the estates with the *ghatwals* with two exceptions. These two exceptions were Dumri and Mahesri which were settled directly with the proprietors, the story being that the *ghatwal* tenure holders led at the approach of Captain Browne their reputation as dacoits and brigands being too strong for them to face a Government officer without fear of the consequences. In the case of Dumri however, the Ghatwals finding that in their absence a settlement had been made of their tenure, returned and obtained a *sanad* settling it with them under the Raja of Gidhaur. Of the estates settled with *ghatwals* only two are now held by their descendants, *viz.*, Tilwa and Kewal. The others have passed into the hands of the Maharaja of Gidhaur, Chetru Rai, Akleswar Prasad and others of Rohini."

The statement that Tilwa and Kewal were the only two estates still held by the descendants of the original *ghatwals*, although possibly accurate at the present day was hardly quite accurate in 1909 when it was written as at that time a part at least of the Dumri estate still remained in the hands of the descendants of Jungle Singh although the other *kismats* and part of that originally granted to Jungle Singh had been acquired by the Maharaja.

The evidence shows that *parwanas* were issued by the Collector to the *ghatwals* appointed by Captain Brown and their descendants calling upon them to perform certain duties attaching to their office up to about the middle of the last century or even later and it may be that the grant of the tenure was regarded as concomitant of the *ghatwali* office.

The question is not free from difficulty but on the whole we are not prepared to disturb the Subordinate Judge's finding upon this part of the case and propose to treat the tenure for the purpose of this decision as a *ghatwali* tenure.

It was argued on behalf of the appellant that all *ghatwali* tenures are inalienable and reference was made to Regulation XXIX of 1814 which regulates the settlement of the Birbhum *ghatwali mahals*. In our opinion the estate in the present case is in no way comparable to the Birbhum *ghatwali* tenures and Regulation XXIX of 1814 does not apply to it, but in its origin it is rather of the nature of the Kharagpur *ghatwalis*. One of the main distinctions between these two classes is that the former are inalienable except with the consent of Government by whom the settlements were made and to whom the revenue is paid direct, whereas the latter are alienable subject to the consent of the landlord to whom the rent or revenue is paid. The Regulation of 1814 applies to the former only. The grant in the present case made with the sanction of Captain Brown would appear to bear a close resemblance to some of those mentioned as having been made in the Kharagpur estate by Mr. Cleveland and referred to in the case of *Raja Lelanund Singh* v. *Govt. of Bengal* (1).

In fact in argument before the Subordinate Judge the late Sir Rash Behari Ghose who appeared on behalf of the appellant admitted that the estate in this case was a Kharagpur and not a Birbhum *ghatwali*. It is highly improbable that a lawyer of his experience and learning would make the admission without good cause and we consider his admission that it was not a Birbhum *Ghatwali* was justified.

The incidents that are clearly proved or are admitted to attach to the tenure are (1) that it is impartible, and permanent (2) that it descends by lineal primogeniture, and (3) that it is alienable at least with the consent of the *zemindar*. Proof of the last incident is supported by the fact that considerable portions of the estate have been alienated since Jungle Singh's time by the holder for the time being and at least one if not more of the other three 4 annas interests in Dumri has passed out of the hands of the original grantee and his descendants and is now held by the Maharaja of Gidhaur.

In our opinion the tenure was not inalienable but could be alienated by the *ghatwal* for the time being at least with the consent of the *zemindar*. In the present case the *zemindar* was the brother of the respondent, the purchaser, and as he has made no attempt to question the transaction of the 13th October 1898 under which the respondent holds, it may be presumed that he is a consenting party.

The question then arises as to the course of succession of a tenure of his nature. The family of the appellant is governed by the Mitakshara Law and the devolution of immoveable property in the family must be governed by that law subject to the question of impartibility, unless either there be some special custom of the family to the contrary, or unless there be some peculiar feature inherent in *ghatwali* tenures which prevents the operation of the Mitakshara rule of succession in the case of impartible property.

It is the appellant's case that Pairu Singh the brother of Ghanasyam Singh and his son Mukhtar Singh were separate from and not living jointly with Ghanasyam Singh at the time of his death in 1880, and that therefore even under the Mitakshara Law the widows would be entitled to succeed to the family property in preference to the separated *gotias* but that owing to the impartible nature of the property only one *ghatwal* can inherit at a time and that therefore the senior widow would take first and after her the junior. This is also said to be in accordance with the

(1) (1855) 6 M. I. A. 101=4 W. R. 77=1 Suth. 208=1 Sar. 505 (P C).

family custom relied upon.

It is next contended that all *ghatwali* property is the exclusive separate property of the holder for the time being and devolves according to the rules affecting separate property subject again to the question of impartibility.

We propose first to consider whether Pairu and his son and other members of his family were living jointly with Ghanasyam or not at the time of the latter's death. It appears from a petition dated the 5th March 1843 presented in the Court of the Principal Sadar Amin at Bhagalpur by Lal Behari Singh, the father of Ghanasyam Singh that Jungle Singh and the others who were appointed *ghatwals* in the time of Captain Brown each held a fourth share in the *Mahal*. Whether they took jointly in the first instance and afterwards separated or whether they each took a four annas share originally is not very clear, but, however that may be, the 4 annas *Kismat* of Jungle Singh has come down from him to his descendants in the direct maleline without a break until the time of Ghanasyam Singh the husband of the appellant who died childless in 1880. During that time many of the *mauzas* comprised in the estate have been granted by way of maintenance to members of younger branches of the family and not resumed.

The evidence on this point is dealt with by the learned Subordinate Judge at length and need not be repeated. These branches have separated from the main stock and are no longer connected with it in mess or estate. The family house of Ghanasyam Singh and his ancestors is at Panjbhajan and some attempt was made to prove that one of the villages of the estate, *mauza* Chauki, had been given by Ghanasyam to his brother Pairu as a maintenance grant and that Pairu and his son Mukhtear and other members of his family lived there separate from Ghanasyam.

No document was produced in support of this story. Many documents on the other hand have been put in evidence by both parties in the case from the year 1881 up to 1918. Many of them are executed by members of the family and in one instance by the appellant herself. Others are plaints and decrees in suits in which the family was interested and in every case Pairu and Mukhtear where their names are mentioned, and the instances are numerous, are described as residing at Panjbhajan.

It is admitted that they had no separate residence there and some of the appellant's principal witnesses admit that Pairu and Mukhtear lived jointly with Thakur Ghanasyam Singh during his life time and with his widows afterwards although others say that they were separate. Kishori Kumari, the senior widow during her life time executed one document at least, a mortgage bond dated the 15th July 1895, in which she describes herself and Pairu as members of a joint family and joint in mess and business.

The learned Subordinate Judge has dealt at length with this part of the evidence and has arrived at a clear finding that Pairu and Mukhtear were not separated from Ghanasyam during his lifetime but lived jointly with him and had continued to live jointly with the appellant after his death up to the present day. In our opinion his finding was amply justified upon the evidence and should not be disturbed.

This being so unless there is some feature peculiar to this tenure which distinguishes the course of succession from other impartible estates or unless there be some family custom controlling the inheritance, on the death of Ghanasyam Singh the estate would devolve under the Mitakshara Law upon the male agnates entitled by survivorship, to the exclusion of the widows, and the estate being impartible it would go to Pairu Singh the eldest surviving brother of Ghanasyam and after him to his son Mukhtear. Had the family been separated the widows would have taken in turn in priority to the next male collateral heirs.

There are no doubt *dicta* to be found in the cases dealing with *ghatwali* estates which go to the length of saying that the succession is not governed by the Mitakshara Law and in particular the case of *Kastoora Koomaree* v. *Monohur Deo* (2) was relied on. In that case

(2) (1864) W. R. Gap. No. 39.

the question of succession to a *ghatwali* tenure arose. The claimants were *Musammat* Kastoora Koomaree, the mother of the last male holder, a posthumous son who died about a year after his birth, and the plaintiff Monohur Deo a distant cousin of the deceased holder. It does not appear from the report whether these cousins were joint or separate in estate but their common ancestor was the great-great-grand-father of the plaintiff.

Incidentally it may be mentioned that the *ghatwali* in that case was situated in Birbhum and a distinction is drawn in the judgment between Birbhum *ghatwali* in which the evidence showed that females succeeded and those in Ramgarh where the evidence showed they did not. The plaintiff relied on family custom but this was decided against him on the evidence. The trial Court had decided in favour of the plaintiff. The High Court reversed this decision and pronounced in favour of Kastoora Koomaree, the mother of the last male holder.

The High Court appears to have approached the question for decision upon the assumption that the mother would succeed unless the contrary could be proved. There are two passages in the judgment which are relied on. In the first the Court expresses the view that succession to "those *ghatwalis*" by which I gather Birbhum *ghatwalis* are referred to, was regulated by no rule of *koolachar* nor by Mitakshara Law but solely by the nature of the *ghatwali* tenure.

The later passage reads thus: "Even under the Mitakshara Law the widow and mother would be entitled to succeed if the property left by the deceased were not held in common and we have stated above that we do not think that the *ghatwali* tenure could ever be said in the sense used in the Mitakshara to be held in common."

This passage, whilst no doubt true in the sense that the property is impartible and the sons and other members of the family take no immedite interest at birth entitling them to claim partition, does not satisfactorily dispose of the real question for determination which arises in the present case namely whether in a joint Mitakshara family the course of succession to *ghatwali* property is any, different from that which regulates the succession of other impartible property for, there is abundant authority for the proposition that in a Mitakshara family living in commensality the inheritance even of impartible estates is confined to male members to the exclusion of females unless the estate itself is separate or self-acquired property.

We shall consider some of these cases presently but before doing so it will be convenient to refer here to the case of *Chataradhari Singh* v. *Sarsawati Kumari* (3) upon which special reliance was placed. It is a decision of the Calcutta High Court and although not binding upon this Court is entitled to the greatest respect. The subject of that suit was one of the *ghatwali* tenures of Birbhum to which Regulation XXIX of 1814 applies.

One of the main questions for decision was whether the word "descendants" in the Regulation meant heirs of the body or heirs generally including widows. The latter construction was preferred and the learned Judges Ghose, and Gorden, JJ., held that between the widow and the separate brother of the last *ghatwal* the widow's right to inherit should prevail. It may be pointed out that it was found on the evidence that the brothers had separated and that the estate was the exclusive property of the late *ghatwal*.

Upon this finding the right of the widows was established but although the Court considered it unnecessary to determine what was the original character of the Birbhum tenures as described in Regulation XXIX of 1814, they expressed the view that the estate was the exclusive property of the *ghatwal* for the time being and not joint family property in the proper sense of the term.

It is unnecessary for present purposes to express an opinion either of concurrence or dissent upon this proposition as stated in the judgment as it was a dictum based upon the construction of a regulation which is not applicable to the present case.

(3) (1895) 22 Cal. 156.

But if it means that the members of the family acquire by birth no immediate rights in the property entitling them to partition or creating a restraint upon the holder's powers of alienation such as they may be, it appears to us to do no more than to define the tenure as impartible.

The case of *Raja Leelanund Singh* v. *Doorgabutty*,(4), also a decision of the Calcutta High Court, was referred to where it was held that a *ghatwali* tenure in Kharagpur was not alienable without the consent of the landlord. In the present case, however, we have already held that the transfer to the respondent was with the landlord's consent.

We may now refer to some of the more important cases which deal with the question of the course of succession in impartible estates. In *Tekaet Doorga Pershad Singh* v. *Tekaetnee Doorga Kooree* (5) it was decided that an impartible *ghatwali* estate might descend to the widow or mother of the deceased *ghatwal* in preference to a collateral male agnate but in that case reliance was placed on the fact that the plaintiff was separated from, and not joint with, the last male holder.

In *Katama Natchiar* v. *The Rajah of Shivagunga* (6) the dispute was between the late holder's widow and daughters on the one hand and his brother's son and grandson on the other. The last male holder was found to have been joint in estate with his brother. His son and after his death his grandson claimed the *zemindari* which was in the nature of an impartible principality. It was found that the *zemindari* in dispute was the separate property of the late *zemindar* in which his brother had no interest as a member of the joint family, and it was upon this finding that the decision of the Privy Council ultimately turned.

It was held that the property being separate or self-acquired devolved upon the widows and daughters in preference to the brother's son and grandson in the same manner as other self-acquired property under the Mitakshara Law which prevailed in the part of Madras where the parties resided.

It is important, however to bear in mind that if their Lordships had found that the *zemindari* was not separate property they would have decided in favour of the brother's descendants in preference to the daughter as the following passage from the judgment at page 593 of the report shows:—

"Hence if the *zemindar*, at the time of his death, and his nephews were members of an undivided Hindu family, and the *zemindari*, though impartible was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the *zemindar*, at the time of his death was separate in estate from his brother's family, the *zemindari* ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to nephews, following the course of succession which the law prescribes for separate estate. These propositions are incontestable."

It will be observed from the passage quoted from the judgment of the Judicial Committee in 1863 that an impartible *zemindari* was not necessarily the separate estate of the holder for the time being. It may be held as common family property in which case subject to impartibility and the rule of primogeniture it will descend according to the canons of devolution applicable to such property, that is to say, the joint male agnate will succeed to the exclusion of females, and of the agnates the eldest in the most direct line will take.

Again in 1875 in the case of *Chintamon Singh* v. *Nowlakho Konwari* (7) their Lordships held that the fact that an estate is impartible does not imply that it is separate and in a Mitakshara family whether the general status of the family be joint or divided, property which is joint will follow one, and property which is separate will follow another course of succession. The judgment refers to the earlier decision

(4) (1864) W. R. Gap No. 249.
(5) (1871) 20 W. R. 154.
(6) (1863) 9 M. I. A. 539=9 Sar. 25.

(7) (1875) 1 Cal. 153=2 I. A. 263=24 W. R. 255=3 Suth. 204=3 Sar. 537 (P. C.)

of the Board in 1870 in the case of *Venkayama* v. *Sri Rajah Boochia Vankondora* (8) where the *Shivagunga* case (6) had been quoted in argument for the proposition that impartible property was always separate, but without success, and their Lordships had observed on that occasion as follows:

"The authority invoked, however, affords no ground for this argument. The decision in the *Shivagunga* case (6) will be found to proceed solely and expressly on the finding of the Court that the *zemindari* in question was proved to be the self-acquired and separate property of Gowery Vallabha Taver. It assumes that if this had not been so the decision would have been the other way."

The case of *Kali Pershad* v. *Anund Roy* (9) may here be referred to as it was relied on by the appellant partly for the proposition that a *ghatwali* tenure is inalienable and partly for the proposition that it is not governed by the Mitakshara Law. The suit was by the son of a former *ghatwal* to recover the estate which had been sold in execution of a decree obtained against his father on a bond. The arguments advanced on behalf of the plaintiff, the appellant before their Lordships, were first, that the estate was inalienable except to the extent of the incumbent's life interest, and secondly that by the Mitakshara Law the son acquired a right at birth which could not without his consent be defeated by the act of his father.

Their Lordships held that a Kharagpur *ghatwali*, which the property in suit was, could be alienated with the *zemindar's* consent and secondly that such a tenure was in some particulars distinct from and could not be governed by either the general objects of Hindu inheritance or the rule of the Mitakshara. The general objects of Hindu inheritance referred to are explained as the selection of heirs capable of exercising certain religious rites for the benefit of the deceased, and the Mitakshara rule as the right of the son immediately on his birth to share equally with his father in the ancestral immoveable estate. But their Lordships were particular to limit their decision to this, that the Mitakshara Law and the general Hindu Law of Inheritance were not to their full extent applicable to a *ghatwali* tenure. There is nothing in this decision which necessarily implies that a *ghatwali* tenure may not be held as common property of the joint family for some purposes as in the case of other impartible estates.

In *Raja Durga Prasad Singh* v. *Tribeni Singh* (10) the Privy Council again had to consider the nature of *ghatwali* tenure in Kharagpur, and expressed the view that it is ordinarily hereditary, the estate descending to such male members of the family as the *zemindar* approves as competent, and that it is the right of the family as long as they have male members competent to perform the duties to have one or more of them appointed *ghatwals*. Their Lordships also agreed with the view of the Courts in India that the incidents of a *ghatwali* tenure were not such as to give the family any rights over the property while it is in the hands of the *ghatwal*. Their decision proceeds upon the view that a *ghatwali* tenure in Kharagpur ordinarily descend to the male member of the family as long as there is any one competent to perform the duties.

We are unable to interpret this decision as any authority for the proposition that in the event of the *ghatwal* dying without issue the succession should be regulated according to the rules affecting the devolution of separate property in a Mitakshara family which prefers the widow to the collateral male relations. The view expressed in that case as to the rights of the family over the property while in the hands of the *ghatwal*, applies as it seems to us with equal force to all impartible estate.

The only other case that need be referred to upon this point is that of *Baijnath Prasad Singh* v. *Tej-*

(8) (1870) 13 M. I. A. 333=2 Sar. 546.
(9) (1887) 15 Cal. 771=15 I. A. 18=5 Sar. 121 (P. C.)

(10) (1918) 46 Cal. 362=45 I. A. 251=24 M. L. T. 407=28 C. L. J. 508=9 L. W. 60=48 I. C. 527=21 Bom. L. R. 569 (P. C.)

Bal Singh (11) decided by the Judicial Committee in 1920. It was the case of an impartible Raj held by a Mitakshara family. Most of the earlier authorities were there reviewed and it is unnecessary to refer to them here.

The conclusions arrived at were that the fact that a Raj is impartible does not, in a case governed by the Mitakshara Law, make it separate or self-acquired property. It may be self-acquired property or it may be the property of a joint undivided family. In the latter case succession will be regulated according to the rule of survivorship but as one person alone can hold the estate at a time, the person designed is the eldest male member of the senior branch of the joint family.

We can see no reason for applying a different rule of succession in the present case from that which governs other impartible estates. The history of the estate, so far as we know it, does not appear to afford any ground for treating the property as the separate or self-acquired property of the holder. The incidents of the tenure before Jungle Singh's period are unknown. The earliest documents show that it was claimed to have been the property of Jungle Singh's ancestors before the advent of British rule in Bihar.

At about the time of the permanent settlement a fresh grant was made to Jungle Singh by the Raja of Gidhaur at a fixed rent in perpetuity. It then descended in the direct male line for about 100 years. The junior branches of the family have from time to time acquired interests in certain *mauzas* of the estate by way of maintenance grants and have separated from the main branch retaining the estates so acquired in their own families. Ghanasyam is found living jointly with his brother and nephew at the time of his death and the family is admittedly a Mitakshara family.

Assuming, as one must, that the members of a joint Mitakshara family do not acquire in impartible property the same rights as in partible property belonging to the family such as the right of joint enjoyment, the right of partition or the right of restraint on alienation, they at least retain the right of survivorship and we consider that the burden of proving that the property is separate or self-acquired in the present case rests upon the plaintiff who asserts it. That burden, in our opinion, she has failed to discharge.

The only question remaining to be determined is whether the custom relied upon by the appellant is made out. Were it not for the admission in the written statement that Kishori Kumari succeeded to the estate by some family custom we should have been inclined to find that no custom of the family had been proved whereby even the senior widow was entitled to succeed in preference to the brother or nephew but assuming this matter to be concluded on the pleadings, we consider that no custom has been proved in favour of the junior widow. Since 1780 the succession has been from father to son without a break.

No case has arisen in which the widow's claim could ever have been considered. Some of the appellant's own witnesses even admit that no other *Thakur*, by which term the holder of the title is designated, left two widows before Ghanasyam and it would be difficult to find in favour of a special custom applicable to a case which has never arisen so far as can be ascertained, unless there were some very strong evidence of tradition. After more than 20 witnesses had been called for the appellant, most of whom alleged the custom to exist without being able to refer to any instances, a witness Sadho Singh, was called who mentioned as instance in which before the time of Jungle Singh one Pratap Singh had died childless leaving two widows who succeeded one after the other. This he says he heard from his grand father but he is unable to mention the names of the widows. It is significant that none of the earlier witnesses, many of them *golias* of Ghanasyam had ever heard of it.

On the other hand they admitted, when asked, that they knew of no case of even one widow succeeding. Some 60 witnesses alto-

(11) A. I. R. (1921) P. C. 62=43 All. 228=48 I. A. 196=19 A. L. J. 317=33 C. L. J. 388=40 M. L. J. 387=(1921) M W. N. 300=25 C'W. N. 564=2 P. L. T. 257=23 Bom. L. R. 654=29 M L. T. 358 (P C.)

gether were called for the appellant and of these two later ones also mentioned the case of Pratap Singh.

There is no document to support it and the pedigree of the family produced in evidence does not go back further than Maniyar Singh the father of Jungle Singh. It is perhaps significant that Pratap Singh's widows are said to have been the immediate predecessors of Maniyar so that it is impossible to check this statement from the pedigree produced wh ch goes no further back than Maniyar the father of Jungle Singh. Had the case been true it seems difficult to suppose that those responsible for presenting the plaintiff's case to the Court would not have been able to verify it and produce some more convincing evidence and further particulars with the names of the widows in question who succeeded in their family.

Daleep Singh an old man of 70 called by the appellant, whose name appears in the pedigree and who is the grandson of one of Jungle Singh's brothers says positively that in the family of the appellant no Thakur ever had two wives and apart from Kishori Kumari no *Thakurain* got the *gadi* at any time. The next witness Taran Singh also a *gotia* of Ghanasyam says no female had succeeded to the *gadi* in the family except Kishori Kumari and the appellant, and no other Thakur left two widows nor did he ever see a junior widow succeeded after the senior widow at any other place.

It may also be assumed that he never heard of it either. Evidence that such a custom exists is easily given but it is difficult to refute when the witnesses themselves can give no instances; and when it is admitted that no such case has occurred evidence of this nature should be treated with the greatest reserve. The respondent's witnesses who live at Dumri and the neighbourhood deny the custom whereby the junior widow succeeds, and in our opinion, the learned Subordinate Judge who refused to accept the evidence of the appellant's witnesses on this point and who described them as having given their evidence as if by rote arrived at a proper appreciation of that evidence when he refused to believe it.

It is also not without significance that no later than the year 1914 the appellant herself instituted a suit against her co-widow Kishori Kumari and Mukhtar Singh, in whose favour Kishori had relinquished the estate to recover a half share alleging not as now, that she was entitled to succeed on the death of Kishori but that she succeeded jointly with her upon her husband's death and was entitled to a half share in the estate which she claimed to recover back and at the same time sought to set aside a number of mortgages and transfers of portions of the estate effected by Kishori Kumari, Pairu and Mukhtar.

The basis of the title which she asserted at that time is entirely inconsistent with the custom which she now sets up. The truth appears to be as found by the learned Subordinate Judge and as would appear from the evidence of Daleep Singh and others of the appellant's witnesses, that when Ghanasyam died his brother Pairu claimed the *gadi* and as the result of a family council, in which a number of the *gotias* took part, the respective claims of Pairu and Kishori were mooted and an arrangement was come to that Kishori should be the *gadinashin* for the time being and after her death it would be seen whether Pairu would succeed. As a matter of fact Pairu had *de facto* control of the estate and was given a general power of attorney by the widow in 1881 and he took no active steps to assert his legal right in the circumstances.

The learned Judge considered that this *ammukh-tarnama* or general power of attorney was a device by which Pairu was made to acquiesce in the position assigned to him by the family council, the title remaining with Kishori but the estate being under the control of Pairu. As the family of Pairu and Mukhtar increased, the expenses rose in proportion and the family got into debt. A great number of alienations and mortgages in order to raise money were executed. In Pairu's time they could be executed by himself under the general power of attorney but after his death in 1899 Kishori Kumari no doubt found it inconvenient to manage the estate

and execute documents in her own name, and accordingly in 1900 relinquished in favour of Mukhtar Singh.

There is evidence to show that everything she did was done in consultation with the appellant and no exception was taken. In 1914 judgments were obtained in mortgage suits for considerable amounts against Kishori, Mukhtar and the other members of the family. Seeing the property pass from their possession the present appellant was put forward in 1914 to endeavour to recover half the property by alleging that she and Kishori were jointly interested on the death of Ghanasyam Singh.

The suit although in form against Kishori and Mukhtar was in substance an endeavour to annul the alienations made by them and it was admitted by the appellant that Kishori paid the expenses of that suit. That suit failed and Kishori Kumari herself in 1915 brought another suit challenging all the acts of Pairu and Mukhtar as fraudulent. She died before it came to trial. The appellant attempted to get herself substituted in Kishori's place to carry on the suit but this came to nothing and the suit subsequently abated.

In the opinion of the learned Subordinate Judge the present suit was merely a third attempt on behalf of Mukhtar to save something out of the family property. Unfortunately for the appellant the plea she now sets up is entirely at variance with the case previously pleaded that she and Kishori Kumari succeeded jointly on the death of her husband. This part of the case was dealt with by the learned Judge in considering the question whether the appellant ever got possession of any part of the property after the death of Kishori Kumari. He found that she did not in fact do so, but that Mukhtar Singh was always in possession after the bazidawa deed was executed in his favour in 1900. This aspect of the case however also has a bearing in considering the plea now put forward by the appellant as to custom.

In our opinion the learned Subordinate Judge was right in the conclusions at which he arrived and we consider that this appeal should be dismissed with costs.

Appeal dismissed.

✱ A. I. R. 1923 Patna 464

DAS AND KULWANT SAHAY, JJ.

Jagdip Prasad Sahi—Defendant—Appellant

v.

Mt. Rajo Kuer and another—Plaintiffs—Respondents.

F. A. No. 193 of 1920 and No. 5 of 1921, decided on 17th April, 1923, from the decision of the Sub. J., Mozaffarpur, dated 15th July 1920.

(a) *Contract Act, S. 38—Section is not applicable to principal and agent.*

The liability of an agent to account is not a liability that arises by virtue of contract between the parties but is a liability that is annexed by law to the office of the agent and S. 38 has nothing to do with this question. [P. 465, C. 2.]

(b) *Principal and Agent—Co-principals—Discharge by one is not valid as against the others.*

Co-principals may jointly appoint an agent to act for them and in such cases become jointly liable to him and may jointly sue him. The agent is not bound to account separately to one of several co-principals and if he has done so he is not thereby discharged from liability to the other or others unless the co-principals are also partners. Where the monies are received on behalf of joint principals, the agent is liable to account to them jointly and is not discharged by payment to one or more of them only, unless by authority of all. Halsbury's Laws of England Vol. I. P. 159, Ref. [P. 466, C. 1.]

(c) *Limitation Act, Art. 89—Joint principals—Time will run only from date of joint demand.*

In the case of joint principals, time runs from the date of demand by all the principals and a refusal thereon and a demand by one only and a refusal thereon does not start limitation as against him. [P. 466, C. 2.]

(d) *Evidence Act, S. 115—No estoppel applies when truth is known.*

Where the truth is known to both the parties there is no case of estoppel. [P. 468, C. 2.]

S. N. Ray—for Appellant.

Sultan Ahmad and *Jal Govind Prasad Singha*—for Respondents.

Das, J.—These analogous appeals arise out of a suit instituted by Musst. Rajo Kuer and Musst. Shampati Kuer for account as against Jagdip Prasad Sahi.

On the 13th December 1912 the plaintiffs executed an *am-moktarnama* in favour of Jagdip Prasad Sahi. They stated in that document that it was necessary in order to preserve the property to appoint a competent and conscientious person to manage their estate and accordingly they

appointed the defendant as their agent to look after their properties.

In the first paragraph they provided that the agent should pay Government revenue and the rent payable to the superior landlords. In the second paragraph they provided that the agent should take proper steps for the collection of rent due to them. In the fifth paragraph they say as follows:—

"He shall from time to time pay to us in equal halves year after year a certain sum for our personal expenses and house repairs, etc. He shall pay exclusively to me, Mussammat Rajo Kuer, the entire income of the share of Mauza Pagra Mahisuri Jalkar Ghatam Nadi Bulan Pargana Sarisa, Tauzi No. 1377/16, Thana and Sub-Registry Dalsing Sarai, District Darbhanga. I, Musammat Shampati Kuer, neither have, nor can have, nor shall have anything to do with the income and share of the said Mauza."

In the ninth paragraph they provided that the agent shall receive as his remuneration five per cent. of the amount realised by him "out of the income in cash or kind of our estate and out of the money payable to us by the debtor." This *mokhtarnama*, as I have said, was executed on the 13th December 1912. It is stated in the plaint that the plaintiff No. 1 terminated the agency on the 5th February 1919 and that Plaintiff No. 2 terminated the agency on the 19th January 1917. The defendant not having rendered any account to the plaintiffs the suit out of which these appeals arise was instituted on the 19th September 1919 for an account from the defendant.

The learned Subordinate Judge has come to the conclusion that Musst. Rajo Kuer has discharged the defendant from accounting to her and that she is not entitled to an account from the defendant. Musst. Rajo Kuer being aggrieved by the decision of the learned Subordinate Judge has appealed to this Court and her appeal is Appeal No. 5 of 1921. So far as Musst. Shampati Kuer is concerned the learned Subordinate Judge has come to the conclusion that the defendant did not render any account to her and that she is entitled to an account from the defendant.

The defendant appeals from that portion of the judgment which is against him and his appeal is F.A. No. 193 of 1920. In my opinion the appeal of the defendant ought to be dismissed. Mr. Hasan Imam contended before us that the *mokhtarnama* in favour of the defendant was a joint *mokhtarnama* and that upon the finding of the learned Subordinate Judge that the defendant rendered an account to Musst. Rajo Kuer and that Musst. Rajo Kuer gave a complete discharge to the defendant, it must follow, so it was argued by Mr. Hasan Imam, that the liability of the defendant is at an end. The argument was developed to-day by Mr. Naresh Chandra Sinha who places considerable reliance upon S. 38 of the Indian Contract Act.

S. 38 of the Indian Contract Act provides that:—

"Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract" and it also provides that an offer to one of several joint promisees has the same legal consequences as an offer to all of them.

The question whether a discharge by one of two joint creditors operates as a complete discharge under S. 38 of the Indian Contract Act has been debated in different Courts and there is a considerable divergence of opinion on this important topic. But it seems to me that the question which has been argued before us is not one under S. 38 of the Indian Contract Act.

I will assume for the purpose of this decision that one of two joint creditors can give a valid discharge to a debtor so as to completely bind the other joint creditor. But the liability of an agent to account is not a liability that arises by virtue of a contract between the parties but is a liability that is annexed by law to the office of the agent. Therefore it seems to me that we have nothing whatever to do with S. 38 of the Indian Contract Act.

So far as the liability of an agent

to account to joint principals is concerned the authorities are unanimous that an agent cannot get a discharge by accounting to only one of two co-principals.

The position is put in this form in Halsbury's Laws of England. Co-principals may jointly appoint an agent to act for them and in such case become jointly liable to him, and may jointly sue him. The agent is not bound to account separately to one of several co-principals and if he has done so he is not thereby discharged from liability to the other or others unless the co-principals are also partners. (Vol. 1, P. 159, para. 347). At P. 187 the proposition is put in this form: "Where the monies are received on behalf of joint principals, the agent is liable to account to them jointly, and is not discharged by payment to one or more of them only, unless by authority of all.

Two cases are relied upon as authorities in support of the propositions which are laid down in the passages to which I have already referred. The first of these cases is the case of *Hatsall* v. *Griffith* (1). That was a case in which two persons, Brown and Prothero, on their behalf and on behalf of Hatsall, the plaintiff, employed the defendant as an agent to sell a ship in which they were all interested. The defendant sold the ship and paid over to Brown and Prothero their proportionate share of the purchase money; but he refused to make over the share of the plaintiff except on a joint receipt by all of them. His refusal to account to the plaintiff was upheld by the Court on the ground that he was not bound to account to only one of the co-principals. Baron Alderson put the point very clearly in these words: "The want of the joint concurrence of the three appears to have been the ground of the defendant's refusal to pay."

It follows from this decision that in order to give a discharge to an agent there must be a joint concurrence of all the principals and where such a joint concurrence is wanting there is in point of law no discharge at all. The other case is the case of *Lee* v. *Sankey* (2).

In that case two trustees employed a firm of Solicitors to receive the proceeds of the testator's real estate. The Solicitors paid over the money to one only of such trustees without the receipt or authority of the other. It was argued on behalf of the Solicitors that a discharge by one of the trustees operated as a complete discharge and was completely binding on the other trustees. The Court came to the conclusion that the receipt of one trustee was not a sufficient discharge to the Solicitors for the money which they had received by the authority of the two and that they were personally liable to make good the loss which had resulted to the trust estate.

In my opinion these cases are conclusive on the point which has been argued before us. I must accordingly hold that the discharge by Musst. Rajo Kuer did not absolve the Appellant from accounting to his principals jointly.

It was next argued that the suit is barred by limitation. The *mokhtarnama*, as I have already stated, was executed on the 13th December 1912. Mr. Naresh Chandra Sinha argues before us that upon the evidence of Musst. Rajo Kuer there was a demand for account and a refusal to render account in January 1914 and that accordingly time began to run from January 1914.

Mr. Naresh Chandra Sinha states before us that there is evidence on the record that each of the two ladies called upon the defendant to account to each of them. But he concedes that there is no evidence whatever that the two ladies jointly called upon the defendant to account to them. In my opinion upon the authorities which I have already discussed, the question of limitation must be answered in favour of the plaintiffs. It is sufficient to say that the defendant was not bound to account to the principals separately and that the principals acting separately could not have given a valid discharge to the Defendant.

(1) (1834) 2 C. & M. 679=1-9 E. R. 933=3 L. J. Ex., 191=4 Tyr. 487.

(2) (1872) L. R. 15 Eq. 204=27 L. T. 809=21 W. R. 286.

Mr Naresh Chandra Sinha puts his case on the terms of Art. 89 of the Limitation Act which provides that a principal has three years to bring a suit for account from the time when the account is, during the continuance of the agency, demanded and refused. Mr. Naresh Chandra Sinha argues that it being admitted by Musst. Rajo Kuer that there was a demand for account and a refusal to render account in January 1914, the time, so far as she is concerned, began to run in January 1914, and that, so far as Shampati Kuer is concerned, time began to run at the end of each year when she is alleged to have made a demand for account, a demand which was not complied with by the defendant.

The argument in my opinion is wholly inadmissible. The ladies could not have maintained separate suits, each on her own account. It may be that if Musst. Rajo Kuer were entitled to maintain a suit for account on her own behalf such a suit is barred by limitation. It may also be that if Musst. Shampati Kuer were entitled to maintain a suit for account on her own behalf that suit is barred by limitation.

But we are not in this litigation concerned with any suit that might have been brought either by Musst. Rajo Kuer or by Musst. Shampati Kuer. This is a suit by Musst Rajo Kuer and Musst. Shampati Kuer jointly and to such a suit it is clearly no answer to say that so far as Musst. Rajo Kuer is concerned, if she had filed a suit on her own behalf, that suit would have been barred by limitation and that so far as Shampati Kuer is concerned if she had brought a suit on her own account, that suit would have been barred by limitation.

This is a joint suit by the two ladies and there is no evidence that there was a joint demand for an account by the two ladies. In my opinion time began to run from the termination of the agency and it is conceded that time having begun to run from the termination of the agency, the suit is well within time.

The last point which has been argued before us is that the agent should not be called upon to account for *zirait* lands and *kasht* lands. Mr. Hasan Imam informed us yesterday that there was nothing in this point. But his learned junior has pressed this point before us with great vehemence. Having considered the point we are bound to agree with the view which was taken by Mr. Hasan Imam, namely, that there is nothing at all in this point. The learned vakil argues that there is nothing at all in the *mokhtarnama* which provides that the agent was to be in charge of *kasht* lands or *zirait* lands.

Conceding that there is nothing in the *mokhtarnama* to support the contention of the plaintiffs, it is equally clear that there is nothing in the *mokhtarnama* which supports the contention of the learned Vakil for the defendant that the agent was not to be put in charge of the *kasht* lands and *zirait* lands. As a matter of fact there is indication in the *mokhtarnama* that the agent was to be in charge of property yielding rent in kind and also that he was to be in possession of *kasht* lands.

In the first paragraph of the *mokhtarnama* it is provided that the agent should pay the rent of the *kasht* land in the possession of the plaintiffs to the landlord. It is argued that although there was a duty upon him to pay the rent due to superior landlords, there was absolutely no duty on him to look after the *kasht* lands. It appears that the agent has in his account debited the plaintiffs with the rent which he has from time to time paid to the landlord but has not credited the plaintiffs with the profits of the *kasht* land.

In my opinion it is impossible to take the view that although the agent was to pay the rent due to the superior landlord he was to have nothing whatever to do with those lands. The ninth paragraph of the *mokhtarnama* provides in distinct terms that the agent should get as his remuneration for his work 5 per cent. of the amount realised by him out of the income in cash and kind. It is very ingeniously argued by the learned Vakil that the income in kind referred to in para. 9 is the income derivable from *bhao'i* land and not from *kasht* land.

I am unable to agree with this contention, especially as there is nothing in the *mokhtarnama* to exclude the view

that the agent was to be put in charge of all the properties that belonged to the Plaintiffs. It is admitted by the learned Vakil that there are no documents in his favour. It is admitted by him that the evidence which has been adduced on behalf of the Plaintiff does not support him.

The learned Vakil has, however, referred us to a passage in the evidence of Musst. Shampati Kuer at P. 34 of the paper book. She distinctly states in that passage that since the appointment of Jagdip as the manager, Pandey, who used to work as her *ziratia*, has ceased to work as such. The whole of her evidence supports her case that the Defendant was put in charge of *kaht* lands as well as *zirait* lands.

It was then pressed before us that her previous deposition supports the case of the Defendant that she had her own servants to look after the *zirait* land. Her previous deposition is Ex. M. In the course of her evidence in a case between her and Musst. Rajo Kuer she stated as follows:—

"We are separate and some of our lands are separate but this disputed land is joint since Chengan Sahi's death. Brahmdeo cuts crops and divides on my behalf and Maha Rudra looks after Musst. Rajo's affairs. Jagdip was agent for both of us when the barley crop still lying in the field was cultivated and he cultivated it for both of us jointly."

In my opinion this evidence does not support the case of the Defendant. She was undoubtedly right in so far as she stated that at the time when she was giving her evidence Brahmdeo was looking after her *zirait* lands and Maha Rudra was looking after Rajo Kuer's land. But she stated very definitely that Jagdip was the agent for both when the barley crops were cultivated and that he cultivated them for both of them.

Undoubtedly since the termination of the agency of the Defendants other arrangements have been made by these ladies. But it does not follow that because other arrangements were made by the ladies in 1919, that is to say at the time when Musst. Shampati Kuer was giving her evidence in the case, that that arrangement was also in existence at the time when Jagdip was the agent of the ladies. In my opinion the decision of the learned Subordinate Judge so far as Musst. Shampati Kuer is concerned is right and must be upheld. I would accordingly dismiss F. A. No. 193 of 1920 with costs

I come now to Musst. Rajo Kuer's appeal and it seems to me that that appeal must be decided upon our view of law that an agent cannot discharge himself by accounting to only one of two co-principals. The finding of the learned Subordinate Judge is, not that the Defendant did account to Musst. Rajo Kuer, but that Musst. Rajo Kuer in order to defeat the interests of Musst. Shampati Kuer in a threatened litigation between Musst. Rajo Kuer and Shampati Kuer, entered into a conspiracy, for the finding of the learned Subordinate Judge comes to that, with Jagdip Prasad by which she accepted the position that Jagdip had rendered account to her.

These accounts upon which reliance is placed are Exs. B. to B 3. The accounts are headed "Accounts of receipts and disbursement of the estate of Musst. Rajo Kuer, proprietress." There is no doubt whatever that a conspiracy was on foot in order to defeat the interests of Musst. Shampati Kuer and the question which we have now to consider is this, whether the transaction between Musst. Rajo Kuer and Jagdip Prasad Sahi was such as now precludes Musst. Rajo Kuer from placing the true facts before the Court and claiming an account from Jagdip Prasad Sahi.

There are two questions involved in the argument, a question of law and a question of fact. Now, the question of law which I have already discussed is a complete answer to the defence taken in this case. If it be the law that an agent cannot discharge himself by accounting to one of the co-principals, it must follow that the transaction between Musst. Rajo Kuer and Jagdip Prasad Sahi is wholly ineffectual so as to save the Defendant from accounting to the plaintiffs as to the profits that came into his hands in the course of his agency.

But apart from any such question, it seems to me that the truth being known to both the parties;

there is no case of estoppel which would prevent Musst. Rajo Kuer from claiming accounts from Jagdip Prasad Sahi.

Mr. Naresh Chandra Sinha concedes that this is not a case of estoppel at all. But his argument is that the question being one of discharge, Musst. Rajo Kuer was entitled to discharge Jagdip Prasad from accounting to her. But when we are considering whether Musst. Rajo Kuer did absolve Jagdip Prasad from accounting to her we are bound to consider the case made on this point by Jagdip Prasad.

Now, his case is that he took the accounts to Musst. Rajo Kuer; that he explained them to Musst. Rajo Kuer; that Musst. Rajo Kuer accepted those accounts and admitted them to be correct and that Musst. Rajo Kuer in a *Mukhtarnama* which she subsequently executed in favour of Maha Rudra stated very definitely that Jagdip Prasad Sahi had explained all the accounts to her and that she had accepted those accounts as correct. If there be no estoppel, Musst. Rajo Kuer is entitled to say that the statements which were made by her have no foundation in fact; and the decision of the learned Subordinate Judge supports the evidence of Musst. Rajo Kuer.

But the learned Subordinate Judge has taken the view that having entered into a fraudulent conspiracy she ought not to be allowed to claim an account from Jugdip Prasad. I am unable to take this view. That conspiracy was not carried into effect and no equities have arisen which would induce us to hold that Musst. Rajo Kuer is not now entitled to put the true facts before the Court. If indeed the conspiracy had succeeded and Musst. Shampati Kuer had been defeated in her claim, no doubt it would be impossible to hold that Rajo Kuer was entitled to claim an account against Jagdip.

But as I have said before, the conspiracy was not carried into effect and no equities have arisen which would prevent us from giving the appropriate relief to the Plaintiff. It is not the case of the Defendant that Musst. Rajo Kuer gave him a complete discharge without taking any accounts from him. It would be impossible to support such a case, if such a case had been made, having regard to the fact that the dealings were between principal and agent, and that the principal was an illiterate *pardanashin* lady.

The whole argument of Mr. Naresh Chandra Sinha is that Musst. Rajo Kuer was entitled to give a valid discharge to the agent without any accounts from him. It is sufficient to say that that is not the case of the Defendant and that that case will not be supported in any Court of law.

The case of the Defendant is that he rendered an account to Musst. Rajo Kuer, and that Musst. Rajo Kuer gave him a discharge after accepting the accounts as correct. The learned Subordinate Judge has found that the Defendant did not render any accounts to Musst. Rajo Kuer and that the accounts Exs. B to B 3 are not correct. It is conceded that there is no case of estoppel which would prevent Musst. Rajo Kuer from claiming an account now from the Defendant.

I hold that the plaintiffs are entitled to an account from the Defendant. The appeal of Musst. Rajo Kuer must accordingly be allowed, and she will be entitled to the general cost of the appeal, but not to a separate hearing fee.

The result is that the decree passed by the learned Subordinate Judge must be varied in accordance with the judgment and the defendant must pay the costs of the suit to the Plaintiffs.

Kulwant Sahay, J.—I agree.

Appeal No. 193 dismissed.
Appeal No. 5 allowed.

A. I. R. 1923 Patna 470

MULLICK AND BUCKNILL, JJ.

Jaldhari Rai and others—Defendants—Appellants

v.

Muhammad Abdul Kabir and others—Plaintiffs—Respondents.

A. Nos. 760 of 1920, 360, 361, 364, 365, 367, 368, 369, 370, 372, 373, 374 and 700 of 1921, decided on 30th January, 1923, from Appellate decree of Subordinate Judge, Second Court, Gaya.

Arbitration—Award partly bad—Court cannot declare it valid in part, or remit it for amendment.

Where an arbitration is made without the intervention of a Court and an application is made to file the award, then if the award is good in part and bad in part, the Court cannot remit to the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part 19 C. W. N 476 and 4 P. L J 394 Foll. [P. 473, C 1.]

T. N. Sahai and *D. G. Varma*—for Appellants.

N. C. Sinha—for Respondents.

Mullick, J.—These 14 second appeals arise out of 14 suits brought by the Mukarraridars of the 10 annas odd piece share of Mauza Chehal against their tenants for declaration of title and recovery of possession of certain holdings. It appears that the holdings were held partly on *naqdi* and partly on *Bhauli* rent and on various dates in the year 1910 the tenants executed *Kabuliyats* in favour of the plaintiffs commuting the *bhauli* rents into *naqdi* rents at rates of Rs. 12 and Rs. 10-8 0 per *bigha*.

Shortly after the execution of these *kabuliyats* the plaintiffs obtained rent decrees against the defendants for the arrears of part of the year 1315, the whole of the years 1316, 1317 and for part of the year 1318, Fasli. These decrees were obtained after contest and it seems that at the time when judgment was given certain suits were pending in which the tenants impeached the validity of the *kabuliyats* and asked that they should be set aside.

In making the decrees in the rent suits the Court made an express reservation that the question of the validity of *kabuliyats* was not decided: that question was decided about a month later when the declaratory suits were dismissed. The relevant dates of disposal were different for the different tenants but taking as an example the principal tenant Jaldhari Rai, who is concerned with suit No. 140 of 1919 corresponding to S. A. 760 of 1920. I find that the rent decree in his case was passed on the 18th April, 1912 and his declaratory suit was dismissed on the 30th May 1912.

Nothing further appears to have been done by either party in the Civil Court for some time, and the contest was shifted to the Criminal Courts and after various orders had been taken before the Sub-Divisional Magistrate of Nawadah we find that on the 30th June 1913 a number of tenants, including Jaldhari made an application to the Collector of Gaya praying that disputes between the landlords and themselves might be settled by the Executive Authority. It is to be noticed that in this application the only prayer was that the *Malik* might be induced to take his decree money in instalments. No other matter in dispute was mentioned to the Collector. The petition was sent by the Collector to the Sub-Divisional Officer of Nawadah and after considerable difficulty the parties were prevailed upon to resort to arbitration.

Now the first petition for a reference to arbitration was one made by the tenants on the 1st October, 1915 to the Sub-Divisional Officer of Nawadah. At that time a proceeding under section 107, Criminal Procedure Code, was pending against Abdul Aziz, the son of one of the proprietors, and he had been called upon by the Magistrate to show cause why he should not give security to keep the peace towards his tenants, and on the 2nd October, 1915 the plaintiffs replied with an application before the same Officer and agreed to an arbitration and to the appointment of Rai Saheb Beni Madhab Prasad. It is clear that these two petitions taken together form the foundation and the basis of the arbitrator's jurisdiction.

There are also 4 other petitions which were made to the arbitrator himself and which amplify the matters in dispute but do not in any sense constitute the original reference to arbitration. They detail on the one side or the other the various grievances

of the parties and ask the arbitrator to take them into consideration.

It will be as well at this stage to take these six petitions in their chronological order.

Exhibit X.—The tenants' petition dated the 1st October 1915, recites that a case for executing a fresh *patta* in respect of the lands held on the *naqdi* system in the said Mauza and for making the dues payable by instalments is pending before Sub-Divisional Magistrate of Nawadah and that the petitioners have appointed Rai Saheb Beni Madhab Prasad as arbitrator "to decide of his own accord regarding the execution of fresh *patta* either *naqdi* or *bhauli* and settle the dues and make them payable by instalments and the Maliks (*Mukarraridars*) and the petitioners (the *raiyats*) will accept the same"

It is to be noted that by this time the landlords had executed their rent decrees and had brought the holdings of all the defendants in the present suits to sale and taken delivery of possession and I think it is clear that this petition refers to the necessity for the execution of a fresh *patta* in order that arrangements might be made between the landlords and the tenants for the resettlements of the holdings upon a new contract.

It is also to be noticed that the petition does not in any way state that there was any dispute pending between the parties as to the amount of the arrears decreed by the Civil Court. The only dispute mentioned was, whether payment was to be made in one instalment or was to be distributed over a number of years; and as for the dues to which reference is made, it is clear that these dues refer to the rents accruing between the time of the rent decrees and the date of the award.

Exhibit B.—The landlords' petition of the 2nd October 1915 is more general in its terms and the following words in the vernacular are sufficient to explain what in the opinion of the landlords was the dispute submitted to arbitration. These words are:—

"*Is Kisse kojo badarmian hamlog kepesh hai kisi panch ke sapurd kiya jae. Banabir fidwian raiyan o fidwian Mukarraridaran ne Rai Saheb Babu Beni Madho Prasad Saheb, Hony. Magistrate Nawada ko bakhushi khahish apene apne panch waste infasal amoorat tesfia talab to mokurar kia.*"

It refers to the dispute as "*Is kisse*" that is to say, this matter or this story; and by implication the reference is to the disputes mentioned by the tenants in their petition of the previous day. The landlords meant that the matters submitted to arbitration were the matter of the execution of a fresh *patta* and the settlement of the question of instalments. No other matter was within the jurisdiction of the arbitrator.

The next petition (Ex. 16) is one by the tenants to the arbitrator on the 25th October 1915, asking him to settle the following points:—

(1) the execution of the *patta*;
(2) the settlement of dues;
(3) the question of instalments;
(4) the remission of 2 *kathas* in every *bigha* according to the practice of Survey department;
(5) the question of expenses for Gilandazi.

To this the landlords made two replies;

(1) by a petition dated the 2nd October, 1915 by the landlords of the 5 annas 4 pies share and (2) by a petition (Ex. 30) dated the 7th November 1915 by the plaintiffs who are now before us. There was nothing of much interest in the petition of the 5 annas 4 pies landlords; but in exhibit 30 the plaintiffs asked for a determination on the following points namely,

(1) mesne profits;

(2) the houses erected by Jaldhari since the delivery of possession to the landlords;

(3) Certain wrong entries in the settlement records in favour of a *thikadar* named Karu Rai;

(4) the length of the standard of measurement; and

(5) the rate of rent at which the lands should be resettled with the *raiyats*.

Now, with regard to the last point, it is quite clear that the landlords asked for an enhanced rate and also contended that unless the tenants who asked for resettlement paid up the whole amount of the dues, resettlement should be refused or, at all

events, resettlement should be given only in proportion to the amount paid.

There were two further petitions, one by the tenants dated the 12th December 1915, and the other exhibit B-1 by the plaintiffs on the same date. In the former the tenants pleaded that the *kabuliyat* rent was too high and asked that a fair rent be fixed. They also asked for instalments; but in paragraph 4 of the petition there was an altogether new request, namely, that the dues payable should be calculated not from the date on which the tenants became liable but from the date on which terms of a fresh *patta* were fixed by the arbitrator.

This is the interpretation which I give to paragraph 4 of the petition and it has at least the merit of explaining the arbitrator's decision to remit the claim for the years preceding 1318. The reply of the landlords (Ex. B-1) asserted that the *naqdi* rent as fixed by the *kabuliyat* was fair and in paragraph 5 it was prayed that the arbitrator may after considering all the facts and referring to the papers, decide the matter accordingly."

Now, on a perusal of these 6 petitions, it is quite clear that the arbitrator had no authority to remit any part of the money which the plaintiffs were entitled to claim by the decree of the 18th April 1912. The arbitrator submitted his award on the 29th April 1916. He remitted the claim in respect of 1315, 1316, 1317 and for 1318 he allowed rent not at the *kabuliyat* rate (which was claimed in the plaint) but at the rate of Rs. 10, for lands assessed in the *kabuliyat* at Rs. 12-8-0 and at Rs. 7-8-0 for lands assessed at Rs. 10. From the year 1319 up to the date of his award he allowed the plaintiffs compensation at the reduced rates fixed by him but for the *naqdi* lands he accepted the rates entered in the plaintiff's previous *jamabandis*; and with regard to the question of instalments, he directed that the defendants should pay down in cash a quarter of the sum and that for the remainder they should execute a *kistbandi* for payments spread over a period of 7 years; and he also directed that the tenants should mortgage their holdings if it "was legally necessary to do so."

Although it is alleged by the defendants that the plaintiffs accepted this award and payments were made by the defendants upon the basis of this award, it has been found as a fact by the lower appellate Court that these allegations are false; and we must now take it that the award was not accepted by the plaintiffs. It is said that the 5 annas 4 pies *maliks* have accepted the award; but with them we are not concerned. The material point is that on the 5th April 1919 the plaintiffs filed the suits now before us impeaching the award, and praying that it should be declared null and void; and they also prayed for declaration of their title as auction purchasers and for recovery of possession against the defendants.

The Munsif tried all the suits together and found that the award was valid.

On appeal by the landlords that decree has been set aside and the Subordinate Judge has decreed the suits and directed the trial Court to determine the mesne profits.

Now it is a fact that since the year 1315 the tenants have not paid one penny out of the rent due to the landlord and that they have been in occupation of these lands in spite of delivery of possession given to the landlords by the Civil Court; after the rent suits there was a cadastral survey and settlement of the village, and they were recorded as trespassers in occupation. Unless the award is valid they cannot resist ejectment and to me it is quite clear that the learned Subordinate Judge is right in the view that he took of the case.

There can be no doubt that upon the terms of reference as stated in Exhibit X and Exhibit B which are the only two documents on which his jurisdiction is founded, the arbitrator had no authority whatsoever to remit any portion of the decree money. The question was never in dispute and the tenants, when they asked the Collector and the Sub-Divisional Officer to assist them in the matter of an arbitration, never dreamt of disputing their liability. The rent suits were hotly contested; no reduction was

claimed at the trial and it was not till their petition of the 12th December to the arbitrator that the idea came into the heads of the defendants to ask that the dues should be paid not from the date on which they accrued but from the date on which the award was given

That being so, the award was in excess of jurisdiction and was bad; and the question is, whether the bad part can be separated from the good part and the Court can give modified relief by affirming the good part. I think it is not possible to do so in the present case.

Whatever the law in England may be, it is now settled in India that where an arbitration is made without the intervention of a Court and an application is made to file the award, then if the award is good in part and bad in part, the Court cannot remit it to the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part.

The High Courts in India are agreed upon this point and it is necessary only to cite *Dinabandhu Jana* v. *Chintamoni Jana* (1) and *Kunj Lall* v. *Banwari Lall* (2). In this last mentioned case the learned Judges pointed out that it was unfortunate perhaps that in this country clause 21 of the 2nd Schedule of the Civil Procedure Code does not give any power to confirm an arbitration in part where it has been made without the intervention of the Court but that the law was that even where a portion of the award open to exception can be separated from the rest, the only course open to the Courts was to refuse permission to file the award. If, therefore, in the present case, the tenants cannot enforce the award in Court, they ought not, in my opinion, to be allowed to set up the award as a defence in this suit.

The other ground upon which exception must be taken is that the arbitrator has given a direction with regard to the execution of a mortgage bond for the liquidation of the arrears which is wholly uncertain and contingent. He says that if it is legally necessary then the tenants will execute a mortgage as security for payment of the instalments. Now, what does this mean? Does it mean that it is contingent on legal opinion obtained by the plaintiffs or legal opinion obtained by the defendants? It may be assumed that the legal advisers of the plaintiffs will declare the necessity of a mortgage and those of the tenants will deny it. Who is to decide the point? The arbitrator has not decided it, and, therefore, the award is provisional and uncertain.

There is yet another objection. The plaintiffs are co-sharer landlords and have purchased the holdings of the tenants and are entitled to retain them on payment, to the 5 annas 4 pies landlords, the proportionate share of the rent due to them. If the tenancies are occupancy holdings not capable of transfer without the consent of the landlord, then obviously a mortgage by the tenants in favour of the plaintiffs will not bind the 5 annas 4 pies landlords and will be wholly ineffectual in giving the plaintiffs any security unless the latter gave their consent to the transfer. There also the award is provisional, uncertain and contingent.

As for the other points argued before us I think the arbitrator had authority to reduce the rent as he has done. The Kabuliyat executed by the tenants was for the period 1318 to 1326 F. S. inclusive, and while holding that the rents in that contract were fair, the arbitrator made an appeal for mercy and compelled the landlord to show some generosity; his decision may not have been logical but upon the terms of the submission he was entitled to make the reduction.

The result, however, is that the plaintiffs are not bound by the award and are entitled to recover possession of the suit lands. The plea of payment which was set up by the tenant, though believed by the Munsif has been disbelieved by the Subordinate Judge and we are bound by that finding of fact in second appeal.

In these circumstances the learned Subordinate Judge's decree is right

(1) (1915) 19 C. W. N. 476 = 26 I. C. 697.
(2) (1918) 4 P. L. J. 394 = 48 I. C. 711.

and the appeals must be dismissed with costs.

With regard to the question of mesne profits, the Subordinate Judge has already decided that the matter is to be determined by the trial Court and therefore, the inquiry upon that point will take its course.

Bucknill, J.—I agree.

Appeals dismissed.

A. I. R. 1923 Patna 474

MULLICK AND BUCKNILL, JJ.

Emperor

v.

Ali Hyder—Accused.

Jury Ref. No. 2 of 1922, decided on 11th May 1923.

Criminal P. C., S. 303—Reasons should not be asked of the Jury for their verdict.

It is not competent to the Sessions Judge after a clear verdict was returned by the Jury to ask them for their reasons 58 I. C 829 Foll.

[P. 474, C. 2]

H. L. Nandkeolyar—for the Crown.

S. A. Sami—for Accused.

Mullick, J.—The accused was charged before the Sessions Judge of Patna with having committed cheating under section 420 of the Indian Penal Code on the 5th November 1921, 27th November 1921 and the 5th December 1921. It is alleged that the accused presented to the Booking Clerks at Barh Station on the East Indian Railway certain forged military warrants and induced the railway officers to deliver to him either passes or tickets as follows:—

On the 25th November a pass for 5 soldiers' tickets from Barh to Bombay. On the 27th November two intermediate and 3 third class soldiers' tickets from Barh to Bombay and on the 5th December one pass for five third class passenger tickets from Barh to Giridih.

The case was tried with the assistance of a Jury, who were unanimously of opinion that the accused should be given the benefit of doubt and who returned a verdict of not guilty. The Sessions Judge considers that the verdict is improper and under section 307 of the Criminal Procedure Code he has referred the case to this Court for orders.

[The Judgement here discussed the evidence and continued as follows:—]

There is sufficient evidence to prove the guilt of the accused and that the verdict of the Jury is one which no reasonable man could have given. If the verdict had turned merely upon the appreciation of oral evidence capable of being viewed either way, but as to which we were inclined to take a different view from that of the Jury, it is clear that we could not have interfered.

But, in my opinion, the evidence here is so coercive that it is impossible to draw any conclusion except one adverse to the accused. In this view of the case it is our duty to interfere, and having considered and given due weight to the opinion of the Jury and to the opinion of the Sessions Judge I think that to affirm the verdict would be to assist a gross miscarriage of justice. I accordingly reverse the verdict and find the accused guilty.

Our attention was drawn to certain authorities of this Court, namely, *Emperor* v. *Punit Chain* (1) and *Emperor* v. *Bhuilotan Singh* (2) and it was contended that it was the duty of the Sessions Judge, to question the Jury as to the reasons for their verdict, and that in the absence of informatien as to the exact circumstances which operated on the minds of the Jury this reference should be discharged.

We are unable to accept this view of the duties of the Judge, and we think the law is correctly stated in *Edon Korikor* v. *King Emperor* (3). It was not competent to the Sessions Judge after a clear verdict was returned by the Jury to ask them for their reasons.

The result is that we find the accused guilty of the three offences charged and we sentence him to rigorous imprisonment for three years.

Bucknill, J.—I agree.

Reference accepted.

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(1) A. I. R. 1922 Pat 348=3 P. L. T. 413=23 Cr. L. J. 421.

(2) A. I. R. 1921 Pat. 191=2 P. L. T. 655=6 P. L. J 264=23 Cr. L. J. 11

(3) (1920) 58 I. C. 829.

A. I. R. 1923 Patna 475

MULLICK AND ROSS, JJ.

Maulvi Muhammad Fahimal Haq—Plaintiff—Appellant

v.

Jagat Ballav Ghosh—Defendants—Respondents.

F.A. No. 3 of 1921, decided on 25th November, 1922, from the decision of the Sub-Judge, Cuttack, dated 28th September 1920.

(a) *Civil P. C., O. 1, R. 8—Beneficiary in a Mahomedan Waqf—Can sue to set aside alienations by Mutwalli without recourse to O. 1, R. 8.*

A beneficiary of a trust in respect of a Mahomedan Waqf interested in the maintenance of a mosque or other charitable institution may, without having recourse to the provisions of Rule 8, Order 1, Civil P. C. and without suing in a representative capacity on behalf of the other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the properties are the subject of the trust and that they cannot be alienated. 5 All. 497; 7 All. 178 F. B. and 24 B. 170 Foll. [P. 477, C 2.]

(b) *Specific Relief Act, S. 42—Further relief not prayed for—Suit is not maintainable—Transfer void in law—Transferor himself can question it—No equity exists between transferor and transferee—Trust.*

A suit for declaration by a beneficiary of a Mahomedan Waqf to set aside the alienation by the mutwalli is not maintainable without at the same time suing for consequential relief of possession 16 C.W.N. 838 Foll. [P. 478, C.1.]

The power of Courts in India to entertain suits of a Civil nature does not carry with it the general power of making declarations, except in so far as such power is expressly covered by statute. It is now settled that even if the grantor has himself been implicated in the abuse of the trust, the Courts will interfere at his instance to prevent a repetition of the abuse though his previous conduct might be a reason for excluding him from the administration of the trust property. The general principle in these cases is that where the transfer is void in law, no quest on of equity as between the transferor and the transferee can arise. [P. 477, C. 1, P. 478, C 1 & P. 479, Cs 1 & 2.]

(c) *Limitation Act, Art 120—Suit to set aside alienation by mutwalli is within the article.*

A suit to contest alienation by a Mahomedan Mutwalli and for possession must be brought within 6 years from the date of alienation. 8 I. C 357 Ref. [P. 479, C. 2.]

(d) *Limitation Act, S. 23—Applicability—Declaratory suit—Section does not apply.*

The principle of section 23 which deals with continuing wrongs can have no application to a declaratory suit and there is no recurring cause of action for a declaratory relief. 20 Cal. 906, Diss. [P. 480, C. 2.]

B. N. Das—for Appellant.

B. N. Bose—for Respondent.

Mullick, J.—Suit No. 746 of 1919 out of which this appeal arises relates to a 12 annas 6 pies share in Taluk Kamong *Zamindari* bearing *Touzi* No. 1451, and to a 1 anna 6 pies 17 *krants'* share in Taluk. Gobindpur *Zamindari* bearing *Touzi* No. 1844, in the district of Cuttack. The properties are alleged by the plaintiff, Muhammad Fahimul Haq, the son of Maulavi Enamul Haq, to be the subject of a *waqf* created by his ancestress, Musammat Asmatunnissa, by a deed dated the 31st January, 1848, for the endowment of a mosque and a *khanka* in *mauza* Farhattabad, appointing herself as the first *mutwalli*, and, as her successor, her husband, Maulavi Muhammad Faruk, by whom the properties had been conveyed to her by two *hibanamas*, dated the 1st September 1836, and the 14th October 1840, in lieu of deferred dower.

It is alleged that Asmatunnissa was succeeded by Muhammad Faruk, who was succeeded by his son Muhammad Kamal *alias* Muhammad Faik, who again, upon his death, was succeeded by his eldest son, Abdul Gunny, defendant No. 3, in this suit. The plaintiff is the son of Enamul Haq who was Muhammad Faruk's step-brother. He does not claim to be the *mutwalli* but as a member of the founder's family asks for a declaration, that the defendant No. 3 had no proprietary right in the properties in suit and that a mortgage bond in respect thereof, dated the 18th May, 1900, in favour of defendant No. 1 and defendant No. 2 and the auction sale following thereupon, dated the 15th August, 1907, are illegal and inoperative.

It is admitted that the defendant No. 3, Abdul Gunny, mortgaged both properties to defendants Nos. 1 and 2 on the 18th May, 1900, and that in execution of the decree obtained on the mortgage, the mortgagees took possession on the 5th February, 1908, and that they subsequently sold property No. 2 to the defendant No. 22, who is Sitanath Roy, *shebait marfatdar* of Sri Hanuman Jiu Thakur. The second declaration which the plaintiff seeks runs as follows:—

" That the possession of the defendants Nos. 1 and 2 is that of a trustee and they ought not to have any connection with the property in claim

inasmuch as they are not *mutwallis* and are unfit to act as such".

In the plaint there were three other prayers as follows:

"(*Ga*) That if the Court considers that the plaintiff is fit to act as *mutwalli* then it may be decided that the disputed properties may be managed by the plaintiff for the purpose of discharging religious duties in connection with the aforesaid Farhattabad Mosque;

(*Gha*) that if the Court so considers it may settle any other scheme for the management of the disputed properties for the benefit of the *masjid*; and

(*Cha*) that any other relief may be granted to the plaintiff which the Court considers fit".

These prayers were considered by the learned Subordinate Judge to be for consequential relief within the meaning of section 42 of the Indian Specific Relief Act, and, upon the plaintiffs refusing to pay *ad valorem* court-fees thereon, the Court, by an order, dated the 1st September, 1920, directed that they should be deleted.

The suit was defended at first by defendants Nos. 1 and 2 and upon their pleading that it could not proceed in the absence of defendant No. 22, the vendee of property No. 2, the idol Sri Hanuman Jiu was added as a party through his *marfatdar* Sitanath Roy who has also filed a written statement.

The Subordinate Judge finds that the *waqf* created by Asmatunnissa was valid and operative and that as the plaintiff has declined to ask for any consequential relief the suit is not maintainable by reason of the provisions of section 42 of the Specific Relief Act; he also finds that the suit is barred by the rule of six years' limitation. He has accordingly dismissed the suit and the plaintiff appeals.

There was another suit tried jointly with this suit, namely. Suit No. 112 of 1919 in regard to the same properties in which the plaintiff Abdul Sakur, claimed to be the *mutwalli* of the *waqf* upon appointment by Abdul Gunny, three or four years before the suit. In that suit he, in addition to the declaration mentioned above, claimed recovery of possession.

The learned Subordinate Judge found that the suit was properly framed but that as Abdul Sakur had not established that he had been appointed *mutwalli* by his father, Abdul Gunny, he was not competent to maintain it. In the course of the trial Abdul Gunny died and Abdul Sakur asked leave to amend the plaint by adding a claim that he was entitled to succeed to the post of *mutwalli* as the eldest son of Abdul Gunny. That prayer for amendment was not allowed and in the result the suit was dismissed.

There was a third Suit, No. 244 of 1919, in which the plaintiff, Muhammad Fahimul Haq, asked for declarations similar to those in Suit No. 746. That suit also was dismissed. As there are no appeals against decrees in Suits Nos. 112 and 244 we are no longer concerned with them.

The only question, therefore, for decision is one of law, namely, whether Suit No. 746 is maintainable.

Taking the position most favourable to the appellants and assuming for the moment that notwithstanding the cross-objections of the respondents the trust in regard to the mosque was in respect of specific properties for a specific purpose, that it was valid under Muhammadan Law and that the transfers made by Abdul Gunny in favour of defendants Nos. 1 and 2 and, therefore, also the sales by defendants Nos. 1 and 2 in favour of defendant No. 22, were invalid, the sole question for decision is whether the plaintiff, Muhammad Fahimul Haq, is entitled to the declaration which he seeks.

Not being the *mutwalli*, even though he is a member of the family of the founder, he is no better than a member of the public interested in the trust and it was open to him to bring a suit under section 92 of the Civil Procedure Code for the removal of the trustee, the appointment of a

new trustee, the vesting of property in the trustee, for the settling of a scheme and for the other reliefs enumerated in that section; but the plaintiff has not taken that course, and, in my opinion, the learned Subordinate Judge was right in holding that he can obtain no relief under the general law unless he asks for consequential relief in the shape of recovery of possession. His suit clearly offends against the express provisions of section 42 of the Specific Relief Act.

It is now settled that a beneficiary of a trust in respect of a Muhammadan *waqf* interested in the maintenance of mosque or other charitable institution may, without having recourse to the provisions of Rule 8, Order I, Civil Procedure Code, and without suing in a representative capacity on behalf of the other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the properties are the subject of the trust and that they cannot be alienated.

It is true that in *Delroos Banoo* v. *Nabab Syed Ashgur Ali* (1) it was held that in respect of a property which is subject to the provisions of Act XX of 1863 no suit could be brought by a beneficiary without the leave of the principal Civil Court as required by section 18 of the Act. But that decision was virtually overruled in *Jan Ali* v. *Ram Nath Mundul* (2) where it was held that the plaintiff in such a suit may sue without obtaining permission under section 18 of the Religious Endowment Act, but he must sue in a representative capacity after complying with the provisions of section 30, Civil Procedure Code of 1882, which corresponds to rule 8, order I of the present Civil Procedure Code.

A still wider view has been taken in the later ruling of the Allahabad High Court in *Zafaryab Ali* v. *Bakhtawar Singh* (3) and in a Full Bench decision of the same Court in *Jawahra* v. *Akbar Hussain* (4).

The judgment of Mahmood, J. in this last mentioned case is clear authority for the proposition that the trust property vests in God and the right of a Muhammadan, who is entitled to use a mosque to bring a suit for the recovery of property belonging to it, is comparable to a right of suit in respect of a private road which many persons have a right to use. Every Mussulman who derives any benefit from such a *waqf* is entitled to maintain an action against the *mutwalli* to establish his right thereto or against a trespasser to recover any portion of the *waqf* property which has been misappropriated, without joining any other person who may participate with him in the benefit. It is clear that, if the *mutwalli* himself is the offender or if he is unwilling to act, the beneficiary must have the power to recover the property.

This also was the view taken in *Kazi Hassan* v. *Sagun Balkrishna* (5). The judgment of Parson, J. in that case is clear authority for the proposition that a right of suit for a declaration and for the recovery of the property for the benefit of the trust will lie. Ranade, J., the other member of the Bench, was of opinion that the suit was maintainable for the declaratory relief which was the principal cause of action and that the relief as to possession might also be claimed under certain circumstances if it was proved that the plaintiff had succeeded to the office of the *mutwalli* or was rendering service at the mosque.

The main question argued before the Hon'ble Judges was whether the suit could be brought without resorting to the procedure of section 539, Civil Procedure Code of 1882, and on a careful reading of the judgment of Ranade, J. it would appear that he did not hold that if there was consequential relief open to the plaintiff, the

(1) (1875) 15 B. L. R. 167=23 W. R. 452.
(2) (1882) 8 Cal. 32=9 C. L. R. 486.
(3) (1883) 5 All. 497=(1883) A. W. N. 91.
(4) (1884) 7 All. 178=(1884) A. W. N. 324 (F. B.)
(5) (1900) 24 Bom. 170=1. Bom L. R. 649.

plaintiff was entitled nevertheless to ask for a mere declaration. I think what that learned Judge intended to hold was that if it should turn out that the plaintiff was not under the circumstances entitled to recovery of possession then a suit for a mere declaration would lie; this was also the interpretation put upon this decision by Dundas, J. in the Lahore High Court in *Mt. Afiman* v. *Hamiuddin Hussain* (6).

The question then is whether consequential relief being clearly available to the plaintiff in the present suit, he is entitled to a mere declaration. In my opinion, he is not so entitled, and I rely upon the observations of Jenkins, C. J. in *Mt. Dookali Koer* v. *Kedar Nath* (7), where the learned Judge defines the scope of section 42 of the Specific Relief Act as follows:

"The limit imposed by section 42 of the Specific Relief Act is on decrees which are merely declaratory and does not expressly extend to decrees in which relief is administered and declarations are embodied as introductory to that relief. For such declarations legislative sanction is not required as they rest on long established practice. But for all that the Court should be circumspect and even chary as to the declarations it makes; it is ordinarily enough that relief should be granted without the declaration".

The decision of their Lordships of the Calcutta High Court in *Ashraf Ali* v. *Muhammad Nurajjoma* (8) would seem to offend against this principle, but the circumstances of that case were peculiar. There the plaintiffs, who were worshippers at a mosque, which was *waqf* property, sued for a declaration that the alienations made by the *mutwalli* were void and inoperative and for a decree for *khas* possession with mesne profits either in favour of the plaintiffs or the *mutwalli*. The prayers for *khas* possession and mesne profits were disallowed and the plaintiffs were satisfied with a mere declaration.

On second appeal by the contesting defendant the High Court held that a suit by a worshipper was maintainable and they dismissed the appeal. There was no cross appeal by the plaintiffs in regard to the consequential relief and under the circumstances the Court had no option but to maintain the decree of the Court below in the form it was passed. That decision, however, does not seem to be authority for the proposition that a Court can give a decree in violation of the provisions of section 42 of the Specific Relief Act.

It is argued before us that even though section 42 might be a bar, that section is not exhaustive and that apart from statutory authority the general law entitles the plaintiff to a declaration. In my opinion there is no substance whatever in this contention. It is now well settled that the power of Courts in India to entertain suits of a civil nature does not carry with it the general power of making declarations, except in so far as such power is expressly covered by statute.

In *Srimathoo Vijia Raghonadha Ranee Kolandpuree Natchiar* v. *Dorasinga Tever* (9) their Lordships of the Judicial Committee in stating the history of declaratory decrees in India and in construing section 15 of the Civil Procedure Code of 1859, observed as follows:

"Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that clause," and their Lordships finally held that a declaratory decree could not be made unless there was a right to consequential relief capable of being had in the same Court or in certain cases in some other Court. It may be contended that if a beneficiary is permitted to sue for recovery of alienated trust property and not to ask the Court to deliver it to the offend-

(6) (1919) 58 P. W. R. 1919=51 I. C. 799.

(7) (1912) 39 Cal. 704=15 I. C. 427=16 C. W. N. 858

(8) (1919) 23 C. W. N. 115=49 I. C. 355.

(9) (1875) 2 I. A. 169=15 B. L. R. 83=23 W. R. 314=3 Sar. 476 (P. C.)

ing *mutwalli*, the Court will in effect be assisting in a fraud upon the alienee and in violating the general principle that a grantor cannot derogate from his grant. That certainly appears at first sight to be a contention worthy of some attention, but the decided cases all show that the Courts have paid more regard to the protection of the trust than to the protection of the alienee and it is now settled that even if the grantor has himself been implicated in the abuse of the trust the Courts will interfere at his instance to prevent a repetition of the abuse though his previous conduct might be a reason for excluding him from the administration of the trust property.

In *Juggutmohinee Dossee* v. *Sookhmoney Dossee* (10) their Lordships of the Judicial Committee observed that they would not decline to protect the property and leave it further exposed to loss and decline to make a declaration that it is trust property merely because they would not trust the plaintiff with its administration.

That case was followed in *Subbarayudu* v. *Kotayya* (11) where the Court went so far as to hold that a hereditary *dharmakarta* of a temple, who had assigned his office to a zamindar and consented to a decree being passed on the footing of such assignment, is competent nevertheless to bring a suit to set aside a Court sale of temple lands, treating such assignment as a nullity.

To the same effect is *Srimati Mallika Dasi* v. *Ratan Mani Chakervarti* (12), where a shebait who had mortgaged his priestly office with the emoluments was permitted to plead as a defence to a suit by the mortgagee that the transfer was void and inoperative. The general principle in these cases is that where the transfer is void in law no question of equity as between the transferor and the transferee can arise.

The learned Vakil for the appellant finally asks that he may be permitted to amend his plaint so as to include a prayer for consequential relief. In my opinion that prayer cannot be allowed at this stage in particular as the prayers *(Ga)*, *(Gha)*, and *(Cha)* which related to consequential relief were deleted in consequence of his laches in the trial Court.

The learned Vakil also asks that we should consider the prayer *(Kha)* as a prayer for consequential relief. That clause runs as follows:—

"That it may be declared that the possession of the defendants Nos. 1 and 2 of the property in claim is that of a trustee and that they ought not to have any connection with the property in claim inasmuch as they are not *mutwallis* and are unfit to act as such."

In the first place it is quite clear that the defendants 1 and 2 being Hindus cannot be *mutwallis* of the trust property. In the second place the words "ought not to have any connection with the property in claim" are vague and do not amount to a request for recovery of possession. The plaintiff throughout prosecuted his suit as a suit for a mere declaration and it is too late in the day to contend that the suit complied with the provisions of section 42 of the Specific Relief Act.

Therefore, on the question whether the suit is maintainable, I am of opinion that the decision of the learned Subordinate Judge must be affirmed and that the suit has been rightly dismissed.

As to limitation, it is contended on behalf of the respondents that the suit is barred by six years' limitation which runs from the date of alienation. That view is, in my opinion, correct. Article 120 of the Indian Limitation Act applies and the judgment of their Lordships of the Madras High Court in *Ananda Varar* v. *Vasudewan Nanbudiri* (13) though very

(10) (1870) 14 M. I. A. 289=17 W. R. 41=10 B. L. R. 19=2 Suth. 512=3 Sar. 23 (P. C.)
(11) (1892) 15 Mad. 389.
(12) (1897) 1 C. W. N. 493.
(13) (1910) 8 M. L. T. 289=8 I. C. 357=(1910) M. W. N. 594.

shortly reported, is clearly to the point. There the manager of a Hindu endowment sued for a declaration that certain alienations were void.

It was held that the cause of action dated from the date of the *patta* by which the alienation was made; and that as more than six years had elapsed since that date the plaintiff's suit should be dismissed although the right of the *dewaswam* to the property might not be barred.

The learned Vakil for the appellant contends that if a suit for possession and declaration is maintainable by the successor of a *mutwalli* in respect of alienations made by the *mutwalli* before his death and the period of limitation is twelve years, it should follow *a fortiori* that a suit during the lifetime of a *mutwalli* by a beneficiary or by the *mutwalli* himself cannot be barred; and that in any event the period of limitation should not expire till six years from the death of the *mutwalli*.

In my opinion this argument is fallacious. The declaration obtained in a suit for possession is merely ancillary and is generally unnecessary; but where the cause of action is based upon a shadow cast upon the title of a person, who is not entitled to any consequential relief at the moment, limitation must run from the date on which that challenge to his title commences. If the learned Vakil's argument is correct then the death of the *mutwalli* can make no difference and there ought to be no limitation at all. Cases coming under Article 134, for recovery of possession after the death of a trustee, have no application to the present case.

The question was considered at some length in *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar* (14). In that case a beneficiary sued for recovery of property wrongly alienated by a Hindu and section 120 of the Limitation Act was set up as a bar and the Court held that either Article 134 or 144 of the Limitation Act would be applicable as the suit was one for possession and not for a mere declaration.

It may perhaps be contended on the authority of *Chukkun Lal Roy* v. *Lolit Mohan Roy* (15) that in the present case the right of suit is a continuing right and that so long as the plaintiff's right to the property continues the suit cannot be barred by limitation. Although certain observations in *Chukken Lal's* case (15), which was a suit for the construction of a will by a reversioner, may seem to support this view, I think with great respect that, if it was intended to lay down the general proposition that there is a continuing right to a declaratory decree in respect of property so long as the right to the property is not extinguished, the proposition is too widely stated.

The principle of section 23 of the Limitation Act, which deals with continuing wrongs, can have no application to a declaratory suit and there is no recurring cause of action for a declaratory relief. It is to be noted that the decision in *Chukkan Lal's* case (15) has been reversed by the Privy Council in *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy* (16) on another point. Their Lordships did not consider the question of limitation but I venture to think that limitation began to run when the defendant did the first act prejudical to the plaintiff's title.

In any event the facts of the present suit are different and it is in my opinion clearly barred by limitation as was instituted more than six years after the date of the alienation.

The result is that the appeal is dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.

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(14) (1918) 41 Mad. 124=33 M. L. J. 357=22 M. L. T. 218=42 I. C. 366=6 L. W. 666.

(15) (1893) 20 Cal. 906.

(16) (1897) 24 Cal. 834=24 I. A. 76=1 C. W. N. 387=7 Sar. 156 (P. C.).

* A. I. R. 1923 Patna 481

ADAMI, J.

Dalpheroo Mian—Deft. Appellant.

v.

Bangali Mali and others—Respondents.

S. A. No. 1040 of 1920, decided on 15th December 1922 from the appellate Court of the District Judge, Shahabad, dated the 30th July 1920.

(a) *Mahomedan Law—Gift—Delivery of possession is necessary—Intention to transfer, must be unequivocally expressed.*

If a person disposed of by gift a house to another and continued himself to inhabit it, or even keep some part of his property therein, the gift is void if complete delivery and possession are not established. Exception is made in that case to the gift of a house by a wife to her husband in which the parties continue, both, to reside and by a father of his house to his son while himself continuing to occupy it (6 M H C. R. 455, Ref.) In other cases for the completion of the gift, abandonment even for a short time by the donor would be necessary (29 Bom 478, Ref.) Or it is sufficient that the donor and the donee are present on the premises, and an intention on the part of donor to transfer has been unequivocally manifested. (9 Bom. 146, Ref.) Where beyond the written deed of gift, there is no unequivocal intention to transfer manifested, but on the contrary the donor, soon after her deed of gift, joined in mortgaging the house.

Held, this action of her would tend to show that there was no such intention expressed as would render unnecessary the vacation of the house by her to complete the gift.

[P 482, C 2; P 483, C 1]

(b) *C. P. Code, O. 6, R. 17—Claim under gift cannot be changed into one under inheritance.*

Plaintiff would not be entitled in the same suit to recover possession of any part of the house as being his share, where his original case was that the whole house had been his transferor's property under a gift from the transferor's father and this case has been found to be false. It is impossible to allow the plaintiff to change his case altogether from the case made in the plaint and depend on the case of the defendants for relief.

[P. 483, Cls. 1 & 2]

A. B. Mukherjee and *B. B. Mukerji*—for Appellant.

Rameshwar Dayal—for Respondents.

Judgment.—The plaintiff in the suit out of which this second appeal arises sought for declaration of title and recovery of possession in respect of a house in Mouza Berhampur. According to his case Musammat Panna received the house from her father and in 1905 made a gift of the house to her daughter's son, Noor Mohammad, and after Noor Mohammad's death his uncle, Sardar Mian, inherited the properties. The plaintiff claimed to have purchased the house from Sardar Mian in 1918.

The defence was, that the house formed the joint property of Mt. Panna's husband, Ajaeb, and Wali Mohammad, and that, after Ajaeb's death, Musammat Panna and Wali's son, Dalpheroo, sold a portion of the house to the defendants in order to pay off a mortgage debt. The allegation of the gift by Musammat Panna to Noor Mohammad was denied by the defendants.

The Munsif dismissed the plaintiff's suit; he held that the plaintiff's case, that Musammat Panna received the house as a gift from her father, was false and that the house was the property of Ajaeb and Wali Mohammad. He found, too, that the case of a gift had not been made out, inasmuch as Musammat Panna and Dalpheroo had, so soon after the alleged gift, mortgaged the house. He disbelieved the allegation that Sardar Mian had been in possession of the house; in fact, he found that the plaintiff had not proved the exclusive title of Panna, that Dalpheroo had been in possession, that Noor Mohammad had never been in exclusive possession and that Sardar had never been in possession; and, finally, that the deed of gift had been practically revoked by a transfer to their creditors by Dalpheroo and Panna.

In appeal the learned District Judge has agreed with the Munsif that the house was in the joint possession of Ajaeb and Wali. In his opinion, however, the gift to Noor Mohammad by Musammat Panna was a valid gift, and he held that, as Noor Mohammad was living with Musammat Panna, delivery of possession by vacation of the house or otherwise need not be proved. As he had found, however, that Panna could only inherit her husband's half share of the house he held that the plaintiff could obtain under the gift to Noor Mohammad only a half share in the house. He, therefore, decreed the plaintiff's

suit to the extent of a half share in the house.

After the case had been heard by the Munsif a petition was put in by the plaintiff, asking that the plaint might be so amended as to show a claim only to such share as *Musammat* Panna had in the house. But the Munsif, I think, rightly refused to grant the petition at that stage, inasmuch as it altogether changed the basis of the plaintiff's suit.

The first contention by Mr. Abani Bhusan Mukherji on behalf of the appellant is that the learned District Judge is mistaken in finding that, under the Muhammadan Law, *Musammat* Panna as widow of Ajaeb would be entitled to the whole share which belonged to her husband. It is pointed out that under the Muhammadan Law the widow, if a child was living, would be entitled only to a one-eighth share of her husband's property while a half share would go to her daughter, if living, and the residue would go to the brother, so that in no case could *Musammat* Panna have gifted to Noor Mohammad more than her one-eighth share if her daughter was living. If the daughter was living, Noor Mohammad would be able to claim a half share of Ajaeb's property as being his mother's share; so that out of the eight-annas share of the house belonging to Ajaeb, the five-annas share would fall to Noor Mohammad through *Musammat* Panna and his mother, and the other three-annas share of the eight-annas would come to Wali.

Mr. Parmeshwar Dayal, on behalf of the respondents, admits that such would be the shares and that the District Judge is not correct in finding that Ajaeb's widow would be entitled to a half share of the whole house. If, on the other hand, at the time of Ajaeb's death, the daughter of Ajaeb were no longer living, the widow, *Musammat* Panna, would be entitled to a quarter share in the house and the residue would go to Wali, the brother, so that at the most *Musammat* Panna could only have transferred by gift a quarter share of her husband's half share in the house. It is quite clear that the District Judge was mistaken in his reckoning of the share falling to *Musammat* Panna which she would have a right to gift to her daughter's son.

Another point taken by Mr. Mukerji is, that the learned District Judge is incorrect in his view that it was not necessary to show that there was actual delivery of possession in order to complete the gift. Mr. Macnaghten in his Precedents of Muhammadan Law, in Case No. 19 at page 233, shows that a gift by a woman to her grandson is legal and valid and cannot be revoked; and in Case No. 22, on page 231 of the same work, it is said: "In books of law it is expressly stated that if a person disposed of by gift a house to another, and continued himself to inhabit it, or even keep some part of his property therein, the gift is void from the circumstance of complete delivery and possession not having been established." Exception is made in that case to the gift of a house by a wife to her husband in which the parties continue both to reside and also exception is made in a case of the transfer by a father of his house to his son while himself continuing to occupy it, and the only exceptions to the rule that there must be actual delivery of possession seem, according to that case, to be the gift of a house by a wife to a husband or a husband to a wife, and a gift to sons by parents.

This case has been upheld in the case of *Azim-un-nissa Begum* v. *Clement Dale* (1). In the case of *Bava Saib* v. *Mahomed* (2) it was held that where a Muhammadan woman made an oral gift of her husband's house to her nephew on the occasion of his marriage, but subsequent to the gift continued to live with him in the house, the gift was null and void, as there was no entire relinquishment of the house of the donor and the case did not fall within the exception allowed by the Muhammadan Law.

In the case of *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan* (3) it was held that a temporary abandonment of possession of house

(1) (1868) 6 M.H.C.R. 455.
(2) (1896) 19 Mad. 343.
(3) (1905) 29 Bom. 468 – 7 Bom. L.R. 443.

by the donor would be sufficient to show delivery of possession in order to complete a gift, and it is shown in that case that for the completion of the gift, abandonment even for a short time by the donor would be necessary. It seems, then, settled that in the present case the gift of the house to Noor Mohammad could not have been made complete, unless *Musammat* Panna, for a time at least, abandoned possession in favour of Noor Mohammad; and it is not shown that in this case there was any such vacation of the house by the lady.

In the case of *Saikh Ibrahim* v. *Saikh Suleman* (4) it was held that for the purpose of completing a gift of immoveable property by delivery and possession, no formal entry or actual physical departure is necessary; it is sufficient that the donor and the donee are present on the premises, and an intention on the part of the donor to transfer has been unequivocally manifested.

In this case beyond the written deed of gift, there is no such unequivocal intention manifested; on the contrary, the donor, *Musammat* Panna soon after her deed of gift, joined in mortgaging the house which according to the plaintiff, was wholly hers, though she had already executed the deed of gift. This action of her would tend to show that there was no such intention expressed as would render unnecessary the vacation of the house by her.

These are the two chief points in the Muhammadan Law which, I think, form good ground for finding that the decision of the learned District Judge was not correct.

It remains to be considered whether the plaintiff would be entitled in this suit to recover possession of any part of the house as being his share. The plaintiff's case was that the whole house had been *Musammat* Panna's property under a gift from her father and this case has been found to be false. The plaint rests the claim wholly on the gift by *Musammat* Panna to Noor Mohammad and makes no claim on account of the interest inherited by Noor Mohammad or Ajaeb. It is impossible to decide what share Noor Mohammad would be entitled to, if any, for there is no finding whether Noor Mohammad's mother, the daughter of Ajaeb, was alive at the time of Ajaeb's death. The fact of the daughter's existence at the time of Ajaeb's death would make a considerable difference to the share to which Noor Mohammad would be entitled; in fact if she were not alive he would not be entitled to anything as a share in Ajaeb's property. It is impossible to allow the plaintiff to change his case altogether from the case made in the plaint and depend on the case of the defendants for relief.

Having found that the gift by *Musammat* Panna to Noor Mohammad was not completed by such delivery of possession as is required by the Muhammadan Law, and having no satisfactory evidence on which to decide the share, if any, which Noor Mohammad would have acquired, I am of opinion that the plaintiff's case must fail and the appeal must be allowed.

The decree of the lower appellate Court is, therefore, set aside and that of the Munsif restored. The appeal is allowed with costs.

Appeal allowed.

(4) (1884) 9 Bom. 146.

** **A. I. R. 1923 Patna 483**

DAS AND KULWANT SAHAY, JJ.

Sadho Saran Rai and others—Defendants-Appellants

v.

Anant Rai and others—Plaintiffs—Respondents.

Appeal from Original Order No. 18 of 1922 decided on the 11th May, 1923 of Sub-J., Arrah, dated 14th January, 1922.

Civil P. C., S. 151—Consent decree obtained by practising fraud on Court—Total absence of consent of one party pleaded - Court can set aside decree on application and no suit is necessary.

The Court has inherent powers to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties. A distinction has been drawn in the cases of Indian Courts between a fraud

practised upon a party and a fraud practised upon the Court. It has been laid down that where the question is whether there was consent in fact, there is power in the Court to investigate the matter in a properly constituted application and to set aside the decree if it is satisfied that a party never in fact consented to it but that the Court was induced to pass the decree on the fraudulent representation made to it that the party had consented to it, but that where there is a consent in fact, that is to say, where the parties have filed a compromise petition and they admit that they have filed but allege that his consent was procured by fraud, the Court cannot investigate the matter either in review or in the exercise of its inherent power, and that the only remedy of the party is to institute a suit to set aside the decree on the ground of fraud. In other words, the *factum* of the consent can be investigated in summary proceedings but the reality of the consent cannot be so investigated. 17 C. W. N. 631, 19 C. W. N. 419; 34 Bom. 408; 27 M. L. J. 172 Foll [P. 486, Cs 1, 2.

K. P. Jayaswal, S. M. Mullick, and *N. K. Prasad*—for Appellants.

C. C. Das and *Mahabir Prasad*—for Respondents.

Das, J.—This is an appeal against an order of the learned Subordinate Judge of Arrah by which he set aside a consent decree. The suit in which the consent decree was passed was instituted by the respondents against the appellants for partition of joint family properties. The properties sought to be partitioned were set forth in the several schedules annexed to the plaint. On the 3rd January 1921 a petition of compromise was filed in the Court. The petition alleged that "all the properties sought to be partitioned have been partitioned and under the said partition the properties are in possession and occupation of the parties in equal halves". It set out the properties in schedule A and declared that the parties were and shall be in separate possession of their respective shares. The schedule annexed to the petition deals with an insignificant portion of the properties enumerated in the schedules to the plaint. It does not, for instance, deal with the *malkiat* properties; and in regard to the bond debts due to the joint family, while it awards about 12,000 to the defendants it gives less than Rs. 6,000 to the plaintiffs. There are important alterations in the schedule which attracted the suspicion of the Court when it was called upon to pass a decree in terms of the compromise. For instance, the whole of the money due from Sathan Choubey, Hargum Rai and Baijnath Rai seemed to have been allotted in the first instance to the plaintiffs: but at the time when the compromise petition was actually filed in Court it was noticed that the figures standing against those persons had been tampered with and that only half the amount due from them was allotted to the plaintiffs and the other half was allotted to the defendants.

As I have said, the alterations made in the schedule attracted the suspicion of the Court which called upon the plaintiffs' pleader Babu Inder Deo Sahay to initial the alterations. I cannot help thinking that the learned Subordinate Judge should have done well to call upon the plaintiff personally to appear before him and to say whether he had consented to those alterations which were obviously to his detriment; but that course was not adopted and the learned Subordinate Judge was apparently satisfied with the initials of the learned pleader for the plaintiffs and he passed a decree in terms of the settlement.

The plaintiff's case is that the compromise actually filed was not the compromise which he signed. His evidence is to the effect that the compromise petition was copied "in six leaves" and that the schedule contained all the family properties sought to be partitioned and that after signing the petition he made it over to Sadho Saran, one of the defendants, for the purpose of being filed in Court. He makes the definite case in his evidence that only the first page and the last page of the compromise petition were retained and that the intervening pages were extracted and were not filed in Court and that alterations were made in the last page without his knowledge but to his detriment. He definitely states that Babu Indra Deo Sahay was not his pleader and that he did not remember which pleader had signed the compromise petition from him and that he did not himself take the petition to any pleader for signature, and that he left it entirely to Sadho Saran relying upon Sadho Saran's honesty in the matter.

Upon the evidence I have no doubt that a gross fraud has been perpetrated not only upon the plaintiffs but upon the Court itself. The petition definitely states that all the properties sought to be partitioned had been partitioned and that the specifications were given in Schedule A to the petition. Now the properties sought to be partitioned are given in different schedules annexed to the plaint. As I have said before, schedule A of the petition of compromise compromises only a very insignificant portion of the properties sought to be partitioned.

Mr. Jayaswal contends before us that in their written statement the defendants disputed the correctness of the properties set out in the schedule and that their case in the written statement was that most of the properties sought to be partitioned were not joint family properties at all. That may be so; but where the petition definitely states that all the properties sought to be partitioned have been partitioned. I must assume that the meaning of the petition is that the properties sought to be partitioned in the suit by the plaintiffs have been partitioned. There is no indication in the compromise petition that the plaintiffs had recognized the justice of the defendants' claim that most of the properties sought to be partitioned by him were not joint family properties and that they could not be partitioned. In my opinion it is sufficient to refer to the schedule A annexed to the petition of compromise and to compare it with the properties set out in the schedules to the plaint to hold that the plaintiffs petition in this respect is unassailable. It was then argued that the compromise petition bore the signature of the plaintiff's pleader and that it must be assumed that the pleader had authority to settle the case on the terms mentioned in the petition of compromise.

The plaintiffs, however, deny that Babu Indra Deo Sahay is their pleader. The evidence of Projit Rai on this point is as follows:—

"Indra Deo Sahai was not my pleader. I do not remember which pleader had signed the *Sulehnama* petition for me. I have not taken that petition to any pleader for signing it. Sadho Saran had done so on my behalf". Babu Indra Deo Sahay has been examined as a witness on behalf of the defendants-appellants. His evidence is that he signed the *Sulehnama* petition on behalf and at the request of the plaintiffs. He says that he had enquired from his client that he had compromised and he was satisfied that the plaintiffs had compromised the suit on the terms contained in the petition of compromise as filed by him.

In cross-examination he admits that he was not pleader in the case and that the "party" went to him only when the compromise was to be filed in Court. He also admits that he cannot recognise the different persons that had gone to him, although his impression is that it was Anant Rai, plaintiff No. I who saw him in connection with the compromise petition. He adds, however, that he did not know Anant Rai before. He says that the person who saw him told him that he was Anant Rai and he was apparently satisfied with that and signed the compromise petition.

The evidence of the pleader, therefore, does not establish that the plaintiffs or any of them engaged him to file the petition of compromise on behalf of the plaintiffs. If indeed any of the plaintiffs were known to him at the time when he was engaged on their behalf it would be impossible to accept the evidence of Projit Rai that the plaintiff did not engage Babu Indra Deo Sahay as their pleader in the case. The vakalatnama itself strongly supports the case of the plaintiffs. We have carefully examined the vakalatnama and it is a matter of grave suspicion that, though Babu Indra Deo Sahay actually appeared on behalf of the plaintiffs in the matter of the compromise, his name does not appear in the printed list of pleaders appearing in the vakalatnama.

It was very strongly contended before us that there is an admission in the petition of the plaintiffs that Indra Deo Sahay was their pleader in the matter. I have read the petition very carefully and I am unable to agree that there is any admission to that effect. No doubt it is not alleged in the petition that Babu Indra

Deo Sahay was not their pleader, but it is distinctly stated that it was defendant No. 1 who obtained the signature of the pleader of the parties on the petition. There may be an admission by implication, but there is no clear and definite admission that Babu Indra Deo Sahay was the pleader of the plaintiffs.

If the defendants intended to make any point of such admission by implication contained in the petition filed by the plaintiffs, they should have cross-examined Projit Rai on this point. The attention of Projit Rai was not drawn to the alleged admission contained in the petition and, in the absence of any explanation of Projit Rai, I am not disposed to attach much importance to the alleged admission contained in the petition. The evidence is clear and definite that the name of Indra Deo Sahay does not appear in the printed list of Vakils in the vakalatnama and that Babu Indra Deo Sahay was not the regular pleader of the plaintiffs but was only engaged for filing the compromise petition.

Indra Deo Sahay admits that he did not know the plaintiffs but that he accepted the word of the person who actually saw him and thought that he was acting on behalf of the plaintiffs. I have no doubt whatever that a gross and deliberate fraud has been practised upon the Court and that the Court was pursuaded to sign a decree to which the plaintiffs had never consented, and that upon the representation made to the Court that the plaintiffs had consented to it.

The question then arises whether the Court had power to set aside the compromise decree either in review or in the exercise of its inherent power. There is a long list of cases of the Calcutta High Court, of the Bombay High Court and of the Madras High Court in which it has been broadly laid down that a Court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties. It was urged before us on behalf of the defendants-appellants that the only remedy is by suit and that once the decree has been signed there is no jurisdiction in the Court to set it aside on the ground of fraud. A distinction has been drawn in the cases of the Indian Courts between a fraud practised upon a party and a fraud practised upon the Court. It has been laid down that where the question is whether there was a consent in fact, there is power in the Court to investigate the matter in a properly constituted application and to set aside the decree if it is satisfied that a party never in fact consented to it but that the Court was induced to pass the decree on the fraudulent representation made to it that the party had consented to it, but that where there is a consent in fact, that is to say, where the parties have filed a compromise petition and they admit that they have filed it but one of the parties alleges that his consent was procured by fraud the Court cannot investigate the matter either in review or in the exercise of its inherent power, and that the only remedy of the party is to institute a suit to set aside the decree on the ground of fraud. In other words, the factum of the consent can be investigated in summary proceedings, but the reality of the consent cannot be so investigated.

In *Hakimqir* v. *Basdeo Sah* (1) it was held by Mookerjee and Caspersz, JJ., that where an order is obtained from the Court on the allegation that both parties had assented to it and it is asserted by one of the parties that he never consented to the order in question, it is open to the Court to review the order and recall it.

In the case of *Peary Choudhury* v. *Sonori Das* (2) it was held by Chatterjea and Greaves, JJ., that, it is the inherent power of every Court to correct its own proceedings when it has been misled and that it has complete jurisdiction to recall the order on being apprised of the true facts.

In *Basangowda Hannantgowda Patil* v. *Churchigirigowda* (3) the facts were that in the course of a suit a compromise was presented which was signed by the defendant's pleader who was not

(1) (1911) 17 C.W.N. 631—10 I.C. 894—15 C. L. J. 408.
(2) (1914) 19 C.W.N. 419—27 I.C. 628.
(3) (1910) 34 Bom. 408—6 I.C. 968—12 Bom. L. R. 223.

especially authorised in that behalf. The Court passed a decree in terms of the compromise. The defendant then applied to set aside the decree on the ground that he did not engage the pleader and that he never authorised the pleader to compromise the suit. The Court set aside the decree and set down the suit for hearing. On appeal it was argued in the High Court that there was no section in the Code which entitled the party to ask the Court to re-open the suit and set aside the decree in a summary manner. Chandavarkar, J., in upholding the contention of the respondent said as follows:—

"What the defendant says is that there was a suit against him, and that the suit was declared to have ended by reason of a decree passed with his consent. He never consented, and the result has been that there has been fraud committed upon the Court The Court was pursuaded to sign a decree to which the defendant had never consented, and that upon the representation that he had consented to it. Therefore, once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure Code to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled."

A similar view has been taken in the Madras High Court, see *Vilakathala* v. *Vayalil* (4) These decisions, though not binding on this Court, are entitled to the greatest respect, and we have been referred to no decision which lays down a contrary rule in cases where it is asserted by a party, not that the consent was obtained from him by fraud, but that there was no consent in fact on his part.

As I have said before a distinction has been made in the Indian Courts between the cases where a party comes to Court and complains that he never consented to the order at all and the cases where a party comes to Court and admits that he did consent to the order but complains that his consent was obtained by fraud.

(4) (1914) 27 M. L. J. 172—25 I.C 213.

In the one case the fraud is upon the party; in the other case, the fraud is upon the Court; and it is well-established, so far as the Indian Courts are concerned, that the Court has inherent jurisdiction to set aside the order when it is apprised of the fact that it was induced to sign the decree on a fraudulent representation of facts made to it.

In my opinion the order passed by the Court below is right and I would dismiss this appeal with costs.

Kulwant Sahay, J. —I agree.

Appeal dismissed.

A. I. R. 1923 Patna 487

DAS AND ADAMI, JJ.

Bhagwan Das and another—Petitioners

v.

The East Indian Railway Company—Opposite Party.

Civil Rev. No. 79 of 1922, decided on 29th November 1922, from a decision of the Subordinate Judge, Hazaribagh.

Railways Act, S. 72—Risk note—Package means both covering and contents.

The word "package" seems to mean both that which is packed and that in which it is packed, its covering or receptacle. 41 Cal. 576, 21 C. W. N. 815 Foll. [P 487, C. 2]

Shiveswar Dayal and *Brij Kishore Prasad*—for Petitioners.

Siva Narain Bose—for Opposite Party.

Das, J.—The view of the learned Judge in the Court below is supported by two decisions of the Calcutta High Court, the case of *East Indian Railway Co.* v. *Nilkanta Roy* (1) and the case of *Kali Das* v. *East Indian Railway Co.* (2). According to the decision of Mr. Justice Woodroffe in *Kali Das* v. *East Indian Railway Co.* (2) the word "package" seems to mean both that which is packed and that in which it is packed, its covering or receptacle. We are unable to say that the view taken in the two cases to which we have referred is wrong.

We must, accordingly, dismiss this application but in the circumstances without costs.

Adami, J,—I agree.

Rule discharged.

(1) (1913) 41 Cal. 576—19 C. L. J, 142—22 I. C. 679—19 C. W. N. 95.

(2) (1917) 21 C. W. N. 815—40 I.C. 626.

*** A. I. R. 1923 Patna 488**

DAS AND ADAMI, JJ.

Pandit Ramashivendra Narayan Ojha and others — Decree-holders-Appellants

v.

Babu Awadh Behari Saran — Judgment-debtor-Respondent.

A. Nos. 132 and 133 of 1922, decided on 7th November, 1922, from an order of the District Judge, Shahabad.

Limitation Act, Art. 182 — Prior application for sale of properties — Later application for arrest — Latter cannot be regarded as continuation of former.

An application can only be considered as a continuation of the previous application, when it is similar in scope and character to the former application. Where the former application asked the Court, in form and in substance, to sell the properties of the judgment-debtor other than those which were comprised in the mortgage bond, and the next application in form and in substance, asked the Court to realise the money from the judgment-debtor by his arrest and detention in prison.

Held that it is quite impossible to regard the second application as a continuation of the previous application. The fact that the decree obtained was a mortgage decree makes no difference. 2 P. L. T. 22 Foll.

[P. 489, C. 2, P. 490, C. 1.]

Kulwant Sahay and *Har Narain Prasad* — for Appellants.

S. M. Mullick, S. N. Ray, S. Dayal and *Satyadeva Sahay* — for Respondent.

Das, J.—This appeal is directed against an order of the learned District Judge of Shahabad by which he dismissed an application for execution on the ground that it was barred by limitation. The material facts are these:—

The appellants obtained a mortgage-decree against the respondent, but it appears that the mortgaged properties had been sold at a revenue sale before the decree was pronounced in the mortgage action. The decree in effect provided that the appellants should proceed against the surplus sale-proceeds in the hands of the Collector. On the 8th of February, 1917 the appellants presented an application for execution of the decree. That application was allowed by the Court below but on appeal to this Court, the order of the lower appellate Court was set aside and the appellants were asked to proceed in a particular way by this Court. The present application was then presented for execution on the 22nd January 1921, and the only material question which arises for our consideration is whether the present application is barred by limitation.

It is conceded by Mr. Kulwant Sahay, who appears on behalf of the decree-holders-appellants, that, unless the present application can be regarded as a continuation of the previous application, it must fail. It is necessary, then, to consider what exactly the appellants asked the Executing Court to do by their application which they presented on the 8th of February, 1917, and what they have asked the Executing Court to do in the present application.

It will be remembered that the decree was a mortgage-decree, though, in the circumstances which happened, the decree-holders could only proceed against the surplus sale-proceeds in the hands of the Collector. It appears that before they made their application of the 8th February 1917 they made an effort to withdraw the surplus sale-proceeds from the Collectorate; but they were told that the surplus sale-proceeds had already been withdrawn by the judgment-debtors. In their application of the 8th of February, 1917, they recited all the material facts and then asked for the following relief:—

"It is, therefore, prayed that this execution case may be registered and first a *Zaidsal* notice may be issued and then properties of the judgment-debtor, as given in the under-mentioned inventory, may be attached and sold, and the entire decretal amount with costs and interest of this execution case, as may be found due on an account being made in the office, may be realized."

The judgment-debtor seems to have raised the question whether he had in fact withdrawn the money from the Collectorate. It seems to have been his case that that money was not withdrawn by him but by his wife. That was a question which the Court below had to determine in the application of the 8th of February 1917.

The lower appellate Court thought

that it was unnecessary for it to determine whether the money had in fact been withdrawn by the judgment-debtor or not, and it directed that execution should proceed. The order of the lower Appellate Court, therefore, amounted to this, that the properties of the judgment-debtor, as given in the inventory attached to the application of the 8th of February 1917, should be attached and sold in due course of law. That was the effect of the order of the Court on the application of the 8th of February, 1917.

As I have stated before, the judgment-debtor appealed to this Court and this Court came to the conclusion that the application in the form in which it was presented to the Court could not be entertained by the Court. This Court pointed out that primarily, the only decree under execution was the decree under O 34, R. 4, and that execution could only be taken out against the mortgaged property or against the sum lying in the Collectorate as representing the mortgaged property, and that before any other property could be pursued, an order under O. 34, R. 6 was necessary.

This Court thought that a decision on the question as to who had withdrawn the surplus sale-proceeds from the Collectorate was absolutely necessary, and that if the Court in deciding that question came to the conclusion that the money had been withdrawn by the judgment-debtor, it was necessary to make an order upon him to bring that money into Court before a decree under O. 34, R. 6 could be passed against him.

The learned Judges in delivering the judgment of the Court said this:—

"We note that the former decree-holder is dead and that a fresh application will be required for proceeding with the execution of the decree. In dealing with the fresh application the Court below will have regard to our remarks upon the question of the liability of the parties".

The decision of this Court then was this, that the application, in the form in which it was presented by the appellants to the Court, was not maintainable; that it was necessary for them first to establish that the money had in fact been withdrawn by the judgment-debtor and to obtain an order to the effect that the judgment-debtor do bring the money withdrawn by him into Court. On his failure to do so, the decree-holders might then be entitled to a decree under O. XXXIV, R. 6 and to a sale of such of the properties of the judgment-debtor as were not comprised in the mortgage.

The High Court pronounced its order on the 29th of October 1918 and the present application was presented to the Court on the 22nd of January 1921. By their application presented on the 23rd of January 1921 the decree-holders asked for issue of notice under O. XXI, R. 22 and then "by issue of notice of warrant of arrest the entire decretal amount with costs and interest as per account prepared by the Court and as set out below may be awarded.",

This application was then an application for arrest and detention in prison of the judgment-debtor; and we have been invited by Mr. Kulwant Sahay to hold that this application must and ought to be regarded as a continuation of the application of the 8th of February 1917.

In my opinion, it is impossible to regard the present application as a continuation of the previous application. Now, it is well established that an application can only be considered as a continuation of the previous application, when, to quote the words of Mr. Justice Jwala Prasad, in the recent case of *Kesho Proshad Singh* v. *Harbans Lal* (1), it is similar in scope and character to the former application. Now, the former application asked the Court, in form and in substance, to sell the properties of the judgment-debtor other than those which were comprised in the mortgage-bond; the present application, in form and in substance, asked the Court to realise the money from the judgment-debtor by his arrest and detention in prison. It is quite impossible, in my opinion, to regard the present application as a continuation of the previous application.

Mr. Kulwant Sahay, however, urges

(1) [1920] 2 P. L. T. 22=53 I. C. 85.

before us, that the fact that the decree obtained by him in this case was a mortgage-decree makes some difference to the case. I am unable to agree with the very ingenious argument that was advanced before us by Mr. Kulwant Sahay.

Then, there is another serious objection, and it is this: that if we regard this application as a continuation of the previous application, then it is the previous application which must be considered on its merits. Now, that application could never be entertained by the Court, because the decree-holders, without exhausting their remedies under the decree, asked for sale of properties other than those comprised in the mortgage-bond. The decree-holders have not yet asked the Court to compel the judgment-debtor to bring into Court the money, which, according to their allegations, the judgment-debtor had withdrawn from the Collectorate.

As was pointed out by this Court, that was the only application which they could have made. In my opinion, it will not assist the decree-holders if we treat the present application as a continuation of the previous application. The question was not argued before the learned Judge in the Court below, but the Court of first instance considered the question and decided it against the decree-holders. In my opinion, the order of the Courts below is right and must be confirmed.

This order will govern Miscellaneous Appeal No. 133 of 1922.

Adami, J.—I agree.

Appeals dismissed.

*** A. I. R. 1923 Patna 490.**

MULLICK AND MACPHERSON, JJ.

Aulad Ali --Decree-holder—Appellant

v.

Abdul Hamid --Auction-purchaser--Respondent.

S.A. Nos. 156 and 155 of 1922, decided on 1st May, 1923, from an order of District Judge of Purnea, dated the 16th March, 1922.

(a) *Mortgage—Mortgagee becoming a part-owner—Can sell other portions for proportionate amount of mortgage money.*

Where mortgagee has become a part owner of the mortgaged property which is ordered to be sold under the mortgage decree then in the absence of any direction in the decree to the contrary and of any equities created against himself, he is entitled to sell the mortgaged properties in whatever order he chooses. The purchase of the equity of redemption in a portion of the property splits up the mortgage and the mortgagee becomes entitled to recover only a proportionate share of the mortgage money by the sale of the remaining portion. He is not entitled to sell the remaining portion for the entire debt but the Court cannot compel him to sell the portion in which he has got equity of redemption. [P. 491, C. 1.]

(b) *Civil P. C., O. 21, R. 89—Mortgagee who has become part-owner can make a deposit.*

Mortgagee who has purchased equity of redemption in one portion of the mortgaged property can apply under **R. 89**, to set aside the sale held under his own decree. [P 491, C. 2.]

(c) *Civil P. C., S. 115—Refusal to accept deposit under O 21, R. 89, C. P. C., is refusal to exercise jurisdiction.*

It is now the settled practice of the Patna High Court to treat a refusal to accept deposit tendered for the purpose of setting aside a sale under O. 21, R. 89, Civil P. C., as a refusal to exercise jurisdiction. [P 491, C 2.]

Muhammad Tahir—for Appellant

S N Dutt—for Respondent.

Mullick, J.—Appeal No. 156 of 1922 is preferred by a mortgagee whose mortgage lien covered 4 lots of property and who obtained a preliminary decree against the respondent on the 28th July 1918 and a final decree on the 13th July 1919. Meanwhile on the 16th April 1918 the appellant had bought the equity of redemption in lot No. 1 in execution of a money decree which he had obtained against the respondent. Then on the 4th August 1920 the appellant took out execution of his mortgage decree and applied for the sale of lots 2, 3 and 4 only but this course the judgment-debtor objected and the execution case was dismissed.

In his next application for execution the appellant entered in the list of the properties to be sold all the four lots but he requested that lot No. 1 should be sold last because he had purchased the equity of redemption in it. The judgment-debtor opposed this prayer and on the 11th December 1920 lot No. 1 was put up to sale and the whole decretal debt realised therefrom.

The appellant thereupon appealed to the District Judge but without success, and he files the present second appeal on the ground that in the absence of any direction in the decree to

the contrary and of any equities created against himself he was entitled to sell the mortgaged properties in whatever order he chose. I think this contention is well founded. The purchase of the equity of redemption split up the mortgage and the appellant became entitled to recover only a proportionate share of the mortgage money by the sale of lots 2, 3 and 4. He was not entitled to sell these 3 lots for the entire debt and all that the execution Court could compel him to do was to sell lots 2, 3 and 4 for the reduced amount. But the Court could not compel him to sell lot No. 1 and its order was therefore bad.

But the lot having been purchased by a third party *bona fide* and without notice, we are unable in this appeal to set aside the sale

It is alleged by the appellant that the purchaser Latifur Rahman is a *benamidar* for the judgment-debtor, but that has not been proved. The appellant might perhaps have been in a better position if he had, when the Court decided to sell lot No. 1 declined to proceed with the execution and preferred an appeal; but as matters stand this second appeal must be dismissed with costs.

S. A. No. 155 of 1922.

This appeal has been heard with the above appeal No. 156.

It appears that after Latifur Rahman purchased the property, the mortgagee made an application under Order 21, Rule 89, C.P.C., for leave to deposit the purchase money with interest and to get the sale set aside. The Munsif decided in the appellant's favour, but the District Judge in appeal held that by putting the four properties up for sale without stating in the sale proclamation that he had purchased the equity of redemption in lot No. 1, the appellant had created an equitable estoppel against himself. He accordingly reversed the Munsif's order and dismissed the appellant's application. Against his order the appellant files the present appeal.

It is clear no appeal lies but the appellant asks that his petition may be treated as an application for revision. In the special circumstances of this case we grant his prayer and proceed to consider the merits of his case.

Far from attempting to conceal that he was the purchaser of the equity of redemption the appellant had from the moment that he filed his first execution case strenuously contended that lot No. 1 could not be sold because he was its owner by purchase and I can see no representation on his part by reason of which the auction-purchaser was induced to change his position. I think therefore that there was no equitable estoppel in the case.

The next question is whether the appellant was entitled to make the deposit. In my opinion his purchase of lot 1 did not extinguish the equity of redemption; the right purchased was in the first place not co-extensive with his right as mortgagee and in the second place here the presumption of an intention to keep the security alive is very strong.

Therefore he was at the time of the mortgage sale the owner of the property, and he was competent to make the deposit under Order 21, Rule 89 of the Civil Procedure Code, in my opinion, the Munsif's order setting aside the sale was right and the learned District Judge was wrong in reversing it.

It is however contended by the opposite party that this is not a case in which we can interfere under section 115, C.P.C. The reply is that it is now the settled practice of the Court to treat a refusal to accept a deposit tendered for the purpose of setting aside a sale as a refusal to exercise jurisdiction and I think that the present application is maintainable under section 115, C. P. C.

The result is that the application is allowed with costs: the order of the District Judge is set aside and that of the Munsif restored. The appellant is entitled to his costs in the Courts of the Munsif and the District Judge. The hearing fee in this Court is fixed at Rs. 32.

Macpherson, J.—I agree.

S. A. No. 156 *dismissed.*
S. A. No. 155 *allowed.*

*** * A. I. R. 1923 Patna 492.**

DAS AND KULWANT SAHAY, JJ.

(Rao Bahadur) Man Singh —Plaintiff-Appellant

v.

(Maharani) Nawalakhbati and another —Defendants-Respondents.

F. A. No 205 of 1922, decided on 6th April, 1923, from the Addl Sub. J, Bhagalpur, dated 5th June, 1922.

(a) *Practice—Person under disability—Change of plea on ceasing of disability allowed.*

A person under disability is no doubt bound by the act of the guardian; but it is well established that such a person can reopen the proceedings after the disability ceases, if he satisfies the Court that the act of the guardian has prejudiced him. [P. 497, C. 2.]

(b) *Court of Wards Act (IX of 1879, B C), S 60—Widow can relinquish without sanction if it is really surrender, but cannot if it is really an alienation which is valid by analogy of surrender.*

A Hindu widow may, under certain circumstances, effectively divest herself of her interest in her husband's estate without coming within the prohibition of section 60 of the Court of Wards Act; but it is not correct to say that under no circumstances would section 60 operate to prevent a Hindu widow from relinquishing her estate in favour of her husband's next reversioners; just as the Court of Wards Act cannot prevent the widow from dying, so it has no operation if the widow desires to turn *byragi* or renounce the world. In a case of disclaimer by the widow at the time of the death of her husband or of relinquishment, properly so called, afterwards, the title of the heir would undoubtedly arise by operation of law, and section 60 of the Court of Wards Act would not operate to the prejudice of the heir Where the widow sells the estate for valuable consideration to the heir or to a stranger with the consent of the heir, in other words whenever the transaction is one, not of relinquishment, the title of the heir arises, not by operation of law, but by the act of transfer on the part of the widow, and the transaction would come within the prohibition of section 60.

Where the deed of surrender by a widow recited that the grandsons who were the next heirs who had undertaken to pay them or the survivor of them the monthly sum of rupees two thousand out of the income and profits of the estate and also to defray the expenses of the daily and periodical worship of the family deities, and the document then asserted that the grandsons had agreed to all the terms aforesaid, and the grandsons executed another deed whereby they agreed to pay 2,000 per month to the widows and to spend Rs. 100 per month for the worship and agreed to be liable to pay 2,000 with interest at 12 p. c. p. m. from date of default and to make the amount a charge on the property.

Held, the act of the widows is not an act of the renunciation of the world or an act which in the eye of law would justify the inference in that they were civilly dead. The transaction operated as a conveyance and fell within the prohibition of section 60 of the Court of Wards Act [P. 499, Cs. 1 & 2; P. 504, C. 1.]

(c) *Hindu Law—Widow—Relinquishment—Nature of—Conveyance for consideration to next heir is not relinquishment—For a relinquishment there must be some act justifying inference that she is civilly dead.*

Although actual transfers by Hindu widows have, in many cases, been supported by reference to the theory of the relinquishment of the widow's entire interest, there is relinquishment in the true sense of the term, when there is disclaimer by the widow at the time of the death of her husband, or the renunciation of the world by her afterwards, or some act by her which might, in the eye of law, justify the inference that the widow is civilly dead. It is only when the widow is dead, either actually or civilly, that the law steps in and gives the estate of her husband to the next reversioner. There are cases in the books which are called cases of relinquishment but which are in fact not cases of relinquishment at all where alienations by Hindu widows have been upheld by arguing from analogy. But analogy denotes only a partial similarity; and it does not follow that, because where a widow renounces the world, the next reversioners take the estate by operation of law, there is also a succession by operation of law where, as a result of a transaction not amounting to a relinquishment, properly so called, but capable of being supported by reference to the theory of relinquishment, the estate comes to the next reversioners. *E. g.* a Hindu widow may sell for valuable consideration the entire estate of her husband to the next reversioner or to a stranger with the assent of the next reversioner. The transaction will be upheld by applying the analogy of a relinquishment of her estate by the Hindu widow; but it can hardly be argued that there is relinquishment properly so called, in such a case, or that the title of the reversioner arises by operation of law The truth is that the law on the subject has ground from precedent to precedent; and it is impossible to argue that because a certain legal incident is true of a certain proposition, it must also be true of every proposition which may have been logically drawn from the first proposition, or which is capable of being supported by reference to the first proposition. It is one thing to say that because upon the death of a widow either actual or civil, the estate would at once vest by operation of law upon the next heir of her husband, therefore the widow can operate her own death by conveying absolutely the estate of her husband to one who, at the moment of the conveyance, is the next heir of her husband; it is another thing to say that when the widow does convey the estate to the next reversioner, the reversioner takes the estate by operation of law and not by virtue of the conveyance. It does not follow that, because the heir takes by operation of law when there is real relinquishment by the widow, that is to say, when she elects to die a civil death, he also takes by operation of law when, as a result of a transaction which may be supported by reference to the theory of relinquishment, but which in fact is not relinquishment, the estate is carried

from the widow to the heir or to a stranger with the consent of such heir. It cannot be laid down as an inflexible rule applicable to all cases that the heir takes by operation of law whenever as a result of a transaction to which the widow and the heir are parties, the entire estate becomes vested in the heir or goes to a stranger with the consent of such heir. A relinquishment becomes operative only when the widow acts upon the declaration and withdraws herself from the estate. A widow cannot be said to have withdrawn her life estate, if, notwithstanding her paper declaration, she continues to be in possession of the estate.

[P. 499, Cs. 1 & 2; P. 500, C 1; P. 501, C. 1; P. 502, C. 1; P. 504, C. 2.]

(d) Part performance Theory is applicable only on subsequent actings and conduct.

Though a party has complete power to resile from an incomplete engagement, such a power will be denied when the acting and the conduct of the parties have carried the incompletely executed engagement into effect. But in order to exclude the plea of *locus penitentiae*, a party must have his claim, not upon the incompletely executed engagement, but upon the equities that arise from the actings and the conduct of the parties. The equitable rule applies to imperfectly clothed transactions, transactions which in England ought to be evidenced by writing but are not evidenced by writing, which in India ought to be evidenced by a registered document but are not evidenced by registered document, and it is well established that, provided there have been actings and conduct of the parties unequivocally referable to the engagement and productive of alteration of circumstances, loss or inconvenience, a party can found upon the equities arising from the acts done though not upon the engagement itself. [P. 505, C. 1.]

(e) Hindu Law—Inheritance—Daughter's sons succeeding to grandfather get ancestral estate in which their sons have interest.

Daughter's sons take grandfather's property as ancestral property which is deemed to be an accretion to the joint property in which their sons take interest by birth. The doctrine of survivorship is not limited to unobstructed succession and to the succession to the joint property of re-united coparceners but it applies also to widows and daughters. 25 M. 678, Expl. 35 Cal. 1039 (P. C.), 9 M. I A. 539 Exp. and Foll. [P. 508, C. 2.]

(f) Pardanashin lady—Execution of document—Principles—Persons claiming under document must show that she knew what she was doing—Principles enunciated in books are only rules of prudence and depend upon facts of each case

Every person taking a document from a pardanashin lady is bound to show affirmatively that the document was her document, that is to say, that she understood the nature of the transaction and the effect of it The Courts of law have laid down certain rules for assisting them to determine the point, but it is necessary to remember that the rules so laid down are rules of prudence rather than rules of law, and that their application will depend on the particular facts of each case. As the Judicial Committee once pointed out, there is a grave risk of failure of justice, if these rules are moulded into inelastic formulæ or crystallised into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication Execution, full knowledge of the nature and effect of the transaction, and, independent and disinterested advice must be proved to justify the alienation by the lady. Decisions will be found to fall broadly into two groups namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of a personal confidence and secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted, in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate, to have possessed the capacity to judge for herself.

[P. 510, Cs. 1 & 2; P. 511, C. 1.]

Independent advice is necessary even in cases of alienation for religious purposes.

If upon a review of the facts which include the nature of thing done and the training and habit of the mind of the grantor, as well as the proximate circumstances affecting the executio.., the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand [P. 512, C. 2.]

Sultan Ahmad, A. Sen, N.C. Sinha and *S. C. Mazumdar*—for Appellants.

K. B. Dutt, C. C. Das, P. Dayal and *L. K. Jha*—for Respondents.

Das, J.—Maharaja Sir Harballabh Narain Singh, K.C.I.E., was the owner of a considerable zamindari known as the Sonbarsa Raj. He was murdered on the 1st of April, 1907, by an unknown assassin and he died leaving him surviving two widows, Maharani Tarabati and Maharani Nawalakhbati, a daughter, Maharaj Kumari Padmabati, and two grandsons, the sons of Maharaj Kumari Padmabati, Rao Bahadur Govind Singh known as Barra Lal and Rudra Pratap known as Chotey Lal. Maharaj Kumari Padmabati died in May, 1915; Rao Bahadur Govind Singh died in October, 1919, and Maharani Tarabati died in August, 1920. The plaintiff, the appellant before us, is the son of Govind Singh and he seeks, as against Maharani Nawalakhbati and Chotey Lal, to recover possession of an eight anna share of the Sonbarsa Raj.

On the 18th December, 1918

two widows of the late Maharaja executed a deed of surrender in favour of their grandsons Gobind Singh and Rudra Pratab. At the time of the execution of the deed of surrender, the Maharanis were wards of the Court of Wards; and the main questions in this appeal are : first, whether the Maharanis were competent to execute the deed of surrender without the concurrence of the Court of Wards; secondly, whether the plaintiff, in the circumstances of the case, can claim under the deed of surrender; and, thirdly, whether the deed of surrender was intelligently executed by Maharani Nawalakhbati and whether she had independent advice in relation to the execution of that document.

The admitted facts are as follows:— Chotey Lal was suspected of the murder of the late Maharaja, and under an executive order of the Government, he was externed from the District of Bhagalpur directly after the murder. The order of externment was not removed until some time in 1920. On the 30th April, 1907, the Maharanis applied to the Collector of Bhagalpur to be declared disqualified proprietors under section 6 of the Court of Wards Act, so that the estate might be managed by the Court of Wards. On the 15th May, 1907, the Maharanis addressed another letter to the Collector of Bhagalpur. They alleged in that letter that the late Maharaja before his death expressed a desire that Chotey Lal should succeed him as the proprietor of the Sonbarsa Raj and that, in obedience to the wishes of the late Maharaja they were willing to surrender their estate in favour of Chotey Lal.

The petition was signed not only by two Maharanis but also by their daughter Padmabati and their eldest grandson Barra Lal in token of their assent to the proposal made by the Maharanis. Mr. Lyall, the Collector of Bhagalpur, interviewed the Maharanis on the 23rd of May, and it appears that he pointed out to the Maharanis,

"the grave objections that exist in so important a matter of any precipitate or imperfectly considered action."

The Maharanis agreed to postpone the execution of the deed of relinquishment for some months and the interview came to an end. On the 27th May, 1907, the estate was taken over by the Court of Wards and thereupon the Maharanis became wards of the Court of Wards. On the 4th February, 1916, the Maharanis, it appears, addressed a letter to the Collector of Bhagalpur proposing to surrender their estate in favour of Barra Lal. The letter is not on the record, but is recited in another letter dated the 4th March, 1918 addressed by the Maharanis to the Collector of Bhagalpur. The last mentioned letter sets out the legal difficulty in executing the proposed deed of surrender in favour of one only of their two grandsons and states that to obviate all future difficulty and prospective litigation they have decided that the surrender should be in favour of both the grandsons.

To this letter they annexed a draft deed of surrender in substitution of the one which they had sent to the Collector in February, 1916, and asked the Collector to obtain the sanction of the Court of Wards to the new deed which would be executed in favour of both the grandsons. In their letter the Maharanis entered into an elaborate defence of Chotey Lal and asserted that there was no evidence to justify the police theory that Chotey Lal had any concern direct or indirect, in the murder of the late Maharaja. They asserted further that the late Maharaja had affection for Chotey Lal and wanted to make him the sole heir of the Sonbarsa Raj and that

"during the few minutes that he survived the dastardly and murderous attack which resulted in his death he actually wrote with his own hand a will bequeathing the entire Sonbaras Raj to the said Rudra Pratap Singh" but that "unfortunately he did not survive long enough to sign the will and get it legally attested."

They also prayed that the Government might be pleased to withdraw the order prohibiting the return of Chotey Lal to the District of Bhagalpur. This letter was obviously forwarded through the Commissioner of Bhagalpur to the Board of Revenue and on the 25th

October, 1918, the Board of Revenue wrote to the Commissioner stating that it could not accord sanction to the Maharanis to surrender their estate in favour of their grandsons. Notwithstanding the adverse decision of the Board of Revenue, the Maharanis, on the 18th December, 1918, executed a deed of surrender in favour of their grandsons. On the 23rd December, 1918, the Maharanis wrote another letter to the Collector of Bhagalpur intimating that they had executed and registered a deed of surrender in favour of their grandsons and requesting the Collector.

"to take steps to make over the charge and management of the said properties to Rao Bahadur Govind Singh and Rudra Partap Singh if the Court of Wards do not think fit to retain management under section 13 (A) of Act IX of 1879 (B. C.)".

On the 15th April, 1919, the Maharanis were informed that the Board of Revenue considered that the deed of relinquishment executed by them in favour of their grandsons was invalid. Barra Lal then applied for registration of his name in the Land Registration Department. The Court of Wards on behalf of the Maharanis contested the application of Barra Lal and the application of Barra Lal was refused. Barra Lal died in October, 1919 and on the 17th January, 1921 the suit, out of which this appeal arises, was instituted by the appellant, the son of Barra Lal, for a decree for possession in his favour and in favour of Chotey Lal whom he cited as defendant second party in the action and in the alternative for a decree for possession of eight anna share in the Sonbarsa Raj.

The plaintiff's case is that the Maharanis were competent to, and did in fact execute a deed of surrender in favour of his father and Rudra Partap on the 18th December, 1918, and that upon the execution of the deed of surrender the estate, of which the Maharanis were then in possession as Hindu widows, vested absolutely in his father and in Rudra Partap. According to him the Collector of Bhagalpur put undue pressure upon the Maharanis to compel them to agree to the Court of Wards taking charge of the estate and that the assumption by the Court of Wards of the management of the estate was contrary to the provisions of law and did not give it any right to object to the execution of the deed of surrender by the Maharanis.

The Court of Wards on behalf of Maharani Nawlakhbati put in a written statement in which it contested the claim of the plaintiff. It denied that any pressure was put on the Maharanis to compel them to agree to the Court of Wards taking charge of the estate and it asserted that as the late Maharaja was heavily involved in debts, the liabilities amounting to about ten lakhs of rupees and as the Maharanis being *pardanashin* ladies were unable to protect their interest, the Maharanis applied for the protection of the Court of Wards and that the Maharanis were declared disqualified proprietors upon their own application. In the 6th paragraph of the written statement there is an admission that in 1916 the Maharanis expressed their desire to relinquish their estate in favour of Barra Lal and there is a suggestion that the deed of relinquishment sued upon was not executed by them intelligently.

Then there is an added paragraph which runs as follows:—

"That the defendant No. 2 of whom the Maharanis were very fond was ordered by the Government to leave the district owing to his suspected complicity in the murder of the late Maharaja Bahadur. The plaintiffs have represented to the Maharanis that it was necessary to have a deed executed by them, so that the Government might be induced to allow the defendant No. 2 to return to Bhagalpur and the Maharanis on that misrepresentation without any proper and independent advice signed the alleged deed of surrender without properly understanding its effects. This defendant submits that in the circumstances the deed is legally invalid and inoperative."

The 7th paragraph raises a question of law, namely, whether the deed of surrender was valid inasmuch as the sanction of the Court of Wards was not obtained by the Maharanis. The 8th paragraph alleges that the deed

of surrender was not acted on by the Maharanis and that

"the Maharanis continued in enjoyment of the same rights as before the execution of the alleged deed of surrender."

The defendant second party also put in a written statement in which he charged Barra Lal with having procured the execution of the deed of surrender by false representations. The case made is, that Barra Lal took advantage of the fact that the Maharanis were fond of Chotey Lal and that he induced them to execute the deed of surrender by representing to them that the execution of the deed would secure the withdrawal of the order of externment against Chotey Lal.

The learned Subordinate Judge who tried the case framed the following issues :—

1. Is the suit maintainable?

2. Whether non-compliance with the provisions of section 80 of the Civil Procedure Code bars the suit?

3. Whether the deed of surrender, dated the 18th December, 1918 was executed by the Maharanis, widows of Maharaja Sir Harballabh Narain Singh Bahadur, under misrepresentation without getting any independent advice and without knowing or understanding its contents. Is it legally valid or operative?

4. Whether the said deed of surrender amounts to a surrender of the entire interest of the Maharanis in the Sonbarsa estate?

5. Is the deed of surrender valid having regard to the provisions of section 60 of the Court of Wards Act (IX of 1879 B. C.)?

6. Did the plaintiff's father and defendant second party accept the surrender and give consent to it?

7. Did the aforesaid deed of surrender accelerate the succession of plaintiff's father and defendant second party the next reversioners to the said estate and vested in them and did they (the plaintiff and defendant No. 2) acquire a right, and title to the said estate in equal shares and become entitled to possess it by virtue of the said surrender?

8. Whether the plaintiff has got any right or title to a moiety of the Sonbarsa estate and is he entitled to succeed to it and get possession; if so, under what terms?

9. Whether the *ekrarnama* set up by the plaintiff was caused to have been executed under misrepresentation and fraud as alleged by defendant second party?

10. Is the plaintiff entitled to get any mesne-profits, if so, to what amount?

11. To what relief or reliefs is the plaintiff entitled?

12. Was any pressure brought to bear on the Maharanis to agree to make over the Sonbarsa estate to the Court of Wards?

Issues 1 and 2 were not pressed before him and he answered those issues in favour of the plaintiff. In regard to issues 3 and 9 he came to the conclusion that there was no misrepresentation in the case and that there was an intelligent execution of the deed of surrender by the Maharanis. He thought the independent advice was not necessary but that there were circumstances in the case which suggested the inference that the Maharanis had independent advice in regard to the execution of the deed of surrender. He decided these issues in favour of the plaintiff. He found no difficulty in answering issue No. 4 in favour of the plaintiff. The question raised in that issue was whether the surrender could be regarded as a surrender of the entire interest of the Maharanis having regard to the fact that they retained a substantial interest in the estate for their maintenance. The learned Subordinate Judge thought that the provision of a monthly allowance to the Maharanis for their maintenance did not effect the validity of the deed of transfer. Issue No. 12 was not very seriously pressed before him and he decided that issue against the plaintiff. He lastly considered issue No. 5 and he thought that section 60 of the Court of Wards Act constituted a prohibition on the right of the widows to surrender their estate without the concurrence of the Court of Wards He answered this issue against the plaintiff and in the result he dismissed the suit.

Before dealing with the arguments that have been advanced to us it is necessary to mention a matter as to which there has been some discussion before us. The hearing of the suit began on the 10th May 1922; and from the 10th May 1922 up to the 31st May 1922 Maharani Nawalakhbati was represented in the record of the suit by the Court of Wards and by the Officiating Government pleader in Court. The Court of Wards made no attempt to examine Maharani Nawalakhbati as a witness on her behalf, but she was examined as a witness on behalf of the defendant second party.

While she was being examined on commission, Babu Debta Charan Mukharji, the Officiating Government pleader stated to the Commissioner that under instructions from the Court of Wards he would not press issue No. 3 on behalf of Maharani Nawalakhbati and that he would not examine the Maharani as a witness in support of her written statement.

Issue No. 3, it will be remembered, raises the very important question of fact namely, whether the deed of surrender was intelligently executed by the Maharanis and whether they had any independent advice in regard to the execution of this document. The Maharani as the ward of the Court of Wards was completely bound by the act of the Court of Wards on her behalf, and it appears that the Court of Wards intended to raise one point and one point only, on her behalf, namely, whether she was competent to execute the deed of surrender having regard to the fact that the sanction of the Court of Wards had not been obtained.

It was obviously a matter of great prejudice to the Maharani that her real defence was not allowed to be raised on her behalf by the Court of Wards; but she was bound by the act of the Court of Wards, and, so long as she remained a ward of the Court of Wards, she had no right under the Court of Wards Act to raise any defence on her behalf. The Court of Wards, however, retired from the management of the estate on the 27th April 1922 after the evidence had been recorded in the case and the arguments heard in part.

On the 31st May 1922, Babu Debta Charan Mukerji, presented a petition stating that the Maharani was no longer a ward of the Court and that the Government pleader had no further authority to represent her in the suit. On the 1st June, 1922, Maharani Nawalakhbati appeared through another pleader and filed a petition in which she prayed that the written statement filed by the defendant second party might be considered as her written statement and she intimated to the Court that she desired to press issue No. 3.

This application was opposed on behalf of the plaintiff. The position taken up by the plaintiff was that the learned Government pleader representing Maharani Nawalakhbati having given up issue No. 3, he, the plaintiff, did not adduce evidence in support of his case that the deed of surrender was intelligently executed by the Maharanis and that they had independent advice in regard to the execution of that document.

The learned Subordinate Judge thought that there was great force in the contention of the plaintiff and he considered that any attempt on the part of Maharani Nawalakhbati to re-open issue No. 3 would seriously prejudice the plaintiff. He held that Maharani Nawalakhbati could not be allowed to reopen issue No. 3.

When this appeal was opened before us, we came to the conclusion that it was not right and proper that Maharani Nawalakhbati should be debarred from presenting a case to the Court which she has undoubtedly made in her written statement. The learned Government Advocate, appearing on behalf of the plaintiff, strenuously contended that she was completely bound by the act of the Court of Wards and that, to allow here to resile from the position conceded by the Court of Wards, would operate as a great hardship on his client.

A person under disability is no doubt bound by the act of the guardian; but it is well established that such a person can reopen the proceedings after the disability ceases if he satisfies the Court that the act of the guardian has prejudiced him. In our opinion, it is far better that she should be allowed to reopen the matter now than that she should come to us after-

wards, if we should decide the appeal against her on the question of law raised on her behalf, and invite us to deal with the whole case on the footing that the document was not read and explained to her, and that she had no independent advice in relation thereto. We accordingly came to the conclusion that it was open to her to press issue No. 3 and that the learned Subordinate Judge should have allowed her to reopen that issue and to have met any case of prejudice by adjourning the hearing of the suit and giving an opportunity to the plaintiff to adduce such evidence as he thought necessary.

Mr. Sultan Ahmed then pressed before us that if we allowed Maharani Nawalakhbati to reopen issue No. 3 we should give him an opportunity to examine certain witnesses who are material witnesses on this issue. We recognised the force of Mr. Sultan Ahmed's contention and gave him leave to cross-examine Maharani Nawalakhbati on issue No. 3 and to examine Mr. B. C. Sen, the Commissioner of the Patna division who was the Collector of Bhagalpur from April 1916 to September 1918; Mr. Nil Money Dey, who was the manager of the Sonbarsa Estate from 1914 till July 1920; Mr. Md. Abdus Samad who was the Manager of the Sonbarsa estate under the Court of Wards at the time when the written statement was filed on her behalf; Mr. Surja Prasad the Government pleader of Bhagalpur and Babu Anirudh Prosad Singh, a zamindar and a pleader who is alleged to have taken a prominent part in the matter of the execution of document by the Maharanis. The plaintiff has examined all these witnesses before us except Babu Anirudh Prosad Singh and we have considered their evidence in deciding issue No. 3.

It will be convenient, first to deal with the questions of law which have been raised by the defendant in this litigation. The contention which found favour with the learned Sub-ordinate Judge is that section 60 of the Court of Wards Act constitutes a prohibition on the power of a Hindu widow to relinquish the estate (of which she may be in possession as a Hindu widow) without the concurrence of the Court of Wards.

It is not disputed that, at the time when the Maharanis purported to relinquish their estate in favour of their grandsons, the estate was under the management of the Court of Wards, and that the Maharanis were wards of the Court. On the 4th March 1918, the Maharanis forwarded to the Collector of Bhagalpur a draft deed of surrender which they proposed to execute in favour of their grandsons and asked him to obtain the sanction of the Court of Wards " to the new deed which will be in favour of both the daughter's sons."

The Collector forwarded the application of the Maharanis to the Board of Revenue through the Commissioner of the Bhagalpur division, and on the 25th October 1918, the Board wrote to the Commissioner to say that it agreed with the collector that the execution of the deed of surrender by the Maharanis during their lifetime in favour of their grandsons will complicate matters and create difficulties in the way of the Courts management.

It accordingly directed "that things should be allowed to go on for the present as they are".

On the 13th December 1918, the Collector conveyed the decision of the Board of Revenue to the Maharanis. On the 18th December, 1918, with the full knowledge of the decision of the Board of Revenue, the Maharanis executed the deed of surrender by which they relinquished their widow's estate in favour of their grandsons.

Section 60 of the Court of Wards Act provides as follows :—

" No ward shall be competent to create, without sanction of Court, any charge upon, or interest in, his property, or any part thereof, or to assign over or charge any allowance to be received by him from the Court."

The question at once arises whether by relinquishing her estate in favour of her husband's reversioners, a Hindu widow creates on interest in her estate. It has been contended on behalf of the plaintiff that the substance of the transaction is the with

drawal of the widow's estate, and the consequent acceleration of the interest of the heirs who succeed to the properties, not by virtue of any act done by the widow, but by operation of law.

I am quite willing to admit that a Hindu widow may, under certain circumstances, effectively divest herself of her interest in her husband's estate without coming within the prohibition of section 60 of the Court of Wards Act; but I am not prepared to admit that under no circumstances would section 60 operate to prevent a Hindu widow from relinquishing her estate in favour of her husband's next reversioners.

It is well to remember that, although actual transfers by Hindu widows have, in many cases, been supported by reference to the theory of the relinquishment of the widow's entire interest, there is relinquishment in the true sense of the term, when there is disclaimer by the widow at the time of the death of her husband, or the renunciation of the world by her afterwards or some act by her which might, in the eye of law, justify the inference that the widow is civilly dead. It is only when the widow is dead, either actually or civilly, that the law steps in and gives the estate of her husband to the next reversioner; and just as the Court of Wards Act cannot prevent the widow from dying, so it has no operation if the widow desires to turn *byragi* or renounce the world.

But there are cases in the books which are called cases of relinquishment but which are in fact not cases of relinquishment at all where alienations by Hindu widows have been upheld by arguing from analogy. But analogy denotes only a partial similarity; and it does not follow that, because where a widow renounces the world the next reversioners take the estate by operation of law, there is also a succession by operation of law where, as a result of a transaction not amounting to a relinquishment, properly so called, but capable of being supported by reference to the theory of of relinquishment the estate comes to the next reversioners.

To take a simple case, a Hindu widow may sell for valuable consideration the entire estate of her husband to the next reversioner or to a stranger with the assent of the next reversioner. The transaction will be upheld by applying the analogy of a relinquishment of her estate by the Hindu widow; but it can hardly be argued that there is relinquishment properly so called, in such a case, or that the title of the reversioner arises by operation of law.

The truth is that the law on the subject has grown from precedent to precedent; and it is impossible to argue that because a certain legal incident is true of a certain proposition, it must also be true of every proposition which may have been logically drawn from the first proposition or which is capable of being supported by reference to the first proposition.

A discussion of some of the leading cases will, I think, make good my point. In 1856, the question arose before the Supreme Court in the case of *Judomonee* v. *Saroda Prosonno* (1) whether a Hindu widow could for good consideration, convey her estate, inherited by her from her son in favour of the next heir then living. In answering the question in the affirmative, Calvilla, C. J. pointed that it was "but another way of doing that which in former times was continually done without violence to the letter or spirit of Hindu law, though in a manner shocking to humanity, by means of the rite of "*Suttee*," and he took note of the fact that a "widow can by adopting a certain form of religious life divest herself of the estate and then accelerate its devolution on the next heir in her lifetime."

The case before the Supreme Court was a case of conveyance, pure and simple; but arguing from the analogous cases of widows committing suicide or adopting a religious life and thus accelerating the devolution of the estate on the next heir, the Court came to the conclusion that there was nothing inherently wrong in the widow conveying the estate of her husband for consideration to one who would take the estate by inheritance if she were to die at

(1) (1856) I Boul. 120.

the date of the conveyance.

But it is one thing to say that because upon the death of a widow, either actual or civil, the estate would at once vest by operation of law upon the next heir of her husband, therefore the widow can operate her own death by conveying absolutely the estate of her husband to one, who, at the moment of the conveyance is the next heir of her husband; it is another thing to say that when the widow does convey the estate to the next reversioner the reversioner takes the estate by operation of law, and not by virtue of the conveyance.

Jadomonee's case (1) was decided in the Supreme Court in 1856; and between 1856 and 1884 the law was firmly established in Bengal that a Hindu widow by relinquishing her rights in favour of the heir of her husband's estate could accelerate his inheritance, and that the effect of a conveyance by her and such heir was to convey the absolute estate.

In 1884, in *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy* (2) the question was raised whether the transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer being assented to by the person who at the time is the next reversioner, would conclude another person not a party thereto who is the actual reversioner upon the death of the widow, from asserting his title to the property.

The facts were these: the widow executed a conveyance of the property in favour of a stranger, reciting necessity. The High Court took the view that there was not a sufficient finding in the judgment of the appellate Court as to whether there was legal necessity for the conveyance or not, and the whole case was argued on the footing that there was no necessity for the conveyance. The person who at the time was the next reversioner executed a separate document in which he assented to the conveyance by the widow, and covenanted on behalf of himself and his heirs, that he would not lay claim to the property at any future time. The reversioner died, and the person entitled to succeed on the death of the widow was another person who was in no way bound by the covenants executed by the previous reversioner.

The Division Bench conceded that the widow might retire in favour of the next reversioner and that, if she did so, that is, if she abandoned her interest in her favour the next reversioner would have as complete and absolute a title to the property as he could have on her death. It also conceded that there might be a transfer by the widow to the reversioner, and a second transfer by the reversioner to the stranger; but it did not see how the effect of a double transfer could be given to two documents different in their nature and contents. The learned Judges accordingly referred the question for the determination of the Full Bench.

Sir Richard Garth, in delivering the judgment of the Full Bench pointed out that if the widow died a natural death, her husband's heirs would at once succeed to the estate; or if she were to become a *byragi* or otherwise die a civil death, the result would be the same, and he thought that just as she might have disclaimed her estate when her husband died, there was nothing wrong or objectionable in her relinquishing her estate at any time in favour of her husband's heir for the time being, after she had once accepted it. So far the position was perfectly clear; but then the question had to be faced whether the widow and the next heir could agree to make an alienation of the estate without any legal necessity to support it.

On this question, Sir Richard Garth said as follows:—

"But, if it is once established as a matter of law, that a widow may relinquish her estate in favour of her husbands' heir for the time being, it seems impossible to prevent any alienation, which the widow and the next heir may thus agree to make."

The learned Chief Justice recognised the essential distinction between a case of relinquishment, properly so called, and a case of sale, without any legal necessity merely with the consent of the next male heir, but he thought that there was such a long course of authority in favor of the,

(2) (1884) 10 Cal. 1102 (F. B.)

power of the widow to alienate the estate with the consent of the next heir that the Full Bench could not decide the contrary without disturbing the titles which had been acquired on the strength of that authority, Sir Lawrence Jenkins in *Debi Prasad Choudhari* v. *Gopal Bhagat* (3) summed up the decision in *Nobokishore's case* in these words :—

"Starting then from the established position that the next heir's succession can be accelerated by relinquishment, it was determined in Nobokishore's case as a logical consequence that the widow, with the next heir's consent, could alienate without any legal necessity."

And the learned and distinguished Chief Justice said as follows :—

"The road to the decision in Nobokishore's case was not without its difficulties, but the learned Judges felt it had to be travelled that title might be quieted.

It seems to me clear beyond dispute that the extension of the doctrine was more or less forced upon the Court; the Court upholding the extension on the ground that it was the logical consequence of the right conceded to the widow either to disclaim the estate at the time of the death of her husband or to turn *byragi* or otherwise die a civil death afterwards and thus accelerate the succession of her husband's heir.

The decision of Sir Richard Garth points out the real distinction between a case of relinquishment, properly so called, and a case of alienation capable of being supported by reference to the theory of relinquishment; and it seems to me that it does not follow that, because the heir takes by operation of law when there is real relinquishment by the widow, that is to say, when she elects to die a civil death, he also takes by operation of law when, as a result of a transaction which may be supported by reference to the theory of relinquishment, but which is in fact not relinquishment, the estate is carried from the widow to the heir or to a stranger with the consent of such heir.

It is not necessary for our present decision to discuss any of the subsequent decisions. *Behari Lal* v. *Madho Lal Ahir Goyawal* (4) recognises that the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. In the Full Bench case of *Debi Prasad* v. *Gopal Bhagat* (3) it was laid down that, to uphold an alienation by the widow on a ground other than that of legal necessity or of the equitable extension founded on legal necessity, it should be shown that there was a consent of the next heir to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire estate and consequent acceleration of the interest of the consenting heir, provided the alienation is of the whole estate.

The question involved in the Full Bench case was whether a widow could alienate a portion of her estate with the consent of the next reversioner. Sir Lawrence Jenkins pointed out that, if the alienation was to be supported by reference to the theory of the relinquishment of the widow's entire interest, the alienation must be of the entire estate; for as the Judicial Committee afterwards said in the case of *Rangasami Goundan* v. *Nachiappa Goundan* (5).

"there cannot be a widow who is partly effaced, partly not so."

The decision of Sir Lawrence Jenkins makes it perfectly clear that the Courts have been obliged to have recourse to the theory of relinquishment for the purpose of deciding cases which are not cases of relinquishment in order that title acquired on the faith of a long series of decisions may not be disturbed.

I have come to the conclusion that it cannot be laid down as an inflexible rule applicable to all cases that the

(3) (1913) 40 Cal. 721.—17 C.W.N. 701—19 I.C. 273—17 C.L.J. 499 (F. B.)

(4) (1891) 19 Cal 236—19 I.A. 30—6 Sar. 88 (P.C.).

(5) (1918) 42 Mad. 523—46 I.A. 72—36 M. L. J. 493—26 M. L. T. 5—17 A. L. J. 536—29 C. L. J. 539—21 Bom. L. R. 640—23 C. W. N. 777—(1919) M.W.N.262—50 I.C. 498—10 L. W. 105 (P. C.)

heir takes by operation of law whenever as a result of a transaction, to which the widow and the heir are parties, the entire estate becomes vested in heir or goes to a stranger with the consent of the heir. In a case of disclaimer by the widow at the time of the death of her husband or of relinquishment, properly so called, afterwards, the title of the heir would undoubtedly arise by operation of law, and in my opinion section 60 of the Court of Wards Act would not operate to the prejudice of the heir, assuming that, at the date of the relinquishment the widow were a ward of the Court.

But a case of relinquishment must be carefully distinguished from a case which is not one of relinquishment, but which is capable of being supported by reference to the theory of relinquishment. A true case of relinquishment arises when there is the renunciation of the world by the widow and the abandonment of the estate by her or some act by her which might in the eye of law justify the inference that she is civilly dead.

But where the widow sells the estate for valuable consideration to the heir or to a stranger with the consent of the heir or enters into an engagement with the heir which has the effect of carrying the estate to the heir or a stranger with the consent of the heir, in other words, whenever the transaction is one, not of relinquishment, but one capable of being supported by reference to the theory of relinquishment, the title of the heir arises, not by operation of law, but by the act of transfer on the part of the widow, and the transaction would come within the prohibition of section 60, assuming that the widow were a ward of the Court, and the sanction of the Court were not obtained to the transaction.

I have now to consider whether the transaction of the 18th December, 1918, operated as a relinquishment or as an alienation. Now the transaction is evidenced by two documents one executed by the Maharanis in favour of the grandsons and the other executed by the grandsons in favour of the Maharanis. The deed of surrender is described as an indenture to which the Maharanis and the grandsons are parties, and the deed executed by the grandsons is described as an agreement to which the grandsons and the Maharanis are parties. The deed of surrender recites that the Maharanis were each getting a monthly allowance of Rs. 625 from the Court of Wards and that, as they were growing old and were desirous of remaining aloof from the concerns of the world and of spending their latter days in divine worship and meditation in the holy city of Benares with an allowance for their maintenance befitting their rank and position, they wished to surrender and relinquish their Hindu widows' estate in the property left by their husband to their grandsons who were the next heirs of their husband and who had undertaken to pay them or the survivor of them the monthly sum of rupees two thousands out of the income and profits of the estate and also to defray the expenses of the daily and periodical worship of the family deities.

The document then asserts that the grandsons "have agreed to all the terms aforesaid" and proceeds to provide as:—

1. That the first party Maharani Tarabati and Maharani Nawlakhbati do hereby relinquish and surrender all their rights in the property moveable and immoveable, left by their husband, the late Maharaja Harballabh Narain Singh Bahadur, K. C. I. E. commonly called the Sonbarsa Estate, now in the charge and under the management of the Court of Wards to and in favour of the second party Rao Bahadur Gobind Singh and Rudra Pratap Singh, the next heirs of the said *Maharaj* Bahadur under the Hindu Law, and in pursuance thereof the first party do hereby make over the entire property aforesaid to the second party in full extinction of their rights as Hindu widows.

2. That the second party will be entitled to the whole property aforesaid from this date and they will hold and enjoy the same in the rights of daughter's son succeeding to the property of their maternal grand-father under the Benares school of Hindu law, the share of each being a moiety of the said property.

3. That the second party will be entitled to have their names entered as proprietors in equal share in

respect of the revenue paying or revenue free estates included in the said property by removing the names of the 1st party now recorded in the registers maintained under Act VII of 1878 (B. C.)

4. That the first party will at once inform the Court of Wards of this surrender and request the Court to make over the charge and management of the said property to the second party subject to the Court's retaining the management if it thinks fit under section 13 A of the said Act, IX of 1879 (B. C.)

5. That the first party, or the survivor of them, will be entitled to receive a maintenance allowance of Rs. 2000 (rupees two thousand) per mensem, from the second party out of the rents and profits of the said property so long as they or either of them live or lives.

6. That the second party undertake to keep up and maintain the daily and periodical worship of the family deities Lachmi Naram Jee, Ram Chandra Jee and Radha Krishna Jee, installed at the Sonbarsa house left by the said Maharaja Bahadur, at a cost of Rs. 100 (rupees one hundred) per mensem and should they omit or neglect to carry out this undertaking the first party will be entitled to enforce the fulfilment thereof.

The agreement executed by the grandsons in favour of the *Maharanis* contains all the recitals that are to be found in the deed of surrender, and provides as follows :—

The first party, therefore, in considera tion of the promises, do hereby agree of their own free will and accord that from the day they became the proprietors of the said Sonbarsa estate, by reason of the surrender aforesaid they and their heirs, successors, executors, administrators and assignees shall pay to the second party or the survivor of them, so long as they or either of them live or lives, the monthly sum of Rs. 2,000 (rupees two thousand) for their maintenance in a style suitable to the rank and position held by their deceased husband, and if they fail to pay the allowance due for any months (which is to be taken as an English month) on the first day of the following month, the second party will be at liberty to enforce the payment thereof, with simple interest at the rate of 12 per cent. per mensem by process of Court, and the said arrears of allowance, with interest and the costs of the suit, if any, to enforce the payment thereof shall be the first charge on the property mentioned in the schedule hereto annexed which from a part of the estate surrendered by the second party as mentioned above.

And the first party further agreed that from the day aforesaid they shall keep up and maintain the daily and periodical worship of the family deities, Lachmi Naram Jee, Ram Chandra Jee, and Radha Krishna Jee, installed at the Sonbarsa house left by the said Maharaja Bahadur, at a cost of Rs. 100 (Rupees one hundred) per mensem (the month being taken as an English month) and should they omit or neglect to carry this agreement the second party will be entitled to enforce the fulfilment thereof.

What, then, is the substance of the transaction between the *Maharanis* and their grandsons? In the first place it is an agreement, and indenture, as the parties themselves describe the document. In the second place, the desire of the *Maharanies* to retire from the world is not unconditional, but is subject to two important conditions, first, that the grandsons, will pay them or the survivor of them a sum of money for their maintenance "befitting their rank and position" that is to say, a sum of rupees two thousand, per month, which let it be remembered, is a sum much in excess of what the *Maharanis* were actually receiving from the Court of Wards, and secondly that the grandsons will defray the expenses of the daily and periodical worship of the family deties at a cost of Rs. 100 per month.

In the third place, the *Maharanis* are sufficiently alive to their worldly interest to stipulate that their maintenance allowance at Rs. 2,000 per month with interest on arrears at 12 per cent. per month shall form a first charge upon certain specific properties belonging to the estate. In the fourth place, they retain a

sufficient interest in the estate of their husband by reserving to themselves the liberty to enforce the fulfilment of the condition as to *debshera*.

Now I do not desire to throw the slightest doubt upon the numerous cases which have decided that transactions similar to the one which I am considering are capable of being supported by reference to the theory of the relinquishment of the widow's entire interest. I have not the slightest doubt that, had the Court of Wards not stood in the way, the transaction would have carried the estate from the *Maharanis* to the grandsons; but, in my opinion, the estate would have been carried, not by operation of law, but by the act of the *Maharanis*.

In *Jadomonee's case* (1) the widow relinquished her estate in favour of the next reversioner in consideration of a yearly allowance of Rs. 1,400 to be paid to her. The transaction was described by the learned Judges as a conveyance for good consideration.

In the case before us, the *Maharanis* entered into the transaction in consideration of the promise on the part of the grandsons to pay them a sum of money much in excess of what the Court of Wards was paying them. I find it impossible to hold that the act on the part of the *Maharanis* was an act for the renunciation of the world or an act which in the eye of law would justify the inference that they were civilly dead. In my opinion, the transaction operated as a conveyance and fell within the prohibition of section 60 of the Court of Wards Act, and the learned Subordinate Judge was right in dismissing the plaintiff's suit on this ground.

My conclusion on the question which I have just discussed is sufficient for the disposal of the appeal but as the case is likely to be carried to the Judicial Committee, it is necessary that I should express my views on the questions which have been raised before us on behalf of the defendants. It was urged that assuming that S. 60 of the Court of Wards, Act did not prevent the *Maharanis* from surrendering their estate in favour of their grandsons, the deed of surrender, standing by itself, could not carry the estate from the *Maharanis* to their grandsons, and, as possession still remained with the *Maharanis*, the transaction was incomplete, and there was a power in *Maharanis* Nawlakhbati to resile from an incomplete engagement.

The basis of the argument is that, in order to accelerate the succession of the next heir, there must be a relinquishment in fact, and not merely a paper declaration to that effect. As I have shown, before, the present law on the subject of relinquishment is merely the extension of the rule of Hindu Law which permitted a widow to renounce the world and abandon the property. It was determined in the case of *Debi Prasad* v. *Gopal Bhakat* (3) that if logic was to have any place in our system of law, relinquishment must be of the entire estate, and not of a portion of it. And so it is argued that if the analogy is to hold good, there must be an abandonment in fact in order that the heir at law may step into the inheritance.

I think that the contention is right and ought to prevail. A relinquishment, in my opinion, becomes operative only when the widow acts upon the declaration and withdraws herself from the estate. It is difficult to understand how a widow can be said to have withdrawn from her life estate, if notwithstanding her paper declaration she continues to be in possession of the estate. It was pointed out by the Judicial Committee in *Rangasami* v. *Nachiappa* (5) that

'it is the effacement of the widow – an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date."

In my opinion, the effacement must be founded on fact, and so long as the widow does not in fact efface herself, she has the right to say,—since she is not bound to efface herself :—

"I have changed my mind, and I do not intend to give effect to my declaration."

The learned Government Advocate does not dispute the correctness of the proposition which I venture to

think is at the very foundation of the doctrine of relinquishment. But he asserts that circumstances have arisen which make it inequitable for her to change her mind.

Now I quite agree that though a party has complete power to resile from an incomplete engagement, such a power will be denied when the actings and the conduct of the parties have carried the incompletely executed engagement into effect. But, in order to exclude to the plea of *locus penitentiae*, a party must have his claim, not upon the incompletely executed engagement, but upon the equities that arise from the actings and the conduct of the parties.

But here the engagement was incomplete because possession was retained by the *Maharanis*, and, if possession was retained by the *Maharanis*, there could be no equity upon which a claim could be founded. The equitable rule upon which the learned Government Advocate relies applies to imperfectly clothed transactions, transactions which in England ought to be evidenced by writing but are not evidenced by writing, which in India ought to be evidenced by a registered document but are not evidenced by a registered document, and it is well established that, provided there have been actings and conduct of the parties unequivocally referable to the engagement and productive of alteration of circumstances, loss or inconvenience, a party can found upon the equities arising from the acts done, though not upon the engagement itself.

In my opinion, there is no scope for the application of the equitable rule to the facts of the present case. It is not suggested by the defendants that the document, upon which the plaintiff relies, was imperfectly clothed, or that all the formalities connected with the document were not gone through, what is suggested is that the relinquishment did not become effective until there was a relinquishment in fact, and to a case so put, it is clearly no answer to refer us to the doctrine of part performance.

But supposing it is possible to investigate a case of part performance, it is relevant to enquire whether the plaintiff does found upon the equities arising from the alleged actings of the parties. The plaint expressly asks for the following declaration:

"That the Court be pleased to declare that by the deed of surrender and the *ekrarnama* dated the 18th December, 1918, the plaintiff's father and the defendant second party became entitled as the next immediate reversionary heirs of the late *Maharaja* Sir Harballabh Narain Singh Bahadur, K.C.I.E., to all the properties left by him, and the defendant 1st party has no right to withhold possession of the Sonbarsa estate from the plaintiff and the defendant second party."

This does not look as if the plaintiff has based his claim, not upon the deed of surrender but upon the equities arising from the actings of the parties. A careful perusal of the plaint is sufficient to establish that the plaintiff bases his title on the deed of surrender. We are not told what the actings of the parties were which have given rise to an equity in favour of the plaintiff and it is, in my opinion, quite impossible to investigate a case of equity on the plaint as presented by the plaintiff.

But I do not intend to rest my decision on this point on so narrow a ground as the construction of the plaint. The evidence does not, in my opinion, establish that there have been actings of the parties on which the plaintiff can base his title. The deed of surrender was executed on the 18th December, 1918. On the 23rd December, the *Maharanis* addressed a letter to the Collector informing him of what they had done and requesting him

"to take steps to make over the charge and management of the said properties to Rao Bahadur Gobind Singh and Rudra Pratab Singh if the Court of Wards do not think fit to retain management under section 13 (*a*) of Act IX of 1879 (B. C.)"

This is the sole 'acting' on the part of the *Maharanis*, and it has been gravely argued that, upon this letter an equity can be founded in favour of the plaintiff. I am unable to accept this contention as well founded. It

was productive of no alteration of circumstances, no loss or inconvenience, and it certainly does not disclose any act done by the grandsons, known to and permitted by the *Maharanis* to take place on the faith of the engagement, as if it were perfect. The letter was written and addressed on the 23rd December 1918, and there is no evidence of any act done subsequent to the 23rd December 1918 which might suggest the inference that the *Maharanis* acted on the transaction of 18th December or that they permitted their grandsons to act on the faith of the transaction of the 18th December as if it were complete in itself. The *Maharanis* continued to reside in Sonbarsa and to draw their maintenance allowance from the Court of Wards. The eldest *Maharani* died in August 1920, and on her death, her interest in her husband's estate became vested in *Maharani* Nawlakhbati.

The suit was instituted on the 17th January 1921, and the Court of Wards retired from the management of the estate on the 27th April 1922. On the retirement of the Court of Wards *Maharani* Nawlakhbati became entitled to speak on her own behalf, and she promptly repudiated the transaction of the 18th December. In my opinion, the evidence does not support the contention that there were actings of the parties on which the plaintiff could rely in support of his title.

It was then argued that the only way in which the *Maharanis* could have abandoned the property was by requesting the Court of Wards to make over the properties to their grandsons, and that this they did by their letter of the 23rd December. But the question, in my opinion, is not whether the *Maharanis* made an attempt to relinquish their estate, but whether there was relinquishment in fact.

Upon the withdrawal of the Court of Wards from the management of the estate, it was open to *Maharani* Nawlakhbati to affirm the transaction of the 18th December. She expressly declined to affirm it, and I do not see on what ground the plaintiff should be allowed to maintain ejectment against her since she was not at any time bound to relinquish her estate in favour of her grandsons, and since she has resiled from the engagement before completing the transaction.

It was then contended on behalf of defendant No. 2 that assuming that the deed of surrender carried the estate from the *Maharanis* to him and to his brother, on the death of his brother, the interest of his brother came to him by survivorship, and the plaintiff as the son of his brother has no title to maintain the suit. The argument is founded on the decision of the Judicial Committee in *Venkayamma* v. *Venkataramanayama* (6) in which it was established that, upon the death of a daughter, her sons succeeded to the property of their maternal grandfather as his heirs, and that they took the property jointly with rights of survivorship.

The Madras High Court had come to the conclusion that the doctrine of survivorship was limited to unobstructed succession and to the succession to the joint property of reunited co-parceners. This was undoubtedly the view of so eminent a Hindu lawyer as Sir Gurudas Banerji, and was accepted as settled law both in the Calcutta High Court and Madras High Court.

It was contended before the Judicial Committee by Mr. Mayne that there was a number of cases in the books in which property inherited as obstructed inheritance was regarded as joint with right of survivorship. Mr. Mayne referred to the case of sons succeeding to the self-acquired property of their fathers, to the case of widows succeeding to the property of their husband, and to the case of daughters succeeding to the property of their fathers.

The Judicial Committee thought that,

> where sons succeed, the inheritance as to them is unobstructed,"

but it accepted the cases of widow and daughters as conclusively establishing that the doctrine of survivorship is not limited to unobstructed succession and to the succession to the joint property of reunited co-parceners.

It was urged before us by Mr. Naresh Chandra Sinha, that, according to the Mitakshara, upon the death of a widow or a daughter, her co-widow

(6) (1902) 25 Mad. 678=29 I. A. 156=4 Bom. L.R. 657=7 C. W.N. 1=12 M.L.J. 299=8 Sar. 286 (P.C.).

or the surviving daughter succeeds to the property, not indeed by survivorship, but as the nearest heir of the last male holder of the property but it seems to me that we are not at liberty to entertain the argument, for to do that would be to throw doubt upon the correctness of the decision of the Judicial Committee. On the decision of the Judicial Committee it must follow that Barra Lal, at his death, did not leave any interest in the estate which was capable of being inherited by the plaintiff.

But the actual decision of the Judicial Committee by no means decides the questions which have been raised in this appeal. The critical question is, is the right of survivorship, referred to by the Judicial Committee, the right of survivorship as understood by the *Mitakshara* law, according to which the right will not prevail in favour of the survivor as against the male issue of the deceased? The passage in the judgment of the Judicial Committee, as to the interpretation of which the Madras High Court and the Allahabad High Court have differed from each other, runs as follows:—

"what then was the character of the property which they" (that is to say, the daughter's sons) "took? In the grandfather's hand it was separately acquired property. In the hands of the grandsons it was ancestral property which had devolved on them under the ordinary law of inheritance."

And then follows a passage which, in my opinion, is the key to the understanding of the decision. That passage is as follows:—

"Niladri and Appa Rao were members of a united family."

Now it must be conceded that if the term "ancestral property" was used by the Judicial Committee in the sense in which that term is understood in the *Mitakshara*, it will be impossible to admit the validity of the argument advanced on behalf of defendant No. 2 that his right to take by survivorship will prevail as against the plaintiff. "Ancestral property" in its technical sense means "property which descends upon one person in such a manner that his issue acquire certain rights in it as against him."

Mr. Lakshmi Kant Jha on behalf of defendant No. 2 maintains that there is an exception to the general rule when we are dealing with daughter's sons and their issue. Daughter's sons, we are told, occupy a special position in the family of their maternal grandfather, but their sons are not members of the family of the maternal grandfather of their father, and they cannot be regarded as having an interest by birth in the property of the maternal grandfather of their father, since they do not offer any funeral cakes to their father's maternal grandfather.

The argument is an attractive one, but it has two serious defects; first, whatever the position of the daughter's sons may have been before the appointment of a daughter to raise up issue for her father became obsolete, under this present law he is a member of his own father's family, and cannot be regarded as a member of his maternal grandfather's family, and secondly, the fact that a person does not offer funeral cakes to the owner of the property does not decide the question which is in debate before us.

It is quite true that it is only the persons who offer the funeral cake to the owner of the property that are regarded as having an interest in the property by birth. But it is well established that as each fresh member takes a share, his descendants to the third generation below him take an interest in that share by birth. In my opinion, if the estate were ancestral estate in the hands of Barra Lal and Chotey Lal, their descendants to the third generation below them would take an interest in that estate by birth, and the plaintiff, as the son of Barra Lal, would be entitled to maintain partition against Chotey Lal.

But a more serious question remains, namely, whether the property could be regarded as ancestral property in the hands of Barra Lal and Chotey Lal. Mr. Mayne answers the question in the negative. "Hence all property," says Mr. Mayne,

"which a man inherits from a direct male ancestor, not exceeding three degrees higher than himself, is ances-

tral property, and is at once held by himself in coparcenary with his own issue. But where he has inherited from a collateral relation, as for instance, from a brother, nephew, cousin or uncle, it is not ancestral property; consequently his own descendants are not coparceners in it with him.....On the same principle property which a man inherits from a female, or through a female, as for instance a daughter's son.....would not be ancestral property." (Mayne 8th Edition, section 275, page 350).

In the case of *Atar Singh* v. *Thakur Singh* (7) the Judicial Committee came to the same conclusion. In the course of its judgment, it said as follows:

"unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu law."

The question is one of difficulty: and I have great hesitation in holding that the Judicial Committee in the Madras case used the expression "ancestral property" in the technical sense in which that term is used in the *Mitakshara*.

How then should the question be answered? In my opinion, the solution lies in the sentence which follows the statement that in the hands of the grandsons it was ancestral property. The Judicial Committee pointedly referred to the fact that Niladri and Appa Rao were members of a united family, and then cited the following passage from *Sivaganga case (8)* | *Kattama Nachiar* v. *The Rajah of Sivagunga* |

"According to the principles of Hindu law, there is coparcenership between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's life-time a common interest and a common possession."

Now admittedly Niladri and Appa Rao did not have a common interest and a common possession in the property of their maternal grandfather during his lifetime. But they were undoubtedly members of a united family, and there was coparcenership between them, and, I would add, their issue, *qua* the property which was admittedly their ancestral property. In my opinion, the Judicial Committee acted upon the view that the property inherited by Niladri and Appa Rao formed an accretion to their family property, for on no other hypothesis is it possible to explain that decision consistently with the admitted principles of the *Mitakshara*. This is the view which the learned author of Mayne's Hindu Law has taken.

"It will be observed", says the learned author, (8th Edition, S. 563 A.)

"that in this case the property descended to a single daughter, who was the mother of both sons and that these sons were members of an undivided family, who took the whole property at the same time by the same title. *Prima facie* there was no reason why they should hold it in any manner different from that of their other family property, to which it would naturally form an accretion."

If this view be right, as I think it is, their sons would have an interest equal to their fathers in the property treated as having accreted to the property in which they had an interest by birth. In the case before us, Barra Lal and Chotey Lal were members of a united family, and it is not suggested that there was, at any time, a separation between them. In my opinion, the question must be answered in favour of the plaintiff and against defendant No. 2.

The only other question which I have to consider is the question of fact raised by *Maharani* Nawlakhbati, namely, whether the deed of surrender executed by her is operative and

(7) (1908) 35 Cal. 1039=35 I. A. 206 =10 Bom. L. R. 790=12 P.W.R. 1908=8 C.L.J. 359=12 C.W.N. 1049 =18 M.L.J. 379=4 M.L.T. 207= 6 I.C. 721=12 P.R. 1910 (P.C.).

(8) (1863) 9 M.I.A. 539—2 W.R. 31 =2 Sar. 25 (P.C.).

enforceable against her. The case of the *Maharani* on this point is stated in paragraph 6 (*a*) of her written statement which is as follows :—

"That the defendant No. 2 of whom the *Maharanis* were very fond, was ordered by the Government to leave the district owing to his suspected complicity in the murder of the late *Maharaja Bahadur*. The plaintiff's father represented to the *Maharanis* that it was necessary to have a deed executed by them, so that the Government might be induced to allow the defendant No. 2 to return to Bhagalpur district and that the *Maharanis* on that misrepresentation without any proper and independent advice, signed the alleged deed of surrender without properly understanding its effect. This defendant submits that in the circumstances the deed is legally invalid and inoperative".

Now, one thing is clear on the evidence and that is that the *Maharanis* made repeated attempts to have the order of externment against defendant No. 2 recalled. On the 15th May 1907, the *Maharanis* presented a petition to the Collector of Bhagalpur in which they asked for permission to be allowed to surrender their estate in favour of Chotey Lal. With reference to this petition the learned Subordinate Judge says that this was an attempt "to prove the innocence" of Chotey Lal.

"In the peculiar circumstances in which he was then placed", says the learned Subordinate Judge, "his mother and brother could not withhold their consent to the said application if it could remove the strong suspicion of murder from him. A perusal of this application would show that its main object was to save Chotey Lal. The surrender matter played an insignificant part in it. It was rather thrown out as a bait."

Between 1907 and 1916, the *Maharanis* made various attempts in the same direction. Ex. T is a letter from the Collector dated the 14th March 1908 to the *Maharanis*, in which, replying to the letter of the *Maharanis* dated the 11th March 1908 he states that the Commissioner and he were of opinion that it was "not advisable to recall Chotey Lal Sahib at present".

Ex. K is an order dated the 24th December 1912 passed by the Collector on the petition of the *Maharanis* praying that their younger grandson may be allowed to visit Sonbarsa. The order runs as follows :—

"I have fully considered the question and regret I am unable to recommend that the younger grandson of the late *Maharaja Bahadur* of Sonbarsa should be again allowed the privilege of coming to this district and to Sonbarsa."

In 1913, the *Maharanis* presented a memorial to the Local Government, and Ex. K is the reply of the Government to the memorial which runs as follows :—

"With reference to their memorial dated nil, the undersigned is directed to convey to the *Maharani Sahebs* of Sonbarsa, the regret of the Lieutenant-Governor in Council that he is unable to alter the existing order under which Lal Rudra Pratap Singh is forbidden to come back to Sonbarsa."

In their letter of the 4th March 1918 Ex. 5, the *Maharanis* in forwarding the deed of surrender which they proposed to execute in favour of their grandsons to the Collector entered into an elaborate defence of Chotey Lal and expressly asked that the Government may withdraw the order prohibiting the return of Chotey Lal to the district. And the evidence of Rai Bahadur Surja Prasad shows that, on the eve of the execution of the deed of surrender, the elder *Maharani* consulted him as to "what was the best way of getting the younger grandson to Bhagalpur".

Now it is impossible to read the evidence of *Maharani* Nawalakhbati, without being impressed by the passion with which she exclaims again and again "I have not given the property to anybody. It has been done by *dhokha dhokhi* (that is, by practising deception) about the coming of Chotey Lal".

Her evidence is that it was represented to her that if she executed the document the order of externment against Chotey Lal would be recalled,

and he would be able to return to Bhagalpur. She says that the document was not read and explained to her, and that she would never have signed it, had she known that she was divesting herself of her proprietary interest in property for ever. In my opinion, the story told by her is inherently probable having regard to the antecedent history showing what strenuous efforts were made by the *Maharanis* to have the order of externment against Chotey Lal recalled.

Before examining the evidence on the point, it will be useful to remember the rules which have from time to time been laid down in order to enable the Courts to determine whether deeds taken from *pardanashin* ladies are enforceable against them. The jurisdiction of the Courts of law to afford protection to *pardanashin* ladies rests on a presumption of the imperfect knowledge of the world and exposure to undue influence, making it the duty of a person taking a beneficial grant or contract from a *pardanashin* lady to show that the deed was explained to her and understood by her.

Starting from the elementary principle that every person taking a document from a *pardanashin* lady is bound to show affirmatively that the document was her document, that is to say, that she understood the nature of the transaction and the effect of it. The Courts of law have laid down certain rules for assisting them to determine the point; but it is necessary to remember that the rules so laid down are rules of prudence, rather than rules of law, and that their application will depend on the particular facts of each case. As the Judicial Committee once pointed out, there is a grave risk of failure of justice, if these rules are moulded into inelastic formulas or crystallized into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

Now I do not propose to discuss all the cases bearing on the point. It will be sufficient to refer to the decision of Mr. Justice Mukherji in *Nibarn Chandra Mukerji* v. *Nirupama Debi* (9) where the learned and distinguished Judge summed up the whole position in these words—

"It is well settled," said the learned Judge, "that the Court, when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered, and thirdly, that she had independent and disinterested advice in the matter..... .

"On examination, these decisions will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence and secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically.... .

"The essence of the matter was tersely put by Lord Buckmaster in *Sunitabala Debi* v. *Dhara Sundari Debi* (10) when he stated that the circumstances under which a *pardanashin* woman agrees to transfer property in which she is interested must be carefully examined, in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters and that she did understand them as they were explained to her, that nothing was concealed, and there was no undue

(9) (1921) 34 C.L.J. 563=69 I.C. 476 =26 C.W.N. 517.

(10) (1919) 47 Cal. 175=46 I.A. 272 =22 Bom. L.R. 1=11 L.W. 227 =24 C.W.N. 297=37 M.L.J. 483 =17 A.L.J. 997=53 I.C. 131=(1919) M.W.N. 821 (P.C.).

influence or misrepresentation. ....

"It will be observed that the Court must thus have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate, and to have possessed a capacity to judge for herself."

I respectfully adopt the view which was expressed by Mr. Justice Mukherji in the case just cited.

Now it is relevent to enquire whether the case before us belongs to the first class mentioned above, where the person who seeks to hold the lady to the terms of her deed stands towards her in a relation of personal confidence. The learned Government Advocate strenuously contends that since the *Maharanis* were under the Court of Wards, Barra Lal did not stand towards her in a relation of personal confidence.

Now one of the most impressive facts in the present case is that, though the *Maharanis* were wards of the Court, they made no attempt to seek the advice of the Court of Wards in the matter of the execution of the deed of surrender. They kept the Collector informed of what they were doing in the matter but it is one thing to keep the Court of Wards informed of what they were doing; it is another thing to seek its advice in the matter. The Court of Wards, though the statutory guardian of the *Maharanis*, was completely ignored; and the evidence of Mr. Nilmony De, who was the manager of the Soubarsa Estate under the Court of Wards from 1914 to 1920, shows that, so far as he was concerned the *Maharanis* were altogether "reticent" on this question of the deed of surrender. It is idle, therefore, to say that, as the Court of Wards was the guardian of the *Maharanis*, Barra Lal could not have stood towards them in relation of personal confidence.

In the case of *Mariam Bibi* v. *Ibrahim* (11) the document was taken by brother from a sister who was living with her husband. The case was decided on the footing that there was a relation of personal confidence between them.

In the case of *Nabaran* v. *Nirupama* (9) the document was taken from the lady by her husband's step-brother. The case was again decided on the footing that there was a relation of personal confidence between them. Mr. Justice Mukherji pointed out in the latter case that according to the normal structure of a joint Hindu family, the lady would look upon her husband's step-brother as her natural protector in whom she might repose confidence properly to safeguard her rights.

The facts of the present case are strongly in favour of the view that Barra Lal would be looked upon as the natural protector of the *Maharanis*, who, it must be remembered, were old and had no one else to advise them. Barra Lal was their daughter's son and was brought up in their house. There was no one nearer to them in relationship than Barra Lal and, it is Barra Lal to whom they would naturally turn for advice and guidance. His Lordship then discussed the evidence and proceeded as follows:—On a careful consideration of all the evidence, I have come to the conclusion that Barra Lal stood towards *Maharanis* in a relation of personal confidence.

That being so, it was, in my opinion, absolutely necessary that the *Maharanis* should have received independent and disinterested advice in the matter. The learned Subordinate Judge has come to the conclusion first, that it was not necessary, in this case, that they should have received independent advice, and secondly that there are circumstances in the case which suggest the inference that they did receive independent legal advice in the matter. I will first consider whether the possession of independent legal advice was essentially necessary to validate the deed. The learned Subordinate Judge bases his conclusion on his view that there is an inherent right in a Hindu widow to surrender her estate to the next reversioners and that,

"such act is regarded as pious and meritorious on their part for which independent or disinterested legal advice is not necessary."

(11) (1918) 28 C.L.J. 306=48 I.C. 561.

It is impossible, in my opinion, to maintain the proposition. There is an old case in the books, the case of *Delroos Banoo Begum* v. *Nawab Syed Ashgur Ali Khan* (12) which is still treated as a leading case in our Courts. That was a case in which a Muhammadan widow executed a *tawlentnamah* with a view to perpetuate certain ceremonies in commemoration of her mother's death.

Now it cannot for a moment be disputed that there is "an inherent right" in a Muhammadan widow to dedicate her properties to religious trust, and that such dedication "is regarded as pious and meritorious" on the part of Muhammadan widows. She however denied on oath an effectual knowledge of the document, and the Calcutta High Court came to the conclusion that it was not operative against her on the ground (amongst others) that "she had no professional assistance at the time."

The decision of the Calcutta High Court was affirmed by the Judicial Committee [*Ashgur Ali* v. *Delroos Banoo* (13)]. It is unnecessary to pursue the subject, for there is no authority in support of the proposition for which the learned Subordinate Judge has made himself responsible.

The conclusion of the learned Subordinate Judge is also based upon his finding that the *Maharanis* had "intellectual attainment and business capacity"

sufficient to bring the case within the decision of Lord Shaw in *Kali Baksh Singh* v. *Ram Gopal Singh* (14).

That was a case in which a Hindu lady made a gift of about one-half of her estate to the son of her paramour. The Judicial Committee found, first, that the lady had been in the habit for a considerable period of years of managing her affairs, of entering up her accounts, and of attending to business; secondly, that she had much strength of will, and thirdly that she was a capable woman, fully alive to the direction of her own interests, and well aware of what she was doing. Upon these facts their Lordships had to consider whether the fact that the lady did not obtain independent outside advice invalidated the deed.

In dealing with this point Lord Shaw said as follows:—

> The possession of independent advice or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended and deliberately and of her own free will carried out the transaction. If she did, the issue is solved and the transaction is upheld; but 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—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand."

Now, in my opinion, there is no resemblance whatever between this case and the case of *Kali Baksh* v. *Ram Gopal* (14). Here the judgment dealt with evidence and continued as follows:—On an anxious consideration of the evidence in the case, I have come to the conclusion that the circumstances do not establish that *Maharani* Nawlakhbati obtained any independent legal advice in the matter that she understood that, by executing the deed of surrender, she had effectively divested herself of all proprietary interest in the estate of her deceased husband.

It remains for me to consider whether the deed of surrender was read and explained to the ladies. The judgment then dealt with evidence and proceeded as follows:—To sum up, I have been impressed by the fact that *Maharani* Nawlakhbati has denied on oath an effectual knowledge of the deed of surrender.

(12) (1875) 23 W. R. 453=15 B. L. R. 167.
(13) (1877) 3 Cal. 324=3 Sar. 749 (P.C.).
(14) (1913) 36 All. 81=41 I. A. 23=16 O. C. 378=18 C.W.N. 282=12 A. L. J. 115=15 M. L. T. 130=19 C. L. J. 172—1 O. L. J. 67=26 M. L.J. 121—(1914) M. W. N. 112=21 I. C. 985=16 Bom. L.R. 147 (P.C.).

The act imputed to her is an act of effacement, an act by which she is said to have operated her death. In the witness box she denies that she is dead, and she explains the circumstances under which she came to execute the deed of surrender.

It was determined in the case of *Delus Banoo Begum* v. *Ashgar Ali* (12) and affirmed by the Judicial Committee [see (13)] that *pardanshin* ladies have a claim to special consideration where they deny on oath an effectual knowledge of documents which they are said to have made. It may of course be that her explanation is untrue and that she is really dead; but where the question is whether a *pardanashin* lady has operated her own death, which she was not bound to do, the Courts will, I apprehend, act with great caution, and will not deprive her of her property unless compelled to do so.

Most of the cases that come before the Courts are cases which arise after the death of the *pardanashin* ladies; but the question here is raised in the lifetime of *Maharani* Nawlakhbati, and the claim of the plaintiff is disputed by *Maharani* Nawlakhbati. In the next place, it seems to me that the explanation given by *Maharani* has received considerable support from the admitted history of the transactions from 1907 to 1918.

Again and again attempts were made by the *Maharanis* to have the order of externment against Chote Lal recalled; and we know that in 1907 they proposed to surrender the estate to Chote Lal not with a view to carry the estate from them to Chotey Lal, but with the object of forcing the Government to recall the order of externment against Chote Lal. And the advice which they sought from Rai Bahadur Suraj Prasad on the eve of the transaction in suit is not without significance, and suggests that, in the minds of the *Maharanis*, there was some connection between the execution of the document and the cancellation of the order of externment against Chotey Lal.

In the third place, I consider that Barra Lal stood towards *Maharanis* in some relation of personal confidence, and should have dealt with them at arm's length. This he did not do and, what is more, he completely ignored the Court of Wards which was the statutory guardian of the *Maharanis*. The Court will, in such a case, presume confidence put and influence exerted, and I am not satisfied on the evidence, that confidence was not put and that influence was not exerted.

But, apart from the question of presumption and, assuming that Barra Lal did not stand towards the *Maharanis* in some relation of personal confidence, I am quite clear that the possession of independent and disinterested advice was essential to give validity to the deed of surrender. There is no evidence that the *Maharanis* had an intellectual attainment or business capacity sufficient to fit them to be on guard against any attack that might be made on their property, and I am unable to say that the possession of independent advice would have made no difference in the case. The terms of the deed were, on the face of it, attractive so far as the *Maharanis* were concerned, for the immediate effect of the deed would be to give them Rs. 2,000 per month, whereas they were getting much less from the Court of Wards. But the debts of the estate had practically been liquidated, and the retirement of the Court of Wards could not long be delayed.

Then again it is established beyond doubt and controversy that the motive which impelled the *Maharanis* to enter into the transaction of the 18th December, 1918, was to secure the withdrawal of the order of externment against Chotey Lal; and I think that this was a matter in which they were entitled to have independent advice. I think that it is established that *Maharani* Nawlakhbati did not have any independent advice; and though I agree that the document was read to the *Maharanis* in the language understood by them, I am unable to hold, on the uncorroborated evidence of a single witness, since that evidence is contradicted by *Maharani* Nawlakhbati, that the document was explained to them. Differing from the learned Subordinate Judge, I hold that the deed of surrender is not enforceable as against *Maharani* Nawlakhbati.

I would dismiss this appeal with costs.

Appeal dismissed.

* A. I. R. 1923 Patna 514

DAS AND KULWANT SAHAY, JJ.

Surajdeo Narain Singh and *another* - Decree-holders-Appellants.

v.

Partap Rai and *another*—Judgment-debtors-Respondents.

A. No. 245 of 1922, decided on 15th May, 1923 from an order of Sub. J., Muzaffarpur, dated 14th May, 1921.

(a) *Civil P. C., O. 41, R. 19—One appeal dismissed for default—Fresh one is entertainable, if not time-barred—C. P. C., S. 11—Dismissal for default is not a decree.*

There is nothing in law to prevent entertainment of a fresh appeal on the dismissal for default, of a previously filed appeal, provided the latter appeal was otherwise in order and was filed within the period of limitation. The only ground upon which a fresh appeal can be held to be barred is that the order of dismissal of the previous appeal would operate as *res judicata* to the hearing of the fresh appeal. But the order of dismissal for default does not amount to a decree within the definition of the term as given in the C. P. Code as the appeal was not heard and decided on the merits. 36 A. 350 P.C., Foll., 2 P. L. T. 28, Dist. The omission of a provision for fresh appeal in O. 41, R 19., cannot have the effect of taking away such right, if it is not otherwise barred. [P. 514, C. 2, P. 515, C. 1]

(b) *Civil P. C., S. 96—'An appeal'—'An' does not mean 'one'.*

The words an 'appeal' in S. 96 do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not bar the hearing of the fresh appeal. 24 C. W. N. 1020 Dist. [P. 516, C. 1]

(c) *Occupancy holding—Non-transferable—Holding can be sold in execution of money decree.*

The law is now settled that a non-transferable occupancy holding can be sold in execution of a money decree. A. I. R. 1922 P. 114; 3 P. L. T. 205, Foll. [P. 516, C. 2]

P. C. Rai and *S. N. Rai* - for Appellants.

Shiveshwar Dayal—For Respondents.

Kulwant Sahay, J.—This is an appeal by the decree-holders against the order of the Subordinate Judge of Muzaffarpur, dated 10th July 1922, dismissing their appeal on the ground that the appeal was not maintainable.

The decree-holders are co-sharers landlords and they obtained a money decree against the respondents who are their tenants. In execution of this decree they sought to sell certain trees and bamboos standing on the occupancy holding of the respondents.

The respondents thereupon filed an objection under section 47, Civil Procedure Code on the ground that the trees and bamboos being attached to the land of their non-transferable occupancy holding, were not liable to attachment and sale in execution of the money decree. The learned Munsif allowed the objection and dismissed the execution case by his order dated the 14th May 1921. Against this order the decree-holders preferred an appeal before the District Judge, which was registered as Miscellaneous Appeal No. 75 of 1921. This appeal was dismissed for default on the 3rd June 1921. The dismissal was under Order 41, Rule 18, Civil Procedure Code on account of the failure of the appellants to deposit the process fees for service of notice on the respondents.

Thereupon the appellants, instead of applying for re-admission of the appeal under Order 41, Rule 19, Civil Procedure Code, filed a fresh memorandum of appeal before the District Judge within the period of limitation for appeal, with a prayer that the copies of order and decree of the first Court filed by them in the previous appeal might be attached to the fresh memorandum of appeal.

The learned District Judge allowed this prayer and the fresh appeal was registered as Miscellaneous Appeal No. 85 of 1921. This appeal No. 85 came on for hearing before the Subordinate Judge when an objection was taken by the respondents to the effect that the appeal was not maintainable. The learned Subordinate Judge has given effect to this objection and has dismissed the appeal although he was of opinion that on the merits the appellants were entitled to succeed.

The decree-holders preferred this second appeal against the order of the Subordinate Judge and it is contended on their behalf that the decision of the learned Subordinate Judge that the appeal was not maintainable is wrong in law.

In my opinion the view taken by the learned Subordinate Judge cannot be supported. There is nothing in law to prevent the entertainment of a fresh appeal on the dismissal for default of a previously filed appeal provided the later appeal was otherwise in order

and was filed within the period of limitation. The only ground upon which a fresh appeal can be held to be barred is that the order of dismissal of the previous appeal would operate as *res-judicata* to the hearing of the fresh appeal.

The question is what is the effect of the order of dismissal for default. The order does not amount to a decree within the definition of the term as given in the Code of Civil Procedure. The appeal was not heard and decided on the merits. As was pointed out by the Judicial Committee of the Privy Council in the case of *Abdul Majid* v. *Jawahir Lal* (1), the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellants had not complied with the condition under which the appeal was open to them and therefore they were in the same position as if they had not appealed at all.

The learned Subordinate Judge seems to hold that the only remedy available to the appellants was an application for readmission of the appeal under Order 41, Rule 19, Civil Procedure Code. This rule gives an option to the appellants to apply for re-admission of the appeal, but it does not take away any other remedy that may be available to them.

Reliance has been placed by the learned Vakil for the respondents on the case of *Raghu Prasad Singh* v. *Jadu Nandan Prasad* (2) where it has been held by a Division Bench of this Court that where there has been an appeal and that appeal is dismissed for default on the part of the appellants for failure to pay the printing cost, an application for execution of the decree awarding cost to the respondents passed by the first Court was within time, if presented within 3 years from the date of dismissal of the appeal and it has been contended that the effect of the decision is that although an appeal is dismissed for default, the position is not the same as if no appeal had been filed at all.

The decision of that case turned upon the interpretation of article 182, clause (1) of the Limitation Act and it was held that where there had been an appeal and where that appeal has been properly presented and is within time, any order of the High Court dismissing the appeal or putting an end to the appeal in any way is either a decree or an order within the meaning of article 182, clause (2) of the Limitation Act.

Clause (2) of article 182 provides that where there has been an appeal, the period of limitation for execution of the decree or order of any Civil Court not provided for by article 183 or by section 48 of the Code of Civil Procedure is 3 years from the date of the final decree or order of the appellate Court or the withdrawal of the appeal, and their Lordships held that although an appeal might be dismissed for default, the order of dismissal is an order within clause (2) of article 182 and the period of limitation would run from the date of the order of dismissal of the appeal.

Their Lordships did not hold that the order dismissing the appeal would amount to a decree and this case is no authority for the proposition that the order would operate as a bar to the entertainment of a fresh appeal, if presented within time. As I have already said, the decision turned entirely upon the interpretation of clause (2) of article 182 and does not in my opinion help the respondents in the present case.

Reference has been made by the learned Vakil for the respondents to the provisions of Order 9, rule 4 of the Code of Civil Procedure, and it is argued that inasmuch as the right to bring a fresh suit is given by that rule to a plaintiff whose suit is dismissed for default under Rule 2, Order 9 in addition to his right to apply to set aside the dismissal, and inasmuch as no right to prefer a fresh appeal has been given to an appellant under Order 41, Rule 19, it follows by analogy that an appellant, whose appeal

(1) (1914) 36 All. 350 -1 L. W. 483 12 A. L. J. 621 -16 Bom. L. R. 395 18 C. W. N. 963 19 C. L. J. 626 27 M. L. J. 17--(1914) M.W.N. 485 - 23 I. C. 649=16 M. L. T. 44 (P.C.)

(2) A. I. R. 1921 Pat. 6=6 P. L. J. 27—59 I. C. 896—2 P. L. T. 28.

is dismissed under Order 41, Rule 18, has no right to prefer a fresh appeal and his only remedy is by an application for re-admission of the appeal. I cannot agree with this contention. The omission of a provision for fresh appeal in Order 41, Rule 19 cannot have the effect of taking away such right, if it is not otherwise barred.

It is next contended by the learned Vakil for the respondents that section 96 of the Code of Civil Procedure contemplates only one appeal. The words used are "an appeal shall lie from every decree" and it is contended that an appeal having been once preferred and dismissed although for default, a fresh appeal cannot be maintained.

To my mind the interpretation put upon section 96 by the learned Vakil is not correct. The words "an appeal" do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not bar the hearing of the fresh appeal. Reliance has been placed by the respondents upon the case of *Aboda Khatun* v. *Majubali Chaudhuri* (3).

In that case the plaintiffs made an application under section 105 of the Bengal Tenancy Act for enhancement of rent of a tenure. Subsequently the plaintiffs appeared and stated that they did not wish to prosecute the proceeding under section 105, whereupon the proceeding was dismissed for non-prosecution. Subsequently the plaintiffs brought a suit in the Civil Court for enhancement of rent.

It was contended by the defendant that the suit was barred by section 109 of the Bengal Tenancy Act and their Lordships held that the suit was so barred although the application under section 105 of the Bengal Tenancy Act had been withdrawn and the proceeding was dismissed for non-prosecution. In the course of their judgment their Lordships observed "An application which has been made, whether it is withdrawn or whether it is dismissed for non-prosecution, is nevertheless an application made within the meaning of the provisions of section 109."

The decision of that case depended on the interpretation of section 109 of the Bengal Tenancy Act which provides that a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted, or proceedings taken under sections 105 to 108. Section 109 clearly operates as a bar to the entertainment of any application or suit by the Civil Court where the subject matter of the application or suit has already been the subject of an application made or suit instituted under sections 105 to 108 of the Act and the applicant whose application under section 105 is dismissed, cannot avoid the consequence merely by not prosecuting the application or suit.

Their Lordships did not hold that a fresh application under section 105 of the Bengal Tenancy Act was not maintainable. This case is clearly distinguishable from the facts of the present case.

The order of the learned Subordinate Judge holding that the appeal was not maintainable must therefore be set aside.

As regards the merits, the learned Subordinate Judge has come to the conclusion that the order of the Munsif was wrong. After the decision of the Full Bench of this Court in the case of *Sundarmohan Panigrahi* v. *Gana Raut* (4) the objection raised by the judgment-debtors cannot be sustained. The law is now settled that a non-transferable occupancy holding can be sold in execution of a money decree and the learned Vakil for the respondents frankly admits that the decision of the learned Subordinate Judge on the merits is correct.

The result is that this appeal is allowed, the order of the learned Subordinate Judge is set aside, the objection of the judgment debtors-respondents to the execution of the decree is dismissed and it is ordered that the execution do proceed according to law. The appellants are entitled to their costs in this Court and in the Courts below.

Das, J.—I agree.

Appeal allowed.

(3) A. I. R. 1921 Cal. 455—48 Cal. 157—24 C. W. N. 1020—33 C. L. J. 304.

(4) A. I. R. 1922 Pat. 19—1 Pat. 317—3 P. L. T. 205 (F. B.)

*A. I. R. 1923 Patna 517

MULLICK AND MACPHERSON, JJ.

Jugal Kishore Narayan Singh and others—Decree-holders-Appellants

v.

Bhatu Modi and others—Judgment-debtors-Respondents.

A. No. 248 of 1922 decided on 2nd May, 1923, from an order of District Judge, of Monghyr, dated 29th August, 1922.

Landlord and tenant—Decree for rent—Sale in execution of, subject to liabilities under another decree—Decree-holder himself purchasing properties—Execution against other properties of debtor in respect of the other decree is not barred—Execution.

After a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant it cannot ordinarily be again sold in execution of any other decree for rent due by the same tenant. An exception however has been made in cases where the executing Court, although irregularly, allows the holding to be sold subject to a liability to satisfy another outstanding decree, in such cases the auction purchaser is concluded by *res judicata* and the landlord is competent to proceed in the first instance against the holding and to call upon the auction purchaser to discharge the liability which he has undertaken. But the principle has no application at all where the decree-holder is himself the purchaser. 6 C. W. N. 877 Dist. Even in a case where the landlord decree-holder purchased subject to liability to satisfy his other decree for arrears of rent, he may bring to sale the other property of the tenant in execution of his unsatisfied decree. [P. 517, C. 2]

K. P. Jayaswal—for Appellants.

A B Mukharji—for Respondents.

Mullick, J.—This case illustrates the difficulties which arise when in execution of a decree for arrears of rent the Court sells the holding subject to a liability for the arrears of years other than those in suit. The matter was considered in this Court in *Sayid Muhammad Jawad Hussain* v. *Maharaja Kumar Gopal Narain Singh* (1) and it would seem that here the irregularity has resulted in a loss against which the judgment-debtor can get no relief.

The facts are that on the 30th July 1910 the landlord obtained a rent decree against the tenant for the years 1314,1315 and 1316 F. S. for a sum of Rs. 641-11-0. He brought a second suit for the years 1317 to 1320 which was decreed on the 29th August 1914 for a sum of Rs. 935-13-0. In execution of the first decree he then brought the holding to sale in May 1915 and it must now be taken as established that it was sold subject to a liability to satisfy the second decree. The landlord then instituted execution case No. 23 of 1921 for the realization of the second decree and asked for the attachment of properties other than the holding but the Subordinate Judge by his order dated the 20th December 1921 held that as the decree-holder was himself the auction purchaser and had bought the holding subject to the liability to satisfy the second decree the debt was satisfied and the execution could not proceed.

In appeal the learned District Judge held on the 29th August 1922 that there was an equitable estoppel in the case and that the proper course was for the decree-holder to sell the holding first and then if the decree remained unsatisfied to proceed against the other properties of the judgment-debtor.

The present second appeal is filed against the District Judge's order.

Now it is settled that after a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant it cannot ordinarily be again sold in execution of any other decree for rent due by the same tenant. An exception however has been made in cases where the execution Court, though irregularly, allows the holding to be sold subject to a liability to satisfy another outstanding decree; in such cases the auction purchaser is concluded by *res judicata* and the landlord is competent to proceed in the first instance against the holding and to call upon the auction purchaser to discharge the liability which he has undertaken.

That was the principle of the decision in *Haradhan Chattoraj* v. *Kartik Chandra* (2) on which the respondent now relies; but that case has no application at all where the decree-holder is himself the purchaser. I take it that the judgment-debtor could not have resisted the attachment of other properties if after the sale the decree-holder had changed

(1) (1921) 2 P. L. T. 248.

(2) (1902) 6 C. W. N. 877.

his mind and declined to proceed against the auction purchaser. The law gives the decree-holder an option and I cannot see how any estoppel arises.

But it is contended that there was some representation by the decree-holder by reason of which the tenant was induced to change his position. Now the representation must be a statement of fact and not of a proposition of law, and it is clear that the decree-holder has said nothing which he now desires to repudiate. If the representation was that there was a second decree outstanding then there was nothing incorrect in that statement and no question of a change of position by reason of such a representation can arise. If the representation was that the property was in law liable to be again sold in execution of the second decree that was a statement of a proposition of law and cannot raise an estoppel; and even if the decree-holder had gone so far as to represent that he would not execute the second decree at all except by the sale of the holding (which is not found in this case) the decree-holder would not be estopped by the mere expression of such an intention.

It is said that the judgment-debtor might, if he had been aware that the decree-holder would exercise his option as against the other properties, have applied to get the sale set aside under Order 21, rule 89, C. P. C. The reply is that the decree-holder has no responsibility in the matter. It may be that the judgment-debtor has been beguiled into a sense of security, but after all that is his own fault. He should have objected at the outset to the irregular sale and not having done so he must suffer the consequences.

The result is that the appeal will be decreed with costs in this Court and the Courts below.

Macpherson, J.—I agree.

Appeal allowed.

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* **A. I. R. 1923 Patna 518**

MULLICK AND ROSS, JJ.

Sheo Prasad Singh—Petitioner

v.

Sukhu Mahto—Opposite Party.

Civil Rev. No. 293 of 1922, decided on 19th January, 1923 against the order of Munsif of Barh.

Civil Procedure, Code, S. 115—Refusal to frame a necessary issue is good ground for interference in revision—Government of Ind a Act, S. 107.

Where upon the pleadings clearly an issue arises whether the rent payable by the defendan is below the prevailing rate and the trial Court, t on being so requested refuses to frame the same.

Held that the case is perhaps near the border line so far as section 115 of the Civil Procedure Code is concerned, but it is clear that under section 107 of the Government of India Act it is a fit case for interference in revision. 15 C. W. N. 682, Dist. [P. 518, C. 2, P. 519, C. 1]

Janak Kishore—for Petitioner.

Bhimala Charan Sinha—for Opposite Party.

Mullick, J.—The plaintiff brought a suit for enhancement of rent on two grounds, namely, that there had been a rise in the price of staple food crops, and that the rent paid by the defendant was lower than the prevailing rate paid for similar land with similar advantages.

The Munsif framed an issue with regard to the first ground but declined to frame an issue as to the prevailing rate. An application was made to him to re-consider his decision, but that application was unsuccessful, and the plaintiff now seeks the assistance of this Court in revision.

It is quite clear that the general rule is that, except on proof of irreparable injury, this Court will not interfere in revision under section 115 of the Code of Civil Procedure, when there is another remedy open to the applicant. Interlocutory orders are not exempted. Upon the pleadings here, clearly an issue arises whether the rent payable by the defendant is below the prevailing rate and the learned Vakil for the defendant cannot assign any reason why that issue was not framed. He contents himself by suggesting that possibly the Court may have been under the impression that section 31 (A) of the Bengal Tenancy Act did

not extend to the locality to which the suit relates, but that is not a sufficient answer. The plaintiff is entitled to have the issue raised and to give evidence as to the subject matter of it.

The learned Vakil for the opposite party next falls back upon the plea that, the Munsif having decided in exercise of a jurisdiction which he possesses, this Court cannot interfere either under section 115, Code of Civil Procedure, or under section 107 of the Government of India Act, and he cites *Chandi Roy* v. *Kirpal Roy* (1).

In that case Mr. Justice Woodroffe and Mr. Justice Carnduff declined to interfere where the Court had refused the plaintiff's prayer for the amendment of the plaint, but the learned Judges did not lay down any rule that, where there has been a refusal to exercise jurisdiction, the High Court will not be justified in interfering.

The case before us is perhaps near the border line so far as section 115 of the Civil Procedure Code is concerned, but it is clear to us that under section 107 of the Government of India Act it is a fit case for our interference.

The application will, therefore, be allowed and the Munsif will frame the issue which arises as to the prevailing rate and proceed with the trial in accordance with law. The petitioner will get his costs. Hearing fee one gold *mohur*

Ross, J.—I agree.

Rule made absolute

(1) (1911) 15 C. W. N. 682—10 I.C. 308.

A. I. R. 1923 Patna 519

COUTTS AND DAS, JJ.

Bhangi Dubey—Petitioner

v.

Emperor—Opposite Party.

Criminal Rev. No. 302 of 1922, decided on 15th June, 1922 from a decision of Magistrate, Sahabad.

Criminal Trial—No evidence except that of complainant—Enmity between complainant and accused Conviction is unsafe.

Where the whole prosecution evidence in regard to the actual occurrence has been disbelived except the evidence of the complainant himself; and it is found that there is serious enmity between the accused and the complainant, it is unsafe to convict the petitioner on the uncorroborated testimony of the complainant alone. [P. 519, C. 2]

S. P. Varma—for Petitioner.

The Assistant Government Advocate—for the Crown.

Coutts, J.—The petitioner in this case, Bhangi Dubey, has been convicted under section 325 of the Indian Penal Code and has been sentenced to one year's rigorous imprisonment and a fine of Rs. 100.

The case for the prosecution was that on the evening of the 24th of February 1922, as Shah Ghulam Makhdum was on his way home he was assaulted by the petitioner and others, and Bhangi Dubey struck him with a *danta* on his left eye with the result that the sight of his eye was destroyed. The whole prosecution evidence in regard to the actual occurrence has been disbelieved except the evidence of Shah Ghulam Makhdum himself, and it is on his uncorroborated statement that the petitioner has been convicted. There is serious enmity between the accused and Shah Ghulam and, in my opinion, it is unsafe to convict the petitioner on the uncorroborated testimony of this witness.

I would accordingly set aside the conviction and sentence and acquit the petitioner; the fine if paid must be refunded.

Das, J.—I agree.

Petition accepted.

A. I. R 1923 Patna 520

MULLICK AND KULWANT SAHAY, JJ.

(Firm of) *Jainaram Ramjash* Defendant-Appellant

v.

Sitaram Marwari and others Plaintiffs-Respondents.

Civil Rev. No. 310 of 1922, decided on 17th April 1923, against an order of District Judge of Manbhum, dated the 20th July, 1922.

Civil Procedure Code, O. 41, R. 17—Incapacity of pleader to argue must be treated as non-appearance.

On the adjourned date of hearing of an appeal, the Court refused to grant further adjournment, and called upon the junior pleader to argue the appeal. This, the junior pleader said, he was unable to do. The Court thereupon passed the following order: "Pleader for Appellant states that he cannot argue the appeal. Vakil for Respondents ready. The appeal is dismissed for default with costs."

Held, that in order to constitute appearance by a pleader it is necessary to show that the pleader was ready to place materials before the Court upon which the Court could apply its judicial mind and that there was no appearance within the meaning of O. 41 and that order of dismissal for default was right. 34 C. 403 F. B. and 1920 Pat. 118 Ref. [P. 521, C. 1]

A. B. Mukherjee and B. B. Mukherjee for Appellant.

P. N Sinha –for Respondent.

Mullick, J. –The suit out of which this application arises was brought by Sitaram Marwari and three others in the Court of the Additional Subordinate Judge of Dhanbad against Jainaram Ramjash for recovery of *khas* possession of surface rights of some lands and for the issue of a permanent injunction and for Rs. 1,000 on account of damages for subsidence. On the 28th February 1922, the Additional Subordinate Judge decreed the suit in full and on the 28th March following the Defendants appealed against his decree to the District Judge of Manbhum.

The hearing of the appeal was fixed for the 21st April 1922 when it was again adjourned till the 6th June. On the 6th June, in consequence of a telegram received from the Appellant's Vakil, the appeal was postponed to the 20th July. On the 19th July, which was a Wednesday, the Appellant's Vakil again sent a telegram asking that the case should be postponed till the following Monday. This the District Judge declined to do and he directed that the parties should be ready on the following day which was the adjourned date fixed for the hearing.

On the 20th July, Babu Chandra Sekhar Patra, the junior pleader engaged by the Appellants, filed a petition for time on the ground that his senior, Babu Lalit Kumar Mitra, was still unable to appear and that he had been endeavouring to engage another senior pleader but had not been successful. The District Judge refused to grant any further adjournment and called upon the junior pleader to argue the appeal. This, the junior pleader said, he was unable to do. The Court thereupon passed the following order: "Pleader for Appellant states that he cannot argue the appeal. Vakil for Respondents ready. The appeal is dismissed for default with costs."

On the 23rd October, the present application was made for the exercise of the Court's Revisional Jurisdiction under Section 115, C. P. C.

It is contended that in the circumstances the District Judge had no jurisdiction to make an order under O. 41, R. 17, C.P.C., dismissing the appeal for default and that he had jurisdiction only to write a judgment and to dispose of the appeal on its merits. I very much doubt whether this is a case in which any question of jurisdiction is involved, but apart from that preliminary objection I think on the merits the Petitioners have no case.

In the first place, in my opinion, the learned Judge was quite right in treating the case as one of non-appearance. Babu Chandra Sekhar Patra, when asked to argue the appeal, declined to do so on the ground that the case was too difficult for him. He was certainly present in Court; but that was not sufficient. Whether he was instructed to apply for an adjournment only or whether his instructions were to argue the appeal if he felt himself capable of doing so is immaterial, the legal position would not have been different if he had been unable to argue by reason of illness

and in law there was no appearance by him.

Although the decisions on this point in the various High Courts are not uniform, I think the Full Bench of the Calcutta High Court laid down the correct rule in *Satish Chandra Mukherjee* v. *Achara Prasad Mukherjee* (1) and I think that in order to constitute appearance by a pleader it is necessary to show that the pleader was ready to place materials before the Court upon which the Court could apply its judicial mind see *Shaikh Muhammad Bakar Ali* v. *Gulhar Mahto* (2).

It follows that the question in every case will turn upon the facts and in the present case I am satisfied that there was no appearance within the meaning of O 41. That being so, that order of dismissal for default was right.

Whether the learned Judge was right in the circumstances in refusing further time is a question which does not arise in an application under S. 115, C. P. C., but looking at the facts placed before us I cannot see what else the learned District Judge could have done. The senior pleader was unable to attend on the 6th June because he had another engagement and the case was adjourned at his request till the 20th.

On the 19th, the Judge refused a prayer for further adjournment and warned the parties that the case would be taken up the following day. The junior pleader had full notice and I am altogether unable to understand why he did not make some effort to argue the case. In any event the Appellant had ample opportunity after the 6th June for engaging a practitioner who would have sufficient leisure and capacity to appear in the case.

The application therefore fails and is dismissed with costs; hearing fee two gold mohurs.

Kulwant Sahay, J.- I agree.

Application rejected.

(1) (1907) 34 Cal. 403—11 C. W. N. 329—5 C. L. J. 247—2 M. L. T. 123 (F. B.)

(2) (1919) 4 P. L. J. 712—52 I.C. 290.

1923—P 66

* **A.I.R. 1923 Patna 521.**

JWALA PRASAD AND ROSS, JJ.

Musammat Inderbasi Kuer —Petitioner

v.

Satnarain Singh and others—Opposite Party.

Civil Rev. Petition No. 337 of 1922, decided on 4th April 1923, against the order of Sub-Judge of Arrah, dated 11th September '22.

Civil P. C., S. 73—Judgment-debtors against whom execution is taken, common to all decrees—Distribution allowed—Provisions mandatory—Enquiry under, though summary, must be made where necessary.

The addition of the word 'passed' in S. 73 has not in the least altered the sense thereof in the old Code, but has on the other hand, made it clearer than what it was under the old Code. There is no authority for the proposition that no rateable distribution can be allowed of the assets realised from the judgment-debtors common in all the decrees concerned on the ground that in some of the decrees there are judgment-debtors other than the common judgment-debtors. 42 C. 1, 24 I. C. 476 Dist.

There is no room for any contention that section 73 is not applicable where six of the judgment-debtors are common in all the decrees. 27 C. L. J. 100 Foll. The section is imperative. It does not need any application by the parties for rateable distribution. Only an application for execution of the decree is necessary in order to obtain the benefit of it, and once an application has been made for execution the Court is bound to distribute the assets rateably among the several decree-holders. The provision in S. 73 intends to give a substantial relief to holders of decree passed against the same judgment-debtor inasmuch as it enables all of them to get the fruit of their decrees when money is realised in the execution of one of the decrees. Therefore even if the procedure is summary, the consequences thereof are very material to the decree-holders and any enquiry that may be needed in order to give relief to the decree-holders should not be grudged by any Court.

[P 522 Cs. 1 & 2 P 523 C, 1 P. 524 Cs 1 & 2]

P. C. Rai—for Petitioner.

Mahabir Prasad for Opposite Party.

Jwala Prasad, J.—This is an application against an order of the Subordinate Judge of Shahabad, dated the 11th September 1922, refusing the application of the petitioner for rateable distribution of the assets of the judgment-debtors realised in execution of two other decrees. Those decrees were obtained by the opposite party Nos. 1 and 2 Sat Narain Singh and Radha Prasad Singh in Suits Nos. 84 and 85 respectively on the 1st and 9th March 1922. Sat Narain Singh and Radha Prasad Singh levied execution in respect of the aforesaid decrees in

execution case Nos. 68 and 69 and the properties of the judgment-debtors were sold on the 16th September 1922. The assets realised by the sale of the properties were held by the Court.

The petitioner had obtained a money decree on the 7th July 1922 in Suit No. 81 of 1922 against the judgment-debtors in the decrees obtained by the opposite party Sat Narain Singh and Radha Prasad Singh in Suits Nos. 84 and 85 as well as against one Bankeshwar Parsad Singh. The petitioner put her decree in execution on the 22nd July 1922 and her application for execution was actually registered on the 8th August 1922 and the properties of the judgment-debtors were ordered to be attached on the 9th August 1922. On the 7th September 1922 the petitioner put in separate applications in Execution Cases Nos. 68 and 69 for rateable distribution of the assets that were likely to be realised in execution of the decrees of the opposite-party.

The Court by its order of the 11th September, 1922, refused the application of the petitioner upon the ground that Bankeshwar Pershad Sahu, a judgment-debtor in the decree of the petitioner was not a judgment-debtor in the decrees of the opposite party in Suits Nos. 84 and 85. The reason given by the learned Subordinate Judge for his refusal to grant the prayer of the petitioner under Section 73 of the Civil Procedure Code is that the judgment-debtors are not the same in the decrees of the petitioner and the opposite party, inasmuch as the number of judgment-debtors in the decrees of the petitioner was 7, whereas the number of judgment-debtors in the decrees of the opposite party was 6.

It is undisputed that six of the judgment-debtors are common in all the decrees in question. Bankeshwar Prasad Sahu, who does not appear as a judgment-debtor in the decrees of the opposite party, is son of Ramkishun Prasad Sahu, judgment-debtor in all the decrees. The judgment-debtors who are common in all the decrees as well as Bankeshwar Prasad Sahu who appears only in the decree of the petitioner were jointly and severally liable for the amount decreed against them in the decree of the petitioner. The assets realised were from the properties which belonged only to the judgment-debtors who were common in all the decrees. Therefore the petitioner is entitled to a rateable distribution of the assets realised by the Court subsequent to the execution having been levied by the petitioner and held by the Court on the 16th September 1922.

The learned Vakil on behalf of the opposite party contends that Section 73 of the Code has no application unless all the decrees passed are against all the judgment-debtors. In other words, he contends that all the judgment-debtors in all the decrees in question must be identical. It is, however, conceded that under the corresponding provisions in Section 295 of the old Code of Civil Procedure it was not essential that the judgment-debtors must be identical in all the decrees concerned and that a decree-holder is entitled to a rateable distribution of the assets realised from the properties belonging to the judgment-debtors who are common in all the decrees though there may be other judgment- debtors in some of the decrees.

Whatever doubt that might have existed was cleared up by the decision of a Full Bench of the Calcutta High Court in the case of *Ganesh Das* v. *Shiva Lakshman* (1) The principle of that decision seems to have been adopted by all the Courts in India. But the contention of the learned Vakil is that the addition of the word "passed" in Section 73 of the present Code to the words that existed in the corresponding Section 295 of old Code has in fact over-ruled the decisions of the Courts in India and has restricted the application of the section to cases where the judgment-debtors are identical in all the decrees concerned.

Now, a mere perusal of the words in the two sections will make it clear that there was no such intention in the mind of the Legislature. The passage in question in Section 295 ran as follows:—

"for execution of decrees for money against the same judgment-debtor."

(1) (1903) 30 Cal. 583—7 C. W. N. 414 (F. B.)

Section 73 has simply added the word "passed" between the words "money" and "against" in the aforesaid passage. Section 73 says:

"for the payment of money passed against the same judgment-debtor."

It appears to me that the change in the section has not in the least altered the sense thereof in the old Code, but has on the other hand made it clearer than what it was under the old Code. It has virtually given effect to the decision of the Courts in India in making it explicit that the decrees in execution must have been "for the payment of money passed against the same judgment-debtor."

My attention has been drawn to certain authorities in support of the contention that the word "passed" introduced in the old provision of the law has restricted the application of the section, but the authorities quoted do not go so far. In the case of *Balmer Lawrie & Co* v *Jadunath Banerjee* (2) (Mukerjee and Beachcroft, JJ.) the decision was based solely upon the ground that the judgment-debtor in both the decrees in question was not the same person and is no authority for the proposition that the section does not apply and no rateable distribution can be allowed of the assets realised from the judgment-debtors common in all the decrees concerned on the ground that in some of the decrees there are judgment-debtors other than the common judgment-debtor.

This is obvious from the following passage in that judgment:—

"It is essential for the application of the section that the decrees should have been passed against the same judgment-debtors. This has been made clear beyond possibility of dispute by the introduction of the word "passed" which did not find a place in section 295 of the Code of 1882. But as already stated the decree held by the opposite party, in execution of which the properties have been brought into Court, was passed against Dasarathi Mukherjee, while the decree held by the petitioner was obtained against the firm of which Dasarathi Mukherjee was a partner, and is not shown to be capable of execution against him individually."

Rateable distribution was disallowed in that case because in the view of the learned Judges, Dasarathi Mukherjee was not the same person as Dasarathi Mukherjee & Co. The same appears to be the *ratio decidendi* in the case of *Toola Ram* v. *Abdul Gafur* (3), where the judgment-debtors in the several decrees in question were held not to be the same. The learned Judges, however, were of opinion that

"Where there are several defendants in one decree and only some of them in another, rateable distribution has been allowed so far as the interests of those in both decrees are concerned."

This observation is directly against the contention that the word "passed" introduced in the section has restricted the application of it in any way. Now, Mukherjee, J. who delivered the judgment in the case of *Balmer Lawrie & Co.* v. *Jadunath* (2), which is relied upon as an authority for the contention of the learned Vakil, later in the case of *Nilmani Dey* v. *Hiralal Das* (4), observed that the judgment-debtors in the two decrees need not necessarily be the same persons provided the decree is against the judgment-debtors in their representative capacity and the estate concerned is the same. He expressly rejected any suggestion to the effect that the section should be narrowly construed. He observes

"we may add that we are not disposed to put a narrow construction upon the terms of section 73, so as to defeat the ends of justice."

On the other hand, the view taken under the old Code was followed in the decisions passed subsequent to the introduction of the new Code. In the case of *Bijoy Kumar* v. *Rama Nath Barman* (5) their Lordships observed,

(2) (1914) 42 Cal. 1 = 27 I. C. 644—19 C. W. N. 201.

(3) (1914) 7 Bur. L.T. 667—24 I.C. 476.

(4) (1917) 27 C.L.J. 100—43 I. C. 452.

(5) (1917) 43 I. C. 715.

"Now from the language of section 73 of the Code of Civil Procedure and also from the decision of this Court in the Full Bench case reported as *Ganesh Das* v *Shiva Lakshman* (1) the authority of which in our opinion has been in no way impaired by the insertion of the word "passed" in Section 73 of the new Code, in so far as the shares due from the 4 judgment-debtors common to the two decrees are concerned, that application was a proper application."

Vide also *Ramchandra Nath* v. *Raghunath Saran Singh* (6). The contention of the learned Vakil, therefore, is concluded by the recent authorities, and there is no room for any contention that section 73 is not applicable to the present case where six of the judgment-debtors are common in all the decrees and only one of them is in excess in the decree of the petitioner.

To my mind, the section itself is clear and to interpret it otherwise would work as a great hardship and would defeat the object of the section which entitled the decree-holders to rateable distribution of the assets held by the Courts in execution of any of the decrees. The section is imperative. It does not need any application by the parties for rateable distribution. Only an application for execution of the decree is necessary in order to obtain the benefit of it, and once an application has been made for execution the Court is bound to distribute the assets rateably among the several decree-holders. The word in the section is "shall."

The learned Subordinate Judge does not seem to have bestowed any consideration upon the point involved in the case. The authorities referred to by me could be found in any annotated edition of the Code of Civil Procedure and still the learned Subordinate Judge summarily disposed of such an important matter before him in a few lines which I quote hereunder :-

"The above petition in the presence of pleader considered. It appears that the name of one judgment-debtor (Bankeshwar Prashad Sahu) is in excess in the copy of decree, hence no order in Execution Cases Nos. 68 and 69 of 1922. The number of judgment-debtors must tally with the number of judgment-debtors noted in the decree filed in Execution Cases Nos. 68 and 69."

This is the whole judgment of the learned Subordinate Judge.

It is clear from the above order that the learned Subordinate Judge was cognizant of the fact that all the judgment-debtors except one were common in all the decrees before him and therefore the decrees were passed against the same judgment-debtors so far as the common judgment-debtors were concerned and this brings the case within the letter of the section, and the assets held by the Court were realized by the sale of the properties of the same judgment-debtors in all the cases and there was therefore no difficulty in allowing rateable distribution of the assets among the holders of the several decrees.

But, says the learned Vakil on behalf of the opposite party, there may be cases where an elaborate enquiry might be needed in order to find out the shares of the common judgment-debtors in the assets and in a summary proceeding such an enquiry could not be intended by the Legislature to be made.

The provision in section 73, however, intends to give a substantial relief to the holders of decrees passed against the same judgment-debtor inasmuch as it enables all of them to get the fruit of their decrees when money is realised in the execution of one of the decrees. Therefore even if the procedure is summary, the consequences thereof are very material to the decree-holders and any enquiry that may be needed in order to give relief to the decree-holders should not be grudged by any Court.

We, therefore, set aside the order of the Subordinate Judge and direct that he will under Section 73 of the Code give relief to the petitioner by awarding his proportionate share in the assets held by the Court.

The application is allowed with costs.

Ross, J.—I agree.

Rule made absolute.

(6) (1918) 16 A.L.J. 530—46 I. C. 101.

*** A. I. R. 1923 Patna 525**

DAS AND MACPHERSON, JJ.

Jaibhadar Jha—Petitioner

v.

Matukdari Jha—Opposite Party.

Civil Rev. No. 411 of 1922, decided on 17th April, 1923 from an order of Munsif, 1st Court, Madhubani, dated the 16th November, 1922 in Execution Case No. 711 of 1922.

Civil P. Code, O. 21 R. 84—Sale when complete—Acceptance of bid and declaring the purchaser are necessary.

It is only when the presiding officer closes the bidding and formally accepts the bid and declares the purchaser, that the sale is complete. Mere closing of the bid does not complete the sale. [P 527 C 1]

Murari Prasad—for Petitioner.

L. K. Jha—for the Opposite Party.

Macpherson, J—The circumstances in which we are asked to interfere in revision in this case, hardly admit of any dispute. A *raiyati* holding was put up to auction on the 15th November, 1922 under the orders of the Munsif of Madhubani. The sale was conducted by the Nazir of the Court who is the officer of the Court designated under Order 21, rule 65 of the Code of Civil Procedure, and the High Court General Rules and Circular Orders, but not in presence of the Court.

The bid-sheet, the entries in which are in the handwriting of Nazir shows that the decree-holder bid Rs. 188/-, one Babunandan Rs. 189 -, the petitioner Jaibhadar Jha Rs. 200/-, Babunandan Rs. 215/-, and the petitioner Rs. 220 -. The Nazir sent the bid-sheet in accordance with practice to the Munsif who wrote "close" against the last offer and signed the order.

The petitioner thereafter, purporting to act under Order 21, rule 84, C. P. C. paid in by chalan to the officer conducting the sale a deposit of one-fourth of Rs. 220/-. After the Court had risen for the day, certain persons, including the opposite party, approached the Munsif and represented that they had been waiting the whole day to bid and that no public auction had taken place. The learned Munsif informed them that he had not signed the order knocking down the sale and would consider their representation next day.

On the following day when the Munsif took his seat in his chamber Order No. 3 in the order-sheet dated the 15th November was put up before him for signature by the execution clerk, and it is as follows: —"Sale held. One Jaibhadar Jha purchased the property at Rs. 220/- and deposited the earnest money to-day, vide chalan No. 1134. The purchaser to deposit the balance of the purchase money in time. Put up on 1-12-22." The Munsif initialled this order. He was then about to sign the following order on the bid-sheet, which has been written and sent by the Nazir: "Sale knocked down in favour of Jaibhadar Jha, son of Sone Lal Jha, Bhatiswar Pargana Bachow, for Rs. 220.- only. Munsiff. 5-11-22," and which should have been put up for signature before the order on the order sheet, when he realised that the case must be that regarding which certain persons had approached him on the previous day.

He then made enquiries from them and from his office. As a result he struck out his incomplete signature on the bid-sheet and put his initials to order No. 3 on the order-sheet. On the bid-sheet he wrote "Some of the intending purchasers represent that the sale took place in their ignorance while they were ready to bid for higher amount. In the interest of the judgment-debtor the property is put to sale again", and signed and dated this order the 15th (or 16th—the figure is not clear) November.

In the order sheet he wrote "Before the sale was knocked down, some of the intending purchasers represented to me that the sale took place in their ignorance while they were ready with their money to bid at the sale. As the sale appears to me to have been conducted in haphazard way, in the interest of the judgment-debtor the property is put to sale again." He affixed no date to this order though order No. 4 in the order sheet which is in the handwriting of the clerk is dated the 15th and is 'Put up for sale to-morrow as there is no time to-day." Order No. 5 dated the 16th November is "One Padhokant Jha and others file a petition stating that the decree-holder wants to get the property sold secretly and praying

that the sale be held in the presence of their pleader. Let the sale be held as prayed for."

The auction was accordingly resumed on the same day in the presence of the Munsif himself, Rs. 220/- being the starting point. The petitioner appears to have been present but he did not interpose. The first bid of the day was Rs. 420/- and it came from Mutukdhari Jha the present opposite party. There was a spirited contest and eventually against Mutukdhari Jha's final bid of Rs. 1075, the Munsif wrote and signed the order "closed", and later affixed his full signature to the order endorsed by the Nazir on the bid-sheet: "Sale knocked down in favour of Mutukdhari Jha, son of Sone Lal Jha of Bhawanipur, Purgana Hati, for Rs. 1075 only", and also after the opposite party had made the deposit required under Order XXI, Rule 84 on the order sheet of the case to an order in the same terms as order No. 3 quoted above.

On the 6th December both the opposite party and the petitioner deposited the balance of the purchase money. As regards the latter, the Munsif recorded the order "One Jaibhadar Jha in whose favour the sale was not knocked down, has deposited the balance of purchase money. He is directed to take back his money". The learned Munsif has not yet confirmed the sale, as proceedings were stayed by order of this Court prior to the date fixed for the confirmation of the sale.

In the view of the learned Munsif there had been no sale to the present petitioner. By his order "Close" he merely meant the officer conducting the sale to stop the auction and put up for the Court's signature the order knocking down the property and declaring the purchaser under Order XXI, Rule 84. The sale in his view would be completed only after the Court's signature was obtained. The passing of the chalan for the earnest money was done erroneously by the Sherishtadar in anticipation of the Munsif's acceptance of the highest bid which would have been forthcoming in ordinary cases and would have denoted the completion of the sale.

There are no materials before us upon which it is possible to determine whether on the 15th November the Nazir conducted the auction in a hole and corner fashion. The rule laid down by the High Court which is also in accordance with long standing practice is that the auction should be conducted in the immediate presence of the presiding officer, and where that is not possible, in another place within the Court premises to be selected by the presiding officer. No application was made under Order XXI, Rule 90. The only point for determination therefore is whether there was a sale to the petitioner on the 15th. If there was, the Munsif, as is obvious and as indeed is admitted, acted without jurisdiction in resuming the auction on the following day and purporting to sell the property to the opposite party.

Mr. Murari Prashad on behalf of the petitioner contends that in the circumstances the sale to his client was complete and he should be considered to have been declared the purchaser of the immoveable property within the meaning of Order XXI, Rule 84. He claims that the word "close" written by the Munsif showed that the Court had accepted the bid and that the order "Knocked down to etc" was in the circumstances superfluous, being merely a record of the fact of sale such as was also entered in the order-sheet. Stress is laid on the allegation that an order to the prejudice of the petitioner was made without hearing him.

This contention is, in my judgment, not well founded. The petitioner who, as appears from the affidavit of the opposite party, was present in Court on the 16th when the auction was resumed, made no protest though the opportunity presented itself, and it is not unreasonable to infer that he also understood that the sale was not complete. The contention, moreover, takes no account of the distinction which has on several occasions been pointed out in this Court between the function of the presiding officer in connection with a Civil Court sale and the function of the officer who conducts the sale. The sale is held by the Court.

Thus in *Jagdhari* v. *Langat* (1) the sales were not set aside inasmuch as they had, it was found, been completed the bids having been accepted by the Court (and not only by the Nazir) and the purchaser having been declared. In fact, the function of the Nazir or other officer appointed by the Court to conduct the auction is of a ministerial character: if he conducts it in presence of the presiding officer, the latter is still in direct charge of it and forthwith declares under Order XXI, Rule 84, who the purchaser is and signs the formal order (as in fact happened on the 16th November in this case) and the sale is not complete until the declaration has been made and the order signed.

Equally when the auction is (for reasons of convenience) not held in his presence, the presiding officer is still in charge of it, and the officer conducting the sale is in no more responsible position than if he were conducting it in presence of the presiding officer. That the sale may be completed, not only the order of the presiding officer to close the bidding, but also his order under Order XXI, Rule 84 formally accepting the bid and declaring the purchaser is required, exactly as in sale proceedings conducted in his presence.

In really efficient proceedings, the officer conducting the sale puts up the formal order under rule 84 for signature expeditiously and certainly before the presiding officer rises for the day, and the presiding officer before signing the order enquires from the persons present in Court whether there is any advance on the highest bid given to the Nazir.

In the case before us the proceedings were somewhat casual both on the part of the officer conducting the sale, who did not put up the order terminating the sale and yet in anticipation of it erroneously accepted from the highest bidder the deposit required from a declared purchaser and on the part of the Court which rose before the proceedings in connection with the sale had been concluded.

Nevertheless, it is manifest that there was no sale to the petitioner since until a bid has been accepted it is only an offer and there is no sale. In such a case it is open to the Court to resume the auction. That is what occurred in the present instance. As there was no sale to the petitioner the Court did not act without jurisdiction in declaring the opposite party to be the auction purchaser, and there is no reason so far at least as the petitioner is concerned, why the sale to the opposite party should not be confirmed.

Accordingly the application fails and is dismissed with costs. Hearing fee two gold mohurs.

Das, J: I agree.

Application dismissed.

(1) A. I. R. 1923 Pat. 572=4 P.L.T. 495.

A. I. R. 1923 Patna 527

BUCKNILL, J.

Wahari Mander and others —Petitioners

v.

King-Emperor —Opposite Party.

Criminal Misc. No. 15 of 1923 decided on 25th April, 1923 from an order of Sessions Judge of Monghyr, dated the 22nd March, 1923.

Criminal P. C., S. 107 (3) and (4)—Bail can be refused only in the special circumstances of clauses (3) and (4).

Where the proceedings have been instituted against a person under section 107 it is only in the special circumstances referred to in Sub-Sections (3) and (4) of that Section that the law empowers a Magistrate to detain a person in custody until the completion of the enquiry. The Sub-section can only be put into operation when a Magistrate, who has no powers to proceed under Sub-section (1) of Section 107 is led to believe that a person is likely to commit a breach of the peace or to disturb the public tranquillity or to do any wrongful act which might possibly occasion a breach of the peace or disturbance and cannot, by any other means, prevent the possibility of such an occurrence, that he with his limited powers can arrest a person and send him then to another Magistrate who has got adequate powers for dealing with the case. 32 C. 80 and 31 M. 315 Ref. [P. 528 C. 1]

G. C. Pal- for Petitioners.

Judgment.—This was an application made to this Court on behalf of four persons Wahari Mander, Ramlochan Mander, Saukhi Mander and Kamal Das asking that they should be released on bail. It is indeed somewhat difficult to understand why or how they ever found themselves in gaol. But it would appear that the Sub Divisional Officer of Monghyr initiated proceedings under Section 107 of the Criminal

Procedure Code against the petitioners and, at the same time, issued notice against them under section 144 of the Criminal Procedure Code. Further, on the 16th March, the opposite party, that is the first party, made an application to this officer that the petitioners should be put in gaol as they, the complainant first party, were in apprehension of personal injury or danger.

On this, the Magistrate issued warrants against these men on the 4th April and, on that date, apparently, the Sub-Divisional Magistrate sent them to Hajat purporting presumably, to act under Sub-Section (3) of Section 107 of the Criminal Procedure Code. It may be also pointed out that the warrants which were issued against these men by the Magistrate were bailable warrants. Now, the applicants made an application to be released on bail to the Sub-Divisional Officer but he refused the application; and what to my mind, is somewhat more serious, is that an application was then made to the Sessions Judge, who, after pointing out that the accused were in Hajat under Section 107 Sub-section (4) of the Criminal Procedure Code, declined to grant bail to the applicants.

Now, I think it is desirable to point out that it would certainly appear that where proceedings have been instituted against a person under section 107 of the Criminal Procedure Code, it is only in the special circumstances referred to in Sub-Sections (3) and (4) of that Section that the law empowers a Magistrate to detain a person in custody until the completion of the enquiry. The point is that the Sub-section can only be put into operation when a Magistrate, who has no powers to proceed under Sub-section (1) of Section 107 is led to believe that a person is likely to commit a breach of the peace or to disturb the public tranquillity or to do any wrongful act which might possibly occasion a breach of the peace or disturbance and cannot, by any other means, prevent the possibility of such an occurrence, that he with his limited powers can arrest such a person and he must send him then to another Magistrate who has got adequate powers for dealing with the case.

The case of *Raghunandan Prasad* v. *King Emperor* (1) appears to lay this matter down very clearly. See also *Chidambaram Pillai* v. *Emperor* (2) where it was expressly held that a Magistrate has no jurisdiction to remand a person in custody under section 107, Sub-Section (4) of the Criminal Procedure Code when such person is not sent to him by another Magistrate under Section 107 (3). Now, I find that it is said in the letter of explanation which was given by the District Magistrate (as a result of the rule issued by this Court on the 9th April 1923) and which I may add is dated the 16th April last that "Wahari Mander and others in the marginally noted case" were granted bail of Rs. 300 each on the 14th April as a result of a police report from which it appears that there was no further immediate danger of a breach of the peace.

If it is quite clear that the four applicants here have been thus admitted to bail there is nothing further to be done, but if there has been any mistake and these particular four petitioners are not those who have been so admitted to bail then they must be admitted to bail forthwith to the satisfaction of the District Magistrate.

Application allowed

(1) (1905) 32 Cal. 80—8 C. W. N. 779

(2) (1908) 31 Mad. 315—3 M.L.T. 311—7 Cr. L. J. 360.

A. I. R. 1923 Patna 528

ROSS, J.

Sukhari Nonia and others—2nd Party-Petitioners

v.

Ramkhelawan Thakur and others—1st party—Opposite Party.

Criminal Rev. No.17 of 1923, decided on 31st January 1923, against an order of the Magistrate, First Class, Muzaffarpur, dated the 20th November 1922.

Criminal P. C., S. 145—Order of Magistrate regarding more land than included in the proceeding is illegal.

If, in a proceeding under S. 145, the Magistrate deals in his order with more land than

that included in the proceedings, his order is bad and must be set aside. 7 C. W. N. 558 Foll.

S. P. Varma and *Hareshwar Prasad Sinha*—for Petitioner.

Shiveswar Dayal—for the Opposite Party.

Judgment.—The only point urged in support of this application is, that the Magistrate has dealt with a large area of land than is included in the proceedings drawn up in the case, and has, therefore, exceeded his jurisdiction, as was held in *Amriteshwari Debi* v. *Durga Naram Das* (1). The proceedings were drawn in respect of 5 *bighas* 10 *kathas*, *and* 18 *dhurs*. The Magistrate deals with 7 *bighas* of land settled by Kornoul Factory with certain persons. He then proceeds to deal with the land of each of these persons. He says that the first party does not claim the lands of Khubhari and Dukhni (1 *bigha* 10 *kathas* in each case) and he confirms these persons in their possession. He then says that the second party do not contest the possession of the first party of 1 *bigha* of Dhari's land. This reduces the area in dispute to 3 *bighas* and he deals with these three *bighas* and confirms the first party in possession. It is, therefore, clear that he has passed orders about the possession of at least 6 *bighas*.

It is said on behalf of the opposite party that there was no dispute about the lands of Khobhari and Dukhni and the real dispute was only about 4 *bighas* and, therefore, the Magistrate has not gone beyond the land dealt with in the proceedings. But he has in fact passed orders about 6 *bighas*, and it is impossible to be sure with regard to any of the really contested area whether that was included within the proceedings or not.

The whole order is, therefore, bad and must be set aside.

Rule made absolute.

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(1) (1903) 7 C. W. N. 558.

A. I. R. 1923 Patna 529

JWALA PRASAD, AND ROSS, JJ.

(Maulvi Syed) Mohammed Momuddin Ashraf—Appellant

v

(Moulvi) Mohammad Ishaq Ashraf and others—Respondents.

F. A. No. 56 of 1923, decided on the 18th April 1923.

Limitation Act, S. 12—Decree not prepared in time—Time between judgment and signing of decree must be excluded.

The period between the delivery of judgment and the preparation and signing of the decree would be excluded from the period of limitation prescribed for filing the appeal if the application for copy is made before the preparation of the decree. 1 P. L. J. 573 (F. B.) Dist.

[P. 530, C. 2]

Order.—The question is one of limitation. The appeal is against the decree for partition. The judgment of the lower Court was delivered on the 18th November 1920. An application for copy of the judgment was made on the 4th February 1921, the 5th February 1921 was fixed for notifying the requisite number of stamps and folios which were supplied on the 8th February 1921. The copy was ready for delivery on 10th February and was delivered on the 11th February 1921.

An application for copy of the decree according to the note in the tabular statement on the back of the decree was made on 17th January 1923, the requisite stamps and folios were supplied on the 18th, 24th, 29th and 31st January, the copy was ready for delivery on 3rd February, and was delivered on the 6th February. Computing the time taken in obtaining copies of the judgment and the decree from the aforesaid dates, the Stamp Reporter reports that the limitation expired on 27th February 1923. The appellant filed an application on the 12th March praying that the period between the delivery of judgment and the preparation and signing of the decree be excluded from the period of limitation prescribed for filing the appeal stating that if this be done, the appeal will be well within time.

Now the question is whether the aforesaid prayer can be granted.

It appears from the certified copies of the previous applications filed by

the appellant for obtaining copy of the decree that an application for copy of the decree was made by him on the 9th March 1922, but the copy was not granted with a note on the application that the Commissioner's fee was not deposited and therefore no decree was prepared. Similar applications were made on the 5th September and 6th December 1922, with similar orders. Therefore the appellant tried to obtain copy of the decree but he could not get it inasmuch as no decree was prepared and signed by the Court. The decree was prepared and signed on 12th December 1922.

The appellant relies upon a Full Bench decision of this Court in *Ram Asray Singh* v. *Sheo Nandan Singh* (1) where it was held that under section 12 of the Limitation Act, 1908, an appellant is entitled to deduct the time between the delivery of judgment and the signing of the decree in computing the period of limitation prescribed for an appeal.

This decision was dissented from in a subsequent Full Bench case; *Jyotindra Nath Sarkar* v. *The Lodna Colliery Co. Limited* (2) and the learned Vakil on behalf of the respondent relies upon this case. In that case it was held that (1) the time requisite for obtaining a copy of the decree within the meaning of Section 12 of the Limitation Act, 1908 does not begin until the actual application for a copy has been made, and further that (2) if the appellant does not apply for a copy until after the expiration of the period prescribed by the Limitation Act, provided copies were obtainable within that period he is not entitled to deduct the time between the actual signing of the decree and the delivery of judgment.

This ruling obviously does not apply to the present case, inasmuch as copy of the decree was not obtainable until after the 12th December 1922 when the decree was signed and the application for copy was made long before the decree was ready and signed. In the aforesaid Full Bench case the decree was drawn up and signed on the 18th August 1920 and the application for copy was not made until the 3rd January 1921. Therefore on both grounds : that the copy of the decree was not obtainable before the 12th December 1922 and that the application for copy of decree in this case was made long before the aforesaid date of preparation and signing of the decree, the decision is not applicable to the present case.

The appellant is therefore entitled to computation of the period of limitation from the date of the signing of the decree. In any view of the case he is entitled to enlargement of the time for filing the appeal.

The appeal is therefore filed within time.

The application is allowed. In the circumstances of the case we make no order as to the costs of this application.

Application allowed.

(1) (1916) 1 P. L. J. 573—35 I. C. 868 =1 P. L. W. 35 (F.B.).

(2) A. I. R. 1921 Pat. 175=6 P. L. J. 350=2 P. L. T. 361 (F.B.).

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* A. I. R. 1923 Patna 530

MULLICK AND MACPHERSON, JJ.

(Syed) Shah Mahomed Maudood and others—Petitioners

v.

Maharaja Sir Rameshwar Singh Bahadur and others—Opposite Party.

Civil Rev. No. 108 of 1923, decided on the 20th April, 1923, from an order of Subordinate Judge 1st Court, Patna dated the 18th March 1922.

(a) Civil Pro. Code, O. 17, Rr. 2 and 3—Pleader for plaintiff appearing but without instructions—Dismissal is one under R. 2 and not under R. 3.

Where on the date of hearing the Vakils of the plaintiffs had no instruction to prosecute the case and they were apparently instructed only to apply for an adjournment.

Held, in these circumstances there could have been no appearance on behalf of the plaintiffs at the hearing of that day and the dismissal was therefore one under Rule 2 of Order 17 and not under R. 3. [P. 531, C. 2]

(b) Civil Pro. Code, S. 115—Refusal to receive evidence in application for restoration is refusal to exercise jurisdiction.

Refusal to receive evidence in support of application for restoration of a suit dismissed under O. 17, R. 2, on the understanding that it was dismissed under R. 3, is a refusal to exercise jurisdiction within S. 115. [P. 531, C. 2]

K. B. Dutt and *G. S. Prasad*—for Petitioners.

N. C. Sinha—for Opposite Party.

Mullick, J.—In 1918 and 1920 Shah Muhammad Maudud, Hafiz Karim, Muhammad Musa, Shujait Ali, Abdul Mali and Zafar Hussain filed 3 suits against a large number of defendants for a declaration that cetain properties were wakf properties and that they could not be sold in execution of certain mortgage decrees obtained by the defendants (the Maharaja of Darbhanga and others). On the 29th July 1918 Hafiz Karim filed a petition through his pleader Babu Avadesh Kishore stating that he would withdraw from the suit and the Subordinate Judge's order thereon was that the petition should be put up on the date of the opening of the case. A similar petition was thereafter made by the plaintiff Abdul Mali and after the case had run a leisurely course it came on for hearing on the 8th August 1921. On that date when the case was called on the plaintiffs did not respond and the order sheet of the Court shows the following entry:—

"Defendant has put in Hazri. His Vakils are ready. The plaintiff does not respond to call. His pleader Mr. Abdur Rahman has sent word that he has no instruction to-day. Inform plaintiff's pleader." The signatures of Maulvi Abdul Rahman and Abdul Quayum, two Vakils engaged by the plaintiffs show that the entry was duly shown to them.

A little later on the same day the Court recorded the following order:—"After the above order a petition for time is put in on behalf of the plaintiffs on the ground that some plaintiff is dead and some is at Muzaffarpore and so forth. The case has been pending for the last 3 years or so. It appears from the order sheet that enough time has been allowed to the plaintiff to be ready in this suit but he was never ready. The other side is ready with his witnesses and I see no reason to grant any adjournment and so I reject plaintiff's petition for time".

To the right of this order under the heading "Pleaders' signatures" appear the following entries "*Sd.* S. L. Singh Pleader. *Sd.* A. Quayum, Vakil." "I have no further instructions, *Sd.* A. Rahman, Vakil 8-8-21".

Later again on the same day the Court recorded the following order:—No further steps by the plaintiffs. The plaintiffs failed to adduce evidence though time was given to them to do so in support of their case. The suit is therefore dismissed with costs for want of evidence under Order 17, Rule 3, C. P. Code.

An application was then made on the 18th March 1922 for the restoration of the suit under Order 9, Rule 9 of the Civil Procedure Code; but the Subordinate Judge held that the suit having been disposed of under Rule 3 of Order 17 and not under rule 2, the application under Order 9 was not maintainable.

Thereupon Saiyid Shah Muhammad Maudud, Muhammad Musa Sujait Ali and Zafar Hussain filed the present application to this Court on the 23rd March 1922 for the exercise of its revisional jurisdiction under Section 115 of the Civil Procedure Code.

Now, it is clear that on the 8th August 1921 the Vakils of the plaintiffs had no instructions to prosecute the case. They were apparently instructed only to apply for an adjournment and in these circumstances there could have been no appearance on behalf of the plaintiffs at the hearing of that day. The dismissal was therefore one under Rule 2 of Order 17 and the Subordinate Judge was in error in basing it upon Rule 3.

The application for restoration under Order 9, Rule 9 was therefore maintainable and the Subordinate Judge declined to exercise jurisdiction in refusing to hear the evidence in support of it.

We accordingly set aside his order and direct that the application for restoration be disposed of according to law.

It is contended by the opposite party that a remand will only protract a litigation which has already continued for nearly 5 years and we have been asked to dispose of the application for restoration ourselves. We hesitate to adopt this course as it is possible that all the evidence upon which the plaintiffs rely may not be before us. The petition dated the 8th August 1921 asks for an adjournment on the following grounds:—

(1) the illness of Shah Muhammad Maudud, (2) the absence of Zafer Hussain on business at Muzaffarpore, (3) the death of Hafiz Karim, and (4) the refusal of Abdul Mali to prosecute the suit. With regard to Hafiz Karim, it is clear that as he had already applied for leave to withdraw no substitution of his heirs was necessary, as for Abdul Mali his refusal to continue to appear as plaintiff was also no ground ; the only question therefore is whether the suit could not proceed in the absence of Shah Muhammad Maudud and Zafar Hussain and whether there was sufficient cause for such absence. The learned Counsel for the plaintiff contends that the answer to this question is in the affirmative and he prays that an opportunity may be given to him to adduce evidence. We think his prayer should be allowed.

We accordingly direct that upon the record reaching the Subordinate Judge he do fix a date for hearing the application under Order 9, Rule 9, C. P. C. allowing sufficient time to both parties to produce their evidence and that if for any reason whatsoever the parties or either of them be not ready to proceed with the hearing on the date so fixed, no further adjournment be given and the case be forthwith disposed of.

It will not be necessary to issue notice of the date fixed for hearing to any of the parties other than those who have appeared before us to-day namely, Saiyed Shah Muhammad Maudud, Haji Sheikh Muhammad Musa, Sheikh Shujait Ali, and Saiyid Zafar Hussain Khan the petitioners and Maharaja Sir Rameshwar Singh Bahadur, Chowdhury Kedar Nath Thakur, Mr. Saiyid Hassain and Ramsundar Dass Bairagi the opposite party.

The application is allowed with costs ; hearing fee one gold mohur.

Macpherson, J.—I agree.

Application allowed.

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* **A. I. R. 1923 Patna 532**

KULWANT SAHAY, J.

Gajo Chaudhry and others—Petitioners

v.

Debi Chaudhry and another—Opposite Party.

Criminal Rev. No. 111 of 1923, decided on 6th April 1923 from an order of Sub-Divisional Officer of Monghyr, dated the 3rd Feb. 1923.

(*a*) *Penal Code, S. 379—Accused, declared to be in possession in a previous case, removing crops—Removal is not theft.*

Where the accused is declared to be in possession of the crops in a prior Criminal Case between the same parties he cannot be guilty under S. 379, if he removes them from the land, before the previous case is decided against him in appeal. [P. 534, C. 2.]

(*b*) *Criminal P. C, S. 190. (c)—'Information received.'—Answer by petitioners in proceeding against them under S. 144—Statement in, is not "information received."*

Information received from the petition of objection filed by the petitioners opposite party in the proceeding under Section 144 in showing cause against the order under the said section is not information received as against the petitioners. [P. 534, C. 2.]

(*c*) *Criminal P. C, S. 369—Final Order—Entry "Enter false: mistake of law" is a final disposal and cannot be altered or reviewed by the magistrate.*

An entry in the order sheet "Enter false, mistake of law" is an order finally disposing of the case and has the effect of "destroying the proceedings"; and therefore under S. 369 the Magistrate has no jurisdiction to after or review that order. 20 Cal. 867 Foll. A.I.R. 1922 Pat. 97, Dist. [P. 535, Cs. I & 2.]

(*d*) *Criminal P. C., S. 2 (h)—Application to continue proceedings is not complaint.*

An application by the complainant stating that the proceedings against the accused already taken be revived as he has sufficient material to support the case against the accused, is not a complaint but an application for continuing the case. [P. 535, C. 2.]

G. C. Pal—for Petitioners.

The Assistant Government Advocate—for the Opposite Party.

Kulwant Sahay, J.—This is an application for revision of an order dated the 3rd February 1923 passed by the Sub-Divisional Officer of Monghyr whereby he ordered the issue of summonses against the petitioners under Ss. 379 and 147, Indian Penal Code. The petitioners pray that under the circumstances set out in their petition the learned Sub-Divisional Officer's order should be set aside as being illegal, or, in any event, the proceedings should be quashed.

In order to understand the circumstances under which the order sought to be set aside was passed, it is necessary to state shortly the previous history of the case.

There are three plots of land in village Rahimpur, lying contiguous to each other from east to west. The two plots on the east and west admittedly belong to the petitioners. The dispute relates to the middle plot measuring about 15 bighas, which is claimed by the petitioners as being their holding while it is claimed by Debi Chaudhury and others as belonging to them.

A dispute arose between the parties as regards the possession of the middle plot and in the year 1920 a case of rioting was started against Debi Chaudhury and others on the complaint of Gajo Chaudhry one of the petitioners. In that case the Deputy Magistrate convicted Debi Chaudhury and others, sometime in January or February 1922, and in his judgment the Deputy Magistrate found that the petitioner Gajo Chaudhury was in possession of the disputed middle plot.

There was an appeal by Debi Chaudhury and others which was heard by the Sessions Judge of Monghyr and the learned Judge upheld the conviction for rioting; but in the course of his judgment he was pleased to observe that Debi Chaudhury and others were really in possession of the middle plot and he maintained the conviction on the ground that the accused persons in that case had exceeded their right of private defence inasmuch as they had chased the complainant of that case and assaulted him somewhere outside the disputed land. An application for revision was filed by Debi Chaudhury and others to the High Court which was dismissed. It is said, however, that the High Court remarked in its judgment that the question of possession of the middle plot did not arise in the case.

Subsequently sometime in August 1922 fresh disputes cropped up between the parties as regards the possession of the middle plot, and proceedings under Section 145 of the Criminal Procedure Code were initiated, but as it was found that the land had gone under water the said proceedings were dropped. Again in November 1922 proceedings under Section 144 of the Criminal Procedure Code were initiated wherein Debi Chaudhury and others were the first party and the petitioners were the second party. Notice was issued upon them to show cause why an order under Section 144 should not be passed against them.

The petitioner Gajo Chaudhury thereupon filed a petition on 28th November 1922 showing cause as to why an order under Section 144, Criminal Procedure Code should not be passed against him, and, in that petition he stated that he was in possession of the land and he had cultivated the land and grown crops thereon which he cut and removed on the 17th of March 1922.

Thereupon without any complaint by any one, simply on the statement in the petition of Gajo Chaudhury that he had cut and removed the crops, the learned Sub-Divisional Magistrate made an order on the 29th November 1922 in which he stated that the petitioners had no right to reap the crops on the 17th of March 1922 as both the Sessions Judge and the High Court had found in the rioting case that the petitioners were not in possession of the disputed land, nor had the land been settled with them and he recorded the following order in the order-sheet "I therefore take cognizance of the offences committed by him (i.e. Gajo Chaudhury) under sections 379, 109 and 447/109 Indian Penal Code in 1921 and 1922, under the provisions of section 190 (c) Criminal Procedure Code and remand him to Hajat. I send the file to the Sub-Inspector Khagaria for investigation."

The result was that the petitioner Gajo Chaudhury was at once arrested and taken to the Hajat. He later on applied for bail on the same date but this was rejected. Bail was, however, subsequently allowed by the learned Sessions Judge. On the 21st of January, 1923 final report of the Police was received by the learned Magistrate and he recorded the following order in the order sheet of that date: —"Final report received. Enter false,

mistake of law. Ss. 379/109, 447/109 I. P. C."

On the 3rd of February 1923 Debi Chaudhury filed an application before the Sub-Divisional Magistrate for revival of the case under section 379/109 and 447/109 I. P. C. and thereupon the learned Sub-Divisional Magistrate made the following order on that date " Petition filed by Debi Chaudhury for continuing the case. His Vakil states orally that he can prove that Debi Chaudhury was in possession till 17—3—22, on which date accused had the crop cut. The Sub Inspector's report shows that he considered at that time the evidence of possession was equally balanced. As the title is with the complainant and he has been proved to have been in possession on 13—10—20, I consider he must in fairness be given an opportunity of proving his case. Issue notice to accused Gajo's bailor to produce him on 19-2. Summon Phulten. Bhattu and Shibteyai Singh for that date under section 379 and 147 I. P. C." It is against this last order of the learned Sub-Divisional Magistrate that the present application for revision has been filed.

The learned Vakil for the petitioners contends firstly that the learned Magistrate having by his order of the 21st January found the case to be false he has acted illegally in taking fresh action and reviving the case. Secondly, it is contended that the learned Magistrate had no jurisdiction to to take action as on a complaint inasmuch as there was no complaint before him, and he did not as a matter of fact proceed under section 190 (a) of the Criminal Procedure Code as there was no examination of the complainant upon oath under section 200 of the Code. Thirdly, it is contended that in any event it is a fit case in which the proceedings should be quashed.

In my opinion, apart from the legal objections taken by the petitioners, having regard to the previous history of the case, it is not proper that the present proceedings should be continued. The finding of the Deputy Magistrate in the rioting case was that the petitioners were in possession of the disputed plot of land. That finding was not upset by the Sessions Judge until the 18th of March 1922 and the crops were removed by the petitioners on the 17th of March 1922 i.e., at a time when the finding of the Deputy Magistrate was still subsisting and had not been upset on appeal and therefore there was no ground for holding that they removed the crops with any dishonest motive.

Secondly, it is stated by the learned Vakil for the petitioners that the High Court in revising the order of the learned Sessions Judge had held that the question of possession did not arise in the case. The learned Assistant Government Advocate does not challenge the correctness of this statement, but the Sub-Divisional Magistrate proceeds on the assumption that the High Court had confirmed the finding of the Sessions Judge as regards possession. I have not got a copy of the order of the High Court before me, but in any event it cannot be said that on the 17th of March 1922 the petitioners had no justification for removing the crops which they allege to have been grown by them.

Then again the learned Magistrate took cognizance of the case under section 190 (c) of the Code of Criminal Procedure upon information received by him in the course of the proceeding under section 144 of the Code. This information was received from the petition of objection filed by the petitioners in the proceeding under section 144 in showing cause against the order under the said section. The petitioners stated as a ground that no order under section 144 should be passed against them; that they had been in possession of the land and had removed the crops on 17th March 1922. There was no complaint before the Magistrate and there was no justification for his coming to the conclusion that the petitioners had committed any offence of which he ought to take cognizance under section 190 (c) of the Code. Again when the matter was referred to the Police for

enquiry the Police made an enquiry and submitted a report in favour of the petitioners. The Magistrate was apparently satisfied with that report and he ordered the case to be entered as "false, mistake of law". Having regard to the fact that the alleged offence took place in March 1922 after which there were fresh proceedings under sections 145 and 144 of the Criminal Procedure Code and that no complaint of that was made by Debi Chaudhury at any time from the 17th March 1922 up to the 3rd February 1923 I am clearly of opinion that it is improper to revive the proceedings upon the petition of Debi Chaudhury filed on the 3rd February 1923.

As regards the first objection of the learned Vakil for the petitioners that the learned Magistrate had no jurisdiction to revive the proceedings after his order of the 21st of January 1923 his argument is that the order of the 21st January 1923 had the effect of finally disposing of the case and that order could not be cancelled by the learned Magistrate under any provision of the Code.

He relies upon the case of *Tarini Charan Chowdhury* v. *Amulya Ratan Roy* (1) where their Lordships observed that unless it can be shown that there is a legislative enactment giving a power to that effect, cessation by the order of the Magistrate of any Criminal Proceedings must, until that order is set aside operate not only as staying the proceedings, but destroying them.

The learned Assistant Government Advocate for the Crown argues that the order of the 21st of January 1923 was merely an executive order and it was not a judicial order disposing of the case, and he relies upon the observations of Jwala Prasad J. in the case of *Bir Narayan Singh* v. *Emperor* (2).

His Lordship in that case observed that an entry such as that made in that case, namely, "enter true sections 384/114, I. P. C." was an entry which ought not to have found a place in the judgment. The judgment in that case was entirely in favour of the accused but after disposing of all the arguments and considering all the facts and the evidence in the case and coming to the conclusion that the accused in that case was not guilty of the offence charged, the learned Magistrate had made an entry at the end of the judgment "enter true sections 384/114, I. P. C" and his Lordship held that such an entry ought not to have found a place in the judgment.

Under the rules contained in the Police Manual such an entry has to be made in the register prescribed by paragraph 314, Chapter XIII of the Police Manual and his Lordship ordered the entry to be expunged from the judgment. In the course of his judgment his Lordship observed that such an entry had been interpreted by certain authorities as an entry of purely executive character and he gave that as a reason for holding that if it was an entry of an executive character, it ought not to have found place in the judgment of the Court. That case is no authority for the proposition that such an order as that passed by the Sub-Divisional Magistrate in the present case on the 21st January 1923 was an executive order.

It was an order finally disposing of the case and to use the expressions of their Lordships of the Calcutta High Court in the case of *Tarini Charan Chowdhury* (1) just cited, it had the effect of "destroying the proceedings". If that is so, then under section 369 of the Code of Criminal Procedure the learned Magistrate had no jurisdiction to alter or review that order, and the order of the 3rd of February 1923 must in this view of the case be held to be illegal.

As regards the second objection of the learned Vakil for the petitioners, I am of opinion that that objection is also well founded. If it is argued that the proceedings were initiated on a complaint made by Debi Chaudhury then the provisions of section 200 of the Code of Criminal Procedure have not been complied with; in fact the petition filed on the 3rd of February cannot be regarded as a complaint and the learned Magistrate himself did not treat it as a 'complaint' but merely as "an application for continuing the case."

(1) [1893] 20 Cal. 867.
(2) A.I.R. 1922 Pat. 97=3 P. L. T. 239=23 Cr. L. J. 371.

For the reasons given above I am of opinion that no fresh action ought to be taken against the petitioners and the proceedings initiated by the order of the 3rd of February 1923 must be quashed.

Order set aside.

A. I. R. 1923 Patna 536.

BUCKNILL, J.

Beni —Petitioner

v.

King-Emperor —Opposite Party.

Criminal Rev. No. 149 of 1923 decided on the 17th April, 1923, from an order of District and Sessions Judge of Bhagalpur dated the 20th January, 1923.

Practice—(Criminal)—Procedure—Summoning of witnesses—Two different applications on same day—Trifling delay in applying not to be considered, very material.

On the date of hearing some three witnesses for the accused did not appear; on the same date the accused asked the Magistrate to issue a warrant ordering one of these three witnesses, to attend on a future date to give such testimony as he could on behalf of the accused. The Magistrate accordingly complied with this request. A little later on the same date the accused again applied asking that warrants against the other two absent witnesses should also be issued. This for some reason or other was not granted.

Held, that mere technicalities as to whether he applies at one moment or a little later are not very material. It does not matter in the least to the tribunal or to the administration of justice whether there is or is not a trifling delay in the operation and conduct of proceedings. [P. 537, Cs 1 & 2]

Ali Imam, A. Shafiuddin and *Sultanuddin Hussain*—for Petitioner.

The Assistant Government Advocate for the Crown.

Judgment.—This is an application in Criminal Revisional Jurisdiction in connection with a decision of a Magistrate of the first class of Bhagalpur by which, on the 20th December last, that Magistrate convicted the applicant of an offence against the provisions of section 420 of the Indian Penal Code, that is to say, cheating, and sentenced him to undergo rigorous imprisonment for six months and to pay a fine of Rs. 150; in default of payment of which he was to undergo rigorous imprisonment for 30 days in addition. From this decision there was an appeal to the Sessions Judge of Bhagalpur, who, on the 20th January, 1923, confirmed the conviction and sentence.

Now the matter has been brought up to me on a very small, but at the same time on a not unimportant, point. I need not here go into all the circumstances which led up to the initiation of the charge against the present accused. The short facts are as follows:—

The appellant whose name is Beni-Chamar and who is a resident of Patna has been convicted of cheating the complainant Dachman Chamar, who now lives in Bhagalpur but who formerly lived in Patna i. e., of swindling him by obtaining from him under false pretences the sum of Rs. 150. It was said that the accused came to the complainant and told him that he was expecting a large consignment of leather valued at some Rs. 2000 from Calcutta which was to be delivered to him in Bhagalpur; he suggested to the complainant that if he (the complainant) would advance to him Rs. 200, he (the complainant) should have the pick of the consignment and that the rest should afterwards be sold for whatever it would fetch in the ordinary course of trade. He is said to have shown a paper to the complainant which indicated that there really had been a transaction with regard to this question of leather. The complainant is said to have given the accused the sum of Rs. 150 as an advance. The accused and the friend who was with him then left and did not return, and subsequently a charge was made against the accused by the complainant.

Now, one of the principal points which was put forward on behalf of the defence was that he had not in fact been present on this occasion at the time when it was alleged that he had made these propositions to the complainant which had been accepted by the complainant; in other words, that he could show a clear *alibi*. The accused at an early stage of the proceedings put forward the names of several witnesses whom he proposed to call to give testimony on his behalf.

Amongst these were certain persons whose names were Munshi Sheonandan Lal, Budhoo and Digamber, but on the 14th December out of the numerous witnesses whom he had called these three

did not attend. It would appear that on the same date the accused asked the Magistrate to issue a warrant ordering the third of these three witnesses, Digamber to attend on the future date to give such testimony as he could on behalf of the accused. The Magistrate accordingly complied with this request. It would appear from the explanation which has now been (second hand) given by the Magistrate that at that moment no application was made to the Court that the other two witnesses, namely Munshi Sheonandan Lal and Budho should also have warrants issued against them to compel their attendance.

But it is agreed that a little later on the same date, the accused again applied asking that warrants against these two men (the other two absent witnesses) should also be issued. This, for some reason or other, which, I must confess is inexplicable, was not granted. The case appears to have continued four days after this order had been refused.

So far as I can see from the order sheet it does not seem that there was anything in the District Magistrate's note which shows that this matter was then actively taken up, and, indeed, it is also apparently fairly clear that although the matter may, as is stated at the Bar here, have been brought to the attention of the Sessions Judge, he did not pay any attention to the question, or if he did, did not think it worth mention.

The question, however, has been brought now before this Court, and on this ground, a rule was obtained from the Chief Justice and Mr. Justice Mullick on the 22nd March, 1923 under which it was ordered that this application should be heard and that applicant should be admitted on bail to the satisfaction of the District Magistrate. I have no hesitation in thinking that there has been some unfortunate mistake here. I can see no reason why, within all reasonable limits an accused person should not be entitled to obtain the assistance of the Court in bringing before the Court all such persons as he may think are necessary in order to protect himself against the accusation and charge which has been brought against him in connection with any criminal offence. Mere technicalities as to whether he applies at one moment or a little later do not seem to me to be very material. It does not matter in the least to the tribunal or to the administration of justice whether there is or is not a trifling delay in the operation and conduct of proceedings.

The only important thing from a fundamental point of view is that the tribunal should ascertain what is the truth of the accusation which has been brought against the individual. In those circumstances I have no hesitation whatever in admitting this application. The matter must go back to the proper tribunal for hearing *de novo*, and the order of the conviction and sentence of the Deputy Magistrate of the 20th December last and the affirmation of the Sessions Judge of the 20th January last will both be set aside.

Application allowed.

A. I. R. 1923 Patna 537

BUCKNILL, J.

Jailal Jha and others—Petitioners

v.

King-Emperor—Opposite-Party.

Criminal Rev. No. 152 of 1923, decided on 24th April 1923, from a decision of District Magistrate of Darbhanga, dated 12th March 1923.

Penal Code, S. 297—Local inspection—Magistrate's own opinion is not evidence—Practice.

In a case under S. 297, the Magistrate went to the alleged burial ground accompanied by pleaders representing both parties and proceeded to have the ground removed at various spots which were pointed out to him.

He unearthed, two small bones which he thought were human collar bones, and also found some mattingand some pieces of bamboo. On this inspection he came to the conclusion that the place was a burial ground and convicted the accused.

Held, that this proceeding was entirely irregular. If he had desired to have very sure evidence adduced as to whether this land was a grave-yard it is possible that an investigation of the character which he himself conducted personally as to the results of which he himself in effect gave evidence, might have with due reverence been carried out by properly qualified official persons and their evidence in Court afterwards might have been

of great assistance and value to him. Judicial officers cannot and are not legally permitted to find out for themselves the facts of a case they have to decide. [P. 538, C. 2 P. 539, C. 1]

G. C. Pal—for Petitioners.

Muhammad Hasan Jan—for Opposite Party.

Judgment.—This was an application in Criminal Revisional Jurisdiction made by three persons who have been convicted under section 297 of the Indian Penal Code, that is to say, of having ploughed up two cottahs of grave-yard situated in the village Rasula thereby wounding the feeling of the Mahamadans of the village of Pura who used this plot of ground (which is No. 73 in the survey) as their burial ground. They were sentenced each to six months rigorous imprisonment on the 2nd February last by the Deputy Magistrate of Darbhanga, the District Magistrate of Darbhanga dismissed an appeal made to him on the 12th March last. The matter then came before this Court and a rule was granted by their Lordships the Chief Justice and Mr. Justice Mullick on the 23rd *ultimo*, it has now come before me.

There are two principal points which have been placed before me and upon which it is requested that I should exercise the revisional jurisdiction of this Court. The first point is that the decision of the District Magistrate was not in accordance with law because it did not in any way deal with the evidence which had been adduced by the accused in their defence. The second point is with regard to the effect and validity of a local inspection which was made by the Deputy Magistrate. I think that in view of the opinion to which I have come with regard to the latter of these two points (a view which I may at once state necessitates in my opinion a trial *de novo* of the accused) it is unnecessary for me to say more with regard to the first point than that it certainly does appear that the District Magistrate does not in his decision make any mention of the evidence which had been brought forward by the accused in their defence.

The other matter, however is a much more serious one. The question which was indeed of primary importance in coming to a proper conclusion as to whether the accused were guilty of the offence with which they were charged, was as to whether the land, which is said to have been ploughed up by the accused, was or was not really a burial ground. Now, the Deputy Magistrate, with no doubt the best of intentions, thought fit to hold, what he calls, a local inspection but what I should venture to designate a necropolitan exploration.

He appears to have gone accompanied by pleaders representing both parties to the locality where there assembled a large crowd of some 400 on-lookers, and not content with viewing the physical features of the locality, proceeded to have the ground removed at various spots which were pointed out to him. He unearthed according to what I suppose one must call his evidence, two small bones which he thought were human "collar bones" how he knew they were, I cannot say nor does he tell. He also found some matting and some pieces of bamboo.

Upon these discoveries he has in his judgment much to say and he there enlarges upon the importance of his digging and is obviously deeply impressed by his excavations. I must admit that I think that this proceeding was entirely irregular. It was not legally in order for the Magistrate to have excavations conducted at his command in his presence so that he personally could try to form an opinion visually, whether there were underground any graves on the property in question.

It certainly does not seem to me that it was open to the Magistrate to embark upon any such kind of investigation. If he had desired to have very sure evidence as to whether this land was a grave yard it is possible that an investigation of the character which he himself conducted personally and as to the results of which he himself in effect gave evidence might have with due reverence, been carried out by properly qualified official persons and their evidence in Court afterwards might have been of great assistance and value to him.

But I have no doubt whatever, here, that, although as I have said, this excavation or investigation was carried out with the best possible intention, the action of the Deputy Magistrate was altogether legally invalid.

To one's personal regret but doubtless, for the public good, judicial officers cannot and are not legally permitted to find out for themselves the facts of a case; they have to decide it on the evidence properly produced before them, a lesson which cannot too often be reiterated. Now, it may be said that what he did has not materially affected the position of the accused but I think, that in this case it would be extremely unsafe to say that the conclusions to which the Deputy Magistrate came were not affected very materially by what he himself did.

To my mind it is quite obvious that the finding of these two pieces of bones (which he says are collar bones) mats and bamboo impressed him very strongly with the idea that the excavation indicated that there were graves of human beings on the spot. I do not think that it is possible, after reading his judgment, to come to any other conclusion than that his own zealous and no doubt interesting exploration affected his decision very materially.

I am very far from suggesting that there was no other evidence implicating the accused besides that of his own explorations, but it is only right that the accused should have the opportunity of being tried afresh in view of the fact that the worthy, but I fear, illegal action of the Deputy Magistrate may have and in my opinion did prejudice their position.

The convictions and sentences passed by the Deputy Magistrate will, therefore, be set aside. The accused should be tried *de novo* and not by the same Magistrate. They must remain at liberty on the same bail as hitherto.

Application allowed.

A. I. R. 1923 Patna 539.

BUCKNILL, J.

Nand Kishore Missir— Petitioner

v.

Kalika Missir and others—Opposite Party.

Criminal Rev. Petition No. 178 of 1923 decided on the 30th April, 1923, from an order of Sessions Judge of Arrah, dated the 7th February, 1923.

Criminal Pro. Code, S. 203—Dismissal of complaint—Complainant not examined on oath—Dismissal is improper.

Where a person having made a charge against another finds that the police report designates his charge as false, he is entitled to file a petition before a Magistrate impugning the correctness of the police report. The Magistrate must regard this petition as a complaint and the complainant is entitled to have the persons complained against tried on the charge, or else his statement (that is the complainant's statement must) be recorded on oath and his complaint dismissed. [P. 540, C. 1]

G. C Pal—for Petitioner.

P Dayal and *Mahabir Prasad*—for Opposite Party.

Judgment—This is an application made in criminal revisional jurisdiction on behalf of one Nand Kishore Missir. The circumstances under which this application is made appear to me to be somewhat peculiar. On the 30th January last the Sub-Divisional Officer of Buxar dismissed the complaint of the applicant that he had been assaulted. The applicant applied to the Sessions Judge asking for further enquiry; but his motion was rejected on the 7th February last. It is these orders which the applicant now asks should be set aside.

Now, there is no doubt that there was a somewhat serious affray and there is also no doubt that the complainant was somewhat severely injured. It is said that he received no less than 7 injuries including two punctured wounds on the arm and on the chest. He made a complaint to the police and the police submitted a lengthy report. It would seem that although the police fully thought that there had been an attack made on the applicant, yet they considered that some part of the story which he put forward and in particular with regard to the locality at which the affair occurred was not true; and so far as

I can see, on this ground, the Police Officer writes at the close of his report "The Sub-Inspector supervised the enquiry on 3—1—1923 and ordered me to submit final report false and hence I am submitting the final report false."

Now when the complainant became aware of the attitude which the police had takenup, he wrote a long petition to the Magistrate which was in effect an indictment of what the police had done. He asked that this petition should be treated as a definite complaint, that he should be examined on oath and that proper enquiry should be made into the matter as required by law. But the Magistrate did not take any such steps. All that he seems to have done was to have visited the locality where the affair is said to have taken place and to have come to the conclusion that, for some reason or other which he does not give "there could not possibly have been any *marpit* on the disputed field." It is very difficult to say how it was possible definitely to arrive at such a conclusion; but I gather from the Police report that there must have been no signs of disturbance on the land where the complainant said he had been injured. That matter, however, appears to me to have been somewhat prematurely decided. The Magistrate then dismissed this petition.

In the case of *Jogendra Nath Mukharji* v. *Emperor* (1) it is clearly laid down that where a person having made a charge against another finds that the police report designates his charge as false, he is entitled to file a petition before the Sub-divisional Officer impugning the correctness of the police report. The Magistrate must regard this petition as a complaint and the complainant is entitled to have the persons complained against tried on the charge, or else his statement (that is to say the complainant's statement) must be recorded on oath and his complaint dismissed.

I think therefore that the order in this case made by the Magistrate is probably in law bad; but, even if it was not so, I should still be strongly inclined under the circumstances of this case to interfere and to direct that further enquiry should take place. I think the circumstances are such that it certainly is desirable that this case should be further enquired into; and therefore I direct that the order of the Sub-Divisional Officer of Buxar, of the 30th January, 1923, and that of the Sessions Judge of Shahabad of the 7th February last, be set aside. I further direct that the petition of the 29th January last, of the complainant be treated as a formal complaint and that the enquiry shall proceed upon that complaint in accordance with law.

(1) (1906) 33 Cal. 1=2 C.L.J. 228=10 C.W.N. 158=2 Cr.L.J. 615.

A. I. R. 1923 Patna 540.

MACPHERSON, J.

Rangi Sah—Petitioner

v.

B. N. W. Railway Co.—Opposite Party

Criminal Rev. No. 213 of 1923, decided on 7th May 1923, from an order of Sub-Divisional Officer of Chapra, dated 10th March' 23.

(a) Criminal P. C., S. 133—Railway land not a public place—Finding as to public way must be specific, in order to apply section.

There is no warrant for the view that Railway land is necessarily a public place especially railway land which is outside the railway fencing at a railway station. Where there is a finding of fact that the accused has encroached on the railway land left outside the railway fencing, but there is no finding that the land encroached upon is in a way or that if it is in a way, it is on one which is or may be lawfully used by the public.

Held, that S. 133, would apply. The observation which the Magistrate made when discussing the question why the land is outside the fencing *viz.* "It is said that it appears to have been done for the sake of the public to use the well" cannot be considered to be a finding that there is a way over the land encroached upon.

[P. 541 Cs. 1, & 2.]

Criminal P. C., S. 137—Finding as to the bona fides *of claimant is necessary.*

In taking evidence under S. 137, in a case where the public nature of the way is disputed, it is incumbent on the Magistrate, even where he has found, that the claim of title to the land in question on the part of the person showing cause is not justified, to determine further whether the claim is nevertheless a *bona fide*, claim, and if he finds in the affirmative, to stop proceedings and give such person time to establish his claim in the Civil Court. Where the Sub-Divisional Magistrate failed to find that the petitioner's claim, even though not justified was not *bona fide*.

Held, that his proceedings cannot be sustained. 15 C. 564, 2 P.L.J. 67 Foll. [P. 541 C. 2]

Nansu Narayan Sinha and *Bhuvaneshwar Prasad Sinha*—for Petitioner.

Judgment.—This is an application to revise an order made by the Sub-Divisonal Officer of Chapra under the provisions of S. 133 of the Code of Criminal Procedure. The proceedings appear to have their origin in a letter from the Assistant Engineer of the Bongal North Western Railway, dated the 16th August, 1922, to the Land Acquisition Deputy Collector, in which it was stated that the present petitioner, Rangi Sah, had encroached on railway land by building a tiled-roof verandah at the west end of the Sonepur Station yard.

The Land Acquisition Officer issued a notice to Rangi Sah, who denied that he had encroached upon railway land. The proceedings were sent from the Land Acquisition Deputy Collector to the Sub-divisional Officer with the suggestion that action should be taken under S. 133. The Sub-divisional Officer issued notice under that Section on the 29th October and again on the 18th December and finally after a report by a *kanungo*, on the 21st February 1923. The notice on the last mentioned date set out that the present petitioner having built a verandah (*osara*) and house encroaching 90′ × 5′ on railway land must either remove the encroachment by the 28th February or show cause on that date.

The petitioner, as he had done on three previous occasions denied the encroachment stating that the land was his own and shown in his name in the survey records and in particular stated that the well which was close by was an old well belonging to him. He claimed that evidence should be taken. The Sub-divisional Magistrate then took evidence and in his order found as follows:—

"On the whole I am satisfied that there has been an encroachment the width of which is 5′ from the present fencing and the length of which is about 90′ from the railway fencing up to the District Board road."

He accordingly directed the opposite-party to remove the encroachment within a week of receipt of notice.

In the first place it is not clear from the proceedings that the case properly falls under S. 133 at all. The obstruction to which S. 133 is applicable is

"An unlawful obstruction..... in any way which is or may be lawfully used by the public or in any public place."

There is no warrant for the view that railway land is necessarily a public place especially railway land which, as in this instance, is outside the railway fencing at a railway station. There is indeed a finding of fact that the petitioner has encroached on the railway land left outside the railway fencing but there is no finding that the land encroached upon is in a way or that if it is in a way, it is on one which is or may be lawfully used by the public. The observation which the Magistrate makes when discussing the question why the land is outside the fencing.

"It is said that it appears to have been done for the sake of the public to use the well"

cannot be considered to be a finding that there is a way over the land encroached upon.

In the next place, even if the section be applicable, the procedure of the learned Magistrate was not in accordance with the rule firmly engrafted by the Courts upon the conduct of an enquiry under S. 137, in a case where the public nature of the place from which the unlawful obstruction is to be removed, is disputed, as it is by the petitioner. It is true that this procedure does not appear to be warranted by the Section, but even where judicial opinion on the point has been adverse, it has been recognized that it is too late to go back on the long line of previous decisions following *Lakheenaram* v. *Ram Kumar* (1), and it has been accepted in this Court in *Imrat Ali* v. *Amjad Ali* (2) and other cases.

In taking evidence under S. 137, in a case where the public nature of the way is disputed, it is incumbent on the Magistrate, even where he has found, as in the present instance, that the claim of title to the land in question on the part of the person showing cause is not justified, to determine further whether the claim is nevertheless a *bona fide* claim, and if he finds in the affirmative, to stop proceedings and

(1) (1888) 15 Cal. 564.

(2) (1916) 2 P. L. J. 67 = 3 P. L. W. 404 = 39 I. C. 292 = 18 Cr.L.J. 452

give such person time to establish his claim in the Civil Court. The Sub-divisional Magistrate failed to find that the petitioner's claim, even though not justified, was not *bona fide* (it appears to obtain support from the recent record of right), and on this ground also his proceedings cannot be sustained.

In view of the manner in which notices under S. 133 have been drawn up and failure of the Magistrate to follow the procedure sanctioned by decisions of the Courts, the proper order in this case is to set aside the order of the Magistrate leaving it open to him to take fresh proceedings according to law if so advised. He has seen the place and should be in a position to say whether the encroachment is an obstruction on a way and whether the way, if there be a way, is or may be lawfully used by the public. If he takes action he should only issue notice after clearly making up his mind as to the form the proceedings are to take, so that on the fifth notice to the petitioner, a final order according to law may be passed. If it is a case of mere encroachment on railway land, the railway company should be referred to the Civil Court.

The application is allowed and the order of the Sub-divisional Magistrate, dated the 10th March, 1923, is set aside.

Rule made absolute.

A. I. R. 1923 Patna 542

BUCKNILL, J.

Chote Lal Modi—Petitioner

v.

King Emperor—Opposite Party.

Criminal Rev. No. 206 of 1923, decided on 1st May 1923, from an order of Deputy Magistrate of Monghyr, dated 3rd April 1923.

(*a*) *Criminal P. C, S. 476—Penal Code, S. 182—A non-judicial and irregular enquiry—Improper basis to decide that an information given to the Magistrate was false.*

A private or a personal enquiry conducted on non-judicial lines without the recording of any evidence, without cross-examination and based upon un-recorded and irregular methods of taking testimony does not justify the conclusion that a petition to a Magistrate to proceed under S. 144, Criminal P. C. was false and does not justify the petitioner's prosecution under S. 182 of the Penal Code. [P. 543, Cs. 1 & 2. P. 544, C. 2].

(*b*) *Criminal P. C., S. 195 (a)—Proper investigation is necessary before granting sanction.*

Sanction must not be given to prosecute a person merely because an officer without proper judicial investigation or enquiry is of opinion that such person ought to be prosecuted for some offence. [P. 544, C. 2].

G. C. Pal, for Petitioner.

Judgment.—This was an application in Criminal Revisional Jurisdiction to set aside an order of the Deputy Magistrate of Monghyr dated the 3rd April last under which he ordered that the applicant should be summoned for prosecution in connection with an alleged offence against the provisions of S. 182 of the Indian Penal Code. The circumstances under which this order has been made appear to me to be very unusual.

The history of the matter is a somewhat lengthy one. The applicant's mother is a tenure holder under the Darbhanga Raj in village Matsumbha in the Monghyr district. A number of persons are *bataidars* under the petitioner who looks after his mother's properties. Now it is admitted that there had been some ill feeling of late between the petitioner and these *bataidars*. Suits under section 40 of the Bengal Tenancy Act for commutation of rent were instituted and applications under section 69 of the same Act for division of crops under the supervision of an officer of the Court were made.

According to the applicant's petition it is said that, when the peons, who were ordered by the Court to go to the locality to cut the crops, arrived there, it was found that the crops had been cut and removed by the tenants. Now on the 27th February last the applicant filed a petition before the Sub Divisional Officer, the gist of which was that he had himself reaped the crops on his own *kas khash* lands and stored them in his own *khalihan*; that he was afraid that the tenantry, when he began to thresh his crops, might cause trouble, in view of their previous action in removing the crops from the batai lands before it was possible for the peons to arrive so that division could properly be made between the applicant and the tenants. He therefore asked that a notice might be

issued under section 144 ordering the tenants not to go to his *Khalihan* during these operations.

The Sub-Divisional Magistrate however ordered the police to make an enquiry, which they did, and, in their report dated the 5th March they clearly came to the conclusion and informed the Deputy Magistrate that the allegations which had been made by the petitioner were substantially correct. Upon this the Magistrate issued notice against both parties under section 144 on the 9th March, and on the 12th the applicant asked by a petition that he might be allowed to thresh out and remove such portion of the crops in his *khalihan* as were not claimed in any way by the tenants, for one of the matters which was alleged by the tenantry appears to have been that some of the crops which were in the *khalihan* of the applicant in fact had come from their *raiyati* lands. On the 12th March the Magistrate, on the ground stated in an order of that date, ordered the police to let the applicant remove that part of his crop from the *khalihan* which was claimed by the second party but that the remainder was to be threshed and stored with a third person.

Now, on the 28th March both parties appear to have filed their statements under the orders which had been passed on the 9th in connection with the proceedings under S. 144. The Deputy Magistrate then seems to have considered that it was desirable that he should make some local enquiry for in his order sheet he says —"Petitions filed by parties. I will enquire locally at 8-30 a. m. on the 30th instant. Parties must produce their witnesses on the spot. No adjournment will be given." I suppose that what was contemplated by the Deputy Magistrate was that he would hold his Court at the actual locality.

However, on the 30th the Deputy Magistrate was at the spot and entered upon a line of investigation which I can only think was irregular. He appears to have made a large number of personal enquiries. He does not seem to me so far as I am aware and so far as appears on the records before me to have made any notes or kept any record of this evidence. There appears, so far as I know, to have been no sort of cross-examination on the part of either party and in short the enquiry or hearing which was made, was not conducted in a judicial manner but merely so far as I can understand, as a kind of personal investigation. At any rate there was nothing done which was required to be done under the procedure which is laid down for the conduct of any enquiry of a judicial nature.

Now, there is no doubt that the Magistrate took a very serious view of the position. He gives, in his order sheet of the 30th March, a long account of the enquiry which he made; and he, apparently, came to the conclusion that what has been said in the petition of the applicant of the 27th February was not altogether true. In fact he remarks upon it as being false.

I have pointed out that there had been, so far as I can see, no sort of judicial enquiry; but, notwithstanding this, the Magistrate thereupon ordered the applicant to show cause on the 4th April why he should not be prosecuted for an offence against the provisions of S. 182 of the Indian Penal Code, that is to say, for having given, by his petition false information to the Magistrate himself, thereby causing him to issue the notice under S. 144 forbidding the second party from coming to the *khalihan* and thereby using his lawful power to the injury of these persons.

I must at once point out here that it appears to me that his decision which was come to by the Magistrate was based upon an arbitrary opinion and not upon any judicial enquiry or investigation. If he had made a local inspection in a proceeding under the provisions of S. 144 and had conducted the enquiry at the place, as it appears it was his intention so to do under the provision of that section in a judicial manner, that is to say by properly recording the evidence of the parties giving opportunities for cross-examination and the like and at the end of his investigation, had come to the conclusion that the applicant's petition of the 27th February was of such a false character that it ought to form the subject matter of a prosecution under the provisions of S. 182 of the Indian

Penal Code, it would then undoubtedly have been perfectly open for him under the provisions of S. 476 of the Criminal Procedure Code to have sent the case for enquiry to another Magistrate and even to have sent the accused to such Magistrate in custody.

But in view of the nature of the investigation in which the Magistrate engaged, it does not seem to me that he had any jurisdiction to do what he did at that time. In addition to this I should also point out that he remanded the applicant in custody in default of the bail for Rs. 500.

The next thing which happened was that on the 4th April the applicant showed cause why he should not be prosecuted under S. 182 of the Indian Penal Code. The cause so far as I can see appears to have been contained in a petition which was dated 4th April. This petition appears to comprise a somewhat pathetic attempt to show to the Magistrate that the Magistrate's procedure had been irregular. He points out that he had had no chance to cross-examine these persons upon whose unrecorded statements the Magistrate had come to the conclusion that the applicant's petition of the 27th February was false. He reiterated the story which he had told before and hoped that the matter would be treated as a civil dispute.

No notice, however, was taken of this petition by the Magistrate who in his order-sheet simply remarks. "The cause shown is not satisfactory. I have held a full and careful local enquiry. Even witnesses named by applicant as independent supported the opposite party. I am fully satisfied that the allegations in his petition dated the 27th February were false and malicious. I therefore under S. 476, Criminal P. C. sanction his prosecution under S. 182 of the Indian Penal Code and send the case to Babu R. N. Pande for disposal."

This is the order against which an application was made to this Court and in connection with which a rule was granted on the 16th ultimo by Mr. Justice Mullick and Mr. Justice Macpherson. I do not consider that the circumstances under which the Magistrate came to the conclusion that he was justified in thinking that the petition made by the applicant was as he says false and malicious, were circumstances under which he could judicially come to any such opinion.

A private or a personal enquiry conducted on non-judicial lines without the recording of any evidence, without cross-examination and based upon such unrecorded and irregular methods of taking testimony do not in my opinion justify any presumption such as that to which the Magistrate came. The proceeding of the 30th March appears to me to have been very irregular. I have already pointed out what he should have done had he contemplated taking any such steps to sanction a prosecution of this application.

Now it is pointed out that at present no final order under S. 144 of the Criminal Procedure Code has been passed at all; the order, however, for the sanction of the prosecution of the 3rd April will be quashed.

With regard to the necessity for any order under S. 144 it is no part of my duty to direct that any proceeding should take place thereunder. As to whether it is necessary that such proceedings should take place or not depends upon circumstances connected with an apprehension of a breach of the peace as to which I am in no way concerned. But assuming that the condition still remains which existed before, I take it that these proceedings under S. 144 should be carried out to their completion; but they should be carried out in accordance with law and not in such a manner as they were attempted to be carried out hitherto. If as a result of such proceedings, or of another proceeding, properly conducted it is thought that the applicant should be prosecuted for any kind of offence the matter can easily be arranged. But sanction must not be given to prosecute a person merely because an officer without proper judicial investigation or enquiry is of opinion that such person ought to be prosecuted for some offence.

Revision allowed.

A I. R 1923 Patna 545.

BUCKNILL, J.

Gajadhar Mull Marwari and others—Petitioners

v.

Thakur Singh and others—Opposite Party.

Criminal Rev. No. 157 of 1923, decided on 2nd May, 1923, from an order of Deputy Magistrate of Purnea, dated 29th January, 1923.

Criminal P. C., S 145—Trial of numerous claims held together is not illegal, if the subject-matters are linked together.

Proceedings were initiated between two sets of persons both of whom claimed a large area of somewhat over 300 bighas situated in the domain of the Maharaja of Darbhanga. The first party claim to be in possession as tenants of the Raj from long past, the second party claimed to have recently been settled on the land by the Raj and to be in possession thereof. The lands were not co-terminus, but they were divided into some 23 different plots They were not claimed jointly or as a whole by all of the eight parties of the first party, but each party claimed to be in possession of certain of these plots.

Held, there is nothing to prevent a Magistrate from joining numerous claims of this description together and in dealing with the matter at one hearing. The only objection which can really be taken to such a course is, if it can be shown, that the objector is adversely prejudiced by such proceeding, and the fact, that the Magistrate does not in his judgment state which of the first party is actually, according to his finding, in possession of which part of the property in dispute, does not concern the second party at all.

[P. 545, C. 2; P. 546, C. 1]

K. B. Dutt—for Petitioners.

Hasan Imam—for Opposite Party.

Bucknill, J.—This is an application in criminal revisional jurisdiction asking that an order made by the Deputy Magistrate of Purnea on the 29th January last should be set aside. Proceedings were initiated as the result of a police report between two sets of persons both of whom claimed a large area of somewhat over 300 bighas in extent of land which is apparently situated in the domain of the Maharaja of Darbhanga The first party who are the respondents here claim to be in possession as tenants of the Raj from long past, the second party who are the applicants here, claim to have recently been settled on the land by the Raj and to be in possession thereof. Subsequently the manager of the Darbhanga Raj was added as the third party; and, in this application, he adopted the arguments which have been so ably placed before me by the learned counsel who appears on behalf of the applicants.

Now, the position was, as is often the case in these matters, a somewhat complicated one, for not only were the lands not co-terminus, but they were divided into some 23 different plots. They were not apparently claimed jointly or as a whole by all of the eight parties of the first party; but each party appears, so far as I can gather from their written statements, to have laid claim to be in possession of certain of these plots. One plot, indeed No. 7, it is common ground, was not claimed at all.

Now, the matter might of course quite well have been dealt with in several different proceedings, that is to say, in proceedings in which one person claiming possession of a specific piece of property might have been joined as the first party and another person also claiming possession of that piece of property might have been joined as the second party. But the Magistrate did not adopt such a course although, as was pointed out by an officer who was deputed to make a report upon the possession of the land, it probably would have been more convenient had he done so.

There is, however, it is quite clear, nothing to prevent a Magistrate from joining numerous claims of this description together and in dealing with the matter at one hearing. The only objection which can really be taken to such a course is, if it can be shown, that the objector is adversely prejudiced by such proceeding.

Now in this case, the Magistrate went into the matter very carefully and he came to the conclusion, a conclusion which I may say is not and could not well be challenged here, that the second party was not in possession at all of any of the lands in dispute and that the first party was. The objection which is put forward to the order by the second party (the applicants here) is that the Magistrate does not in his judgment state which of the first party is actually, according to his finding, in possession

of which part of the property in dispute.

It is suggested by the learned counsel who appears on behalf of the respondents (the first party here) that it may be said that those details may be inferred as being included in the Magistrate's decision by reference to the written statements which have been filed. But what I think is a more cogent argument than that is that, so far as the second party is concerned, the allocation to the individuals of the first party of the different pieces of land does not appear to me to be a matter of any concern or moment. So far as the applicants are concerned the result of the Magistrate's decision is simply that he has found that they are in possession. So far as the first party are concerned as between the parties thereto, the question of which piece of the property in dispute is in the possession of which of them is a matter which concerns themselves and not one which immediately in these proceedings in any way concerns now the second party.

Under those circumstances although I must admit that I think it would have been more workmanlike in his judgment to have given clearly the limits of the pieces of the property and the persons in whose possession the Magistrate actually found those pieces of property to lie, I do not think that I can say that the order as it stands is without jurisdiction and I must therefore decline to interfere.

With regard to plot No 7 it is agreed by both parties that this plot was not claimed by either party and ought not to have been included in the proceedings So far therefore as this plot is concerned, the order will be modified by excluding it therefrom.

A. I R 1923 Patna 546.

BUCKNILL, J.

Nand Kishore Missir—Petitioner

v.

Kalika Missir and others—Opposite Party.

Criminal Rev. No. 177 of 1923, decided on 30th April, 1923, from an order of Sub-divisional Officer of Buxar, dated the 19th March, 1923.

Criminal P. C., Ss. 145 and 146—Where property is in joint possession, order under Sections 145 and 146 cannot be made.

Where the Magistrate finds that the property is joint and presumably in the joint possession of both the parties, he cannot make an order under section 145 or under section 146. [P. 547, C. 1.]

G. C. Pal—for Petitioner.

P. Dayal—for Opposite Party.

Judgment.—This was an application in criminal revisional jurisdiction. It was made on behalf of certain persons who were parties to proceeding instituted by the Sub-divisional Officer of Buxar. It is a little difficult to understand exactly what the Sub-divisional Officer has done. It would appear, however, that, in the first instance, he started proceedings under section 107 of the Code of Criminal Procedure against both the parties on the 26th January. On the 20th February he appears to have ordered the institution of proceeding under section 145 and on the 16th March to have proceeded to hear evidence apparently in both proceedings. On the 19th March he gave judgment which appears to be, so far as I can gather, a judgment both in the proceedings started under section 107 and those started under section 145. He orders that the proceedings under section 107 should be dropped and that the land should be attached under the provisions of section 146.

Now, it is pointed out by the learned Vakil who appears for the applicant that it would seem that the Magistrate had no jurisdiction to make this order, because would seem clear from what the Magistrate himself writes that the property is in the joint possession of the parties. Here again it is a little difficult to gather exactly what the Magistrate means; but, at any rate, he starts his judgment of the 19th ultimo by saying " This is a joint family dispute. Deodat Missir, Jaigobind Missir, Kalika Missir and Jagdat Missir are brothers. Their properties are joint. The present dispute is over 8 bighas of land."

Then later towards the end of his judgment he writes " This is clearly a dispute over which the Criminal Court has no jurisdiction. As regards possession it is impossible to come to any conclusion. The whole family used to possess and cultivate this land jointly."

Now, if he had merely said he had been unable to come to any conclusion as to who was in possession of the property, no doubt he would have had jurisdiction to make the order under section 146 as he did. But as he finds apparently that the property is joint and presumably in the joint possession of the parties, under such circumstances it is quite clear on ample authority that he cannot make an order under S. 145 or under S. 146.

Under these circumstances the order of the Sub-divisional Officer of Buxar, dated the 19th March, 1923, attaching the land in dispute under the provisions of section 146 of the Code of Criminal Procedure must be set aside.

Application allowed.

A. I. R. 1923 Patna 547.

MULLICK AND BUCKNILL, JJ.

King Emperor—Appellant

v.

Bhola Bhagat and others—Respondents.

Govt. A. No. 17 of 1922, decided on 11th January, 1923, from a decision of S. J., Purnea, dated 8th September 1922.

(a) *Criminal P. C., Ss. 202 & 54—Trial by Magistrate and investigation by Police conducted simultaneously—Order under S. 202 does not affect the power of police to arrest and investigate.*

The Cr. P. C draws a clear difference between jurisdiction to try and jurisdiction to investigate and it is possible to conceive of cases where although the Magistrate may distrust a complaint or delay in passing orders the police would be failing in their duty, if they did not arrest an offender against whom a cognizable offence has been made out. Much more so would this be the case where the Magistrate, after recording the complaint, finds that a regular police investigation would be more suitable and intentionally keeps the complaint pending in order that the police may exercise their powers of investigation and arrest independently of the Magistrate In practice, of course, the police would not ordinarily take independent action in respect of a complaint which had already been distrusted by the Magistrate; but to lay down the general proposition that a Magistrate's order under S. 202 debars the police from exercising their powers of arrest and investigation, would be neither expedient nor correct. [P. 548, C. 2.]

(b) *Criminal P. C., S. 4 (p)—Writer Head Constable may investigate when officer-in-charge.*

Where in a particular case Sub-Inspector in charge was ill and the Writer Head Constable was not generally empowered to investigate cognizable cases,

Held, that he being the officer in charge of the police-station on that day, it was his duty to make the investigation. [P. 549, C. 1]

(c) *Criminal P. C., S. 54—Complaint recorded by Magistrate is sufficient information to police.*

A complaint of cognizable offence recorded by a Magistrate and sent by him to Police for investigation and report is sufficient information to justify resort to the provisions of S. 54. [P. 549, C. 1]

Sultan Ahmad—for Crown.

Gour Chandra Pal—for Respondents.

Mullick, J.—This is an appeal by the Local Government against an order of acquittal passed by the Sessions Judge of Purnea in Criminal Appeal No. 6 of 1922. The material facts are as follows:—

On the 30th January 1922 one Ali Beg lodged a complaint before the Sub-Divisional Magistrate of Araria stating that three persons Bhola Bhagat, Abdul and Jan Mohamad had forcibly snatched away a bottle of liquor and robbed him of a purse containing Rs. 10. The Sub-Divisional Magistrate recorded the complaint and passed the following order upon it. "Police to take cognizance under S. 379, I. P. C. make quick enquiry and report by 8-2-1922".

That order reached the Sub-Inspector of Araria Thana on the 4th February and as he was ill he deputed the officer next in seniority to him to proceed to the place of occurrence and to hold an enquiry. The Writer Head Constable Mahesh Narain accordingly arrived at Joki Hat on the 5th February and after making some investigation he arrested Bhola, Abdul and Jan Muhammad. It is alleged that, while he was bringing these three persons to the Police Station, a mob of 2,000 persons forcibly rescued the prisoners and assaulted two constables who attempted to resist.

Thereafter Bhola, Abdul and Jan Muhammad were placed upon their trial for the offences enumerated in Ali Beg's complaint and were convicted under Ss. 352, 426 and 379, I. P. C. and sentenced as follows. Bhola to rigorous imprisonment for one month under S. 379, I. P. C. and one month under S. 426, I. P. C; Abdul and Jan Muhammad to rigorous imprisonment for one month under S. 426, I. P. C. Against that order there

was a reference to the High Court and on the 22nd May 1922 Mr. Justice Adami set aside the convictions and directed a trial. That retrial has not yet been concluded.

Meanwhile, the Police had instituted an inquiry against the persons who had been engaged in the rescue of the prisoner and in regard to that occurrence, they, on the 5th February sent up 20 persons for trial to the Sub-Divisional Magistrate of Araria. The result was that nine out of these 20 were acquitted and the remaining eleven, who are respondents in the present appeal, were convicted and sentenced as follows: Bhola, Abdul and Jan Muhammad to one month's rigorous imprisonment and to a fine of Rs. 20/- each under S. 224, I. P. C.; Ramcharitar, Rajkumar, Rashid Mian, Makhru Sahu, Bunsi Chamari, Phul Muhammad, Kutubuddin and Muhammad Irfan to one month's rigorous imprisonment and to a fine of Rs. 20/- each under S. 225, I. P. C.; all the eleven accused to six months' rigorous imprisonment each under Ss. 147, 225 and 332, I. P. C.; the sentences of imprisonment in all cases to run concurrently.

An appeal was then preferred to the Sessions Judge of Purnea and he, on the 8th September 1922, reversed the convictions holding that the arrest of the 3 prisoners was illegal, and that the appellants had committed no offence.

The present appeal has been preferred by the Local Government against that order of acquittal and the 11 appellants before the Sessions Judge are now respondents before us.

Mr. Gour Chandra Pal on behalf of the respondents contends that the learned Magistrate distrusted the truth of Ali Beg's complaint and acting under S. 202, Cr. P. C., sent it to the Police for enquiry and report; that the Police had no jurisdiction to do anything more than to hold a local nquiry and to send their report to the Sub-Divisional Magistrate; and that they were incompetent to exercise any of the powers which they may have possessed under the general provisions of the Criminal Procedure Code, either under S. 54, Cr.P.C. or under the chapter relating to the investigations of cognizable cases. In other words it is contended that the arrest of the 5th February was not an act done in excess of jurisdiction but with complete absence of jurisdiction.

It is necessary, therefore, to see what was the meaning of the order of the 30th January. Reading that order it is impossible to say that it was an order made under S. 202, Cr. P. C. In my opinion it was an order directing the Police to exercise the independent powers conferred upon them by the law. The learned Deputy Magistrate nowhere says that he is proceeding under S. 202, Cr. P. C. or that he distrusts the truth of the complaint; and in these circumstances the question is whether the Police were entitled to proceed with the investigation independently of the Magistrate, even though a complaint was pending before the Magistrate in regard to the same matter. In my opinion there was nothing in the law to prevent such a course.

The Criminal Procedure Code draws a clear difference between jurisdiction to try and jurisdiction to investigate and it is possible to conceive of cases where, although the Magistrate may distrust a complaint or delay in passing orders, the Police would be failing in their duty, if they did not arrest an offender against whom a cognizable offence has been made out. Much more so would this be the case where the Magistrate after recording the complaint finds that a regular Police investigation would be more suitable and intentionally keeps the complaint pending in order that the Police may exercise their powers of investigation and arrest independently of the Magistrate. In my opinion this is what he did in the present case.

But even if the order of the Magistrate was an order under S. 202, Cr. P. C., I cannot see why the jurisdiction of the Police to arrest and to send up a charge sheet was ousted. In practice, of course, the Police would not ordinarily take independent action in respect of a complaint which had already been distrusted by the Magistrate; but to lay down the

general proposition that a Magistrate's order under S. 202, Cr. P. C., debars the Police from exercising their powers of arrest and investigation, would, in my opinion, be neither expedient nor correct.

Therefore from any point of view the Police had in this case jurisdiction to take cognizance of the information which was given to them.

Mr. Pal next contends that in fact there was no information upon which the Police could act. The reply to this is that the Police had the complaint which had been recorded by the Magistrate. His reply to that again is that if he was not acting under S. 202, Cr.P.C., then the Magistrate had no authority under the Code to send the complaint at all to the Police. Assuming that this was so and assuming that the Magistrate acted extra judicially, the fact remains that the Police got information upon which they could proceed.

At its lowest the communication was a request from a private person that investigation should be made and I fail to see how the Police were precluded from taking cognizance of the subject-matter of that communication. But in my opinion the Magistrate's order stands on a higher footing. As the executive head of the Police he had power to send that complaint to the Police and to direct them to investigate; in either case the jurisdiction of the Police could not have been ousted.

The next question is whether Writer Head Constable had authority to make the investigation. Now, S. 4, clause (*p*) of the Criminal Procedure Code clearly shows that the Writer Head Constable in this case was qualified to do so. The Sub-Inspector in charge was ill and although the Writer Head Constable admits that he has not been generally empowered to investigate cognizable cases, he being officer in charge of the Police Station on that day, it was his duty to make the investigation.

The only question that remains is, whether the arrest which followed on the 5th February was lawful. Now, S. 54 of the Criminal Procedure Code is clear and the first clause of that section says that if a Police Officer finds that a reasonable complaint has been made or credible information has been given or a reasonable suspicion exists he is competent to arrest the accused person. It is contended by Mr. Pal that in this case there was no reasonable complaint or credible information or reasonable suspicion. To this the reply is that there was first of all the complaint which had been recorded by the Sub-divisional Magistrate. It is, however, urged that in the complaint before the Magistrate was a charge of a cognizable offence against Bhola only, and that against Abdul and Jan Muhammad there was only a charge of assault and mischief.

Now, although the vernacular complaint states that Bhola was the person who snatched away the purse, in the English statement recorded by the Magistrate there is no qualification or discrimination and all three men are charged with the robbery. Again when the Writer Head Constable arrived at Joki Hat Ali Beg repeated the accusation, and in these circumstances it seems impossible to say that the Writer Head Constable had not credible information against all the three accused. In my opinion it was his duty to arrest all three and to leave it to the Court to decide which if any were guilty.

It is, however, contended that inasmuch as the Magistrate himself had not thought it necessary to issue process in the first instance, the Police Officer was put upon his guard and that he did not in fact believe that there was any cognizable case against the three men. In my opinion, this was not the position. There was nothing before the Writer Head Constable to indicate that the Magistrate did not believe the charge, and as I have said before, even if he had known that the Magistrate was doubtful, his jurisdiction would not have been ousted.

In these circumstances the view taken by the learned Judge seems to be wrong. The arrest was lawful; there was no absence of jurisdiction and therefore any assembly, which had for its object the rescue of the prisoners or the commission of an assault upon the Police while engaged

in the lawful exercise of their duties, was an unlawful assembly within the meaning of the Indian Penal Code.

Our attention has been drawn to "*In the matter of Charu Chandra Mazumdar*" (1) in which a learned Judge of the Calcutta High Court held that, a letter written by the Criminal Investigation Department in Bombay to the Police Commissioner in Calcutta asking for the arrest of a certain person, was not sufficient information to justify resort to the provisions of S. 54 of the Criminal Procedure Code. That case, however, is of no real assistance ; for it must surely be a question of pure fact whether or not in the present case the materials before the Police Officer were sufficient to set S. 54 in motion. If he should be so unfortunate as to be unable to establish those facts, the arrest must of course be pronounced illegal. In my opinion he has discharged the *onus* and his proceedings were perfectly legal.

In this view of the case, it is unnecessary to examine the arguments addressed to us as to the scope of S. 99, I. P. C. There are observations in *Queen Empress* v. *Dalip* (2), in *Nowrangi Singh* v. *The Queen Empress* (3) and in *Queen Empress* v. *Pukot Kotu* (4) which may lead to the inference that even though the arrest is illegal, resistance is unlawful if the Police acted in good faith and under colour of their office.

Mr. Pal asks us to distinguish these cases and to hold that they cover irregularities and not illegalities. I agree that it is often said that S. 99 extends not to cases where there is complete absence of jurisdiction but only to cases where there is jurisdiction and something has been done in excess of jurisdiction. It is unnecessary for us to examine the authorities dealing with this part of the case because, in my opinion, there was no illegality or irregularity whatsoever in the arrest.

The order, therefore, that we shall make is, that the appeal be allowed and that the case be remanded to the Sessions Judge of Purnea for re-hearing. He will decide the questions of fact which arise upon the evidence. We only decide the question whether the arrest was legal.

The District Magistrate, upon receiving this judgment, will call upon the respondents to surrender and will then inform the Sessions Judge of the fact of his having done so in order that he may fix a day for the re-hearing of the appeal. As the respondents were on bail in the Court of the Sessions Judge, the District Magistrate will be competent to release them on adequate bail to appear before the Sessions Judge for the hearing of the appeal.

Bucknill, J.—I agree.

Appeal allowed.

(1) [1917] 44 Cal. 76=20 C. W. N. 1253=37 I. C. 57=18 Cr L. J. 73.
(2) [1896] 18 All. 246=(1895) A. W. N. 48.
(3. [1900] 28 Cal. 411=5 C. W. N. 134.
(4) [1896] 19 Mad. 349.

A. I. R. 1923 Patna 550.

DAWSON MILLER, C. J. AND MULLICK, J.

Gansa Oraon—Accused-Applicant
v.
King Emperor—Opposite Party.

Death Ref. No. 9 of 1923 and Cr. App. No. 34 of 1923, decided on 20th March, 1923, from the reference of J. C., Chota Nagpur, dated 10th February, 1923.

(a) *Criminal P. C., Ss. 154 and 162—Where first information is vague and the police make inquiry—Statements made to police during this enquiry is not first information.*

Circumstances may arise in which information given to the police is of such a vague and indefinite character that it cannot be treated as coming under S. 154 so as to make it incumbent upon the officer in charge of the police station to start an investigation, and he may reasonably require more direct information before doing so and such further information given to him in such circumstances might not come under the provisions of S. 162. The information referred to in S. 154 appears to be something in the nature of a complaint or accusation, or at least information of a crime given with the object of putting the police in motion in order to investigate, as distinguished from information obtained by the police when actively investigating a crime. The information referred to in S. 154 may come from more than one source and more than one such information may be recorded at or about the same time, but once the police have taken active steps to investigate, any written statements taken by them cannot be admissible as evidence as they would come within S. 162. [P. 553, C. 2.]

(b) *Criminal P. C., S. 288—Statements before committing Magistrate are good evidence.*

The section clearly intends that the evidence taken before the committing Magistrate where the witnesses produced are examined at the subsequent trial may be treated as substantive evidence in the case. 28 A. 688; 24 M 414 and A. I. R. 1922 B. 108 Ref. [P. 554, C. 2]

Sambhu Saran—for Accused.

H. L. Nanikeoliyar—for the Crown.

Dawson Miller, C. J.—In this case Gansa Oraon was tried and convicted of murder and sentenced to death by the Judicial Commissioner of Chota Nagpore, on the 10th of February last. The proceedings have been referred to this Court under S. 374 of the Code of Criminal Procedure and the convict has appealed.

The appellant and his brother, Tikua Oraon, were joint in estate, and occupied the same house in *Mauza* Bongeloya in the Ranchi District. The appellant was married whilst his brother was single. There had been some dispute between them as to the division of the paddy crops on their land and Tikua endeavoured, but without success, to bring about a partition. The appellant had promised that when Tikua got married, he would agree to a partition of the land.

According to the prosecution case they had quarrelled about 7 o'clock on the night of the 15th of December last on the question of the division of the crops, with the result that the appellant picked up a *Balua* with which he struck his brother on top of the head a severe blow cutting through the scalp and exposing the brain. Two persons are said to have been present and witnessed the occurrence. One of them was *Musammat* Budhni, the wife of the appellant, the other is Khurloo, his cousin.

The first intimation which the police received of the occurrence was at 4 p.m. on the 16th of December when Rup Singh, the *chaukidar* of the village, arrived at the Police Station at Basia, about 10 miles distant from *Mouza* Bongeloya, and reported to the Sub-Inspector that the same morning the mother of the accused and Tikua had told him that her elder son Gansa Oraon had assaulted his younger brother Tikua the previous evening, whilst they were under the influence of *Handia*, with a *Tangi*, and that he had gone to the house and seen Tikua who had blood stained wound on his head, but on asking him who had assaulted him he gave no reply.

This report was entered in the police station diary but not signed by the *choukidar*, nor was it treated by the Sub-Inspector as an information within the meaning of S. 154 of the Criminal Procedure Code. The Sub-Inspector proceeded the same afternoon to Bongeloya and reached the village at about 8 p.m. He found Tikua at the house with a big wound on his head. He was unconscious and unable to speak. He thereupon questioned *Musammat* Budhni, the wife of the appellant, whose statement he took down in writing and obtained her thumb-impression in the presence of two witnesses treating it as what is known as the first information report, which under S. 156, Criminal Procedure Code, would entitle him to hold an investigation. He then proceeded to obtain evidence from other persons with the result that the appellant was arrested on the 17th of December, and on the following day at 9 o'clock in the morning made a confession at the Sub-Jail at *Gumla* before a Magistrate. The statement made by the appellant at that time was to the following effect:—

"There was a division between my brother Tikua and myself. I struck him with a *Balua* on his head. We are eight members including my children and Tikua is along with his mother. He picked up a quarrel for his share. I have no motive in saying this. Nobody has tutored me. He took 2 annas while I have one and a half annas of the land."

On the following day, the 19th of December, Tikua, who had in the meantime been removed to hospital, died of his wound without having recovered consciousness.

When before the Committing Magistrate on the 4th of January the appellant admitted having made the confession to the Magistrate on the 18th December and again admitted that he had struck his brother with a *Balua* on his head. He added that he drunk. Before the Judicial Commissioner on the 7th of February, when questioned

he stated that he did not know if he had beaten Tikua as he had taken *Handia* (country liquor). He admitted that he had made the statement before mentioned to the Magistrate but added that he made it because he had been beaten by the constable. He said he had no quarrel with his brother about land and explained the evidence given by Khurloo and another witness, Dassin, by saying that they had deposed against him because there was a dispute between himself and them. He also stated that he was on bad terms with Rup Singh the *Choukidar*, who had threatened to kill him. He further stated that he had enmity with Sukhu Mahton, who had given evidence as to the quarrel between the two brothers.

At the trial Khurloo stated that on the evening of the occurrence he took food at the appellant's house and afterwards was given tobacco He and Gansa and Tikua sat on the verandha facing south, that Gansa struck Tikua but it was a dark night and he did not know what he struck him with. He further stated that nothing was said between Gansa and Tikua, that Gansa struck him silently on the head and Tikua remained sitting. Gansa then went outside and he did not know what happened to the weapon with which Gansa struck him. He said that *Mt.* Budhni was not with them but in the north facing room

This evidence given by an obviously unwilling witness varied in some material respects from the statement which he had made earlier before the Committing Magistrate and the learned Judicial Commissioner allowed his deposition made on the former occasion to be put in evidence under the provisions of S. 288 of the Criminal Procedure Code. His attention was drawn to his previous statement which was to the following effect.

That he went to the accused's house in the evening and was smoking there sitting on the verandah facing east. The accused's wife *Mt.* Budhni and Tikua were there. Tikua and the accused began to quarrel and he took up his *Balua* and hit Tikua on the head with it and then ran away out of the house. Tikua stood up and then sat down again. He could not say why the accused struck Tikua but added that the latter had cut paddy of 2 annas on their joint land whilst the accused had cut only 1½ annas He admitted that he had said before the Magistrate that the brothers began quarrelling and that the accused took up his *Balua* and hit Tikua on the head with it and added that what he said in the lower Court was true but that it was not true that they quarrelled.

Budhni, the appellant's wife, was also called and stated that she did not know how Tikua met his death She had gone to sleep after her evening meal and only saw Tikua next morning when he was unconscious. He had wound on his head but she did not see how the injury was caused. This witness also had made a statement before the Magistrate which was at variance with her statement given before the learned Judicial Commissioner and her previous statement was allowed to be put in evidence under the provisions of S. 288, Criminal Procedure Code.

On that occasion she had stated that her husband and Tikua and Khurloo were on the south verandah watching the fire when her husband and Tikua began to quarrel over the division of the paddy Her husband told Tikua that he would divide the land after Tikua's marriage and that her husband took *Balua* which was on the verandah and struck Tikua on the head with it once. She identified the *Balua* which was in the Court. She admitted making the statement but alleged that she made it because the constable said if she did not, the Magistrate would abuse and beat her. It was proved by the Sub-Inspector that Budhni produced the *Balua* when he first went to the house on the night of the 16th.

This was the principal evidence against the appellant. Another witness Dasain Oraon, who knew the parties and belonged to the same village, stated that last year Tikua called a *panchayat* for the division of their land but Gansa would not allow any division until Tikua got married, so the *panch yat* dissolved. On the night of the occurrence Gansa came to his, Dasain's house, and stated that he

had done wrong. When asked what wrong he had done, he merely repeated that he had done wrong, and, as he had nothing on the part of his body and it was cold, he asked for covering, which was given, and he went away.

The medical evidence showed that there was an incised wound 7 inches long by 1 inch deep on the top of the deceased man's head and that the brain substance was coming out when he was admitted into the hospital. The *post-mortem* examination showed that the parietal and frontal bones of the skull were clean cut as if by a sharp instrument.

The learned Judicial Commissioner was satisfied beyond any reasonable doubt that the appellant was guilty of the charge preferred, although the opinion of the assessors was inconclusive and unsatisfactory, one of the assessors thought it was established that the accused did strike the deceased but that it has not been proved what was the weapon used and he did not think that the accused intended to kill his brother; he thought that he should be sent to jail and not hanged. The other thought it was improbable that a brother would kill his brother, but it might be that the accused was drunk and struck his brother and the circumstance did not warrant more than imprisonment. It would seem probable, as the learned Judicial Commissioner thought, that the dislike of inflicting a capital sentence was the primary cause of such halting opinion.

It was argued before us in appeal that the written statement made to the Sub-Inspector by the appellant's wife on the evening of the 16th ought not to have been admitted in evidence as a first information report. It was pointed out that information having been already given at the Police station earlier by the *Choukidar*, any statements afterwards taken by the police were taken in the course of an investigation and were inadmissible as evidence under S. 162 of the Criminal Procedure Code.

I have no doubt that the statement made at the police station by the *Choukidar* was information relating to the commission of a cognizable offence within the meaning of S. 154 of the Code. It ought to have been taken down in the book kept for that purpose as provided in the section, and whether this was done or not, in the particular circumstances of this case, I think, all further statements taken from the witnesses were taken in the course of the police investigation and that the written statements so taken were inadmissible as evidence under S. 162 of the Code.

Circumstances may arise in which information given to the police is of such a vague and indefinite character that it cannot be treated as coming under S. 154 so as to make it incumbent upon the officer in charge of the police station to start an investigation, and he may reasonably require more direct information before doing so, and such further information given to him in such circumstances might not come under the provisions of S. 162 The information referred to in S. 154 appears to me to be something in the nature of a complaint or accusation or at least information of a crime given with the object of putting the police in motion in order to investigate, as distinguished from information obtained by the police when actively investigating a crime. I can also conceive that the information referred to in section 154 may come from more than one source and more than one such information may be recorded at or about the same time, but once the police have taken active steps to investigate, any written statements taken by them cannot be admissible as evidence as they would come within S. 162.

The Sub-Inspector in the present case stated that as the *Choukidar* did not give him any idea of the seriousness of the wound he thought the case to be non-cognizable, I have no doubt that he acted honestly in coming to this belief but at the same time there can be no doubt that the information disclosed by the *Choukidar* in the first instance was such as to show that something more than a common assault had been committed.

I, therefore, consider that the so-called first information taken from Budhni, the wife of the appellant, ought not to have been placed on the record as it was not admissible in evidence. I observe that the learned Judicial Commissioner does

not refer to this statement as evidence in the case and his judgment does not appear to have been in any way influenced by it. I also think that it should be rejected. Had I considered that it in any way influenced the learned Judicial Commissioner in arriving at the conclusion of the appellant's guilt, I should have considered whether it was necessary to order a new trial.

But after considering the other evidence in the case, coupled with the appellant's own confession I feel no reasonable doubt in my mind that the appellant was guilty of murder. It is noticeable that the appellant, when examined in the Sessions Court, did not deny that he had confessed before the Magistrate, nor did he deny that he had beaten Tikua. He pleaded that he did not know whether he had or had not, because he had taken *Bandia*. This was also his defence before the Committing Magistrate in which he admitted the assault upon his brother but said he was drunk. The main witnesses of his guilt were the appellant's wife and a near relation and they were no doubt confronted with a very difficult and trying situation. It is only natural that they should try as far as possible to do what they could for one so nearly related, and the evidence given by both of them before the Committing Magistrate as well as the evidence of Khurloo given at the trial abundantly corroborate the confession made by the appellant and leave no doubt in my mind as to his guilt.

It was contended that the statements made before the Committing Magistrate were not admissible as substantive evidence in the case and that a conviction could not be based solely upon such evidence. For this proposition the case of *Queen-Empress* v. *Jeochi* (1) was relied upon. In that case there was no evidence before the Court to prove the guilt of the accused except the statements made by some of the witnesses when before the Committing Magistrate, and Mr. Justice Banerjee, as the witnesses had given a diametrically opposite version before the Sessions Judge, refused to convict upon such evidence. In the later case of *Emperor* v. *Dwarka Kurmi* (2) the same learned judge, when sitting with Mr. Justice Aikman, explained that in the earlier case he did not intend to hold that such depositions were wholly inadmissible, and having regard to the clear language of S. 288 it could not be held that statements made before the Committing Magistrate could not be admitted in evidence under the section.

Again the Madras High Court in *Queen-Empress* v. *Doraisami Aiyar* (3) held that under S. 288 of the Code the Court is not restricted to admitting the evidence of a witness duly taken before the Committing Magistrate merely for the purpose of contradicting that witness when giving evidence in the Sessions Court, but that the section was intended to enable the Court to read the previous evidence as substantive evidence at the trial where, for the purposes of justice, the adoption of such a course was found necessary by the Judge.

A similar view was also expressed by the Bombay High Court in the case of *Maruti Joti Shinde* v. *Emperor* (4) and, in my opinion, the section clearly intends that the evidence taken before the Committing Magistrate where the witnesses produced are examined at the subsequent trial may be treated as substantive evidence in the case. No doubt it is a matter for the discretion of the Judge whether he thinks that such evidence should be used in the interests of justice. At the same time I consider that many cases may arise in which it would be extremely dangerous to rely upon such evidence where witnesses have proved themselves before the Sessions Judge altogether unworthy of credit.

In my opinion, the learned Judicial Commissioner rightly admitted the evidence in this case. It must also be observed that it was not the only evidence which corroborated the appellant's confession. That of Khurloo as given

(1) (1898) 21 All. 111=(1898) A. W. N. 196.

(2) (1906) 28 All 698=(1906) A. W. N. 187 3 A. L. J. 852 4 Cr L. J. 61.

(3) (1901) 24 Mad 414.

(4) A. I. R. 1922 Bom. 109=46 Bom. 97=23 Bom. L. R 820=22 Cr. L. J. 686.

in the Sessions Court was strong corroboration of the fact that the appellant struck his brother with some sort of weapon.

The only other point argued before us was that the appellant might not have been aware that the blow, which he struck his brother, was one likely to cause his death or that he might have inflicted the blow under a grave and sudden provocation which deprived him of his self-control. From first to last in this case there is no suggestion of any grave or sudden provocation; indeed the evidence shows that the quarrel between the brothers was not violent or heated or that anything in the nature of a fight arose between them before the act was committed; nor is it possible to believe that any one, using a weapon such as that which was used in this case in inflicting the wound which the deceased man received, could fail to realise that his act was so imminently dangerous that it must in all probability cause death or at least such bodily injury as was likely to cause death; and I can find no circumstance which should lead us to interfere either with the verdict or the sentence. The appeal is accordingly dismissed and the sentence confirmed.

Mullick, J.—I have no doubt that the accused committed culpable homicide by causing the death of his brother Tikua.

From the evidence of the accused's cousin, Khurloo Oraon, in the Sessions Court it appears that on Friday the 15th December last he was on a visit to the accused's house and took his evening meal with the accused. The deceased Tikua did not share in the meal but sat afterwards with the witness and Gansa in the verandah of one of the huts. Khurloo says that suddenly Gansa struck Tikua on the head with something which he did not see and that Gansa then went away. But in the Court of the Committing Magistrate on the 3rd January 1923 this witness said that Gansa and the deceased began quarrelling, that Gansa then took up his *balua*, struck the deceased on the head with it and ran out of the house; he also admitted that the accused's wife *Mt.* Budhni was sitting in the verandah at that time.

In the Sessions Court the witness denies that there was any quarrel; at the same time he asserts that what he said before the Committing Magistrate was true, though he cannot explain why the statement that Gansa and the deceased began quarrelling appears in the Magistrate's record. As to his denial that *Mt.* Budhni was in the verandah he, when confronted with his statement before the Committing Magistrate, explains that Budhni was sitting in the verandah of another room.

The investigating officer, Ghulam Haider, who took the statement of Khurloo on the evening of the 16th December, states that Khurloo corroborated the statement made to him by *Mt.* Budhni which clearly speaks of a quarrel between Gansa and Tikua with regard the division of the paddy crop. Again at 9 A.M. on the 18th December the accused made a confession before Mr. Shaning, 1st class Magistrate, in the Sub-Jail, Gumla, the record of which runs as follows:—

"*Warnings.*—I am a Magistrate. I warn you that if you have anything to say, think over, consider and then say. Don't speak false or don't speak anything tutored by any man."

"*Question.*—What do you wish to say?

"*Answer.*—There was a division between my brother Tikua and myself. I struck him with a *balua* on his head. We are 8 members including my children and Tikua is along with his mother. He picked up a quarrel for share, I have no motive in saying this. Nobody has tutored me. He took two annas while I have 1½ annas of land."

On the 4th February the accused was examined by the Committing Magistrate and the record of his statement runs thus:—

Q. Did you assault your brother Tikua with *balua* on his head?

A. Yes, I was drunk.

Q. Did you make this statement (confession Ex. C and read over to the accused before me)?

A. Yes."

In these circumstances I do not think that there can be any doubt that the statements made by Khurloo to the Sub-Inspector and to the Committing Magistrate are more correct than those made by him before the Sessions Judge. That he was present and saw the assault is common to both sets of statements, and his denial in the Sessions Court that there was any quarrel is clearly false and fails to explain the cause of the assault.

It is curious, however, that nothing was asked from the witness as to what he did after the assault. If he had been questioned on the point he might perhaps have given valuable information as to the conduct of the accused, but, in my opinion, his evidence, sufficiently proves that there was a quarrel between the accused and the deceased in consequence of which the accused inflicted the injury which caused the death of Tikua.

The learned Vakil for the accused contends that Khurloo's statement before the Committing Magistrate is not admissible in evidence because the accused did not cross-examine him. The record does not show why the witness was not cross-examined in the Committing Magistrate's Court, but there is no reason for supposing that the accused was deprived of the opportunity of cross-examining the witness. There is nothing to show that he was in any way prevented by the Court from exercising his right of cross-examination.

The only other eye-witness is the accused's own wife *Mt.* Budhni. She too has given evidence in the Sessions Court which is at variance with her evidence before the Committing Magistrate.

She states in the Sessions Court that Tikua and the accused took their meals together and that her husband went to bed and that she does not know what happened to Tikua, but that next morning she found Tikua, unconscious in the verandah with a wound on his head.

Before the Committing Magistrate on the 3rd January 1923 she admitted that the two brothers began to quarrel about the division of the paddy crop and that her husband struck the deceased on the head with a *balua* which was in the verandah and that the witness Khurloo was there present.

She was the first person examined by the Sub-Inspector, Ghulam Haider, on the 16th December and she then gave a slightly fuller account of the occurrence adding that when she questioned her husband he replied that he had assaulted his brother with the *balua* thinking it to be a *lathi*.

Ghulani Haider deposes in the Sessions Court that she handed a *balua* to him saying that it was the weapon with which the assault had been committed.

The learned Vakil for the accused objects to the admissibility of Budhni's statement to the Sub-Inspector on the ground that it is a statement made in the course of an investigation and, therefore, inadmissible by reason of S. 162, Cr. P. C. On the other hand the learned Assistant Government Advocate contends that it is an entry in an official book prescribed by S 154 of the Code and that S. 35 of the Indian Evidence Act applies. To this the learned Vakil rejoins that the real first information in the case, *i.e*, the information upon which the Sub-Inspector took cognizance of the offence and commenced investigation, was the statement of the *Chaukidar* Rup Singh which was given at the *thana* at 4 P.M. on the 16th December and which ran as follows :—

"Rup Singh, *Choukidar* of Bangoliya, came and reported that this day morning while he was returning from Harakh Ahir's house of Bagaucha with Harakh, Tikua Oraon's mother of Bangoliya said to him that her elder son Gansa Oraon assaulted his younger brother Tikua last evening while they were under the influence of *Handia* with a *tangi* ; he went there along with Harakh and saw Tikua Oraon who has got a blood stained wound on his head and asked Tikua as to who assaulted him, but he gave no reply."

The Sub-Inspector explains that he did not trust this information and he did not commence the investigation till he had visited the locality and taken the statement of *Musammat* Budhni.

In my opinion, the investigation had already commenced when the statement of *Musammat* Budhni was recorded, and the learned Vakil's contention must be accepted.

The word 'Information" is not defined, but the definition of " complaint " throws some light upon its meaning. " Complaint " is defined in S. 4 (*h*) as an allegation made to a Magistrate with a view to his taking action that some person whether known or unknown has committed an offence In my opinion, an information is a corresponding allegation made to a Police Officer, and this view seems to me to be supported by the language used in S. 112 of the Code of 1872 (Act X of 1872) which provides for the entry in the official register, not of informations but of complaints.

I think then that if the allegations made are in the nature of a complaint, the Police Officer must record them as an information under S. 154, Cr. P. C., and the writing will attract the provisions of S. 35 of the Evidence Act : and if, as he seems to be entitled to do, the Police Officer should record more than one information relating to a cognizable offence they will all share the privilege of being exempt from the disability imposed by S. 162 of the Criminal Procedure Code. In every case it is for the Court to decide whether the communication is an information in this technical sense and whether when the Police investigation had in fact begun.

The question then is whether in the present case the investigation had begun before Budhni's statement was recorded by the Sub-Inspector. In my opinion, it had, for the reason that Budhni's statement was not made to the Sub-Inspector with a view to taking action on the contrary from Rup Singh's evidence it is clear that no one in accused's house was willing to come forward as the accuser and I am satisfied from the facts of this case that Budhni's statement was certainly not that of a voluntary informant. It is then clear that although the *Choukidar's* information was hearsay the Sub-Inspector did in fact take it as an information under S. 154, Cr. P. C., and that he had already commenced his investigation when he recorded the statement of Budhni. Therefore the writing (Ex. 1) is not legal evidence.

But the exclusion of the document does not affect the decision in this case ; for Budhni's deposition before the Committing Magistrate clearly shows that the assault took place on account of a quarrel about land and that she witnessed it. The Sub-Inspector has given evidence under S. 157 of the Indian Evidence Act which corroborates that deposition and her explanation in the Sessions Court that the statement and the depo ition were made under the influence of fear cannot in the circumstances be accepted.

It is again to be regretted that no attempt was made either in the Committing Magistrate's Court or in that of the Sessions Judge to elicit from this witness any information as to the accused's movements during the remainder of the night. Rup Singh, however, deposes that when on the morning of the 16th he went to the accused's house the accused would not allow Tikua to be taken to the Police nor would he go there himself. The only other inmate of the house on the night of occurrence was *Musammat* Bauni, the mother of the accused, but she states that she came home late, was taken straight away to bed and that it was not till the following morning that she saw the wound on Tikua's head.

Realizing the prime importance of reducing the value of the accused's confessions the learned vakil contends that having been retracted in the Sessions Court they themselves require corroboration. Now in the Sessions Court the accused while admitting the two previous statements made to the Magistrate said that he had been beaten by the Police and that having been under the influence of liquor he knew nothing about the assault In my opinion the statement made by the accused to the Committing Magistrate on the 4th January 1923 was not tainted by any coercion or undue influence and it is conclusive corroboration of the confession on the 18th December 1922, it proves satisfactorily that the accused did assault his brother,

In his later statement he added the plea of drunkenness but it is clear there is no substance in it. The only direct evidence on this point is that of Budhni and she states that Gansa and the deceased had drunk "*Handia*" in the morning but not with their evening meal. The *Chaukidar* also states in his information to the Police that the deceased's mother had informed him that the assault had been committed under the influence of drink. Giving the fullest weight to this evidence it goes only to show that the accused had taken alcohol in the course of the day, but the onus of proving that he did not commit the act with the intention of causing death or injuries sufficient to cause death is upon him and he has declined to give any explanation or evidence in the Sessions Court.

There is no evidence whatsoever that the accused was not in a position to formulate the intention to kill or to cause injuries sufficient to cause death. As to the quarrel there is no evidence of its suddenness and no provocation has been proved which would reduce the offence to one less than murder.

The result is that in my opinion the accused is guilty of murder.

As for the motive the evidence of Dasain and Sukhan shows clearly that a dispute had been going on between the deceased and the accused and the deceased wanted a division of the family lands because he wished to marry.

Finally a plea has been made for mitigation of sentence, but having regard to the callous manner in which the accused behaved after the occurrence, it is impossible to allow the plea. The evidence of Dasain shows that after the assault the accused came to him and said that he had done wrong and complained that he was feeling cold. He did not explain what he had done but he borrowed a covering from Dasain which was recovered the next day from the accused's house.

Nothing is known as to what he did during the remainder of the night, but it does not appear that he made any attempt to assist Tikua or that he showed any contrition. On the following morning the accused declined to allow the deceased to be taken to the *Thana* and it was not till the Police arrived that the deceased was despatched to the Hospital at Gumla.

In my opinion the sentence of death should be confirmed.

Sentence confirmed.

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* A. I. R. 1923 Patna 558.

DAS AND KULWANT SAHAY, JJ.

Chattrapat Pratab Bahadur Sahai—Plaintiff-Appellant

v.

C. G. Lees and others—Defendants-Respondents.

F. A. No. 55 of 1920, decided on 9th February, 1923, from the decision of the Sub. J., Second Court, Muzaffarpur, dated 26th November, 1919.

(a) *Civil P. C., O. 29, R. 1—Where dispossession is caused by a manager of a factory the suit for ejectment should be against the manager in his personal capacity and not against the factory.*

Where the cause of action alleged in the plaint was the dispossession by the defendant, the manager of a factory on account of the proceeding under S. 145 of the Code of Criminal Procedure in which the defendant, was declared to be in possession.

Held, that the plaintiffs had got a cause of action against the person who had actually dispossessed them and not against the factory of which the defendant was manager. [P. 560, C. 1]

(b) *Adverse possession—Ejectment suit—Plaintiff must prove title and possession.*

In a suit for ejectment it is incumbent upon the plaintiffs not only to prove their title but also that they have been in possession within twelve years of the date of the suit. [P. 560, C. 1]

(c) *Evidence Act, Ss. 35 and 57*—Thak *map is no evidence of prescriptive titles.*

Thak maps are good evidence of possession at the time they were made, but they are no evidence of title acquired by prescription or adverse possession. The object of the *Thakbust* Survey, which precedes the Revenue Survey, is to ascertain the position of boundaries and areas of estates and villages and it is no part of the duty of the Revenue Officers conducting the *Thakbust* operations to record prescriptive rights.

[P. 560, C. 2]

Sultan Ahmad and *S. N. Rai*—for Appellant.

P. Kennedy, S. K. Mitra and *S. C. Mitra*—for Respondents.

Kulwant Sahay, J.—Mouza Majharia Shaikh in Tappa Khadda District Champaran, originally belonged to the Bettiah Raj and it was granted

by the Raj as a rent free tenure to the predecessors of the plaintiffs more than 60 years ago and it is now owned by the plaintiffs and they are in possession thereof. Within the said Mauza there is a lake which has been surveyed in the last Cadastral Survey and bears Khasra Nos. 1446, 1448, 3233 and 1446-3275, to 1346-3298. Out of these survey plots, plots Nos. 1446, 1448, and 3233 measuring about 163 48 acres are under water and the parties claim *jalkar* rights therein. Survey Nos. 1446—3275 to 1446—3298 measuring about 2'33 acres, are culturable lands. The defendant is the Manager of the Lalsarya Factory and Mauza Lalsarya and several other Mauzas are held by the factory under a *mokarrari* grant, dated the 3rd November 1888, under the Bettiah Raj and in the *mokarrari* deed the *jalkar* right in Tappa Khadda is expressly excluded from the grant.

The plaintiffs allege that they have been in peaceful possession of the *jalkar* bearing survey Nos. 1446, 1448 and 3233, but during the last Revisional Survey the plaintiffs came to know that the defendant had settled Survey Nos. 1446-3275 to 1446-3298 with several tenants and wrongfully appropriated the rental in respect thereof on the allegation that the said lands appertain to Mauza Jawakatia covered by their *mokarrari*, but ultimately those plots were recorded in the Record of Rights as appertaining to the plaintiffs' Mauza Majharia Shaikh and the tenants with whom the lands had been settled abandoned the same, and the lands are now in the *khas* possession of the plaintiffs.

As regards the Jalkar Nos 1446-1458, and 3233, there was a proceeding under S. 145 of the Code of Criminal Procedure between the defendant and the servants of the plaintiffs wherein the Magistrate found the defendant to be in possession and the plaintiffs allege that they have been dispossessed from these *jalkar* plots by reason of this order under S. 145 of the Code of Criminal Procedure.

The plaintiffs brought the present action on the 21st October 1918 praying for adjudication of their title to plots Nos. 1446, 1448 and 3233 and for recovery of possession thereof with mesne profits and for the recovery of Rs. 117-9-0 being the amount of rent alleged to have been realised by the defendant and appropriated by him on account of rents of plots Nos. 1446-3275 to 1446-3298. The defendant raised various pleas and contended *inter alia* that the plaint did not disclose any cause of action as against him, as he was merely the Manager of the Factory; that the disputed *jalkar* was in possession of the factory for more than 70 years, and that the plaintiffs were never in possession thereof and he denied the plaintiffs' title to possession and their right to recover mesne profits and damages.

The learned Subordinate Judge has found that the *jalkar* plots Nos. 1446, 1448 and 3233 are situated within, and appertain to, Mauza Majharia, but that the plaintiffs have failed to prove possession within 12 years of plots Nos. 1446 and 1448, and that the defendant has proved adverse possession for more than 12 years. He has, therefore, dismissed the plaintiff's suit as regards those two plots. As regards plot No. 3233, he has found that the plaintiffs have proved their possession within 12 years and has made a decree in their favour in respect of this plot. As regards the claim for damages for plots Nos. 1146-3275 to 1446-3298 the learned Subordinate Judge has dismissed the plaintiff's claim and the learned Counsel for the plaintiff's does not press his claim as regards the damages in this appeal.

There were two plaintiffs in the suit, but the present appeal has been filed only by the plaintiff No 2, and the plaintiff No. 1 who is a ward of the Court of Wards has been made respondent in the appeal. The only point pressed in the appeal is as regards the plaintiff's right to plots 1446 and 1448.

The first point which arises for decision in this appeal is as to whether the suit is maintainable as against the defendant in the case as he is merely the Manager of the Lalsarya Factory the proprietors whereof have not been made defendants. Mr. Kennedy for the respondent argues that the action being in ejectment and the defendant being merely a Manager of the Factory,

the suit is not maintainable without the proprietors of the Factory being made parties. To my mind there is no substance in this objection. The cause of action alleged in the plaint is the dispossession by the defendant on account of the proceeding under S. 145 of the Code of Criminal Procedure. In that proceeding Mr. Lees, the defendant, was declared to be in possession and the plaintiffs have got a cause of action against the person who has actually dispossessed them.

Moreover, the suit cannot be defeated on account of non-joinder of the proprietors of the Factory. If it be shown that they are not properly represented in the present action by the Manager, the defendant No. 1 they might not be bound by this decree, but that is no reason for dismissing the suit.

The main question, however, for decision in the appeal is as regards the title of the plaintiffs to the *jalkar*. The learned Subordinate Judge has found that the *jalkar* appertains to Mauza Majharia Shaikh and it is apparent on a reference to the *Thakbust* Map of 1845 and the Revenue Survey Map of 1846 that the disputed *jalkar* is situated within the ambit of Mauza Majharia. The plaintiffs would, therefore, be *prima facie* entitled to possession of this *jalkar* unless they have lost their title being out of possession for more than twelve years.

The learned Government advocate for the appellant argues that the title being in the plaintiffs, the *onus* was on the defendant to prove adverse possession for more than twelve years but the action being in ejectment it is incumbent upon the plaintiffs not only to prove their title but also that they have been in possession within twelve years of the date of the suit The question of *onus*, however, is not of any importance in the present case inasmuch as both sides have produced evidence and the Court is entitled to come to a finding upon the evidence as a whole as to whether the plaintiffs or the defendant have been in possession within the statutory period.

As regards the evidence of possession, the plaintiffs rely on the Survey Map of 1846, which shows the western portion of the *jalkar* to be in Majharia. They also rely on the Khatian of 1895, Ex. 20, which shows the disputed *jalkar* in the possession of Dhanukdhari Singh and others, ancestors of the plaintiffs, in Mauza Majharia Shaikh through their tenant Teka Kamkar. They also rely on *Jamabandi* papers, Exhibits 1 to 12, for the years 1904 to 1913 which show settlements made by the 8 annas proprietors of village Majharia and realisation of rents for the *jalkar*. In addition to this, they have produced oral evidence to prove the fact of their possession and they argue that the evidence on the record proves their possession from the years 1846 down to 1913.

As against this, the defendants rely on the *Thakbust* Map, Exhibit A. (a), of the year 1845 wherein there is an entry as regards the disputed *jalkar* to the following effect: "River Mun *jalkar* appertains to Mauza Sundaria and land belongs to this Mauza" (The translation in the printed paper-book to the effect that the land belongs to the "said Mauza" is clearly a mistake for 'this Mauza" the word in the original being *haza* which means 'this' and not 'said'). Now the defendant's case is that the *jalkar* in dispute, although situated within the ambit of Mauza Majharia Shaikh is a part of a continuous *jalkar* which is known as *jalkar* Sinduria and which belongs to the Factory and reliance is placed upon the *Thakbust* Map to show that in the year 1845 the *jalkar* in dispute was found to be a part of the Sundari *jalkar* although lying on the lands of Majharia

No doubt, these *Thak* Maps are good evidence of possession at the time they were made, but they are no evidence of title acquired by prescription or adverse possession. The object of the *Thakbust* Survey, which preceded the Revenue Survey, was to ascertain the position of boundaries and area of estates and villages and it was no part of the duty of the Revenue Officers conducting the Thakbust operations to record prescriptive rights. (See notes on the old Revenue Surveys of Bengal, Bihar, Orissa and Assam by Captain F. C. Hirst, and the remarks of their Lordships of the Privy Council in the case of *Satcowri Ghosh Mandal* v. *Secretary*

of State for India in Council (1).

The value of the entry in the *Thakbust* Map is further very much diminished by the Revenue Survey Map which was prepared the next year 1846, wherein this *jalkar* is shown as belonging to Mauza Majharia and not to Mauza Sundaria. In fact, the Survey Map of 1846 clearly shows that the eastern portion of the lake was included in Lalsaraya, and if the western portion which is now in dispute was also outside Majharia and included in Sundaria, the said western portion would also have been shown in the same way as the eastern portion. Therefore, the entry in the *Thak* Map is not of much help to the defendant in the present case.

The defendant has produced *bandobasti* papers, Exhibits A to A- and B to F-8, from the year 1-0 onwards to show that the Factory used to settle *jalkars* with tenants, but in those papers there is nothing to identify the *jalkars* settled, with the plots in dispute now. We only find a mention of Sundaria or Senwaria *jalkar* and the *Bandobasti* papers by themselves are not sufficient to prove the defendant's possession of the *jalkar* now in dispute.

The same remarks apply to the cash books showing realization of rents in respect of the Senwari *jalkar*. The defendant has also produced *kabuliats* Exhibit E series, the earliest of which is dated the 13th September, 1914. These *kabuliats* show settlements by the factory of a large number of *jalkar Mahals*, one of which is in Majharia Shaikh, but as I have already remarked they do not go far enough to establish adverse possession for more than twelve years. The defendant has also examined several witnesses to prove the fact of his possession. His witness No 3, Jang Bahadur Singh, says that he took settlement of the disputed *jalkar* from the factory in 1306, 1307, and 1308, and his witness No. 4. Lakshman Mallah, claims to have taken settlements of the same *jalkar* from the factory from 1301 to 1309 *Fasli*.

This period overlaps with the lease of the witness No 3, Jang Bahadur Singh, and the evidence of these witnesses who speak of having taken settlements of the *jalkar* from the Factory is, to my mind, not reliable.

The learned Subordinate Judge has, however, placed reliance on the evidence of Mr. Reid and Mr. Finzel, who were Managers of the factory before the present defendant Mr Lees. As regards the evidence of Mr. Reid, he was Manager of the Factory from 1901 to 1910. He speaks of the possession of the factory over the *jalkar* and *Narkat* in the lake by the side of the Factory. It does not appear from his evidence that he was referring to the *jalkar* now in dispute. He was examined on commission and interrogatories put to him and the answers given by him do not, in my opinion, establish the possession of the defendant over the identical *jalkar* now in dispute.

There are admittedly other *jalkars* in possession of the Factory and they are close to the Factory. Therefore, his evidence is not sufficient to establish adverse possession of the defendant. As regards Mr. Finzel, he was Manager from March to September 1911. He no doubt says, that he knows the *jalkar* in suit and that he made settlement of this *jalkar* with certain persons, but in cross-examination he says that he has no idea of the boundaries of the disputed *jalkar* or lake and in a vast sheet of water extending over several miles this sort of evidence is not sufficient to prove adverse possession over the disputed land.

As regards Mr. Lees, he says in his evidence that he knows the *jalkar* in dispute and that it is in the possession of the Factory He, however, became Manager in September 1911 and he cannot speak of the previous possession from his own knowledge. He gives reason for his opinion that the Factory is in possession of this *jalkar* from a long time because the *Thakbust* Map of 1845 includes the *jalkar* in Mahal Sonbaria. Another reason that he assigns is that in February 1897, he went to the *jalkar* in dispute in the company of Mr. McLeod on a pig-sticking excursion.

Mr McLeod set the reeds on fire and on asking who was going to pay the damages, Mr. McLeod said that the whole of it belonged to him. Now this statement of Mr. Lees is, to my mind, not legal evidence as regards

(1) (1895) 22 Cal. 252.

the possession of the Factory over disputed *jalkar* in the year 1897. This is the whole of the evidence on the record and in my opinion it is not sufficient to prove adverse possession of the defendant over the *jalka* in dispute.

The only documentary evidence in support of the defendant is the *T akbust* Map of 1845 and Mr Lees in his evidence admits that he has got no other document to show that the Sonbaria *jalkar* includes the disputed *jalkar*. I think that the plaintiffs have succeeded in proving their possession within twelve years and they are entitled to a decree for possession of this disputed *jalkar* 1446 and 1448 also

I would, therefore, set aside the decree of the Court below as regards these two *jalkars* and decree the suit in respect thereof with costs. The plaintiff will be entitled to mesne profits in respect of these *jalkars* the amounts whereof will be ascertained by the Court below.

Das, J.—I agree.

Appeal allowed.

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*A. I. R. 1923 Patna 562.

DAS AND FOSTER, JJ.

Ganesh Narain Sahi Deo—Plaintiff-Appellant

v.

Manik Lal Chandra and others—Defendants-Respondents.

A. No. 135 of 1920, decided on 25th May, 1923, from the decision of the Sub-J., Ranchi, dated 5th May, 1920.

Jurisdiction—Submission to—No inherent lack of jurisdiction—Absence of formality is immaterial

If there is submission to the jurisdiction of a Court and if there is no inherent lack of jurisdiction in that Court the absence of formality (*e. g.*, asking leave of the High Court under Letters Patent which would confer complete jurisdiction on that Court) will not render the judgment of that Court null and void. [P 563, C 1]

G. S. Prasad and *T. N. Sahai*—for Appellant.

A. B. Mookerjee, A. . Roy and *D. N. Sarkar*—for Respondents.

Das, J.—This appeal arises out of a suit instituted by the appellant for setting aside a decree obtained by the respondent against the appellant in the Original Side of the Calcutta High Court sometime in 1917. The defendants 1 and 2 were the plaintiffs in the suit which was instituted in the Original Side of the Calcutta High Court

It appears that there was an agreement between the plaintiff of the first part and defendants 1 and 2 of the second part and defendant No. 3 of the third party by which defendant No. 3 who had previously taken a lease of certain forest belonging to the plaintiff agreed to supply certain sleepers to defendants 1 and 2 at a certain price and the plaintiff agreed to stand surety for defendant No. 3 and to pay all damages for non-delivery that might be sustained by defendants 1 and 2.

Defendants 1 and 2 alleged in the suit which they instituted in Calcutta that defendant No 3 failed to deliver the sleepers to them and by the suit which they instituted on the 10th December 1914 they asked for damages not only as against defendant 3 but also as against the plaintiff. On the 10th February 1915 defendants 1 and 2 got an *ex-parte* decree against the plaintiff and defendant No. 3. On the 10th February 1916 defendants 1 and 2 applied for execution of the decree in the Court of the Subordinate Judge of Ranchi.

On the 14th April 1916 the plaintiff applied in the Calcutta High Court for setting aside the *ex-parte* decree. On the 11th August 1916 the decree was set aside on certain terms which it will be necessary to consider when we come to deal with the question of jurisdiction of the Calcutta High Court. On the 21st November 1916 the suit was decreed as against the plaintiff upon contest. The plaintiff thereupon appealed to the Appeal Court. In May 1917 the Appeal Court remanded the suit for trial of certain issues. On the 6th July 1917 the suit was finally decreed for Rs 21,600.

In September 1917 the defendants 1 and 2 took out execution in the Court of the Subordinate Judge of Ranchi and on the 17th November 1917 the suit out of which the present appeal arises was instituted by the plaintiff who was defendant No. 3 in the previous action. His case is that the decree obtained by defendants 1 and 2

against him was fraudulent, and secondly, that the Original Side of the Calcutta High Court had no jurisdiction to entertain the suit. So far as the first question is concerned it is sufficient to say that the plaintiff appeared in that suit from start to finish and there is no ground for setting aside the decree on the ground of fraud. So far as the second point is concerned it is suggested that the plaintiff is not a resident of Calcutta but is a resident of Srinagar in Ranchi, that the contract was entered into in Gumla and that the breach of the contract, if any, took place in Ranchi. It is argued on behalf of the appellant that there was a lack of inherent jurisdiction in the Original Side of the Calcutta High Court and that consent could not confer jurisdiction on that Court.

I quite agree that if there was absolutely no jurisdiction in the Calcutta High Court to entertain the suit the consent of the parties could not confer any jurisdiction upon the Court. But it has got to be considered whether there was the absence of that jurisdiction in the Court. It will be noticed that when the time for performance of the contract came Messrs. B. N. Basu and Co, Solicitors on behalf of the plaintiff, wrote and addressed the following letter to the defendants.

The letter runs as follows :—

" Dear Sirs,

" A mere denial on your part that you have not failed to fulfil your part of the agreement will not help you in altering facts. In spite of repeated requisitions by our client you failed to provide with the necessary funds and you have thereby put him to heavy loss. Our client has instructed us to take proper steps in the matter.

" We understand that after writing to us the letter under reply you wrote a letter to our client. As you have failed to perform your part of the agreement he is not bound to supply you with any sleepers which please note."

This letter was written in Calcutta and was a repudiation of the agreement between the defendants 1 and 2, and the plaintiff. Defendants 1 and 2 acted upon this repudiation and promptly proceeded to bring a suit against the plaintiff in the Original Side of the Calcutta High Court.

Now, it seems to me that the breach of the agreement took place in Calcutta and that being so, part of the cause of action arose within the limits of the ordinary Original Jurisdiction of the Calcutta High Court. It is quite true that defendants 1 and 2 who were the plaintiffs in that action should have taken the leave of the Court under clause XII of the Letters Patent before instituting the suit. But it has been held in numerous cases that if there is submission to the jurisdiction of a Court and if there is no inherent lack of jurisdiction in that Court, the absence of formality which would confer complete jurisdiction on that Court will not render the judgment of that Court null and void. Part of the cause of action as I have said, arose within the jurisdiction of that Court. There was therefore not an entire absence of jurisdiction in the Original Side of the Calcutta High Court taking cognizance of the suit In order to give a complete jurisdiction it was necessary for the plaintiff in that action to ask the leave of the Calcutta High Court.

It is quite true that leave of the Calcutta High Court was not taken when they instituted the suit in 1914. But then the plaintiff submitted to the jurisdiction of the Court and expressly undertook not to question the jurisdiction of the Court. That undertaking was given when they applied for setting aside the *ex parte* decree. One of the terms of the consent order by which the *ex parte* decree was set aside was that the plaintiff would not question the jurisdiction of the Calcutta High Court.

In my opinion the Calcutta High Court had jurisdiction to render judgment in the case. That being so, it is quite impossible to set aside the judgment of the Calcutta High Court. The view of the learned Subordinate Judge is perfectly right and I would dismiss this appeal with costs.

Foster, J.—I agree.

Appeal dismissed.

*A. I. R. 1923 Patna 564.

DAWSON MILLER, C. J., AND FOSTER J.

Bhagwan Lal Defendant-Appellant

v.

Rajendra Prasad Sahi and others—Plaintiffs-Respondents.

F. A. No. 155 of 1920, decided on 21st March, 1923, from the decision of the Sub-J., 2nd Court, Patna, dated 10th April 1920.

(a) *Civil P. C., S. 64—Transfer of attached property—Attachment released and property attached afresh—Transfer is not void.*

The words 'All claims enforceable under the attachment' in S. 64 do not mean 'All claims of the attaching creditor enforceable under that or any subsequent attachment under the same decree.' [P. 567, C. 2]

(b) *Specific Relief Act, S. 42, Proviso—Not applicable to suits under O. 21, R. 63, Civil P. C.*

A suit brought under Order 21, R. 63 is a special remedy granted in special circumstances and is not governed by the proviso to S. 42 of the Specific Relief Act. [P. 572, C. 2]

N. C. Sinha and *R. T. N. Sahai*—for Appellant.

S. N. Roy for Respondents.

Dawson Miller, C.J.—In this case certain property belonging to Narayan Prasad Singh and other members of his family who are the first seven defendants in the suit was attached and sold in execution of a decree in favour of Bhagwan Lal Hajam, the defendant No. 8. The plaintiffs claimed that at the time of the attachment and sale they had a subsisting mortgage upon the property and petitioned the Court that the sale should be made subject to their mortgage. Their application was dismissed and the property was sold free from the encumbrance of their mortgage. They consequently instituted the present proceedings praying that the properties sold at the execution sale and purchased by Bhagwan Lal Hajam, the decree-holder, should be declared subject to the encumbrance of their mortgage.

The trial Court found in favour of the plaintiffs and granted them the relief claimed. The defendant, Bhagwan Lal, the purchaser, has appealed from that decision.

Rajendra Prasad Sahi and others the plaintiffs in the suit, are members of a joint family residing at Phatra in the Muzaffarpur district where they carry on business as *zemindars* and money lenders. The defendants 1 to 7 Narayan Prasad Singh and other members of his family, who may conveniently be referred to as the Singh defendants, are *zemindars* and cultivators residing at Jilanichak in the Patna district where at one time they owned considerable property. Bhagwan Lal Hajam, the defendant No. 8, who is the appellant before us, resides at Mahendru in Patna City. He belongs to the barber caste but also does some business in money lending.

In the year 1892 the father of the first defendant, Narayan Prasad Singh executed a mortgage in favour of Bhagwan Lal's father, hypothecating certain property other than that which is the subject-matter of the present suit, to secure an advance of Rs. 1,000 carrying compound interest at 2 per cent. per mensem with quarterly rests. Ten years later in January 1902, a suit was instituted against the Singh defendants to enforce the mortgage. A decree was obtained and in execution thereof the mortgaged property was brought to sale in August 1903 and purchased by the decree-holder. The decree passed in that suit was appealed from by the Singh defendants but their appeal was dismissed by the High Court in May 1904.

The sale proceeds of the mortgaged property sold in execution proved insufficient to satisfy the decretal amount and interest which had rapidly accumulated at the high rate stipulated in the bond by the time the property was sold in execution. The mortgagee accordingly applied for, and on the 15th December 1906 obtained, a personal decree against the mortgagors for the unsatisfied balance amounting at that time to over Rs. 17,000.

About three years later, towards the end of 1909, Bhagwan Lal, his father having died, first began to make efforts to execute this decree. After three unsuccessful attempts a fourth execution case was filed and registered on the 1st June 1914. It was numbered 201 of 1914 and certain properties belonging to the Singh

defendants (the judgment-debtors) were attached in that execution proceeding in June and July 19 4 The properties so attached form the subject-matter of the dispute in this case. They were subsequently sold in execution and purchased by Bhagwan Lal under circumstances presently to be stated, and after certain events had happened which are material in considering the question for determination.

The plaintiffs claimed title to these properties under a mortgage executed by the Singh defendants in their favour on the 9th March 1915. In the meantime, namely, on the 24th February 1915, Bhagwan Lal had filed a fresh application for execution praying that the execution case No. 201 of 1914 then pending, might be dismissed and that the new execution case might be considered as being in continuation of it. The application was heard the same day and the following order was passed :—

"Fresh execution petition filed. Let this case be dismissed. The attachment made to continue. The petition filed to-day to be taken as in continuation of this case so no fresh notice under Order 21, rule 66 would be necessary."

The new execution case was also registered on the 24th February 1915 as No. 51 of 1915 and on the same day an order was passed therein as follows :

" Attachment and notice under Order 21 rule 66 need not be issued, as ordered in execution case No. 201 of 1914. Issue sale proclamation fixing 19th April 1915 for sale at 6 a. m."

On the 9th March 1915, as already stated, the Singh defendants granted a mortgage of certain properties, including those which had been attached to Rajendra Prasad Sahi, the first plaintiff in this suit, to secure an advance of Rs. 25,000 repayable within two years and carrying compound interest at 1 per cent. per month with yearly rests. In May following Bhagwan Lal, for reasons which are not material, found himself unable to continue with his execution against the properties attached, and on the 17th May 1915 the execution case No. 5 of that year was dismissed for default, and the attachment accordingly came to an end.

On the 16th September 1916 Bhagwan Lal filed a fresh execution proceeding the case being numbered 181 of 1916. In March 1917 the same properties were again attached and a sale proclamation was duly issued. The plaintiff, Rajendra Prasad Sahi, subsequently, in June 1917, applied under Order 21, rule 62 that the sale should be ordered to take place subject to his mortgage of the 9th March 1915. His application was heard together with the applications of certain other objectors and was dismissed on the 18th June 1917.

The only reason assigned by the learned Subordinate Judge for dismissing the application was that there was nothing to show the *bona fide* character of the mortgage and that it looked strange that at that stage these persons should have come forward to put an obstruction in the way of the decree-holder. The properties were accordingly sold in execution of Bhagwan Lal's decree on the following day and purchased by him for Rs. 14,000.

The plaintiffs have accordingly preferred this suit under provisions of Order 21, rule 63 claiming a declaration that the sale of the properties to Bhagwan Lal in execution case 181 of 1916 was subject to the encumbrance of their mortgage of the 9th March 1915.

The Singh defendants filed written statement alleging that they had never denied the plaintiffs' mortgage bond of the 9th March 1915, and that as the suit was not for recovery of the bond money, they were improperly made defendants and that no cause of action had accrued against them. Bhagwan Lal also filed a written statement impugning the *bona fides* and the validity of the plaintiffs' mortgage bond on the ground that it was a collusive transaction between the plaintiffs and the Singh defendants and was fraudulent and without consideration and that it was merely a false and colourable transaction. He further pleaded that the suit was barred by the proviso to S. 42 of the Specific Relief Act; that it was executed for the purpose of defrauding him as a creditor in contravention of the provisions of S. 53 of the Transfer of Property Act, and further, that it contravened the provisions of

S. 59 of the Transfer of Property Act and was on that account illegal and invalid.

The Singh defendants did not appear at the trial and have not been represented in this appeal. On behalf of the appellant it was argued in the first place that the plaintiffs' mortgage bond had not been proved according to law as provided by S. 68 of the Indian Evidence Act and could not therefore be used in evidence, and, further, that even if that section had been complied with the evidence of the attesting witnesses called to prove execution was unreliable and contradictory and should not be accepted.

The execution of the bond was attested by 6 witnesses. In the translation of the bond filed on the record they purport to have attested on the admission of the executants but the words used and translated as "on the admission of the executants" are "*mukhate Mukrin*" which might be more idiomatically rendered as "At the request of the executants."

Two of the attesting witnesses Ram Lal Mahton and Nath Sahay were called at the trial on behalf of the plaintiffs. The former says he was a witness to the bond and that the executants signed in his presence and he verified the signatures of himself and some of the other witnesses who he said were present. In cross-examination he stated that he went away after attesting the bond and that two or three persons had already attested the bond before he went there but that two of them, namely, Narain Mahton and Nem Narain Singh attested the bond after he went there. In the next sentence he says "No other witness attested on that bond before me." This was relied upon as contradicting his previous statement that two or three persons had already attested the bond before he went there but the words "before me" are ambiguous and they may well be a literal translation of the Hindi expression which means "In my presence."

Later on when further questioned he states that "Narain Mahton signed in my presence on the bond and after I signed it" and adds that "Nem Narain Singh had affixed his signature in my absence on that bond." This last statement would appear to be in conflict with what he had said before, namely, that Nem Narain Singh, attested the bond after he went there.

It must be remembered, however, that the witness was giving evidence of events which had happened five years earlier and it may be that his recollection of the names of the witnesses who actually signed in his presence was somewhat confused, or it may be that he was not very clear on the question put to him in cross-examination and even assuming that Nem Narain Singh signed in his absence the net result of his evidence would be that he and one other witness at least, Narain Mahtop, were present when the bond was executed and appended their signatures as witnesses.

The other attesting witness Nath Sahay who was called at the trial merely stated that he was a witness to the bond and proved his signature on it. He does not appear to have been asked any question in cross-examination in reference to this part of his evidence. It would perhaps have been better had the learned Subordinate Judge himself endeavoured to clear up the apparent discrepancy in the first witness's evidence.

The learned Judge accepted the evidence of these witnesses as sufficient to prove the execution of the bond and I do not consider that the criticism of their evidence is weighty enough to induce us to discard it as unreliable.

It was next contended that the mortgage of the 9th March 1915 granted in favour of the 1st plaintiff, having been granted at a time when the property was under attachment, was void as against all claims enforceable under the attachment by reason of the provisions of S. 64 of the Civil Procedure Code.

In answer to this argument the respondents contended that there was no valid attachment in operation when the mortgage was executed and, secondly, even if there was a valid attachment at that time, it came to an end on the 17th May 1915 when execution case No. 51 of 1915 was dismissed for default. In support of their first answer on this point the respondents contended that the attachmen made in June and July 1914 in execution case No. 201 of 1914 came to an end on the 4th February 1915 when that execution

case was dismissed and that no proper attachment was made in the succeeding execution case No. 51 of 1915 which was registered on the same day. It was argued that the dismissal of the earlier execution case was a dismissal for default and that under the provisions of Order 21 rule 57 of the Civil Procedure Code the attachment thereupon ceased and although the attachment was ordered to continue no proper notice of attachment were served and no further attachment was in fact made, and that it was not competent to the Court to effect a valid attachment in this manner.

There is much to be said in support of this contention but it is not necessary to decide the point as the subsequent execution case No 51 of 1915 was itself dismissed for default on the 17th May that year, and the foundation upon which the appellants claim to have priority over the mortgage disappeared as from that date. It is not upon the attachment which at that date terminated that their title under the subsequent sale is based. The claim of the appellants is enforceable, within the meaning of S. 64, not under the attachment in execution case No. 51 of 1915 or the earlier execution case but under the attachment made in execution case No. 181 of 1916 which was not instituted until after the respondent's mortgage had come into operation.

It was contended on behalf of the appellants that the mortgage was void within the meaning of S. 64 of the Civil Procedure Code against their present claim because it was a claim which might have been enforced under the earlier attachment which came into operation before the mortgage. In my opinion this is not the meaning of S. 64 which reads as follows: —

" Where an attachment has been made, any private transfer or delivery of the property attached, or any interest therein, and any payment to the judgment-debtor of any debt, dividend or other monies, contrary to such attachment, shall be void as against all claims enforceable under the attachment."

If the claim ceases to be enforceable under an attachment relied upon as avoiding the alienation it seems obvious that there is no longer any claim enforceable thereunder and the section contemplates a claim which remains enforceable and not one which might have been enforced under an attachment which has since come to an end The appellants' claim in the present instance is no longer enforceable at all except under the attachment made in execution case No 181 of 1916 which came into operation after the mortgage.

The attachment contemplated in the section is that under which the claim is enforceable but the appellants' argument demands that the words " All claims enforceable under the attachment" should be read as "All claims of the attaching creditor enforceable under that or any subsequent attachment "

I cannot read the section as including claims which have ceased to be enforceable under the attachment contemplated and upon this point the appeal fails.

It was next contended that the mortgage was made with intent to defraud or to defeat or delay the appellants as creditors within the meaning of S 53 of the Transfer of Property Act and, further, that the mortgage transaction was a merely colourable transaction not meant to be acted upon between the parties to it.

The two points raise separate considerations S. 53 of the Transfer of Property Act seems to contemplate a transfer of property binding as between the parties to it but one which is voidable in the circumstances there contemplated. If, however, the transaction is merely colourable and not meant to be acted upon between the parties there is clearly no transfer at all and in a case like the present it would be merely a fraudulent attempt on the part of the respondents to avoid liability.

The only argument urged before us in support of this part of the case was that the mortgage was merely a sham transaction engineered by the Singh defendants with the acquiescence of the plaintiffs with the object of defeating the execution of the appellants' decree. The mortgage bond of the 9th March 1915 is to secure a loan of Rs. 25 000. It recites that the mortgagors under

four previous bonds executed by them in the years 1904 and 1906 are indebted to the amount of Rs. 20,645 from which the mortgagees undertake to discharge retaining that sum for the purpose. The balance of Rs. 4,365 was stated in the mortgage to be necessary for payment of Government revenue, performance of the marriage of Babu Ram Ghulam Prasad Singh, a member of the mortgagors' family and meeting the expenses in connection with law suits. That the earlier bonds executed in 1904 and 1906 existed has been amply proved.

It is also proved that these were discharged by the mortgagees and the bonds returned to them not long after the execution of the mortgage in 1915 except in one instance in which payment was postponed until December 1917.

The appellants contend that even the earlier bonds of 1904 and 1906 were merely colourable transactions made with their relatives or tenants in order to protect their property from the possible claims of creditors in the future and specially the claim of the appellants. They point out that it was not until after the appellants' mortgage decree had been confirmed by the High Court in May 1904 that the Singh defendants began to alienate their property or create charges thereon Had the appellants been able to show that the Singh defendants in 1904 for the first time suddenly began to create charges upon their property, without any apparent reason for their doing so, except that they were largely indebted to the appellants, we might perhaps be entitled to regard those transactions with a certain amount of suspicion; but it is clearly proved that ever since the year 1881 this family has been in financial difficulties and frequently borrowing and mortgaging their property as security for the loans, it is unnecessary to refer to these earlier transactions in detail but they were numerous and frequent and I am not prepared to hold that there was anything unusual in the fact that further liabilities were incurred in 1904 and 1906 or that any suspicion could attach to those transactions upon the grounds suggested.

One matter, however, is strongly relied upon by the appellant and it must be admitted that it is a matter which entitles the Court to scrutinise the conduct of the Singh defendants with the greatest suspicion.

I have already said that these defendants are shown to have embarked upon a course of borrowing since the year 1881. In 1904, in order to discharge some of their more pressing debts and save their property from forced sales in execution, they sold certain portions thereof for Rs. 38,000, by a sale deed dated the 9th October that year, to one Dhiraj Mahato with whom they had on previous occasions had money lending transactions. Out of the purchase price Rs. 933 were paid in cash, the balance being retained by the purchaser to pay off the creditors and free the property from encumbrance.

A representation appears to have been made by the vendors that the creditors were willing to remit a portion of their claims for interest and the sum retained by the purchaser was arrived at on this basis. There was also some undertaking to reimburse the purchaser for any excess payments he might have to make to free the purchased property from charges and encumbrances.

Dhiraj Mahto got his name recorded in the land Registration Department as proprietor but he found difficulty with the creditors with regard to the matter of interest. He further found certain charges and encumbrances which had not been disclosed.

It also appears that the vendors got their names recorded in the survey and settlement operations, which took place shortly afterwards, with respect to some of the properties covered by the sale deed, and various disputes arose between them and Dhiraj Mahto over possession of the lands. He in fact soon discovered that in purchasing the property he had also acquired a fruitful crop of litigation.

Many suits and proceedings both civil and criminal ensued. These culminated in 1914 when after Dhiraj Mahto's death his family brought a suit against the Singh defendant for a declaration of their title to the purchased property and for confirmation of possession. In that suit the defendants raised many pleas

and endeavoured in every way they could to preserve their property. Amongst other things they pleaded that the sale deed of 1904 was a *farzi* transaction made with Dhiraj, who they alleged was their servant, with the object of defeating the claims of creditors This fact is strongly relied upon as proof that the Singh defendants were unscrupulous and unprincipled in their dealings with their creditors and that the present mortgage transaction of 1915 was only another instance of their dishonest conduct.

I am quite prepared to concede that the Singh defendants, whether the plea then raised be true or false, stand self confessed either as persons whose word is not to be trusted or whose conduct is shown to have been tainted with dishonesty, but this does not prove that the plaintiffs were either so lacking in a sense of honesty as to lend themselves to a palpably fraudulent transaction or so foolish as to trust those who were admittedly not to be trusted for it is abundantly proved that the plaintiffs in fact discharged the debts to pay off which their mortgage transaction was effected.

The suit of 1914 brought by Dhiraj Mahto's descendants was decided by the additional Subordinate Judge of Patna in 191 in a long and careful judgment in which the whole of the previous dealings of the Singh family with their property were discussed.

The learned Judge found that the sale deed of 1904 in favour of Dhiraj Mahto was a valid and *bona fide* document executed for consideration and that Dhiraj Mahto, so far from being a servant and creature of the Singh family who lent himself to a *farzi* transaction to save their property, had no connection with the family except as a creditor, and had in fact discharged the debts out of the consideration money.

The plaintiffs in that suit however did not recover the whole of the property claimed as it was proved that in one of the many disputes which arose between the parties, after the sale, Dhiraj Mahto had, by way of compromise in 1909, reconveyed some of the properties claimed to one Parshidh Narayan Singh the nominee of the Singh defendants in consideration of Rs. 10,000, no doubt less than their value. This compromise was disputed by Dhiraj Mahto's heirs but the point was decided against them.

It will be observed that in that case, just as in the present, a transaction which turned out to be perfectly valid was challenged as a *farzi* transaction The plea however put forward in the previous case by the defendants themselves did not avail the defendants In the present case the plea is put forward by one of their creditors against another and it is not supported by the Singh defendants.

I do not think the fact that the Singh defendants on a previous occasion endeavoured to protect themselves under a false plea, which even if true did them no credit, is sufficient in itself to lead to the conclusion that the present transaction was one of a fraudulent nature. That the Singh defendants were in want of a certain amount of cash for paying revenue and to meet other expenses is hardly surprising, and it is proved that the marriage of Ram Gulam which was one of the reasons for requiring cash actually took place.

It is also shown that they had to meet expenses of litigation. With regard to the balance of over Rs. 20,000, this was required to pay off four creditors named in the bond.

Rs. 375 were due to Nemdhari Mahto under a usufructuary mortgage of 3 *bighas* of land in mauza Chirayia Deyal granted in 1904 Nemdhari was called as a witness and proved payment to him by the plaintiffs in June 1915. The receipt is endorsed on the bond which was delivered up to the plaintiffs on payment. It was produced by them in evidence.

Rs 14,000 were to due to Jagdam Prasad Singh under a mortgage granted in July 1904 over a 4 pies share in Mauza Akbarpur to secure a loan of Rs. 1,300. The rate of interest was high ; 2 per cent. per month compound with quarterly rests, as in the case of the appellant's

mortgage. This improvident family do not seem to have been very particular as to the rate of interest at which they borrowed. Jagdam the mortgagee was dead, but his brother Janki Prasad Singh was called and proved that the bond was paid off by the plaintiffs in December 1917. The bond was produced by the plaintiffs with the discharge endorsed thereon. The greater part appears from the recitals to have been borrowed to discharge previous loans and the balance Rs. 375 for household expenses. He was in no way related to the Singh defendants and there seems no reason why the transaction with him should be regarded with suspicion.

It is urged that if the transaction was genuine he would have sued on the bond before it was actually paid. He says he did not do so because the defendants generally paid out of Court. His evidence as to the payment of the bond is corroborated by Jadu Singh another witness who was present at the time.

Rs. 3,270 were due under a mortgage granted to Harikishen Mahton in February 1906 over a 4 pies *mulguzari milkiat* interest in mauza Akbarpore to secure a loan of Rs. 1,500. The interest was in this case 2 per cent. per month simple interest. The sum was taken to discharge a previous loan of Rs. 1,200 which with interest had amounted to Rs. 1,380 and the balance was taken in cash. The plaintiffs proved payment of this bond to Harikishen in April 1915 through their servant Nath Sahai. The bond was produced with the endorsement thereon.

The last bond was a mortgage dated the 19th April 1906 of shares in 5 villages in favour of Sham Keshwar Prasad Singh to secure a loan of Rs. 600 carrying compound interest at Rs. 2-8-0 per cent per month with half yearly rests. The amount due was Rs. 3,000. The money was borrowed to provide for the *dwiragaman* of a sister of Narayan Prasad Singh. Badri Singh a son of the mortgagee proved the transaction and the subsequent payment by the plaintiffs. The bond was produced showing the discharge endorsed thereon.

The plaintiff Rajendra Prasad was also called and supported generally the case put forward by him.

There is no evidence on the part of the appellant to discredit this evidence except a statement by him that he was told by the defendants' *karpardaz* that he had committed such a fraud that there would be difficulty in finding the truth and that another man named Khedu told him that all the deeds to which I have referred were fraudulent. He admits he made no enquiries from the creditors whose claims were discharged and he did not call either of the two persons named.

The learned Judge did not place any reliance upon this part of his evidence. He thought it highly improbable that if the *karpardaz* was responsible for a fraud intended to deceive the appellant he would disclose it to his victim. I think the learned Judge rightly appreciated the value of this evidence.

We have been urged however to treat the mortgage in favour of the Singh defendants as a collusive instrument on the ground that there are many suspicious circumstances which amount almost to proof of fraud.

It is asked why should the Singh defendants be anxious to pay off Nemdhari and the other creditors who had not pressed their claims when the appellant had a decree for Rs. 17,000 carrying high interest in addition to what he already recovered by sale of the mortgaged property. I confess I can see nothing surprising in the defendants' conduct. They could hardly be expected to have any tender feelings towards the appellant who had already done very well out of his loan of Rs. 1,000 carrying high interest. What the total amount due to him was when he sold the mortgaged property in 1903 has not been disclosed, nor does it appear in evidence what the mortgaged property fetched.

We do not know however that after giving credit for the sale proceeds he still had an unsatisfied claim of over Rs. 17,000. That the defendants should endeavour to

discharge the debts due to their other creditors by a mortgage of their remaining property before the appellant could get a lien upon it is only human nature. Moreover the sum advanced was probably a better bargain for them than if the property had been attached and sold in execution. If, however, the transaction was a genuine one the mortgage cannot be impugned as they had a right to prefer one creditor to another.

It is next urged that the sum advanced, namely, Rs. 25,000 was much more than the value of the property, which indicates that the transaction was a sham. In support of this it is pointed out that the appellant himself in his last execution case purchased the same property or the greater portion of it for Rs. 14,000.

This argument has little force when it is remembered that the appellant purchased at an auction sale in execution of his own decree and the property purchased at that sale was valued by the Court at Rs. 21,980 based upon a road cess return, which is not the best class of evidence, whereas the property mortgaged included in addition a 2 anna share in two other villages the value of which although not proved may have been considerable.

Moreover if the mortgage transaction was merely colourable it is difficult to see why the consideration should have been placed at an unreasonable figure. It may also be pointed out that the sale to the appellant in execution was challenged by the judgment-debtors and the case went on appeal to the High Court where the appellant compromised and agreed to give up 2 out of 5 villages purchased. It may, therefore, be assumed that he was satisfied with his bargain in getting 3 only of the villages for Rs. 14,000.

The next matters called to our attention are that the mortgaged properties or most of them were at the time of the mortgage of the 9th March 1915 the subject of a claim by the heirs of Dhiraj Mahto in the suit to which reference has already been made and which was not decided until the following year, and further that the bulk of the mortgaged properties were in fact then under attachment by the appellant himself in the execution case No. 51 of 1915 which had not at that time been dismissed for default.

No doubt if the plaintiffs had full knowledge of these claims and believed them to be formidable it would be a matter of surprise to find them advancing money on so precarious a security. But everyone including the appellant himself who had attached the properties appears to have been aware that those claimed by Dhiraj Mahto's heirs in their suit then pending, in so far as they are identical with those in the mortgage, had been reconveyed by Dhiraj in 1909 under the compromise already mentioned and belonged to the Singh defendants who were in fact in possession.

The appellant himself had no doubt as to the defendants' right to them. Rajendra Prasad Sahi, the *karta* of the plaintiffs' family, would appear to have left the business transactions in the hands of his agent Nath Sahai. They both gave evidence at the trial. The former had very little knowledge of the material facts but was advised by his agent. Nath Sahai made enquiries when the negotiations for the mortgage began some 4 or 5 months before the date of the mortgage. He ascertained that the villages to be mortgaged had been reconveyed by Dhiraj Mahto to Parsidh Narayan and that the defendants were in possession. He went to the villages and saw the village papers and the revenue and the cess receipts. He also saw the sale deed in Parsidh Narayan's favour. He also enquired at the Collectorate and ascertained that there was no attachment on those villages in the Collector's books.

It is argued that this cannot be true, but in the absence of any evidence as to what the Collector's books would show, there is no reason why the evidence should not be accepted. It will be remembered that the execution case in which the attachment was first made was dismissed on the 24th February 1915 and no fresh notices were sent to the Collector.

There seems no reason why after that date any notice of attachment

should be found at the Collectorate and it would be dangerous to reject the evidence of Nath Sahai on mere suspicion when the appellant himself could have put the matter beyond doubt by calling the Collector to produce his books.

A few other matters of minor importance or which are not substantiated by the evidence were also relied upon by the appellant in argument on this part of the case. It is pointed out that the plaintiff Rajendra Prasad Sahi and the defendant Narain Prasad Singh are relations and therefore likely to assist each other in a collusive transaction. It is true that they are connected by marriage. Rajendra's mother and Narain Prasad's wife are sisters, but their husbands belong to entirely different families which live in different parts of the province many miles apart.

It is sufficient to say that it would be in the highest degree dangerous to treat with suspicion business transactions between relations even more nearly connected than the parties in the present case or to found any presumption of *mala fides* upon such slender grounds It is also said that two of the properties mortgaged to Sham Keshwar in 1906 had already been transferred to Dhiraj Mahton in 1904, but the interest mortgaged was a share in the malikhana milkiat interest of the two villages, in the one case 4 annas odd, in the other case 2 annas odd, whereas the property sold to Dhiraj was 8 annas share in each of the same two villages.

There is nothing to show that the shares were the same or even that the interest was the same and no cross-examination was directed to the point. Again with regard to Akbarpur a 4 pies share in which was mortgaged to Harikishen Mahto in 1906, to which reference has been made, it is pointed out that one Nathuni Sahu had purchased a 9 pies share in this village from the Singh defendants in execution proceedings in 1903 and as they had no interest left, the mortgage to Harikishen must have been a bogus transaction made in order to create a fictitious debt for future purposes but there is nothing to show that this was their only interest remaining in that village. In fact what evidence there is points the other way as it appears from the judgment in Dhiraj Mahto's case that the family had an 8 annas share in Akbarpur still in their possession in 1906.

On the whole although there are circumstances which give rise to a certain amount of suspicion they are not in my opinion of sufficient weight to entitle us to discard the whole of the evidence as to the payment of the debts to the defendants' creditors out of the mortgage money retained for that purpose by the plaintiffs. If these creditors were paid off it may be said to conclude the matter, and for the reasons already given I am not prepared to differ from the conclusions of fact arrived at by the learned Judge who saw the witnesses and accepted their evidence.

The last point taken before us was that the suit being one for a declaration only, no relief should be granted as the plaintiffs had not sought to enforce their mortgage and the provision to S. 42 of the Specific Relief Act was a bar to such a claim. This point was not seriously pressed and the short answer to it is that a suit brought under Order 34, rule 63 of the Civil Procedure Code is a special remedy granted in special circumstances and is not governed by the proviso to S. 42 of the Specific Relief Act.

In my opinion this appeal should be dismissed with costs.

Foster J. :—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 572.

JWALA PRASAD, J.

Jagdhari Rai and others—Decree-holders-appellants

v.

Langat Gope and others -Auction-purchaser-Respondents.

Mis. A. Nos. 112 and 114 of 1921, decided on 17th February, 1922.

Bengal Tenancy Act, S. 170 (2)—Application under, may be oral and may be made to the Nazir but must be before tenure is knocked down to purchaser—Bona fides need not be gone into—Civil P. C., O. 21, R. 69 does not apply.

An application under S. 170 (2) of the Bengal Tenancy Act, for release of the tenure on the ground that the decree has been satisfied may be made orally and to the Officer conducting the sale and the holding should be released from attachment and the Court need not go into the *bona fides* of the application

But the application must be made before the holding is knocked down to the purchaser. When the application was made after the sales had taken place and the bid was accepted by the Court *held* that the sales could not be set aside *Held* further that O. 21, R. 69 of the Civil P. C. does not apply to such cases. [P. 574, Cs. 1 & 2]

T. N. Sahay and *Anand Prasad*—for Appellants.

L. N. Singh and *B. B. Saran* -for Respondents.

Jwala Prasad, J.—These second appeals arise out of sales held in execution of rent decrees obtained by the decree-holders-appellants. The sales were held on the 9th of August, 1920. The case of the decree-holders is that before the sales were held their pleader told the *Nazir* not to hold the sales inasmuch as petitions of satisfaction of the decrees were going to be filed and the *Nazir* assured him that the sales would not be held. At that time, it is said, the presiding officer was in his chamber and consequently the applications were filed after he came out of his chamber. The *Nazir* was examined in this case and he stated that no doubt the pleader of the decree-holders told him not to hold the sales but at that time the sales had already taken place.

We find in the order-sheet two orders of the 9th of August, namely, Nos. 3 and 4. In Order No. 3 the Court recorded the following order :

"Sale held and the property purchased by Jagdip Singh other than the decree-holder for Rs. 21. Earnest money deposited. The balance of the purchase-money to be deposited within 15 days. Put up on 26th August, 1920, for further orders."

Order No. 4 runs as follows :—

"Afterwards the decree-holder filed a petition certifying full satisfaction of the decretal money. Put up in the presence of the pleaders."

On the 10th August the auction-purchaser filed a petition opposing the petition of satisfaction filed by the decree-holders. This also was ordered to be put up in the presence of the pleaders concerned.

On the 11th August the decree-holders filed a petition stating that the sales were held after a petition of satisfaction had been filed, and prayed that the sales may not be accepted. In view of the difference between the parties as to when the petition of satisfaction was filed by the decree-holders and as to whether there was a real *bona fide* petition of satisfaction, the Court took evidence on behalf of both the parties in support of their respective case.

On the 7th September, the Munsif held that the petitions of satisfaction were not *bona fide* and that the decrees were, as a matter of fact, not satisfied. In his view it did not matter whether the petitions of satisfaction were filed before or after the sales had taken place, inasmuch as the intimation to the *Nazir* not to hold the sales was not valid under Order XXI, rule 69 which requires that a sale held within the precincts of the Court house shall not be adjourned without the leave of the Court, and the *Nazir* who was conducting the sales had no right to adjourn the sales.

On appeal by the decree-holders the learned Subordinate Judge differed from the view of the Munsif that the petition of the decree-holders was not fit to be entertained inasmuch as the petitions of satisfaction were not *bona fide*. He was of opinion that it was not the business of the Court to make any enquiry as to whether the payments had actually been made to the decree-holders or not, or whether the petitions of satisfaction filed by the decree-holders were *mala fide*, or bogus. According to him after a petition of satisfaction is filed by the decree-holder, whether *bona fide* or *mala fide*, the sale could not take place,

In his view he is supported by the case cited by him in *Haider Mirza* v. *Kailash Narain Dar* (1).

The learned Subordinate Judge is also supported in his view by S. 170 of the Bengal Tenancy Act though he does not expressly refer to it. This section seems to have been lost sight of by the Munsif for he does not refer to it in his judgment. Clause 2 of that section clearly provides for a decree-holder to make an application for a release of the tenure or holding on the ground that the decree has been satisfied out of Court. Upon such an application the tenure or holding shall be released from attachment provided the application is made before the tenure or holding is knocked down to the purchaser. Under that section no enquiry is needed as to whether the application is *bona fide* or not.

The only condition laid down is that the application should have been made before the tenure or holding is knocked down to the auction-purchaser. The evidence of the *Nazir* was that the decree-holders' pleader asked him not to hold the sales after the sales had taken place. The orders Nos. 3 and 4 in the order-sheet of the Munsif referred to above clearly show that the decree-holders' petition certifying full satisfaction of the decretal money was made after the sales were held and the property was purchased by the auction-purchaser and earnest money was deposited.

In Order No. 3 the Court, therefore, had already accepted the sale. The petition filed by the decree-holders was, therefore, a little too late. None of the Courts has come to a definite finding as to whether the verbal intimation to the *Nazir* was made before or after the sales had actually taken place. The parties were at variance on this point. If it were held that the intimation was given to the *Nazir* of full satisfaction of the decrees and therefore not to hold the sales, perhaps the *Nazir* would not have been justified to persist in knocking down the holdings in question, for S. 170 of the Bengal Tenancy Act does not require either a written application or that an application for release of the tenure or holding, on the ground that the decree has already been satisfied out of Court, should be made to the Court and not to the Officer conducting the sale.

I do not agree with the view of the Courts below that Order XXI, rule 69 had any application to the present case if in fact the intimation of satisfaction of the decree was given to the *Nazir* before the sales had taken place, regard being had to the fact that the presiding officer of the Court was in Chamber and it was almost physically impossible to make the application, to the Court, though, as the Munsif says, there was nothing to prevent the decree-holders' pleader coming into his Chamber; but that would have been an unusual thing and the decree-holders' pleader might or might not have liked to go into the Chamber. Had the matter rested there, I would have considered it to be a case of illegal sale in contravention of S. 170, Clause (2) of the Bengal Tenancy Act, but it appears from the orders referred to above that the application by the decree-holder certifying full satisfaction of the decrees was made to the Court after the Court had accepted the sales.'

Presumably the order accepting the sales was signed when the presiding officer came out of his Chamber and sat on his *ijlas*, in the absence of any proof that Order No. 3 was signed by the presiding Officer in his Chamber. In this view, the application of the decree-holders was made after the sales had taken place and the bid was accepted by the Court (not only by the *Nazir*), and therefore the sales cannot be set aside on account of the application made by the decree-holders for the release of the tenure or holding on the ground that the decrees were satisfied out of Court.

When the case was first argued before us there was a talk of compromise, and the Vakil on behalf of the decree-holders offered to pay 5 per cent. of the purchase-money as compensation to the purchaser. The compromise, however, ultimately failed and the case had, therefore, to be heard again.

Considering that the case was a hard one I was myself inclined to think that this was a fit case to be compromised. At that time my

(1) (1918) 5 O. L. J. 482 = 41 I. C. 177 = 21 C. C. 161.

attention was not drawn to S. 170, Bengal Tenancy Act, and in fact neither the Courts below nor the learned Vakils appearing on behalf of the parties in this case drew my attention to that section. On a fuller consideration of the case, I hold that S. 170, Bengal Tenancy Act, bars the application of the decree-holders to have the sales set aside. In fact, no proper application for having the sales set aside was made under Order XXI, rule 90 of the Code of Civil Procedure on the ground of irregularity in publishing or conducting the sales. The application of the 9th of August was an application for satisfaction of the decree. The application of the 11th August was an application asking the Court not to accept the sales. Obviously, the decree-holders treated the sales as being wholly without jurisdiction.

It appears to me that second appeals in this case from the order of the Court below are incompetent. The learned Vakil on behalf of the appellants asked me to convert the appeals into applications for revision. Even if his request is acceded to, it has already been shown that there is no want of jurisdiction or any illegality or irregularity in the order of the Court below and consequently this Court will not have power to revise the order of the Court below.

The result is that the appeals are dismissed. In view of the circumstances of the case I would make no order as to costs.

Appeals dismissed.

A. I. R. 1923 Patna 575.

COUTTS AND DAS, JJ.

Mt. Bhagjogni —Defendant Appellant

v.

Sakhi Mahton and another —Plaintiffs-Respondents.

A. Nos. 297 to 299 of 1921, decided on 13th June, 1922, against the appellate decree of the Offg. Dt. J., Shahabad, dated 20th November, 1920.

Civil P. C., O. 2, R. 2—First suit for compulsory registration—Second suit for possession—not barred.

Where the cause of action in the first suit was the refusal of the Defendant to register the document executed in favour of the plaintiff and the cause of action in the latter suit was the order passed by the Criminal Court under S. 146, of the Code of Criminal Procedure.

Held, that there being no cause of action in the plaintiff in the previous suit to ask for possession of the disputed land the latter suit is not barred.

[P. 575, C. 2.]

Siveshwar Dayal for *G. C. Pal*—for Appellant.

Kailashpati—for Respondents.

Das, J. —The only question in these appeals is whether the suits out of which these analogous appeals arise fall within the mischief contemplated by O. 2, R. 2 of the Civil Procedure Code. The learned Subordinate Judge in the appellate Court has answered the question in the negative. In my opinion the view taken by the learned Subordinate Judge is right and ought to prevail.

Now O. 2, R. 2, C. P. C., requires that every suit shall include the whole of the claim arising from the one and the same cause of action and not that every suit shall include every claim and every cause of action which the plaintiff may have against the defendant. Consequently if the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. The whole question for our investigation, therefore, is whether the cause of action in the subsequent suits is the same as that in the first suits.

Now the cause of action in the first suits was the refusal of Mussammat Soopi, the defendant in the action, to register the documents which she had executed in favour of the plaintiffs; that was the plaintiffs' cause of action in the first mentioned suits. The cause of action in the present suits is the order passed by the Criminal Court under S. 146 of the Code of Criminal Procedure.

In my opinion, it is impossible to say that there was any cause of action which was in the plaintiffs in the previous suits to ask for possession of the disputed land. In the first place, since we must accept the allegation made by the plaintiffs in the plaint to be correct, the plaintiffs were not entitled to ask for possession of the

disputed land at the time when they instituted their suits for compulsory registration of the Rehan deeds. In the second place, the order by the Criminal Court under S. 146 of the Code of Criminal Procedure clearly gave the plaintiffs a fresh cause of action.

In my opinion, it is impossible to say that the cause of action in the present suits is the same as that in the first mentioned suits

I would dismiss these appeals with costs.

Coutts, J.—I agree.

Appeals dismissed.

A. I R 1923 Patna 576.

DAWSON MILLER, C. J., AND KULWANT SAHAY, J.

Kaniz Zohra Plaintiff-Appellant

v.

Syed Muztaba Husain and another— Defendants-Respondents.

S A. No. 85? of 1921, decided on '9th June, 923, against a decision of Dt. J., Bhagalpur, dated 7th February, 1?21.

Mahomedan Law — Waqf — Sajjadanashin — Females cannot be sajjadanashins and minor cannot be appointed as mutawalli.

No woman is qualified to become a *sajjadanashin* whose office involves the performance of religious and spiritual duties, not only those of *pirimuridi* but those of reading the *fateha* and offering prayers and incense in a place of public worship (19) M W N 662 Dist.; Mad. 95 and 4 M. H. C R. 28 Foll [P. 578, C 2.]

Where the succession is not by inheritance but by appointment or selection a minor cannot be appointed as *muttawalli* [P. 580, C. 1]

Sultan Ahmad, W H. Akbari and ***Sultanuddin Hussain*** —for Appellant.

Hasan Imam and ***S. M. Tahir*** — for Respondents.

Dawson Miller, C. J.—This is an appeal on behalf of the plaintiff from a decision of the District Judge of Bhagalpur affirming a decision of the Subordinate Judge dismissing the suit.

Bibi Kaniz Zohra, the plaintiff in the suit, is the daughter of the late Saiyed Ijteba Husain who died in the year 1913 leaving as his heirs his widow and the plaintiff and a younger daughter. During his life-time the plaintiff's father and uncle were the joint *mutwallis* of certain *wakf* property dedicated to the maintenance of a mosque and Imambara and a *durgah* or shrine of a saint situated in the town of Bhagalpur. At the time of her father's death the plaintiff was about eight years old. She claims that she succeeded by inheritance to a half share in the management of the *wakf* property or, in the alternative, that she is entitled to share jointly in the management with her uncle Saiyed Muztaba Husain, the first defendant in the suit.

She further claimed that if she did not succeed by inheritance she was in fact appointed by her relations and the assembled congregation after her father's death. She instituted the present suit in the year 1919 whilst still a minor suing through her mother as next friend to establish her right to a share in the *mutwalliship* of the endowed property. The defendants in the suit are her uncle and her younger sister The former alone filed a written statement and contested the plaintiff's claim

The endowment is an old one. It is proved to have been in existence at the beginning of the last century and its origin is probably of much earlier date There was at one time a *khankah* or monastery attached to it and it is found by both the trial Court and the first Appellate Court that there has all along been attached to the institution a *sajjadanashin* and that this office still exists. It is further found that the management or *mutwalliship* of the trust property goes with the office of *sajjadanashin*. The qualifications of the two offices are different.

The *sajjadanashin* is a priestly office involving the performance of spiritual and religious duties which it is admitted cannot, according to Muhammadan law, be performed by a woman. The functions of a *mutwalli* are purely secular involving the management of the trust property and a woman is not disqualified by reason of her sex from performing the duties of a *mutwalli* as such.

The devolution of the office of *mutwalli* depends in the first instance upon the provisions of the *wakfnama*, or trust deed, but in the present case the *wakfnama* has not been produced in evidence and probably no longer exists.

In its absence the order of succession must be determined according to the usage proved to have prevailed with regard to the endowment in question.

It is found that the usual course for appointing the *mutwalli* was that after the death of an incumbent a relation of the late *mutwalli* was chosen by the other relations and the well-wishers of the *wakf* after consultation with respectable neighbours and gentlemen of neighbourhood and also, if necessary, by the advice of *sajjadanashins* or *mutwallis* of other *wakf* properties and that in any particular case either the whole of this procedure or a part of it only might have been carried out; that these were the usual guiding principles in choosing the successor.

It would appear therefore that the devolution was not strictly according to the rules of heredity but was by election out of a limited class and the office could only be held by one qualified to act as *sajjadanashin*. The plaintiff claimed to have been elected by the relations after consultation in the manner described above.

The Subordinate Judge before whom the case came for trial was of opinion that the plaintiff had failed to make out that she had been elected.

The District Judge on appeal took a different view upon this part of the case. He was of opinion that the plaintiff had sufficiently made out her case that she was in fact elected as co-*mutwalli* with her uncle Muztaba Husain, but that as she was not qualified to perform the office of *sajjadanashin* her election was not valid.

It was the plaintiff's case that in the institution with which we are concerned the office of *sajjadanashin* had become extinct and had ceased to exist many years ago before the time of her grandfather who was the *mutwalli* of the *wakf* property, and the main contention in both the lower Courts centred round this issue. The Judge of the trial Court in his judgment says:

"There is no dispute that the plaintiff cannot be a *sajjadanashin*, but her case is that this office has become extinct since the time of Irtiza Husain and he with his successors has been in possession in the capacity of a *mutwalli* only."

The learned District Judge on appeal also expressed the matter thus:

"It is a common ground of both appellant and respondents that as Kaniz Zohra is a woman she cannot exercise the functions of a *sajjadanashin*. If therefore the *sajjadanashinship* has not become extinct, then the appellant admittedly has no case. I will therefore deal first with this point and my finding upon it will decide the appeal."

Both Courts found that in fact the office of *sajjadanashin* had not become extinct and as a woman was admittedly disqualified from performing the functions of that office the plaintiff's suit must fail.

In appeal before us it was argued that the real issue had not been properly understood by the learned District Judge and that although the office of *sajjadanashin* had not become entirely extinct the spiritual duties, as distinct from the performance of religious ceremonies, no longer existed and that the learned District Judge had not dealt with this aspect of the case. It was argued that the spiritual duties of a *sajjadanashin* were the only office which the *mutwalli* as such was not competent to perform and that the *mutwalli* or indeed any Muhammadan might perform the religious duties, that is to say, leading the prayers, reading from the *Koran* and performing the *urs* and *fateha* and carrying out the other duties required by the Mahammadan ritual.

The learned Counsel for the appellant referred to the evidence of the defendant himself in which he admitted that there was no system of *pirimuridi* in the family. The *pir* is the spiritual instructor and the *murid* is the disciple or pupil and the system referred to is that of giving spiritual instruction to the disciples. He contended that the origin of the rule that no woman could act as *sajjadanashin* was based upon the fact that by Muhammadan law a woman may not allow her skin to be touched by a man outside the circle of her immediate blood relations whereas the spiritual instruction known as *pirimuridi* required that the pupils or disciples should on some occasions kiss the hand of the *sajjadanashin*. No authority for this

limited disqualification was cited but a passage in Macnaghten's Principles and Precedents of Muhammadan Law, 2nd Ed., was quoted. The passage is contained in a note at p. 343 and reads thus :—

"The meaning of the term *sajjada-nashin*, which is synonymous with Guddee Nisheen is thus given by Meninski : *Considens in tapete sacras preces peracturus aliisque proeiturus antistes.* This officer is frequently confounded with the *mutwalli*, that is, the trustee or superintendent of the endowment, although they are quite distinct ; the one having charge of the spiritual, the other of the temporal affairs of the endowment. The office of trustee may be held by a woman, and the duties may be discharged by proxy ; whereas the office of superior requires peculiar personal qualifications."

There is a further passage on p 332 of the same volume which was also relied upon. It is as follows :—

" Females are not competent to assume the office of superior of an endowment; and such an act is at variance with the usage of the country, because it is the duty of the superior to instruct and guide his disciples, to teach his scholars, and to keep their company continually, in private and in public, and this cannot be done with propriety by a woman, whose duty it is to live retired and secluded.

The learned Counsel argues from this that the only obstacle in the way of a woman acting as *sajjadanashin* is that the duties of the office require the incumbent to keep company in private and in public with his disciples and that as there were no disciples in the present case the disqualification did not exist. A passage was also relied upon from the judgment of Abdur Rahim, J., in the case of *Sujjada Shah* v. *Shaw Habit* (1) in which the question was whether the Court had power to remove a *sajjadanashin* and appoint some one else in the office. In that case the learned Judge speaking of the duties which were actually performed by the incumbent in the particular case before him says at p. 680 of the report :

"In short the duties ordinarily attached to the office of a *sajjadanashin* did not appertain to the position which the defendant and his ancestors have been occupying. All that they had to do was to conduct the annual *urs* and to offer *fatehas* at tombs, and none of these could be said to be functions incapable of being performed by other Mahomedans As regards maintenance of the daily service at the mosque or of the special service in the mosque on Fridays or on the occasion of the Ramzan, the Eedul-Fatar and the Bakrid, the work was capable of being attended to by any *mutwalli* of a mosque."

It cannot be supposed, however, that in delivering this opinion the learned Judge had in mind the question of whether a woman could perform the duties to which he was referring. That the duties referred could be performed by a *mutwalli* not especially qualified as *sajjadanashin* may be conceded, but the opinion of Abdur Rahim, J., above quoted does not touch upon the question of sex disqualification. No doubt the origin of the rule that a woman was not qualified to perform the functions of a *sajjadanashin* is based upon the consideration that it is unseemly for a Muhammadan lady to perform duties which bring her in close and intimate association with the general public of the opposite sex but there seems to be no reason why the disqualification should be confined only to those cases in which the office requires that spiritual instruction should be given by a teacher to his disciples.

Whatever may have been the exact nature of the objections upon which the disqualification of a woman to act as *sajjadanashin* was originally based it would appear to have become a settled rule at the present day that no woman is qualified to become a *sajjadanashin* whose office involves the performance of religious and spiritual duties, not only those of *pirimuridi* but those of reading the *fateha* and offering prayers and incense in a place of public worship. In *Mujavar Ibrambibi* v. *Mujavar Hussain*

(1) (1919) M. W. N. 662=58 I. C. 677.

Sheriff (2) it was held that a woman is not competent to perform the duties of *mujavar* of a *durga* which are not of a secular nature. In that case the lands had been dedicated for the reading of the *fatcha*, for the supply of water, lights, flowers, and other things requisite for the service to be performed at a *durga* and for the support of those by whom the services should be performed. In that case the learned Judges stated :—

" It appears from the evidence that the office of *mujavar* entails the discharge of duties of a spiritual character, such as reading the fateha, offering prayers and incense, etc., which could not conveniently be performed by a woman. There is no satisfactory evidence that the office has ever been held by a woman, except in one instance, and that was at a different place, and in that case it is admitted there were in the family in which the office was hereditary no male members by whom its functions could be discharged.

" The question as to the competency of a female to hold the office was in reference to the same endowment considered and determined by this Court in the negative in *Hussain Beebee* v. *Hussain Sheriff* (3), where a claim was advanced by the widow of a deceased in her turn to the duties of the office and to obtain possession of a share of the endowed property. That decision notices the distinction which exists between a trusteeship for secular purposes, which can be held by a woman, and an office entailing religious duties, for which a woman is not eligible and rests on the authority of Macnaghten (Muhammadan Law, 343, Note, and the cases cited in the appendix to that work)."

On referring to Mr. Macnaghten's Note already quoted it will be found that he makes no difference between spiritual and religious duties, the antithesis being between spiritual and temporal duties, the latter being capable of performance by woman and the former not. The authority of other text-writers also seems opposed to the view that a woman can perform the duties of a *sajjadanashin*. Mr. Syed Ameer Ali, a text-writer of repute, states the matter thus:

"The office of *mutwalli* is an office of personal trust, and a person who cannot discharge the duties of the trust personally nor be responsible for their due discharge, cannot appoint a deputy. But where the *mutwalli* has to perform religious duties or spiritual functions in connection with the *wakf*, which, as regards men, can only be performed by a man, a woman cannot be appointed to the office. For example, if the *mutwalli* is also the superior of a religious establishment, and, as such, has to officiate on occasions of religious festivals, a woman is precluded by her sex from holding the *towliat* ".

In support of this opinion he relies amongst other authorities upon the case, already referred to, of *Mujawar Ibrambibi* v. *Mujavar Hussain Sheriff* (2). (Muhammadan Law, 4th Ed., Vol. I, 443). Sir Roland Wilson in his treatise on Anglo-Muhammadan Law, 5th Ed., p. 357, para. 331, states the law thus :—

"A female may be the *Mutwalli* of an endowment and so may a non-Muhammadan ; but if the endowment be for the purpose of divine worship, neither females nor non-Muhammadans are competent to hold the office of *sajjadanashin* or spiritual superior."

Mr. P. R. Ganapathi Ayer, in his book on Hindu and Muhammadan Endowments, 2nd Ed., p. 435, after pointing out that the office of *sajjadanashin* and *mutwalli* are separate and distinct says :

"The *sajjadanashin* has charge of the spiritual affairs of the endowment, but the *mutwalli* has charge of its temporal affairs One consequence of this is that a woman may be a *mutwalli* but cannot be a *sajjadanashin*. According to the Muhammadan law the duties of *mutwalli* who has not to perform religious duties or spiritual functions may be discharged by proxy. But the office of *sajjadanashin* requires peculiar personal qualifications and the duties attached to that office cannot be discharged by proxy. A woman, therefore, cannot be appointed to such office.....It may happen that in some cases the office of *mutwalli* and *sajjada* are combined

(2) (1880) 3 Mad. 95.
(3) (1868) 4 Mad. H. C. R. 23.

in the same person. Then also a woman cannot be appointed."

It is found in the present case that the *mutwallishipp* appertains to the office of *sajjadanashin* and as that office requires certain personal qualifications which cannot be performed by proxy the question does not arise in the present case whether a female could be appointed *mutwalli* delegating the performance of religious offices to a proxy. This question was considered in the case of *Munnavara Begam Sahiba* v. *Mir Mahapalli Sahib* (4) where it was held that a religious office can be held by a woman under the Muhammadan law unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy. In that case Abdur Rahim, J., remarked:

"The rule prohibiting women from being appointed to such offices is not confined to the office of *sajjad-nashin* but there may be other offices which she may not be able to perform, for instance, that of an Imam in a mosque where she would have to lead the congregation."

The learned Judge was of opinion that the prohibition did not arise from any absolute injunction of Muhammadan religion or law but from local usages and customs. In the present case no local usage or custom has been proved which would entitle a woman to act as *sajjadanashin* nor was any instance given in which a woman had occupied that office in the mosque in question. In my opinion the plaintiff is disqualified by reason of her sex from the right to act as *mutwalli* of the property in suit by reason of the fact that the office involves the performance of the duties of a *sajjadanashin*.

Moreover, there is, I think, another fatal objection to the plaintiff's claim. Although a minor might succeed by inheritance to the office of *mutwalli*, a substitute being appointed to carry out the duties during his minority, it seems to be settled law that where the succession is not by inheritance but by appointment or selection a minor cannot be appointed. Syed Ameer Ali, Muhammadan Law, Vol. I, p. 445, says:—

"In the absence of any provision in the trust-deed as to the mode of succession, or of any evidence of usage, the *mutwalli* may, on his deathbed, nominate his successor, and such nomination will be valid without any judicial order. But in order that the nomination may be effective it is necessary that the person so appointed should be adult and possessed of understanding. All the authorities are agreed that a minor cannot lawfully be appointed a *mutwalli*. The Fatawai Alamgiri lays down the principle thus:—

"And it is a condition to the validity (of the appointment of a *mutwalli*) that he should be adult and possessed of understanding and thus it is stated in the Bharur-Raik."

"So also in the Radd-ul-Muhtar. The conditions necessary to the validity (of the appointment) are puberty (*bulugh*) and understanding (*aakl*)."

The learned author further points out that where the office of *mutwalli* devolves upon a minor by virtue of the provisions of a trust-deed, in such a case the appointment will remain in abeyance until majority is attained.

So also when the *towliat* is hereditary in a family and a minor succeeds, the *Kazi* shall not remove him but shall appoint another to discharge the duties of the office during his minority. Mr. Tyabji's Principles of Muhammadan Law, p. 410, also states clearly:

"Where an infant or person of unsound mind is purported to be appointed as a '*mutwalli*' his appointment is void. Where the office of '*mutwalli*' devolves upon a person who is a minor, the Court may appoint another '*mutwalli*' to act in his place during his minority."

In the present case the plaintiff's right is based not upon succession but upon appointment and her minority appears to be fatal to the claim. In my opinion this appeal should be dismissed with costs.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

(4) (1918) 41 Mad. 1033=51 I. C. 489.

A. I R. 1923 Patna 581.

KULWANT SAHAY AND FOSTER, JJ.

Kesho Prasad Singh—Defendant-Appellant

v.

Lakhu Rai and another—Plaintiffs-Respondents.

A. No. 397 of 1921, decided on 11th July, 1923, against the appellate decree of the Dt. J., Shahabad, dated 24th July, 1920.

Suits Valuation Act, S. 11—Objection to jurisdiction not taken in Courts below—No prejudice proved—Decree is valid.

Where no objection as regards the valuation or jurisdiction of the Court was taken by the defendant either in the trial Court or in the Court of appeal below and the objection was taken for the first time in the High Court by the Stamp Reporter and nothing had been shown by the defendant that the under-valuation of the suit and of the appeal to the District Judge in any way prejudicially affected the disposal of the suit or of the appeal on its merits

Held, that having regard to S. 11 there being no proof of prejudice, the objection cannot be entertained that the decree of the District Judge is null and void for want of jurisdiction 9 All. 91 and 33 Cal. 639, Dist

[P. 583, C. 2, P. 584, C. 1.]

N. N. Sinha and *Bhuvaneshwar Prasad Singh*—for Appellant.

Siva Sharan Lal—for Respondents.

Kulwant Sahay, J.—This is an appeal by the defendant against the decree of the District Judge of Shahabad, reversing a decree of the Subordinate Judge of that place and decreeing the suit with costs. The facts of the case are shortly these.

The defendant is the proprietor of *Mauza* Isarpur, *Tauzi* No. 883 in the District of Shahabad. In this *Mauza* the plaintiffs had a holding of 88 *bighas* 19 *dhurs* of land which according to survey measurement, came to 20·23 acres in area. In the year 1899 the predecessor-in-interest of the defendant brought Rent Suit No. 18 of 1899 for recovery of arrears of rent for the year 1306. On the 26th September 1899, a decree for rent was passed in that suit and in execution of decree the plaintiffs' residential house was sold and purchased by the decree-holder on the 4th of February 1913.

Subsequently the holding of the plaintiffs was sold in execution of the same decree on the 2nd of February 1914, and was purchased by the decree-holder himself. Objections were subsequently made to the delivery of possession to the decree-holder auction-purchaser on the ground that the execution was time-barred and that the decree itself was fraudulently obtained.

These objections were disallowed and the decree-holder was put in possession of the properties in suit. The present suit was brought by the plaintiffs for a declaration that the decree dated the 26th September, 1899, was obtained fraudulently and surreptitiously without the knowledge and information of the plaintiffs, that the proceedings in execution of the said decree were taken secretly in collusion or concert with the Court peons and by suppression of all the processes and that the auction sale in execution of the decree was illegal and invalid on the ground of these irregularities and also on the ground that the price fetched at the sale was grossly inadequate causing substantial loss to the plaintiffs.

The plaintiffs therefore prayed for a declaration that the decree and the sale were not legally binding on them, that the sales held on the 4th of February 1913 and on the 2nd of February, 1914, were altogether inoperative and the defendant had not and could not in law acquire any right under the sales. The suit was originally valued at Rs. 5,509 which was the valuation of the house and the holding as fixed by the plaintiffs. The plaint was presented in the Court of the Subordinate Judge of Shahabad, on a Court-fee stamp of Rs. 13 on the 3rd of February 1917. On the 4th of February 1917 a report was made by the office to the effect that the proper Court-fee payable on the plaint was *ad valorem* fee on Rs. 5,200.

The Subordinate Judge thereupon ordered *ad valorem* Court-fee to be paid or cause to be shown why *ad valorem* fee should not be paid. Pleaders were heard and the Court decided that the Court-fee payable on the plaint was *ad valorem* on the value of the properties which formed the subject-matter of the suit. The plaintiffs thereupon filed a petition reducing the valuation of the suit from Rs. 5,500 to Rs. 2,300. The Court apparently accepted this valuation and ordered the deficit Court-fee to be paid calculated on the valuation

of the suit at Rs. 2,300. This deficit Court-fee was made good by the plaintiffs on the 1st of May 1917 and the plaint was admitted and duly registered. The defendant appeared and filed a written statement traversing the allegations of the plaintiffs as regards the illegalities and irregularities in obtaining the decree and in taking the execution proceedings. No objection was taken as regards the valuation of the suit and at the trial no issue was framed as regards the under-valuation of the suit.

The learned Subordinate Judge, however, dismissed the suit on merits. The plaintiffs thereupon preferred an appeal before the District Judge of Shahabad. The memorandum of appeal was valued at Rs. 2,300, which was the valuation fixed in the Court below, and Court-fee was paid on this valuation upon the memorandum of appeal before the District Judge.

Again no objection was taken by the defendant and the appeal was heard on its merits and the learned District Judge set aside the decree of the Subordinate Judge and decreed the suit. Against this decree the defendant has preferred this second appeal to this Court.

An objection was taken by the Stamp Reporter that the valuation of the suit was improperly fixed at Rs. 2,300 that the true valuation should have been at Rs. 5,500 as alleged by the plaintiffs themselves originally in their plaint, and that therefore the Court-fee payable on the memorandum of appeal to this Court as well as the Court-fees payable on the plaint and on the memorandum of appeal to the District Judge ought to have been upon the valuation of Rs. 5,500. He, therefore, reported that there was a deficiency in the Court-fee paid on the memorandum of appeal to this Court to the extent of Rs. 155 and that the plaint and the memo. of appeal to the District Judge were also insufficiently stamped by Rs. 155 each.

The matter came for decision before the Taxing Officer and he held that the Court-fee payable on the memorandum of appeal to this Court was *ad valorem* on Rs. 5,500 which was the value of the property in dispute and he ordered the appellant to pay the deficit Court-fee of Rs. 155 which was duly paid by the appellant and the appeal registered. As regards the valuation of the plaint and the memo. of appeal to the Lower Court the Taxing Officer ordered that the same will be considered when the respondents appeared in the appeal. When the respondents entered appearance in this appeal, the matter was again brought before the Registrar and on the 2nd of December 1921 he allowed time to the plaintiff respondents up to the 13th of December to pay the deficit Court-fee.

No objection seems to have been taken by the plaintiff-respondents as regards the valuation and payment of the deficit Court-fees. The respondents, however, did not pay the deficit Court-fee as directed by the order of the 2nd of December 1921 and on the 15th of December 1921 an order was made by the Registrar to the effect that the question whether the plaint should be rejected should be determined by the Bench at the time the appeal came on for hearing.

When the appeal came on for hearing before us the learned Vakil for the respondents raised no objection to the valuation, but paid the deficit Court-fee of the plaint as well as the memorandum of appeal to the District Judge. This was accepted and the appeal was heard.

At the hearing of the appeal the learned Vakil for the appellant takes the objection that the valuation of the suit being now determined to be Rs. 5,500 the appeal to the District Judge was incompetent; that the decree made by the District Judge was without jurisdiction and is void. He relies on the Privy Council case of *Ledgard* v. *Bull* (1) and also upon the case of *Rajlakshmi Dassi* v. *Katyayani Dassi* (2).

Now there can be no doubt that, having regard to the value of the properties forming the subject-matter of the suit as now fixed and accepted by the plaintiff-respondents, the appeal to the learned District Judge was incompetent. The

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(1) (1886) 9 All 191=13 I. A. 134=4 Sar. 741 (P. C.)
(2) (1910) 38 Cal. 689=12 I. C. 464.

appeal against the decree of the Subordinate Judge lay to the High Court and not to the District Court. The question is whether the decree passed by the learned District Judge can be treated as a nullity. S. 99 of the Code of Civil Procedure provides.

"No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

Here the jurisdiction of the Court of appeal below is affected by the alteration of the value of the suit. S. 11 of the Suits Valuation Act, however, provides that

"Notwithstanding anything in section 99 of the Code of Civil Procedure an objection that by the over-valuation or under-valuation of a suit or appeal a Court of first instance or Lower Appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless

(*a*) the objection was taken in the Court of first instance at or before the hearing at which issues were framed and recorded or in the Lower Appellate Court in the memorandum of appeal to the Court; or,

(*b*) the appellate Court is satisfied for reasons to be recorded by it in writing that the suit or appeal was over-valued or under-valued and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits".

Sub-section 2 of Section 11 of the Suits Valuation Act provides

"If the objection was taken in the manner mentioned in clause (*a*) of Sub-section (1) but the appellate Court is not satisfied as to both the matter mentioned in clause (*b*) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or Lower Appellate Court."

Now, as I have indicated above, no objection as regards the valuation or jurisdiction of the Court was taken by the defendant either in the trial Court or in the Court of appeal below. The objection was taken for the first time in this Court by the Stamp Reporter. Moreover, nothing has been shown by the defendant-appellant before us that the under-valuation of the suit and of the appeal to the District Judge has in any way prejudicially affected this disposal of the suit or of the appeal on its merits.

In the case of *Ledgard* v *Bull* (1) objection as regards the jurisdiction of the Court was taken from the very beginning. It was taken before the Subordinate Judge and again before the District Judge and it was reiterated in the High Court, and their Lordships of the Privy Council referred to this matter and to the fact that the defendant in that case had done nothing to waive that objection since it was stated in the written statement in answer to the plaint and held that the Court had no jurisdiction to try the suit

In the case of *Rajlakshmi Dassi* v. *Ratnavvni Dassi* (2) a decree was filed in evidence by one of the parties to the suit which was objected to by the other party on the ground of its being a nullity for the reason that it was passed by a Court which had no jurisdiction to pass it. Their Lordships in that case held that the decree was fraudulently obtained on a deliberate under-valuation of the subject-matter of the suit and that the Court which passed the decree had no jurisdiction to pass it and, therefore, it was a nullity and could not be used in evidence against the other party who was not a party to that decree. As to what the effect of that decree would have been between that parties to the decree their Lordships expressed no opinion.

On page 668 of the report their Lordships observed: —

"We are not called upon to consider what the effect of such lack of jurisdiction would be upon the decree in so far as the parties thereto were concerned. It is manifest that so far as a stranger to the decree is concerned, he can obviously ask for a declaration that the decree is a nullity because made by a Court which had

no jurisdiction over the subject-matter of the litigation."

The provisions of S. 11 of the Suits Valuation Act were not considered in the case of *Rajlakshmi Dassi* v. *Katyayani Dassi* (2) and the case of *Leigard* v. *Bull* (1) was decided before the enactment of Suits Valuation Act of 1887. Having regard to the provisions of S. 11 of the Suits Valuation Act, I am of opinion that there being no proof of prejudice, the objection cannot be entertained that the decree of the learned District Judge is *null* and *void* for want of jurisdiction.

As regards the merits it appears that before the rent decree of the 26th of September, 1899 mentioned above, was passed the defendant's predecessors-in-interest had in the year 1893 obtained an *ex-parte* rent decree for arrears of rent due for a prior period. This *ex-parte* decree was subsequently set aside and the suit was restored and a fresh rent decree on contest was passed in favour of the defendant's predecessor-in-interest in the year 1898. Execution of this decree was taken out and the holding of the plaintiffs was sold on the 17th November 1900 and purchased by the decree-holder. Possession was delivered to the decree-holder auction purchaser on the 27th of February 1903.

In the year 1910 a suit was brought by the predecessor-in-interest of the defendant against the present plaintiffs for possession and mesne profits of the holding on the ground that the plaintiffs had dispossessed the defendant's predecessor-in-interest from the said holding. Mesne profits were claimed for the year 1315 to 1317. This was suit No. 81 of 1910. This suit was referred to the arbitration of the present defendant. On the 2nd of December 1912 the present defendant as an arbitrator made an award to the effect that the present plaintiffs should be allowed to retain possession of the holding on payment of a sum of Rs. 1,400 on account of arrears of rent and mesne profits and a sum of Rs 100 on account of costs.

These two sums were apparently paid in due time and the plaintiffs continued in possession until they were dispossessed as a result of the sale held on the 2nd of December 1914 in execution of the decree of the 26th of September 1899 as mentioned above.

Two questions have been raised, first as to what was the effect of the purchase by the predecessor-in-interest of the defendant of the year 1900 and, secondly, what was the effect of the award of the 2nd of December 1912.

It is contended on behalf of the plaintiff-respondents that the effect of the sale of the 17th of November 1900 was to extinguish the decree of the 26th of September 1899 ; and, secondly, that by the award of the 2nd of December 1912, the sum of Rs. 1,400 was fixed to represent all sums on account of arrears of rent and mesne profits outstanding up to that time and that by the payment of Rs. 1,400 nothing remained due under the decree of the 26th of September 1899. The learned Subordinate Judge found these points in favour of the defendant and dismissed the suit.

On appeal the learned District Judge has held that by the sale of the 17th of November 1900 the encumbrance on the property under the decree of the 26th of September 1899 was extinguished. He apparently relies on the provisions of S. 101 of the Transfer of Property Act, but, under that section, the charge will not be extinguished if the owner of the charge declares by express words or necessary implication that it should continue to subsist or such continuance would be for his benefit. The learned District Judge has not considered the evidence on this point.

As regards the second point, namely, the effect of the award of the 2nd of December 1912 that also depends upon the evidence in the case, which has not been considered by the District Judge.

Under the circumstances we, in the ordinary course, would have remanded the case to the District Judge for a finding upon these two points upon the evidence, but, having regard to the circumstances of the case and the valuation of the suit as now fixed, we consider it undesirable to make a remand to the District Judge. We therefore, think it desirable that this Court should determine these points upon a consideration of the evidence

in the case under the provisions of S. 103 of the Civil Procedure Code.

We, therefore, direct that this appeal do stand over for a month. The appellant should prepare either a typed or a printed copy of all the evidence on the record bearing on these two points which he wishes this Court to consider. He should, within a week, give a list of all the documents and the evidence which he proposes to print to the Vakil for the respondents; and if the respondents' Vakil wishes to refer to any other document besides those included in the appellant's list he shall give notice thereof to the appellant's Vakil within three days of his receiving the appellant's list. The appellant will then print the papers which the respondents wish to print. The printed or typed copy of the papers should be filed by the appellant's Vakil in this Court on or before the 6th of August 1923.

Foster, J.—I agree.

Appeal adjourned.

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* A. I. R. 1923 Patna 585.

DAS AND MACPHERSON, JJ.

Jhobali Rai and others—Plaintiffs-Appellants

v.

Sakhi Rai and others—Defendants-Respondents.

A. No 216 of 1920, decided on 2nd July, 1923, against the decision of Sub. J., Shahabad, dated 11th August. 1920.

Evidence Act, S. 32 (5)—Genealogical tree merely copied by the dead person from an old one is inadmissible.

Where there was a genealogical table in the possession of one *T* and that was merely copied from the old pedigree which was in his possession and it was not shown who was responsible for the old pedigree which was in the possession of *T*.

Held, that the genealogical table was not admissible in evidence. [P. 586, C. 2]

Sultan Ahmed, Yusuf Aziz Ahmed, P. C. Roy and *Mahabir Prasad*—for Appellants.

S. M. Mullick, Nawal Kishore and *Deoki Prasad Sinha*—for Respondents.

Das, J.—The properties in dispute in this litigation are 52 bighas of *kasht* lands described in Schedules A, B and C of the plaint According to the Plaintiffs, these *kasht* lands belonged to three brothers of a joint Mitakshara family, Bhola Rai, Mahabir Rai and Bihari Rai and upon the death of Bhola Rai and Bihari Rai, Mahabir Rai, as the sole surviving member of the joint Mitakshara family, took possession of these lands. The Plaintiffs assert that they are the heirs of Mahabir Rai and they became entitled to succeed to these *kasht* lands left by Mahabir Rai at his death which took place over 30 years ago.

As to the question of delay in enforcing their claim, the Plaintiffs say that they allowed the properties to remain in the possession of Musst. Lakhpati Kuer, the widow of Bhola Rai and Musst. Ramlochan Kuer, the widow of the predeceased son of Bhola Rai and they maintain that their cause of action arose on the 15th Baisak 1318, the date of the death of Musst. Lakhpati Kuer.

The defendants in their written statement alleged that they were the heirs of Mahabir Rai, but in their evidence they completely repudiated their own written statement and put forward the case that they were in possession of the *kasht* lands in their own rights. They also rely upon limitation and adverse possession to defeat the Plaintiffs' claim. It is only necessary to add in this connection that the record-of-rights is completely in favour of the defendants.

The learned Subordinate Judge has taken the view that the oral evidence in the case is not of any value; and on a consideration of the circumstances, he has come to the conclusion that the Plaintiffs have not established their case that they are the heirs of Mahabir Rai. In this Court it was strongly contended on behalf of the Plaintiffs by Mr. Sultan Ahmed that upon the finding of the Court below that the Defendants have no sort of title to these properties, the Court should not have required such strict proof of the Plaintiffs' title as it would have been justified in requiring had there been a competition between the Plaintiffs and the Defendants on the question of heirship. With this contention I do not agree. The

Defendants are in possession of the properties, and the record-of-rights is in their favour; and the question of their title does not fall to be considered until the Plaintiffs have established their title to the properties. The important evidence in favour of the plaintiffs is the genealogical table which has been produced by the witnesses Jagdeo Rai.

In my opinion it is doubtful whether the document was properly admitted in evidence. The evidence upon this point is that of *Jhubali Rai* and Jagdeo Rai. Jhobali Rai, the plaintiff says in his evidence that the genealogical table produced by Jagdeo Rai was written by one Thakur Rai who died 22 or 23 years ago. He adds that Thakur Rai gave it to Jagdeo Rai saying "it would be of use in future." Jagdeo Rai's evidence is that Thakur Rai wrote the genealogy in his house in his presence and that it was written by him 26 or 27 years ago. He admits that there was an old genealogy from which it was copied and he says that the old genealogy was worn out and that it no longer exists.

Now the only section under which the genealogy could be admitted is S. 32, cl. 5, which provides that statements written or verbal, made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement has special means of knowledge, and when the statement was made before the question in dispute was raised.

It will be noticed that the section requires that it must be shown that the statements contained in the pedigree were made by a person who had special means of knowledge of the relationship to which the statements relate. Now whose statement is contained in the genealogical table? Not the statement of Thakur Rai, for it is admitted by Jugdeo Rai that Thakur Rai merely copied the statements from an old genealogical table which was in his possession and which is no longer in existence.

In my opinion, before the pedigree could be admitted in evidence, the Plaintiffs should have shown who was responsible for the old genealogical table. The evidence might indeed be hearsay, but where the witness is stating from hearsay, he must show that his knowledge comes from a person whose statements are admissible under S. 32 of the Act. In this case it is not shown by the Plaintiffs that the statements contained in the genealogical table are the statements of any person whose statements are admissible in evidence under S. 32 of the Act. If it were the case of the Plaintiffs that Thakur Rai wrote out the whole genealogical table from his own knowledge as to the relationship of the different parties, the document would undoubtedly be admissible in evidence under S. 32, cl. 5 of the Act; but that is not the case of the Plaintiffs.

The case of the plaintiffs, on the other hand, is that there was an old genealogical table in the possession of Thakur Rai and that Thakur Rai merely copied from the old pedigree which was in his possession. Since it is not shown who was responsible for the old pedigree which was in possession of Thakur Rai, I very much doubt whether the genealogical table was properly admitted in evidence.

But I do not desire to decide this case on this narrow ground. In my opinion the learned Subordinate Judge was right in not relying upon the genealogical table. The learned Subordinate Judge in his judgment says that the document was produced at a very late stage.

In this Court it was argued that the learned Subordinate Judge should have made a distinction between a document which is produced by a party and a document which is produced by a witness and that since this document was produced not by a party but by a witness, he should have come to the conclusion that no question arose as to its late production.

In order to determine this question it is necessary to see whether Jagdeo Rai is in fact a witness or a party. In

my opinion the evidence of Jagdeo Rai establishes that he is a partisan witness and not an independent witness; for instance, he supports the case of the plaintiffs that Bharosa Rai got possession of these lands after Mahabir's death and that the ladies asked Bharosa Rai to be allowed to enjoy the produce and that Bharosa Rai agreed to this. Now Jhobali Rai undoubtedly made himself responsible for this portion of the case, but he admitted that no one was present when he and Bharosa gave the lands to the Musammats for their maintenance.

In order then to see whether Jagdeo Rai should be accepted as a witness of truth, it is necessary to consider whether it is possible to accept that part of his evidence in which he gives support to the plaintiffs in regard to their case that the ladies were in possession of the disputed lands with the permission of the plaintiffs. In my opinion it is only necessary to state the facts to reject it entirely. The plaintiffs were, neither of them, in affluent circumstances. Jhobali Rai, one of the plaintiffs, states that he had only about 14 bighas of land in his possession which he inherited from Chaturi.

It appears that Bharosa had about 15 bighas of *kasht* lands. Now the properties in dispute in this litigation are *kasht* lands having an area of 53 bighas. It is impossible to accept the case that these two persons, each having between 12 to 15 bighas of *kasht* lands, should have consented to the ladies holding possession of no less than 52 bighas of *kasht* lands for their maintenance. Now if this portion of the case is rejected, it is impossible to resist the conclusion that Jagdeo Rai is a partisan witness. In other words, he is really in the position of a party and not in the position of a witness.

That being so, there is no explanation why the pedigree should have been produced at a late stage of the case. Mr. Sultan Ahmed on behalf of the Appellants has argued before us that the pedigree has received strong corroboration from some admitted circumstances in the case; for instance, he relies upon the fact that the pedigree shows that Uma Rai was the father of Bhola Rai, Behari Rai and Mahabir Rai. That may be so. Nobody disputes that the pedigree is correct in certain matters; but the question is whether the pedigree ought to be accepted as a genuine document in so far as it shows that the Plaintiffs are the heirs of Mahabir Rai. Mr. Sultan Ahmed also relies upon Ex. 4, the *batwara khasra*, which shows that Plot No. 1220 was the *khand* of Mahabir Rai, Bhorosa Rai and Sarabjit Rai. In my opinion it is quite impossible to found an argument upon Ex. 4 for it may well be that Mahabir Rai, Bharosa Rai and Sarabjit Rai were co-sharers and not members of the same family.

On the whole I agree with the learned Subordinate Judge that the pedigree is not a reliable document and should not be accepted.

The question really is a short one and it is this—Why have the plaintiffs delayed in putting forward their case for over 30 years? Their only answer is that they allowed the ladies to appropriate the profits arising out of these lands. For myself I am unable to accept the explanation. I have shown that neither of the Plaintiffs was in affluent circumstances, and it is impossible to accept the explanation that they allowed the ladies to remain in possession of the lands to which they were entitled by right of inheritance.

It follows therefore that the basis of their claim must be scrutinized with care. Their evidence is unconvincing and the genealogical table upon which they rely is unacceptable. That being so, it is quite impossible to say that the conclusion at which the learned Subordinate Judge has arrived is incorrect.

I would accordingly dismiss this appeal with costs.

Macpherson, J.—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 588

KULWANT SAHAY, J.

Lakhpat Gope and others—First Party—Petitioners

v.

Emperor—Opposite Party—Respondent.

Criminal Rev. No. 82 of 1923, decided on 14th March, 1923.

Criminal Pro. Code, Ss. 146, 439—General remarks that evidence is unreliable is not a proper disposal and the order is revisable.

The general remark in an order under S. 146, Criminal Procedure Code, that the oral evidence is not reliable, without referring to it and without giving any reason, is not a disposal of the evidence upon the record, it amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision and 57 I. C. 169 Foll. A. I. R. 1921 Pat. 178.

[P. 588, C 2]

P. C. Rai—for Petitioners.

Assistant Government Advocate—for the Crown.

Judgment.—This is an application on behalf of the first party in a proceeding under S. 145, Criminal Procedure Code. The subject of dispute comprises two fields measuring 4 acres and 39 decimals, being Survey Plots Nos. 316 and 324. The first party claimed this land as their *Kasht* land while the second party claimed this as their *khudakast* land. The Record-of-Rights which was finally published in the year 1911 is in favour of the first party.

The learned Magistrate in his judgment says "the parties have introduced into the case a mass of irrelevant matters fit for cognizance by a competent Court in a regular suit for adjudication of title and restoration of possession with recovery of mesne profits. They have also filed certified copies of documents and of judgments or orders of Courts, most of which tend to throw little light on the case."

Then as regards the oral evidence all that he says is, "both the parties have produced oral evidence which is not quite satisfactory." Then he ends his judgment by saying

"I have perused the statements filed by the parties, heard their pleaders and considered the effect of the evidence adduced by them and in the circumstances of the case I decide that the second party was in actual possession of the plots under dispute on the date of the initiation of the proceedings."

In my opinion this judgment cannot stand. The learned Magistrate does not consider the evidence, produced by the parties. The Record-of-Rights is in favour of the first party. He does not say how this Record-of-Rights has been rebutted and what is the evidence adduced by the other side. It is stated before me that a large number of documents had been produced by the second party which rebut the presumption raised by the Record-of-Rights, but the learned Magistrate does not refer to a single one of those documents and it does not appear that he considered those documents inasmuch as he says that most of the documents were irrelevant, and throw little light on the case.

As was laid down in the case of *Lachmi Ojha* v. *Biraj Misser* (1), the general remark in an order under section 146, Criminal Procedure Code, that the oral evidence is not reliable, without referring to it and without giving any reason, is not a disposal of the evidence upon the record. It amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision. The same view was taken in the case of *Kailasbehari Lal* v. *Jai Narain Rai* (2). In my opinion this order cannot be upheld. One can form no idea as to what the evidence on the record is and whether the learned Magistrate considered the evidence adduced by the parties.

This order must be set aside and the case remanded to the Court below for trial according to law.

Case remanded.

(1) A. I. R. 1921 Pat. 178.

(2) (1920) 1 P. L. T. 291=57 I. C. 169=1920 P. H. C. C. 288.

A. I. R. 1923 Patna 589.

DAS AND MACPHERSON, JJ.

Ramdulari Kuer—Defendant-Appellant

v.

Jang Bahadur Singh and others—Plaintiffs-Respondents.

A. No. 846 of 1921, decided on 2nd July 1923 against the decision of the Dt. J., Gaya, dated 4th February, 1921.

Hindu Law—Joint family—Contract in favour of manager personally—Not enforceable by other members of his family after his death—Contract Act, S. 37.

Where *A* executed an agreement to sell in favour of *B* personally and received Rs. 2,000 as earnest money, and thereafter *B* died.

Held that the other members of the joint family of which *B* was the manager cannot sue to enforce the contract against *A* but that *A* was bound to refund the earnest money received by him

[P. 589, C. 2, P. 590, C. 1, 2.]

N. K. Prasad—for Appellant.

Sivanandan Rai—for Respondents.

Macpherson, J.—This appeal is preferred by the widow and legal representative of the Defendant, the suit against whom was dismissed by the trial Court but decreed in part by the District Judge on appeal.

The case for the plaintiffs was that Rai Bindheswari Prasad on or before the 4th December 1916 in anticipation of a decree on compromise which he eventually obtained on 15th December against Mathura Prasad for Rs. 19,145-9-1 contracted to sell the decree to the plaintiffs and their father Ramphal Singh for Rs. 18,000 and took Rs. 3,000 at once out of the stipulated consideration and on the 11th January 1917 executed an agreement (Ex. 1) in favour of Ramphal Singh to sell the aforesaid decree to him mentioning therein that Rs. 2,000 had been paid, though in fact Rs. 3,000 had been paid. The plaintiffs *inter alia* alleged as follows:—

4. That Babu Ramphal Singh, the plaintiffs' father lived jointly with them and they were members of a joint family governed by the Mitakshara School. He died while living jointly with the plaintiffs and leaving the plaintiffs behind him. The plaintiffs entered upon possession and occupation of the entire property belonging to the joint family by right of survivorship."

The defendant failed to execute the deed of sale in spite of notice from the plaintiffs and on the other hand realised the decretal money from Mathura Prasad by execution of the decree which he had contracted to sell to plaintiffs. The plaintiffs therefore claimed Rs. 4,522-9-1 made up of Rs. 3,000 paid to the defendant, Rs. 1,145-9-1 damages, and interest.

The defences were that non-execution was due to the laches of the plaintiffs, that only Rs. 2,000 had been advanced and that the contract was void as Ramphal Singh had died before the 11th January 1917 when the contract was executed.

The trial Court found that the contract was complete before 4th December but sustained the defence that non-execution of the sale deed was due to the inexcusable laches of the plaintiffs in spite of notice from the defendant to execute the *kewala* and held that the plaintiffs were accordingly not entitled to recover the deposit of Rs. 2,000, even though there was no express stipulation for forfeiture in case of default. As to the death of Ramphal Singh it was found to have occurred on the 20th December 1916 but the learned Subordinate Judge held that the matter was not affected by his death inasmuch as the agreement did not appear to be a personal one in his favour.

The lower Appellate Court held that it was not proper to apply to Ex. 1 a construction at variance with its terms which he considered was a promise to execute a sale-deed in favour of Ramphal Singh personally and that this promise became incapable of fulfilment on his death, accordingly the plaintiffs could not enforce a penalty clause against the defendants, and equally the defendant's claim was untenable that the plaintiffs forfeited the earnest money (1) since on the defendant's own showing there was uncertainty in the contract on the question in whose favour the deed should be executed and (2) since the deed was not signed by Ramphal Singh or by any one on his behalf. As the death of Ramphal Singh

had rendered the contract incapable of fulfilment and therefore void, or in the alternative as it is or had become void for uncertainty, the defendants must refund Rs. 2,000, the earnest money, with interest to the plaintiffs.

In second appeal by the widow and heir of the defendant it is submitted that the contract, which was admittedly entered into on the 3rd or 4th December 1916 was capable of performance since it was entered into by the joint family and the money was advanced from the joint family funds.

In reply it is contended that there is a clear finding of fact that the contract was a personal one and the earnest money could not be forfeited except for default and Ramphal Singh was not in default.

No other contention was advanced and indeed the arguments in the appeal have hardly extended beyond a statement of these propositions.

The peculiarity of the present position is that each party relies upon the pleadings of the other. The question for decision is therefore whether the contract of appellant's husband was a personal one with Ramphal Singh or one with him as *karta* of the joint family of which Respondents, his sons, are the surviving members. It is admitted that if it is not found to have been a contract with the joint family of which Ramphal Singh was *karta* this appeal must fail.

Now the findings of the first Court on this point are very far from confident. After deciding that the contract was complete before the 4th December 1917, he proceeds: "Besides the contract does not appear to be of a purely personal nature. Ramphal Singh was member of the Plaintiffs' joint family and the Plaintiffs themselves appear to have paid the earnest money." He relies on the fact that such had been the case of Defendant in his first written statement as well as of Plaintiffs.

The learned District Judge, relying upon the fact that the document itself is expressed as being in favour of Babu Ramphal Singh and not in favour of him and his heirs or of him and other members of his family, finds that the contract is of a personal nature so that it did not bind the executants to execute a sale-deed in favour of any one but Ramphal Singh. Here he accepts the case made by Defendant in his second written statement and displaces the hesitating finding of the trial Court. No copy of Ex. 1 has been produced and thus this Court is restricted to the information obtainable from the paper-book: It appears therefore that the question whether the contract was personal or was entered into by the joint family consisting of the Respondents and their father is disposed of by the finding of fact of the lower appellate Court when he holds that the Defendant did not bind himself to execute a sale-deed in favour of any person but Ramphal Singh himself. It has not been contended before us on the strength of S. 37 of the Indian Contract Act, 1872 or otherwise, that the Respondents as heirs and representatives of their father (as distinguished from the members of the same joint family with him) are bound by his agreement to purchase.

In our opinion, in the circumstances of the case, the decision of the lower Appellate Court is correct. The appeal accordingly fails and is dismissed with costs.

Das, J.—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 590.

MULLICK AND BUCKNILL, J J.

Shyam Sunder Rai and others—Defendants-Appellants

v.

Jagarnath Misra — Plaintiff-Respondent.

A. No. 1098 of 1921, decided on 11th July, 1923, from the Appellate decree of the Sub-Judge, Bhagalpure, dated 9th May, 1921.

(a) *Hindu Law—Alienation by one co-parcener—Suit by another co-parcener for his share only on ground of no necessity does not lie.*

A co-parcener in a joint family property, who establishes that a member of the family has alienated that property without legal necessity, can sue to recover the whole property. He cannot be allowed to sue for his own share or any specific portion thereof for in a Mitakshara joint family no particular

share can be predicated as belonging to any individual member. [P. 591, C. 2.]

(b) *Civil P. C., O 6, R 17—Amendment involving change of case cannot be allowed in second appeal.*

A prayer for amendment involving a claim for additional relief and addition of new parties and a change in the whole aspect of the case cannot be allowed in second appeal. [P. 592, C. 2.]

S. N. Sinha—for Appellants.

S. M. Mullick—for Respondent.

Mullick, J.—This second appeal raises the question of the right of a coparcener in a joint Hindu family governed by the Mitakshara law to bring a suit for the recovery of his share of the property from transferees who have purchased the property from a coparcener claiming to act on behalf of the joint family and who have failed to prove that the sale was made for legal necessity.

The plaintiff and his father Bulan represented one branch while Makut and Babujan represented the other branch of the joint family and on the 15th November 1907 the property in suit was sold by Babujan and Makut to the defendants for a sum of Rs. 3,350; the plaintiff alleges that in 1902 his father separated from Babujan and Makut and began to hold his half share in the property separate from them. The present suit was brought against the transferees only on the 5th July 1918 for a declaration that the plaintiff's half share could not be affected by the sale and for recovery of possession of that share from the defendants.

The defendants filed a written statement pleading that the family was joint and that there had not been any separation as alleged by the plaintiff. The issue upon this was: "Did Bulan separate from Makut Lal and Babujan in Pus 1302?"

This issue, if decided in favour of the plaintiff, would have been sufficient for the decision of the case, but as the defendants pleaded jointness an additional issue was framed and ran as follows: "Was there any legal necessity and is the *Kebala*, dated 15-11-1907 binding on the plaintiff?"

The Munsif found that the plaintiff was not separate at the time of the sale. He found that the family was still joint, that there was no legal necessity for the alienation and that therefore the sale was invalid. He however gave the plaintiff a decree for his half share and that decree has been affirmed by the lower appellate Court.

The present second appeal is preferred by the defendants on the ground that in view of the finding that the plaintiff was not separate at the time of the sale his claim to recover a half share cannot be entertained.

Now upon the authorities this contention is undoubtedly correct. A coparcener in a joint family property, who establishes that a member of the family property has alienated that property without legal necessity, can sue to recover the whole property. He cannot be allowed to sue for his own share or any specific portion thereof for the simple reason that in a Mitakshara joint family no particular share can be predicated as belonging to any individual member. In the present case the plaintiff has not only omitted to ask for the recovery of the whole property but he has failed to implead his co-sharers. Therefore, in my opinion the suit ought not to have been entertained.

The only concession, which the Courts have so far made in the direction of allowing the share of the transferor to be affected, is where the share of the transferor has been attached in execution of a money decree. In such a case the Courts have held that a co-sharer, who sues for the recovery of the whole property, will be allowed to recover, but that it will be declared that the purchaser of the interest of the transferor is entitled to partition and to recover thereafter that portion of the property which represents the transferor's interest therein.

There is no justification for the contention that as the plaintiff was entitled to sue for the whole he is entitled also to relinquish his claim to half and to ask for a decree for the remainder. The Courts have never countenanced a suit of this kind.

The question as to other equitable relief does not arise in this case. In *Bunwari Lal* v *Sheo Sunker Misser* (1)

(1) (1909) 13 C. W. N. 815=1 I. C. 670.

a co-parcener sued the transferees as well as the coparceners who had transferred the property. There a decree was made for the recovery of the whole property but it was provided that the plaintiff should refund to the transferees the purchase money paid by them and in the event of his failing to do so, the transferees would be entitled to retain possession of that share, which on partition would represent the interest of the transferors.

A somewhat similar course was followed in *Mahanth Ram Sunder Das* v. *Barhamdeo Narayan Thakur* (2). There a coparcener sued for a declaration that a mortgage in respect of the joint family property by his co-parceners was invalid. The mortgagees having brought a suit for the enforcement of their mortgage and advertised the joint family property for sale, the declaration given to the plaintiff in his suit was that the whole property was liable to be sold in execution of the mortgage decree, it being notified at the sale that the plaintiff and his coparceners were in possession in proportion to their respective interests and that the shares of the mortgagor coparceners were held subject to the lien of the transferees. No such equity arises in the present case in view of the form in which the suit has been laid.

The result might have been otherwise if the plaintiff had put his claim in the alternative and joined his coparceners as defendants, but he has not chosen to do so; and I think it is not possible to allow him any equitable relief.

It is suggested by the learned Vakil for the appellants that we should allow the plaint to be amended. But having regard to the fact that the case has now reached the second appeal stage and that it was open to him in the trial Court as soon as the evidence on the issue as to separation was taken to ask for the amendment, I do not think we should now allow him to alter the whole aspect of the litigation by including an additional prayer for relief and by bringing new parties on the record.

The result therefore is that the decree of the lower appellate Court will be set aside and the suit will be dismissed with costs throughout.

Bucknill, J.—I agree.

Appeal allowed.

(2) (1909) 14 C. W. N. 552 = 2 I. C. 986.

* A. I. R. 1923 Patna 592

JWALA PRASAD AND ROSS, JJ.

Binanand Sawase and another—Plaintiffs-Appellants

v.

Thuroo Mahto and others—Defendants-Respondents

A. No. 1191 of 1921, decided on 26th June, 1923 against the Appellate decree of the J. C., Chota Nagpur, dated 11th April, 1921.

Adverse possession—Mortgagee in possession—Trespass against mortgagor's interest must be known to mortgagor.

A mortgagee in possession of property is bound to preserve the right, title and interest of the mortgagor and to prevent any invasion of that right by a stranger. The mortgagor having put the mortgagee in his stead in the possession of the property enjoys immunity and believes that so far as his possession is concerned his interest will be protected by the mortgagee. Therefore, if the mortgagee has either by neglect or in collusion allowed any other person to come into possession of the property there will be, no invasion of the rights of the mortgagor and when the time for redemption arrives he will be entitled to treat the stranger as a trespasser, and the stranger's right by adverse possession will not commence against the mortgagor unless and until the mortgagor had exercised his right of redemption and had redeemed the property. This is the case of a complete possession where no right of possession is exercised by the mortgagor. There may, however, be cases where the mortgagor and the mortgagee are both in possession of the property in accordance with the arrangements arrived at by them, and set forth in the covenant in the bond. In such a case the application of the above principle will also be varied; but the principle will apply to that portion of the usufruct which is supposed to be in possession of the mortgagee. It may be that in some cases the mortgagor may himself be realising from the tenants that portion of the rents and profits which represents the *hakajri*: but that does not affect the principle though it may be only a question of what amount of evidence will be necessary to prove adverse possession in a stranger. Therefore when *hakajri* or rents and profits are reserved by the mortgage and are payable to the mortgagor there is no reason why the principle of adverse possession should not apply, though in order to take advantage of adverse possession it must satisfy all the usual conditions required for adverse possession. A mere non-payment of the *hakajri* or forbearance to realise it for any length of time would not

create any adverse possession nor a mere payment of the same to a stranger by duress, force or compulsion, unless such payment is made with the knowledge of the mortgagor that it was being paid against his interest. [P. 546, C 1, 2; P 547, C 1]

Sultan Ahmed and *Atul Krishna Roy*—for Appellants.

P. K. Sen and *H. P. Sinha*—for Respondents.

Jwala Prasad, J.—This appeal arises out of a suit for redemption based upon a mortgage bond, dated the 23rd April 1881. By this deed Harakh Nath Sahi mortgaged his *jagirdari* interest in village Hitu Tola to Lal Khan, ancestor of defendants Nos. 1 to 3. The mortgagee took possession of the property and enjoyed the profits thereof in lieu of interest and had to pay annually to the mortgagor what is locally called *niksari* rent. The mortgage was payable in Magh 1268, corresponding to January 1905. On the 21st June 1888 the Plaintiff purchased the *jagirdari* interest of the mortgagor in Hitu Tola. His sale certificate is Ex. 2, dated the 10th September 1888. He took delivery of possession of the property through Court, but was dispossessed by the mortgagee who had obtained a decree in an ejectment suit brought by him against the Plaintiff. In 1891 the superior landlord of the *jagir* brought a suit against tenure-holder. Lal Harakh Nath Sahi, for arrears of rent. In that suit amongst others, he impleaded the Plaintiff as Defendant probably on account of his purchase in execution of the money decree already adverted to.

In para 2 of the plaint of that suit, Ex P. the Plaintiff stated that the mouzas of Senegutu, Pargana Sonepur belonged as *khorposh jagir* to the Defendant No. 1 on payment of fixed rent, etc., and the mouzas were held in possession by the Defendants Nos. 2 to 7 and he claimed the arrears of rent due to him from all the Defendants including the Plaintiff in this case. The Defendants did not appear and the Court on the 16th December 1891 passed the following order :—

" Defendants absent, Notice proved to have been served. *Ex parte* decree to the Plaintiff for full claim with costs, interest at six per cent. per annum."

Decree was prepared, Ex. M. 3. in which all the Defendants including the Plaintiff in the present case are mentioned as parties.

The direction in the decree was : " It is ordered that the suit be decreed *ex parte* against Lal Harakh Nath Sahi besides full costs, etc."

The sale certificate Ex. G. dated the 8th May 1893, mentions all the Defendants as judgment debtors and states that " Tilakdhari Lal purchased at auction sale on the 15th March 1893 the properties of the judgment-debtors as per detail given below under S. 124 of Act I of 1879 along with the right and interest belonging to them etc."

The specification of the properties covered by the sale-certificate is in the following terms " Details of the rights and interest in the properties belonging to the judgment-debtors which were sold by auction under S. 124 of Act I of 1879 ; the *jagirdari khorposh* interest in the entire mauzas of Senegutu, Sardkel, Durgah & Ulidih belonging to Harakh Nath Sahi, judgment-debtor No. 1."

On the 2nd July 1893, possession was delivered to the purchaser Tilakdhari of the properties described in the sale-certificate. On the 2nd February 1906 Tilakdhari sold his interest in the properties by private *kewala* to the Defendants Nos 4 and 5. On the 9th February 1906 the Defendants Nos. 4 and 5 deposited Rs 1 000 due on the *zarpeshgi* and the defendants Nos. 1 to 3, the sons of the mortgagee withdrew the amount.

The mortgage was thus redeemed and the Defendants Nos. 4 and 5 were in possession of the property. In Magh 1963 (corresponding to 1907) the Plaintiff tendered the *zarpeshgi* money to the Defendants Nos. 1 to 3 ; but they refused to accept the money stating that it had already been paid off by Defendants Nos 4 and 5. The Plaintiff therefore deposited the money in Court and commenced his action for redemption of the property in question.

The learned Munsif decreed the suit. On appeal the Judicial Commissioner of Ranchi set aside the decision of the Munsif and dismissed the suit. He held that the Plaintiff's purchase having been unregistered, the superior landlord was entitled under the proviso to S. 125 of Act I of 1879 to treat the

whole *jagir* as the right and title of Lal Harakh Nath Sahi and that the title of the Plaintiff's father passed to Tilakdhari in his purchase of 1893 in execution of the rent decree obtained by the superior landlord He further held that the Plaintiff lost his title, if any, to the property in question by reason of the adverse possession on the part of the defendants for the statutory period.

The Plaintiff has, therefore, come to this Court in second appeal, and he disputes the findings of the Court below on both the aforesaid points. His contention is that in 1888 he purchased the right, title and interest of Lal Harakh Nath Sahi, and therefore when Tilakdhari the ancestor of the Defendants purchased the property in 1893 in execution of the rent decree of the superior landlord, Harakh Nath had no interest in the property.

Consequently that purchase is of no avail as against the plaintiff The *jagir* in question is of the nature of a *khor osh* grant resumable upon failure of male issue in the line of the original grantee. But under Bengal Act I of 1873 which governed the tenure in question at that time it was saleable in execution of a decree obtained for rent or any other money with the sanction of the Commissioner. But in such a sale only the right, title and interest of the judgment-debtor passes and not the tenure itself.

Therefore, if the plaintiff had already purchased the right, title and interest of Lal Harakh Nath previous to the auction sale in execution of the rent decree at which the defendants had purchased the property there was nothing left of the interest of Lal Harakh Nath to pass to Tilakdhari. The plaintiff, however, having purchased the tenure in execution of his money decree was bound to pay the arrears of rent to the superior landlord for which the decree Ex. M 3 was obtained by him and in execution of which Tilakdhari purchased the property.

The superior landlord accordingly made the Plaintiff along with others, who had any interest or possession in the property, parties to the rent suit. He gave reason in para. 2 of the plaint which has already been referred to above for making persons, claiming through Lal Harakh Nath, the tenure-holder, parties to the suit He said that they were in possession of the properties through Lal Harakh Nath, the tenure holder. This is obviously because the name of Harakh Nath continued to be registered with respect to the tenure in question and as being liable to the landlord for the rent.

The Plaintiff and other persons referred to in the plaint of 1891 were not probably registered in the landlord's *sherista*, and consequently although they had acquired the interest of the *jagirdar* the landlord brought the suit against the *jagi dar* by making them parties to the suit thus giving them an opportunity to pay the arrears of rent and save the property from being sold in execution of the rent decree. But the Plaintiff naturally stated in the plaint that Lal Harakh Nath, the tenure-holder, being the recorded tenant was still responsible for the rent.

The judgment of the Court was passed *ex parte* against all the Defendants. The decree mentions the names of all the Defendants but directs that the decree be passed against the judgment-debtor Lal Harakh Nath, Defendant No. 1.

Mr. Sultan Ahmed from this argues that the Plaintiff was exonerated from the liability of the decree and no decree was passed against him. The decree does not seem to have been drawn up in accordance with the judgment in specifying that it was passed against the Defendant No. 1 for the judgment does not make such specification; whereas on the other hand, if it was the intention either of the judgment or of the decree to exempt the Plaintiff in this case or the Defendants other than Lal Harakh Nath, it would have been expressly stated there. It may be that the decree was prepared under some misapprehension probably on account of the prominent mention in the plaint of Lal Harakh Nath as the holder of the *jagir* and as being probably liable.

The subsequent proceeding in execution of the decree, however, makes it perfectly clear that the interest not only of Lal Harakh Nath but of all the judgment-debtors including the Plaintiff in

this case was sold up (*vide* sale-certificate and *dakhal chani* mentioned above). Here also Mr. Sultan Ahmed contends that in the specification of the properties sold it is shown that only the interest of Harakh Nath was sold and not of all the judgment-debtors.

I do not agree with this contention. It has been clearly stated in the sale-certificate that the right, title and interest of all the judgment debtors was sold by auction. The word is "*hakait madkunan*" and not "*hakiat madkun*"; and then in the earlier part of the sale-certificate "*madkunan*" that is, judgment-debtors in the plural have been mentioned; and though judgment-debtors were stated in the description of parties at the beginning of the sale certificate, the name of Lal Harakh Nath only is mentioned. But this is only with a view to describe the property that is, "*hakiat jagir khorposh* Lal Harakh Nath Sahi, *Madkun* No. 1."

That is the descriptive portion of the property which was sold at the auction sale; in other words, the *khorposh jagir* of Lal Harakh Nath Sahi.

On careful consideration of all these documents in question I am clearly of opinion that the Plaintiff's interest if any, was sold at the auction sale in execution of the rent decree and purchased by Tilakdhari. The Courts below were probably misled by the decree in this case in stating that it was passed only against the *jagirdar*. They did not refer to the sale-certificate and *dakhal dehani*. If their attention had been drawn to these documents they would probably have held that the interest, if any, of the Plaintiff also passed by that sale. Even if the decree was passed only against the *jagirdar* it was not the decree but the purchase under the sale-certificates that gave title to Tilakdhari who was not a party to the decree.

For the first time he comes upon the scene by virtue of his purchase at the auction sale and he takes his title from the sale-certificate That sale-certificate, as observed above, showed that he purchased not only the interest of the *jagirdar* but the interest, if any, of the Plaintiff. The plaintiff was a party to the decree. He was a party to all the proceedings which led up to the grant of the sale-certificate and the *dakhal dehani*. If this had been discovered during the trial of the case either in the original Court or in the Appellate Court much trouble and cost would have been saved to the parties; perhaps the case would not have come to this Court.

Whereas we in second appeal are somewhat circumscribed and not required to go into the evidence, it is expected that the Courts below who have to deal with the facts and upon whose appreciation of facts we have to go, should take great care to go through the documents and other evidence in the case so as to leave no loophole for criticism being levelled against the findings of fact or injustice being done to parties.

To my mind the documents in question referred to throw the Plaintiff altogether out of Court, and that probably is the reason why for so many years from 1893 up to the time when he brought this case, he did not move in the matter and dispute the title acquired by Tilakdhari from his purchase at the auction sale.

On the view that I have taken the appeal should be dismissed, although I am not prepared to endorse the view expressed by the Court below that sale in execution of the rent decree under Act I of 1879 of a *jagir* tenure would as a matter of course extinguish the title of any person acquired previously, either by private purchase or in execution of a money decree both in sale in execution of money decrees and in sale execution of rent decrees the right, title and interest only of the *jagirdar* in the tenure passes and consequently one who purchases first prevails against subsequent purchasers.

The learned Judicial Commissioner dismissed the Plaintiff's case also upon the ground that his right and title in the property were extinguished by reason of adverse possession for over twelve years held by the Defendants. This view of the learned Judicial Commissioner has been strenuously commented upon by the learned Government Advocate and has, on the other hand, been vehe-

mently supported by Mr. Sen on behalf of the Respondents.

The question raised by learned Counsel on both sides is whether there can be any adverse possession against the mortgagor so long as the mortgagee is in possession of the property when the time for redemption of the mortgage has not arrived.

In support of their respective contentions learned Counsel have cited authorities Mr. Sultan Ahmed relies on, amongst others, the cases of *Chinto* v. *Janki* (1) and *Kunwar Sen* v. *Darbari Lal* (2). Mr. Sen on the other hand relies upon the cases of *Kanhovlal* v. *Mt. Manki* (3), *Amma* v. *Ramakrishna Sastri* (4) and *Puttappa* v. *Timma ji* (5). He also refers to the case of *Nand Kumar Lal* v. *Brojo Bhookun Singh* (6). This report is not available. I have carefully considered this case and also the observation of Lord Hardwicke in *Casborne* v. *Scarfe* (7) referred to in *Kunwar Sen* v. *Darbari Lal* (2) and without going into a detailed discussion of the authorities placed before me, I would like briefly to state my views on the subject.

We are considering the case of a mortgagee in possession of property. Now so long as he is in possession his possession is, to some extent, that of a trustee; unlike ordinary lessees he is bound to preserve the right, title and interest of the mortgagor and to prevent any invasion of that right by a stranger.

The mortgagor having put the mortgagee in his stead in the possession of the property enjoys immunity and believes that so far as his possession is concerned his interest will be protected by the mortgagee. Therefore if the mortgagee has either by neglect or in collusion allowed any other person to come into possession of the property, there will be, in my opinion, no invasion of the rights of the mortgagor and when the time for redemption arrives he will be entitled to treat the stranger as a trespasser, and the stranger's right by adverse possession will not commence against the mortgagor unless and until the mortgagor had exercised his right of redemption and had redeemed the property. This is the case of a complete possession where no right of possession is exercised by the mortgagor.

There may, however, be cases where the mortgagor and the mortgagee are both in possession of the property in accordance with the arrangements arrived at by them and set forth in the covenant in the bond. The possession of the mortgagee consists in the appropriation of the usufruct of the property and that the usufruct may be enjoyed by both mortgagor and mortgagee for the usufruct and the income of the property might far exceed the interest in lieu of which the mortgagee enjoys the possession of the property In such a case the application of the principle which I have tried to lay down above will also be varied: but the principle will apply to that portion of the usufruct which is supposed to be in possession of the mortgagee.

To give a concrete example, I would refer to the facts of the present case where a rent has been reserved to be payable by the mortgagee to the mortgagor. It may be that in some cases the mortgagor may himself be realising from the tenants that portion of the rents and profits which represents the *hakajri*; but that does not affect the principle, though it may be only a question of what amount of evidence will be necessary to prove adverse possession in a stranger.

Therefore I am of opinion that when *hakajri* or rents and profits are reserved by the mortgage and are payable to the mortgagor there is no reason why the principle of adverse possession should not apply, though in order to take advantage of adverse possession it must satisfy all the conditions required for adverse possession, namely, it must be open, hostile and to the knowledge of the mortgagor. A mere non-payment of the *hakajri* or forbearance to realise it for any length of time would not create any adverse possession nor a mere payment of the same to a

(1) (1892) 18 Bom. 51.
(2) (1916) 38 All 1 34 I. C. 171.
(3) (1901) 6 C. W. N 601.
(4 (1879 2 Mad 226.
(5) (1895) 4 Bom. 76.
(6) (1867) 4 Wyman's Rep. 36.
(7) (1737) 1 Atk. 603=26 E. R. 377.

stranger by duress, force or compulsion, unless such payment is made with the knowledge of the mortgagor that it was being paid against his interest.

This therefore necessarily leads to the conclusion that in the case of a mortgagee in possession where *hakajri* is fixed, the circumstances of each case will determine whether there can be any adverse possession or not in a stranger. In the Allahabad case the person claiming by adverse possession had got his name registered in the Revenue Court and that fact alone was said not to constitute adverse possession. In the present case in the attestation proceedings it was held that the Defendants Nos. 3 and 4 were in possession of the property and their names were registered as against the plaintiff. That alone on the view taken by the Allahabad High Court may not be sufficient to create adverse possession in favour of the Defendants Nos. 4 and 5.

Now in this case the money became payable and the right to redeem the property did arise and in fact on the 9th February 1906 the defendants deposited the money due on the *zarpeshgi* and redeemed the property on the 17th February 1906. They are also said to have realised the *hakajrs* due to them, and these facts, the Courts below have held, constituted adverse possession in favour of the Defendants Nos. 4 and 5 and satisfied all the requirements or conditions of a complete and valid adverse possession.

There is a good deal of force in the view taken by the learned Judicial Commissioner. I, however, find that the question of adverse possession becomes much stronger in the Defendants Nos. 4 and 5 by reason of the result of the litigation in the rent suit in 1893 when the possession of the property was delivered through Court to Tilakdhari in the presence of the Plaintiff.

This fact has not been noticed by either of the Courts below nor is it urged in the arguments at the Bar. Tilakdhari, the plaintiff says, had no right to be in possession and if he got possession in 1893, he was a trespasser from that moment; that possession was delivered in a case where the plaintiff was a party and consequently it was open and hostile.

Taking all these circumstances into consideration I would in this case hold that the Plaintiff lost his title, if any, by adverse possession. Therefore I would dismiss the appeal with costs.

Ross, J.—I agree.

Appeal dismissed.

A. I. R. 1923 Patna 597.

JWALA PRASAD AND ROSS, JJ.

Karshan Bhaban Chatalia—Judgment-debtor-Petitioner

v.

Indra Narayan Chandra—Decree-holder-Opposite Party.

S. A. No. 987 of 1922, decided on 9th April, 1923.

(*a*) *Civil Pro. Code*, O. 41, *R.* 5—*Conflicting allegations—Balance of convenience to be looked to.*

In an application by the judgment-debtor for stay of execution pending the disposal of the appeal, the judgment debtor alleged that on the land in question stood his coolie shed and tram lines for the purpose of working colliery and the opposite party denied the existence of any coolie shed or the tram lines.

Held, that the balance of convenience lay in staying the execution and delivery of possession of the property in dispute pending the disposal of the appeal on the judgment-debtor furnishing sufficient security for the restitution of the same to the decree-holder in the event of the appeal being dismissed. [P. 598, C. 1.]

(*b*) *Practice—Procedure*—Ex parte *order for delivery of possession not to be made*—*Civil P. C.*, O 21, *r.* 35

An important order such as order for delivery of possession should not be passed *ex parte* and the signature of pleader should invariably be taken in column 4 provided for in the order-sheet for the purpose. The special column provided for in the order-sheet is particularly meant to guard against any injustice being done by an *ex parte* order behind the back of a party. [P. 599, Cs. 1., 2.]

(*c*) *Practice—Case sent back from High Court—Parties must be given notice of receipt of record.*

It is the usual practice of notifying to the parties the receipt of the record when it goes back from the High Court in order that the parties may be apprised of it and take necessary steps. [P. 599, C. 2]

A. B. Mookerjee—for Petitioner.

S. C. Muzumdar—for Opposite Party.

Order.—This is an application by the judgment debtor for stay of execution pending the disposal of the appeal in this Court. The opposite party decree-holder resists this application. The disputed property is a

piece of land about 10 *kathas* in area. The judgment-debtor says that on the land in question stand his coolie shed and tram lines for the purpose of working his colliery. The opposite party denies the existence of any coolie shed or the tram lines. It is true that in face of the extraordinary statements made on behalf of the parties it is not possible to be certain as to whether the coolie shed and the tram lines stand on the land in dispute. If, however, they do exist, the judgment-debtor will be put to substantial injury and loss if the decree-holder removes them after getting possession of the property in dispute.

According to the case of the opposite party, the land is practically *parti* and therefore no loss would accrue to the opposite party if the delivery of possession is stayed pending the disposal of the appeal. Any undertaking on behalf of the decree-holder not to change "the outlook and sight of the land" in dispute will be of no avail if, as he says, there is nothing on the land in question.

Considering the circumstances of the case we are satisfied that the balance of convenience lies in staying the execution and delivery of possession of the property in dispute pending the disposal of the appeal on the judgment-debtor furnishing sufficient security for the restitution of the same to the decree-holder in the event of the appeal being dismissed. We, therefore, set aside the order of the Registrar and direct that the execution be stayed as aforesaid. The Court below will determine the amount of security necessary for the purpose.

The learned Vakil on behalf of the decree-holder, however, contends that there is no occasion now for the stay of the delivery of possession inasmuch as possession of the property has already been delivered to the decree-holder. To this the learned Vakil on behalf of the judgment-debtor replies that the circumstances in which the delivery of possession was effected will justify this Court to ignore the said delivery of possession and to restore *status quo ante* and direct the possession to be delivered back to the judgment-debtor. These circumstances are as follows:—

On the 26th February 1923 the learned Registrar refused the application of the judgment-debtor for stay of the execution. The judgment-debtor shows by an affidavit filed in this Court that the order in question was not passed in the presence of his Vakil, and that neither he nor his Vakil was aware of the said order until the 1st of March 1923 when the order was shewn to his Vakil. This allegation is not refuted and is in fact supported by the note made by Mr. Abani Bhusan Mukharji, Vakil of the petitioner, in the order sheet on the 1st March 1923. His note was "The order was never communicated to me. I came to see this order." This note has been penned through and is followed by the word "Seen."

Mr. Mukharji says that he cancelled his note upon the representation of the Deputy Registrar that the order sheet of the High Court should not contain such a note. We do not see any reason why such a note should not have been allowed to be made if what was stated by Mr. Mukharji was a fact. This, however, does not matter for the order was actually seen for the first time by the Vakil on the 1st March 1923. Therefore till then the learned Vakil was ignorant of the order.

Mr. Mukharji states that he immediately wired to his client asking him to come and take necessary steps in order to move this Court against the order of the Registrar, on the 5th March The High Court was notified to be closed on the 3rd, 4th and 5th March on account of holy festival, but at the eleventh hour the dates were changed into 2nd, 3rd and 4th March. Thus 2nd of March became a holiday and consequently nothing could be done by the petitioner to move this Court against the order of the Registrar until the Court re-opened on the 5th of March.

An application of the petitioner was filed to the Court against the order of the Registrar on the 5th March and was disposed of on the 6th March. In that order the Court admitted the application and directed notice to be issued to the opposite party, granting *ad interim* stay of execution of the decree pending the disposal of the application. In the meantime the order of

the Registrar rejecting the judgment-debtor's application for stay passed on the 26th February 1923 was communicated and received by the lower Court on the 23th of February, although the order was not shown to the petitioner's Vakil, as stated above, until the 1st of March. On receipt of the order of the Registrar the lower Court directed the execution to proceed and the issue of processes for delivery of possession fixing the 19th March 1923. This order was, however, not passed in the presence of the judgment-debtor or his pleader. The order sheet does not bear the signature of the judgment-debtor or his pleader.

The petitioner has sworn in his affidavit that he or his pleader was not aware of the aforesaid order. The order sheet does not contain the signature of the judgment-debtor or his pleader. The result was that possession was delivered to the decree-holder on the strength of the aforesaid order on the 5th March 1923, before the judgment-debtor could obtain an order of this Court on the 6th March for an *ad-interim* stay of the execution. The judgment-debtor applied to the Court below for stay of execution on the basis of the order passed by the High Court.

In these circumstances we do not think that the delivery of possession can in any way frustrate the petition of the judgment-debtor for stay of execution. It is obvious that the judgment-debtor was ignorant of the order passed by the Court below on the 28th February and that order cannot in any way prejudice him. The order of the 28th of February was an important order. It was an order after a lapse of time during which the application of the judgment-debtor for stay of execution was pending in this Court.

It has been pointed out more than once that an important order such as the present one should not be passed *ex parte* and that the signature of pleader should invariably be taken in column 4 provided for in the order sheet for the purpose. In the present case there were stronger reasons why the order should not have been passed behind the back of the petitioner and without his knowledge or that of his pleader. The special column provided for in the order sheet is particularly meant to guard against any injustice being done by an *ex parte* order behind the back of a party. In the case of *S. M. Sudevi Devi* v. *Sova-am Agarwallah* (1), where there was no provision relating to notice to be given to a party concerned, Woodroffe J. held that notice should have been given. He further said that it was an elementary principle that no order should be made in favour of one party against and to the prejudice of another unless that other had an opportunity of showing that it should not be made.

I remember to have followed and adopted the dictum of Woodroffe J. in some cases and I still adhere to the view and consider the dictum a salutary one, vide *Gour Chandra Ray* v. *Janardhan Thakur* (2) and *Ram Sukhol Pathak* v. *Kesho Prasad Singh* (3).

Therefore the order of the 28th February and the delivery of possession given to the opposite party must be considered to be null and void, and cannot in any case give any right to the decree-holder in the property in dispute to the prejudice of the judgment-debtor as in the case of *S. M. Sudevi Devi* v. *Sova-am Agarwallah* (1). The possession delivered to the decree-holder in pursuance of the order must be set aside and the property delivered back to the judgment-debtor.

I would further point out to the Munsif the usual practice of notifying to the parties the receipt of the record when it goes back from the High Court in order that the parties may be apprised of it and take necessary steps. The aforesaid elementary rules of procedure should always be kept in view and the non-observance of the same works, as it has done in the present case, great hardship to the parties.

I would therefore invite the attention of the learned Munsif specially to the rules and the authorities referred to above.

The result is that execution and the delivery of possession are stayed pending the disposal of the appeal upon the judgment-debtor furnishing secu-

(1) (1905) 10 C. W. N. 806.
(2) A. I. R. 1923 Pat 180.
(3) (1918) 3 P. L. J. 218=48 I. C. 925=4 P. L. W. 75 (F.B.)

rity to the satisfaction of the Court below for restitution of the same in the event of the appeal being dismissed. In the circumstances of the case we direct that the opposite party would pay two gold mohurs to the applicant as the hearing fee.

Application allowed.

A. I. R. 1923 Patna 600.

JWALA PRASAD AND ADAMI, JJ.

Bhuneshwari Prasad Singh and others —Appellants

v.

Kishen Dayal Bhagat and others—Respondents.

M. J. C. No. 155 of 1922, decided on 15th February, 1923.

Civil P. C., S. 151—Court can grant certificate for refund of Court Fees on appeal which was returned.

The High Court has inherent power to grant a certificate for renewal or refund of the value of stamps used on a memorandum of appeal which was returned to the appellants, on the ground that it was not properly stamped. 3 P. L. J. 452 Foll. [P 600, C. 2.]

Jagannath Prasad—for Appellants.

Order.—This is an application on behalf of the appellants for the grant of a certificate for renewal or refund of the value of stamps worth Rs. 1,627-8-0 used on a memorandum of appeal which was returned to the appellants by the order of this Court dated 22nd November 1922, because the memorandum of appeal was not properly stamped.

An application was made to the Collector of Patna for renewal or refund of the stamps used on the memorandum of appeal, but he refused the application by his order of the 6th of December, 1922.

The appellants then moved the Commissioner, who by his order of the 11th of January, 1923, directed the petitioners to obtain a necessary certificate for renewal from the Taxing Officer of this Court. Hence the application to this Court, and the matter has been referred to us by the Taxing Officer.

According to the view of the Stamp Reporter the case is not governed by any rule, and that rule 28 does not apply inasmuch as that rule is applicable only to fees chargeable under S. 3 of the Court Fees Act and the memorandum of appeal in the present case does not come under that section. Even if here be no rule, this Court has inherent power under S. 151 of the Code of Civil Procedure to grant the certificate asked for, as was held We note case of *Chandradhari Singh* v. *Prasad Singh* (1). That decision was based upon the decision of the Calcutta High Court in the case of *Harihar Guru* v. *Ananda Mahanty* (2). No doubt, a different view has been taken in the Allahabad High Court, but, in our opinion, we should follow the decision of this Court and the Calcutta High Court where the practice seems to have grown up from the earliest time; *vide, In the matter of Mr. G. H. Grant* (3).

We, therefore, direct that the certificate asked for be granted by the Taxing Officer of this Court.

Certificate granted.

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(1) (1918) 3 P. L. J. 452=46 I. C. 271=1918 P. H. C. C. 278.
(2) (1913) 40 Cal. 965=20 I. C. 193.
(3) (1870) 14 W.R. 47.

[*The End.*]