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1926

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Puisne Judges:

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THE

ALL INDIA REPORTER

1926 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 1926 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 1926 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 1926 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 1926 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 5 PATNA.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 5 Patna=All India Reporter

ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.
1	1925 *P* 474	157	1926 *P* 197	281	1926 *P* 263	452	1926 *P* 302	578	1926 *P* 299		
8	1926 " 162	168	" " 255	290	" *PC* 2	461	" *PC* 31	585	" *PC* 56		
13	1925 " 581	171	" " 279	306	" *P* 409	464	" *P* 367	595	" *P* 305		
20	1926 " 256	198	" " 17	312	" *PC* 9	465	" " 384	631	1927 " 140		
23	" " 259	205	" " 258	326	" *P* 330	468	" " 474	634	1926 *PC* 79		
25	" " 176	208	" " 251	341	" " 239	476	" " 438	646	" *P* 582		
33	1925 " 717	211	" " 249	346	" " 362	480	" " 364	714	1927 " 38		
40	1926 " 184	216	" " 237	350	" " 1	488	" " 418	721	" " 46		
46	" " 42	221	" " 336	361	" " 218	496	" " 458	726	1926 " 416		
58	1925 *PC* 203	220	" " 141	393	" " 485	505	" " 351	735	" *PC* 60		
63	1926 *P* 232	229	1927 " 59	398	" " 274	511	" " 320	746	" *P* 427		
80	" " 130	233	1926 " 504	404	" " 260	513	" " 337	755	1927 " 23		
96	1925 " 743	238	" " 253	415	" " 465	520	" " 433	759	1926 " 401		
106	" " 727	243	" " 292	433	" " 359	533	" " 424	765	1927 " 1		
110	1926 " 214	249	" " 205	441	" " 192	536	" " 493	768	1926 " 528		
118	" " 148	255	" " 246	445	" " 497	539	" " 321	678	1927 " 35		
128	" " 40	262	" " 81	447	" " 400	573	" " 535	777	" " 61		
135	1925 *PC* 280	276	" " 289	450	" " 368						

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Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1926 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.

1926 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	1926 *P* 205	86	1926 *P* 274	138	1926 *P* 335	228	1926 *P* 416	300	1926 *J* 116
4	" " 246	89	" " 81	139	" " 316	236	" " 421	302	" *P* 516
9	" " 411	97	" " 276	142	1925 " 618	241	" " 481	303	" " 564
11	" " 89	99	" " 423	145	1926 " 321	246	" *J* 166	305	1927 " 9
13	" " 211	100	1925 " 822	158	" " 432	249	" *P* 478	310	1926 " 337
16	" " 525	102	1926 " 334	160	" *J* 183	254	" " 444	314	" " 499
19	" " 197	103	" " 277	161	1927 *P* 135	256	" " 461	321	" " 438
24	" *J* 88	105	" " 258	167	1926 " 440	258	" " 495	323	1927 " 25
29	" *P* 156	106	1925 " 717	176	" " 493	261	" " 487	327	1926 " 474
34	" " 241	110	1926 " 267	178	" " 404	264	" " 460	332	1927 " 57
37	" " 239	113	" " 288	183	" " 353	265	" " 430	333	1926 " 457
40	1925 " 691	114	1925 " 727	187	" " 348	267	" " 449	338	1927 " 97
42	1926 *J* 138	117	1926 " 295	190	" " 299	274	" " 427	342	" " 92
44	1925 *P* 540	118	" " 356	195	" " 364	279	" " 514	344	" " 93
49	1926 " 218	121	1927 " 90	199	" " 340	282	" " 359	349	" " 7
65	" " 260	123	1926 " 273	207	" " 347	286	" " 512	353	" " 114
70	" " 17	125	" " 296	210	" " 385	288	" " 403	358	" " 105
74	1925 " 755	129	1925 733	220	" " 395	290	" " 569	362	1926 " 549
81	1926 " 504	134	1926 " 291	223	" " 369	293	" " 561	381	1927 " 113
83	" " 266	137	" " 140	225	" " 401	298	" " 605	388	1926 " 464

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7 Patna Law Times=All India Reporter.

PLT)	A. I. R.	PLT)	A. I. R.	PLT)	A. I. R.	PLT)	A. I. R.	PLT)	A. I. R.
1	1926 *P* 71	114	1926 *P* 81	257	1926 *P* 162	381	1925 *P* 534	499	1926 *P* 207
4	1925 " 544	124	1925 " 480	259	" " 29	383	1926 " 302	501	" *PC* 56
9	" " 473	127	1926 " 423	260	1925 " 748	388	1925 " 706	507	1925 *P* 787
11	1926 " 55	129	1925 " 602	264	1926 " 164	391	1926 " 256	524	1926 " 296
14	1925 " 381	134	1926 " 257	267	" " 180	392	" " 147	529	" " 462
19	" *PC* 213	136	" " 170	269	1925 " 581	393	" " 192	530	" " 525
22	1926 *P* 28	138	1927 " 90	272	1926 " 36	396	" " 232	532	" " 266
25	1925 " 702	140	1926 " 165	275	1925 *PC* 257	407	" " 351	535	" " 457
27	" " 591	145	" " 156	280	" *P* 615	410	" " 143	540	" " 461
30	1926 " 287	150	" " 87	285	" " 689	415	1925 " 577	542	" " 446
35	" " 181	153	" " 33	287	" " 712	420	1926 " 358	547	" " 187
36	" " 34	156	" " 67	288	1924 " 589	424	1925 " 138	552	" " 70
39	" " 62	158	" " 77	291	1926 " 27	425	1926 " 241	553	" *PC* 79
42	" " 14	161	1925 " 576	293	" *J* 182	428	" " 168	561	" *P* 148
45	" " 137	163	1926 *PC* 9	295	" *P* 154	431	1925 " 765	567	" " 316
47	1925 " 820	170	" *P* 268	299	" " 122	441	1926 *J* 138	570	" " 444
49	" " 818	175	1925 " 441	304	" " 214	443	" *P* 346	573	" " 255
52	1926 " 17	178	1926 " 253	310	" " 76	445	" *J* 88	575	" *PC* 93
57	" " 40	183	" " 184	313	" " 218	449	" *P* 292	577	" *P* 330
61	" " 194	186	1925 " 551	330	" " 160	453	" " 239	587	" " 425
65	" " 53	188	1926 " 130	333	" " 209	456	1925 " 807	589	" " 432
67	1925 " 784	199	" " 25	335	" " 400	461	1926 " 274	591	" *PC* 46
71	1926 " 80	203	" " 269	337	" " 318	463	" " 258	599	" *P* 537
73	1925 " 796	209	1925 " 585	340	" " 141	465	" " 205	602	" " 519
75	" " 597	213	1926 " 246	343	1925 " 755	468	" " 202	604	" " 542
79	1926 " 244	218	" " 560	350	1926 " 533	473	1925 " 477	608	" " 499
82	1925 " 674	220	1925 " 692	353	1924 " 628	478	" " 737	622	" " 178
87	" " 547	223	1926 *PC* 2	355	1926 " 42	481	1926 " 57	625	" " 210
90	1926 " 190	233	1925 *P* 743	362	" " 78	483	" *PC* 60	626	" " 518
95	1925 " 822	239	" " 797	367	" " 566	491	" *P* 409	628	" " 504
97	" *PC* 280	253	" " 549	372	1925 " 677	495	" " 259	631	" " 356
111	" *P* 494	256	1926 " 162	375	1926 " 197	496	" " 398		

7 Patna Law Times=All India Reporter—(*Concld.*)

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.
684	1926 *P* 362	677	1926 *P* 277	734	1925 *P* 623	779	1926 *P* 421	804	1926 *P* 547
641	" " 527	679	" " 321	737	1927 " 45	784	" " 485	807	" " 299
642	" " 251	695	" " 305	739	" " 135	788	" " 397	811	" " 516
644	1925 " 810	716	" " 368	746	1926 " 276	793	" " 320	812	" " 493
657	" " 678	717	" " 213	747	" " 549	794	" " 367	815	" *PC* 105
661	1926 *PC* 94	719	" " 427	768	" *J* 174	795	" " 462	821	" *P* 582
664	" *P* 404	724	" " 474	770	" *P* 464	797	1927 " 44	870	" " 363
671	" " 436	730	" " 89	772	" " 267	798	1928 " 411	871	" " 503
673	" " 211	732	" " 399	775	" " 545	801	" " 358	873	" *J* 188

27 Cr. L. J. & 91 to 98 Indian Cases=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. 1926 Lahore.**

Table No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1926 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, 1926 PATNA. Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

A. I. R. 1926 Patna=Other Journals.

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	1925 *P H C C* 271	31	4 *Pat* 693	57	7 *P L T* 481	89	1926 *P H C C* 11
	6 *P L T* 731		6 *P L T* 802	58	26 *Cr L J* 1475		95 *I C* 187
	90 *I C* 732		88 *I C* 923		89 *I C* 1043		7 *P L T* 730
	5 *Pat* 350	32	6 *P L T* 768	61	90 *I C* 273	90	4 *Pat* 824
5	26 *Cr L J* 1589		26 *Cr L J* 1248	62	7 *P L T* 39		6 *P L T* 598
	90 *I C* 661		88 *I C* 864		89 *I C* 992		90 *I C* 65
9	1925 *P H C C* 281	33	90 *I C* 262	64	90 *I C* 489	94	1925 *P H C C* 289
	6 *P L T* 787		7 *P L T* 153	67	26 *Cr L J* 1287	102	90 *I C* 728
	90 *I C* 895	34	26 *Cr L J* 1394		89 *I C* 151		7 *P L T* 256
14	7 *P L T* 42		89 *I C* 706		7 *P L T* 156	103	4 *Pat* 799
	90 *I C* 454		7 *P L T* 36	68	89 *I C* 1020		90 *I C* 513
16	3 *Pat L R* 111	36	26 *Cr L J* 1559	70	26 *Cr L J* 1504	109	4 *Pat* 752
	6 *P L T* 797		90 *I C* 439		90 *I C* 160		91 *I C* 476
	88 *I C* 397		7 *P L T* 272	71	7 *P L T* 552	112	89 *I C* 913
17	7 *P L T* 52	37	89 *I C* 863		7 *P L T* 1	122	1925 *P H C C* 353
	90 *I C* 553	40	5 *Pat* 128		89 *I C* 702		92 *I C* 617
	1926 *P H C C* 70		7 *P L T* 57	73	4 *Pat* 766		7 *P L T* 299
	5 *Pat* 198		90 *I C* 680		92 *I C* 179	125	90 *I C* 769
20	6 *P L T* 620	42	5 *Pat* 46		7 *P L T* 362	128	90 *I C* 217
	92 *I C* 874		1925 *P H C C* 298	76	90 *I C* 757	129	89 *I C* 886
	27 *Cr L J* 362		90 *I C* 871		7 *P L T* 310	130	5 *Pat* 80
23	7 *P L T* 22		7 *P L T* 355	77	1925 *P H C C* 317		1925 *P H C C* 254
	89 *I C* 822	47	90 *I C* 325		90 *I C* 785		91 *I C* 169
25	26 *Cr L J* 1565	49	88 *I C* 820		7 *P L T* 158		7 *P L T* 188
	90 *I C* 445	51	26 *Cr L J* 1511	80	7 *P L T* 71	137	7 *P L T* 45
	7 *P L T* 199		90 *I C* 295		90 *I C* 352		90 *I C* 1
27	4 *Pat* 704	53	7 *P L T* 65	81	7 *P L T* 114	139	26 *Cr L J* 1627
	91 *I C* 483		26 *Cr L J* 1462		1926 *P H C C* 89		90 *I C* 928
	7 *P L T* 291		89 *I C* 1030		5 *Pat* 262	140	6 *P L T* 859
28	90 *I C* 82	54	90 *I C* 708		27 *Cr L J* 641		92 *I C* 350
29 (1)	26 *Cr L J* 1289	55	7 *P L T* 11		94 *I C* 593		1926 *P H C C* 187
	89 *I C* 153		88 *I C* 989	87	1925 *P H C C* 338	141	1925 *P H C C* 357
	7 *P L T* 259	57	26 *Cr L J* 1502		90 *I C* 622		92 *I C* 629
29 (2)	90 *I C* 329		90 *I C* 158		7 *P L T* 150		5 *Pat* 228

A. I. R. 1926 Patna=Other Journals—(*Contd.*)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
141	7 P L T 340	194	7 P L T 61	253	27 Cr L J 512	302	27 Cr L J 849
143	90 I C 799		90 I C 244	255	5 Pat 168	305FB	5 Pat 595
	7 P L T 410	196	6 P L T 799		96 I C 13		96 I C 791
146	6 P L T 860		27 Cr L J 142		7 P L T 573		7 P L T 695
	92 I C 2		91 I C 814	256	5 Pat 20	316	1926P H C C 139
147	1925P H C C 359	197	5 Pat 157		93 I C 999		94 I C 705
	92 I C 626		1926P H C C 19		7 P L T 391		27 Cr L J 657
	7 P L T 392		90 I C 862	257	7 P L T 134		7 P L T 567
148	5 Pat 118		7 P L T 375		98 I C 351	318	7 P L T 337
	1925P H C C 805	202	4 Pat 696	258	5 Pat 205		96 I C 623
	90 I C 812		93 I C 935		1926P H C C 105	320	5 Pat 511
	7 P L T 561		7 P L T 468		94 I C 10		96 I C 446
152	90 I C 777	205	1926P H C C 1		7 P L T 463		7 P L T 793
154	1925P H C C 330		5 Pat 249	259	5 Pat 28	321	1926P H C C 145
	90 I C 739		94 I C 826		93 I C 1001		94 I C 433
	7 P L T 295		7 P L T 465		7 P L T 495		5 Pat 539
156	1926P H C C 29	207	4 Pat 723	260	1926P H C C 65		7 P L T 679
	90 I C 929		93 I C 932		5 Pat 404	330	5 Pat 326
	7 P L T 145		7 P L T 499		94 I C 624		94 I C 273
159	90 I C 834	209	92 I C 900	263	5 Pat 281		7 P L T 577
160	1925P H C C 315		4 Pat 688		7 P L T 170	334	1926P H C C 102
	90 I C 847		7 P L T 333		93 I C 1001		94 I C 103
	7 P L T 330	210	3 Pat L R 339	266	1926P H C C 83	335	1926P H C C 138
162	5 Pat 8		95 I C 293		94 I C 31		95 I C 441
	90 I C 817		7 P L T 625		7 P L T 532	336	5 Pat 221
	7 P L T 257	211	1926P H C C 13	267	1926P H C C 110		96 I C 206
164	1925P H C C 324		95 I C 273		27 Cr L J 609	337	94 I C 284
	91 I C 799		27 Cr L J 753		94 I C 353		5 Pat 513
	7 P L T 264		7 P L T 673		7 P L T 772		1926P H C C 310
165	1925P H C C 333	218	3 Pat L R 341	269	7 P L T 203		7 P L T 788
	7 P L T 140		95 I C 303		95 I C 1036	340	1926P H C C 199
	90 I C 790		7 P L T 717	273	1626P H C C 123		96 I C 188
168	26 Cr L J 1611	214	5 Pat 110		94 I C 510		6 Pat 51
	90 I C 715		7 P L T 304	274	5 Pat 398	346	7 P L T 443
	7 P L T 428		93 I C 963		1926P H C C 86		96 I C 115
170	4 Pat 783		27 Cr L J 499		94 I C 36		27 Cr L J 867
	7 P L T 136	218	1926P H C C 49		7 P L T 461	347	1926P H C C 207
	27 Cr L J 9	FB	7 P L T 313	276	1926P H C C 97		96 I C 221
	91 I C 41		93 I C 939		94 I C 209		27 Cr L J 909
171	6 P L T 540		5 Pat 361		7 P L T 746	348	1926P H C C 187
	85 I C 852	232	5 Pat 63	277	1926P H C C 103		27 Cr L J 841
173	4 Pat 795		93 I C 884		94 I C 229		95 I C 761
	93 I C 986		7 P L T 396		7 P L T 677	351	7 P L T 407
	27 Cr L J 522		27 Cr L J 484	279	5 Pat 171		5 Pat 505
	7 P L T 622	237	5 Pat 216		96 I C 509		96 I C 242
175	90 I C 621		7 P L T 30		27 Cr L J 957	353	1926P H C C 183
176	5 Pat 25		93 I C 146	288	1926P H C C 113		95 I C 867
	6 P L T 833		27 Cr L J 418		94 I C 553		7 P L T 801
	27 Cr L J 235	239	1926P H C 37	289	5 Pat 276	356	1926P H C C 118
	92 I C 219		93 I C 303		94 I C 765		94 I C 750
180	3 Pat L R 270		5 Pat 341	291	1926P H C C 134		7 P L T 631
	92 I C 184		7 P L T 453		94 I C 506	358	7 P L T 420
	7 P L T 267	241	1926P H C C 34	292	5 Pat 243		95 I C 935
181	7 P L T 35		93 I C 300		7 P L T 449		27 Cr L J 855
	90 I C 74		7 P L T 425		94 I C 890	359	5 Pat 433
182	26 Cr L J 1498	244	7 P L T 79		27 Cr L J 698		1926P H C C 282
	90 I C 154		93 I C 40	295	1926P H C C 117		96 I C 627
184	5 Pat 40		27 Cr L J 392		94 I C 558	362	5 Pat 346
	90 I C 822	246	1926P H C C 4	296	1926P H C C 125		95 I C 396
	7 P L T 183		7 P L T 213		94 I C 714		27 Cr L J 796
187	94 I C 929		5 Pat 255		27 Cr L J 666		7 P L T 684
	7 P L T 547		94 I C 841		7 P L T 524	363	1926P H C C 223
190	1925P H C C 311	249	5 Pat 211	299	1926P H C C 190		96 I C 1036
	7 P L T 90		94 I C 22		27 Cr L J 611		6 Pat 64
	90 I C 687	251	5 Pat 208		94 I C 355		7 P L T 870
192	1925P H C C 348		94 I C 19		5 Pat 578		1926P H C C 195
	92 I C 177		7 P L T 642		7 P L T 807	364	5 Pat 480
	7 P L T 393	253	7 P L T 178	302	7 P L T 383		95 I C 1051
	5 Pat 441		5 Pat 238		5 Pat 452	367	5 Pat 464
			93 I C 976		95 I C 929		

A. I. R. 1926 Patna=Other Journals—(*Concld.*)

A I R	Other Journals	A I R	Other Journals	A I R	Other Journals	A I R	Other Journals
367	96 *I C* 528	424	5 *Pat* 533	474	5 *Pat* 468	524	96 *I C* 587
	27 *Cr L J* 976		98 *I C* 254		96 *I C* 287	525	1926 *P H C C* 16
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PATNA HIGH COURT

★ A. I. R. 1926 Patna 1

ADAMI AND SEN, JJ.

Baijnath Rai and *others*—Defendants —Appellants.

v.

Mangla Prasad Narayan Sahi and *others*—Respondents.

Appeal No. 849 of 1922, Decided on 23rd June, 1925, from the Appellate Decree of the Sub-Judge, Muzaffarpur, D/- 10th June, 1922.

★ (a) *Hindu Law—Succession, effect of—Heirs whether male or female are bound to maintain those whom last holder was bound to maintain—Maintenance includes marriage expenses.*

Where a person takes a property, either by inheritance or survivorship, he is legally bound to maintain those whose maintenance was a charge upon it in the hands of the last holder. A female heir is under exactly the same obligation to maintain the members of a family as a male heir would be by virtue of succeeding to the same estate. The obligation extends even to the King when he takes the estate by escheat or by forfeiture. The duty of the person who inherits is to provide for the maintenance, education, marriages, sradhs and other usual religious expenses of the co-parceners and of such members of their family as they are, or were, when alive, legally or morally bound to maintain. [P 3 C 1]

★ (b) *Hindu Law—Reversioner has no interest in the estate—Compromise with reversioner does not bind reversionary body and is wholly void.*

The interest of a Hindu reversioner has been defined as *spes successionis*, that is, a mere possibility of succession. Such a possibility gives no interest to the reversionary heir in the estate of the deceased, present or future, vested or contingent; (45 Cal. 590 (P. C.) and 6 Pat. L. J. 604, Foll.) An alienation by way of compromise entered into between a limited owner and persons who had no *bona fide* claim to the property at the time of the compromise is not binding on the reversioners: 3 Pat. L. J. 83, *Foll.* [P. 5 C. 1]

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

L. N. Singh and *L. K. Jha*—for Respondents.

Sen, J. —The appellant instituted a suit out of which this appeal arises for redemption and possession of certain specified shares in the properties set out in the plaint which he alleged were in wrongful possession of the defendants first party. The following facts appear to be undisputed, the questions raised being only as to the character and legal effect of some of the transactions:

Upon the death of one Ram Ratan Singh the family property, except certain parcels which went to widows in lieu of their maintenance, came into the hands of one Dhuna Singh, his grandson, by his son Maniar Singh. Subsequently on the death of Dhuna Singh the estate went by inheritance to his mother Musammat Ramdularee Kuer, the widow of Maniar Singh. On the 11th April 1896 Ramdularee executed a mortgage bond (Ex. 8) for Rs. 1,000 in favour of one Jagarnath Sahi, cousin of Durga Prasad Narain Sahi (the father of the plaintiff). By this mortgage bond the Musammat purported to hypothecate 12 annas of Tauzi Nos. 2345 and 2346 by way of security for the loan which she purported to raise for defraying the expenses of marriage of Musammat Ramsumaree Kuer with the plaintiff. Musammat Ramsumaree was the son's daughter of Johnti Singh, the elder brother of Maniar Singh. On the 19th August 1897 an ex parte decree was obtained on foot of the mortgage above mentioned and the properties mortgaged brought to sale and purchased in the name of Jagarnath Sahi. On the 16th November 1898 Dhanpat Singh, the

next reversioner instituted a suit being Suit No. 110 of 1898 challenging the mortgage in favour of Jagarnath Singh and all proceedings based thereon. This suit was compromised and the result was that on the 22nd August 1889 an ekrarnama (Ex. 11) was executed whereby Jagarnath Sahi relinquished his claim to 12 annas of tauzi O. S. 2345 and 2346 and accepted a third share of the estate subject to all debts and liabilities of Dhuna Singh. Ramdularee also took one-third and Dhanpat Singh, the next reversioner, took the remaining one-third share. On the 24th September 1899 Jagarnath sold his entire interest by kobala (Ex. 1), to plaintiff for a consideration, it is alleged, of Rs. 3,500. Hence the plaintiff claims to have become entitled to the shares in the mauzas claimed in the suit.

Then came another set of transactions which brings us to the immediate cause of the plaintiff's suit. The plaintiff alleges that on the 18th September 1909 he and the then presumptive heir Dhanpat Singh borrowed a sum of Rs. 1,995 from Bechan Sahi, father of defendant No. 9, and Basist Sahi, defendant No. 10, and executed a zerpeshgi bond in respect of the tauzi Nos. compromised within the estate of Dhuna Singh in favour of Bechan and Basist Narain. It is said that out of the sum of Rs. 1,995 the plaintiff got Rs. 595 only and Basist Narain the balance of Rs. 1,400. Thereafter Dhanpat Singh, the presumptive reversioner, died and his son Ramparichan Singh came into possession of all his estate. He applied for mutation of his name before the Collector, the application was opposed by the actual reversioners of Dhuna Singh who are the defendants first party in the suit, (for by that time Mt. Ramdularee had died and succession had opened to the reversioners). On the 28th November 1918, it is alleged by the plaintiff, a collusive and fraudulent ekrarnama was entered into between Ramparichan Singh and the defendants first party, whereby the defendants first party got a portion of the zerpeshgi property, and on the strength thereof, on the 14th March 1919 collusively got the entire amount of zerpeshgi, that is, Rs. 1,995 deposited in Court in the name of the creditors, that is, the defendants third party, without the knowledge of the plaintiff, and defendants third party collusively withdrew the said bond money rom the Court and gave up possession of the zerpeshgi property to them. Hence the plaintiff was denied the opportunity of depositing his proportionate share of the debt. As a result the defendants first party got possession of the entire zerpeshgi property and are still in possession thereof. On the facts above mentioned the plaintiff prayed for a declaration that he was entitled to get possession of his share of the properties given in zerpeshgi on payment of his share of the debt and for a decree for a redemption and possession in his favour. The defendants first party, the present reversioners, were the contesting defendants. They assailed the mortgage (Ex. 8) as unsupported by any legal necessity and the transactions entered into under Ex. 8, Ex. 11 and Ex. 1 as being void and of no effect as they were alleged to be parts of a device to deprive the reversioners of their just right and to divide up the estate between the limited owner Ramdularee and the presumptive owner Dhanpat Singh. They alleged that Jagarnath was a mere farzidar of Ramdularee and no interest passed under the ekrarnama (Ex. 11) to Jagarnath and consequently none passed to the plaintiff under the sale deed (Ex. 1). As regards the zerpeshgi deed dated the 18th September 1909, their case was that it was really a transaction entered into by Ramdularee in the name of the plaintiff and Dhanpat Singh for the purpose of paying up the debts of Dhuna Singh due to Gopal Sahi and others; that they were just debts of the last male holder and, therefore, binding on the reversioners and on the estate; that the allegation of the plaintiff that a portion of the zerpeshgi money was due from him was utterly false; that upon the death of Dhanpat his son Ramparichan realised that the estate had passed to the defendant first party, the present reversioners, and he thereupon saw the necessity of executing the ekrarnama dated the 28th November 1918 to discharge the aforesaid debt; that the defendants first party have as such reversioners paid off the zerpeshgi debts and secured possession of the property to which they were justly entitled and that the plaintiff's claim to redemption and possession should be dismissed.

Two main points of law have been put forward before us. First, whether the expenses of marriage of Ramsumaree Kuer could come within the description of legal-

necessity, and consequently whether the mortgage (Ex. 8) or any rights thereunder could be deemed to be valid beyond the lifetime of the limited owner. Secondly, did the ekrarnama Ex. (11) pass a valid title to Jagarnath Singh, or was it invalid and of no effect? Was it a mere device by the limited owner to defeat the right of the reversioners?

As a question of fact it is now beyond all dispute that the amount of Rs. 1,000 which was raised upon the mortgage (Ex. 8) was actually employed on the marriage expenses of Mt. Ramsumaree Kuer. What is disputed is that there was any duty cast upon the limited owner Mt. Ramdularee to defray the marriage expenses of Ramsumaree Kuer out of the estate in her hands. It is urged that the duty of marrying Mt. Ramsumaree lay on Jhonti Singh or, in the last instance, upon Dhuna Singh, the last male holder. It is also urged that directly the estate passed by inheritance to Mt. Ramdularee Kuer it ceased to be bound to pay the marriage expenses of Jhonti's son's daughter. This view appears to me clearly untenable. The true principle, as laid down in the Shastras, is "that where a person takes a property, either by inheritance or survivorship he is legally bound to maintain those whose maintenance was a charge upon it in the hands of the last holder. (see Mayne, Art. 453). A female heir is under exactly the same obligation to maintain the members of a family as male heir would have been by virtue of succeeding to the same estate. The obligation extends even to the King when he takes the estate by escheat or by forfeiture". (See Mayne, Art. 458). In fact, the duty of the person who inherits is to provide for the maintenance, education, marriages, sradhs and other usual religious expenses of the co-parceners and of such members of their family as they are, or were, when alive, legally or morally bound to maintain. Now, Ramsumaree Kuer would easily come within the description of such members as were dependent on the male co-parcener when they were alive. In this view it appears that the mortgage (Ex. 8) was for legal necessity and the mortgagee-decree-holder got a valid right and title to the properties purchased by him at the execution sale.

The next question relating to the validity or otherwise of the ekrarnama (Ex. 11) calls for a somewhat detailed investigation. The Munsif held that the ekrarnama was not supportable on the ground of alienation by Ramdularee for legal necessity nor was it supportable on the doctrine of surrender or renunciation. He further held that Dhanpat Singh, the presumptive reversioner, had no right or interest *in praesenti* in the property which Ramdularee held for life until it vested in him on her death should he survive her. He had no substantial claim on which to litigate with her at the time and that, therefore, the ekrarnama which purported to compromise the matters in dispute and difference between the parties to that suit could not be held to be legally valid. On this ground he held that the plaintiff who derived his title from Jagarnath on foot of the said ekrarnama could not recover possession by redemption of any portion of the estate as against the reversioners. He accordingly dismissed the suit. On appeal the learned Subordinate Judge held that the plaintiff's vendor Jagarnath had derived a good title under the mortgage; that he could not be blamed for suing on it when the mortgage money was not paid; that the ekrarnama whereby Jagarnath relinquished what he had purchased under the decree and took what was given to him as one-third of the estate plus the encumbrance thereon was good and valid so far as Jagarnath was concerned and it conferred a title on him. With regard to the other parties to the ekrarnama he observes: "Whether it operated as surrender or alienation on behalf of the lady in favour of Dhanpat is a different question with which we are not concerned in the present suit." Upon these findings he proceeded to hold that the plaintiff had a right to redeem the zerpeshgi which Dhanpat executed in favour of the defendant third party and he allowed the appeal.

It has been urged before us that a disposition by compromise such as that effected by the ekrarnama (Ex. 11) is perfectly valid as the entire estate was then in the hands of Mt. Ramdularee, and that although a limited owner, she was still the manager and as such manager was quite competent to dispose of the estate to the best of her discretion. The subject of the power of a limited owner to deal with the estate of the last male holder as against the rights of the reversioner was

dealt with very fully in the case of *Rangasami Goundan* v. *Nachiappa Gounden* (1). The Judicial Committee in that case observed:—

"This raises a consideration of the whole subject of the power of a Hindu widow over an estate which belonged to her husband to which she has succeeded either immediately on the death of her husband, or as heir on the death of her own childless son, her husband being already dead. This subject has been dealt with in many cases which are too numerous to cite individually; it has given rise to different currents of judicial opinion, and, as in this case and some others, to actual difference in judicial determination. * * *

It has often been noticed before, but it is worth while to repeat, that the rights of a Hindu widow in her late husband's estate are not aptly represented by any of the terms of English Law applicable to what might seem analogous circumstances. Phrased in English law terms, her estate is neither a fee nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question, become entangled in western notions of what a holder of one or other of these estates might do. On the other hand, what a Hindu widow may do has often been authoritatively settled. Here arises that distinction which as Seshagiri Ayyar, J., most justly observed in the present case, will, if not kept clearly in view, inevitably lead to confusing the distinction between the power of surrender or renunciation which is the first head of the subject and the power of alienation for certain specific purposes, which is the second.

To consider first the power of surrender. The foundation of the doctrine has been sought in certain texts of the Smritis. It is unnecessary to quote them. They will be found in the opinions of the learned Judges in some of the cases to be cited. But in any case it is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree, if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death." (Pages 531 and 532).

At page 536 their Lordships observed: "The result of the consideration of the decided cases may be summarized thus: (1) An alienation by a widow of her deceased husbands estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by Jenkins, C. J., and Mookerjee, J., in the case of *Debi Prosad* v. *Gopal Bhagat* (2).

The question to be considered, therefore is whether the ekrarnama in question can be supported on either of the principles above laid down. There can be no valid contention in this case that the ekrarnama is supportable on the doctrine of legal necessity. On the finding that the mortgage deed was for legal necessity the sale of 12 annas in favour of Jagarnath of Tauzi Nos. 2345 and 2346 may be considered to be valid and binding. But thereafter we find that Dhanpat, the presumptive reversioner institutes a suit against Musammat Ramdularee and Jagarnath for a declaration that the mortgage was not for legal necessity and that therefore the sale was not binding. It was this suit which was purported to be compromised by the ekrarnama (Ex. 11) and by virtue of that ekrarnama each of the three parties to the suit got a third share in the whole estate. The transaction has to be looked into from different points of view. Firstly, had Dhanpat at that time any right or interest in the property in

(1) [1919] 42 Mad. 528=46 I.A. 72=26 M.L.T. 5=36 M.L.J. 493=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.).

(2) [1913] 40 Cal. 721=17 C.W.N. 701=19 I.C. 273=17 C.L.J. 499 (F.B.).

regard to which he instituted the suit ? True he was entitled as presumptive reversioner, to institute a suit for a declaration, but was he under any circumstances entitled to a share in the property ? The interest of a Hindu reversioner has been defined as *spes successionis*, that is, a mere possibility of succession. Such a possibility gives no interest to the reversionery heir in the estate of the deceased present, or future, vested or contingent. This principle is supported by various rulings among which may be mentioned the case of *Amrit Narayan Singh* v. *Gaya Singh* (3) ; *Musammat Bhagwati Kuer* v *Jagdam Sahay* (4). On this principle it has also been laid down that, an alienation by way of compromise entered into between a limited owner and person who had no *bona fide* claim to the property at the time of the compromise is not binding on the reversioners, *Anud Narain Singh* v. *Mahabir Prasad Singh* (5). Therefore it is clear that the ekrarnama in question offends the principle laid down in these rulings on account of the fact that it purports to give Dhanpat Singh, who had no interest in præsenti at the moment a third share in the whole estate which he was clearly not entitled to.

Secondly, looking at it from the point of view of the limited owner, Musummat Ramdulari Kuer, the question that has to be considered is whether she purported to efface herself completely and to operate her own death as it were by relinquishing the entire estate and consequently accelerating the interest of the consenting heir This she clearly did not do, for she purported to take under the ekrarnama one-third of the estate. It is urged before us that this share in the estate was given to her in lieu of her maintenance. It is doubtful, if she could do so, but the matter does not arise at all inasmuch as there is no evidence on the record, nor does it appear to have been contended at any stage of the proceedings that the share that she took was by way of her maintenance. On this ground it appears to me to be quite clear that the ekrarnama is illegal and invalid as against the right of the actual reversioners. The learned Subordinate Judge seems to think that it is not necessary to consider whether the ekrarnama operarted as surrender or alienation on behalf of the lady in favour of Dhanpat, but that it is sufficient to consider as to whether Jagarnath got a valid title under it. Such a piecemeal consideration of the ekrarnama is wholly unwarranted. It is either valid or invalid and if it be invalid, it must be held to be invalid in respect of all the parties. That being so, the conclusion is irresistible that Jagarnath never got a valid title under the ekrarnama and that therefore the plaintiff is not entitled to any relief.

This decision will not in any way prejudice such rights as the plaintiff or his vendor Jagarnath might have in respect of Tauzi Nos. 2345 and 2346 which Jagarnath purchased at auction in execution of his mortgage decree.

The appeal must therefore be allowed with costs. The judgment and decree of the learned Subordinate Judge must be reversed and the judgment and decree of the learned Munsif restored.

Adami, J.—I agree.

Appeal allowed.

(3) [1918] 45 Cal. 590=45 I. A. 35=23 M.L.T. 142=22 C.W.N. 409=27 C.L.J. 296=34 M.L.J. 298=4 P.L.W. 221=16 A.L.J. 265 =(1918)M.W.N.306=7 L.W. 581=44 I.C. 408=20 Bom. L.R. 546 (P. C.)

(4) [1921] 6 P. L. J. 604=62 I. C. 933=2 P. L. T. 471.

(5) [1917] 3 P.L.J. 83=42 I.C. 95=3 P.L.W. 295.

✻ A. I. R.1926 Patna 5

MULLICK AND JWALA PRASAD JJ.

Pershad Tewari and others—Appellants.

v.

Emperor—Respondent.

Criminal Appeal No. 68 of 1925, decided on 4th June 1925, from the decision of the Sessions Judge, Saran, dated 25th March, 1925.

✻ (a) *Criminal trial—Sessions trial—Defence having a counter case should give evidence and should not rely on the discrepancies in prosecution evidence.*

It is advisable that when persons who are accused of serious charges in the Sessions Court have a counter case and have also to give some substantive evidence in support of it, they should produce that evidence and not rely on the chance of finding discrepancies and loopholes in the prosecution evidence. [P. 6, Col. 2.]

✻ (b) *Crim. Pro. Code S. 210—Prosecution not producing all material witnesses—Committing Magistrate should call them himself.*

It is not sufficient for committing Magistrates to say that a *prima facie* case has been made out

and thus to relieve themselves of further responsibility. If the prosecution did not send up all the material witnesses it is the committing Magistrate's duty to examine them himself in order to determine which side was speaking the truth. [P 8, Col. 2]

(c) *Criminal trial — Prosecution case not proved—Accused should be acquitted.*

Where the prosecution fails to prove its case as laid, the accused are entitled to acquittal.

S. P. Varma and *B. P. Jamuar*—for Appellants.

Assistant Govt. Advocate—for the Crown.

Mullick, J.—About 6 A. M. on the 21st November last Ram Bodhan in the course of a quarrel in his village received an injury on the head from the result of which he died at 2 o'clock on that night in the hospital at Chapra. Within 4 hours of the assault his son Awadh-Bihari lodged an information before the Sub-Inspector of Mirzapur thana which is about 7 miles away stating that early in the morning a buffalo, belonging to the appellant Kuldip had trespassed into the mustard field of his father and that his father had seized the buffalo for the purpose of impounding it. Kuldip came and protested and there was then a struggle. The appellant Ram Prasad, who is the brother, and the appellant Nathuni, who is the nephew of Kuldip, were standing by with lathis and came to the assistance of Kuldip. The result was that Ram Bodhan was struck by Ram Prasad and Nathuni on the head 5 or 7 times. Awadh Bihari who was in his house 63 paces off, came up running and Kuldip gave him a thrust with the spear-head of his lathi in the forearm. Thereupon the appellants went home with the buffalo and Ram Bodhan was carried home by his relatives and by prosecution witness Ram Parsan Ojha. That was the story put forward by Awadh Bihari in his first information to the police.

At or about the same time that Awadh Bihari lodged his information, the appellants Ramprasad and Nathuni also appeared at the thana and laid a counter information to the effect that at 6 A.M. that morning the wife of Ram Prasad had had a quarrel with the wife of Ram Bodhan in a rahar field to the east of Ram Prasad's house and that Ram Bodhan, Awadh Bihari and Awadh-Bihari's brothers Mahadeo and Sita Ram, and Ram Bodhan's brother Jeo Bodhan had come to the place with lathis and that when Ram Prasad and Nathuni interfered to protect Ram Prasad's wife, they assaulted Ram Prasad most severely. Nathuni was also alleged to have been assaulted at the same time. Strangely, how Ram Bodhan and Awadh Bihari came by their injuries was neither asked nor explained.

After recording the two informations, the Sub-Inspector sent Ram Bodhan, who had been brought on a stretcher by Awadh Bihari, to the Chapra hospital. He also sent Awadh Bihari, Ram Prasad and Nathuni to the same place. The Sub-Inspector arrived at the place of occurrence on the evening of the same day. On the following morning he began an investigation, but it does not appear that he did anything substantial. At 10 a.m. he received news that Ram Bodhan had died in hospital the previous night. But although the case had thus assumed a graver aspect he did not consider it his duty to make any serious investigation and he left the village that night. On the 23rd or 24th he did not go to the village at all and I must express my surprise that in a case of this description where there was a complaint and a counter-complaint and where everything depended upon a speedy investigation for ascertaining which side was telling the truth, the police took no action whatever for two days. However on the 25th November, the Sub-Inspector returned and took up the investigation in earnest. In the result he decided upon sending up the appellants for trial and upon keeping the counter-case pending till the disposal of this case.

Now the case must be decided upon the evidence adduced for the prosecution. The defence have called no evidence and have as usual run a grave risk in not doing so; but it seems hopeless to impress upon those who are accused of serious charges in the Sessions Court, that it is necessary when they have a counter-case to give some substantive evidence in support of it and that it is generally most dangerous for them to rely on the chance of finding discrepancies and loopholes in the prosecution evidence. However, it is fortunate for the appellants in this case that there are circumstances in the prosecution evidence which induce us to hold that the real assault took place not under a mohua tree near the mustard field but near the well to

the east of Ram Prasad's house as alleged by the defence.

The prosecution witnesses are first of all a man named Bansi. He states that he was going out for a necessary purpose early in the morning and he saw the assault. On the morning of the 22nd when the Sub-Inspector took up the investigation he declined to make any statement whatsoever though pressed to do so. He did not show the Sub-Inspector the mohua tree where two drops of blood were found on the 25th November by the Sub-Inspector. It is strongly contended on behalf of the prosecution that the presence of these two blood stains at that place conclusively establishes the truth of the prosecution story. But the unfortunate part of it is that Bansi did not at the earliest moment disclose this important piece of evidence before the police. On the contrary the Sub-Inspector states that Bansi and Awadh Bihari's brother Mahadeo and the appellant Kuldip went with the Sub-Inspector to the well and there pointed out large patches of blood on the ground and that they allowed the Sub-Inspector to take it as admitted that the well was the place where the fatal assault was committed. In these circumstances it is impossible to accept Bansi's present statement that nothing took place at the well and that Ram Bodhan and Awadh Bihari received their injuries near the mohua tree. The distance between the two places is not less than 97 paces and there can be no ground for contending that the places were so close that the discrepancy was not considered by Bansi to be material.

The next witness for the prosecution is Ram Parsan Ojha. This witness states that he also was going out for a necessary purpose and when he was at a distance of 15 or 16 laggas from Rama Bodhan he saw Ram Prasad and Nathuni striking him 4 or 5 times on his head with their lathis. He says that Ram Bodhan spun round on receiving the first blow and that the other blows were delivered after he fell. According to him Awadh Bihari arrived after his father fell and received his injury because he remonstrated.

The remaining eyewitness is a Rajput named Kali Singh. Now this man states that he was coming from his village which is to the north of Nautan to fetch some labourers whom he wished to employ. He also corroborates Ram Parsan but it is evident that he and the other two witnesses have attempted in the Sessions Court to make a much more definite case against Ram Prasad than they did before the police. They now stated that they are confident that Ram Prasad struck the fatal blow; but before the police they were not quite clear that Ram Prasad struck the fatal blow and the suggestion then made was that Nathuni and Ram Prasad were responsible jointly for the injury from which Ram Bodhan died.

In the case of Ram Parsan and Kali Singh, the same difficulty arises as to the occurrence at the well. They ignore all knowledge of any assault at that place and it is clear that they cannot be accepted as impartial witnesses who have come forward to tell the whole truth. Evidence has been given that on the 17th November Awadh Bihari had impounded two cows belonging to Kuldip and that on the 21st October Awadh Bihari's brother Sitaram had impounded another cow belonging to Kuldip. An attempt was made to show that the pound keeper was perjuring himself, but I do not think that attempt has succeeded. In my opinion the learned Judge was right in accepting the allegation that the feelings between the parties had been strained for some time and that shortly before the occurrence Awadh Bihari's family had twice seized Kuldip's cattle and impounded them. That, however, was not the immediate motive for the occurrence of the 21st November.

The question then is whether we are to accept the story told by Ram Prasad in the counter-information. It is obvious that there was no delay in putting forward this story, and, reading the account, it seems to me to be a much more natural one than that told by Awadh Behari himself and to be more consistent with the circumstances proved in this case. The allegation is that 2½ years ago Ram Prasad was suspected of an intrigue with one of the daughters of Ram Bodhan in consequence of which he had to go away to Calcutta. He had returned from Calcutta three months before the occurrence, but the old feud was still continuing and on the morning in question a sudden quarrel broke out between the wife of Ram Bodhan and the wife of Ram Prasad. I do not think a story of this kind would have been easily invented having regard to the fact that the

appellants are Brahmins by caste. Awadh Bihari himself and the other prosecution witnesses stoutly deny that Awadh Bihari had a sister called Sudama and that any such intrigue was ever suspected. He maintains that he had two sisters both of whom died 8 or 10 years before the occurrence. The concoction of a story of this kind requires time and as there was no delay at all in going to the police. I think on the whole that it furnishes a better explanation for the assault than that put forward by the prosecution. That being so, the question is whether the blood patches near the well were the result of a fight as alleged by the defence. On this point we have the fact that Ram Prasad had no less than 11 injuries, 3 of which were lacerated wounds. His nose appears to have been very severely damaged and the other two lacerated wounds must have also bled considerably. Nathuni had three injuries, one of which was a lacerated wound, and although it had been contended by the Crown that the above injuries were not sufficient to cause copious bleeding, I think the evidence establishes that the blood marks at the well were due to Ram Prasad's and Nathuni's injuries.

On the other hand it is in evidence that Ram Prasad died of a fracture of the skull and that there was no external wound from which any blood could have flowed. The only injury on his side from which blood could have come was Awadh Bihari's which was a trifling one and which certainly could not have produced the copious patches which the Sub-Inspector found near the well. On the 25th November two small spots of blood under the mahua tree were pointed out to the Sub-Inspector. They were about the size of a 4-anna bit each and the earth was scraped up and sent to the Chemical Examiner and the report is that they were caused by human blood. But it has to be remembered that on the 22nd November when the Sub-Inspector first came to the village, Bansi did not point either the place or the marks to him and in the circumstances the suggestion that the blood was subsequently put there for the purpose of creating evidence should, I think, be accepted. Therefore we have now the position that while the account given by the defence has much to support it, the evidence for the prosecution is so deficient that it cannot be safely accepted for the purpose of convicting the appellants. If the prosecution case is substantially true, then they have only themselves to thank for its failure.

In this connexion I think it necessary to point out that it was the duty of the Committing Magistrate to make some investigation into the truth of their story before he committed the appellants to the Sessions Court. It is not sufficient for Committing Magistrates to say that a prima facie case has been made out and thus to relieve themselves of further responsibility. If the police did not send up all the material witnesses, it was the Committing Magistrate's duty to examine them himself in order to determine which side was speaking the truth. Here two clear cut cases were put forward by the respective sides and from the police diaries we find that there were apparently independent witnesses to support the account given by the appellants, and the learned Magistrate might with very little trouble have reached the conclusion that it was advisable to try the counter-case first and to keep the present case pending. If that procedure had been adopted, the appellants would either have been discharged or committed for trial with all the material evidence at the service of the Sessions Court.

Therefore, in these circumstances, being unable to say that the case put by the prosecution is a true account of the manner in which Ram Bodhan came by his injuries, I think there must be an acquittal.

The learned Judge has set out the various submissions made to him at great length, but he has not met them by an adequate discussion of the evidence nor referred to the discrepancies between the depositions and the statements before the police, nor has he considered the question whether having suppressed a material part of the prosecution story the eyewitnesses on whom he relies can be trusted in respect of the assault upon Ram Bodhan. He thinks, and evidently the assessors also think so, that the assault took place in both places. But of this there is no evidence at all and we cannot proceed upon mere conjecture.

The result, therefore, is that the convictions and the sentences will be set aside and the appellants will be acquitted and set at liberty.

Jwala Prasad, J.—I agree.

Conviction set aside.

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MILLER, C. J., AND MACPHERSON, J.

Tarni Singh alias *Tomi Singh and others*—Defendants—Appellants.

v.

Satnarain Maharaj and others—Plaintiffs—Respondents.

Appeal No. 1277 of 1922, Decided on the 22nd June 1925, from Appellate Decree of District Judge, Monghyr, D/- the 16th June 1922.

(a) *B. T. Act* (1885), *S.* 5 (5)—*Tenant whether tenure-holder or raiyat—Test is purpose and extent of tenancy.*

In determining whether the status of tenant under the B.T. Act is that of a tenure-holder or a raiyat what has to be considered is (1) the purpose for which the land was acquired and (2) the extent of the tenancy 45 *Cal.* 805. *Foll.*

Where the area exceeds 100 bighas there is under S. 5 (5) of the Act a presumption until the contrary is proved that the tenancy is a tenure. But if the first criterion is established the second does not arise, while if the first is not established the second is conclusive, [P. 11, Col. 1.]

(b) *Civ. Pro. Code, S.* 100—*Question whether tenant is tenure-holder or raiyat under B. T. Act ultimately depends on question of fact.*

Though a substantial question of law may and generally does, arise in determining whether a tenant is a raiyat or a tenure holder, the point depends ultimately on questions of facts. 46 *Cal.* 90 (*P. C.*), *Foll.* [P. 11. Col. 1.]

In second appeal the High Court is not entitled to go behind the findings of fact of the lower Appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure, (19 C. W. N. 270,*Foll.*). Such findings cannot be assailed however gross and inexcusable the error therein if the lower Appellate Court had before it evidence proper for its consideration in support of its finding. 18 *Cal.* 23 (*P. C.*). *Foll.* [P. 11, Col. 1.]

(c) *Landlord and Tenant—Expression "cultivate and get cultivated" does not necessarily indicate a tenure-holder rather than a raiyat.*

A *patta kaulkarar* executed by the darmustajirs in respect of 275 bighas for a period of seven years provided inter alia "it behoves that you cultivate and get cultivated the land in the said village."

Held: that the expression was consistent with the status of the grantee being that either of a rayat or of a tenure-holder. 45 *Cal.* 805 (*P. C.*); 46 *Cal.* 90 (*P. C.*), *Dist.*

(d) *B. T. Act* (1885), *S.* 5 (5)—*Tenant whether tenure holder or raiyat—Reclamation and cultivation by tenant by his own plough is inconsistent with tenant being tenure-holder only.*

Though reclamation of the whole jot by the settlement-holders and cultivation by their own ploughs may not be absolutely inconsistent with a tenure, it is entirely contrary to experience in Bengal in cases where the tenancy is a tenure or the tenant proposes to settle raiyats upon the land and become a rent-receiver, more especially where the settlement-holder belongs to an agricultural caste or tribe. [P 12 C 1]

(e) *B. T. Act* (1885), *S.* 85 (2)—*Lease registered contrary to S.* 85 (2) *through misapprehension of registering officer—No collusion between lessor and lessee to evade the provision—Lease is inoperative beyond nine years.*

Where there is no evidence that lessor and lessee conspired by false or equivocal recitals to evade the provisions of S. 85 (2) the lease that was admitted to registration contrary to the provisions of section 85 (2) through a misconception of the registering officer does not affect the property demised, at any rate beyond the period of nine years. [P. 13, Col. 2]

S. M. Mullick and *N. N. Sinha*—for Appellants.

Sultan Ahmad and *Jagannath Prasad*—for Respondents.

Macpherson, J.—This appeal has been preferred by the defendants first party from the decree of the District Judge of Monghyr in which he affirmed the decree of the Munsif for the ejectment of the appellants and of the defendants second party from the land in suit.

The land in suit is a reputed area of 137½ bighas which, at the time of the cadastral survey was found to be actually 157 bighas, 2 kathas. In the record-of-rights finally published in 1908 the adoptive mother of plaintiff No. 1 and the plaintiff No. 2 who is his natural mother as guardians of their respective minor sons, were entered in the record-of-rights as "*jotdar istimrari lekin mukarrari nahi*," signifying "permanent tenant but not at a fixed rent," the defendants first party, now appellants, as "*dar jotdar istimrari lekin mukarari nahi*" signifying permanent under-tenant but not at a fixed rent," and the defendants second party as occupancy raiyats under the darjotdar. The defendants first party were also entered as in cultivating possession of a portion of the area and as receiving Rs. 350 as rent from defendants second party.

The plaintiffs sued for adjudication that the plaintiff No. 1 is occupancy raiyat of the land in suit; the defendants first party are dar-rayat of the land and not "*dar jotdar istimrari lekin mukarrari nahi*" as shown in the record-of-rights, and the defendants second party have no concern with the land, for khas possession thereof

from the defendants and for mesne profits from Asin 1327.

The case on behalf of the plaintiffs was briefly as follows :

The land in suit was a jot held by Hibharan Singh as an occupancy-raiyat. On the 29th November 1893, the jot was sold in execution of a rent decree and purchased by Nand Maharaj, the right sold being shown as "hak-mokabzat." On the 25th October 1897, Nand Maharaj granted a dar-jot of the jot purchased by him for the years 1305—1311 at an annual rent of Rs. 400 to Khanro Singh, father of Defendants Nos. 1 to 3. This grant is described as thika patta and the grantee as thikadar and as mustajir ; and it is set out that after expiry of the term of the thika patta the thikadar shall not retain possession over the lands in suit without executing a new patta and will give up possession after the expiry of the term or if the grantor sells the land. On the expiry of that patta a new patta, Ex. D-1, for the period 1312—1320 was executed on the 5th February 1904, by Mt. Mini, widow of Jaisa Maharaj, for herself and as guardian of Plaintiff No. 1, and by Plaintiff No. 2 who is the widow of Nand Maharaj for herself and as guardian of Durgapat Maharaj, her son, now deceased. It may be here observed that Jaisa Maharaj and Nand Maharaj were brothers, and Jaiso adopted Plaintiff No. 1, that Plaintiff No. 1 is the sole surviving member of the joint family and that Plaintiff No. 2 has been joined in this litigation merely to avoid future dispute, The patta Ex. D-1 differs considerably from the patta of 1897. The executants set out therein that they "have executed a patta conferring a darkarindgi jot in respect of the land demised for a term of nine years at an annual rental of Rs. 400," and that "objection on the score, of (loss through) inundation, drought, hail and storm will be the concern of you the raiyat," and make provision for renewal which will be quoted and discussed later. The grantee is referred to as "jotdar" and in particular there is no mention of thika, thikadar, or mustajir.

In the record-of-rights of 1908 the lessee is shown as Khanro Singh and Nandlal Singh of whom the former is the father of Defendants Nos. 1 to 3 and the latter (his brother) is the father of defendants Nos. 4 and 5. These five defendant constitute the defendants first party though plaintiffs do not admit that Defendants Nos. 4 and 5 have any concern with the land.

Towards the end of the settlement operations the Banaili Raj, which besides being proprietor of the village had then become the immediate landlord of the plaintiffs' tenancy, applied under S. 105 of the Bengal Tenancy Act for settlement of a fair and equitable rent in respect of it, the tenants having been as will be remembered recorded as "*jotdar istimrari lekin mukarrari nahi.*" The tenant thereupon claimed under S. 105-A to be an occupancy raiyat and that claim was sustained. That decision, however, does not bind either defendants first party or defendants second party as they were not parties to the litigation.

After the expiry of the lease Ex. D-1 in 1913 the plaintiffs sued the defendants for recovery of possession of the leased land and for mesne profits. It was held in appeal that as plaintiffs had realized some rent for 1321, the year after the expiry of the period of the kabuliyat, notice under S. 49 of the Bengal Tenancy Act was necessary before the defendants could be ejected. The suit was accordingly dismissed. The plaintiffs thereafter issued notice upon the defendants first party under S. 49 which was served in 1325, calling upon them to relinquish the land from 1327, and as the defendants first party failed to comply therewith plaintiffs instituted the suit for ejectment out of which this appeal has arisen.

The suit was contested by Defendants Nos. 1 to 5. They contended that they were in fact occupancy raiyats and that in any case the plaintiffs could not in view of the patta of 1904 eject them.

The Munsif decreed the suit holding that Hibharan Singh and therefore the purchaser of his interest, Nand Maharaj, who is now represented by the Plaintiff No. 1 was a raiyat, and that the defendants first party have neither occupancy right nor any permanent right. On appeal the District Judge affirmed the decision holding that the evidence on record established that the tenancy of the Plaintiff No. 1 is raiyati and that the defendants have no permanent tenancy over the land in suit and are liable to be ejected.

In second appeal the decision of the

lower appellate Court is assailed on the following three grounds :

(1) The plaintiff No. 1 has wrongly been held to be of *raiyati* status and entitled on that ground to eject the appellants.

(2) Even if the land is the occupancy holding of the plaintiff No. 1 the defendants first party are not, in view of the terms of the lease of 1904, liable to ejectment since that lease confers upon them a permanent tenancy.

(3) The suit was not within the pecuniary jurisdiction of the Munsif and his decision being void for want of jurisdiction, there should be a remand of the suit to a competent Court for trial.

Now as laid down in *Debendra* v. *Bibhudendra* (1), in determining whether the status of a tenant under the Bengal Tenancy Act is that of a tenure-holder or a *raiyat*, what has to be considered is : (1) the purpose for which the land was acquired, and (2) the extent of the tenancy. In the present case the area exceeds 100 bighas and therefore there is under section 5 (5) of the Bengal Tenancy Act a presumption, until the contrary is proved, that the tenancy is a tenure. But if the first criterion is established the second does not arise, while if the first is not established the second is conclusive.

The finding of the final Court of fact is that the presumptions in favour of the defendants under section 103-B and section 5 (5) of the Bengal Tenancy Act have been rebutted by the evidence adduced by the plaintiffs and though a substantial question of law may, and generally does, arise in determining whether a tenant is a *raiyat* or a tenure-holder, the point, as indicated by Lord Sumner in *Rajani Kant* v. *The Secretary of State* (2), depends ultimately on questions of fact. In second appeal the High Court is not entitled to go behind the findings of fact of the lower appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure (*Uma Charan* v. *Midnapur Zamindari Co.* (3).)

On behalf of the appellants it is contended by Mr. N. N. Singh in regard to the finding on the question of status, *first*, that it is based on a misconstruction of the document of 1876, by which the tenancy of Hibharan Singh was created, and *secondly*, that there is a misapplication of the law inasmuch as the finding that the plaintiff No. 1 is a *raiyat* is based on evidence legally insufficient to support it, or rather that there is no evidence to support the finding.

Now Ex. B, the document of 1876, is a brief *patta kaulkarar* (agreement) in favour of Tekan Singh and Hibharan Singh executed by the *darmustajirs* in respect of 275 bighas for a period of seven years from 1284 at an annual rental of Rs. 221. The only relevant provisions are : "It behoves that you cultivate and get cultivated the land in the said village (*jot wa abad karke wa karake*) and pay the said rent, etc., [literally "It behoves that you (by) doing and getting done ploughing and cultivation (? reclamation) pay the said rent, etc.,"] and "objection on the score of (loss through) inundation, drought and calamities of the sky will be your concern." The learned District Judge held, that the expression "*jot wa abad karke wa karake*" was consistent either with the status of a *raiyat* or the status of a tenure-holder. It is now urged that taken in conjunction with the area of 275 bighas [or even with the moiety of that area held by each of the two lessees, and (as the sale in 1903 of half of the area shows) accepted by the landlord as a separate tenancy] the word "*karake*" points to the grant of a tenure. In my opinion such is not necessarily the case, and it is impossible on that word alone to hold that a tenure rather than a holding is implied, especially when the grantees take from a *darmustajir*. Apart from the fact that the words, "*jot wa abad*" would seem in the word '*abad*" to imply reclamation of the soil in addition to cultivation, the lessees and each of them in his own moiety might well contemplate cultivation of such an area by their (or his) own family or hired servants without any idea of settling *raiyats* upon it. Much the same language was indeed used in the leases discussed in *Debendra* v. *Bibhudendra* (1) and in *Rajani Kant* v. *The Secretary of State* (2), but in those leases there were clear indications that a tenure was intended, and it

(1) [1918] 45 Cal. 805=45 I. A. 67=5 Pat. L. W. 1=27 C. L. J. 548=22 C. W. N. 674=16 A. L. J. 522=23 M. L. T. 384=(1918) M. W. N 379=20 Bom. L. R. 743=46 I. C. 411=35 M. L. J. 214 (P. C.).

(2) [1918] 46 Cal. 90=45 I. A. 190=51 I. C. 226=23 C. W. N. 649 (P. C.).

(3) [1913] 19 C. W. N. 270=26 I. C. 182=20 C. L. J. 11.

was so found by the final Court of fact. The District Judge has in my judgment taken a correct view of the terms of the original lease.

The original lease being inconclusive the attendant circumstances may be looked at to determine the purpose for which the tenancy was created. The learned District Judge found that that purpose was established by three pieces of evidence : (1) the statement of Kamla Singh, one of the original settlement-holders, who deposed that originally the settlement was a *raiyati* one ; (2) the deposition of Tilak Singh who is a nephew of Hibharan Singh and 71 years of age and who stated that the land was jungle at the time of the settlement and that the settlement-holders got the jungle cut and cultivated the land with their own ploughs ; and (3) the mention in the sale certificate of 1893 "that Hibharan Singh judgment-debtor, had '*hak mokabzat*' e. occupancy right in the land sold."

Mr. N. N. Singh strenuously contends that the evidence relied upon by the District Judge is conclusive as to the status of Hibharan Singh and his successor-in-interest and could not, especially as it is not contemporaneous, negative the statutory presumptions arising under Ss. 103-B and 5 (5) of the Bengal Tenancy Act. It is urged that the opinion of the witness Kamla Singh is valueless especially as the area is so large that the reclamation of the land by the lessee is not altogether inconsistent with an intention to settle *raiyats* upon it and so is inconclusive, and that "*hak mokabzat*" is not "occupancy right" as used technically in the Bengal Tenancy Act, but is simply a loose expression meaning "the right to possession."

Now the lower appellate Court had before it the evidence of Kamla Singh which has not been shown to us, and it is therefore impossible to say that he ought not to have relied upon it. Again though reclamation of the whole *jot* by the settlement-holders and cultivation by their own ploughs may not be absolutely inconsistent with a tenure, it is entirely contrary to experience in this province in cases where the tenancy is a tenure or the tenant proposes to settle *raiyats* upon the land and become a rent-receiver, more especially where the settlement-holder belongs to an argicultural caste or tribe. It has also not been shown that from 1876 to the date of sale in 1893 there were any under-tenants. It was only when the "landlord and stamp-vendor," as Nand Maharaj describes himself, came into possession that sub-leasing began. Finally it is not possible to say that in the circumstances the terms "*hak mokabzat*" does not, as the District Judge held, denote, the "occupancy right" of the Bengal Tenancy Act which had been in force for eight years at the time of the sale.

There is no substance in the complaint of the learned Advocate that the defendants' evidence on the subject of status had not been considered. The learned Judge having referred to the presumptions proceeded to examine the nature of the settlement, and as will be seen below the *patta* of 1904 does not throw any light on the character of the tenancy of Hibharan Singh.

Findings of fact of the lower appellate Court cannot be assailed in second appeal, however gross and inexcusable the error therein if, as Lord Macnaghten said in *Durga Chaudhurani* v. *Jawahir Singh Chaudhuri* (4), "the lower appellate Court had before it evidence proper for its consideration in support of its finding." It is impossible to say that the learned District Judge had not before him evidence on which a finding of fact could legally be based that the presumptions in favour of plaintiff No. 1 being a tenure-holder were rebutted and that he is in fact a *raiyat* as he claims to be. The first point therefore fails.

It is next urged that even if the plaintiff No. 1 is a *raiyat* he is not entitled to eject the appellants. In support of this contention reliance is placed on a provision in the *patta* of 1904 which runs as follows :—"When the terms of the *patta* will expire, you again taking a fresh *patta* from us (the executants) will cultivate, and if contrary to this provision you cultivate, then rent will be realized at the rate of Rs. 3 per bigha, the rate for adjoining lands, and if you the *karinda* will all along pay faithfully (? punctually) the rent fixed under the *patta* then the land shall remain in your possession and occupation as before."

There are two branches to the argument. In the first place reference is made to S. 18 of the Bengal Tenancy Act

(4) [1890] 18 Cal. 23=17 I.A. 122=5 Sar. 560 (P. C.).

and it is urged that it is for Plaintiff No. 1 to show that he is not "a raiyat at fixed rates" who is not precluded by S. 85 of the B. T. Act or any other enactment from making such a transfer as is involved in the provision quoted. The plaint, however, sets out that the Plaintiff No. 1 is an occupancy raiyat and presumably an entry to that effect was also made in the record-of-rights under S. 109 D of the B. T. Act after the decision under S. 105 A. The appellants also never asserted that their landlord, Plaintiff No. 1, held his tenancy at fixed rates. Indeed the point was never previously taken and it is not mentioned in the grounds of appeal. It therefore cannot be taken now. But apart from that the implied finding throughout is that the Plaintiff No. 1 is an occupancy raiyat.

The main contention, however, is that the plaintiff is in some manner estopped by the provision quoted from ejecting the appellants. In support of it reliance is placed upon the Full Bench decision of the Calcutta High Court in *Chandra Kanta* v. *Amajad Ali* (5) and it is urged that as in the lease of 1904 the plaintiff's predecessors held themselves out to be tenure holders and so S. 85 (2) of the B. T. Act was not a bar to the registration of the deed of sub-lease, though it purports to create a term exceeding nine years, the grantor, even if a raiyat, cannot now be permitted to derogate from his own grant and eject the grantee to whom he made a permanent grant. This argument manifestly lacks foundation unless it is found that the lessors of 1904 held themselves out as having a right higher than that of occupancy raiyat. The learned District Judge was not satisfied that the pardanashin ladies who executed the deed were even aware of the provision or accepted it. But apart from that finding, I am unable to hold that the executants of the lease of 1904, all professed to have a higher status than the status of a raiyat. The period of nine years is a very common one for a sub-lease by a raiyat and less probable in a grant of an under-tenancy or a raiyati settlement. The word 'raiyat" is indeed used in Ex. B, but only in the stipulation that "objection on the score of (loss through) innundation, drought hail and storm will be the concern of you, the raiyat" which is merely an adaptation of the similar provision in the patta of 1876. The word "raiyat" has here not the usual technical meaning nor any special significance, being merely equivalent to grantee. Manifestly it must be interpreted in conjunction with the definite statement in the deed that the grantors have executed a patta conferring a darkarindgri jot, the literal meaning of which is "a sub-management jot." In the course of the document the term "karinda" signifying "agent" or "manager," is twice used of the grantee. The description in the last sentence of the lessee as "jotdar" must also be read in the light of that description of the tenancy. The lease is perhaps one which might equally be executed by a raiyat or by a tenure-holder, but that is all that can be said in favour of the contention on behalf of appellants. Accordingly it must be regarded as a sub-lease granted by the executants in the capacity which they actually occupied. Plaintiff No. 1 is therefore not estopped from denying that he holds a higher status than that of an occupancy raiyat. Ex. D 1 appears to have been admitted to registration contrary to the provisions of S. 85 (2) through a misconception on the part of the registering officer, and whether the misconception was that the term of the sub-lease granted by a raiyat was not more than nine years, or was that the executants held a tenure, is immaterial. There is cartainly no evidence that lessor and lessee conspired by false or equivocal recitals to evade the provisions of the statute. Ex. D-1 therefore does not affect the property demised, at any rate beyond the period of nine years. The first of the three cases dealt with in the Full Bench decision cited is that which applies to the present circumstances and the raiyat is entitled to eject the grantee upon giving notice under S. 49 (2) as has been done in the present instance. The second point also cannot prevail.

As to the third point the suit was valued at Rs. 1,100 and was instituted in the Court of the Munsiff having jurisdiction to try suits of value not exceeding Rs. 2,000. Objection to the jurisdiction of the Court was taken before the Munsiff. Before the District Judge in appeal the objection was renewed. But the trial by a Court of a

(5) (1921) 48 Cal. 783=25 C. W. N. 4=32 C. L. J. 236=61 I. C. 466 (F.B.)

suit beyond its pecuniary jurisdiction is not in itself a ground for setting aside his order on appeal unless the appellate Court is satisfied that the under-valuation has prejudicially affected the disposal of the suit on the merits. The District Judge recorded that he was not so satisfied. It is, however, now argued that in fact the disposal of the suit on the merits was prejudicially affected because the forum of appeal would on a correct valuation of the suit have been the High Court and not the District Judge, and *Mohni Mohan* v. *Gour Chandra* (6) is cited in support of the contention. That decision does not assist the appellants. Therein it was held that where in a suit tried by a Subordinate Judge the appeal was wrongly preferred to the District Judge in disregard of his pecuniary jurisdiction in appeal, the appeal was incompetent and S. 11 of the Suits Valuation Act, 1887, was inapplicable as in fact the under-valuation prejudicially affected the disposal of the appeal on the merits. In the present case the appeal lay to the District Judge whether the correct valuation of the subject-matter was Rs. 1,100 or was Rs 3,650 as the District Judge found it to be for purposes of assessment of Court-fee. The real plea on behalf of the appellants is that the true valuation exceeded Rs. 5,000 so that the appeal from the decision in the suit would lie to the High Court. But that plea must fail in the first place because it is not taken in the grounds of appeal and in the second place because there is nothing before us which would lead us to hold that the valuation of Rs. 3,650 is erroneous, and the appeal in a suit so valued lies to the District Judge and not to the High Court. The third submission also fails.

I would therefore dismiss this appeal with costs.

Dawson-Miller, C. J.—I agree.

Appeal dismissed.

(6) [1902] 5 P. L. J, 897=56 I. C. 762=1 P. L. T. 390.

★ A. I. R. 1926 Patna 14

DAS AND ROSS, JJ.

Rameshwar Singh Bahadur—Plaintiff —Appellant.

Durga Mandar and others—Defendants—Respondents.

Appeal No. 825 of 1922, Decided on 29th May 1925, against the Appellate Decree of Sub-Judge, Bhagalpur, D/- 26th May 1922.

★ *Hindu Law — Debts — Son's liability— Father undertaking to pay money misappropriated by another—Money misappropriated after having taken lawfully—Son is liable.*

Where the taking of the money itself is not a criminal offence, a subsequent misappropriation by the father cannot discharge the son from his liability to satisfy the debt. The same principle applies where the misappropriation was not made by the father but by a third person and the father undertook to pay the money for such third person In such a case also the son is liable to discharge the obligation: 39 *Cal.* 862, *Appl.*. [P 15, C 2]

Murari Prasad and Sambhu Saran—for Appellant.

Siveshwar Dayal—for Respondents.

Das, J.— This appeal is directed against the judgment of the Subordinate Judge of Bhagalpur, dated the 26th of May 1922, and arises out of a suit instituted by the appellant, the Maharaja of Darbhanga, to enforce a mortgage bond executed by one Adhik Lal Mandar in his favour on the 4th of April 1916.

The plaintiff's case as made out in the plaint is as follows: One Jag Narayan Lal Das was his Patwari and he owed the plaintiff Rs. 1,231-15-9 in respect of the collection made by him on behalf of the plaintiff. The Patwari being unable to pay the amount arranged with Adhik Lal Mandar to execute the mortgage bond in question in favour of the plaintiff. The plaintiff states that there were money-lending transactions between Adhik Lal Mandar and Jag Narayan and that Adhik Lal paid Rs. 200 in cash to the plaintiff and executed a mortgage bond for Rs. 1,031-15-9 in favour of the plaintiff. Adhik Lal Mandar is dead and the suit is now brought against defendant No. 1, the minor son of Adhik Lal, and Billo Mandar his brother. The allegation in the plaint is that the defendants were members of a joint family of

which Adhik Lal Mandar was the karta and that, as such the plaintiff is entitled to enforce the mortgage bond as against the members of the joint family.

The learned Munsif found that the mortgage bond was in fact executed by Adhik Lal Mandar for valuable consideration. According to him Jag Narain Lal misappropriated the sum of Rs. 1,231-15-9 and Adhik Lal executed the mortgage bond in question in consideration of the plaintiff abstaining from taking criminal proceeding as against Jag Narain. On this findings he thought that the mortgage bond could not be enforced as against the defendants, and he dismissed the plaintiff's suit with costs. On the question whether defendant No. 2, the brother of Adhik Lal Mandar, was in any event liable, he came to the conclusion that Billo Mandar was separate from Adhik Lal and could not in any case be liable on a bond executed by Adhik Lal. The plaintiff appealed to the learned Subordinate Judge. That learned Judge agreed with the finding of the Court of first instance on the question whether Billo was joined with Adhik Lal. He thought that there was no consideration for the mortgage bond and that, were Adhik Lal Mandar alive, the plaintiff could not enforce the mortgage bond against him. He also agreed with the finding of the learned Munsif that the defendants could not be made liable on the bond in question, and dismissed the appeal. The plaintiff now comes to this Court.

The finding of the Courts below that Billo Mandar was separate from Adhik Lal Mandar is a finding of fact which is binding on us in second appeal. The plaintiff's suit as against Billo Mandar must accordingly fail.

The next question is whether the plaintiff is entitled to recover the money covered by the mortgage bond from the defendant No. 1. The solution of this question depends on whether what Adhik Lal undertook to pay was tainted with illegality or immorality. The argument on behalf of the respondents in this Court was to the effect that Jag Narayan Lal was guilty of a criminal offence and that, if he had executed the mortgage bond in question, it could not be enforced as against his sons; and that that being so, and Adhik Lal having undertaken to pay the money tainted with illegality or immorality, his son, defendant No. 1, cannot be called upon to pay the debt of his father. There are many decisions in the books on the question how far a Hindu son is under a pious obligation to discharge a debt of his father when such debt consists of money misappropriated by the latter. Here the mortgage bond was not executed by the Patwari, but by Adhik Lal Mandar, who certainly was not guilty of any criminal misappropriation. But the problem is exactly the same, namely, is there any illegality or immorality involved in a transaction of this nature. There is a divergence of judicial opinion on this question; but, as was pointed out by Mookerjee, J., in *Chhakauri Mahton* v. *Ganga Prasad* (1) "the cases might possibly be reconciled if we recognize the distinction between a criminal offence and a breach of civil duty." That learned and distinguished Judge discussed the various cases on the point and came to the conclusion that "Where the taking of the money itself is not a criminal offence, a subsequent misappropriation by the father cannot discharge the son from his liability to satisfy the debt; but the position is different if the money has been taken by the father and misappropriated under circumstances which render the taking itself a criminal offence." I entirely agree with the view taken by Mookerjee, J., in the case to which I have referred which is founded on the decision of the Madras High Court in *Medai Tirumalayappa Mudaliar* v. *Veerabadra* (2).

What then is the position? Jag Narayan was the plaintiff's Patwari. It was his duty to make collections on behalf of the plaintiff and the taking of the money was in the ordinary course of his employment as Patwari and was in no sense a criminal offence. Now what was the position when the money originally came into the hands of Jag Narayan? It was his duty to account for it to the plaintiff and the failure to do so involved on his part a breach of civil duty. It is said that he misappropriated the money; but if he did so, it was a subsequent act, for, as I have said, it was part of his duty to make collections on behalf of the plaintiff. That being so, the son is clearly under a pious obligation to discharge the debt incurred by Adhik Lal Mandar. The plaintiff is, however, not entitled to a mortgage decree, for he has

(1) [1912] 39 Cal. 862=16 C. W. N. 519=12 I. C. 609=15 C. L. J. 228.
(2) [1909] 19 M. L. J. 759=4 I. C. 1090.

not shown that the debt was incurred for the benefit of the family. He is entitled to a decree for the sum of Rs. 1,031-15-9 with interest thereon at 12 per cent. per annum up to the date of this decree. The plaintiff is also entitled to interest at 6 per cent. per annum on his decree up to the date of realization. He is entitled to recover the money out of the entire ancestral property now in the hands of defendant No. 1. The plaintiff will also get his costs throughout from the defendant No. 1.

Ross, J.—I agree.

Appeal allowed.

A. I. R. 1926 Patna 16

DAS AND ADAMI, JJ.

Aghori Koeri and *others*—Appellants.

v.

B. Kishundeo Narayan Mahta and *others*—Respondents.

Civil Appeal No. 88 of 1922, Decided on 23rd April 1925, from a decision of the District Judge, Darbhanga, D/- the 16th January 1922.

Land Acquisition Act (1 *of* 1894), *S.* 11 (3) *and* 30 — *Occupancy lands acquired—Lands not transferable without landlord's consent—Landlord is entitled to a share of the compensation money—Occupancy holding—Acquisition.*

When occupancy lands are acquired the landlord is entitled to some compensation, if there is no custom of transferability without consent of the landlord or if within the next 20 years, the landlord could have enhanced the rent of the lands. [P 16, C 2]

Janak Kishore—for Appellants.

S. M. Mullick, S. N. Bose, Rai Guru Saran Prasad and *T. N. Sahay*—for Respondants.

Adami, J.—This appeal arises out of an acquisition of certain lands for the expansion of the Agricultural Farm at Pusa. The Deputy Collector, in respect of the occupancy lands, awarded full compensation to tenants. The landlords made a reference against this decision to the District Judge and the result was that the District Judge found that out of the compensation paid to the occupancy raiyats one-fourth should be paid to the landlords on the ground chiefly that occupancy holdings were not transferable without the consent of the landlords and on the ground that the landlord was entitled to compensation by reason of his rights of reversion and right to enhance the rents.

Mr. Janak Kishore, on behalf of 72 of the tenants only, raises this question before us, namely whether the landlords were entitled to receive this 25 per cent out of the compensation awarded to the tenants.

Now, the Land Acquisition Deputy Collector in his note of reference stated that the village note mentioned that the holdings were transferable without the landlord's consent and that there was no evidence adduced to show that salami was payable on transfer by the raiyats. The learned District Judge has come to a finding in the opposite direction. He states that the village note does not support the custom of transferability without the landlord's consent and that it has been the custom to pay salami of 25 per cent. on transfer of an occupancy holding. For us to be able to decide this appeal, it is necessary to have before us good evidence both as to the custom of transferability and as to the payment of salami. Such evidence is not on the record. The village note even is not before us although both Courts have referred to it. We have looked at the evidence and it is scanty, and is insufficient to show to our satisfaction whether there is the custom of transferability or not.

For a right decision of this question, whether any amount should be taken out of the compensation awarded to the tenants to be paid to the landlords it is necessary to decide whether the custom of transferability exists. It is also necessary to find out whether the landlords had at the time of the acquisition the right to enhance the rent within 20 years of that date and we must send back this case in order that full evidence may be taken to enable a decision on these points. It has to be remembered that if there is no custom of transferability without the consent of the landlords, the landlords will be entitled to some compensation for the right this implies, and the restriction is detrimental to the tenant's claim to full compensation. If, on the other hand, there is a right of transferability without the consent of the landlord, the landlord will not be entitled to a share in the compensation.

Then as to the question of enhancement if, within the next 20 years, the landlord could have enhanced the rent, as shown by

Maclean, C. J., in the case of *Bhupati Roy Chowdhury* v. *Secretary of State* (1), the landlord would be entitled to some amount of compensation, although, as pointed out by the learned Chief Justice, it will be difficult to estimate the money value of that compensation.

Let, therefore, the case be sent back to the District Judge in order that the following two issues may be decided:—

(1) Whether a custom of transferability without the consent of the landlord exists in the village, and

(2) Whether the landlord had accruing to him within the next 20 years the right to enhance the rent under the Bengal Tenancy Act?

After taking evidence on these issues and coming to a finding, the District Judge will return his finding to this Court. The parties will be at liberty to adduce such evidence as may be necessary to prove their respective cases. The finding should be returned to this Court within two months from the date of the receipt of the record.

Costs will abide the result of the appeal.

Das, J.:—I agree.

Case remanded.

(1) (1907) 5 C.L.J. 662.

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* A.I.R. 1926 Patna 17.

DAS AND ADAMI, JJ.

Ramchandra Singh and others—Appellants

v.

Jang Bahadur Singh and others—Respondents.

Appeal No. 14 of 1923, decided on 27th July, 1925, against the Appellate Decree of the District Judge, Gaya, dated 13th June, 1922.

* *Hindu Law—Alienation by manager for personal benefit is not binding though the manager shares the benefit with the family voluntarily or by agreement.*

It is not in the power of the *karta* of a joint family to bind the joint family by entering into speculative transactions. The question of benefit to the family must be determined by reference to the nature of the transaction, and not by reference to the result thereof, although the result may properly be taken into consideration in determining whether the transaction was one into which a prudent owner would enter. Where a transaction would result in benefit to the manager personally and not to the family, debt incurred for the transaction is not binding. The fact that the manager, either by agreement with the family or voluntarily shares the benefit with the family makes no difference. [P. 19, Cols. 1 & 2.]

S. M. Mullick and *S. N. Roy*—for Appellants.

Hasan Jan and *Kailaspati*—for Respondents.

Das, J.:—Dasarat, Nankhu and Ramlochan were three brothers. Ramlochan died leaving a widow Sahodra Kuer and a son Raghubar Dayal. Bhupnarain cited as defendant No. 1 in this suit is the son of Nankhu. Bishundayal cited as defendant No. 8 is the grandson of Dasarat. Defendants Nos. 2 to 7 are the sons and grandsons of Bhupnarain. Defendant No. 9 is the son of Bishundayal and defendant No. 10 is the son of defendant No. 9. It has been found by the Court below, and the finding is one which is binding on us in second appeal, that Bhupnarain and Bishundayal together with their sons and grandsons constitute a joint family. It has also been found that Raghubar Dayal was separate from Bhupnarain and Bishundayal.

Raghubar Dayal died leaving, according to the case of all the parties, three daughters Phalindra Kuer, Lalpari Kuer and Sabinda Kuer. It was the case of Bhupnarain that Raghubar Dayal died leaving also a son Baburam who died shortly after the death of Raghubar; and that, in the events which happened Sahodra Kuer became entitled to succeed to the properties of Baburam on his death as his grandmother and that the daughters of Raghubar Dayal had no interest in the properties which were once of Raghubar Dayal but which on his death came into the hands of his son Baburam. Bhupnarian contended that he was the reversionary heir of Baburam and would be entitled to succeed to the properties upon the death of Sahodra Kuer. Sahodra Kuer on the other hand contended that Raghubar Dayal died leaving three daughters and she applied in the Land Registration Department for registration of the names of the daughters of Raghubar Dayal who are all minors and whom Sahodra Kuer purported to represent in the matter of that application. On the 20th February 1909 the land registration case was decided against Bhupnarain and on the 27th April 1909 Bhupnarain instituted a title suit as against Phalindra

Kuer, Lalpari Kuer and Sabinda Kuer in substance for a declaration that they as the daughters of Raghubar Dayal had no interest in the estate which was once of Raghubar Dayal and that he was entitled to succeed to the properties on the death of Sahodra Kuer. The suit was resisted by the daughters of Raghubar Dayal; but was ultimately compromised on the 14th February 1912 by which Bhupnarain got 7 *dams* 13 *cowris* out of 10 *dams* 13 *cowris mokarrari* in *Mouza* Senaria and 32 *bighas* of *raiyati* land and the daughters of Raghubar Dayal got 3 *dams* of *mokarrari* in the same village and certain other properties.

In the course of this litigation Bhupnarain had to borrow certain sums of money from time to time from the plaintiffs who are the appellants in this Court. The money was required by Bhupnarain to enable him to prosecute the suit as against the daughters of Raghubar Dayal. Five mortgage-bonds in all were executed between September 1909 and November 1910. Of these, four mortgage-bonds were executed by Bhupnarain and Bishundayal and one was executed by Bhupnarain during the illness of Bishundayal. The suit out of which this appeal arises was instituted by the appellants to enforce these mortgage-bonds as against the entire joint family consisting of Bhupnarain, Bishundayal and their sons and grandsons. The suit was not resisted either by Bhupnarain or Bishundayal; but it was resisted by their sons and grandsons and the only question is whether the plaintiffs are entitled to a mortgage-decree in this suit. It is conceded that they are not entitled to any personal decree as against Bhupnarain and Bishundayal inasmuch as the suit was brought more than six years after the execution of the mortgage-bonds.

The Court of first instance dismissed the suit on the ground that the money was borrowed by Bhupnarain and Bishundayal without any legal necessity. The learned Judge in the Court below has reversed the decision on the ground that the expenditure of the money resulted in a benefit to the joint family and that accordingly the creditors are entitled to a mortgage-decree as against the joint family.

There is one passage in the judgment of the learned District Judge which requires immediate attention. He says: "At the outset I may say that I have not been able to find any authority for the proposition of law advanced by the learned Subordinate Judge, that is, that speculative expenditure will not bind a joint family, however, beneficial be the result. The law would appear to be that the test of the transaction is the question of the actual benefit, and that, if the joint family derived actual benefit from the expenditure incurred by the *kartas*, it would be bound by the expenditure, even though the latter may have been speculative at the outset." I entirely differ from the learned District Judge. It is necessary to remember that "the power of the manager for an infant heir to charge an estate not his own, is under the Hindu Law, a limited and qualified power." I may point out that it is settled law that the power of a *karta* of a joint Hindu family stands on the same footing as that of the manager. In the leading case of *Hunooman-Persaud Panday* v. *Babooee Munraj Koonweree* (1), the position in regard to the power of the manager to charge an estate which belongs to an infant heir is stated in these terms: "It can only be exercised rightly in a case of need, or for the benefit of the estate. But, where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mis-management of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." It is obvious, therefore, that the test which must be applied by the Court in each case is—is it a transaction into which a prudent owner would enter? Now I hold that a prudent owner would never think of entering into a speculative transaction which may benefit him, but which may also cause him loss. The question of the right of the creditor or the liability of the joint family cannot depend upon the spin of the coin or the throw of the dice. I may be possibly taking a very extreme case, but the test, in my opinion, is the same. In *Ram Bilas Singh* v. *Ramnad Singh* (2), the Chief Justice of this Court after pointing out that it is not desirable to lay down any general proposition, which would limit and define the various cases, which might

(1) (1854-57) 6 M. I. A. 393=18 W.R. 81 (n)=2 Suther 29=1 Sar. 552 (P.C.).
(2) (1920) 1 P.L.T. 535=58 I. C. 303=5 P.L.J. 622.

be classed under the term beneficial as used in the cases, said as follows :—" It is clear, however, that all transactions of a purely speculative nature would properly be excluded " I may refer to a passage in my judgment in *Sheotahal Singh* v. *Arjun Das* (3): " I quite agree that the manager of a joint family has no authority whatever to affect or dispose of any portion of joint family property in order to enable him to embark on speculative transaction." In my judgment in that case I conceded that there is a certain element of risk in every business transaction, and if we are to hold that when the business has succeeded and the entire family has benefited by it, we ought not to uphold the mortgage transaction entered into by the manager to enable him to embark on such a business unless the mortgagee satisfies us that the business was bound to succeed and that benefit was bound to accrue to the family, we would necessarily handicap the managers of joint Hindu families and place limitation on their powers, which would have the effect of stopping all business transactions in every Mitakshara family. But it is one thing to say that a manager of a joint Hindu family has complete power to enter into business transactions, where the particular business is part of the ancestral joint family property, it is another thing to say that he has power to enter into speculative transactions I still adhere to the opinion which I expressed in that case that the test is not whether benefit was bound to accrue to the joint family, but it is still necessary for the mortgagee to show that the transaction was one into which a prudent owner would enter, and as soon as this test is laid down we must hold that it is not in the power of the *Karta* of a joint family to bind the joint family by entering into speculative transactions. In my opinion the question of benefit must be determined by reference to the nature of the transaction, and not by reference to the result thereof; although the result may properly be taken into consideration in determining whether the transaction was one into which a prudent owner would enter The proposition rests on principle and is covered by authorities and it is not necessary to pursue the subject.

The question, however, is somewhat different in this case. It is conceded that the creditor must establish that the transaction was for the benefit of the joint family. The money was borrowed and the mortgages were executed to enable Bhupnarain to establish his title to the estate of Baburam. On his own case Bhupnarain was the nearest heir expectant of Baburam on the death of Sahodra Kuer. Bishundayal was one degree removed from Bhupnarain and was not entitled in any case to succeed to the properties of Baburam. If Bhupnarain succeeded in the action he might establish his title to the estate of Baburam, but the joint family of which he was a member would not necessarily participate in the benefit that might accrue to Bhupnarain. What then was the position of the joint family ? Bhupnarain might fail to establish his case in which case his suit would be dismissed and no benefit would accrue to the joint family, but Bhupnarain might succeed. But if he succeeded the benefit would accrue to him and not to the joint family, for it is well established that unless he chose to share the property along with the members of the joint family the fruits of his victory would belong to him and not to the joint family. How can it then be said that the mortgage transactions were for the benefit of the joint family ?

It is said that Bhupnarain has actually made over the property which he gained as a result of his suit to the joint family. That may be so, but the matter rested with Bhupnarain and the joint family could never have compelled him to make over the property to it. Benefit has accrued to the joint family, not as a result of the transactions which are the subject-matter of the suit, but as a result of an act of bounty on the part of Bhupnarain If it be contended that there was an agreement between Bhupnarain and the joint family by which the joint family agreed to finance Bhupnarain in the litigation and Bhupnarain agreed to share the property which was the subject matter of that litigation with the joint family, I would unhesitatingly say that the agreement being of a speculative nature could not bind the joint family.

In my opinion the decision of the learned District Judge cannot be supported. I would accordingly allow the appeal, set aside the judgment and the decree passed by the Court below and restore the judgment and the decree of the Additional

(3) (1920) 1 P.L.T. 136=56 I.C. 879=1920 P. H. C. C. 155.

Subordinate Judge. The result is that the suit is dismissed with costs in this Court and in the Court below. So far as the costs in the Court of first instance are concerned, I agree with the learned Additional Subordinate Judge that each party should bear his own costs.

Adami, J.:—I agree.

Appeal allowed.

A.I.R. 1926 Patna 20.

BUCKNILL AND MACPHERSON, JJ.

Badri Chaudhry and others—Accused-Appellants

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 15 of 1925, decided on 19th March, 1925, against an order of the Sessions Judge, Darbhanga, dated 19th January, 1925.

Crim. Pro. Code, S. 162—Statements of witnesses recorded by investigating officer cannot be used to show that the statements do not assist the story put forward in the first information report.

According to the recently amended provisions of the Crim. Pro. Code, statements of witnesses recorded by the investigating officer can only be used to assist the accused in particular by showing that a witness who in court deposes to certain facts has in such a statement at an earlier stage given an account or made statements which are contradictory to the testimony which he gives in Court. They cannot be used in cross-examining the witnesses not merely to show contradictions but at large for the purpose of showing that the statements did not corroborate or assist the story as put forward in the first information report. [P 21, Col. 2.]

K. B. Dutt, S. P. Varma and *Lakshmi Kant Jha*—for Appellants.

H. L. Nandkeolyar—for the Crown.

FACTS:—This was an appeal made to the High Court by eight persons who were convicted on the 19th January 1925 by the Sessions Judge of Darbhanga of various offences and were sentenced to various terms of imprisonment. When the application for the admission of this appeal came before the High Court (before Mullick and Bucknill, JJ.), their Lordships ordered that, although the appeal should be heard, the appellants should be directed to show cause why their sentences should not be enhanced. This was on the 21st January 1925.

Bucknill, J.:—[His Lordship after stating facts as given above, proceeded:]

Now, the learned Counsel has as his first point strenuously suggested that the story which was put forward by the prosecution as the occasion and cause of the wounding of the deceased, his brothers and Sheikh Banwali was not true. He has pointed out that there is a substantial difference between important features in the first information report which was laid by the deceased man on the 5th August, at the Bahera police station, and a statement which he subsequently made before a Magistrate on the 14th August, when it was seen that his condition of health owing to his having contracted lock-jaw was such that it was probable that he would not recover. The principal feature of difference to which very prominent attention has been drawn by the learned Counsel for the appellants is that in the first information the deceased man undoubtedly states that on the 4th August, it was the third appellant Tirpit who had demanded forced labour from him and upon his refusal had threatened him with serious consequences on the following day. In the statement made by the deceased on the 14th August, it will be seen that the deceased man says that the occurrence on the 4th August, was between himself and the father of the third appellant, namely, Sinalal Chaudhry. The learned Sessions Judge evidently either thinks that there has been some mistake or pays little attention to this discrepancy. I think it is undoubtedly a peculiar matter and it is certainly remarkable that the deceased should have in the first instance spoken of the son (that is to say, the 3rd appellant) as having had words with him on the 4th August, and in the second instance that he should have spoken of the father. There is, however, this to be said that there is no doubt that in the first information report the deceased man speaks of the "malik resident" whilst in the statement which he made on the 14th August, he merely mentioned the name of Sinalal, the father of the man Tirpit Chaudhry, the 3rd appellant, whom however he did mention by name in the first information. I do not pretend to explain how this difference arose but at any rate there can be no doubt that the 3rd appellant's father had only quite recently become the *malik* of the deceased man, who was one of his *raiyats*.

The learned Counsel has also referred to a somewhat remarkable statement which appears to have been made by one Genwa Dusadh, a *chaukidar*, on the 5th August, at the police station at about 3 p.m. It is not quite clear whether the *chaukidar*, at the time he gave the information, was aware that something of the nature of a disturbance had already taken place. But what was taken down in the station diary at the Bahera police station was to the effect that this *chaukidar* had arrived and reported that there was an apprehension of a breach of the peace between Sheikh Mazhar and Sheikh Latif on the one side and Sinalal Choudhry and others on the other side in connection with lands. The learned Counsel has persistently suggested that it was really a dispute about land and not about *begari* which had led up to the affray and he based, in the first instance, one of his arguments in this direction upon what he thought was the fact that although a number of persons had accompanied the deceased man to the *thana* when he gave the first information, yet no person other than the deceased had given the names of any of those who were said to have attacked him. He, therefore, suggested that at that time these persons, such as for instance Jero and Latif, the brothers of the deceased, who undoubtedly were both injured and were certainly present at the occurrence, did not know who had attacked their brother the deceased and subsequently concocted the story which has resulted in the conviction of the present appellants. The learned Sessions Judge does not appear, so far as I can gather, to have examined carefully what these persons did actually say to the Head Constable who took down the first information given by the deceased. However, in this Court we had this document examined and it is found that the contention which was put forward by the learned Counsel for the appellants could not be substantiated; for it is quite clear that those persons who were examined by the Head Constable and who purported to be eye-witnesses did in fact corroborate what had been said by the deceased in his first information. This argument, therefore, that, owing to the lack of corroborative evidence at an early stage of the proceedings little, if any, value can be attached to the first information itself, falls to the ground.

But, it is, I think, at this stage not unimportant to draw attention to the somewhat free use which appears to have been made of these statements to the police officer. It is said that according to the recently amended provisions of the Criminal Procedure Code documents of this character can only be used to assist the accused in particular by showing that a witness who in court deposes to certain facts has in such a statement at an earlier stage given an account or made statements which are contradictory to the testimony which he gives in court. Here, in this case, these statements made to the police appear to have been used in cross-examining the witnesses not merely to show contradictions but at large; and they have been referred to in this Court again at large not merely with the idea of contradicting the witnesses' evidence but rather for the purpose of showing that the statements did not corroborate or assist the story as put forward in the first information report. I, therefore, must observe that it was only when this suggestion that these statements could thus be utilized as a serious attack upon the truth of the first information was made that I thought it desirable that what had actually been stated to the police officer should be seen and scrutinized; and it was, as I have said, then ascertained that the contention which was being put forward was not in fact correct. I am not, however, satisfied that the use which was sought to be made of these statements, both at the trial and in this Court, was justified by the present provisions of the Criminal Procedure Code. The matter, however, need not be pursued here further; because although it is suggested, now somewhat naively, that this Court should not perhaps have examined these documents for the purpose of scrutinizing them in order to see if the argument put forward by the learned Counsel for the appellants was sustainable, yet I can only point out that the examination of these statements by this Court was really rendered necessary by the argument of the learned Counsel for the appellants: an argument which perhaps should not have been listened to.

[The rest of His Lordship's judgment is not material to our report.]

Macpherson, J.:—I agree that this appeal must be dismissed and that the sentences under section 148, I.P.C., are

inadequate and fall to be enhanced as proposed.

I offer a few additional observations.

I agree generally with the careful judgment of the learned Sessions Judge except in two particulars. The first of these is the question of sentence; that has been fully dealt with in the judgment just delivered. The second is his interpretation of the new section 162 of the Code of Criminal Procedure, and his admission in evidence of certain statements made to the investigating officer in the course of the investigation under Chapter XIV of that enactment.

The effect of the amending Act of 1923, which is very great, has not yet been fully appreciated by the Subordinate Courts. Before that enactment came into operation, section 162 merely enjoined that the written record of a statement (not covered by section 32 (1) of the Indian Evidence Act) made by any person to a police officer in the course of an investigation under Chapter XIV should not be used as evidence. The proviso permitted the statement itself to be used in certain circumstances to impeach the credit of the maker when examined as a witness. The new Act has substituted a section which prohibits the use of any such statement (not covered by section 32 (1) of the Indian Evidence Act, 1872) or any record of it whether in a police diary or otherwise or any part of such statement or record *for any purpose* (subject to subsequent provisions of the Code) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. The expression "for any purpose" is very important and there is no sound reason why it should not be given its full value. If the legislature meant merely to prohibit the use of the writing as evidence there was no point in amending the section or substituting the present stringent sub-section (1). It is not merely use as evidence of the statement or of the record thereof that is prohibited by sub-section (1) but use of it for any purpose, unless such use comes within subsequent specific provisions of the Code in that regard. There is for all practical purposes no such provision except in the first proviso to sub-section (1) and in sub-section (2), for section 162 overns also section 172 (2). Sub-section (2) excludes from the operation of the prohibition cases covered by section 32 (1) of the Evidence Act, which do not require consideration in this appeal.

The first proviso to section 162 (1) makes an exception in favour of the accused but it is an exception most jealously circumscribed under the proviso itself. "Any part of such statement" which has been reduced to writing may in certain limited circumstances be used to *contradict* the witness who made it. The limitations are strict: (1) only the statement of a prosecution witness can be used; and (2) only if it has been reduced to writing; (3) only a part of the statement recorded can be used; (4) such part must be duly proved; (5) it must be a contradiction of the evidence of the witness in Court; (6) it must be used as provided in section 145 of the Indian Evidence Act, that is, it can only be used after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction, and there are others. Such a statement which does not contradict the testimony of the witness cannot be proved in any circumstances and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer.

Unquestionably the new sub-section has greatly enhanced the difficulty of trials because it excludes much that was previously admissible as evidence on which the Courts were accustomed to rely. It is unfavourable to the prosecution and to a less, but still considerable, extent to the defence. Experience points to the conclusion that the Courts do apply the provisions against the prosecution but fail to do so against the defence. It is, however, not a sufficient ground for deviating from what is intended to be a rigid rule that such deviation will favour the accused. It is incumbent on a Court loyally to observe the prohibition of the legislature in all cases where it is applicable. The legislature has employed firm language palpably intended to make a clean sweep of the use at a trial of any statement to the police during the investigation, not only in evidence but for any purpose not covered by subsequent provisions of the Code which provisions make but one exceedingly restricted exception. The danger of endeavouring to temper this provision in favour of the defence and to widen the exception is illustrated by the

present case. In the cross-examination of the Head Constable, Bir Prasad, evidence has been admitted of statements to the witness of five prosecution witnesses who accompanied the deceased Sheikh Mazhar to the *thana* and who were examined by him at the outset of the police investigation. Among them are several statements which are not admissible under the proviso to section 162 (1) or otherwise. Upon them the learned Sessions Judge founded the remark in his judgment:

"None of the other witnesses told him that night as to who were the assailants of Mazhar",

which on the record of the trial could only have been arrived at by an inadmissible use of the record of the examination under section 161. If the inadmissible evidence be eliminated from consideration, as it must be, there is no warrant in the record for the remark, which indeed substantially misrepresents the position. Learned Counsel has urged that the question of re-trial should be considered because of the improper admission of such evidence. But under section 167 of the Indian Evidence Act the improper admission of evidence is not of itself a ground for a new trial or reversal of a decision in a case, if it appears to the Court that independently of that evidence there was sufficient evidence to justify the decision. In the present instance the evidence improperly admitted was favourable to the appellants and the elimination thereof only makes more inevitable the decision against them. In reaching this conclusion no use of the police diaries is made which is not warranted by section 172 of the Crim. Pro. Code or in accordance with the views expressed by the Judicial Committee in the case of *Dal Singh* v. *King-Emperor* (1). The only use to which these diaries can be put is to aid the Court in an inquiry or trial. Learned Counsel is aware of the contents of the record of the examination of the witnesses under section 161 and is unable to contend that a fuller utilisation of them in evidence within the limits of the law would at all improve the case for the appellants. [The rest of the judgment is not material for our report].

Appeal dismissed.

(1) (1917) 44 Cal. 876=44 I.A. 137=15 A.L.J. 475=1 P.L.W. 661=19 Bom. L.R. 510=21 C.W.N. 818=26 C.L.J. 13=6 L.W. 71=22 M.L.T. 31=(1917) M.W.N. 522=18 Cr. L. J. 471=33 M.L.J. 555=11 Bur. L.T. 54 =39 I.C. 311=13 N.L.R. 100 (P.C.).

*A.I.R. 1926 Patna 23.

DAS AND ADAMI, JJ.

Lekhraj Mahton—Appellant

v.

Jang Bahadur Singh and others—Respondents.

Appeal No. 301 of 1921, decided on 8th April, 1925, from Original Decree of the Sub-Judge, Monghyr, dated 25th August, 1921.

**Transfer of Property Act, S. 74—Subrogation—No subrogation if there is no redemption—Redemption must be of entire security and not part—Payment by subrogator must be on express agreement with debtor or creditor.*

To entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. Subrogation is by redemption and unless there is redemption subrogation cannot take place. Before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied and not only in part, so that he shall be relieved from all further trouble, risk and expense. (36 Cal. 193, *Foll.*) [P. 24, Col. 2.]

Hasan Jan—for Appellant.

S. N. Roy and *Satyadeva Sahay*—for Respondents.

Das, J.:—The question in this appeal is one of priority. To appreciate the point involved in this case, it is necessary to remember the following transactions:

On the 30th Baisak 1305 the principal defendants executed a mortgage in favour of Ghena Singh as a security for a loan of Rs. 3,700 advanced by Ghena Singh to the mortgagors.

On the 1st Sawan 1305 they executed another mortgage in favour of Ghena Singh as a security for an advance of Rs. 500.

In Kartik 1307 corresponding with the 12th of November, 1899, they executed a *zerpeshgi* patta in favour of Sant Prasad and Ram Lagan. Defendants 7 9 represent the interest of Sant Prasad, and Ram Lagan has been cited as defendant No. 15 in this suit. Sant Prasad and Ram Lagan paid Rs. 600 to the mortgagors and held Rs. 4,400 in their hands for the purpose of paying off the mortgages of Ghena Singh, the sum agreed to be advanced by Sant Prasad and Ram Lagan being Rs. 5,000 in

all. It appears that Ram Lagan did not pay his share of the mortgage money, but Sant Prasad discharged the mortgage bond of the 1st Sawan 1305 by paying Rs. 738-12-3 to Ghena Singh. He also paid Rs. 2,104-3-0 to Ghena Singh in part satisfaction of the mortgage of the 30th Baisak 1305.

Ghena Singh instituted a suit to enforce his mortgage of the 30th Baisak 1305. He obtained a decree and proceeded to sell the property in due course. In order to save the properties from sale, the mortgagor-defendants borrowed Rs. 6,000 from the plaintiff and on the 5th December, 1908, executed a mortgage in favour of the plaintiffs. It is the mortgage of the 5th December, 1908, which is sought to be enforced in this suit and the question is whether defendants 7-9 as representing the interest of Sant Prasad are entitled to priority in respect of the sums of monies paid by them and which form part of the consideration of their mortgage of the 12th November, 1899. The learned Subordinate Judge has decided this question in favour of defendants 7-9 and the plaintiffs appeal to this Court.

In my opinion the decision of the learned Subordinate Judge is erroneous. It is quite true that Sant Prasad paid off the mortgage bond of the 1st Sawan 1305; but by so paying he acquired the rights and powers of Ghena Singh as a second mortgagee, for it is to be noted that the mortgage of the 30th Baisak 1305 was still outstanding. Now Ghena Singh enforced the mortgage of the 30th Baisak 1305. He obtained a decree in due course and put up the mortgaged properties for sale. It was the duty of Sant Prasad under his contract with the mortgagor-defendants to satisfy the mortgage of the 30th Baisak 1305; but he paid Ghena Singh the sum of Rs. 2,104-3-0 in part satisfaction of his claim and failed to pay the balance to him. In these circumstances the mortgagor defendants approached the plaintiffs and took a loan from them to enable them to discharge the mortgage of the 30th Baisak 1305 "keeping intact the encumbrances under the bond dated the 30th Baisak 1305 and the decree in Suit 231 of 1907" which was the suit instituted by Ghena Singh to enforce the mortgage of the 30th Baisak 1305.

I have no doubt whatever that the plaintiff is entitled to priority by virtue of his express agreement with the mortgagor-defendants. It has been pointed out more than once that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. In this case the mortgaged properties were about to be sold. Sant Prasad refused to save the properties although under his contract with the mortgagor-defendants it was obligatory on him to satisfy the mortgage of the 30th Baisak 1305. The plaintiffs thereupon lent money to the mortgagor-defendants in order to save the mortgaged properties and there was an express agreement between them that the plaintiffs should receive and hold an assignment of the debt as security.

But it was pointed out that Sant Prasad not only paid off the mortgage-bond dated the 1st Sawan but also partly satisfied the mortgage of the 30th Baisak 1305. As I have said, by paying off the mortgage bond of the 1st of Sawan Sant Prasad stepped into the position of a second mortgagee. Now in regard to the payment by him of Rs. 2,104-3-0 the position of Sant Prasad is a perfectly hopeless one. It is well established that subrogation is by redemption and unless there is redemption subrogation cannot take place. As was pointed out by Mukerji, J. in *Gurdeo Singh* v. *Chandrikah Singh* (1), "before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied, so that he shall be relieved from all further trouble, risk and expense". In this case the demand of Ghena Singh was not entirely satisfied and in my opinion it is impossible to hold that the defendants 7-9 are entitled to be subrogated to the securities held by Ghena Singh to the extent of Rs. 2,104-3-0 paid by them to Ghena Singh.

I would accordingly vary the decree by discharging the direction of the Court below in regard to "the lien of defendants 7-9 for Rs. 738-3-12 plus the amount that would be left out of Rs. 2,104-3-0 after deducting therefrom the interest on Rs. 1,850 at 14 per cent. per annum from the 25th

(1) (1909) 36 Cal. 193=18 I.C. 913=5 C.L.J. 611

Kartik 1307 to 9th Baisak 1309. The result is that the plaintiff is entitled to the usual mortgage decree with costs both in this Court and in the Court below. We give the defendants six months to redeem. The cross appeal is not pressed and is dismissed.

Adami, J.:—I agree.

Decree varied.

A.I.R. 1926 Patna 25.

MULLICK, J.

Faujdar Rai—Petitioner

v.

King-Emperor—Opposite Party.

Civil Criminal Revision No. 5 of 1925, decided on 14th May, 1925, from an order of the District Magistrate, Champaran, dated 23rd February, 1925.

(a) *Civ. Pro. Code, S. 115—Sub-Deputy Collector refusing application to prosecute—Collector on appeal setting aside the order and making a complaint exercises judicial powers and revision lies—Government of India Act, S. 107.*

Where the Sub-Deputy Collector after inquiry refused the application of the opposite party for prosecution of petitioner under Penal Code, S. 471 but on appeal the Collector set aside the order of the Sub-Deputy Collector and made a formal complaint under S. 200, Crim. Pro. Code, for the prosecution of the petitioner.

Held, that the Collector was clearly acting as a Revenue Court and he was exercising judicial powers in setting aside the order of the Sub-Deputy Collector and in making a complaint under S. 200 and was therefore subject to the superintendence of the High Court and his order is revisable under S. 115, Civ. Pro. Code, as also under S. 107 of the Government of India Act. (6 Pat. L.J. 178, *Ref.*) [P. 25, Col. 1.]

(b) *Crim. Pro. Code, S. 476 — Criminal offence suspected—Facts forming the offence should be determined in the proceedings.*

When a criminal offence is alleged to have been committed in the course of revenue or civil proceedings, the rule is that the facts, upon which the criminal offence is founded, should as far as possible be finally determined in the Civil or Revenue Court. A refusal to follow the rule materially affects the criminal proceedings and amounts to a denial of the right of fair trial. [P. 26, Col. 2.]

(c) *Crim. Pro. Code, S. 476 B—Party prejudicially affected has a right of appeal.*

S. 476-B appears to contemplate that if an appellate Court sets aside the order of the original Court the party prejudicially affected has a right of appeal to the Court to which appeals from that appellate Court ordinarily lie. [P. 27, Col. 1.]

S. P. Varma—for Petitioner.

N. N. Sinha—for Opposite Party.

Mullick, J.:—This is an application in revision against a complaint made by the Collector of Champaran on the 23rd February, 1925, under section 476 of the Criminal Procedure Code against the petitioner Faujdar Rai for his prosecution for offences under sections 471 and 193, I.P.C. It appears that on the 1st July, 1924, the petitioner filed an application for the commutation of his rent under section 40 of the Bengal Tenancy Act before the Sub-Deputy Collector of Champaran. On the same day he filed a patta alleged to have been given to him by the opposite party Reoti Raman Ojha. On the 5th August the petitioner was examined and the patta was tendered in evidence. On the 6th August the opposite party took a certified copy of the patta. On the 20th August the parties having come to an arrangement, the commutation case was withdrawn by the petitioner. On the 26th August the opposite party asked the Sub-Deputy Collector not to return the patta to the petitioner; but by that time it had already been taken back. On the 11th September the opposite party asked the Court to direct the prosecution of the petitioner for offences under sections 471 and 193, I.P.C., but the Sub-Deputy Collector after inquiry refused the application.

On appeal the Collector set aside the order of the Sub-Deputy Collector and, on the 23rd February, 1925, he made a formal complaint under section 200, of the Criminal Procedure Code to the Sub-Divisional Magistrate of Motihari for the prosecution of the petitioner.

The petitioner thereupon appealed to the Divisional Commissioner; but he on the 30th March, 1925, held that no appeal lay.

Now the first question is whether the High Court has any jurisdiction to interfere with the order of the Collector. The Collector was clearly acting as a Revenue Court and he was exercising judicial powers in setting aside the order of the Sub-Deputy Collector and in making a complaint under section 200 of the Criminal Procedure Code. He was therefore subject to the superintendence of the High Court and his order is revisable under section 115 of the Civil Procedure Code. *Ituktu Singh* v. *Emperor* (1) is authority for this view.

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(1) (1921) 6 P.L.J. 178=2 P.L.T. 609=22 Cr. L.J. 408=61 I.C. 643=1921 P.H.C.C. 240.

The Court also has jurisdiction to interfere under section 107 of the Government of India Act. Undoubtedly the Collector had jurisdiction in appeal to set aside the Sub-Deputy Collector's order declining to make a complaint against the petitioner. But in arriving at this result the Collector did not apply his mind to the evidence in favour of the petitioner and therefore he has failed to exercise jurisdiction. Finding that the opposite party had withdrawn from the compromise and instituted criminal proceedings against him, the petitioner renewed his application for commutation and refiled the patta in the Sub-Deputy Collector's Court on the 14th November, 1924. It is suggested that this is not the patta which was filed on the 1st July but the Sub-Deputy Collector states definitely that it is the same patta and that it contains the endorsements made by him on the former occasion; the learned Collector has not considered how a prosecution for forgery can be maintained when there is no trace of any alteration in the document. It is true that a certified copy was issued from the Collector's office on the 6th August in which the plot alleged to have been leased by the patta is described as within Khata No. 226, Khesra No. 1227, while in the original document it is said to be within Khata No. 191 and Khesra No. 279. It is also true that in the certified copy the word "Nij" appears and in the original patta contains the word "Khas". The landlord denies that he ever gave any patta to the petitioner and his case is that the patta which is alleged to have been given in 1901, must be a forgery because the land is described by the number given to it at the revisional survey which took place long after 1901. It is suggested that after taking back the document on or about the 20th August the petitioner altered the revisional survey numbers which were originally in the document into the numbers allotted to the land in the Cadastral Survey which took place before 1901

Now there is no evidence to show that the numbers 226 and 1227 which appear in the certified copy have any relation to the numbers 191 and 279 which now appear in the patta and the object of altering the patta is therefore not clear. Moreover, if, as appears from the evidence, the opposite party was aware on the 21st July, 1924, that the patta contained the Revisional Survey plots and was therefore a forgery, it is not understood why he did not bring that fact to the notice of the Sub-Deputy Collector on the 5th August but allowed the case to be withdrawn on the 20th August without demur; nor is there any explanation why only six days later he asked that the documents by the petitioner should be attached. In my opinion the suspicious conduct of the opposite party has not been considered.

The learned Collector relies upon the statements of his copying staff, but they do not really touch the case. It has not been shown that the document, which was given to the copying staff, was the document now under consideration. On the contrary as there are no marks of alteration on the document, the presumption is that it is not the document which was made over to the copying department for the issue of a certified copy. The petitioner suggests that the copying department were in conspiracy with the opposite party and intentionally inserted the revisional survey plot numbers instead of the numbers on the document, but without going so far it is possible to hold that the copying department were deceived and that they copied out a document which was neither filed nor exhibited by the petitioner.

There is another point which requires notice. The learned Collector was asked to proceed with the commutation case which is now pending in order that the question of the genuineness of the patta might be determined before the criminal law was put in motion against the petitioner; but his order is that the question whether in fact the petitioner is a tenant or not should first be determined by the Criminal Court. This is a reversal of the ordinary procedure and cannot be permitted. When a criminal offence is alleged to have been committed in the course of revenue or civil proceedings, the rule is that the facts, upon which the criminal offence is founded, should as far as possible be finally determined in the Civil or Revenue Court. Here the refusal to try out the commutation case materially affects the criminal proceedings and amounts to a denial of the right of fair trial. This Court is therefore competent to interfere under section 107 of the Government of India Act.

There is a third point raised, namely, that the learned Commissioner was wrong in declining to hear the appeal preferred by

the petitioner. I think the contention must be accepted. Section 476-B of the Criminal Procedure Code (appears to contemplate that if an appellate Court sets aside the order of the original Court, the party prejudicially affected has a right of appeal to the Court to which appeals from that appellate Court ordinarily lie. In this case therefore the Commissioner had jurisdiction to hear the appeal from the order of the Collector and to set it aside if necessary, and I am asked to direct that the criminal prosecution should not proceed till the Commissioner has disposed of the appeal. In my opinion it is not necessary to make any such order as I think I have jurisdiction to interfere under section 115, Civil Procedure Code and section 107 of the Government of India Act. I direct that the order of the Collector be set aside.

The application is allowed but without costs.

Application allowed.

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* A.I.R. 1926 Patna 27.

MULLICK AND KULWANT SAHAY, JJ.

Anant Potdar and others—Applicants

v.

Mangal Potdar—Opposite Party.

Civil Revision, decided on 20th March, 1925.

* (a) *Civ. Pro. Code, O. 41, r. 19—Appeal dismissed for failure to deposit printing Costs—Application for restoration is one for review and not one under O. 41, r. 19—Civ. Pro. Code, O. 47, r. 1.*

* The words " for any other sufficient reason " in r. 1 of O. 47 will cover the case where there is a good ground for not filing the deficit printing costs, and therefore an application to set a sides dismissal of appeal for failure to file printing costs is one for review and not an application under O. 41, r. 19. [P. 28, Col. 1.]

* (b) *Civ. Pro. Code, S. 151—Section does not apply whenever no other remedy is open.*

S. 151 of the Code does not apply in every case in which there is no other remedy. A Court has no inherent power to set aside its own orders whenever it chooses to do so. [P. 28, Col. 1.]

M. N. Rai for *Muhammad Yunus*—for Applicants.

Judgment:—The facts of this case are as follows: On the 20th November, 1924, this Bench made an order in First Appeal No. 86 of 1924 that unless the printing costs were deposited within four days the appeal should stand dismissed without further reference to the Bench. The printing costs were not paid within the time prescribed and the appeal stood automatically dismissed on the 25th November. On the 18th December, 1924, an application was made by the appellant for permission to pay the deficit costs. The stamp affixed upon the application is one of the value of Rs. 3 which would be the proper stamp if the application were regarded as one under Order XLI, rule 19 of the Civil Procedure Code. If, however, the appellant is required to file an application for review of judgment, half the fee payable on the original memorandum of appeal is required and the application is insufficiently stamped.

The earlier decisions of this Court proceed upon the decision in *Fatimunnissa* v. *Deoki Pershad* (1) which held that an application to set aside a dismissal of an appeal for failure to file the necessary list must be regarded as one for review under Order XLVII, rule 1. This authority would seem to govern the present case also and has been followed in the following cases:—

(1) Civil Review No. 36 of 1916, decided on the 8th June, 1917, by Roe and Jwala Prasad, JJ.

(2) M. J. C. 95 of 1918, decided on the 20th June, 1918, by Mullick and Thornhill, JJ.

(3) Review No. 31 of 1920, decided on the 11th August, 1920, by the Registrar as Taxing-Officer.

(4) M. J. C. 35 of 1924, decided on the 30th May, 1924, by Das and Ross, JJ.

(5) Review No. 16 of 1924, decided on the 10th June, 1924, by the Registrar as Taxing-Officer.

On the other hand the following cases since 1923 have taken the view that the appeal can be restored by an application under Order XLI, rule 19, read with section 151 of the Civil Procedure Code:—

(1) Review No. 35 of 1923, decided on the 19th April, 1924, by Jwala Prasad and Foster, JJ.

(2) M. J. C. 24 of 1923 and Review No. 38 of 1923, decided on the 15th April, 1924, by Jwala Prasad and Adami, JJ.

(3) Review No. 30 of 1924, decided on the 20th November, 1924, by the Registrar as Taxing-Officer.

If the decision in *Fatimunnissa* v. *Deoki Pershad* (1) is still good law, then the application under Order XLI, rule 19, does not

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(1) (1897) 24 Cal. 850=1 C.W.N. 21 (F.B.).

lie. From the wording of the rule in question it is difficult to see how it can be applied to a case of default otherwise than by non-appearance. It may be said that the Full Bench decision of the Calcutta High Court was made before the present Code of Civil Procedure when an order dismissing a case by default was considered to be a decree. But it does not appear that the change in the definition of a decree really makes any difference for the purpose of this case.

What the party is really seeking is a reversal of an order, which, if it is not a decree, is certainly a judgment, and if the provisions for review do not apply, then there is no remedy at all given by the Code: Order XLI, rule 19, certainly does not seem to be applicable. We think the words "for any other sufficient reason" in rule 1 of Order XLVII will cover the case where there is good ground for not filing the deficit printing costs. If it does not, then the appellant has no remedy and we do not think section 151 of the Code becomes applicable in every case in which there is no other remedy. It does not appear that a Court has inherent power to set aside its own orders whenever it chooses to do so.

The application has to-day been stamped as an application for review and the necessary deficit fee has been paid. The fee will be kept in deposit and notice will issue upon the opposite party to show cause why the review should not be allowed.

Revision allowed.

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*A.I.R. 1926 Patna 28.

ADAMI, J.

Rajkishore Lal, Nand-Keolyar and others —Petitioners

v.

Alam Ara Begum and another—Opposite Party.

Civil Revision No. 547 of 1924, decided on 23rd March, 1925, from an Order of the Munsif, First Court, Gaya, dated 17th November, 1924.

(a) *Lim. Act, S. 22 (1) and (2)—Defendant made co-plaintiff after limitation—Suit does not become barred.*

It is clear from the provisions of sub-S. (2) of S. 22 that the provisions of sub-S. (1) of the section will not apply where a defendant, who was made such by the plaintiff at the time of the institution of the suit, is transferred in that suit as a co-plaintiff. [P. 28, Col. 2.]

* (b) *Civ. Pro. Code, O. 1, r. 10—Transfer of parties raising value of subject-matter higher than Court's jurisdiction—Court should add parties and return the plaint—Civ. Pro. Code, O. 7, r. 10.*

Where transfer of some co-defendants to the side of plaintiffs raises valuation of the suit beyond the pecuniary jurisdiction of the Court, the Court should not refuse the transfer. It should allow transfer and return the plaint for presentation to proper Court. [P. 29, Col. 1.]

Anand Prasad—for Petitioners.

Judgment:—This application is directed against an order of the Munsif, First Court, Gaya, rejecting the application by the petitioners to be made co-plaintiffs in a suit brought by the opposite party No. 1. The opposite party No. 1 sued to recover a sum of money from the defendants Nos. 1 to 26 on account of certain expenses incurred by her in erecting and maintaining a *bandh*. It appears that the co-sharer *maliks* of village Lao and of several other villages have to erect *bandhs* for the purposes of irrigation in those villages. The *maliks* of village Lao supervises the erection of these *bandhs* and the other *maliks* contribute towards the expenses incurred. The suit related to the expenses incurred by the opposite party No. 1 in the years 1329 and 1331. She joined as defendants to the suit defendants Nos. 27 to 35, who are co-sharer *maliks* of *Mouza* Lao. The present applicants petitioned the lower Court to be changed from co-defendants in the suit to co-plaintiffs.

The learned Munsif rejected the application on two grounds, firstly, that if these defendants were made co-plaintiffs, the rule of limitation would come in and the plaintiffs, suit would be barred with regard to the claim for 1329. The second ground was that the addition of these petitioners as co-plaintiffs would raise the value of the suit, beyond the jurisdiction of the Court. Now, with regard to the question of limitation, it is clear from the provisions of sub-section (2) of section 22 of the Limitation Act that the provisions of sub-section (1) of the section will not apply where a defendant, who was made such by the plaintiff at the time of the institution of the suit, is transferred in that suit as a co-plaintiff. Sub-section (2) clearly says that "nothing in sub-section (1) shall apply to a case...where a plaintiff is made

a defendant or a defendant is made a plaintiff." All that the petitioners have asked in this case is that they being defendants should be made plaintiffs in the suit. Accordingly the Law of Limitation will not bar any portion of the claim.

With regard to the other objection raised by the Munsif if the suit after the addition of these petitioners as co-plaintiffs exceeds the valuation which is within the jurisdiction of the Munsif, it will be open to him to return the plaint, after the petitioners have been so added, to the plaintiffs to be presented in the proper Court.

The order of the Munsif must be set aside and it is directed that the status of the present petitioners be changed from the category of defendants to that of plaintiffs in the suit.

Order set aside.

A.I.R. 1926 Patna 29 (1).

ADAMI, J.

**Ram Charan Singh and another*—Petitioners

v.

Emperor—Opposite Party.

Criminal Revision No. 46 of 1925, decided on 24th March, 1925, from an order of the Sessions Judge, Muzaffarpur, dated the 4th December, 1924.

Crim. Pro. Code, S. 342—Provisions are mandatory—Non-observance vitiates trial.

The provisions of S. 342 are mandatory. The accused must be examined under S. 342 after the prosecution has closed and before the accused have entered upon their defence and if the provisions of that section are not observed, the trial is vitiated. [P. 29, Col. 2.]

S. M. Gupta—for the Petitioners.

Judgment:—The only point taken in this application is the fact that the provisions of section 342 have not been complied with in the trial of the petitioners and, therefore, the trial and the convictions found against the petitioners are vitiated.

It appears that the petitioners were not examined under section 342 until about two months had elapsed after the petitioners had entered upon their defence. The learned Sessions Judge holds that, as the defence could not be prejudiced in any way by the delay in examining the accused under section 342, the trial could not be held to be vitiated. It may be that the delay did not in fact prejudice the petitioners; but as has been often held by this Court, the provisions of section 342 are mandatory. The accused must be examined under section 342 after the prosecution has closed and before the accused have entered upon their defence, and if the provisions of that section are not observed, the trial is vitiated. In the Calcutta High Court the case of *Surendra Lal Shaha* v. *Isamaddi* (1) was a case in which the circumstances were similar to those of the present case, and in that case it was found that the trial was vitiated.

The convictions of the petitioners must be set aside and it is directed that the trial of the petitioners must proceed now from the point where the prosecution closed their case. The petitioners must be examined as required by section 342 of the Criminal Procedure Code, and then be allowed to enter upon their defence. The fines, if paid, will be refunded.

Conviction set aside.

(1) A.I.R. 1925 Cal. 480=51 Cal. 933=26 Cr. L.J. 261.

A.I.R. 1926 Patna 29 (2).

KULWANT SAHAY, J.

Shamsher Narain Singh and others—Petitioners

v.

Mohammad Sale—Opposite Party.

Civil Revision Nos. 441 and 442 of 1924, decided on 27th April, 1925, from an order of the Munsif, Bihar, dated 16th September, 1924.

(a) *Civ. Pro. Code, O. 9, r. 13—Application to set aside ex parte decree allowed—No revision lies.*

Where on an application to set aside an *ex parte* decree the Court considered the evidence and decided that the applicant had no knowledge of the suit and that summonses were not served upon him and that he came to know of the decree within 30 days of the application and set aside the *ex parte* decree.

Held, that no revision lay as it cannot be said that the Court committed any error, illegality or irregularity within the meaning of S. 115. [P. 30, Col. 2.]

(b) *Civ. Pro. Code, O. 22, r. 4—Finding that a deceased plaintiff's heirs were not necessary parties to application to set aside ex parte decree is not revisable.*

Where in a proceeding to set aside an *ex parte* decree the heirs of a deceased plaintiff were not made parties to the application, but the Court comes to the finding that it was not necessary to bring his heirs on the record, the finding cannot be interfered with under S. 115. [P. 30, Col. 2.]

(c) *Evidence Act, S. 78—Copies of Registers in Native State are not admissible.*

Copies of entries in registers kept by the officers of a Native State are not admissible in evidence having regard to the provisions of S. 78 (6). [P. 30, Col. 2.]

(d) *Civ. Pro. Code, S. 115—Inadmissible evidence admitted—Finding based on other evidence—Finding not vitiated.*

Where a Court erroneously holds that certain documents are admissible but arrives at its finding independently of such documents, its finding cannot be said to be vitiated by such admission. [P. 31, Col. 1.]

S. N. Roy and *A. H. Fakhruddin*—for Petitioners.

Hasan Jan—for Opposite Party.

Judgment:—These two applications arise out of an order passed by the Munsif of Bihar setting aside two *ex parte* decrees on an application of the defendant under Order IX, rule 13 of the Civil Procedure Code. The decrees were obtained by the plaintiffs-petitioners on the 6th of January, 1920. These decrees were *ex parte* as the defendant did not appear and contest the suits. In execution of these decrees the holding was sold on the 18th of May 1920 and purchased by the plaintiffs. The sale was confirmed on the 18th of June 1920 and possession was delivered to the auction-purchasers on the 6th of July, 1920. The present applications in the two suits under Order IX, rule 13 of the Civil Procedure Code were filed on the 9th of January 1924 the allegation being that the defendant came to know of the decrees and of the sale for the first time on the 11th of December 1923.

The opposite party's case was that he was in the territories of the Nizam of Hyderabad as he was in service there and returned home in April 1923, and he had no information of the institution of the suits or of the decrees, or of the execution proceedings or sale of the holding. The learned Munsif has considered the evidence in very great detail and he has come to the conclusion that the opposite party had no knowledge of the suits and summonses were not served upon him. As regards limitation he has found that the opposite party came to know of the decrees and the sale within thirty days of the applications. There was another objection on the ground of limitation by reason of the fact that one of the plaintiffs Taluka Prasad was dead and his heirs were brought on the record for the first time on the 10th of March 1924, and it was contended that so far as the heirs of Taluka Prasad were concerned, the applications were evidently barred by limitation. The learned Munsif has found that it was not necessary for the opposite party to bring the heirs of the deceased Taluka Prasad on the record inasmuch as all the plaintiffs were members of a joint Hindu family and the surviving plaintiffs represented the family. Upon these findings the learned Munsif has granted the applications.

It has been contended in revision that the learned Munsif was wrong in holding that the applications were within time, and secondly, that he was wrong in using in evidence, certain documents produced by the opposite party which were copies of attendance register and leave register kept by the officers of the Nizam of Hyderabad, which showed the presence of the opposite party at Hyderabad. As regards the question of limitation it has been argued that the heirs of Taluka Prasad were necessary parties, and as they were not brought on the record within thirty days of the date of knowledge of the decrees as alleged by the opposite party, the applications were barred by limitation. Now the learned Munsif has come to a finding that the other plaintiffs represented Taluka Prasad and it was not necessary to bring his heirs on the record. The learned Munsif may be right or he may be wrong, but there is no question of jurisdiction involved on this point. He was entitled to come to a finding on the question as to whether the surviving plaintiffs represented Taluka Prasad and as to whether the applications were barred by limitation and he did come to the finding that the applications were not barred because the heirs of Taluka Prasad were not brought on the record within thirty days. I am of opinion that it is not a question which can be considered in revision under section 115 of the Code.

As regards the question relating to the admissibility of documents of the Hyderabad State, it is clear that those documents were not properly admissible in evidence having regard to the provisions of section 78, clause (6) of the Indian Evidence Act. But the learned Munsif does not base his decision upon those documents only. Before referring to those documents, the learned Munsif had, upon the other evidence

in the case, come to the conclusion that the opposite party was absent from his home and summonses were not served upon him. The learned Munsif has, no doubt, not applied his mind to the consideration of the question as to whether these documents were admissible in evidence or not, but, even excluding these documents from the record, it appears from the judgment that there was sufficient evidence to enable the Munsif to come to a finding on the question as regards the service of summonses.

It was next contended that the document marked Ex. F in the case (which was a compromise petition filed in a proceeding relating to the execution of a decree obtained by the opposite party against the petitioners) showed conclusively that the opposite party had knowledge of the decrees and of the execution proceedings long before 30 days of the filing of the present applications. The learned Munsif has considered this compromise petition and has come to the conclusion that this petition was not filed with the knowledge of the opposite party. He has compared the handwriting and he has considered the other circumstances connected therewith, and his finding on this document is a finding of fact upon a consideration of the document. I cannot in revision say that the Munsif has committed any such error or any illegality or irregularity so as to affect his jurisdiction.

There is no question of jurisdiction involved in these applications and they are dismissed with costs. There will be only one hearing fee, two gold *mohurs*.

Applications dismissed.

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* A.I.R. 1926 Patna 31.

MULLICK AND ROSS, JJ.

Hari Sankar Rai—Appellant

v.

Tapaikuer—Respondent.

Appeal No. 185 of 1924, decided on 5th March, 1925, from the Appellate Order of the District Judge, Saran, dated 19th May, 1924.

**Civ. Pro. Code, O. 34, r. 14—Decree declaring a charge on certain property of defendant—Charge can be enforced in execution—Separate suit is not necessary—Execution—Declaratory decree.*

It is not necessary that in every case where it is sought to enforce a charge created by a declaratory decree the person for whose benefit the charge is created must resort to the procedure for enforcement of claims under a mortgage. (2 P.L.J. 55, *Foll.*; 1 P.L.W. 69, *Dist*, and 22 Cal. 859, *not Foll.*) [P. 31, Col. 2.]

Plaintiff obtained a decree declaring that she was entitled to a certain maintenance allowance from the defendant to be recovered from certain properties belonging to the defendant. In execution of this decree the plaintiff made an application for the recovery of a certain sum on account of arrears of maintenance by sale of the properties charged.

***Held*, that although the decree obtained by the plaintiff was declaratory in form it was capable of execution and the decree obtained by the plaintiff being a money decree the interest of the judgment-debtor in the properties charged with the payment of maintenance allowance could be sold in execution of the decree. The provision of r. 14 of O. 34 of the Civ. Pro. Code, did not apply to such a case. [P. 32, Cols. 1 & 2.]**

Jadubans Sahay—for Appellant.

R. B. Saran—for Respondent.

Mullick, J. :—The decree-holder sued for maintenance and obtained a declaration that she was entitled to an allowance of Rs. 5 per month from the defendant and that certain properties belonging to the defendant were charged with the payment thereof. It is admitted that the decree created a charge within the meaning of section 100 of the Transfer of Property Act. Thereupon the plaintiff made an application in execution for the recovery of a total sum of Rs. 31-10-0 on account of her allowance for six months and some odd days.

The Munsif dismissed the application and held that the plaintiff-decree-holder must bring a separate suit.

In appeal the District Judge has taken a contrary view and directed that the properties charged should be sold in execution.

In second appeal the first point taken is that the decree being declaratory cannot be executed and that the only remedy of the decree-holder is to bring a separate suit. Now, although the decree is declaratory it clearly means that the maintenance allowance shall be recovered from the property charged; and the question simply is what is the proper procedure for the enforcement of the relief. In my opinion there is no reason why recovery should not be made by the agency of the Execution Court. Although neither the original decree nor a copy of it has been filed, it is clear from the recitals in the judgments of the Courts below that it is a decree which was intended to be executed

and that it was not the intention of the Trial Court to subject the decree-holder to the expense of a separate suit. *Raja Braja Sundar Deb* v. *Sarat Kumari* (1) is clear authority in favour of this view.

Then it is urged that even if the decree can be executed the plaintiff cannot bring the property to sale in the present execution and that she must first sue under the provisions of section 67 of the Transfer of Property Act. The reply to this again is that *Raja Braja Sunder's case* (1) is authority which binds us. On the other hand we have been referred to *Gokul Nath Jha* v. *Pran Mal Marwari* (2) as authority for the view that the execution cannot proceed and that a decree for the enforcement of a mortgage must be first obtained. It does not appear that the particular point before us was directly raised in that case. In that case there was a mortgage bond in respect of the property charged and the Court held that as there was a separate bond which was capable of being enforced it was not open to the decree-holder to resort to the procedure of the Execution Court. There may have been observations in that case to suggest that the compromise decree could not be enforced otherwise than by a suit; but these observations were not necessary for the decision itself.

We have also been referred to *Abhoy* v. *Gouri Sunkur Pandey* (3). There also a consent decree was sought to be executed and the properties secured were advertised for sale in the Execution Court. It was held in second appeal that the proper procedure was to obtain a decree for sale as in a mortgage suit and that the execution could not proceed. Now, in the first place this case is not binding upon us in the face of the decision in *Raja Braja Sunder Deb* v. *Sarat Kumari* (1). In the second place with the greatest respect it seems to me that the claim now before us is not one which arises under any mortgage and that, therefore, the provisions of rule 14 of Order 34, Civil Procedure Code, which prohibit the enforcement of a mortgage except in the manner provided in the Code do not apply here. It does not follow, that in every case where it is sought to enforce a charge the person for whose benefit the charge is created must resort to the procedure for enforcement of claims under a mortgage. Section 99 of the Transfer of Property Act of 1882 has been repealed, and as the claim here arises out of a money decree there is no reason why the interest of the judgment-debtor should not be sold without a suit for sale. The provisions of rule 15, Order 34, are not in any way material to the discussion.

The result, therefore, is that the appeal is dismissed with costs.

Ross, J:—I agree.

Appeal dismissed.

(1) (1917) 2 P.L.J. 55=3 P.L.W. 202=38 I.C. 791=1917 P.H.C.C. 67.
(2) (1917) 1 P.L.W. 69=37 I.C. 397=1917 P.H.C.C. 371.
(3) (1895) 22 Cal. 859.

A.I.R. 1926 Patna 32.

DAS, J.

Kishore Ahir and others—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 603 of 1924, decided on 25th November, 1924, against the decision of the Sessions Judge, Shahabad, dated 9th September, 1924.

Crim. Pro. Code, S. 107—Scope.

Two opposing parties in a dispute cannot be proceeded against under S. 107 in one proceeding. [P. 32, Col. 2.]

P. C. Rai—for Petitioners.

Das, J.:—This application must succeed on the short ground that there was no power in the Magistrate to draw one proceeding against two different factions. The order of the learned Magistrate shows that he tried 53 men belonging to two different factions in a proceeding under section 107 of the Criminal Procedure Code. It has been held in *Kamal Narain Chaudhry* v. *Emperor* (1), that the two opposing parties in a dispute cannot be proceeded against under section 107, Criminal Procedure Code, in one proceeding. In accordance with this decision I allow the application and set aside the order of the learned Magistrate.

Application allowed.

(1) (1907) 11 C.W.N. 472=5 Cr. L.J. 197=5 C.L.J. 231.

A.I.R. 1926 Patna 33.

ADAMI and KULWANT SAHAY, JJ.

Baijulal Marwari and another—Petitioners

v.

Thakur Prasad Marwari and others—Opposite Party.

Civil Revision No. 60 of 1925, decided on 21st May 1925, from an order of the Sub-Judge, Godda, dated 11th December 1924.

Santhal Parganas Settlement Regulation (III of 1872), S. 5 (2)- Execution proceedings are "suit" within S. 5—Pending execution cases should not be dismissed but should be transferred to officer appointed under the Regulation.

Execution is merely a continuation of the suit and proceedings in execution are proceedings in the suit. Therefore an application in a pending execution proceeding is a suit within the meaning of S. 5. Where such an application is made the executing Court should not dismiss the application but should transfer it for disposal to an officer, if any, appointed under S. 5 (2) of the Regulation. [P. 34, Col. 1.]

S. M. Mullick and *L. K. Jha*—for Petitioners.

Juggernath Prasad—for Opposite Party.

Kulwant Sahay, J.:—This is an application against an order of the Subordinate Judge, Godda, dismissing the petitioners' application under Order XXI, rule 100 of the Civil Procedure Code. The facts stated in the petition are shortly these:—

The petitioner brought a money suit against one Gurudayal Baram and obtained a decree, and in execution thereof purchased 5 annas 6 pies share in two properties belonging to the judgment-debtor, namely, in *Ghat* Lachmipur bearing *Touzi* No. 494 and in *Ghat* Fauzdar bearing *Touzi* No. 485. The petitioner's purchase is dated the 9th July 1918, the property having been attached on the 26th March 1917. The opposite party Nos. 1 to 4 had also obtained a money decree against Gurudayal Baram and they also applied for execution of their decree and in execution thereof they purchased the remaining 10 annas 6 pies share in each of the two *ghats*. The petitioner got delivery of possession of the share purchased by him on the 16th November, 1919. In the meantime it appears that the opposite party Nos. 1 to 4 had taken an assignment of an 8 annas share in a certain mortgage-bond executed by Gurudayal Baram in favour of the opposite party Nos. 5 to 7. A mortgage suit was brought on the basis of that mortgage-bond to which the petitioners were not parties. It is to be remembered that the attachment in execution of the decree of the petitioners had taken place on the 26th March 1917 and the mortgage suit was brought on the 1st December 1918. It was, therefore, necessary under Order XXXIV, rule 1 of the Civil Procedure Code, to make the petitioners parties to the mortgage suit inasmuch as under section 91, clause (*f*) of the Transfer of Property Act they had a right to redeem. A mortgage-decree was obtained on the 18th December 1918, and in execution of the mortgage-decree, the opposite party Nos. 1 to 4 purchased the whole of the two *ghats* mentioned above on the 28th May 1923. They obtained a sale certificate and applied for delivery of possession and possession was delivered to them in respect of *ghat* Lachmipur on the 21st December 1923 and in respect of *Ghat* Fauzdar on the 23rd December 1923. As a result thereof, the petitioners say that they were dispossessed of the shares purchased by them. They accordingly made an application under Order XXI, rule 100 on the 19th January 1924. After various adjournments, this application came on for hearing before the Subordinate Judge on the 11th December 1924. On that date an application was made on behalf of the petitioners for time. This application was refused. The learned Subordinate Judge then rejected the application under Order XXI, rule 100 on the ground that he had no jurisdiction to entertain the application on account of the provisions of section 5 of Regulation III of 1872.

It appears that under a Government Notification, dated the 27th October 1923, the area within which the property in dispute is comprised was declared to be under settlement from the 1st of November 1923, and the learned Subordinate Judge, held that under the provisions of section 5 of the Regulation he had no jurisdiction to entertain the present application under Order XXI, rule 100, Civil Procedure Code. He accordingly rejected that application. Against this order, the petitioners have come up in revision to this Court; and it is contended that the Subordinate Judge was wrong in holding that he had no jurisdiction to entertain the application, and further he was wrong in rejecting the application

without giving the petitioners an opportunity to substantiate their case. In my opinion the contention of the petitioners is sound and ought to prevail.

As regards the first point, namely, the application for time it is clear that because the petitioners' application for time was rejected, the learned Subordinate Judge was not right in rejecting their application under Order XXI, rule 100 without calling upon them to adduce evidence to substantiate their case. As regards the question of jurisdiction, the learned Subordinate Judge relies on the provisions of section 5 of Regulation III of 1872. Now this section provides that, "from the date on which the Lieutenant-Governor declares under section 9 by a notification in the *Calcutta Gazette*, that a settlement shall be made of the whole or any part of the Sonthal Parganas until the date on which such settlement is declared by a like notification to have been completed, no suit shall lie in any Civil Court established under the Bengal, N.-W. P. and Assam Civil Courts Act, 1887, in regard to any land or any interest in, or arising out of land in the area covered by such notification; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it."

It has been contended that an application in a pending execution proceeding is not a suit within the meaning of section 5. This contention does not appear to be sound, because execution is merely a continuation of the suit and proceedings in execution are proceedings in the suit. The question, however, is whether the application of the petitioners ought to have been rejected on the ground that a notification as contemplated by the section had been issued by the Government. Sub-section (2) of section 5 provides that "between the dates referred to in sub-section (1), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under section 2 of the Sonthal Parganas Act, 1855 or section 10 of Regulation III of 1872.

In the present case if an officer had been appointed under sub-section (2) of section 5, then the Subordinate Judge ought to have transferred the application to that officer. It was a pending execution proceeding at the time when the notification was issued, and under sub-section (2) the Court could only transfer such applications to the officer appointed under sub-section (2) of section 5, and it ought not to have rejected the application on the ground of want of jurisdiction.

The order of the learned Subordinate Judge will, therefore, be set aside and he will proceed according to the provisions of sub-section (2) of section 5 of Regulation III of 1872.

There will be no order for costs.

Adami, J.:—I agree.

Order set aside.

A.I.R. 1926 Patna 34.

FOSTER, J.

Ram Saran Singh—Petitioner

v.

Mohammad Jan Khan and another—Opposite Party.

Criminal Revision No. 680 of 1924, decided on 6th January, 1925, from a decision of the Sessions Judge, Gaya, dated 1st October, 1924.

(a) *Crim. Pro. Code, S. 202—Issue of process without recording reasons is not correct—Cross-examination and arguments should not, as a rule, be allowed in a case of inquiry under S. 202.*

It is certainly not a correct procedure to defer the issue of process and order an enquiry without recording reasons. It is also as a rule undesirable that the enquiry should be prolonged by cross-examination and arguments *inter partes*, the reason being that if this is necessary it is obviously advisable to follow the procedure of a trial and for that purpose to issue process at once. At the same time if a Magistrate having the duty of making an enquiry under S. 202 can make his enquiry more complete and can inform himself of the facts more fully by having the accused in Court, there is no reason either in common sense or in law why the accused should not be called to the enquiry. [P. 35, Col. 2.]

(b) *Crim. Pro. Code, Ss. 437 and 202—Allowing cross-examination in an enquiry under S. 202 is a mere irregularity and further inquiry should not be directed—Crim. Pro. Code, S. 537.*

Cross-examination and arguments *inter partes* are out of place in an enquiry into the truth of the complaint. Such departure from the strict letter of the law constitutes a mere irregularity and the High Court should not in the exercise of its discretion direct a further enquiry. 14 Cal. 141, *Dist.* [P. 35, Col. 2.]

P. C. De—for Petitioner.

Govt. Pleader and *Aziz*—for Opposite Party.

Judgment:—The petitioner, Ram Saran Singh, filed a complaint on the 24th of

July, 1924, charging the Sub-Inspector of Worseleyganj and a constable of the Thana with offences under sections 342 and 504 of the Indian Penal Code. Possibly on the allegations as they were expressed, section 247 I.P.C. would have been more applicable and the charge was of a serious nature. The burden of the complaint was that on the 20th July the complainant who was the newly appointed Sir Punch of a circle within the Police jurisdiction was called to the Thana on official business connected with his office. When he got there the Sub-Inspector informed him that he had been accused by one Barhu Sahu of theft, and the Sub-Inspector put him under arrest refusing bail although Ram Saran Singh had with him a person ready to stand bail by name Santokhi Singh. The constable on the direction of the Sub-Inspector handcuffed the complainant and put him in the *hajut* where he was kept from 9 A. M., on the 20th till 9 P. M. on the 21st; at that hour an order from the Magistrate for Ram Saran's release had been brought to the *Thana*. On this complaint the Magistrate passed the following order:—

"I think a local enquiry by a First Class Magistrate is necessary. Accordingly I direct a local enquiry under section 202 by a Magistrate of the First Class from Sadar ...Send copy of the complaint and order to S. P."

Later on, however, it appears that the Magistrate himself held a local enquiry, having previously notified to the Sub-Inspector who had been accused that he might be present if he so desired. The enquiry lasted several days. On the 8th August 1924, the Magistrate dismissed the complaint under section 203, Criminal Procedure Code, giving nine reasons for so doing. In the Sessions Court a petition for directing further enquiry was rejected in an elaborate order reviewing the case. It appears that in the Magistrate's Court the accused was allowed to be present to cross-examine the prosecution witnesses and to advance arguments.

The petitioner comes to this Court with a prayer that further enquiry be directed. His grievances are (*a*) that the Magistrate did not record reasons when passing the order under section 202, Criminal Procedure Code; (*b*) that the accused should not have been allowed to cross-examine the witnesses, and (*c*) that if the complainant had a *prima facie* case supported by substantial evidence, the Court had no option but to issue process. It is certainly not a correct procedure to defer the issue of process and order an enquiry without recording reasons. It is also as a rule undesirable that the enquiry should be prolonged by cross-examination and arguments *inter partes*, the reason being that if this is necessary it is obviously advisable to follow the procedure of a trial and for that purpose to issue process at once. At the same time, it appears to me that if a Magistrate having the duty of making an enquiry under section 202 can make his enquiry more complete and can inform himself of the facts more fully by having the accused in Court, there is no reason either in common sense or in law why the accused should not be called to the enquiry. But still I do not recede from the position that cross examination and arguments *inter partes* are out of place in an enquiry into the truth of the complaint. The questions are really first whether the departure from the strict letter of the law constitutes an illegality, and secondly, whether if it is not an illegality but a mere irregularity this Court should in the exercise of its discretion direct a further enquiry. The learned Vakil for the petitioner has not put before me any authority for the proposition that these departures from the letter of the law are other than an irregularity. He has quoted a case of 1856—*Baidya Nath Singh* v. *Muspratt* (1). In that case there was a complaint against the Assistant Superintendent of Police and other Police Officers and the Magistrate sent the complaint for enquiry to that Assistant Superintendent of Police. It is perfectly obvious that such an order was highly illegal and improper. That is not the case that is before me now. Another case quoted has been *Balai Lal Mookerjee* v. *Pashupati Chatterjee* (2). In that case the departures from the provisions of Ch. XVI of the Criminal Procedure Code are described as irregularities and as procedure inconsistent with the scheme of the Legislature. The irregularities there complained of were similar to those now put forward by the petition and the Court expressly held that it is a matter of discretion whether in such circumstances the Rule should be made absolute. That marks the point at which

(1) (1887) 14 Cal. 141.
(2) (1916) 24 C.W.N. 127=25 C.L.J. 606=35 I.C. 828=17 Cr. L.J. 396.

authorities cease to have much weight, as each case must be decided on its own merits when we come to the question of discretion. In the present case on a cursory glance I notice that most of the points on which the dismissal of the complaint is founded are points that might have equally well been made by the Magistrate in the absence of the accused and the accused's Pleader. The dismissal of the complaint appears to me to be founded rather on the weakness of the prosecution case than on the strength of the defence. The learned Sessions Judge gave great attention to the case and the length of his order is even made a ground of complaint by the learned Vakil for the petitioner. On the contrary it appears to me to be clear that the learned Sessions Judge appreciated the serious nature of the case and gave it careful attention, and I notice that he goes to the length of finding that the complaint is not only untrue but even malicious. In such circumstances it appears to me to be out of question to direct a further enquiry.

The petition is dismissed and the Rule is discharged.

Petition dismissed.

A.I.R. 1926 Patna 36.

MACPHERSON, J.

Barhamdeo Rai and others—Petitioners

v.

King-Emperor—Opposite Party.

Criminal Revision No. 136 of 1925, decided on 14th May, 1925, from an order of the Sessions, Judge, Shahabad, dated 5th March, 1925.

(a) *Crim. Pro. Code, S. 439 — Accused convicted of one offence though facts found would constitute more serious offence—High Court would not interfere unless sentence is inadequate or accused is deprived of right of appeal.*

Where a Magistrate convicts an accused person of an offence falling within his jurisdiction though the facts found would also constitute a more serious offence not within his jurisdiction, his proceedings are not void *ab initio* and the High Court will not ordinarily interefere unless the sentence appears inadequate or unless the accused has been deprived of the right of appeal. 13 Bom. 502 and 24 Mad. 675, *Ref.* [P. 37, Col. 1.]

(b) *Penal Code, S. 379—Servant knowing his master had no right to complainant's goods and assisting in removing, commits theft.*

Where accused, a servant of co-accused knew perfectly well that his master was removing the goods of complainant without even a pretence of right and yet he assisted him in doing so.

Held that the servant clearly acted dishonestly and was guilty of theft. (9 C.W.N. 974, *Dist.*) [P. 37, Col. 1]

(c) *Witness—Credibility—Witness of the same caste as accused no ground for disbelieving him.*

It is not a sound ground for disbelieving a witness that he is of the same caste or community as the person in whose favour he deposes. [P. 37, Col. 1.]

N. N. Sinha—for Petitioners.

Macpherson, J:—This is an application for revision of the conviction of the petitioners under section 379 of the Indian Penal Code and their sentences of fine. They were tried by a second class Magistrate of Sasaram, an appeal against whose decision was dismissed by the District Magistrate of Shahabad. A motion against the appellate decision was rejected by the Sessions Judge. The petitioner Barhamdeo Rai is father of the other two petitioners and the fourth petitioner is his labourer.

The facts which have been found to be established are that the complainant was unwilling to continue the credit which he had formerly allowed to Barhamdeo Rai who resented the refusal. On the day of occurrence the complainant had brought to the front of Barhamdeo's house a bullock cart on which to carry home five bags of rice which he had bought some time before from Deodhari Missir. The cart had to be left at that point because the road became too narrow for it to proceed. On the bags being brought Barhamdeo and the petitioners removed them from the cart to their house by force. Next day the police found the cart in front of the house of Barhamdeo.

Mr. Nirsu Narain Sinha has advanced the following four contentions in support of the rule:

(1) The offence disclosed by the evidence which has been accepted by the Courts, amounts to robbery, and so a second class Magistrate cannot try it;

(2) The defence of the second petitioner Gaya Rai was that he was ill and he examined two witnesses in support of it, but neither the trial Court nor the appellate Court has discussed their evidence at all;

(3) The 4th petitioner being a servant of Barhamdeo, cannot be convicted without a finding of guilty knowledge, and

(4) The defence witness No. 3 who states that the cart found near Barhamdeo's

door was sold by him to Barhamdeo has been disbelieved on the illegal ground that he is of the same caste as Barhamdeo.

As to the first point I am not prepared to say that a charge of robbery could not stand. The evidence that the first petitioner or perhaps the first three petitioners brought lathis seems to show that in order to the committing of the theft the offenders voluntarily caused fear of instant hurt to the complainant and his cartman, but it has been held in *Queen Empress* v. *Gundya* (1) and *Emperor* v. *Ayyan* (2) that where a Magistrate convicts an accused person of an offence falling within his jurisdiction though the facts found would also constitute a more serious offence not within his jurisdiction, his proceedings are not void *ab initio*, and the High Court will not ordinarily interfere unless the sentence appears inadequate or unless the accused have been deprived of the right of appeal. There are many unreported cases of the Calcutta High Court to the same effect. In my opinion the petitioners having been in no way prejudiced, the fact that they might have been charged with robbery is not a good ground for interference in revision with the conviction under section 379.

As to the second point it would appear that this defence was not discussed because it was not relied upon. Indeed the point was not even taken specifically in the petition of appeal.

The third point is supported by a reference to the judgment of Woodroffe, J. in *Hari Bhuimali* v. *King Emperor* (3). The circumstances are distinguishable. In that case the master of the petitioners had at least a colourable claim of right. In the present case the petitioner No. 4 knew perfectly well that his master was removing the bags of rice of complainant without even a pretence of right and yet he assisted him in doing so and therefore clearly acted dishonestly.

As to the 4th point it may at once be conceded that it is not a sound ground for disbelieving a witness that he is of the same caste or community as the person in whose favour he deposes. The defence adduced evidence in support of Barhamdeo's claim that the cart is his. The learned District Magistrate however accepted the evidence as to the ownership of the cart adduced on behalf of the complainant. He states "The prosecution on the other hand have shown that the complainant's cartman, Ramdas Sundi, obtained the cart from one Rampati Koiri. There is no reason why the latter should have given false evidence and he has given his evidence in such a manner as to leave no doubt in my mind that he was once the owner of this cart". In effect therefore the learned District Magistrate considers the whole evidence of both sides as to the ownership of the cart and on a substantial ground prefers the evidence given by Rampati Koiri. It is urged that the appellate Court has also not discussed specifically the evidence of the first and fourth defence witnesses as to the first appellant having a cart, but on perusing their depositions I am not impressed with their testimony and apparently it was not thought worth while to place it before the District Magistrate, the question being whether the evidence of defence witness 3 or that of Ramdas and Rampati should be believed. It is not shown that the evidence on behalf of petitioners has not been adequately considered or that the decision of the Courts below is wrong on the merits.

In my opinion none of the grounds urged in support of the rule are well founded. The rule is accordingly discharged.

Rule discharged.

(1) (1889) 13 Bom. 502.
(2) (1901) 24 Mad. 676.
(3) (1904-05) 9 C.W.N. 974=2 Cr. L.J. 836.

A.I.R. 1926 Patna 37.

MULLICK AND ROSS, JJ.

Jagdip Singh and others—Petitioners

vs.

Harku Singh and others—Opposite Parties.

Civil Revision Case No. 449 of 1924, decided on 5th May, 1925, from an order of the Additional District Judge, dated the 31st July, 1924.

Government of India Act, S. 107—**Ex-parte decree—Application for restoration—Application decided according to law—High Court will not interfere—Civ Pro. Code, O. 9, r. 13.**

Unless a case of denial of the right of fair trial can be made out High Court will not interfere under S. 107 of the Government of India Act. Where the Court determines according to law the question of fact whether sufficient cause has been made out there can be no denial of the right of fair trial. [P. 38, Col. 2.]

Sultan Ahmed, for *Hasan Imam* and *Messrs S N. Rai* and *Raghu Nandan Prasad*—for Petitioners.

Ali Imam and *Sambu Saran*—for Opposite Parties.

Mullick, J. :—The suit was instituted on the 31st March, 1921 and the Commissioner's report was received on the 18th July, 1922. Thereafter adjournments were taken by both sides and the 21st August was fixed for hearing. On that date the parties were not ready and the 15th October was put down for "peremptory hearing." The parties again applied for time and the 4th December was fixed for final disposal. On that day the plaintiffs applied for time but were refused. The defendants of whom there were 21, were also not ready and as their Pleader Babu Paras Nath, who had been instructed from the beginning and who should have conducted the case, was not present, they engaged a new Pleader named Babu Shyamaldas Chakravarty who applied for time. The Court was willing to give three days in order to enable him to prepare the case, but this offer was not accepted by the Pleader and he retired. Thereupon the Court began the examination of the plaintiffs' witnesses. At 2 P. M. after two witnesses had been examined Babu Paras Nath appeared and applied for an adjournment. The Court was willing to give one day if the defendants paid Rs. 10 as adjournment costs to the plaintiffs. Babu Paras Nath declined the offer and retired from the case. The examination of the witnesses then proceeded and was concluded the same day. Judgment was reserved and on the 7th December the case was finally disposed of and an *ex-parte* decree was made against the defendants.

An application was then made to the Subordinate Judge for restoration but without success.

There was then an appeal to the Additional District Judge of Monghyr, but he also found that sufficient cause had not been shown for restoring the case.

The present application is made in revision.

It is quite clear that section 115 of the Civ. Pro. Code does not give us any power to interfere. The Court below has exercised its discretion and no question of jurisdiction arises.

But it is contended that we have wide powers under section 107 of the Government of India Act and that there has been a denial of the right of fair trial. Here also the petitioners must fail, for it is not even suggested that the application for setting aside the *ex-parte* decree has not been properly tried. The Court determined according to law the question of fact whether sufficient cause had been made out by the defendants and it is not clear how there can have been any denial of the right of fair trial. The following cases were cited on one side or the other, but it does not appear that any of them deals with a decision under Order IX, rule 13 of the Civil Procedure Code, *Siva Prosad* v. *Tricomdas Coverji* (1) *Parmeshwar Singh* v. *Kailaspati* (2), *Ganga Prasad* v. *Nandu Ram* (3), *Kumar Chandra Kishore* v. *Basat Ali* (4), *Brindaban Chander* v. *Gour Chandra* (5), *Sheo Prasad Singh* v. *Shukhu Mahto* (6), *Mani Lal* v. *Durga Prasad* (7), and *Sarju Bala Debi* v. *Mohini Mohan Ghose* (8). The general principle is contained in the Full Bench case of *Parmeshwar Singh* v. *Kailaspati* (2), and unless a case of a denial of the right of fair trial can be made out this Court will not interfere. I think, therefore, that we are powerless to interfere under section 107 of the Government of India Act.

But apart from this legal difficulty the application of the petitioners has no merits.

Now, the first ground urged for the failure of the defendants to conduct their case is that one of them named Sukar Singh had been put into jail. Now, it appears that Sukar Singh was sentenced to a term of rigorous imprisonment for four years about 12 or 13 days before the 4th December. As his trial must have taken some time, it is not explained why the contingency of his being sentenced was

(1) (1915) 42 Cal. 926=27 I.C. 917.
(2) (1916) 1 P.L.J. 356=1 P.L.W. 95=35 I.C. 801=1917 P.H.C.C. 1=17 Cr. L.J. 369 (F.B.)
(3) (1916) 1 P.L.J. 465=20 C.W.N. 1060=37 I.C. 199=3 P.L.W. 55.
(4) (1918) 22 C.W.N. 627=44 I. C. 763=27 C.L.J. 418.
(5) (1920) 1 P.L.T. 467=56 I. C. 155=1920 P.H.C.C. 56.
(6) A.I.R. 1923 Patna 518=4 P.L.T. 401=1 Pat. L.R. 89.
(7) A.I.R. 1924 Patna 673=3 Pat. 930=5 P.L.T. 426=1924 Pat. 254.
(8) A.I.R. 1925 Cal. 204=40 C.L.J. 191=28 C.W.N. 991.

not provided against. Nor is it explained why the other defendants could not prosecute their cases without his assistance. If it is said that he had been looking after the case previously, then some explanation should have been given as to what steps the other defendants took after he was put into jail to arrange for the conduct of the case. No evidence is forthcoming on this point. Moreover the defendants are in possession of separate holdings of which the plaintiff is seeking to take possession. They do not constitute a joint family and most of them have filed separate written statements. The defendant Siri Singh was present in Court on the 4th December and it is not shown why he could not have instructed the Pleader. The allegation that the defendants were helpless without Sukar Singh has been found by both Courts below to be unfounded and no fresh materials have been placed before us in support of it.

The next ground is that Babu Paras Nath was not in Monghyr when the case was taken up on the 4th December. There is no explanation as to when he left Monghyr and why he was absent on the 4th December. If the defendants were really intending to go on with the case, they would have given evidence to show that they came to Monghyr in proper time and that in spite of due dilligence it was impossible to instruct another Pleader. I agree, therefore, that the evidence does not show that the defendants made any effort to be ready. As for the Pleaders engaged in the case, I can understand that Babu Shyamaldas should not have been willing to undertake the case with a three days adjournment, but Babu Paras Nath did arrive at 2 P. M. and his conduct seems altogether unintelligible if the defendants were really anxious that he should proceed with it. It is not understood why he gave no explanation for his late arrival and why he refused the one day's adjournment that the Court offered. Although the case had been pending for over 18 months, no summonses had been issued to any witnesses for the defence and it would, therefore, appear that the defendants were able to bring the witnesses whenever they liked. Why did they not bring a single witness with them on the date of hearing? Again the Court below finds that there was sufficient time to send a man by train to Ramchanderpore and to fetch the witnesses by the 5th or the morning of the 6th December. Why did the defendants not do this? Why again did they not instruct Babu Paras Nath to go on with the cross-examination of the plaintiffs' witnesses, for in that case the defence witnesses would, it seems have had quite enough time to arrive before the cross-examination was closed.

Then it is said that the defendants required time to file certain documents. The case was pending 18 months and obviously it is quite impossible to accept this as a ground for adjournment. The case turned principally upon the Commissioner's report and this had been filed in July.

The defendants appear to make a grievance of the fact that Babu Paras Nath was not allowed even the three days' time which was offered to Babu Shyamaldas. The explanation of this is quite clear. Babu Shyamaldas was new to the case and, therefore, required time to read the brief, but that did not apply to Babu Paras Nath who had been in it from the beginning. Moreover the examination of the plaintiff's witnesses having commenced, the Subordinate Judge was right in not interrupting it for long.

Why the defendants failed to make any contest after the case had been pending so long, it is of course impossible to explain with any certainty and it may be that, as is suggested, both parties had agreed that they would not have the case heard on the 4th December. It is quite impossible, however, to carry on public business if such arrangements are to prevail and to allow the impression to grow that the High Court will always come to the aid of a defaulting suitor.

It is finally said that about 200 *bighas* of land are involved and that the defendants will lose their holdings. It seems that they are *raiyats* without any right of occupancy who claim under a proprietor from whom the plaintiffs have got a title by transfer. The defendants are interested in separate plots and there is no reason why some of them at least could not have carried on the case if they had a good defence. The view of the Courts below seems to have been that the defendants were throughout adopting an obstructive attitude and the failure on the 4th December was merely a part of their general policy. That may be so. But whatever the real reason, sufficient cause has not been shown for restoring the case.

I would dismiss the application with costs: hearing fee two gold *mohurs*.

Ross, J.:—I agree.

Application dismissed.

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*A I R. 1926 Patna 40.

MULLICK, A.C.J. and KULWANT SAHAY, J.

Radhe Lal and another—Plaintiffs-Appellants

v.

East Indian Railway and others—Defendants-Respondents.

Letters Patent Appeal No. 16 of 1925, decided on 15th July 1925, from a decision of Das, J, dated 18th December 1924.

(a) * *Civ. Pro. Code, O 29, r. 2—Suit against Railway Company—Proper name to be described is the one under which it carries on business—If through error Agent is made defendant and not the company and company is real defendant—Suit may proceed against company.*

In a suit against a registered corporation it should be described by its official name and title. In the case of an unincorporated or unregistered Company the names of the individuals must be given, or the ordinary name by which the Company is known and under which it carries on its business In the case of a Railway Company the proper name under which the Company should be sued is the name and style under which it carries on its business. If the plaintiff deliberately chooses to sue not the Company but the Agent he cannot by any decree which he obtains in the suit bind the Company. If, however upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the Company is the real defendant then the suit may proceed against the Company. [P. 42, Col. 1.]

Murari Prasad—for Appellants.

N. C. Sinha—for Respondents.

Mullick, A.C.J—On the 14th January 1922 the firm of Kalu Ram-Brijmohan of Bombay consigned three bales of cloth by Railway to the firm of Ramlal-Lachman Ram of Shaikhpura in the District of Monghyr. While the goods were in transit the latter firm assigned them to the present plaintiffs Radhe Lal and Ganga Prasad. It is admitted that delivery was to be made at Shaikhpura by the East Indian Railway Company. On the 9th February 1922 the Company in question delivered only one *bale* and on the 24th October, 1922, the plaintiffs lodged a suit before the Munsif of Jamui claiming compensation from the Agent of the East Indian Railway for the loss of the two bales. The firm of Ramlal-Lachman Ram were sued as *pro forma* defendants.

The plaint which was filed on the 24th October was not properly stamped and was returned to the plaintiffs. On the 28th October the plaint was re-filed with a proper Court-fee and was accepted.

On the 21st November, 1922, the East Indian Railway appeared and asked for time to file a written statement. Time was granted and the written statement was filed on the 3rd January 1923.

After various adjournments the case was taken up on the 13th December, 1923. The defendant Railway then took a new ground and urged that the suit was incompetent against the Agent and that if it was sought to substitute or add the Company, the time for doing so had expired. The Munsif accepted this argument and held that the frame of the suit was bad and made a decree in favour of the defendants.

The plaintiffs then went on appeal to the Subordinate Judge of Monghyr who on the 21st July, 1924, set aside the Munsif's order and remanded the suit for trial on the merits.

A second appeal was then preferred to the High Court and on the 18th December, 1924, Mr. Justice Das disagreeing with the Subordinate Judge restored the order of the Munsif and dismissed the suit.

The present Letters Patent appeal is against the order of Mr. Justice Das.

The learned Judge relying on the decisions in *Sinehi Ram-Bihari Lal* v. *Agent, East Indian Railway Co.* (1) and *East Indian Railway Co.* v. *Ram Lakhan Ram* (2) held that this was a case brought against the Agent of the Railway and not the Railway Company and that the plaintiffs were not entitled to any relief against the Company, and the learned Judge laid down his view of the law in the following words: "In my opinion when there were two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on the record as a defendant on the ground that he all along intended to sue the other and that in substance he sued the other, and no question of representation arises in the case, it is impossible to maintain the view that

(1) 64 I. C. 125; 2 P.L.T. 679.
(2) (1925) A.I.R. (Pat.) 37=78 I. C 312; 3 Pat. 230; 1924 P.H.C.C. 9=6 P.L.T. 415.

the case is one of mis-description." There is no reason for dissenting from this statement of the law. It has been accepted in other cases and also recently in *Agent, Bengal Nagpur Railway* v. *Behari Lal Dutt* (3). The question now before us depends not upon the correctness of the proposition as stated above but upon its application to the facts of this case. Was the suit against the Railway in substance or not? If it was a suit against the Agent, then obviously no relief can be given against the Railway Company but the point is whether upon a consideration of the plaint and the circumstances of the case it is possible to hold that in truth and substance the plaintiff sued not the Agent as a designated person but the Railway Company as a corporate body. That is a question of fact and must be decided upon the evidence in the case. The decision in the other cases cannot, therefore, be any guide. Now the view that the learned Subordinate Judge took in appeal was that the suit was in substance one against the Railway and that it was competent to proceed. This is a finding of fact which is conclusive in second appeal but it is urged on behalf of the respondent before us that there is no evidence to support it. It is necessary, therefore, for us to see whether there was any evidence upon which the learned Judge was competent to come to the conclusion that this was really a case of mis-description.

In order to come to a finding upon this point it is necessary to see what the plaintiffs did. In their plaint they describe the firstparty defendant as the "Agent of the East Indian Railway." In para. 5 they state that the two bales were lost when in the custody of the defendant first party. In para 6 they state that they made the demand to the Agent. In the relief portion they pray for judgment against the defendant first party as "Agent of the East Indian Railway Company." In their application of the 24th October, 1922 asking for issue of process they describe the defendant not as Agent but as the East Indian Railway Company. In filing the deficit Court-fee with their plaint on the 28th October they againrepeat this description.

Let us now see what the defendant did. The defendant who appeared on the 21st November, 1922 was not the Agent but the Company. The defendant who filed the written statement on the 3rd January was again not the Agent, but the Company and no objection was taken to the competency of the suit until the 12th December, 1923. It is pointed out by the appellant that if that ground had been taken at the earliest moment the error could easily have been remedied within the period of limitation which appears to have not expired till about February 1923. In reply it is urged on behalf of the respondent that para. 1 of the written statement does take the objection. That paragraph runs as follows:—That the suit as framed is not maintainable." It is clear, however, from the fact that the Railway Company appeared on the 21st November and also filed a written statement that this objection had reference, not to the designation of the defendant but to other grounds upon which the suit of the plaintiff's was liable to fail.

Let us next see what the Court did. In the order sheet it describes the suit as one between Radhe Lal, plaintiffs and the East Indian Railway Company and others defendants. On the 21st November, 1922 the Court accepts a petition from the Railway Company for time and on the 3rd January, 1923 it accepts the written statement not from the Agent but from the Company. It is true that process was issued upon the Agent but that was clearly in consequence of the provisions of Section 140 of the Indian Railways Act.

It is clear, therefore, that the plaintiffs the Company and the Court till the 13th December, 1923 all thought that the suit against the Agent was but against the Railway Company.

Is this, therefore, a case in which the plaintiffs have deliberately chosen to proceed not against the principal but his servant? Clearly the plaint differs from that in *East Indian Railway Company* v. *Ram Lakhan Ram* (2) for here in the prayer portion the plaintiffs claim against the defendant first party as Agent and they make it clear that they desire to proceed against the corporation and not against the Agent in his personal capacity.

In my opinion the facts of this case are such that the decision in *East Indian Railway Company* v. *Ram Lakhan Ram* (2) has no application.

There was evidence on which the Subordinate Judge could find that this was a

(3) A.I.R. 1925 Cal. 716=90 I. C. 426=29 C.W. N. 614=52 C. 783.

case of mis-description and his finding is conclusive.

The appellant also urges that the Munsif's orders of the 21st November, 1922 and of the 3rd January 1923 are really orders substituting the Railway Company as a defendant in the suit. Order I, rule 10 of the Civil Procedure Code, would, therefore, apply and no question of limitation would arise. It is true that no formal amendment of the plaint was made. This should have been done but the omission was an irregularity and I do not think it vitiates the order of the Subordinate Judge.

With regard to the general question as to what is the correct way of designating the defendant in a claim against a Railway Company the point has been argued but it is unnecessary to deal with it in detail.

The Civil Procedure Code, 1882 and the present Code both contemplate that a registered corporation should be described by its official name and title. In the case of an unincorporated or unregistered Company the names of the individuals must be given or the ordinary name by which the Company is known and under which it carries on its business. There are companies constituted by Statute which are permitted to sue or be sued in the name of an officer or trustee. As to this class provision is made in section 435 of the Code of 1882 but Order XXIX of the present Code of 1908 is silent. The omission, however, is remedied in the Appendix to the Code which makes it clear that this class of Company may be sued through the designated officer. Therefore, in the case of the East Indian Railway the proper name under which the Company should be sued is the name and style under which it carries on its business. A suit against the Agent would be incompetent and would fix no liability upon the Company. The Company has no registered office in India but the Indian Railways Act provides that an officer named the Agent may be appointed in India upon whom service may be made of all notices and processes addressed to the Company. The appointment of such an officer, however, does not in any way relieve the plaintiff of the duty of suing the proper person and of correctly describing him.

If a plaintiff deliberately chooses to sue not the Company but the Agent he cannot by any decree which he obtains in the suit bind the Company. If, however, upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the Company is the real defendant then the suit may proceed against the company.

Here the Railway did in fact appear and conducted the cases till the 12th December 1923 on the footing that they were the real defendants in the suit.

In these circumstances the judgment of the learned Judge of this Court must be set aside and the appeal must be decreed with costs. The order of the Subordinate Judge will be restored and the case will proceed to trial as directed by him.

Kulwant Sahay, J.:—I agree.

Appeal accepted.

A.I.R. 1926 Patna 42.

DAWSON-MILLER, C.J., AND MACPHERSON, J.

Mt. Bibi Wajibunnissa Begum—Plaintiff-Appellant.,

v.

Babu Lal Mahton and others—Defendants Respondents.

Second Appeal No. 1070 of 1922, decided on 18th June 1925, against the decision of the Sub-Judge, Patna, dated 12th June, 1922.

(a) *Bengal Tenancy Act (1885), S. 46, Sub-S. 7—Rent at enhanced rate is payable from the date of acceptance of agreement.*

The enhanced rent is payable by the tenant from the date when he agrees to pay the rent determined by the Court. Although Sub S. (7) does not in terms say from what date the enhanced rent should be payable yet, as his liability to pay the enhanced rent only arises by reason of his agreement, it seems impossible to hold that he was under any liability to pay rent at the enhanced rate before that date. [P. 45, Col. 1.]

(b) *Bengal Tenancy Act (1885), S 61*—Bonafide *deposit of whole amount is valid though in fact less than due.*

Where there has been a *Bona fide* deposit in respect of the whole amount due at the date of the deposit and not merely in respect of a portion thereof, the deposit is validly made under the section, even though it should turn out that the whole amount due had not been deposited. 20 C.L.J. 153, *Foll.* [P. 46, Col. 1.]

S. Ahmed, G. Das, A. L. Das, Gupta, A. H. Fakhruddin, K. Husnain and *N. Husnain*—for Appellant.

P. C. Manuk and *A. N. Das*—for Respondents.

Dawson-Miller, C.J.:—The suit out of which this appeal arises was instituted by the Plaintiff on the 4th May 1921 claiming rent from the Defendants in respect of a holding of 7 *bighas* 5 *cottas* of land in Patna for the years 1325 to 1327 F. and for the Pous and Chait *kists* of 1328 F. together with damages at 25 per cent. per annum. The rent was claimed at the rate of Rs. 252-13-0 per annum.

The main defences to the action were (1) that the amount of rent recoverable was Rs. 102 per annum and that for the years 1325 to 1327-F. the rent at that rate had been deposited in Court under the provisions of section 61 of the Bengal Tenancy Act and a receipt obtained under the provisions of section 62, sub-section (2) and that the rent claimed for 1328 F. was not payable until Bhado in that year corresponding to September 1921, which date had not arrived when the suit was instituted, and, (2) that the suit was barred by limitation under the provisions of Schedule III, Article 2 (*a*) of the Bengal Tenancy Act, having been brought more than six months after the date of service of notice of the deposit.

It appears that in 1917 the Plaintiff attempted to eject the Defendants as trespassers but it was decided by the High Court in April of that year that the status of the Defendants was that of non occupancy raiyats. The rent then payable was Rs. 102 per annum. On the 13th July, 1917 the Plaintiff filed in Court an agreement under the provisions of section 46 of the Bengal Tenancy Act for the payment of an enhanced rent at the rate of Rs. 379 per annum and on the 18th July, 1917 (9th Sawan 1324) the agreement was duly served on the Defendants. The Defendants refused to execute the agreement and on the 5th November, 1917 the Plaintiff instituted a suit before the Munsif of Patna for ejectment of the Defendants under section 46 (6) of the Act. Under the provisions of sections 46, sub-sections (6) to (10) if the raiyat refuses to execute an agreement tendered to him under the earlier provisions of the section and the landlord thereupon institutes a suit to eject him, the Court shall determine what rent is fair and equitable for the holding. If the raiyat agrees to pay the rent so determined he shall be entitled to remain in occupation of his holding at that rent for a term of 5 years from the date of the agreement but on the expiration of that term shall be liable to ejectment unless he has acquired a right of occupancy. But if the raiyat does not agree to pay the rent so determined, the Court shall pass a decree for ejectment and a decree for ejectment so passed shall take effect from the end of the agricultural year in which it is passed. The suit for ejectment was not decided by the Munsif until the 4th February, 1920 when he found that a fair and equitable rent for the holding was Rs. 252-13-0. On the 12th February, 1920 a notice was served on the Defendants to accept and pay the rent found to be fair and equitable but they do not appear to have agreed to pay the rent at the rate found by the Munsif. The Munsif's judgment has not been produced before us but it may be assumed that he passed a decree for ejectment in accordance with the provisions of section 46 (8) of the Act. No steps however, were taken to eject the tenants and they remained in possession without any agreement to pay the rent determined by the Court. I think the plaintiff was entitled to put them to their election but she failed to do so, and no agreement was come to by the tenants to accept the new rent determined by the Court until a year later as will presently appear.

The defendants appealed from the Munsif's decision to the Subordinate Judge. On the 19th September, 1920 the appeal was dismissed. The defendants then preferred a second appeal to the High Court and applied for a stay of execution of the decree for ejectment. They were in this difficulty that if they refused to agree to pay the rent found equitable, they would be liable to ejectment before the decision of the High Court on appeal. If they agreed to pay the rent found equitable they considered, rightly or wrongly, that their appeal to the High Court could not proceed. In the result they agreed to pay the rent found fair and equitable by the Court stipulating that it should be subject to the result of their appeal then pending in the High Court. Their agreement is dated the 10th February, 1921, corresponding to the 18th Magh 1328 F. The appeal in the High Court was decided on the 3rd January, 1923, the decision of the lower Courts being affirmed and the appeal dismissed. Pending this litigation, the object of which was to fix a fair

and equitable rent which the defendants could only refuse to pay under pain of being ejected, the defendants deposited in Court under the provisions of section 61 of the Act the rent due at the old rate, namely, Rs. 102 per annum, a short time after the expiration of each of the three years 1325 to 1327 and notices of the deposit were served upon the Plaintiff on each occasion shortly after the deposit was made. The notices of the deposits for 1325, 1326 and 1327 were served upon the plaintiff on the 15th December, 1918, 15th December, 1919 and the 24th December 1920, respectively.

The first question for determination is from what date is the enhanced rent payable. The Plaintiff contends that under section 46, sub-section (7) the enhanced rent is payable from the 18th July, 1917 when the agreement mentioned in sub-section (1) was served upon the tenants. Sub-section (7) reads as follows:—"If the raiyat agrees to pay the rent so determined" (that is, the fair and equitable rent determined by the Court in a suit for ejectment mentioned in sub-section 6), "he shall be entitled to remain in occupation of his holding at that rent for a term of 5 years from the date of the agreement under the conditions mentioned in the last foregoing section, unless he has acquired a right of occupancy." Her contention is that the date of the agreement there mentioned has reference to the agreement tendered to the tenant under sub-section (1). It is urged that it would be unjust where the rent is below the fair and equitable rate and the landlord claims enhancement under the earlier clauses of the section to allow the tenant by refusing to pay an enhanced rent, to continue in possession at the old rate until a suit has been brought and a fair rent determined which, as in this case, might take a long time, and that once the fair rent has been determined by the Court it should take effect from the date when the enhancement was first claimed and an agreement tendered under the earlier clauses of the section. The defendants, on the other hand, contend that the date of the agreement in sub-section (7) must refer to the earlier words of that sub-section which contemplate an agreement by the raiyat to pay the rent determined by the Court. They point out that the agreement mentioned in the earlier sub-sections (1) to (5) is merely a document tendered to the raiyat for execution which he may or may not execute at his option and that in fact, until executed, it is no agreement at all, and that if sub-section (7) intended to refer to the date when that agreement was tendered, it would have said so. Moreover the document tendered would not bear any date until its actual execution. They further point out that under sub-section (3) if the agreement referred to in sub-sections (1) and (2) had been accepted and executed by the tenant it would not take effect until the commencement of the agricultural year next following, and there is no reason for supposing that where a raiyat agrees to accept the equitable rent found by the Court after a suit for ejectment, that agreement should take effect from an earlier date than would have been the case had he accepted the proposal put forward by the landlord before litigation took place. Moreover the agreement tendered under section 46, sub-section (1) was to pay rent at the rate of Rs. 379 and it would be unjust that having refused to pay that rent, but afterwards having accepted a smaller rate determined by the Court, he should have to pay the enhanced rent from the date when the larger rate was unjustifiably demanded. Much may be said on purely equitable grounds as to what the law ought to be, but we must interpret the section according to the natural meaning of the words, unless such interpretation would lead to a manifest absurdity which it may be presumed the legislature did not intend.

It may be observed that section 46 refers to two separate and distinct matters. The first five sub-sections contemplate an amicable enhancement of the rent of a non-occupancy raiyat without litigation. The landlord proposes an enhanced rent and tenders to the raiyat an agreement to pay that enhanced rent which he may or may not execute at his option. If he accepts the proposal then the enhanced rent takes effect from the beginning of the next agricultural year. If he does not accept it then the landlord may sue for ejectment. The sixth and subsequent sub-sections relate to the procedure to be adopted where a suit for ejectment has been brought. They provide that before ordering ejectment the Court shall determine what is a fair and equitable rent. If the raiyat refuses to pay the rent so found then he may be ejected, but it seems

perfectly clear that he would not be liable for anything more than the original rent upto the date when he was ejected. If, on the other hand, he agrees to pay the rent so determined he shall be entitled to remain in occupation of his holding at that rent for a term of 5 years from the date of the agreement. It seems to me clear that the date of the agreement there mentioned is the date when he agrees to pay the rent found by the Court. There would appear to be no more reason why he should pay that enhanced rent from an earlier date, if he accepts it, than there would be why he should pay an enhanced rent if he refuses to accept it and renders himself liable to ejectment. The agreement in this case was dated the 10th February, 1921, and, in my opinion, the enhanced rent became payable from that date. The result is that unless the suit is barred by limitation the rent payable by the tenants was at the rate of Rs. 102 up to the 10th February 1921 which corresponds to the 18th Magh 1328 F. and the rent payable after that date is at the rate of Rs. 252-13-0. The learned Subordinate Judge considered that the enhanced rent was not claimable until the 3rd January, 1923 when the High Court finally dismissed the appeal in the ejectment suit. But it seems clear that the enhanced rent is payable at the latest from the date when the raiyat agrees to pay the rent determined by the Court. Sub-section (7) does not in terms say from what date the enhanced rent should be payable. It merely states that the raiyat shall be entitled to remain in occupation of his holding at the enhanced rent for a term of 5 years from the date of the agreement. But, as his liability to pay the enhanced rent only arises by reason of his agreement, it seems to me impossible to hold that he was under any liability to pay rent at the enhanced rate before that date. The fact that the defendants did not in fact agree to pay the enhanced rent until a much later date than that on which they might have been put to their election appears to have been due to the failure of the plaintiff to insist upon her rights. She could have compelled the defendants to pay the new rent or submit to ejectment as soon as the Munsif's decision was given unless the Court ordered a stay, which would only be granted on terms protecting the plaintiff's rights.

It remains to consider whether the claim is barred by the special limitation prescribed in Schedule III of the Act. If the limitation there prescribed applies to the facts of the present case then it is clear that the claim for rent for the years 1325 and 1326 F, is time-barred, for the notices of deposit for those years were served on the 15th December, 1918 and the 15th December, 1919 respectively. The notice of deposit of the rent for the year 1327 was served on the 24th December, 1920 and the learned Subordinate Judge considered that the claim for rent for that year was also barred. It appears to have escaped his notice, however, that the present suit was instituted within six months of the 24th December, 1920, namely, on the 4th May 1921, any it was conceded in argument before us that the rent for that year is not barred.

The appellant, however, contends that the claim for rent for the two previous years is not time-barred on the ground that the requirements of section 61 of the Bengal Tenancy Act were not complied with. The section provides that in certain cases, which are applicable in the present instance, the tenant may present to the Court having jurisdiction to entertain a suit for the rent of his holding an application in writing for permission to deposit in Court the full amount of the money then due. The application must state the grounds upon which it is made and shall contain certain particulars as to the name of the person to whose credit the deposit is to be entered and it shall be signed and verified in the manner prescribed by section 52 of the Code of Civil Procedure. Under section 62, if the Court accepts the deposit, it shall give a receipt for it under the seal of the Court and the receipt so given shall operate as an acquittance for the amount of the rent payable by the tenant and deposited as aforesaid in the same manner and to the same extent as if that amount of rent had been received by the person entitled to it. It is pointed out on behalf of the appellant that as the rent was not deposited until the end of the year, interest became payable from the dates of the different *kists* in each year and the amount of interest was not deposited. It has been found that the rent was payable not at the end of each agricultural year but *kist* by *kist* and this is no longer disputed. It follows,

therefore, that at the end of the year some interest would be due upon the unpaid instalments and as the interest was not deposited it is contended that the defendants cannot be taken to have made a valid deposit under section 61 of the full amount of the money then due. The limitation only applies to cases where the deposit was made under section 61 and if no deposit was made within the meaning of that section the limitation period cannot apply. The question for determination is whether the deposit made in the circumstances stated was a sufficient compliance with the section. The learned Subordinate Judge considered that even if the amount deposited fell short of the sum actually due to the landlord at the date of the deposit it was a sufficient compliance with the section. In support of his finding he relied upon the case of *Sasibhusan Dey* v. *Umakanta Dey* (1). In that case the previous decisions of the same Court were reviewed and the meaning and effect of the section was considered at length. The Court consisting of Mookerjee and Beachcroft, JJ., held that, where there has been a *bona fide* deposit in respect of the whole amount due at the date of the deposit, and not merely in respect of a portion thereof, the deposit is validly made under the section, even though it should turn out that the whole amount due had not been deposited. In my opinion that case was rightly decided. The section appears to me to provide for the case of a *bona fide* deposit of what the tenant considers to be the full amount of the rent due at the time of deposit. The deposit, however, must be in respect of the whole rent due and not in respect of a portion only. It may well happen that there is some difference between the landlord and the tenant as to the amount of rent payable. In such a case the landlord might refuse to accept a sum which he considers falls short of the rent payable. One of the cases to which the section applies is where the rent has been tendered to the landlord and he has refused to accept it or grant a receipt. That might well happen where there was a *bona fide* dispute between the parties as to the actual amount payable. In the present case the tenants were contending that the rent was due at the end of the agricultural year and not *kist* by *kist*. If they were right in that contention no interest would be payable upon the earlier *kists*. The *bona fides* of the tenants in this case has not been impugned although the Court has decided that the rent was payable quarterly and not annually. It seems to me that the intention of the legislature was that where a *bona fide* deposit has been made in respect of the whole rent due, then the matter must be decided by suit at the instance of the landlord within six months of the receipt of the notice. Under section 62 a receipt given for the sum deposited acts as an acquittance to the extent of the amount deposited and the landlord can take the deposit out of Court and sue for the balance if he contends that the total amount due has not been deposited, and I think that the intention was that in such a case the dispute between the parties should be promptly decided, otherwise the landlord cannot question the sufficiency of the amount paid into Court. If the Appellant's contention be accepted it would follow that section 62 could not operate if the amount paid in were less by a few annas than the amount actually due and no valid acquittance could be given to the tenant. Again if the Appellant's contention be accepted it is difficult to see in what case the period of limitation prescribed would be effective, for if the whole amount actually due must be paid in, so as to create a valid deposit under section 61, it follows that any suit by the landlord, whether brought within six months or at a later period to recover the rent, must prove infructuous and there is no necessity for prescribing a period of limitation. If, on the other hand, the deposit of a smaller sum than that actually due is not a valid deposit within the meaning of the section, again the limitation prescribed is of no effect. In my opinion the case of *Sasibhusan Dey* v. *Umakanta Dey* (1) was rightly decided and applies to the facts of this case. I think the claim for rent for the years 1325 and 1326 is barred by limitation and for the year 1327 the Plaintiff is entitled to recover *kist* by *kist* at the old rate of Rs. 102 with interest at 12 per cent. credit being given for the amount deposited. With regard to the rent for the two *kists* of 1328 this is also recoverable at the old rate up to the 10th February, 1921 and after that date at the rate of Rs. 252-13-0 together with interest

(1) (1914) 19 C.W.N. 1143=25 I.C. 171=20 C.L.J. 159.

at 12½ per cent. The Defendants are willing that the amount paid into Court for the years 1325 and 1326, and which we are told is still in deposit, should be paid out to the Plaintiff in satisfaction of the rent for those years notwithstanding the bar. There will therefore be an order that the sums deposited for the years 1325 and 1326 be paid out to the Plaintiff. She will also be entitled to take out of Court the deposit made for 1327 in part satisfaction of her claim for rent for that year. The decree of the lower Appellate Court will be varied in accordance with the decision above arrived at. The Appellant has failed upon each of the main points argued before us but has succeeded in so far as the rent for 1327 is concerned and has succeeded in part as to the date from which the enhanced rent shall be payable. She has gained little advantage in so far as the rent for 1327 is concerned as this has been found to be payable at the old rate and the sum deposited could have been taken out of Court by her at any time. In the circumstances I think that the parties should each bear their own costs of this appeal.

Macpherson, J.:—I agree.

Decree varied.

A.I.R. 1926 Patna 47.

KULWANT SAHAY, J.

(*Kumar*) *Rameswar Narayan Singh*—Defendant-Appellant

v.

Mahabir Prasad and others—Plaintiffs-Respondents.

Appeal No. 643 of 1922, decided on 29th April, 1925, from the Appellate Decree of the Sub. Judge, Ranchi, dated 12th April, 1922.

Chota Nagpur Tenancy Act (VI of 1920), S. 231 —Suit to set aside an execution sale on the ground of fraud is governed not by S. 231 but by Limitation Act, Art. 95.

S. 214 bars a suit to set aside a sale under Chapter 16 of the Act except on the ground of fraud or want of jurisdiction. S. 258 contains a provision similar to that in S. 214. These sections do not create right to institute a suit to set aside a sale for a holding made under the Act. They bar the institution of such a suit except on the ground of fraud or want of jurisdiction. The right to institute a suit to set aside a sale has not been created but has been taken away under the provisions of these sections. The right exists in a person to bring a suit to set aside a sale under the general law and it was taken away by these sections except the right to bring a suit on the ground of the fraud or want of jurisdiction. Therefore a suit to set aside an execution sale on the ground of fraud is not a suit instituted under the provisions of the Chota Nagpur Tenancy Act as contemplated by S. 231 of the Act; and consequently the period of limitation is not the one provided by that section but the one provided by Art. 95 of the Limitation Act and the period of limitation is three years from the time when the fraud became known to the plaintiffs. [P 48, Col 1.]

B. C. De—for Appellant.

N. Roy and *Satdeo Sahai*—for Respondents.

Judgment:—This is an appeal by the defendant against the decision of the Subordinate Judge of Ranchi reversing the decision of the Munsif of Hazaribagh and decreeing the plaintiffs' suit. The suit was for setting aside a sale of a raiyati holding held under the provisions of the Chota Nagpur Tenancy Act. The sale was sought to be set aside on the ground of fraud. The defendant who was the landlord and the purchaser in the execution sale denied that there was any fraud and contended that the suit was barred by limitation. The learned Munsif who tried the suit held that there was fraud on the part of the decree-holder and that the sale was vitiated on the ground of such fraud; he, however, dismissed the suit on the ground of limitation. On appeal by the plaintiffs, the learned Subordinate Judge has held that the suit was not barred by limitation and has accordingly decreed the suit and set aside the sale. Against this decision the defendant has come up in Second Appeal.

The principal question for decision in this appeal is as to whether the suit was barred by limitation. The sale in execution of the decree obtained by the appellant took place on the 3rd of December, 1917. The plaintiffs' case is that the entire amount due under the decree had been paid off and the appellant acted fraudulently in getting the sale confirmed, and that he came to know of the fraud for the first time on the 11th November, 1919, when possession was delivered to the appellant. The suit was instituted on the 10th July, 1920. The Munsif held that the period of limitation was one year and that the plaintiffs had knowledge of the sale beyond one year from the date of the suit and that the suit was accordingly barred by limitation. He did not in his judgment state

under what provision of the law he held the period of limitation to be one year. The learned Subordinate Judge on appeal was of opinion that the period of limitation applicable to the suit was the one provided for in Article 95 of the 1st schedule to the Indian Limitation Act. It has been contended, however, on behalf of the appellant that the present suit was governed by section 231 of the Chota Nagpur Tenancy Act and that the period of limitation was one year from the date of the accrual of the cause of action and that upon the finding of the Munsif the cause of action accrued to the plaintiffs at least on 8th April, 1918, if not earlier, and that the suit being instituted beyond one year from that date was barred by limitation. Now, in order to make the provisions of section 231 applicable to the present suit it must first be established that the suit was one instituted under the Chota Nagpur Tenancy Act. The learned Subordinate Judge is of opinion that section 231 has no application to the present case inasmuch as the suit was not one under the Act. I am of opinion that the learned Subordinate Judge was right and that the present suit is not one under the Chota Nagpur Tenancy Act. Reliance has been placed by the learned Vakil for the appellant upon the provisions of sections 214 and 258 of the Chota Nagpur Tenancy Act and it has been contended that the present suit is one under the provisions of those sections. I am of opinion that this contention is unsound. Section 214 bars a suit to set aside a sale under Chapter XVI of the Act except on the ground of fraud or want of jurisdiction. Section 258 contains a provision similar to that in section 214. These sections do not create a right to institute a suit to set aside a sale of a holding made under the Act. They bar the institution of such a suit except on the ground of fraud or want of jurisdiction. The right to institute a suit to set aside a sale has not been created but has been taken away under the provisions of these sections. The right exists in a person to bring a suit to set aside a sale under the general law and was not conferred under the provisions of the Chota Nagpur Tenancy Act and such right was taken away by these sections except the right to bring a suit on the ground of fraud or want of jurisdiction. The present suit was, therefore, not a suit instituted under the provisions of the Chota Nagpur Tenancy Act as contemplated by section 231 of the Act; and consequently the period of limitation is not the one provided by that section but the one provided by the Indian Limitation Act. I am, therefore, of opinion that the suit must be governed either by the provisions of Article 12 or by those of Article 95 of the 1st schedule to the Indian Limitation Act. In my opinion the suit being for a relief on the ground of fraud the Article applicable is 95 and not Article 12 of the Limitation Act, and the period of limitation is therefore three years from the time when the fraud became known to the plaintiffs. In the present case the suit was brought within three years even from the date of the sale and was evidently within time.

It has next been argued that there was no fraud as alleged in the plaint. I am of opinion that the appellant cannot be allowed to raise this question in Second Appeal. It was found by the Munsif that there was fraud on the part of the defendant and that finding was not challenged by the defendant before the Subordinate Judge as is expressly stated in the decision of the Subordinate Judge. It has been contended that the fraud alleged was not in bringing about the sale but in getting the sale confirmed after receipt of the entire amount of the decree; and it is pointed out that under the provisions of the Chota Nagpur Tenancy Act a sale is not required to be confirmed. No doubt, there is no provision in the Act for confirmation of sale and in *Lal Nilmani Nath Sahi Deo* v. *Rai Bahadur Baldeo Das Birla* (1) it was held by this Court that there was no provision in the Act for confirmation of a sale. Reference was made in that case to the expression "confirmation of sale" occurring in clause (*d*) of section 209 of the Act; but it is noticeable that the word "date" was substituted in this clause for the word "confirmation" by the Bihar and Orissa Act (V of 1920) and the word "confirmation" now no longer occurs in this section. The question of fraud, however, was not raised by the appellant in the lower Appellate Court, and I am of opinion that the appellant cannot be allowed

(1) (1920) 1 P.L.T. 146=5 Pat. L. J. 101=55 I.C. 27=1920 P.H.C.C. 73.

to raise the question here in this Second Appeal. The only point argued before the Subordinate Judge was the question of limitation and this question appears to have been correctly decided.

This appeal is dismissed with costs.

Appeal dismissed.

A.I.R. 1926 Patna 49.

KULWANT SAHAY, J.

Ganesh Lall—Defendant-Appellant

v.

Bisesar Pandey—Plaintiff-Respondent.

Appeal No. 604 of 1922, decided on the 6th April, 1925, against the Appellate Decree of the Sub-Judge, Patna, dated 5th June, 1922.

(a) *Civ. Pro. Code, S. 100—Construction of a title deed is a question of Law.*

The construction of a document of title is a point of law. [P. 49, Col. 2.]

(b) *Civ. Pro. Code, S. 100—Misreading of documentary evidence—Finding is not binding.*

Where a finding of fact is based on a piece of a documentary evidence which has been completely misread by the Court, the finding is not binding in second appeal. [P. 51, Col. 1.]

P. C. Manuk and *Anand Prasad*—for Appellant.

N. N. Sen—for Respondent.

Judgment:—This is an appeal on behalf of the defendant and arises out of a suit brought by the plaintiffs-respondents for a declaration that the defendant has no right to open doors on the south of his house marked F in the sketch map filed with the plaint on a lane marked E in the map, on an allegation that the said lane was the private property of the plaintiffs and of the owners of the houses marked B and C in the sketch map.

The defendant denied the title of the plaintiffs to the lane and asserted that it was a public lane to which the plaintiffs had no exclusive title and that the defendant had as much right to the lane as the plaintiffs had, and that he had the right to open the doors at the points marked G and H in the sketch map towards south of his opening on the lane.

The learned Munsif found that the plaintiffs had got no right to the soil of the lane and that they had only a right of way over it. He was of opinion that the lane was not a public lane as alleged by the defendant but that it was a blind lane terminating at the southern extremity of the house marked A in the map He held that the lane was not a private lane of the plaintiffs only but that the defendant had also the right to use it. He accordingly refused to give a decree to the plaintiffs restraining the defendants from opening his doors at the points G and H and dismissed the suit.

On appeal the learned Subordinate Judge has decreed the suit and has made a declaration that the defendant has no right to open the doors at the points G and H or to open any other door into the lane marked E in the map which he declared to be the private lane of the owners of the houses A, B and C in the sketch map filed with the plaint.

Against this decree the defendant has come up in second appeal to this Court. It is contended on his behalf that the learned Subordinate Judge has made a mistake of record in considering the documentary evidence in the case and has also put a wrong construction upon Ex. 5 which is the title-deed of the plaintiffs.

On referring to the sketch map filed with the plaint, it appears that the plaintiffs' house marked A lies to the east of the defendant's house marked F. South of the plaintiffs' house is the house of Mahadeo Pande marked B and to the south of Mahadeo Pande's house is the house of Basant Misser marked C. Between the house of Mahadeo Pande and the defendant's house there is a lane which is said to be a continuation of the disputed lane marked E lying to the south of the defendant's house marked F.

The learned Subordinate Judge agrees with the Munsif that the oral evidence with regard to the ownership of the lane is not satisfactory; but he was of opinion that the documentary evidence adduced by the plaintiffs was distinctly in favour of the plaintiffs and established their title to the lane. The first document that the learned Subordinate Judge considers is Ex. 5 a *kabala* dated the 30th August, 1872. This is a title deed of the plaintiffs and the construction of this document is a point of law which can be taken in second appeal. By this *kabala* (Ex. 5) Mahadeo Pande, the owner of the house marked B, sold a portion of his house to the ancestor of the plaintiffs. That portion has now been amalgamated with the

plaintiffs' old house, and the house marked A in the sketch is the old house of the plaintiffs amalgamated with a portion of the house B purchased under Ex. 5. The learned Subordinate Judge refers to the eastern boundary of the portion sold by Ex. 5 which was stated to be the house of one Doman and from this he inferred that there was no lane to the east of the plaintiffs' house as alleged by the defendant. He then refers to a description in the *kabala*, Exhibit 5, to the effect that the main entrance of the portion of the house sold lay to the south and he says that this is the entrance as shown in the sketch map as being the entrance of the house A. This, however, does not show the title of the plaintiffs to the lane in dispute and there is no question of mis-construction of this document and the argument of the learned Counsel for the appellant that the Subordinate Judge has misconstrued the title-deed (Exhibit 5) must fail.

The next document referred to by the learned Subordinate Judge is a *khasra* marked Ex. 15 and a map marked Ex. 14. This *khasra* and the map were prepared in the course of a partition suit and it is not a *khasra* made at a public survey as stated by the learned Subordinate Judge. Item No. 211 in this *khasra* is the house marked C in the sketch map. This *khasra* shows that the house marked C then belonged to one *Musammat* Pano Kuer, widow of Dwarka Pande. There are two entries in *Khasra* No. 211. The first entry is that of the house now marked C as the house of *Musammat* Pano Kuer of which the length, breadth and area are given in the columns provided therefor. The next entry runs thus: "Goshagali for egress and ingress westward up to the road"; and the length, breadth and area of this Goshagali are also given separately from those of the house. The learned Subordinate Judge on a reference to the map finds that this Goshagali is the lane marked E in the sketch map which is the subject of dispute in the present case. The learned Subordinate Judge says that these two documents (Exs. 14 and 15) show that the title to the lane was with the widow of Dwarka Pande who was an agnate of the plaintiffs. The learned Subordinate Judge says that this plot No. 211 is entered in the *khasra* under the column headed "*Jagir* Bishanprit, etc." In this he is clearly wrong. It is not shown in the *khasra* under the column headed "*Jagir* Bishanprit, etc." In fact this particular column is left blank against the *Khasra* No. 211. It is contended by Mr. Manuk that this is a mistake of record and that the finding of the Subordinate Judge to the effect that the lane in dispute is proved to be the *Jagir* Bishanprit of Dwarka Pande is based on the erroneous impression that it is entered in the column of "*Jagir* Bishanprit, etc.," in the *khasra* and that when there is no such entry in the *khasra*, the whole decision of the Subordinate Judge is vitiated as the finding is based on a fact which is non-existent. Further on in the judgment the learned Subordinate Judge observed that although the Goshagali was measured as a part of plot No. 211 it will appear that it was the *nikas* of Mahadeo Pande and others and *Musammat* Pano Kuer could not obviously sell it away. Mr. Manuk contends that there is an inconsistency in the finding of the learned Subordinate Judge His first finding being that Pano Kuer had a title to the lane, the subsequent finding that she could not sell it away is inconsistent with that finding. The plaintiffs' case was that the lane in dispute was the *brahmottar* land belonging to their ancestors and to themselves and the learned Subordinate Judge has found that this allegation is correct under the mis-conception that it is described in the *khasra* under the column of "*Jagir* Bishanprit, etc." There being no such entry in the *khasra* the finding of the learned Subordinate Judge cannot be sustained inasmuch as it is based on a mis-reading of the *khasra*. This *khasra* (Ex. 15) was a very important piece of evidence in the case and the learned Subordinate Judge relies upon it very strongly; and one does not know what would have been his decision if he had read the *khasra* correctly.

The documents marked Exs. 13 and 7 which are next considered by the learned Subordinate Judge do not prove the plaintiffs' title to the lane; they only show that the lane was the *nikas* or passage of egress and ingress of the houses of Mahadeo Pande and others. The learned Subordinate Judge himself observes that the documents Exs. 7, 17, 8, 11 and 12 referred to by him do not prove the ownership of the lane to belong to the plaintiffs. As regards the sale-deed (Ex. 19) the learned Subordinate Judge

refers to the eastern boundary thereof which is shown as Galimai *nala* Bisesar Pande. This is the deed by which the defendant purchased the house marked F. Bisesar is one of the plaintiffs in this case and from the description of the eastern boundary of the house marked F the learned Subordinate Judge comes to the conclusion that the lane in dispute belongs to Bisesar Pande. It is, however, pointed out by Mr. Manuk that the lane there referred to is the lane to the east of the house marked F which is not in dispute in the present case. The dispute relates to the lane lying to the south of the house marked F and the description of the southern boundary in this deed Ex. 19 is merely *gali amad raft, i.e.*, a lane which is a passage for ingress and egress. This does not show that the lane in dispute belongs to Bisesar Pande and the different descriptions of the eastern and the southern boundaries in the same document are remarkable.

There is thus a serious error in the judgment of the Subordinate Judge as regards Ex. 15 and, as I have said, it is impossible to say what the decision of the Subordinate Judge would have been if he had correctly read Ex. 15. Further he has considered only one of the boundaries given in Ex. 19 and has not considered the southern boundary thereof which was very important. I am, therefore, of opinion that the decision of the learned Subordinate Judge cannot be maintained. The decree appealed against must, therefore, be set aside and the appeal remanded to the Subordinate Judge for disposal after reconsidering the evidence in the case. Costs will abide the result.

Decree set aside.
Case remanded.

A.I.R. 1926 Patna 51.

MACPHERSON, J.

Harbans Narain Singh and others—Petitioners

v.

Mohammad Sayeed and others—Opposite Party.

Criminal Revision No. 108 of 1925, decided on 6th May, 1925, from a decision of the District Magistrate, Monghyr, dated 14th February, 1925.

Crim. Pro. Code, S. 145—Order passed after looking into evidence and hearing arguments—Order declaring right of one party to be in possession and forbidding others from interfering with the possession is one under S. 145.

Where a Magistrate, on a police report being received that there was a dispute regarding a piece of land and breach of peace was apprehended, called for documentary evidence from the parties, heard arguments and passed an order declaring one party in possession and directing that if other were to obstruct him, proceedings under S. 1 would be started and referred the parties to civ Court :

Held, that the Magistrate acted judicially an passed without jurisdiction an order which h could only pass under S. 145 and therefore i should be vacated. [P. 52, Col. 2]

K. B. Dutt and *P. C. Rai*—for Petitioners.

Niyamat Ullah—for Opposite Party.

Judgment :—This is an application against an order dated the 14th January, 1925, of the Sub-Divisional Magistrate o Monghyr.

On 19th November, 1923, an order under section 144 of the Criminal Procedure Code, was made absolute by a Deputy Magistrate of Monghyr against the petitioner, Harbans Narain Singh and also the opposite party Rita Singh with the result that the opposite party Muhammad Ishaq was directed to be retained in possession of an area of 30 *bighas* which was the land in dispute between the parties or a part of it. The Magistrate added that if the parties to the proceeding created trouble after the expiry of two months, action under section 107 or section 145 of the Criminal Procedure Code, would be taken Harbans Narain moved the High Court and on 1st February, 1924 this Court set aside the order on the view that it was not one which could be properly made under section 144. The learned Judge further directed as follows :

"If there is any apprehension of a breach of the peace it will be open to the Magistrate to take proper proceedings according to law."

On the 2nd December, 1924, the Police submitted a report recommending action under section 144 followed by proceedings under section 145 in respect of a plot of 40 *bighas* (out of a large area of about 163 *bighas*) which apparently includes the area of 30 *bighas* already mentioned, and showing the petitioners as first party, Muhammad Saiyid and others as second party, Fazal Karim and Ishaq, already mentioned, as third party and Rita Singh as fourth

party. On that report the Sub-Divisional Magistrate passed the following order on 9th December.

"All parties should appear before me with their documentary evidence on 20th December. Meantime they should not commit a breach of the peace by going to the lands in dispute."

On 12th January he "heard the lawyers for the first three parties" and two days later passed the order of which revision is sought. It runs as follows :—

"The first party claim the land as *bakast*, but there is no documentary evidence in support of their claim that this particular land is *bakast*. The second party claimed settlement of 40 *bighas* of the disputed land from the previous *maliks* and produced rent receipts in support of their claim. He was also sued by the late *maliks* of 12 annas, etc., share of arrears of rent. The third party claims 30 *bighas* out of the disputed land as his *raiyati* but the rent receipts filed do not seem to be reliable. The fourth party claim to be sub-tenants of the second.

I consider that the second party are in possession 40 *bighas* of the disputed land. The others are forbidden not (*sic*) to interfere with their possession. If they do, they will be proceeded against under section 107, Criminal Procedure Code. They had better go to the Civil Court if they have any rights."

Mr. K. B. Dutt on behalf of the petitioners contends that the order is a judicial one and that this Court has jurisdiction to set it aside. On behalf of the opposite party it is suggested that the order is a judicial one under section 144 which should not be set aside as it has spent its force.

In his explanation the Sub-Divisional Magistrate claims that his order was an executive one, and states that he thought it necessary before taking action under the Criminal Procedure Code, to hear the parties but that after hearing them he did not consider that any action under the Code was necessary. Some support for the view that the order is an executive one might be derived from the fact that in the copy of the order filed with the petition the designation "S. D. O." is appended to the initials of the Magistrate but those letters do not appear in the original.

If the order was passed by him as a Court, the Magistrate manifestly could not avoid responsibility now by saying that he passed the order in an executive capacity. It is, however, difficult to say what the order really is. It does not indeed purport to be passed under section 144 or section 145 and the Sub-Divisional Magistrate apparently desired to avoid issuing orders under section 144 because this Court had set aside a similar order, and also to avoid taking proceedings under section 145 to which the order of this Court pointed, which besides being troublesome too often lead to nothing, as they have to be set aside on technical grounds. But actually the order passed differs little from the previous order which was set aside by this Court (except in the fact that it does not purport to be made under section 144) and that order was set aside on the ground that though passed under section 144 it was actually one contemplated by section 145 which was passed without observing the formalities indispensaible under the provision. It is difficult to see that the order now challenged is anything else than a thinly disguised order under section 145. In substance, though not in form, the Sub-Divisional Magistrate took action under the Criminal Procedure Code and once again passed an order under section 145. He decided a question of disputed possession and forbade interference with the possession of the party in whose favour he decided, directing the opposite parties to the Civil Court. He could not do this executively. The mere fact that he proposed to enforce his order by action under section 107 of the Criminal Procedure Code, instead of by a prosecution under section 188 of the Penal Code hardly affects the matter. A similar reference to section 107 had been made in the illegal order under section 144 which this Court had set aside. I am constrained to the conclusion that the Sub-Divisional Magistrate acted judicially and passed without jurisdiction an order which he could only pass under section 145.

The Rule is made absolute and the order of the 14th January is set aside. It is of course open to the Magistrate to take any proceedings to keep the peace which are warranted by law, but he must face the position squarely and realise that an order contemplated by section 145 cannot be passed by a short cut such as was taken in the present instance.

Rule made absolute.

A.I.R. 1926 Patna 53.

KULWANT SAHAY, J.

Gokul Tatwa and others—Accused-Applicants

v.

Emperor—Opposite Party.

Criminal Revision No. 275 of 1924, decided on 29th June, 1924, against an order of the Sessions Judge, Purnea.

Crim. Pro. Code, S. 59—'In his view' means 'in his presence'.

The words "in his view" in S. 59 mean "in presence of" or "within sight of" and not "in his opinion". [P. 53, Col. 2.]

S. N. Sahay—for Applicants.

The Govt. Advocate—for Opposite party.

Judgment:—The petitioners have been convicted for an offence under section 225 of the Indian Penal Code and sentenced to pay a fine of Rs. 25 each. The prosecution story is that on the night of the 27th of October, 1923, the complainant Sakhichand *Halwai* was roused from his sleep by the falling of a box in one of the rooms of his house Sakhichand is said to have got up and seen three men running away across the courtyard towards the north. Sakhichand is then said to have gone to the room and having perceived the presence of a man inside the room closed the door with a *tatti* and shouted "thief, thief" upon which one Binhai who is one of the accused in the present case and two *chaukidars* Babu Jan and Kishuni came followed by the other accused. Binhai and Sakhichand are alleged to have gone inside the room and after lighting a lamp to have found one Gena Tatwa, a servant of the petitioner Gokul Tatwa, hiding himself beside a *kothi* or granary. Sakhichand is said to have arrested Gena and the petitioners are alleged to have rescued Gena from the custody of Sakhichand The petitioners pleaded not guilty and stated that the charge brought against them was false. The learned Deputy Magistrate who tried the case found that the prosecution story was true in material particulars, and he accordingly convicted the petitioners and sentenced them as stated above.

Two points have been taken by the learned Counsel for the petitioners. The first point taken by him is that upon the findings the custody of Gena Tatwa was not lawful custody. Secondly, it has been contended that Gena Tatwa was tried on the charge of theft and acquitted and it was found that he had committed no offence, and under these circumstances a charge of rescuing him from lawful custody cannot be sustained.

As regards the first point, s. 59 of the Criminal Procedure Code authorises any private person to arrest any person who in his view commits a non-bailable and cognizable offence. It has been argued that in the present case according to the prosecution story Gena Tatwa did not commit any non-bailable and cognisable offence in the view of Sakhichand *Halwai* and that, therefore, the arrest of Gena Tatwa by Sakhichand *Halwai* was not lawful. On the other hand it has been argued by the learned Government Advocate that the facts do show that Gena Tatwa did commit a non-bailable and cognizable offence, namely, the offence under section 379, Indian Penal Code, in the view of Sakhichand *Halwai*, and, therefore, the arrest was lawful. The determination of this question depends on the meaning of the words "in his view" in s. 59 of the Code. In my mind these words mean "in presence of" or "within sight of" and the section provides that if an offence is committed in the presence of or within the sight of any private person then such person is entitled to arrest the person committing such offence. It is only when a non-bailable and cognizable offence is committed in the sight and in the presence of a private person that such person is entitled to arrest the offender. The learned Government Advocate, however, argues that the words in his view mean "in his opinion," and that although the offence might not be committed within the sight or in the presence of a private person but if such person is of opinion that such offence has been committed he is entitled to arrest. I am unable to agree with this interpretation. To my mind the Legislature did not intend to give a private person authority to arrest an offender if, upon information received or from other circumstances appearing before him he is of opinion that an offence has been committed. If I am correct in my interpretation of section 59 of the Code, then the arrest to Gena Tatwa by Sakhichand could not be a lawful arrest, because no offence of theft was committed by Gena in the presence and within sight of Sakhichand *Halwai*, all that was found was that Gena Tatwa was found hiding himself

behind a *kothi* in the house, and that would not entitle Sakhichand to arrest him unless his hiding could amount to a non-bailable and cognizable offence. In the second place the learned Counsel for the petitioners has produced before me a certified copy of the judgment of the case in which Gena Tatwa was charged with the offence of theft and was acquitted. It being found by a competent Court that Gena Tatwa did not commit the offence of theft, it follows that his arrest by Sakhichand was not lawful. It has been argued by the learned Government Advocate that the fact of Gena Tatwa being acquitted on the charge of theft will not make the arrest by Sakhichand unlawful, if it is shown that in the view of Sakhichand, or in other words, in his opinion Gena Tatwa did commit the offence. This depends upon the interpretation of the words " in his view " and according to the interpretation placed upon these words by me the arrest of Gena Tatwa cannot be said to be lawful. In this view of the case I am of opinion that the conviction of the petitioners under section 225 of the Indian Penal Code cannot be sustained.

The conviction and sentence are set aside. The fines, if paid, will be refunded.

Revision allowed.

A.I.R. 1926 Patna 54.

DAWSON MILLER, C.J. AND MACPHERSON, J.

Keshub Prasad Singh—Defendant-Appellant

v.

Harihar Prasad Singh and another—Plaintiffs-Respondents.

Privy Council Appeal No. 20 of 1924, decided on 2nd June 1925.

(a) *Patna High Court Rules, Part II, Chap. III, rr. 12 and 8—Affidavit on an interlocutory application—Declarant must state the source of his belief.*

When in an affidavit on an interlocutory application the declarant makes a statement of his belief he shall, if the facts are ascertained from another person, give such details of such person as are required by r. 8. If the facts are ascertained from a document or copy of a document then he must state the source from which it was procured and shall state his belief as to the truth of such facts. [P. 55, Col. 1.]

(b) *Practice—High Court—Stay of execution for costs is not ordered unless it is clear that the successful party will have no chance of recovering the costs.*

Where a party has been successful in a Court of Appeal and has been awarded his costs it is not the practice of the High Court to stay execution for costs except in cases where it is abundantly clear that there will be no chance of recovering the costs if they are allowed to go unprotected to the person entitled to them. [P. 55, Col. 1.]

L. N. Singh—for Appellant.

P. C. Manuk, B. B. Lal and *S. Dayal*—for Respondents.

Judgment.—This is an application on behalf of the appellant to England asking that the money deposited in Court to set aside a sale in execution of the respondent's decree for costs amounting to Rs. 61,261 should remain in Court pending the hearing of the appeal to the Privy Council. There was a further execution in respect of an additional sum for costs awarded at a later period amounting to Rs. 31,817. With regard to the first sum the appellant has withdrawn his objection. Therefore the respondent will be entitled to take that sum out of the Court, the sale being set aside. With regard to the smaller sum of Rs. 31,817 the execution proceedings have not yet terminated but the appellant contends that the respondent if he receives this money will not be able to re-pay it in the event of the appeal to the Privy Council being successful. In support of that the petition states that the appellant is informed and believes it to be true that the opposite party have not sufficient property over and above the property in dispute which will enable the petitioner to realise his just dues under the decree and costs in case the Privy Council reverses the decree of the High Court. He further says that in the event of the decree being reversed by the Privy Council the petitioner will not be able to realise anything by way of restitution from the opposite party as the petitioner is informed that he has not sufficient property to meet the obligation arising out of the decree in case the High Court's decree is reversed. In that petition the source of the petitioner's information is not stated. The petition, however, is supported by an affidavit signed by one Panchdeo Narayan who describes himself as the *karpardaz* of the petitioner and states: " I am fully aware of the facts stated in the petition. The facts stated in the petition are true to my knowledge." It is very difficult to know exactly what that affidavit is referring to. The facts stated in the petition are that the petitioner has

been informed that the opposite party will not be in a position to refund the money if the appeal to the Privy Council should succeed. It may be that the person who swore the affidavit is aware that the petitioner was so informed but that is not sufficient to entitle the Court to act in a matter of this sort. The rules are clearly laid down in the High Court rules, Part II, Ch. III, rule 12 which state that when in an affidavit on an interlocutory application the declarant makes a statement of his belief he shall, if the facts are ascertained from another person, give such details of such person as are required by rule 8. If the facts are ascertained from a document or copy of a document then he must state the source from which it was procured and shall state his belief as to the truth of such facts. Here the only statement is that the petitioner has been informed of certain things. We are not told where he gets his information from and it makes it none the better that somebody has sworn an affidavit saying that the facts alleged in the petition are true. The petition before us and the affidavit are totally inadequate in our opinion to entitle the Court to act in such a case.

But the matter does not rest there for the respondent has himself filed a petition supported by an affidavit in which he states that he has property in Bihar in addition to the property in dispute worth 20 lakhs of rupees and he refers to an admission made by the appellant in 1921 during the course of execution proceedings when the appellant had got a decree from the Trial Court, in which the appellant admits that the respondent had at that time property in Bihar worth Rs. 9,85,000. It is quite clear, therefore, that the respondent is not devoid of means and even on the petitioner's own showing he certainly is in a position to restore this sum of Rs. 31,817 if the petitioner should succeed in his appeal to the Privy Council. In our opinion this application should be dismissed with costs.

We wish to add that where a party has been successful in a Court of Appeal and has been awarded his costs it is not the practice of this Court to stay execution for costs except in cases where it is abundantly clear that there will be no chance of recovering the costs if they are allowed to go unprotected to the person entitled to them. This application is dismissed and the order of the 19th May directing that the sum paid into Court should remain there pending the hearing of this application is discharged. The respondent is entitled to his costs of this application. Hearing fee five gold *mohurs*.

Application dismissed.

A.I.R. 1926 Patna 55.

ROSS, J.

Asharfi Dhimar—Petitioner

v.

Muhammad Dindalal—Opposite Party.

Civil Revision No. 502 of 1924, decided on 3rd March, 1925, from an order of the District Judge, Darbhanga, dated 30th June 1924.

(a) *Bengal Tenancy Act, S. 174—Sale set aside—No appeal lies at the instance of auction purchaser.*

An order setting aside a sale under the provisions of S. 174 is not appealable at the instance of the auction-purchaser. Where however an appeal preferred against such an order is entertained by the appellate Court and the order is set aside, the High Court will interfere in revision if the order of the appellate Court is wrong on merits. [P. 56, Col. 2.]

(b) *Bengal Tenancy Act, S. 174—Deposit made fully but in slightly erroneous manner—Sale need not be set aside.*

A deposit under S. 174 need not be made by two separate *chalans*, one in favour of the decree-holder and the other in favour of the auction-purchaser. Where, therefore, the total amount of the deposit made by the judgment-debtor was correct, the mere fact that the deposit was made on two *chalans* as above and that the amount deposited on the *chalan* in favour of the decree-holder was slightly in excess and the amount deposited on the *chalan* in favour of the auction purchaser slightly less, than the respective amounts due, does not affect the maintainability of the application to set aside the sale. [P. 56, Col. 2.]

Murari Prasad and *Anirudhji Burman*—for Petitioner.

Saiyid Ali Khan—for Opposite party.

Judgment:—On the 16th of February, 1924, a sale was held in execution of a decree for rent and the holding was purchased by the opposite party for Rs. 76. On the 13th of March, 1924, the petitioner deposited in Court Rs. 59-0-6 under two *chalans*, the first in favour of the decree-holder showing, in its original form, the deposit of Rs. 55-0 6 and the second in favour of the auction-purchaser showing, in its original form, the deposit of Rs. 4. The total amount deposited was, therefore, Rs. 59-0-6. The amount of the decree was

Rs. 55-0 6 and the compensation due to the auction-purchaser was Rs. 3-12-0. The *chalans* were subsequently altered, by what authority it does not appear, with the result that the decree-holder's *chalan* became one of Rs. 55-8-6 and the auction-purchaser's *chalan* one of Rs. 3 8-0, annas 8 having been transferred apparently from the latter to the former. With these *chalans* the petitioner filed an application before the Court stating that he had to pay the amount of the decree and compensation and prayed that the *chalans* might be passed and the sale be set aside. On that day the Court ordered *chalans* to issue to the judgment-debtor for depositing the decree money and costs with compensation as prayed for. On the 24th of March, the order passed by the Munsif was that the decree money and costs with compensation had been deposited under *chalans* specified and that the sale should be set aside and the case dismissed on full satisfaction. Subsequently it was brought to the notice of the Court by the office that although the total amount due by the petitioner had been deposited, in fact the distribution according to the *chalans* in their final forms was incorrect, too much having been deposited in favour of the decree-holder and 4 annas too little in favour of the auction-purchaser. The Court then ordered on the 31st of March, 1924, that is beyond the period of limitation prescribed by section 174 of the Bengal Tenancy Act, that 8 annas deposited under the decree-holder's *chalan* should be transferred to the auction-purchaser. The auction-purchaser appealed to the District Judge against the order setting aside the sale and the learned District Judge has ordered an enquiry to be made into the alteration in the *chalans* and has directed that, if as the result of the enquiry the Munsif finds that the judgment-debtor was responsible for the alteration then the sale must stand: but if he finds that there has been fraud committed then he is at liberty to pass final order in the case on the merits as would seem to him fit and proper.

The first point taken in this application by the judgment-debtor is that no appeal lay at the instance of the auction-purchaser to the District Judge. This contention is established by authority and is conceded by the learned Vakil for the opposite party. He contends, however, that if he succeeds on the merits, this is a case in which the Court should exercise its jurisdiction in revision, even if no appeal lay to the District Judge. This is a well-recognized principle and it is, therefore, necessary to look at the merits of the case. On the merits the contention on behalf of the petitioner is that the Court had accepted the deposit and set aside the sale and the money deposited was in fact more than sufficient to meet the requirements of section 174; and it was for the Court to distribute the dues between the decree-holder and the auction-purchaser. It is pointed out that there is no rule requiring deposit to be made by two separate *chalans*, and that the fact that the distribution actually made in the two *chalans* was slightly erroneous cannot affect the title of the depositer to have the sale set aside, when in fact the full amount due had been paid; and that it was for the office of the Executing Court to make the proper distribution between the parties.

The argument on behalf of the opposite party is that the judgment-debtor chose to make the deposit by two *chalans* and took the risk of error; that the deposit must be made in a form which makes the money immediately available to the person for whose benefit the deposit is made; and that the action of the learned Munsif in re-distributing the deposit after the period of limitation amounts to extending the time which he had no jurisdiction to do. Now the authorities that were cited for the proposition that the deposit must be made in a form immediately available have no application on their facts to the facts of the present case. The money was in Court and was immediately available; and the fact that some clerical process had to be gone through in the Court before the auction-purchaser could get his 4-annas does not bring the case within the principle of the decisions referred to of which the principal was *Rahim Bux* v. *Nundo Lal Gossami* (1). Nor, in my opinion, was time extended by the order of the 31st of March. The money was already in Court and the transfer of 8-annas from one *chalan* to the other was merely a clerical matter which had nothing to do with the extension of time. The deposit was made within the time limited by law and the fact that some action had to be taken in

(1) (1887) 14 Cal. 321.

the office to make the proper amount available to the auction-purchaser cannot, in my opinion, be treated as an extension of time. Apparently the office of the Executing Court was in error and the judgment-debtor was misled as to the exact sums payable to the decree holder and to the auction purchaser respectively. But he had deposited the full amount required by law and his deposit had been accepted and the sale has properly been set aside.

The order of the 24th of March setting aside the sale was, in my opinion, a proper order and as no appeal lay at the instance of the auction-purchaser from that order, that order must be restored. The result is that the decision of the learned District Judge must be set aside and the order of the Munsif setting aside the sale restored. The petitioner is entitled to the costs of this application ; hearing-fee one gold *mohur*.

Application allowed.

A.I.R. 1926 Patna 57.

KULWANT SAHAY, J.

Harnandan Das—Applicant.

v.

Atul Kumar Prasad and others—Opposite Party.

Criminal Revision No. 397 of 1924, decided on 9th September 1924, from an order of the District Magistrate, Bhagalpur.

Crim. Pro Code, S. 203—Order of dismissal—Reasons for dismissal should be recorded.

Under S 203, Cr. P. C it is incumbent upon the Magistrate to record briefly his reason for dismissing the complaint. [P. 57, Col 2.]

Aniruddhaji Burman—for Applicant.

Judgment:—This is an application against an order passed by the Sub-Divisional Magistrate of Madhipura dismissing the complaint of the petitioner under section 203 of the Criminal Procedure Code. The order has been upheld by the District Magistrate of Bhagalpur when a petition of revision was filed before him. It appears that on the 27th November 1923 the petitioner lodged a complaint before the Sub-Divisional Magistrate charging the accused persons who are the opposite party in the present application with having uprooted a bamboo *dhwaja* or flag and demolished a platform near the temple of Mahabirji of which the petitioner alleges to be the *shebait*. He further complained that the accused persons had way-laid the petitioner while he was going to the Police station to lodge information about the occurrence and to have assaulted him and snatched away his wrapper and a sum of Rs 21 which he had about him. The learned Sub Divisional Magistrate by his order, dated the 27th November, ordered an enquiry to be made by Babu Kali Prasanna Banerji, Tahsildar of the Burdwan Estate, under section 202, Criminal Procedure Code. There was, however, some delay, in the papers being sent to Babu Kali Prasanna Banerji, and before the order could be communicated to him he had left the place for Burdwan. It appears that the *peshkar* was responsible for this delay. Thereupon one Babu Tej Narain Sinha, Honorary Magistrate, was requested to make the enquiry and submit a report. He submitted his report on the 9th February, 1924, in which he stated that the allegation of the complainant about the *dhwaja* being uprooted by the creatures of the *zemindar* was true but that his other allegations about the theft of money and of the wrapper were exaggerations. It further appears from his report that the dispute is going on between the petitioner and Atul Kumar Prasad *alias* Tulo Kumar the opposite party in the proceeding, who is a *zemindar* of the village and that in a suit brought by the petitioner for declaration of his title and possession of certain land against Tulo Kumar he has obtained a decree for possession and that it was on account of the dispute between the parties, that Tulo Babu ordered the *dhwaja* to be uprooted and the platform to be demolished. Now, on receipt of this report the learned Sub-Divisional Magistrate by his order, dated the 12th February, 1924, dismissed the complaint under section 203, without giving any reason whatsoever. His order of the 12th February 1924, runs thus :—

" Dismissed, section 203, Criminal Procedure Code, *vide* enquiry report."

Now, under section 203, Criminal Procedure Code, it was incumbent upon the Sub Divisional Magistrate to record briefly his reason for dismissing the complaint. No reasons whatsoever are given in his order of the 12th February, 1924. He merely refers to the report of the Honorary Magistrate but on referring to the report of the Honorary Magistrate it appears that the allegations of the petitioner about the

uprooting of the *dhwaja* and the demolition of the *chabutra* are correct. If that is so, the matter ought to have been enquired into. The learned Sub-Divisional Magistrate has sent a long explanation in reply to the notice issued by this Court, but he deals with matters which are wholly irrelevant to the present application and no one has appeared on behalf of the accused persons to show cause against the present application. I think the order of the learned Sub-Divisional Magistrate dismissing the complaint under section 203 is bad in law and ought to be set aside and the case must be sent back to him for disposal according to law.

Revision allowed.

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* A.I.R. 1926 Patna 58.

FOSTER, J.

Emperor—Complainant.

v.

Phagunia Bhuian—Accused.

Criminal Reference No. 3 of 1923, decided on 11th September 1923, by the Sessions Judge, Gaya.

(a) *Evidence Act, S. 33—Evidence not taken according to Ch. 25, Crim. Pro. Code—Evidence is not admissible.*

Where the formalities prescribed in Ch. 25 of Crim. Pro. Code are not observed in recording evidence, the accused cannot be said to have had opportunity to cross-examine within S. 33. [P. 60, Col. 1.]

(b) *Evidence Act, S. 157—Evidence of raped girl excluded—Evidence of her relatives cannot be used for corroboration.*

If the evidence of a raped girl is excluded from the case, the evidence of her relatives to the effect that she accused a certain person of having raped her cannot be used as corroborative evidence under S. 157. [P. 60, Col. 1.]

* (c) *Evidence Act, S. 8—Evidence of raped girl—Voluntary statements made immediately after occurrence are relevant.*

If the raped girl went to her relatives straight after the occurrence and complained on her own initiative about her rape, her conduct would have a direct bearing upon and connection with the occurrence, but if she only answered questions put to her, her statement would be mere hearsay. [P. 60, Col. 2.]

The Assistant Government Advocate—for the Crown.

M. N. Pal—for Accused.

Judgment:—In this case Phagunia Bhuian was charged with committing rape upon a small girl aged about 6 years by name Saniohwa Bhuini, on the 7th of May, 1923. The Jury returned an unanimous verdict of not guilty, but the Sessions Judge of Gaya found himself unable to agree with the verdict and has referred the case to the High Court under section 307 of the Criminal Procedure Code. The facts are as follows:—

The child Saniohwa was playing near the landlord's house in her village when the accused (whose age is about 22 years) came up and offered to give her cooked rice if she would come with him. The accused lifted her up, thrust a piece of cloth into her mouth and carried her to a latrine immediately in front of the landlord's house, that is, in front of Miran Khan's house. Another landlord of the village, Warasat, lives in a house behind Miran Khan's. Having taken the child into the latrine the prosecution case continues he attempted sexual intercourse in consequence of which a rupture was caused to the vagina. The child went home and informed her relatives. Her cloth was wet with blood, and she was carried to the *thana* bleeding. She was subjected to medical examination, and the medical evidence indicates that some one or other had committed rape effecting penetration, with the result of very serious injury to her person. Saniohwa has died since she deposed in the inquiring Magistrate's Court. There are upon the record two statements made by her; the first is the First Information lodged at 1 A.M. on the 8th May, that is, about 12 hours after the occurrence, at the Sherghati Police Station, 13 miles from the place of occurrence; the other statement is her deposition given on the 21st May, in the inquiring Magistrate's Court.

The Sub-Inspector who recorded the First Information went to the spot and arrested the accused on the day after the date of occurrence and the Senior Sub-Inspector subsequently took over charge of the investigation the same day. Meanwhile the accused had been sent to Gaya. On the following day, the 9th May, the Senior Sub-Inspector went also to Gaya and examined the accused, and on the same day the accused was produced before a Magistrate and made the following statement:—

"The girl was playing under the *kanota*. I induced her to go with me and cohabited with her. When blood began to flow I left her. I do not know her name."

In the Sessions Court this confession was repudiated by the accused who stated that he had been beaten by the landlord who had not paid him wages. He denies that he had made any confession and he denied having committed rape.

The prosecution evidence, so far as it is concerned with the actual occurrence, consists in the statement of a boy Budhoo Khan, aged 6 years, who deposes that he had been playing with Sanichwa and that he saw her carried off by the accused into the latrine, and saw her come out and go home with blood upon her clothes; in the depositions of Sanichwa's brother Sukwa, brother's wife, Mularwa and father Akkal, who described the child's condition when she got home and the account that she gave of what had happened; and in the deposition of Imam Ali who states that Sukwa came to him and told him what had happened and showed him Sanichwa lying unconscious at home, whereupon he went and arrested the accused and brought him before the landlord, Warasat.

In the face of the medical evidence, it is only possible to conclude that the child Sanichwa was subjected to the lustful violence of one or more male adults. Her back, shoulders, and neck bore injuries which, taken with the rupture of the vagina most infallibly point to a rape. It is peculiar that no blood was found in the latrine. This latrine is in itself hardly a likely place for a man to effect a rape, it being directly in front of the house of Miran Khan. Its walls are dilapidated and there is only one corner where the interior is not visible from outside. The learned Sessions Judge contends that if there was a rape there would be no need to change the place of occurrence; but it is obvious that if a guilty person is to be shielded, it might be necessary to change the place of occurrence. Miran Khan's two sons, Imam Ali and Budhoo Khan, have given most important evidence in the case.

It is noticeable that Imam Ali did not come into the investigation as a witness until the 11th of May, that is, the fourth day of the investigation. The learned Sessions Judge found Imam Ali to be a slow and stupid witness and ascribes the fact that he was not examined on the first day of the investigation, to his slowness and stupidity. Then he makes the remark, which I find absolutey unconvincing, that supposing a false case was being manufactured a witness like Imam Ali would have been pushed forward at the first opportunity. Now Imam Ali deposes that he took the accused to Warasat Mian, one of the *maliks* of the village. Warasat has not been produced as a prosecution witness. The learned Sessions Judge is firmly of opinion that the prosecution had no *mala fide* intention in not examining Warasat, and he calls attention to the fact that when it was realized in the Sessions Court that his evidence was necessary every effort was made to produce him. It appears to me to be of secondary importance, to consider whether the prosecution (which is the Crown in this case) was in good faith or otherwise. The important facts are that Warasat Mian has, on two occasions at least, done something which has materially affected the course of this case. Imam Ali deposes that when he took the accused to Warasat, Warasat made the accused wash his loin cloth. This was represented to the Sub-Inspector to be the reason why the accused's loin cloth had no stains of blood. Again, Warasat Mian has abstained from coming to Court to give evidence of what he knows about the case. As to one other way in which he has possibly affected the course of the investigation, namely, his assault upon the accused, I shall have more to say later.

The learned Sessions Judge has summarised the evidence in the case under six headings: (1) the statement of the girl herself, (2) the evidence of Budhoo Khan, (3) the evidence of Sanichwa's relatives, (4) the medical evidence, (5) the evidence of Imam Ali as to having seen blood on the accused's *dhoti*, and (6) the accused's confession. I proceed to deal with these, with the exception of the medical evidence, in their order.

Sanichwa's statement made in the Court of the inquiring Magistrate was not read over in the manner required by section 360 of the Criminal Procedure Code. In section 354 it is prescribed that the evidence of witnesses must be recorded "in the following manner," and that includes provisions of section 360. Now, under section 208 of the Criminal Procedure Code the inquiring Magistrate must take "in manner hereinafter provided" (this refers to Chapter XXV of the Code) "all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the

Magistrate" and "the accused shall be at liberty to cross-examine the witnesses for the prosecution." Now, until the evidence is taken in the manner provided in Chapter XXV, it is obvious that there is no occasion for cross examination by the defence. Till the evidence has been properly verified, the defence cannot be considered to have an opportunity to cross-examine; so in my opinion section 33 of the Evidence Act was not applicable to Saniehwa's deposition of the 21st May. The learned Assistant Government Advocate has frankly conceded that Saniehwa's evidence may go out of the case.

Now I come to the evidence of Budhoo Khan. In the first place, Saniehwa in her First Information and in her deposition in Court denied that any one was with her. In the First Information she states that she was playing alone. In her deposition she states that none was present when the accused took her to the *paikhana*. In the second place, when I read this deposition of Budhoo Khan it strikes me as having the appearance of a mere mechanical statement. He saw the child picked up, taken into the *paikhana* and then saw her come out and he accompanied her to her house. He does not describe what the accused said to the girl, or what the girl did, or what her condition was when she came out of the latrine and went home. He only describes the condition of her clothes. When questions were put outside the bare narrative of the occurrence, he appears to have answered at random: "This happened in the afternoon. My father had gone out to the fields. My mother was at home, and sister, and no one else. We began playing early. I went home and had a meal, she did not come to play again after that. Phagunia was collecting cow-dung. He abused me.

Q. Why?

No answer. After collecting cow-dung he fled. I told my brother.

Q. What did you say? No answer. This Budhoo Khan is, as I have stated, the younger brother of Imam Ali.

As to the evidence of Saniehwa's relatives to the effect that Saniehwa accused Phagunia of rape, if Saniehwa's evidence is to be excluded from the case, this evidence cannot be employed as corroboration under section 157 of the Evidence Act. As to whether it is evidence under section 8 of the Evidence Act (*vide* illustration (*j*), the question is a debateable one whether Saniehwa's statements were complaints. If the girl went to her relatives straight after the occurrence and complained on her own initiative, there is no doubt that her conduct would have a direct bearing upon and connection with the occurrence itself: but if she only answered questions, her statement would be mere hearsay.

Coming to the evidence of Imam Ali that he saw blood on the accused's *dhoti*, I would first suggest that the evidence can only amount to this, that Imam Ali saw marks "as of blood" on the accused's *dhoti*. This witness arouses my suspicions not only because he came at a late date into the case, but also because I find it hard to believe his story. He arrested the accused and took him to Warasat who forthwith began to beat the accused without questioning him expecting to say why have you done this? Then Warasat told the accused to wash his *dhoti*. All this is an extraordinary narrative. It is not clear why Warasat was so suddenly violent, nor can I understand for a moment why it came into Warasat's head to tell Phagunia to wash his *dhoti*, if there was blood upon it. If there was no blood, the washing of the *dhoti* might be a useful step in the preparation of a false charge against Phagunia.

Lastly, I come to the confession made on the 9th of May. The evidence of Imam Ali shows that Warasat beat the accused and told him that it would be better for him to confess. This was on the 8th May, the Police Officers noticed injuries on Phagunia's head, arms and legs, and on the 14th May, the Jail Sub-Assistant Surgeon found 8 marks of violence on Phagunia's person. Now, Phagunia was produced before the Deputy Magistrate to be examined under S. 164 of the Cr. P. C. on the 9th of May. The Deputy Magistrate made some show of careful enquiry as to the voluntary nature of the accused's confession, but he never asked the accused whether he had been beaten and he did not notice any of the marks on his person.

In this criticism of the evidence my main object has been to show that at every turn through the evidence one's path is beset with warning signals. The verdict of the Jury was "not guilty," "giving the accused the benefit of the doubt". The Jury

were immediately questioned as to the principal points on which they were doubtful. The questions could hardly have been foreseen, and some of the reasons given by the Jurors are not complete or convincing, but in my opinion they did not act unreasonably or insincerely in arriving at their verdict of " not guilty."

For these reasons I decline to accept the reference of the learned Sessions Judge. I acquit Phagunia Bhuian and direct that the accused be discharged from custody or bail as the case may be.

Reference not accepted.

A.I.R. 1926 Patna 61.

KULWANT SAHAY, J.

Chakauri Lal—Plaintiff-Appellant

v.

Deo Chand Mahton and others—Defendants-Respondents.

Appeals Nos. 44 to 49 of 1923, decided on 15th April, 1925, from Appellate Decrees of the District Judge, Shahabad, dated 14th December, 1923.

(a) *Custom—Proof must be given apart from cases in dispute.*

A custom must be established independently of and apart from cases in dispute. [P. 62, Col. 1]

(b) *Occupancy holding—Acquisition of right by custom—Mere proof of long possession and planting trees is insufficient.*

The mere fact of the defendants having occupied the lands in dispute for over 40 years and the fact of their having planted trees upon portions of the land and of their being granted printed receipts would not establish in law a custom that the defendants who were *sikmi* tenants or under-*raiyats*, have acquired the right of occupancy in a land. [P. 62, Col. 1]

G. S. Prasad and *Anand Prasad*—for Appellant.

Ramanugrah Narain Sinha and *N. S. Rai*—for Respondents.

Judgment:—These are appeals by the plaintiff and arise out of suits in ejectment upon a declaration that the defendants are under-*raiyats* of the plaintiff who is an occupancy tenant of the land in dispute. The plaintiff served notice upon the defendants under s. 49 of the Bengal Tenancy Act asking them to give up possession, but they have failed to vacate the land. The plaintiff, therefore, brought the present suits for recovery of possession. The defence was that the land in dispute was the *gujasta kasht* of the ancestors of the defendants and that the plaintiff was a tenure-holder and not an occupancy tenant. The defendants assert that they are not *sikmidars* or under-*raiyats* of the plaintiff, and, therefore, are not liable to ejectment.

The Munsif found that the plaintiff was an occupancy tenant and the defendants were under-*raiyats* under him, and that the land in dispute was not the *kasht gujashta* of the defendants, and that the plaintiff was not the tenure-holder. It was further stated by the defendants in their written statement that even as under-*raiyats* they had by custom acquired the rights of occupancy in the land. The learned Munsif in dealing with this point observed that no evidence had been adduced about such a custom and that the defendants had failed to prove that they had acquired occupancy right in the land in suit. He, therefore, made a decree in the plaintiff's favour and awarded mesne profits to the extent of $\frac{2}{3}$rds of what the plaintiff claimed.

On appeal by the defendants the learned District Judge has upheld the findings of the Munsif as regards the title of the plaintiff. He is of opinion that the Munsif was right in his finding regarding the status of the parties, namely, the status of the plaintiff being that of an occupancy tenant and that of the defendants being under-*raiyats*. The learned District Judge, however, has come to the conclusion that as under-*raiyats*, the defendants have acquired a right of occupancy in the land in dispute. With reference to the observation of the Munsif that no evidence had been produced to prove the custom set up by the defendants the learned Judge says that this is so and having regard to the nature of the case made by the defendants, namely, that they were occupancy tenants and not under-*raiyats* of the land in dispute, no such evidence could be expected on their behalf. The learned District Judge has, however, considered the fact that the defendants, who are nine in number, assert that they possess occupancy rights and he says that if the assertion of all these tenants regarding their possession of occupancy rights is accepted, then the usage in question, namely, the usage under which the under-*raiyats* acquire the right of occupancy is established. He refers to the evidence of the defendants themselves to the effect that occupancy rights have accrued to them by

virtue of their long possession and by virtue of the fact that some of them have planted trees upon the holding and by virtue of the fact that the plaintiff has been in the habit of granting them printed receipts. These three facts are, in the opinion of the learned Judge, sufficient to establish a custom under which *sikmi* tenants or under-*raiyats* acquire the right of occupancy in a land. He refers further to the fact that the defendants and their ancestors have been in possession for periods varying from over 40 to 50 years and that the holding in question had been handed down from father to son. In my opinion the facts found by the learned District Judge are not sufficient in law to establish a custom of under-*raiyats* acquiring occupancy rights in the village. The nine cases referred to by the District Judge are cases in dispute and they by themselves cannot go to establish a custom. A custom must be established independently of and apart from the cases in dispute. Admittedly there is no other evidence in this case to prove such a custom; and, in my opinion, in the absence of such evidence the mere fact of the defendants having occupied the lands in dispute in the present cases for over 40 years and the fact of their having planted trees upon portions of the land and of their being granted printed receipts would not establish in law a custom, as set up by the defendants.

In my opinion the decision of the learned District Judge cannot be supported and must be set aside and the decree of the Munsif restored. These appeals are, therefore, allowed with costs here and in the Court below. Hearing fee in this Court will be assessed in each case at half the usual rate.

Appeal allowed.

A.I.R. 1926 Patna 62.

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

Bibi Hajo and another—Appellants

v.

Har Sahay Lal—Respondent.

Appeal No. 164 of 1924, decided on 17th March, 1925, from Appellate Order of the District Judge, Patna, dated 12th May, 1924.

(a) *Practice—Duty of Court—Court will not initiate proceedings.*

It is never the duty of the Court to initiate any proceedings on behalf of the parties. [P. 63, Col. 2.]

(b) *Lim. Act, Art. 181—Execution stayed by an injunction—Right to execute revives on injunction coming to an end—Decree-holder must apply for revival within three years from accrual of right—Lim. Act, Art. 182.*

Where the execution of a decree has been suspended by an injunction of a competent Court, the right to execute revives as soon as the operation of the injunction ceases. Therefore a subsequent application for execution by decree-holder must be made within three years of the accrual of right, *i.e.*, the date on which the operation of injunction ceases [P. 63, Col. 2]

Khurshed Husnain, B. C. Mitra and *Ali Khan*—for Appellants.

Naresh Ch. Sinha and *B. N. Mitra*—for Respondent.

Dawson Miller, C.J.:—The question for determination in this appeal is whether an application filed on the 7th August, 1923, for execution of a decree is barred by limitation. The Munsif found that it was not barred. The Subordinate Judge on appeal found that it was and dismissed the application and the decree-holders have preferred a second appeal to this Court.

The material facts are as follows:—

The appellants obtained a rent decree against the respondent on the 2nd April, 1917, which was affirmed on appeal on the 12th September, 1917. Execution proceedings were first instituted in 1918, but were dismissed. A second application was made on the 23rd May, 1919 and certain property of the judgment-debtor was attached and proclaimed for sale on the 15th September, 1919. Meantime the judgment-debtor on the 15th April, 1918, had instituted a title suit numbered 136 of 1918, in the Court of the Munsif of Bihar against the decree-holders and others impugning the decree-holders' title to the land in respect of which the rent decree had been obtained and claiming, amongst other reliefs, a declaration that the rent decree was null and void. This part of his claim was rejected by the Munsif by his judgment dated the 10th March, 1919. An appeal was carried to the Subordinate Judge of Patna and pending the appeal the judgment-debtor obtained an order from the Subordinate Judge in September 1919, granting an injunction restraining the sale in the execution proceedings until the disposal of the appeal then before him. On the 16th September, 1919, the Executing Court ordered the sale to be stayed until the disposal of the

appeal before the Subordinate Judge in Suit No. 136 of 1918, and on the 13th November, 1919, the Executing Court passed an order in these terms: "Let the case be dismissed at present." The Subordinate Judge of Patna delivered his judgment on appeal in Suit No. 136 on the 9th June, 1920. He varied the decree of the Munsif in certain respects but affirmed that part of his decision which rejected the prayer for a declaration that the rent-decree was null and void. The effect of his decision was to declare that the judgment-debtor (the plaintiff in that suit) was not liable to pay rent until certain conditions had been fulfilled by the landlords. This decision, however, did not and could not affect the decree-holder's right to the previous rent payable under the rent-decree of 1917 which still subsisted and was not declared null and void. The injunction which had been granted restraining the sale in execution pending the hearing of the appeal in Suit No. 136 thereupon automatically came to an end. An appeal from the Subordinate Judge of Patna was preferred to the High Court, but no further application for an injunction restraining the execution proceedings was made. The High Court's decision was pronounced on the 18th January, 1923, restoring the decree of the Munsif and a further appeal under the Letters Patent was dismissed on the 10th May, 1923. The present execution case was instituted on the 7th August, 1923, which is more than three years from the date when the previous case was dismissed in November, 1919, and more than three years from the 9th June, 1920, when the injunction restraining execution came to an end. It is, therefore, *prima facie* time-barred.

The learned Munsif in whose Court the present application was presented was of opinion that the operation of the injunction continued up to the date of the dismissal of the Letters Patent Appeal in the High Court in 1923 and that the present application was not barred. In taking this view I think he was clearly in error The injunction was for a limited period only and expired at the termination of that period, namely, when the appeal before the Subordinate Judge of Patna was disposed of. No fresh application was made and the injunction was never renewed. He also thought that the effect of the Subordinate Judge's judgment in Suit No. 136 was to suspend all payment of rents past and future including the rent covered by the previous decree. In taking this view he was again mistaken. The right to recover the rent included in the decree of 1917 could not be challenged in the subsequent title suit unless the decree itself was declared void, but this part of the claim was rejected throughout and once the injunction automatically terminated on the 9th June, 1920, there was no longer any bar restraining the decree-holder from proceeding with his execution.

The Subordinate Judge of Patna before whom the case went on appeal reversed the decision of the Munsif taking the view which I have just expressed. The decree-holders have appealed to this Court from the decision of the Subordinate Judge and contend that the previous execution case was never finally dismissed and is still pending and that there is no limitation for an application to proceed with a case temporarily suspended. They further contend that it was the Court's duty to restore the case and call on the parties to proceed as the order of the 13th November, 1919, in the previous execution case was not a final dismissal of those proceedings. In my opinion the effect of the order of the 13th November, 1919, was to dismiss the execution case then pending with an intimation that an application for renewal might be made if and when the obstacle should be removed. It was, however, for the parties to move the Court for a re-instatement if so advised. It is never the duty of the Court to initiate any proceedings on behalf of the parties. An application by the decree-holder was necessary to put the law again in motion and even if the present application should be treated as one in continuation of the previous application there must be some limitation for such a proceeding. Assuming that Art. 182 of the Limitation Act does not apply, and it does not help the appellants, then Art. 181 must, I think, be applicable and the period of limitation is three years froms the date when the right to apply accrued. The right accrued in this case on the 9th June, 1920, when the injunction was removed and the present application of the 7th August, 1923, is time barred. This view agrees with the decision of Ross and Dass, JJ. in *Lal Pasi* v. *Ramsaran Lal Chowdhry* (1) dated the 17th January, 1924, where exactly the same question arose for

(1) A.I.R. (1) 1925 Patna 298.

decision "It is argued for the respondent" said Ross, J., in that case "that the present application should be treated as a continuation of the previous application. * * * But, in my view, there must be some limitation to the continuation of execution proceedings and the limitation would appear to be imposed by Art. 181." I see no reason to differ from the view expressed in that case and in my opinion this appeal should be dismissed with costs.

Mullick, J.:—I agree.

Appeal dsmissed.

A.I.R. 1926 Patna 64.

KULWANT SAHAY, J.

Gobinda Bauri and others—Plaintiffs-Appellants

v.

Kristo Sardar—Defendant-Respondent.

Appeals Nos. 943 and 950 of 1922, decided on 8th May, 1925, from Appellate Decrees of the Offg. Sub-Judge, Manbhum, dated 23rd June 1922.

(a) *Chota Nagpur Tenancy Act (VI of 1908), S. 139—Section contemplates cases where relationship of landlord and tenant is admitted—Where Tenancy is not admitted suit for possession of occupancy holding cannot be entertained by Deputy Commissioner but can be maintained in Civil Court.*

This section contemplates a case where the relationship of landlord and tenant is admitted to exist between the parties; it does not contemplate cases where there is a dispute as regards title. Where the relationship of landlord and tenant is not admitted a suit for possession of occupancy holding on the ground of defendant's denial of the Tenancy right is not cognizable by the Deputy Commissioner, and S. 139 does not operate as a bar to the maintainability of such a suit in the Civil Court. [P. 65, Col. 1.]

(b) *Chota Nagpur Tenancy Act (VI of 1908), Ss 89 and 83 and 258—Order under S. 89 of Attestation Officer can be revised by Settlement Officer and such revision bars a suit in Civil Court by reason of S. 258.*

All orders whether by *khanapuri* officers or by Attestation Officers have to be made during the preparation of the draft Record of Rights and all such orders passed before final publication of the Record of Rights are subject to revision under the provisions of S. 89 of the Act. The order of the Attestation Officer is an entry made in the draft Record of Rights within the meaning of S. 89 and therefore the Settlement Officer has jurisdiction to revise that entry under the provisions of S. 89 of the Act and, therefore, S. 258 which provides that such an order of revision will be final and shall have the force and effect of a decree of Civil Court, operates as a bar to the suit in Civil Court to set aside the order. [P. 66, Col. 2.]

(c) *Land Tenure—Ghatwali Tenure—Occupancy rights.*

Occupancy rights cannot be acquired in *ghatwali* lands. (33 Cal. 630 and 1 C.L.J. 138, *Foll.*) [P. 67, Col. 1.]

A.K. Roy—for Appellants.

A. B. Mukerji and *B. B. Mukerji*—for Respondent.

Judgment:—These two appeals are by the plaintiffs and arise out of two suits brought by them for declaration of their title and for recovery of possession of certain lands set out in the schedules attached to the plaint. Their case was that the lands in dispute formed the ancestral *jote jamai* right of the plaintiffs and that the defendant, who is the *ghatwal* of the village where the lands are situated, forcibly dispossessed them in *Agrahayan* 1327 *B. S.* and that, therefore, they claimed recovery of possession on adjudication of their title to the land.

The defence of the defendant was that the Civil Court had no jurisdiction to entertain the suit and that the suit was triable in the Court of the Deputy Commissioner alone; that the suit was barred by limitation; that the plaintiffs had no *raiyati* interest in the lands; that the said lands were granted to the ancestors of the plaintiffs by way of maintenance and that on the death of the maintenance-holders the defendant had resumed the lands and taken possession thereof; that during the settlement operations the plaintiffs tried to take possession thereof as tenants but that by an order of the Deputy Commissioner possession had been delivered to the defendant with the aid of the Police. It was contended that the suit was barred under the provisions of section 258 of the Chota Nagpur Tenancy Act.

The learned Munsif who tried the suit held that the plaintiffs were *raiyats* with occupancy rights of the lands in dispute; that the suit was maintainable in the Civil Court; that it was not barred by section 258 of the Chota Nagpur Tenancy Act; that the plaintiffs were in possession of the lands till they were dispossessed by the defendants through the help of the Police in *Agrahayan* 1327 *B. S.*; that although the lands in dispute were situated in a *ghatwali* village yet the plaintiffs could acquire occupancy right in the *ghatwali* lands. He believed the receipts for rent produced by the plaintiffs and decreed the suits for recovery of possession.

On appeal by the defendant the learned Subordinate Judge has set aside the decrees passed by the Munsif. He has held that the suit was barred under the provisions of section 258 of the Chota Nagpur Tenancy Act, and that the plaintiffs had no right as *raiyats* in the lands in dispute. He further held that the plaintiffs could not acquire occupancy right in *ghatwali* lands. He has accordingly dismissed the suits.

The plaintiffs have come up in second appeal to this Court.

At the hearing of the appeals a preliminary objection was taken on behalf of the respondent to the effect that the suit was not maintainable in the Civil Court. The learned Vakil relied upon the provisions of section 139-A of the Chota Nagpur Tenancy Act, and he contended that the suit being one for recovery of possession by a tenant against his landlord on the allegation that the plaintiffs as tenants had been unlawfully ejected by their landlord their proper remedy was by an application or a suit under clause (5) of section 139 of the Chota Nagpur Tenancy Act and under the provisions of section 139-A of the Act the Civil Court had no jurisdiction to entertain the suit. The objection, in the form it has been taken, here does not appear to have been taken in the Court below; moreover it is not a preliminary objection to the hearing of the appeal but an objection on the merits of the case relating to the jurisdiction of the Civil Court to entertain the suit. Having regard, however, to the frame of the suit I am of opinion that this objection is not sound. Section 139 provides that certain suits and applications shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of the Chota Nagpur Tenancy Act and shall not be cognizable in any other Court except as otherwise provided in the Act; and cl. (5) of the section enacts that all suits and applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord is one of the suits which is so cognizable by the Deputy Commissioner. This section contemplates a case where the relationship of landlord and tenant is admitted to exist between the parties; it does not to my mind contemplate cases where there is a dispute as regards title. In the present case the relationship of landlord and tenant is not admitted; the plaintiffs expressly stated in their plaint that the defendant denied their tenancy right and that he has been asserting that the plaintiffs had no right to the land in suit. There was a specific prayer in the plaint for an adjudication of the plaintiffs' title as occupancy *raiyats* of the land. Such a suit, in my opinion, was not cognizable by the Deputy Commissioner, and section 139 does not operate as a bar to the maintainability of the suit in the Civil Court.

As regards the bar of section 258 of the Chota Nagpur Tenancy Act, the facts appear to be as follows:—One Manu Bauri had five sons. The eldest son was Haru Bauri who was the father of the defendant Krishna Sardar. The second son was Nafar Bauri who was the ancestor of the plaintiffs in Suit No. 986 which gave rise to S. A. No. 950. The third was Gokhul Bauri the father of the plaintiffs in Suit No. 985 giving rise to S. A. No. 943. The remaining two sons were Gopal and Mansaram. According to the plaintiffs their ancestors first came and began to live in village Dhakya and acquired lands there as tenants. Manu and his eldest son Haru subsequently became *ghatwals* of the village; but before the acquisition of the *ghatwali* interest, the plaintiffs assert that their ancestors had already acquired *raiyati* interest in the lands. During the *khanapuri* operations the plaintiffs were first recorded as tenants of the lands in dispute under the defendant; but, subsequently, during attestation proceedings the names of the plaintiffs were removed from the category of tenants and recorded in the remarks column as being in possession of the lands with the share of rent and cess payable by them. The defendant thereupon went to the Deputy Commissioner of Manbhum and complained that he was the *ghatwal* of the lands in dispute and that he had been wrongfully dispossessed by his relations, namely, the present plaintiffs, and asked him for help to recover possession of the lands. The Deputy Commissioner by his *parwana* dated the 16th July, 1920, directed the officer-in-charge of the Police station to oust the plaintiffs from the plots in dispute and to put the defendant in formal possession thereof. The defendant accordingly with the help of the Police obtained possession of the lands

in dispute and the plaintiffs were thus dispossessed therefrom. The defendants thereafter went before the Settlement Officer. The learned Settlement Officer by his order dated 31st January, 1921, directed that the possession of the plaintiffs in respect of the lands in dispute in the *khatian* as made under orders of the Attestation Officer be cancelled. This last order of the Settlement Officer purports to be under section 89 of the Chota Nagpur Tenancy Act, and it is contended that under section 250 of the Act no suit can be entertained in any Court to vary, modify or set aside either directly or indirectly any decision, order or decree of the Deputy Commissioner or Revenue Officer in any suit, application or proceeding under section 89 of the Act except on the ground of fraud or want of jurisdiction, and that every such decision, order or decree has the force and effect of a decree of a Civil Court in a suit between the parties and, subject to the provisions in the Act relating to appeals, the order is final. The learned Munsiff came to the conclusion that, the order of the Settlement Officer dated 31st January, 1921 was not an order under section 89 of the Act inasmuch as section 89 pre-supposes a proceeding under sections 83, 85 or 86 of the Act, and as there was no proceeding under any of these sections prior to the order of the 31st of January, 1921, and, therefore, according to the Munsif the order purporting to be under section 89 was *ultra vires* and without jurisdiction and that section did not apply to the present case. The learned Subordinate Judge, however, has held that there was nothing in the record to show that there was no previous case under section 83 but that even if it were so, it would make no difference inasmuch as by the Amending Act, VI of 1920, (Bihar and Orissa) any entry in the draft Record of Rights can be revised by the Revenue Officer if application be made to him within 12 months from the making of the entry. He was of opinion that the entry made by the order of the Attestation Officer was an entry made in the draft Record of Rights within the meaning of section 89, and that therefore, the settlement officer had jurisdiction to revise that entry under the provisions of section 89 of the Act and, therefore, section 258 which provides that such an order of revision will be final and shall have the force and effect of a decree of Civil Court, operates as a bar to the present suit. In my opinion the view taken by the learned Subordinate Judge appears to be sound. The order of the Attestation Officer must be taken to be an order under section 83 of the Act. All orders whether by *khanapuri* officers or by Attestation Officers have to be made during the preparation of the draft Record of Rights and all such orders passed before final publication of the Record of Rights are subject to revision under the provisions of section 89 of the Act. It is contended that the Revenue Officer can revise the entries in the draft Record of Rights within 12 months from the making thereof and in this case there is nothing to show whether the order of the 31st of January, 1920, was made within 12 months of the order of the Attestation Officer. Now, it must be presumed that the Revenue Officer acted regularly and if the bar of 12 months as provided in section 89 is to be availed of, it has to be shown by the party pleading such bar that there was a bar of limitation and that the order had been passed beyond 12 months. There is nothing in the record to show that this was the case. The present suit, therefore, was barred under section 258 of the Act.

Having regard to the suit being barred by section 258 the other points raised in the appeal do not really arise. As regards the title set up by the plaintiffs the learned Subordinate Judge has come to the finding that there was absolutely no evidence on the record to show that the ancestor of the plaintiffs had acquired any tenancy right before the acquisition of the *ghatwal* interest. He finds on a consideration of the evidence that the lands in dispute were held by the ancestor of the plaintiffs by way of maintenance; and that after the death of the maintenance-holders the defendant, who is the *ghatwal*, was entitled to take *khas* possession of the lands. He moreover finds that the rent receipts produced by the plaintiffs were not genuine documents and there was no relationship of landlord and tenants between the parties. These are findings of fact which are conclusive in this second appeal.

As regards the question as to whether occupancy rights can be acquired in *ghatwali* lands the cases relied upon by the Subordinate Judge support his contention. In *Upendra Nath Hazra* v. *Ram Nath*

Chowdhury (1) it was held that occupancy rights could not be acquired in *ghatwali* lands. The same view was taken in *Mohesh Majhi* v. *Pran Krishna Mandal* (2). The cases relied upon by the Munsif do not relate to *ghatwali* lands but to *chaukidari chakran* lands and have no application to the present case.

The appeals must be dismissed with costs.

Appeals dismissed.

(1) (1906) 33 Cal. 640.
(2) (1905) 1 C. L. J. 138.

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*A.I.R 1926 Patna 67.

MACPHERSON, J.

Nandan Singh and another—Petitioners

v.

Siaram Singh—Opposite Party.

Criminal Revision No. 153 of 1925, decided on 14th May 1925, from an order of the Sessions Judge, Muzaffarpur, dated the 2nd March 1925.

(a) *Crim. Pro. Code, S. 145—Jurisdiction—Non-Joinder or misjoinder of parties does not affect jurisdiction.*

The question of misjoinder of parties does not ordinarily affect jurisdiction. It is a question of procedure by which jurisdiction is not affected, whether a party has been wrongly included or excluded. [P. 68, Col. 1]

(b) *Crim. Pro. Code, S. 145—Absence of notice to one of the members does not render whole proceedings without jurisdiction.*

Where one of the members of one of the parties is not served with a notice the proceedings are bad so far as that member is concerned but the invalidity of the proceedings against one member does not necessarily invalidate the whole proceeding. [P. 68, Col. 1.]

(c) *Crim. Pro. Code, S. 145—Minor made party to order under Sub-S. (1)—Notice not served on him—Minor is not a necessary party.*

Where a minor was made party to the order which was drawn up under Sub-S. (1) but no notice was served on him,

Held, though the minor was a proper party being interested in the dispute, he was not a necessary party especially as he would not be a party likely to cause a breach of the peace. [P. 68, Col. 1]

P. C. Rai—for the Petitioners.

B. P. Jamuar—for the Opposite Party.

Judgment.—This Rule has been issued to consider the question whether the Sub-Divisional Magistrate of Muzaffarpur acted without jurisdiction in a proceeding under section 145 of the Criminal Procedure Code, in which he decided against the second party of which the petitioners Nandan Singh and Hirdey Singh were members.

The facts are as follows:—

In a Collectorate partition the division was under order of the Board of Revenue made upon the basis of the entries in the Record of Rights, (which show as *bakasht malik* certain lands claimed by various co-sharers as their *raiyati* lands) "without prejudice to the question whether the proprietors concerned have a *raiyati* status or not and without prejudice when possession is given upon completion of the partition to the rights of any parties in cultivating occupation." Delivery of possession of *takhtas* was given in 1922 and each set of co-sharer landlords took over the lands within their own new *takhta* which were shown as *bakasht malik* in the Record of Rights. The joint family of the present petitioners consisting of Nandan Singh and Hirdey Singh adults, and Ramlochan Singh minor, took possession of *bakasht* lands previously held by the opposite party and the opposite (first) party took possession of *bakasht* lands previously held by the petitioners. Thereafter the petitioners sold their *takhta* and having no land left endeavoured to retake possession of the lands formerly in their cultivation which had fallen in the *takhta* of the opposite party and had been taken possession of by them.

That the Magistrate rightly held that the opposite party was in possession of the lands in dispute is incontrovertible. It is urged, however, that his proceedings were without jurisdiction in the following circumstances. He made party to the order which he drew up under sub-section (1) not only the petitioners but their minor brother Ramlochan. The process server, however, returned the notice issued on Ramlochan under sub-section (3) with the report "Ramlochan Singh is a minor. Therefore, I have returned the notice issued in his name in which he is not described as a minor." No further steps were taken to serve notice upon the minor and in the written statement which the petitioners filed they took objection that the proceeding so far as it concerned Ramlochan, was illegal because he was not represented by a guardian and that as a result the whole proceeding was without jurisdiction. The Magistrate took no action upon this objection and eventually made an order under sub-section (6) against all three brothers.

Now this application is made by the two major brothers only and Ramlochan Singh is no party to it. It may well be that the proceeding having been taken without notice to him and in his absence is bad in law, so far as he is concerned, for the reason that the Magistrate had no jurisdiction to pass the order so far as it affected him. But that is not to say that for that reason the whole proceeding is without jurisdiction. The decision of the Full Bench in *Krishna Kamini* v. *Abdul Jabbar* (1) is authority for the view that the question of misjoinder and non-joinder of parties does not ordinarily affect jurisdiction. It is a question of procedure by which jurisdiction is not affected, whether a party has been wrongly included or excluded. The invalidity of the proceeding against one member of the petitioner's party does not necessarily invalidate the whole proceeding. The minor, though interested in the dispute and a proper party, was not in the circumstances an essential party, especially as he would not be a likely person to cause a breach of the peace. Thus the proceeding is not without jurisdiction in respect at least of the persons who were actually parties, and were not prejudiced, and it is palpable that petitioners were not prejudiced.

The Rule is, therefore, discharged.

Rule discharged.

(1) (1903) 30 Cal. 155=6 C.W.N. 737 (F.B.)

A.I.R. 1926 Patna 68.

KULWANT SAHAY, J.

Debi Dayal Singh and others—Defendants-Appellants

v.

Mt. Gango Kuer and others—Plaintiffs-Respondents.

Appeals Nos. 338 and 339 of 1922, decided on 25th March, 1925, from Appellate Decrees of the Sub-Judge, Second Court, Gaya, dated 8th February, 1922.

(a) *B. T. Act, S. 103 (b)—Entry in the Record of Rights as to the tenant's right to trees does not carry the presumption of correctness.*

The entry in the Record of Rights as regards the fruits and timber of the trees which shows that the tenants are entitled to appropriate all the fruits and timber of the trees and that the landlords are not entitled to anything, does not carry a presumption of correctness under S. 103 (*b*). 57 I. C. 126, *Foll* [P. 70, Col. 1.]

(b) *Landlord and Tenant—Right to trees—Tenant is to cut trees and landlord is to appropriate wood.*

The ordinary law is that the tenant has a right to cut the trees and the landlord has the right to appropriate the wood. [P. 70, Col. 1.]

S. N. Dutt—for Appellants.

Kailaspati—for Respondents.

Judgment:—These two appeals by defendants Nos. 1 to 3 arise out of the same suit. The suit was for a declaration that two survey plots Nos. 900 and 901 recorded in *khata* No. 13 in *Mouza* Ukarmha Salem, which contains 1.18 acres of orchard land covered with a large number of trees, formed the *bhaoli* holding of defendants Nos. 1 to 3 and that the plaintiffs and defendant No. 4 were entitled to appropriate one-half share of the fruits and the wood of the trees standing on the land and that the entry of *kabil lagan* in the survey papers was wrong. There was a further prayer that if the Court be of opinion that the plaintiffs could not get the price of their share of the fruits from defendants Nos. 1 to 3, then a decree might be passed against the said defendants for the price of the entire landlords' share of the fruits. There was an alternative prayer in the plaint that if the Court was of opinion that the entry of *kabil lagan* in the Record of Rights was correct, then a proper rent might be assessed by the Court. The defendants Nos. 1 to 3 filed a written statement in which they denied the title of the plaintiffs and alleged that the suit was bad for defect of parties. They further alleged that the orchard was held by them as *belagan* or rent-free and no rent was payable therefor, and that the plaintiffs or the other landlords, were not entitled to a half share of the fruits or the wood of the trees.

The learned Munsif found that the plaintiffs had established their title, and that the land was held by the defendants as *bhaoli*, but he dismissed the suit on a finding that the 16-annas landlords were not made parties to the suit and that the suit was bad under section 148-A of the Bengal Tenancy Act. He held that the trees were *ijmal* amongst all the 16-annas proprietors of the village and all those proprietors were necessary parties to the suit.

There were two appeals before the Subordinate Judge against this decree—one by the plaintiffs and the other by the defendants Nos. 1 to 3. The learned Subordinate

Judge decreed the plaintiffs' appeal and directed that the defendant No. 4 be added as co-plaintiff and the amount of the *bhaoli* rent to which the plaintiffs are entitled be determined by the Munsif. As regards the defendants' appeal the learned Subordinate Judge found that the land was held by defendants Nos. 1 to 3 as *bhaoli* and that the landlords were entitled to one-half share of the fruits and the wood of the trees. He accordingly dismissed the defendants' appeal.

Defendants Nos 1 to 3 have therefore, preferred the present two appeals to this Court, and it has been contended on their behalf that upon the findings arrived at by the Munsif as well as by the Subordinate Judge himself, the suit was not maintainable on account of defect of parties. Secondly, it has been argued that the learned Subordinate Judge was wrong in holding that the land was *bhaoli* and not *belagan*.

As regards the first point, it appears from the allegations of the plaintiffs themselves in their plaint that *Mauza* Ukarmha Salem was partitioned by the Civil Court into seven *takhtas*. The plaintiffs and the defendant No. 4 were allotted one of these *takhtas* to the extent of their original share of 2 annas 8 *dams* 17 *kauris* 9 *bauris*. This new *takhta* of the plaintiffs and the defendant No. 4 is known as *Takhta* Sheikh Rahim Baksh and is now treated as one of 16 annas. The plaintiffs alleged in the plaint that since the partition which was effected in 1898, the proprietor of one *takhta* has no connection with the *takhtas* of the other proprietors with the exception of the lands and trees left joint under the said partition. It has been held by the learned Munsif that the trees standing on survey plots Nos. 900 and 901 were left *ijmal* amongst the proprietors of the entire 16-annas of the village and were not partitioned amongst them. This finding does not appear to have been disturbed by the learned Subordinate Judge, as in dealing with the appeal of the defendants, he says that no *raibandi* was fixed in the partition for the trees in dispute because they were left *ijmal* amongst the proprietors. If that is so, then the plaintiffs and the defendant No. 4 did not form the entire body of landlords who are entitled to the rent of the orchard in dispute. In dealing with the plaintiffs' appeal the learned Subordinate Judge has lost sight of this fact. He has treated the plaintiffs as well as the defendant No. 4 as the 16 annas proprietors entitled to the rent of the orchard in dispute. He has not come to any specific finding as to whether or not the trees in dispute were partitioned in the Civil Court partition and allotted to the *takhta* of the plaintiffs and defendant No. 4, or were left *ijmal* amongst the entire body of proprietors of the whole village. The observation about the trees being left *ijmal* made by the learned Subordinate Judge when dealing with the appeal of the defendants is not a specific finding upon this point. He was there considering the question as to whether the land was *bhaoli* or rent-free and he met the argument of the defendants that no *raibandi* had been fixed for the trees by observing that this only meant either that the trees did not belong to the *maliks* but to the tenants or that they were left *ijmal*. I am of opinion that having regard to the fact that the Munsif had dismissed the suit, not only on the ground that it was bad under section 148-A of the Bengal Tenancy Act, so far as the defendant No. 4 was concerned, but also because the other proprietors of the entire village had not been impleaded as parties, the learned Subordinate Judge ought to have come to a specific finding as to whether or not the other proprietors are necessary parties in the present suit. His decree, therefore, passed in the appeal of the plaintiffs must be set aside and the case remanded to him for a finding as to whether the trees on the plots in dispute were left *ijmal* amongst the proprietors of the entire village in the Civil Court partition and as to whether the present suit could proceed in their absence.

Second Appeal No. 339 is, accordingly, allowed and the case remanded to the Court of Appeal below for disposal according to law. Costs will abide the result.

As regards the appeal of defendants Nos. 1 to 3 the finding of the learned Subordinate Judge that the land was *bhaoli* and that the landlords were entitled to have the fruits and the wood of the trees is a finding of fact which cannot be interfered with in second appeal. The learned Counsel for the appellants has, however, argued that the entry in the Record of Rights as regards the fruits and timber of the trees, in dispute is *kul-haq-raiyat* which shows that the tenant defendants are entitled to appropriate all the fruits and timber of the trees and that the landlords

are not entitled to anything. The learned Subordinate Judge is right when he holds that this entry in the Record of Rights does not carry a presumption of correctness under section 103 (*b*) of the Bengal Tenancy Act. The ordinary law that the tenant has a right to cut the trees and that the landlord has the right to appropriate the wood is accepted by the learned Counsel for the appellants, but he argues that the question as to whether the tenant is entitled to appropriate the timber is one of the incidents of the tenancy which the Revenue Officer preparing the Record of Rights was entitled to record under section 102 (*h*) of the Bengal Tenancy Act. The learned Subordinate Judge is of opinion that it is not one of the incidents of the tenancy, but it amounts to a custom or usage varying the common law and that the Revenue Officer in preparing the Record of Rights had no power to record the existence of any such custom, and that the entry of *kul-haq-raiyat* in the Record of Rights is not an entry which carries with it the presumption of section 103 (*b*). This opinion of the learned Subordinate Judge is supported by the decision of this Court in *Suresh Chandra Rai* v. *Sitaram Singh* (1) and the entry of *kul hoq raiyat* in the Record of Rights is only a piece of evidence admissible under section 35 of the Indian Evidence Act, which the learned Judge has taken into consideration as such.

As regards the plaintiffs' claim of half share of the fruits, the learned Judge has believed the plaintiffs' witnesses and has held that the orchard was *bhooli* and the land-lords were entitled to recover a half share of the fruits. These findings being based upon a consideration of the evidence in the case are conclusive and the Second Appeal No. 338 is, therefore, dismissed with costs.

Appeal dismised.

(1) (1920) 57 I.C. 125.

* A.I.R. 1926 Patna 70.

ADAMI AND MACPHERSON, JJ.

Sobhit Mallah—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 341 of 1924, decided on 22nd July 1925, from an order of the Sessions Judge, Muzaffarpur.

* *Crim. Pro. Code, S. 250 3 - Total amount of compensation is the basis to decide appealability.*

There is nothing in S. 250 to show that an appeal will only lie when the compensation directed to be paid to each individual accused is more than Rs. 50. Under Sub Sec (3) a complainant who has been ordered by a Magistrate to pay compensation exceeding Rs 50 has the right of appeal. It is the total amount of compensation directed to be paid by the complainant which must form the basis of the decision whether an appeal lies or not. [P. 71, Col. 1.]

K. N. Moitra—for Petitioner.

B. C. De, for *T. N. Sahay*—for the Crown.

Judgment:—The only question which arises in this case is whether an appeal lies against an order passed by a Magistrate of the First Class under S. 250, Criminal Procedure Code directing the complainant to pay to each of the several accused as compensation a sum less than Rs. 50 the aggregate sum to be paid to all the accused amounting to more than Rs. 50. In the present case the Deputy Magistrate ordered compensation of Rs. 25 to be paid to each of the eleven accused persons, the aggregate thus amounting to Rs. 275.

The learned Sessions Judge, when the appeal was brought before him against the order of compensation, held that no appeal lies under cl. (3) of S. 250 unless the compensation to be paid to any one accused is over Rs. 50. In support of this finding the learned Sessions Judge states that he holds that Sub-S. (3) of S. 250 is controlled by the wording of Sub S. (2) of that section. It is difficult to understand what grounds he has for his findings for even if Sub-section (2) does control Sub-section (3) there is nothing to show that an appeal will only lie when the compensation directed to be paid to each individual accused is more than Rs. 50. Sub-section (3) states that a complainant who has been ordered by a Magistrate to pay compensation exceeding

Rs. 50 has the right of appeal. It is quite evident that it is the total amount of compensation directed to be paid by the complainant which must form the basis of the decision whether an appeal lies or not. The compensation is a fine which the complainant has to pay for instituting a false and frivolous or vexatious case and his right to appeal clearly depends on the total amount of that compensation. It is obvious that the creterion is the amount of compensation directed to be paid in the case. Section 250 begins with the words "If in any case" and in Sub-s. (4) we read the words "when an order for payment of compensation to an accused person is made in a case....."

The present case must go back to the learned Sessions Judge in order that he may hear and decide the appeal according to law.

Petition accepted.

Case remanded.

A.I.R. 1926 Patna 71.

DAS AND ADAMI, JJ.

Sadhu Sao—Defendant-Appellant

v.

Awadh Bihar Saran Singh and others—Respondents.

Appeal No. 815 of 1922, decided on 8th April, 1925, from the Appellate Decree of the Addl. Subordinate Judge, Patna, dated 7th June 1922.

Bengal Tenancy Act, S. 87—No Abandonment where tenant usufructuarily mortgages his holding but still resides in the village.

Where the transfer is by way of usufructuary mortgage, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (a) an abandonment within section 87, or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy. [P. 72, Col. 1.]

In order to make out a case of abandonment under S. 87, the landlord must establish, *First*, that the *raiyat* has voluntarily abandoned his residence without notice to him; *Secondly*, that he has not arranged for payment of his rent as it falls due, and, *Thirdly*, that he has ceased to cultivate his holding either by himself or by some other person. Where therefore the tenant executed a usufructuary mortgage, but he still resided in the village and the equity of redemption still vested in him,

Held, that there was no abandonment within S. 87. [P. 72, Col. 2.]

S. Dayal—for Appellant.

S. N. Roy—for Respondents.

Das, J.:—This appeal is on behalf of the defendants and it arises out of a suit instituted by the plaintiffs-respondents for recovery of possession of certain kasht lands specified in the plaint. The Courts below have differed in opinion, the learned Subordinate Judge in the Court below having given the plaintiffs a decree substantially as claimed by them.

The admitted facts are as follows:—Defendant 2 had a holding under the plaintiff in *touji* No. 2299. He executed a usufructuary mortgage in favour of defendant No. 1 and put him in possession of the entire holding. There was a controversy in the Court of first instance on the question whether the document executed by defendant No. 2 in favour of defendant No. 1 was one of mortgage or one of sale. Both the Courts below have concurrently come to the conclusion that the document was one of mortgage. The plaintiff contends that defendant No. 1 has abandoned the holding by executing the usufructuary mortgage in favour of defendant No. 1 and by giving up possession and ceasing to pay rent. It appears, however, that defendant No. 2 is a resident of *mouza* Kalapur and that he has three holdings in Kalapur, one in *touji* No. 4353, one in *touji* No. 2699 and one in *touji* No. 4366; We are concerned in this litigation with the holding in *touji* No. 2699, but it is not disputed before us that the tenant is still in possession of two other holdings, it is true, under different landlords, but in the same village. The holding with which we are concerned in this litigation consists entirely of agricultural lands and as the learned Subordinate Judge has found, there is no house which forms part of the holding. But the holding in *touji* No. 4366 consists of a house and a plot of agricultural land; and it is not disputed before us that defendant No. 2 is still in occupation of his house in village Kalapur, *touji* No. 4366.

The conclusion at which the learned Subordinate Judge has arrived may be stated in his own words:

"In the present case, the tenant parts with possession of his holding, without arranging for payment of rent to the landlord by himself. He has his homestead and holdings under other landlords, and has abandoned the holding in the only way in which he can give effect to his intention

to abandon the holding, namely, by ceasing to cultivate and omitting to pay rent. In these circumstances, I am of opinion that there has been an abandonment, and I hold that the appellant must succeed."

It is settled law that where the transfer is by way of usufructuary mortgage, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of section 87, of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. It is not contended in this case that there has been either a relinquishment of the holding or a repudiation of the tenancy; but it is strongly contended on behalf of the respondents that there has been an abandonment within the meaning of section 87 of the Bengal Tenancy Act. But as has been held in this Court, the first condition to constitute abandonment under section 87 of the Bengal Tenancy Act is the voluntary abandonment of his residence by the raiyat. In this case it is not disputed that the tenant has not abandoned his residence. The learned Subordinate Judge in the Court below has taken the view that abandonment of the residence must mean abandonment of his residence under the same landlord, so that where a tenant has not any residence under the landlord who is seeking to recover possession of the holding, it is sufficient for the landlord to prove that the tenant has not arranged for payment of his rent as it falls due and has ceased to cultivate his holding either by himself or by some other person. The learned Subordinate Judge points out that if any other construction were placed on the words of section 87 "there will be the anomalous position that there can be abandonment by a non-resident tenant, that is to say, a tenant who does not reside" in the village in which he has his holding and the learned Subordinate Judge comes to the conclusion that the holding and the house of the tenant must be under the same landlord.

With all respect I am unable to agree with this view. The question is one of forfeiture; and there is no injustice in requiring a case of forfeiture to be strictly proved. The essence of abandonment is the giving up of the residence without notice to the landlord. I confess that I do not appreciate the difficulty that seems to have oppressed the learned Subordinate Judge. He says that any other construction would involve the consequence "that there cannot be an abandonment by a non-resident tenant"; and he points out that "there is no point in giving notice of abandonment to a person under whom the house is held, when the holding is held under a different landlord". But section 87 does not provide for any notice to be given to the landlord; it points out the consequence of a raiyat abandoning his residence without notice to his landlord when the abandonment is accompanied by other acts mentioned in the section. "Abandonment of the residence" is an unequivocal act showing an intention not to return and it is a matter of no consequence that the residence is under a different landlord. In my opinion, the section means what it says, and in order to make out a case of abandonment under section 87, the landlord must establish, first, that the raiyat has voluntarily abandoned his residence without notice to him; secondly, that he has not arranged for payment of his rent as it falls due, and, thirdly, that he has ceased to cultivate his holding either by himself or by some other person. In the present case the tenant has executed a usufructuary mortgage; but he still resides in the village and the equity of redemption is still vested in him. On what ground can we say that there is abandonment within the meaning of that term as used in section 87 of the Bengal Tenancy Act?

In my opinion the decision of the learned Subordinate Judge is erroneous and I must allow this appeal, set aside the judgment of the Court below and restore the judgment of the Court of first instance. The result is that the suit is dismissed with costs in all the Courts.

Adami, J.—I agree.

Appeal allowed.

A.I.R. 1926 Patna 73.

JWALA PRASAD, J.

Laurentius Ekka and others—Plaintiffs-Petitioners

v.

Dukhi Koeri and another—Defendants-Opposite Party.

Civil Revision Nos. 381 and 382 of 1923, decided on 13th March, 1924, from an order of the Sub Judge, Ranchi, dated 9th June 1923.

(a) *Legal Practitioners—Advocate can be verbally appointed and can present an application on behalf of clients without vakalatnama—Civ. Pro. Code, O. 3, r. 1.*

An Advocate, unlike a pleader, can be verbally appointed to act on behalf of his client, and when so appointed, under R. 1 of O. 3 he can appear, plead and act. There is nothing to prevent an advocate, either in the High Court or in the subordinate Courts, to present an application on behalf of his client without any power of appointment or vakalatnama given to him in writing. There is nothing in the Legal Practitioners' Act also against this view. 9 All. 617 *Foll.* [P. 74, Col. 2.]

(b) *Limitation Act, S. 5—Petition out of time—No reason for delay shown on the face of it—Petition is not entertainable.*

It is a well recognised principle that a petition filed out of time must show on the face of it the reason for delay, and there must further be an express prayer for condonation of the delay under the section. [P. 75, Col. 2.]

(c) *Compromise by pleader without instructions from party and without his consent—Valid if bona fide in the interests of the party.*

On principle, there does not seem to be any reason for interfering with a compromise consented to by a pleader duly authorized in this behalf, unless fraud or collusion is imputed to the pleader. [P. 76, Col. 1.]

Harihar Prasad Sinha—for Petitioners.

Sambhu Saran—for Opposite Party.

Judgment—This is an application against an order of the Subordinate Judge of Ranchi, dated the 9th June, 1923, rejecting an application of the petitioners presented under Order 47, rule 1 of the Civil Procedure Code for review of a Judgment, dated the 23rd December, 1922 passed by him.

The petitioners were plaintiffs in the case and sought to recover possession of the disputed land on a declaration of their title thereto as their ancestral *Bhuinhari* land. The defendants, on the other hand, claimed to be in possession of the property under a purchase made by their father in 1873 from one Sheikh Bhukun, an auction purchaser of the land. The plaintiffs' suit was dismissed by the Munsif, and the appeal filed by them was placed in the file of the Subordinate Judge for disposal. The arguments of both sides concluded on the 20th December. On the 23rd December a compromise petition was filed before the learned Subordinate Judge. The petition was signed by the defendants and their pleader, and on behalf of the petitioners their pleader signed the same. By the petition of compromise the *Bhuinhari* title of the petitioners was admitted and acknowledged by the defendants, and the defendants were allowed to hold the disputed land as occupancy raiyats under the plaintiffs on payment of rent at the rate of Re. 3 per acre, the rent being revisable at the time of the preparation of the Record of Rights. The appeal was disposed of in terms of the compromise petition per judgment of the Court, dated the 23rd December 1923.

The petition for review of the judgment was filed on behalf of the petitioners on the 5th June. In it, it was alleged that after the arguments were over, the petitioner No. 1, who was in charge of the case on behalf of the plaintiffs, had left Ranchi for his village in order to make preparation for the Christmas festival in his charge, and he came back to Ranchi in the first week of January and learnt that the appeal was disposed of in terms of the compromise referred to above. It was alleged in the petition that the compromise petition was filed without his knowledge and without instructions to his Pleader and that it was prejudicial to the plaintiffs' interest.

The compromise petition was signed by the petitioners themselves, and countersigned by their Counsel Mr. Roy. On the 9th of June 1923 the Court rejected the application for review holding: (1) that it was out of time and (2) that it was not in proper form. As to the latter ground, the learned Subordinate Judge observed, that Mr. Roy being Counsel (Advocate) could not move the petition unless he was instructed by a Pleader and after the latter had signed it, and that if Mr. Roy wanted to present the petition and thereby act as a pleader, he should have filed a Vakalatnama. In support of this view the learned Subordinate Judge has cited the case of *Mr. B. N. Misra*, an Advocate of this Court, who practises in Cuttack. I have looked into the file of the case. Mr. Misra applied for refund of some money on behalf of his client

and filed a petition for that purpose under his own signature, without filing a Vakalatnama. The learned Chief Justice (Sir Edward Chamier) observed that if Mr. Misra wanted to perform the functions of a Pleader he must file a Vakalatnama. This view has been maintained in this Court in several cases, and thus a practice has been established of not allowing refund of money to an Advocate unless he is especially authorised and files a Vakalatnama. This would be so under the provisions of the Stamp Law which especially require that a refund of money can only be made to a person holding a power of attorney, duly stamped, from the person on whose behalf the withdrawal is sought: [Article 48 (g) Schedule I of the Stamp Act]. But the Counsel in the present case did not want any refund of money on behalf of his client; he only applied for review of judgment. The petition for review in the present case was duly signed by all the petitioners, and it was moved by Counsel Mr. Roy, who appeared for the petitioners who were also present in Court at the time. The rules as to the presentation of an application are to be found in Chapter III, page 13 of the High Court Rules, and in Chapter I, Part I, page 5 of the General Rules and Circular Orders for the Subordinate Courts. Rule 4, clauses (iii) and (iv) of Chapter III of the High Court Rules, says that a petition shall be signed and dated either by the petitioner or declarant or his pleader and presented either by the petitioner or declarant or his recognized agent or his pleader or some person appointed in writing in each case by such pleader to present the same. The Note to that rules says:—

"Here and throughout these rules unless there is anything repugnant in the subject or context 'pleader' means 'advocate, vakil or attorney.'

Therefore a petition must be signed and presented either by the petitioner himself or an advocate, vakil or attorney of this Court. In the present case the petition was signed by the petitioners themselves. They were present in Court, and it was signed and presented by Mr. Roy, Advocate, on their behalf. Therefore if the petition were filed in this Court it would have been in order. It is, however, contended by Mr. Shambhu Saran that, as it was presented before the learned Subordinate Judge, the Advocate in question could not present it. Rule 2, clause (3) Chapter I of the General Rules and Circular Orders, however, states that a petition to be presented in the lower Courts may be signed by the person presenting it, and rule 3 says that if the person presenting it is not a pleader or Mukhtar he shall, if so required by the Court, be identified. Therefore, a petition in the Subordinate Courts may be signed and presented by a party or by his pleader "Pleader" has been defined in the Code of Civil Procedure, section 2, clause 15 to mean any person entitled to appear and plead for another in Court and to include an advocate, vakil and attorney of a High Court. This rule refers only to the functions of appearing and pleading, and it is said that it does not include acting.

Rule 1 of Order III of the Civil Procedure Code says:—

"Any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader duly appointed to act on his behalf."

Rule 4, clause (1) of that Order says:—

"The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognised agent or by some other person duly authorised by power of attorney to act in this behalf."

Clause (3) of rule 4 dispenses with the appointment in writing in the case of an advocate of any High Court, and an advocate is not required to present any document empowering him to act.

Therefore, an advocate, unlike a pleader, can be verbally appointed to act on behalf of his client, and when so appointed, under rule 1 of Order III he can appear, plead and act. Hence Mr. Roy need not have filed any Vakalatnama, as his authority to present the petition of revision on behalf of the petitioners. So far as the law and the rules are concerned, there is nothing to prevent an advocate, either in the High Court or in the subordinate Courts, to present an application on behalf of his client without any power of appointment or Vakalatnama given to him in writing. There is nothing in the Legal Practitioners' Act also against this view.

Section 7 of the Letters Patent of this Court conferred upon the Court power

"to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet; and such Advocates Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act or to plead an act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions."

In Section 8 of the Letters Patent it is further declared that this Court

"shall have power to make rules from time to time for the qualification and admission of proper persons to be advocates, Vakils and Attorneys-at-Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-Law, and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to appear, plead or act on his own behalf or on behalf of a co-suitor.

Section 119 of the Civil Procedure Code enacts that

"Nothing in this Code shall be deemed to authorize any person on behalf of another to address the court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, Vakils and attorneys".

No rule has been framed in this Court prohibiting an Advocate from presenting an application or acting on behalf of his client.

Under section 4 of the Legal Practitioners Act (Act XVIII of 1879)

"Every person now or hereafter entered as an advocate or Vakil on the roll of any High Court under the Letters Patent constituting such Court shall be entitled to practise in all the Courts subordinate to the Court on the roll of which he is entered" etc.

Thus, if an Advocate on the roll of this High Court is entitled to sign and present an application and to act on behalf of his client in the High Court itself, by section 4 of the Letters Patent referred to above he will be entitled to practise in all the Courts subordinate to this Court. The word "Practise" in the section has been advisedly used, and unless prohibited by any special rule right to appear, plead an act.

Mr. Shembhu Saran has referred us to the case of *Ram Taruck Barrik* v. *Sidhessuree Dossee* (1).

That case, no doubt, supports his contention, but that case relates to the practice in the Calcutta High Court under the rules framed by that Court prohibiting Advocates of the Court from acting on behalf of their clients either on the Original or on the Appellate Side and all the arguments advanced by Mr. Sambhu Saran were considered and fully met by a Full Bench of the Allahabad High Court in the case of *Bhaktawar Singh* v. *Sant Lal.* (2)

Their Lordships in that case observed

"It does not appear to us necessary to enter upon a discussion of the practice that prevails and regulates the professional status and proceedings of counsel in England, as it seems to us to be altogether beside the question we have to determine, namely whether enrolled advocates of this Court are, as such prohibited from doing all such acts as admittedly may be done by the Vakils".

Accordingly their Lordships held that under the Letters Patent of the Allahabad High Court and its rules an Advocate can appear, plead and act.

Now the Letters Patent of this Court and the rules framed by us are on similar lines as those of the Allahabad High Court. I am, therefore, inclined to adopt the view taken by the Full Bench of that Court, and to hold that the learned Subordinate Judge was wrong in his view that the petition of review presented to him by Mr. Roy, Advocate, on behalf of the petitioners was not properly presented.

The first ground upon which the learned Subordinate Judge rejected the application of the petitioners, however seems to be substantial. The petition was filed much out of time. The appeal was disposed of on the 23rd December 1922, and the petitioner No. 1 came to know of it in the first week of January 1923 when he came to Ranchi to inquire about the case. The review petition should have been filed about the 23rd of March 1923. It was however filed on the 5th of June 1923. This enormous delay has not been explained in the petition for review presented to the subordinate Judge.

It is a well recognized principle that a petition filed out of time must show on the face of it the reason for delay, and there must further be an express prayer for condonation of the delay under Section 5 of the Limitation Act. On the face of it the petition was time barred, and the Court below was right in holding that it was not entertainable.

Again, the petition does not impute improper conduct on the part of the

(1) (1870) 13 W. R. 60.

(2) (1887) 9 All. 617=1887 A.W.N. 153 (F.B.)

pleader who filed the compromise petition, and unless that was done the action taken by the pleader on behalf of the petitioners could not be challenged, for under the Vakalatnama the pleader had full power to compromise the case, vide *Sadhu Saran Rai, Anant Rai.* (3) The recent decision of their Lordships of the Judicial Committee in the case of *Sourindra Nath Mittra* v *Heramba Nath Bandopadhya*, [*A.I.R. 1923 P. C. 98*] may be usefully cited though the facts of the case are not very similar to those of the present one. On principle, there does not seem to be any reason for interfering with a compromise consented to by the pleader duly authorized in this behalf, unless fraud or collusion is imputed to the pleader. No such collusion or fraud has been pleaded in the petition. No doubt, ignorance of the compromise, want of instructions to the pleader, and possibly fraud practised by the opposite party have been vaguely stated in the petition. These are, however, not sufficient to affect the compromise filed in the present case. Again the petitioner No. 1 says that he was looking after the case and went away on the 23rd December 1922 to make arrangements for the Christmas festivities, but there were about ten other petitioners and there is no reason why the petitioners other than petitioner No. 1 could not remain in Ranchi to look after the case.

For all these reasons I dismiss the applications; hearing fee two gold mohurs for both the applications.

Application dismissed.

(3) A.I.R. 1923 Patna 483.

A.I.R. 1926 Patna 76.

ADAMI AND SEN, JJ.

Mt. Sheo Dani Kuer—Plaintiff-Appellant

v.

Ramji Upadhya and others—Defendants-Respondents.

Appeal No. 1385 of 1922, decided on 24th June 1925, from the Appellate Decree of the Sub Judge, Saran, dated 26th August 1922.

(a) *Words*—"Malik" *in a will does not necessarily confer absolute estate.*

The use of the word *malik* in a will does not necessarily imply that the estate conferred is an absolute estate. The word *malik* is not a term of art, it does not necessarily define the quality of estate taken by the donee. A.I.R. 1923 P. C. 198 *Appl.* [P. 77, Col. 1.]

(b) *Will — Construction — Donee described as* Malik Mokamit *and permitted to mortgage the property in case of necessity — Will confers an estate of a Hindu woman and not absolute estate.*

In a will where it was stated that at times of real necessity the donee would be at liberty to mortgage the properties or otherwise deal with the same and out of the income and produce of the properties to find means for her livelihood and there is not a word in the will to show that the testator ever contemplated that the corpus of the property would be alienated by the donee in any way, and the donee was described as *malik mokamit.* [P. 77, Col. 1.]

Held, that what was really intended to be conferred upon the donee was the estate of a Hindu woman subject to alienation only in the event of legal necessity. [P. 77, Col. 2.]

Hareswar Prasad Singh for *Bhagwan Prasad*—for Appellant.

Harnarain Prasad—for Respondents.

Sen, J.:—There is only one point in this appeal and that is whether upon a proper construction of the last Will of one Sheogopal Upadhya the property in dispute passed to the plaintiff's mother, Kishun Kuer absolutely or only for life.

It appears that Sheogopal had two sons both of whom predeceased him. Sheogopal died leaving one Bacha Kuer, the widow of his son Anmaul Upadhaya and Kishun Kuer the widow of his son Ratan Upadhaya. In his Will, Sheogopal provided that the property in question should be enjoyed by Bacha Kuer so long as she might live, and that Bacha Kuer should be able to maintain herself out of the property, but that she would have no power or right to make any sort of transfer of the same; and on her death the property would come to the possession of *Mt.* Kishun Kuer.

As regards the character of the enjoyment of *Mt.* Kishun Kuer provided for in the Will, there is a great deal of dispute between the parties. The appellant before us contends that there are words of disposition which would clearly amount to conferring an absolute estate upon Kishun Kuer, whereas the respondent contends that there are certain terms in the Will which would clearly show that the intention of the testator was not to confer an absolute estate but only the interest of a limited owner. A great deal of stress is laid upon the use of the words "*malik mokamit.*" The learned Vakil for the appellant contends that

the very use of the word *malik* shows that the estate that was purported to be granted to Kishun Kuer was an absolute estate and that once that absolute estate was conferred upon Kishun Kuer then the restrictions laid down in the later portions of the Will would be of no avail. Various rulings are cited in support of this proposition, but the matter is now beyond all doubt that the use of the word *malik* does not necessarily imply that the estate conferred is an absolute estate. As observed by their Lordships of the Judicial Committee in the case of *Bhaidas Shivdas* v. *Bai Gulab* (1) the word *malik* is not a term of art, it does not necessarily define the quality of estate taken, but in the context of the Will before their Lordships in that case, their Lordships thought that the estate conferred was an absolute estate. Therefore, the real question before us is as to whether, reading the context, the word *malik mokamit* in the present case indicates that an absolute estate was intended to be given to Kishun Kuer. I think it is clear that the testator did not intend to give an absolute estate to Kishun Kuer for he observes that "it shall also be within the power of the said Kishun Kuer that at times of real necessity she will meet the same by mortgaging and giving in *zurpeshgi* portions of the lands; further she will do what she likes and from the income and produce of the above she will afford her livelihood, perform pilgrimages have *Khata Puran* etc. etc."

Now, if the testator really intended to grant an absolute estate it would be entirely unnecessary for him to state that at times of real necessity the donee would be at liberty to mortgage the properties or otherwise deal with the same and out of the income and produce of the properties to find means for her livelihood. There is not a word in the Will to show that the testator ever contemplated that the corpus of the property would be alienated by Kishun Kuer in any way.

The learned Vakil for the appellant points out that the words "she may do what she likes" indicate that the testator intended to give her absolute powers of disposal over the property. That does not appear to me to be a correct construction of the words, for they must again be taken together with the context and judging from the manner in which those expressions have been used, it seems to me that what the testator intended to say was that she would be at liberty to do what she chose with the income and produce of the property. At any rate, it does not appear that those words would confer upon the devisee the power to deal with the corpus. In view of the fact that no absolute estate was conferred upon Kishun Kuer, the question does not rise as to whether there were in the later portions of the Will expressions repugnant to an absolute estate which would, therefore, have to be declared to be invalid and of no effect. Taking the instrument in its entirety, I am of opinion that what was really intended to be conferred upon Kishun Kuer was the estate of a Hindu woman subject to alienations, only in the event of legal necessity.

In the circumstances the appeal must be dismissed with costs.

Adami, J.—I agree.

Appeal dismissed.

(1) A.I.R. 1922 P.C. 193.

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*A.I.R. 1926 Patna 77.

ADAMI AND SEN, JJ.

Nathan Prasad Shah — Defendant-Appellant

v.

Kali Prasad Shah—Plaintiff-Respondent.

Appeal No. 1220 of 1922, decided on 24th June 1925, from the Appellate Decree of the District Judge, Santhal Parganas, dated 14th July 1922.

(a) *Lease—Construction—Ijara deed is a mortgage and* haq ajiri *is not rent—Interest on* haq ajiri *cannot be claimed unless there is a stipulation in the deed.*

Under the terms of the deed it was agreed that the Ijaradar should remain in possession of the Ijara property, and out of the fixed annual rent, he should pay Government revenue and road-cess into the Government Treasury every year, should deduct and appropriate to himself certain sum every year in lieu of interest on the *Zarpeshgi* money and should pay the remaining sum every year as *haq ajiri* to the owner.

Held, that the *haq ajiri* payment was not rent, that the deed was a usufructuary mortgage and that the person in possession held as mortgagee and not as a tenant. The *haq ajiri* was due from him as mortgagee under an arrangement with the mortgagor and was not due from him as tenant, and further that the *haq ajiri* not being rent, no

interest was payable on it, as there was no stipulation in the deed for payment of interest thereon. 1 P.L.W. 795 *Rel.* [P. 79, Col. 1.]

(b) *Civ. Pro. Code, O. 8, r. 6—Equitable set off can be claimed though time-barred.*

A time-barred debt may be claimed by way of equitable set off 12 C.W.N. 60 and 19 C.W.N. 1183 *Foll.* [P. 79, Col. 2.]

(c) *Lease—Zar-i-peshgi—Damage to ijara property is to the corpus and compensation for excavation in such property cannot be claimed by ijaradar from third person but can be claimed from the owner.*

Excavation of *ijara* property is a damage to the corpus of the property and the *ijaradar* is not allowed to take away any portion of the soil, nor can he claim compensation from a third person for such excavation but can claim from the owner. [P. 79, Col. 2.]

D. C. Verma and *Ram Prasad*—for Appellant.

G. S. Prasad and *N. C. Sinha*—for Respondent.

Judgment:—In 1907 the plaintiff who is proprietor of village *kasba* Syedpur in the Santhal Parganas, executed and registered an *ijara* deed granting certain proprietary rights in the village in favour of the defendant for a term of seven years in consideration of an advance of Rs. 26,000. Under the terms of the deed it was agreed that the *ijaradar* "should remain in possession of the *ijara* property, and out of Rs. 1,630 8 the fixed annual rent, he should pay Rs. 411 5 6 as Government revenue and road-cess into the Government Treasury every year, should deduct and appropriate to himself every year, Rs. 975 in lieu of interest on the *zarpeshgi* money and should pay the remaining sum of Rs. 294 3-0 every year as *haq ajiri*" to the plaintiff.

The defendant failed to pay the *haq ajiri* for several years in succession and, therefore, the plaintiff instituted the suit out of which this second appeal arises, claiming the *haq ajiri* for the years 1320 to 1325 *Faslis* both inclusive together with interest at the rate of 12 per cent per annum. After the defendant had filed his written statement the plaintiff amended the plaint, withdrawing the claim in respect to the year 1320 *Fasli*.

The defendant did not deny that the *haq ajiri* was due for the years 1321 to 1325 *Faslis* but he contested the claim for interest and also sought to set-off against the demand in respect of *haq ajiri* certain payments alleged to have been made by him to the plaintiff. Of these it is only necessary to mention two, namely, (1) a payment of Rs. 150 realized from one Rai Bahadur Baikuntha Nath Sen, who had excavated a tank in the village without permission and (2) a sum of Rs. 240-5-6 due as rent for the six years in respect of lands in the village held by the plaintiff as *raiyat* under the *ijaradar* and Rs. 120 due as interest on the said arrear rents. The other items sought to be set-off have been disallowed by the lower Courts and no appeal is pressed before us in regard to them. This defendant also set up the bar of limitation against the claim for *haq ajiri* for 1320 to 1323, and urged that *Mt.* Sita Sahuan should have been joined as plaintiff.

The Subordinate Judge found that the plaintiff was entitled to the *haq ajiri* claimed for the years 1321 to 1325 inclusive and that, though the *ijara* deed contained no stipulation for the payment of interest thereon, the *haq ajiri* being rent, the usual rate of 12 per cent. ought to be paid. With regard to set-off, the Subordinate Judge disallowed all the items except that relating to the rent of the plaintiff's *raiyati* holding, but even that claim was found excessive, since the rent for 1320, 1321 and 1322 was not recoverable, the claim being barred by limitation. A sum of Rs. 117 was allowed to be set-off as rent, cess and interest.

On appeal the learned District Judge held that the *haq ajiri* was rent and as such, according to the custom in the Santhal Parganas, interest was payable on arrears at the rate of 12 per cent. He upheld the decision of the Subordinate Judge that the proprietor and not the *ijaradar* was entitled to the Rs. 150 paid by Rai Bahadur Baikuntha Nath Sen, and rejected the claims to set-off other than that allowed by the Trial Court. He thus dismissed the appeal.

The only points pressed in appeal before us are (1) that *haq ajiri* is not rent and, there being no stipulation for interest on it, the Courts below were wrong in allowing interest; (2) that, though the defendant would not be able to seek his remedy by suit in respect of the arrears of rent for 1320 to 1323 that remedy being barred by limitation, the debt still subsisted and he

was entitled to have the arrears of all six years set off against the plaintiff's claim and (3) that the defendant, as *ijaradar* with full proprietary rights granted by the *ijara* lease, was entitled to the Rs. 150 paid as compensation for the wrongful excavation of a tank.

At first sight, since the *ijara* speaks of the *haq ajiri* as being one of the component parts of the Rs. 1,630 8 which is described as the fixed annual rent, there would be an inclination to decide that the lower Courts were correct in finding that interest was payable on it as rent. It is argued that *zarpeshgi* lease is not a mere contract for cultivation but it also provides security for money advanced, and in the present case it was arranged that the appropriation of Rs. 975 every year by the *ijaradar* furnished the security for the advance, while the Rs. 294-3 took the form of rent for the right to cultivate or to collect rent from the *raiyats*. The question, however, whether in such a case as this, *haq ajiri* is rent has been decided by this Court in the case of *Barhamdeo Narain Singh* v. *Ramanand Prasad Singh* (1). That case was similar to the present one; there, in consideration of Rs. 12,000 certain *zemindari* rights were made over to a person who made the advance at what was described as a fixed annual rental of Rs. 803 4. Out of this Rs. 803 4 the person who made the advance was to deduct Rs. 620 on account of interest on the *zarpeshgi* and was to pay Rs. 83 4 annually to the person who received the advance, Chapman and Atkinson, JJ. held that this *haq ajiri* payments of Rs. 83 4 was not rent, that the deed was a usufructuary mortgage and that the person in possession held as mortgagee and not as tenant; the *haq ajiri* was due from him as mortgagee under an arrangement with the mortgagor and was not due from him as tenant. We see no good reason to differ from the above decision and following it, must decide that, the *haq ajiri* not being rent, no interest was payable on it, as there was no stipulation in the deed for payment of interest thereon.

As regards the set-off of the arrears of rent payable by the plaintiff to the defendant, the learned Subordinate Judge was clearly mistaken in holding that the set off of the rent of the years 1920 to 1922, inclusive, was barred by limitation. The case of *Sheo Saran Singh* v. *Mahabir* (2) is an authority for holding that in a suit like the present one the rent of lands held by the mortgagor and forming part of the mortgaged property can be set-off and that such rents may be set-off, even though they may be barred by limitation. *Gajadhar Mahton* v. *Raghubir Gope* (3) and *Ramdhari Singh* v. *Parmanand Singh* (4) also decide that a time-barred debt may be claimed by way of equitable set-off. The defendant-appellant must be allowed to set-off the rent of the six years 1320 to 1325 *Faslis* at the rate of Rs. 29-8-0 a year, that is to say Rs. 177 and road cess and interest at the rate of 12 per cent. per annum.

The last point pressed before us is with regard to the sum of Rs. 150. It appears that Rai Bahadur Baikuntha Nath Sen without permission excavated a tank in the village; both the plaintiff and the defendant took proceedings in Court against him, but the matter was settled by the payment of Rs. 150 which the plaintiff received. It is contended that, as the deed of *ijara* gave to the defendant all the rights of the proprietor during the term of the *ijara*, the defendant was entitled to get the money as temporary proprietor, and, because the excavation of the tank deprived him of part of the usufruct, he is entitled to compensation. If he was entitled to compensation on this ground he would have to seek it from the plaintiff who mortgaged the property to him and not from the stranger who trespassed. The contention cannot be supported, the damage was damage to the corpus of the property, and the *ijaradar* would not be allowed to take away any portion of the soil.

On the findings I have come to the appeal must be allowed in part and the decree of the lower Court must be modified to this extent, that the plaintiff-respondent will be declared to be not entitled to interest and the sum of Rs. 705 will be deducted from the amount decreed; also the appellant will be declared to be entitled to set off Rs. 177 as rent of the plaintiff's holding for the six years 1320 to 1325, both included, with road-cess and interest at the rate of 12 per cent.

(1) (1918) 1 Pat. L W. 795=1918 P.H.C.C. 24.

(2) (1905) 32 Cal. 576=2 C.L.J. 73.
(3) (1907) 12 C.W.N 60.
(4) (1913) 19 C.W.N. 1183.

per annum; this sum of Rs. 177 and the roadcess and interest will be further deducted from the sum decreed as payable to the plaintiff by the lower Courts.

The parties will get costs proportionate to their success in all the Courts.

Decree modified.

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DAS AND ADAMI, JJ.

Prasanna Kumar Banerji and others—Appellants

v.

Kalyan Charan Mandal and another—Respondents.

Appeal No. 688 of 1922, decided on 20th April, 1925, from Appellate Decree of the Sub-Judge, Purulia, dated 7th April, 1922.

Words—Moghli—*The word does not constitute rent.*

The term "*Moghli*" is a word of doubtful meaning and at the best imports no more than that the rent assessed represents a proportion of the Government revenue. In no sense of the term does it constitute rent. (20 C.W.N. 1135, *Ref.*) [P. 80, Col. 2]

A. K. Roy—for Appellants.

A. B. Mukerji and *B. B. Mukherji*—for Respondents.

Das, J.—The only question in this appeal is whether the transaction of the 3rd *Aghran* 1285 *B.S.* was one of sale or one of lease. The document is described as a *khas kobala*; and there is very little doubt to my mind that the parties regarded the transaction as one of sale. The consideration money was arrived at on a calculation of the annual profits of the lands conveyed. It was ascertained that the annual profit was Rs. 7-13-0; and deducting therefrom Rs. 1-1-0 payable by the transferor as the *moghli* the net profit was found to be Rs. 6-12-0. The transferor conveyed the land to the transferee for a consideration which was settled at 18 times the net annual profits of the lands. The critical passage in the document runs as follows:—

"I have myself got the following lands as bounded below, namely," and the boundaries are given, "In all three items of lands about 17 *bighas* in area, the annua profits of these lands amount to Rs. 7-13-0 only, out of which deducting Re. 1-1-0 *moghli*, annual rent is Rs. 6-12 0 only and receiving the sum of Rs. 121 8-0 only as 18 times of the annual profit I sell the said lands to you. From this day forth you become fully entitled to the said lands and are empowered to sell and make a gift of the same and paying yearly Re. 1-1-0 only *moghli* to me and to my heirs and legal representatives from 1286 B S. you become entitled from this day from generation to generation by cultivating the same yourself or by settlement of tenants and to that I or my heirs and representatives shall never make any objection."

It is contended on behalf of the appellants that the respondents were the holders of a subordinate interest since Re. 1-1-0 was payable by them as *moghli* to the appellants; but it is to be pointed out that this *moghli* of Re. 1-1-0 was payable by the appellants who were the transferors to their superior landlord and did not constitute a profit in their hands when paid by the respondents to them. The term "*moghli*" is a word of doubtful meaning and at best imports no more than that the rent assessed represented a proportion of the Government revenue. [*Nawagarh Coal Co. Ltd.* v. *Behai Lal Trigunait* (1).] There is very little doubt that the sum of Re. 1-1-0 represented the proportion of the Government revenue assessed on the lands conveyed. In no sense of the term does it constitute rent. That being so, there is nothing to show that the respondents where the holders of a subordinate interest in relation to the appellants. In my opinion they are the holders of co-ordinate interest.

In my opinion the question was correctly decided by the learned Judge in the Court below and I must dismiss this appeal with costs.

Adami, J.:—I agree.

Appeal dismissed.

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(1) (1917) 20 C.W.N. 1135=1 P.L.J. 275=37 I.C. 450=2 P.L.W. 224.

★★ A. I. R. 1926 Patna 81

ADAMI AND BUCKNILL, JJ

Ranjit Narain Singh and *others*—Appellants

v

Rambahadur Singh and *others*—Respondents

Criminal Appeal No 133 of 1925, Decided on 10th November 1925, from the decision of the Dist. J, Gaya, D/- 10th July 1925

★★ (a) *Criminal P C, S 476-B—First Court refusing to make complaint—Appellate Court allowing appeal and itself making a complaint—Appeal lies to High Court*

An appeal lies under S 476-B of the Criminal P C to the High Court from an appellate order of the District Judge making a complaint which the first Court might himself have made but refused to make [*5 Lah 56 Diss Cr Rev 5 of 1925 Affirmed*] Upon a proper construction of Ss 476, 476-A and 476-B taking for the sake of illustration the three ascending Courts as Munsif, District Judge and High Court there would be an appeal from the District Judge to the High Court (a) where the Munsif has refused on application made to him under S 476 to make a complaint, where there has been an appeal to the District Judge and where the District Judge disagreeing with the Munsif has made a complaint (b) where under S 476-A the Munsif has taken no action suo motu and has not been asked to take any action the District Judge has (a) on application to him made a complaint, (b) on application to him has refused to make a complaint. The same reasoning would apply to any other chain of three Courts (contemplated by S 476) of ascending jurisdiction [P 85, C 1, 2]

★ (b) *Criminal P C, S 476—Making complaint is discretionary—High Court should interfere in exceptional cases*

The question whether a complaint should be made under S 476 Criminal P C is almost invariably a matter of discretion, and the High Court is under those circumstances always loath to interfere except in extraordinary cases. *A I R 1924 Bom. 347 Rel. on*

Where the trial Court and first appellate Court conclude that certain documents are not genuine and the District Court makes a complaint for prosecution it has sufficient ground to make a complaint and its order would not be set aside by the High Court. [P 85, C 2]

(c) *Criminal P C., S. 476—Court generally takes action on application by parties.*

If it was always to be left solely to the self-acting motion of the Courts concerned to institute a complaint, much of S. 476 would be surplusage, as it is frequently only upon application made to it that a Court either under S 476 or S 476-A of the Criminal P. C. takes action. [P. 86, C. 2]

(d) *Criminal P C., S. 476—Question as to forged nature of document is to be decided in prosecutions following complaint and not before making one.*

The questions, whether the documents declared by the Court trying suit as not genuine were forged or not, by or on behalf of the petitioners or whether they were used in any way by or on behalf of them knowing that they were forged, are matters which are to be contemplated as the subject of the prosecution following the complaint and are not the subject matter of the proceeding to issue a complaint. [P 86 C. 2]

Yunus, S N. Bose and *R. K. Nandkeolyar*—for Appellants

Assistant Govt. Advocate—for Respondents

Bucknill, J—This was a matter referred to a Bench by Macpherson, J., on the 2nd September last, it had come before him when sitting as vacation Judge as a proceeding which purported to be an appeal from a decision of the District Judge of Gaya, dated July 10th last. The nature of the matter may be thus summarized

The respondents to the proceeding now before us brought in 1923, a money suit against the 1st petitioner for a share in certain bhaoli produce rent of some 53 bighas of bakasht lands, the 1st petitioner (appellant here) pleaded payment and in support of this defence referred to certain receipts and papers of account which were produced on his behalf and which were either in part or in whole exhibited in evidence by the Petitioners 2 and 3.

The Munsif (2nd Court) of Gaya who tried the suit gave judgment in the respondents' favour, for he was (to use his own words) "not satisfied that the signatures on the receipts and the Bujhaotas were the genuine signatures of these persons" (whose signatures they were alleged to be) the decree was dated 21st July 1924

The 1st petitioner appealed, the appeal was heard on 5th February 1925 and was dismissed by the Additional Sessions Judge and Subordinate Judge 3rd Court, Gaya, who, agreeing with the Munsif that the receipts and bujhaotas were not genuine, dismissed the appeal.

Almost immediately after this appeal had been dismissed, the respondents, on 16th February 1925 applied under S 476 of the Cr P C to the Munsif, 2nd Court of Gaya (who was however not the same individual as that Munsif who had tried the suit in 1924) requesting him to hear the parties and to make a complaint under the provisions of S 476, Cr. P. C., against the petitioners They suggested that the petitioners ought to be prosecuted under sections of the Indian Penal Code such as S. 467 (forgery of a receipt)

and S. 471 (using as genuine a forged document). This Munsif, however, after hearing the parties, refused on 23rd April 1925) to make any complaint as requested. The Munsif seems to have thought that as there was no direct finding of forgery by either the trial or appellate Courts and as neither of those Courts had thought fit to take any step *proprio motu* under the provisions of S. 476, he himself should not think it desirable to take any action.

From this decision the respondents, exercising their right, under S. 476-B of the Cr. P. C. appealed to the District Judge of Gaya who on 10th July 1925 took a different view to that expressed by the Munsif; he considered (to use his own words) that "A good case for prosecution had been made out and that the prosecution should be sanctioned." He added "I therefore institute a complaint against Ranjit Singh, Ajodhya Singh and Bagho Singh (the appellants here) for their prosecution under Ss. 471 and 193 of the Indian Penal Code or any other section or sections that may apply and forward it to the District Magistrate." This action was as a matter of procedure quite properly taken in accordance with S. 476 B of the Criminal P. C.

From this decision the appellants have purported to appeal to this Court. It was entered as Criminal Appeal No. 133 of 1925. It was admitted as an appeal by Jwala Prasad and Macpherson, JJ. on 24th July 1925. It came, as I have already said, before Macpherson, J. sitting as Vacation Judge; the question was raised before him by the Crown as to whether in a case such as this an appeal lies to this Court and as there appeared to be some doubt as to this point and some possible conflict of decisions, the learned Judge referred the matter to a Bench.

It may at once be stated that applications to this Court under S. 476 B of the Criminal P. C have at times been madl both as appeals and in Revisionae jurisdiction; and in other High Courts also. For example in this Court in *Gajaram Marwari* v. *The King-Emperor* (1) and *Bhuki Sao* and *Ramdhani Sao* v. *King Emperor* (2) (which were heard together) the general features of the position were somewhat parallel to those displayed in the matter now under consideration: one Mahabir Sao applied to a Magistrate who had under the provisions of S. 203 Criminal P. C. dismissed a complaint made by another individual asking that that complainant and two others should be ordered by the Magistrate to be prosecuted by virtue of the provisions of S. 476 of the Cr, P. C. The Magistrate refused to make a complaint. Mahabir thereupon appealed to the Sessions Judge who differed from the Magistrate and himself made the complaint requested under S. 476-B. Criminal P. C. The 3 persons thus ordered tobe prosecuted thereupon appealed to this Court; no question was ever raised at any stage of the proceedings as to there being no right or possibility of an appeal. The cases were admitted, as appeals by Kulwant Sahay, J., and myself on 4th February 1925 and were heard as appeals on 16th April 1925 by Macpherson, J. and myself; the appeal in the case of one appellant was allowed and in the case of the other two rejected.

I need not refer, I think, to cases which have come up as applications in revision; for it is common ground that such have occurred.

In Criminal Appeal No. 115 of 1925 Macpherson, J., apparently decided a case similar in general features to the present one as an appeal; the Magistrate in that case had refused to make a complaint, On appeal under S. 476 B. The Sessions Judge differed from the Magistrate and himself made the complaint; the person ordered to be prosecuted appealed to this Court; the appeal came before Macpherson J sitting as Vacation Judge and the point that no appeal lay was specifically taken. Macpherson J. then expressed the opinion that sitting singly he ought to follow the expression of opinion given by Mullick. J. in *Faujdar Rai* v. *King-Emperor* (3) and hold that an appeal did lie; but, whilst expressing this view, he decided to reject the application on its merits whether it was rightly to be regarded as an appeal or as an application in evisional jurisdiction. And, in the present case, as has already been observed, the same learned Judge, at a later date, (i. e., on 2nd September 1925) the same point being more specifically perhaps raised by the Crown, referred the matter to a Bench. In the Lahore High Court in the case of *Mohammad Idris* v. *The Crown & another* (4) the question as to whether an appeal lies from a

(1) Criminal Appeal No, 22 of 1925.
(2) Criminal Appeal No. 37 of 1925.
(3) Criminal Rev. No. 5 of 1925
(4) A. I. R. 1925 Lah. 322

decision under S. 476 B. Cr. P. C. has been discussed and decided by Martineau and Zafar Ali, JJ. In that case their Lordships held that no appeal lies under S. 47-6B. of the Cr. P. C. to the High Court from an appellate order of a District Judge making a complaint which the Sub-Judge might himself have made but refused to make. This was a reference to a Bench made by Scott-Smith, J. who was doubtful as to whether an appeal lay under such circumstances.

This case, is of course, directly in point here ; but it has been suggested to us that the decision is not legally correct. The judgment is very short and was given on October 24th, 1924. It simply reads thus: " This question referred to us in this appeal and in Appeals Nos. 233 and 286 of 1924 is whether an appeal lies to this Court from an appellate order of the District Judge making a complaint which the Subordinate Judge might himself have made under S. 476 of the Criminal Procedure Code. S. 476-B. of the Code gives a right of appeal only when a Court has made or refuted to make a complaint under S. 476 or S. 476-A. and neither of those sections relates to a complaint made by a Court on appeal from an order of a Subordinate Court refusing to make a complaint. We, therefore, answer the question referred to us in the negative. The appeals will be laid before the referring Judge for disposal "

In the Calcutta High Court a case similar in features to the present one has been dealt with in Revisional Jurisdiction and the decision of the Sessions Judge reversed (*Kalisadhan Addya* v. *Nani Lal Hazra*) (5), but the question of the possibility of an appeal did not there arise.

It is, I think, necessary now here to explain the argument which has been well placed before us upon this question by the learned counsel who has appeared for the appellants. He draws a distinction in different sets of circumstances between the possibility of an appeal lying from a decision given by an appellate Court under the provisions of S. 476-B. He argues that there may be different positions as a result of a proceeding under S. 476-B. in appeal. The first position is when the original tribunal has made a complaint (i. e., ordered a prosecution under S. 476) the person ordered to be prosecuted has appealed under S. 476 B and the appellate Court has allowed the appeal. In such a case he admits that there is no further appeal ; though revision by the High Court may be conceivable. This position has been the subject of a decision in the Bombay High Court in the case of a criminal appeal : *Somabhai Valabhbhai* v. *Aditbhai Parshotam* (6). In that case a Subordinate Judge had on the application of one Somabhar under S. 476 Cr. P. C. issued a a complaint and directed the prosecution of certain persons ; they appealed to a Sessions Judge who allowed the appeal. Somabhar appealed to the High Court. Macleod, C. J., and Shah, J. held that there was no appeal. In their judgment their Lordships state "We are clearly of opinion that no appeal lies under the provisions of the Code against an order made by the Court to which the Court making a complaint is subordinate." It will be observed that the point raised before us as disclosed by the 4th position (vide infra) was not before the Bombay Court nor decided by it. The 2nd position is when the original tribunal has refused to take action under S. 476 ; the applicant has appealed under S.476-B. the appellate Court has dismissed the appeal ; he thinks that in this case too there is no further appeal ; though again revision by the High Court is conceivable. The 3rd position is when the original tribunal has made a complaint ; the person ordered to be prosecuted has appealed, the appellate Court has dismissed the appeal ; he thinks that in this case too there is no further appeal ; though once more revision by the High Court s possible. The 4th and, of course, last possible position, is that existing in the present case, the original tribunal has refused to make a complaint ; the applicant has appealed and the appellate Court has itself made a complaint. It is argued that in such case the party ordered to be prosecuted has a right of appeal ; and revision also might be possible ; except that if an appeal lies revisional jurisdiction would not, it is imagined, be exercised.

This is the position upon which the Lahore High Court has given the decision quoted above ; but it seems that a contrary view has been expressed in this Court by Mullick, J., in *Faujdar Rai* v. *King-Emperor* (3).

(5) A. I. R. 1925 Cal. 721.

(6) A. I. R. 1924 Bom. 317

In that case the circumstances were as follows :—An application was made under S. 476 Criminal P. C. to a Sub-Deputy Collector to make a complaint against one Faujdar Rai directing his prosecution for the offences of using a forged document and giving false evidence. The Sub-Deputy Collector after enquiry, refused to take any action. The complainant appealed to the Collector under S. 476-B, Criminal P. C. The Collector disagreed with the Sub-Deputy Collector's view and himself made a complaint. Faujdar Rai thereupon appealed to the Divisional Commissioner who held on 30th March 1925, that no appeal lay. From the Commissioner's decision Faujdar Rai applied to this Court in revision ; not against the Commissioner's decision that no appeal lay but against the Collector's complaint. The first point taken was that the High Court had no jurisdiction to interfere with the Collector's order, but Mullick, J., rejected this contention : his Lordship then dealt with the matter in revision and allowed Faujdar's application. But, so far as is here material, the most important matter in the judgment lies in the following observations ; the learned Judge writes : " There is a third point raised, namely, that the learned Commissioner was wrong in declining to hear the appeal preferred by the petitioner. I think the contention must be accepted. S. 476-B of the Criminal P. C. appears to contemplate that, if an appellate Court sets aside the order of the Original Court, the party prejudicially affected has a right of appeal to the Court to which appeals from that appellate Court ordinarily lie. In this case therefore the Commissioner had jurisdiction to hear the appeal from the order of the Collector and to set it aside if necessary and I am asked to direct that the criminal prosecution should not proceed till the Commissioner has disposed of the appeal. In my opinion it is not necessary to make any such order as I think I have jurisdiction to interfere under Ss. 115, Criminal P. C., and 107 of the Government of India Act."

If this view is correct the same reasoning would apply in the present case and the person against whom the appellate Court (i. e., the District Judge) has under S. 476-B, made a complaint could appeal to the High Court.

It is important in endeavouring to come to a correct decision upon this question to examine carefully the provisions of Ss. 476, 476A and 476-B in order to ascertain what is their proper construction. I may here say that as a result of such investigation as I have been able to make I have not been able to ascertain that in the Report of the Joint Committee on the Bill to make in the Criminal Procedure Code the amendments now comprised in S. 476-B or in the debates when the Bill was in the Legislature the question now arising was in any way envisaged ; and indeed it was hardly likely that it should have been, in view of its somewhat involved nature.

S. 476 contemplates that a Court may either of its own motion or on application make a complaint. S. 476-A contemplates that an appellate Court may make a complaint if its subordinate Court has taken no action under S. 476 suo motu or has not rejected any application made to it to do so. S. 476-B gives a right of appeal to an appellate Court under certain circumstances.

(a) Where the appellate Court's subordinate Court has refused on application made to it under S. 476 to make a complaint ;

(b) where an appellate Court has refused on application made to it under S. 476-A to make a complaint ;

(c) where the appellate Court's subordinate Court has made a complaint either suo motu or on application, i.e., included in the words " or against whom such a complaint has been made ";

(d) where an appellate Court has itself made a complaint.

In following out the effect of this it will be simplest to illustrate by reference to Munsif, District Judge and High Court as instances of original, appellate and superior appellate Courts.

It would seem clear that in case

(a) where a Munsif has refused an application made to him under S. 476 to make a complaint an appeal lies to the District Judge by the applicant, the position does not fall within 476-A but within 476-B. At the appeal no complaint has yet been made ; the District Judge may take the same view as the Munsif and dismiss the appeal. In such case there is no sort of prescribed procedure for an appeal to the High Court. On the other hand the District Judge may disagree with the Munsif and himself make a complaint and the complaint then is amenable to the

provisions of S. 476 ; that is to say, it is, under S. 476-B, subject to appeal to the High Court ; for S. 476-B, reads : " Any person against whom a complaint under S. 476 has been made by any Court."

In the case mentioned the District Judge is making the complaint under S. 476, the District Judge's Court is subordinate to the High Court within the meaning of S. 195, sub-S. 3 of the Criminal P. C. and therefore the appeal lies to the High Court. As to (b) the Munsif has done nothing and has been asked to do nothing. The District Judge has either suo motu or on application made a complaint. All this is under S. 476-A. The complaint is amenable to the provisions of S. 476 ; clearly the complaint can under the provisions of S. 476-B be the subject of appeal to the High Court from the District Judge. For the only complaint is by the District Judge.

As to (c) the Munsif has suo motu or on application made a complaint ; clearly there is an appeal to the District Judge under S. 476-B. The District Judge may uphold the Munsif's view ; but in dismissing the appeal he (the District Judge) makes no complaint ; and it is only against the complaint that so far as (c) is concerned a right of appeal is given. But the District Judge may direct the withdrawal of the complaint ; but even so the District Judge makes no complaint; and it will be once more observed that it is only when the District Judge makes the complaint that the provisions of S. 476 apply to it.

Lastly as to (d) : the Munsif has done nothing and has never been asked to do anything under S. 476. But the District Judge has made a complaint either suo motu or on application under S. 476-A ; to this complaint the provisions of S. 476 are applicable ; and under S. 476-B such a complaint can be the subject of appeal ; but to what Court ? Obviously only to the High Court because it is from the District Judge.

In my opinion, therefore, upon a proper construction of Ss. 476, 476-A and 476-B and still retaining the illustration of the three ascending Courts as Munsif, District Judge and High Court there would lie an appeal from the District Judge to the High Court. (a) Where the Munsif has refused on application made to him under S. 476 to make a complaint, where there has been an appeal to the District Judge and where the District Judge, disagreeing with the Munsif, has made a complaint, (b) where under S. 476-A (the Munsif has taken no action suo motu and has not been asked to take any action) the District Judge has (a) on application to him made a complaint, (b) on application to him has refused to make a complaint.

I can see no possibility of an appeal lying under any other of the positions referred to.

The same reasoning would of course apply to any other chain of three Courts (contemplated by S. 476) of ascending jurisdiction. Being therefore of opinion that in the present case an appeal does lie, one must therefore examine the circumstances under which the District Judge was induced to make the complaint.

I think it is desirable to remark, as is pointed out by Macleod, C. J., and Shah, J., in the case decided in the Bombay High Court, that the question whether a complaint should be made under S. 476, Criminal P. C., is almost invariably a matter of discretion ; and the High Court is under those circumstances always loath to interfere except in extraordinary cases.

It is necessary, therefore, to look first at the original judgment given by the Munsif in the suit which he decided in July 1924. The action was brought by the plaintiff for recovery of his share in the produce of certain bakasht lands in possession of the 1st petitioner. The only substantial defence which appears to have been put forward was that the defendant had in fact paid what was due ; there were other questions raised, one of which was that part of the lands were raiyati lands and part bakasht and that the plaintiff could not sue in one and the same suit for rent for both kinds of lands. This point is only of importance because in support of the plea of payment the defendant produced certain documents of account (bujhaotas) in respect of the alleged payment of what was due with regard to the bakasht lands and certain receipts in respect of the raiyati lands. The Munsif undoubtedly held that these bujhaotas and receipts were not genuine. It would not be, I think, right for me to enter in detail upon the reasons why the Munsif came to this opinion (in case it might be thought that I was expressing any view of my own as to the authenticity of these documents), but I may state

that, apart from observing that, so far as he could judge from the caligraphy, he was not satisfied that the signatures purporting to have been made on behalf of the plaintiff were genuine, he gave several other grounds in support of that view. For instance with regard to the bujhaotas he suggested that they showed a set off in the defendant's favour, in respect of the alleged share of a third party, for the inclusion of which there appeared to be no sort of justification ; again, he thought that under the circumstances, which disclosed litigation still existing between the parties with regard to the lands in question, it was highly improbable that clear receipts and bujhaotas would have been, as the defendant alleged, granted to him by the plaintiffs, or indeed that the defendant would under such circumstances have in fact paid what was alleged to have been due to the plaintiffs. He concludes his summing up of the case in the following words : " Considering all this I disbelieve the defendant's plea of payment and hold the bujhaotas and receipt filed by him not to be genuine." The defendant appealed and it does not appear that the Munsif was then asked or thought fit to take any action under the provisions of S. 476 of the Criminal P. C. The appeal was decided by the Additional Sessions Judge and Subordinate Judge of the 3rd Court of Gaya on the 5th February. The appeal was dismissed. The learned Judge, who again points out that, in view of the disputes which were going on between the parties, it was highly unlikely that the plaintiffs would grant receipts which would have imperilled their position in the other litigation which was principally concerned with a partition suit and who further draws attention to certain intrinsic improbabilities in connexion with the genuineness of the bujhaotas and receipts, agreed with the Munsif that neither the receipts nor the bujhaotas were genuine. As I have mentioned before, very shortly after the appeal had been concluded, application was made by the plaintiffs to the Munsif of the Court before which the original suit had been tried, asking that action should be taken under the provisions of S. 476 Criminal P. C. The Munsif before whom this application came was not the same individual as the Munsif who had tried the case. He seems to have thought in his decision, given on the 23rd April last refusing to take action, that no prima facie case of forgery or the like had been made out. He observes that neither the trial nor appellate Court had specifically found that the documents were forged and comments upon the fact that neither of those Courts had apparently thought fit of their own motion to direct a prosecution. I need not point out that such reasoning is not exhaustive ; for, if it was always to be left solely to the self-acting motion of the Courts concerned to institute a complaint, much of S. 476 would be surplusage ; and indeed, it is well known that it is frequently only upon application made to it that a Court either under S. 476 or 476-A of the Criminal P. C. takes action. The Munsif proceeds to state that although the Courts expressed the view that the documents were not genuine it does not follow that they were forged ; it is again, to my mind, obvious that the questions whether the documents were forged or not by or on behalf of the petitioners, or whether they were used in any way by or on behalf of them (they the petitioners), knowing that they were forged, are matters which are to be contemplated as the subject of the prosecution which has now eventually been ordered. The Munsif, however, remarks that the mere fact that neither the trial nor appellate Court took any action of their own motion under S. 476 Criminal P.C. proves that the matter was not considered sufficiently serious to justify a prosecution ; I have already pointed out that this is fallacious reasoning. The Munsif, lastly, observes that the fact that the plaintiffs asked the Court to issue a complaint shows malice and grudge ; but it is hardly to be understood necessarily that such is the case ; or otherwise it would be difficult to envisage an instance where any private individual could successfully make an application under the provisions either of S. 476 or 476-A of Criminal P. C., I do not therefore, think that the reasoning upon which the Munsif bases his refusal to make a complaint can be regarded as sound.

The applicants appealed to the District Judge of Gaya, and on the 10th July last the learned Judge differed from the Munsif and instituted a complaint. He points out that both the trial and the appellate Courts had clearly found that the receipts and bujhaotas were not

genuine, and he observes that the c onc lu sions at which those Courts had arrived appeared to him to be based upon some good grounds : he also refers to some of those grounds. To my mind it is extremely difficult to see how it is possible for this Court to, interfere with the decision to which the District Judge has come, and I may say, indeed, that had I been in the position of the Munsif before whom the application was made I have little doubt but that I should have adopted the view that a complaint ought to have been instituted.

The learned counsel, who has appeared for the appellants here, has urged against the order of the District Judge instituting a complaint against his clients a variety of circumstances upon which he bases an argument that the reasons which were given by the trial and appellate Courts for thinking that the receipts and bujhaotas were not genuine were mistaken. He points also to the fact that a second appeal against the appellate decree of the Subordinate Judge preferred to this Court has been admitted. It is true that in their application before the Munsif, asking him to institute a complaint, reference is made to the fact that the Government Examiner of documents had reported upon them in their (the applicants') favour and it would seem that the opinion of the expert examiner was before the Munsif when the application was made to him. The Munsif, however, does not pay much attention to this report as he rightly points out that the expert has not yet been cross-examined. The value of the expert's opinion, however, and the other matters which have been referred to by the learned counsel for the appellants here are matters which it seems to me can only properly be gone into during the course of the prosecution proceedings which have been directed. To my mind there was no undue delay in the application to the Munsif. It is impossible for this Court to hold that the District Judge of Gaya has wrongly or unreasonably exercised his discretion. Two Courts have, rightly or wrongly, held that the documents in question are not genuine and, under those circumstances, if the District Judge thinks that there is a case which ought to form the subject-matter of a prosecution it is not in my opinion an occasion upon which this Court should, unless extraordinary circumstances were visible which do not appear here, interfere with what has been done.

Under those circumstances, in my view, the appeal should be dismissed.

Adami, J.—I agree.

Appeal dismissed.

★★ A. I. R. 1926 Patna 87

ADAMI AND SEN, JJ.

Ram Autar Pande and *others*—Appellants.

v.

Shanker Dayal and *others*—Respondents.

Appeal No. 845 of 1922, Decided on 23rd June 1925, against the appellate decree of the Dist.-J., Shahabad, D/- 30th June 1922.

★★ (a) *Civil P. C., S. 11—Competent Court—Suit dismissed but one issue decided against defendant — Defendant appealing — Appellate Court wrongly holding appeal incompetent but deciding the issue in defendant's favour—Finding is res judicata.*

An usufructuary mortgagee brought a suit against mortgagor for possession. He applied for an amendment to add alternate prayer for recovery of debt but his application was refused and his suit dismissed. Court held that consideration had passed. On appeal by defendant Court held that no consideration passed but the appeal was wrongly dismissed on the ground that defendant was successful in lower court and no appeal lay. Plaintiff brought a second suit for money decree for the debt. *Held*: that the first suit operated as rejudicata. *Raghunath Kurmi* v. *Deo Narain Rai* (*S. A.* 1419 of 1916, *Patna*) *Foll.* [P. 89, C. 1]

★ (b) *Civil P. C., O. 2, R. 2—Causes of action different but substantial evidence common to both—Reliefs arising from both should be claimed in the same suit.*

In a suit by usufructuary mortgagee for possession under the terms of the mortgage, the relief under Transfer of Property Act. S. 68 (b) for money decree in the alternative should be prayed for; otherwise it is barred by O. 2, R. 2, Civil P. C. [P. 89, C. 1]

C. C. Das and *D. N. Varma*—for Appellants.

Parmeshwar Deyal—for Respondents.

Adami, J.—The plaintiff in the case out of which this second appeal comes to us took a mortgage from Basudev Rai and Shankar Deyal Rai in consideration of an advance of Rs. 950. He was to take possession of 3 bighas of raiyati land and to enjoy the usufruct in lieu of interest; no date was fixed for repayment, but the mortgagor was to be entitled to recover possession by payment of the amount advanced on the 30th Jeth in any year. The unsufructuary mortgage bond was executed on August 11th,

1914. In 1919 a dispute arose regarding the possession of the land which resulted in proceedings under S. 145 Criminal P. C. In those proceedings it was decided that the plaintiff mortgagee and his lessee were out of possession. Thereupon the plaintiff instituted a suit for recovery of possession on the strength of his mortgage bond. His only prayer in the plaint was for recovery of possession. After the close of the case, however, he put in a petition that he might amend the plaint by an alternative prayer for recovery of the mortgage debt. The learned Munsif rejected this petition and thereafter dismissed the suit on the ground that the property mortgaged was joint family property and that the Defendant No. 3 had not joined in the mortgage and that the plaintiff had failed to prove any legal necessity. The Munsif held that the mortgage was genuine and consideration had passed. In his judgment the learned Munsif stated that a money decree could not be allowed as there had been no prayer for it; he said that he left the point open and plaintiffs may seek their remedy, if so advised, against Defendants 1 and 2 for the money actually advanced.

Against this judgment and decree an appeal was filed by Defendants 1 and 2 against the decision that the mortgage bond was genuine. There was a cross appeal by the plaintiff asking for a money decree. This cross appeal was dismissed by the learned Subordinate Judge because the cross appeal was not sufficiently stamped. As to the appeal, the learned Subordinate Judge held that no consideration had passed, but he proceeded to find that no appeal lay because the defendants had been successful in the Court below and therefore there was nothing to appeal against.

The present plaintiffs on the basis of the statement made by the Munsif, that they might seek their remedy for the money actually advanced, instituted the present suit on the 17th August 1921, praying for recovery of the debt under the bond of 1914.

The learned Subordinate Judge dismissed the suit first: on the ground that a money decree had been asked for in the previous suit and refused and that the provisions of S. 11 of the Civil Procedure Code barred the present suit; and secondly, on the ground that as the plaintiff had the opportunity in the previous suit of asking for the relief and had not taken that opportunity, O. 2 R. 2, of the Civil Procedure Code precluded him from suing for the relief.

On appeal the learned District Judge has upheld the finding of the Subordinate Judge.

Before us Mr. Das takes up the point that S. 11 of the Civil Procedure Code cannot operate because, though the Subordinate Judge on appeal held that no consideration passed, that finding can have no strength as res judicata since the Subordinate Judge found that no appeal lay and dismissed the appeal.

The second point taken by Mr. Das is that the lower Courts are mistaken in thinking that O. 2, R. 2 will operate. His contention is that the cause of action in the previous suit and the cause of action in the present suit are wholly different. He says that in the previous suit the cause of action was the dispossession of the plaintiffs and the prayer was only for recovery of possession, whereas in the present suit the plaintiff is merely asking for the repayment of a debt incurred under the bond. He contends that it cannot be argued that in the previous suit the plaintiff could have asked for a money decree on the basis of S. 68 clause (b) of the Transfer of Property Act, because it was found in that suit that there was no mortgage, and in fact the Court in the previous suit, having come to that finding, could not have given relief under S. 68 clause (b).

I will deal with the second contention of Mr. Das first. It is quite plain that when the plaintiff instituted his first suit claiming the bond to be a mortgage bond and asking for recovery of possession, it was open to him to claim for the repayment of the mortgage money under S. 68 clause (b). That relief was open to him and he did not claim it. His prayer for an amendment of the plaint was rejected and the remark of the Munsif in his judgment can hardly be held to amount to the grant of leave to institute a suit for money. It is quite true that the Munsif having found that there was no valid mortgage would be unable to grant a decree under S. 68, clause (e). It is true too that the cause of action for recovery of the money as a debt due under the bond would be different from the cause of action in the mortgage suit asking for

recovery of possession, for the facts to be proved would not be similar in the two cases. In both, however, the bond would have to be relied on. The trouble to my mind is, if Mr. Das' arguments are accepted and it is held that the present suit is merely a suit for a debt due on the bond, limitation will come in for the bond was executed on the 11th August 1914 and the suit was not instituted till the 17th August 1921 and the suit would be barred. There is no doubt in my mind that in the previous suit the plaintiff should have asked for the relief allowed by S. 68, clause (b) of the Transfer of Property Act. He certainly cannot ask for that relief now.

With regard to S. 11 of the Code of Civil Procedure, the learned Subordinate Judge came to a direct finding on an issue between the parties that consideration did not pass in 1914. The reason given by the learned Subordinate Judge for dismissing the appeal was not altogether a good reason. It was necessary to decide the point whether consideration passed between the parties and the learned Munsif came to a decision on that point which was against the interest of the defendants. If no appeal had been brought the finding of the Munsif would have operated as res judicata against defendants, and therefore as decided by Mullick,J. in the case of *Raghunath Kurmi Deonarain Rai* (1) the defendants had a right of appeal although the suit against them had been dismissed. I think, therefore, that S. 11 of the Civil Procedure Code will operate and bar this second suit, it having been found that no consideration passed on the bond of 1914.

I would, therefore, dismiss this appeal with costs.

Sen, J.—I agree.

Appeal dismissed.

(1) S. A. No. 1419 of 1916.

★★ A. I. R. 1926 Patna 89

DAS AND ROSS, JJ.

Uma Jha—Plaintiff—Appellant.

v.

Chetu Mander and *others*—Defendants—Respondents.

Appeal No. 66 of 1923, Decided on 4th November 1925, from the appellate decree of the Sub-J., Bhagalpur, D/- 25th October 1922.

★★ (a) *Registration Act, S. 77—S. 77 does not affect equitable jurisdiction of Courts to decree specific performance of contracts to sell—Specific Relief Act, S. 12.*

Though independently of S. 77 of the Registration Act a suit to compel registration of a document does not lie, the Registration Act does not touch or affect the equitable jurisdiction possessed by the civil Courts to pass a decree for specific performance by the execution and registration of a fresh document where circumstances exist entitling the plaintiff to such a decree : 9 *Cal.* 150 and 12 *C. L. J.* 464. *Applied.* [P 89 C 2]

★ (b) *Transfer of Property Act, S. 54—Unregistered deed is admissible in a suit for specific performance—Registration Act, S. 49.*

Although a kabala, which has not been registered is inoperative as a kabala yet it is admissible in evidence in a suit to enforce specific performance of the contract which must be deemed to have preceded the execution of the kabala. [P 90 C 1]

N. C. Sinha and *B. B. Ghose*—for Appellant.

S. N. Sahay—for Respondents.

Das, J.—The question for our decision in this case is whether the plaintiff is entitled to a decree for specific performance in the peculiar circumstances of the case. It is not disputed that the Defendant No.1 received Rs. 300 from the plaintiff and executed a kabala in respect of the disputed property in favour of the plaintiff on the 14th December 1916. The document, however, was not registered ; and it appears that Defendant No. 1 subsequently sold the disputed property to the defendants third party. The specific relief claimed in the plaint is that "the Court may direct defendants first party to get the same" namely the kabala "registered within the time fixed by the Court, that in the event of their failure to have registration done even on the direction of this Court the Court may get the said kabala registered."The jurisdiction of the civil Court to direct a document to be registered is a qualified one and only arises if certain essential conditions are satisfied. These conditions have not been satisfied in this case, and the plaintiff was clearly not entitled to the specific relief claimed by him.

But this conclusion, in my opinion does not decide the case. The Registration Act does not touch or affect the equitable jurisdiction possessed by the civil Courts to pass a decree for specific performance where circumstances exist entitling the plaintiff to such a decree. This was the view taken by the learned Munsif. The learned Subordinate Judge has taken a

different view and has relied upon the decision in *Edun* v. *Mahomed Siddik* (1) in support of his view. That case decided that, independently of S. 77 of the Registration Act, a suit to compel registration of a document will not lie—a decision with which we entirely agree. The question raised in this case is whether the plaintiff is entitled to a decree for specific performance of the agreement to sell the disputed property to him; and on this question the decision of Mukherji, J. in *Surendra Nath Nag Chowdhury* v. *Gopal Chunder Ghosh* (2) entirely supports the view of the learned Munsif. As was pointed out in that case, it is not a sufficient performance of the contract for the defendant merely to execute a conveyance: for until the kabala is registered, it is inoperative in law. The execution of the kabala by the defendant not having converted the executory contract into an executed contract, the plaintiff is clearly entitled to a decree directing the defendant to carry it into execution. It was contended before us that the agreement between the parties having been reduced into writing, the only evidence of that agreement would be that furnished by the document, and that the document is inadmissible in evidence as it was not registered in accordance with law. I know of no authority which decides that an agreement for sale has to be registered under the Registration Act. The true view is that although a kabala which has not been registered is inoperative as a kabala, yet it is admissible in evidence in a suit to enforce specific performance of the contract which must be deemed to have preceded the execution of the kabala.

It was then contended that the plaintiff has not asked for a decree for specific performance and that this Court ought not to convert a suit for registration into a suit for specific performance. The argument, in my opinion, is a technical one, and ought not to weigh with us. All the material facts entitling the plaintiff to a decree for specific performance are pleaded. These facts were found in favour of the plaintiff by the learned Munsif and were not challenged before the Subordinate Judge. That being so, the plaintiff was clearly entitled to succeed before the learned Subordinate Judge.

The decree passed by the learned Munsif, is however not strictly in accordance with law. The learned Munsif directs the Sub-Registrar of Banka to register the kabala. As I have already pointed out, the civil Court has no jurisdiction to pass a decree of this nature independently of S. 77 of the Registration Act. The plaintiff is, however, entitled to a decree for specific performance by the execution and registration of a fresh document within three months from the date hereof.

We allow the appeal, set aside the judgment and decree passed by the Court below and vary the decree passed by the Court of first instance in the manner indicated above. If the defendant should fail to execute and register the document within the time allowed, the Court of first instance will do so on behalf of the defendant.

The plaintiff is entitled to his costs throughout.

Ross, J.—I agree.

Appeal allowed.

(1) [1883] 9 Cal. 150=11 C. L. R. 440.
(2) [1910] 12 C. L. J. 464.

★★ A. I. R. 1926 Patna 90

DAS AND ADAMI, JJ.

Kanhaiya Lal Sahu—Plaintiff—Appellant.

v.

Mt. Suga Kuar—Defendant—Respondent.

Appeal No. 94 of 1922, Decided on 29th May 1925, from a decision of the D. J., Darbhanga, in original decree D/- 3rd January 1922.

★★ (a) *Hindu Law—Adoption—Karta putra is not in better position than dattaka putra—Karta putra does not inherit any person except the adoptive father—Karta putra does not by mere adoption get a right to succeed to the estate of adoptive father—Natural born son excludes altogether the karta putra.*

It is a very strong thing to say that a karta putra who retains his status in his natural family and loses no right in that family is in a better position than a datta putra who undoubtedly loses his status in his natural family and who is liable to be defeated in his adoptive family by the birth of a natural born son. The modern text books refer to the adoption of a karta putra as an adoption in the kritrima form; but this is not quite correct. All that is necessary is the consent of the adoptee, which involves the adoptee being an adult. He does not lose the

rights of inheritance in his natural family, and takes the inheritance of his adoptive father, but not of his father's father or other collateral relations nor of the wife of his adoptive father or her relations. It is no part of the contract that the adoptee should succeed to the estate left by his adoptive father. A dattak son who loses his status in his natural family has no absolute right to the estate of his adoptive father. He is liable to be defeated by a gift inter vivos or by a devise made by his father in favour of another person. He is also liable to be defeated, if not absolutely, certainly to the extent of important shares in the estate by the birth of a natural born son subsequent to the adoption. Succession to the estate of the adoptive father is not inherent in the status of a karta putra. Where a natural born son is in existence he is entitled to exclude every other kind of son from sharing with him in the estate of his father: 1 *Sel. Rep.* 11; 6 *I. D., Old series, page* 8, *Expl. and doubted.*

[P 91, C 1, P 92 C 1 and 2, P 93, C 1. P 94 C. 1]

K. P. Jayaswal, S N. Gupta and *Md. Hasin Jan*—for Appellant.

S. M. Mullick and *L. K. Jha*—for Respondent.

Das, J.—Although I differ from the learned District Judge in regard to both the questions decided by him, I think that the decree pronounced by him is right and that it ought to be affirmed.

The plaintiff claims to have been adopted by Khub Lal as his karta putra on the 26th January 1915. Khub Lal died on the 28th December 1915 and a posthumous son Hanuman Prasad, was born to him who, however, died shortly afterwards. The plaintiff contends that, notwithstanding the birth of a posthumous son, he is entitled to succeed to the estate of Khub Lal to the exclusion of the defendant, who is the widow of Khub Lal and who is in possession of the estate not as the heiress of Khub Lal, but as the heiress of her deceased son. Hanuman Prasad. Two questions were raised in the litigation: first, the question of fact, namely whether the plaintiff was adopted by Khub Lal as his karta putra and; secondly the question of law, namely, whether, assuming that he was so adopted, he is entitled to succeed to the properties in the events which have happened. The learned District Judge held that the adoption was not proved and decided the question of fact in favour of the defendant. In regard to the other question raised before him, he thought that the plaintiff would have been entitled to 1/4th share in the estate of Khub Lal had he succeeded in proving his adoption. In my opinion the plaintiff has established the factum of his adoption, but he is not entitled to succeed to the estate of Khub Lal having regard to the fact that a son was born to Khub Lal subsequent to the plaintiff's adoption.

I will first deal with the question of fact. Khub Lal had three daughters, Tapeshwar Kuer, Dhano Kuer and Muneswar Kuer, of whom Dhano Kuer and Muneswar Kuer were alive at the date of the alleged adoption. The plaintiff is the son of Tapeshwar Kuer who died many years ago. Khub Lal had also a son who died in his infancy. It is the common case that Kanhaiya Lal, the plaintiff, was brought up as a son by Khub Lal and was the object of his love and affection. He certainly looked upon him as his son and referred to him as his son to all his friends. The plaintiff lost both his father and mother in his infancy, and, as I have said, was brought up by Khub Lal and was married at his expense. The learned District Judge accepts the case of the plaintiff as inherently probable. He also thinks that "the story told has been told in a consistent way and there is not much contradiction in the same." He says that he "might have been disposed to accept their evidence" but for certain circumstances of the case to which he refers. I will presently refer to these circumstances myself; it is sufficient for me to point out at the present moment that in the view of the learned District Judge the story told by the plaintiff is inherently probable and is supported by evidence which is consistent. [After discussing the evidence his Lordship remarked]:

I hold that the plaintiff has established that he was adopted by Khub Lal as his karta putra.

The next question is whether in the events which have happened the plaintiff is entitled to succeed to the estate of Khub Lal. The plaintiff's case is: first, that he has the right to succeed to the estate of Khub Lal by virtue of the contract at the time of the adoption; and, secondly, that in any event he is entitled to succeed to a share of that estate. The defendant's case is that the only contract between the parties was as to sonship and that he took no estate by virtue of that sonship although he might have suceeeded to one had a son not been born to Khub Lal. It is, in my opinion, a very strong thing to say that a karta putra who retains his status in

his natural family and loses no right in that family is in a better position than a dattak putra who undoubtedly loses his status in his natural family and who is liable to be defeated in his adoptive family by the birth of a natural born son. The modern text books refer to the adoption of a Karta Putra as an adoption in the Kritrima form; but it seems to me that this is not quite correct. I do not however, propose to enter upon this question as it is not material to this litigation. It may be that the system as to Karta putra is an extension of the Kritrima form of adoption; but there is no doubt whatever that the system as we now know it in Mithila is the invention of that very ingenious person, the Mithila Brahmin who is so anxious to preserve unsullied the purity of his genealogical table. The difficulty with which the Mithila Brahmin was faced was this: where an adoption took place the name of the adoptee had to be removed from the genealogical table of his natural family and a question might be raised whether the genealogical table with the correction was an honest document. He, therefore, devised the system—the system of Karta putra—under which a person on adoption did not lose his status in his natural family, though he acquired a status as the son of his adoptive father. No ceremonies or sacrifices are necessary to the validity of this particular form of adoption. All that is necessary is the consent of the adoptee which involves the adoptee being an adult. As I have said, he does not lose the rights of inheritance in his natural family, and takes the inheritance of his adoptive father, but not of his father's father or other collateral relations nor of the wife of his adoptive father or her relations. The following passage in Colebrooke's Digest (Book V, Ch. IV, Sec. 10, cited in Sarkar's Adoption 2nd edition, page 447) is of interest as stating the position in this particular form of adoption: "Sons are thus adopted in Mithila; the practice of adopting sons given by their parents was there abolished by Sridatta and Pratihasta, although the latter had been himself adopted in that manner. Their motive was, lest, a child already registered in one family, being again registered in another, a confusion of families and names should thence ensue. A son adopted, in the form so briefly noticed in the present section, does not lose his claim to his own family, nor assume the surname of his adoptive father; he merely performs obsequies, and takes the inheritance." The reason for this particular form of adoption in Mithila is also explained by Macnaghten as follows (Macnaghten's Hindu Law, Vol. 1, 95-100): "But according to the doctrine of Vachaspati, whose authority is recognized in Mithila, a woman cannot, even with the previously obtained sanction of her husband, adopt a son after his death, in the Dattak form; and to this prohibitory rule may be traced the origin of the practice of adopting in the Kritrima form, which is there prevalent. This form requires no ceremony to complete it, and is instantaneously perfected by the offer of the adopting, and the consent of the adopted party. It is natural for every man to expect an heir, so long as he has life and health; and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt. But in Mithila, where this authority would be unavailable, the adoption is performed by the husband himself; and recourse naturally had to that form of adoption which is most easy of performance, and therefore less likely to be frustrated by the impending dissolution of the party desirous of adopting." The rights of the adopted son would seem to depend on the contract between him and his adoptive father, and the question is what is that contract?

Mr. Jayaswal strongly contends before us that it is part of the contract that the adoptee should succeed to the estate left by his adoptive father. I have investigated this matter with some care and I find it difficult to accept this proposition. As I have said, a Dattak son who loses his status in his natural family has no absolute right to the estate of the adoptive father. He is liable to be defeated by a gift inter vivos or by a devise made by his father in favour of another person. He is also liable to be defeated, if not absolutely, certainly to the extent of important shares in the estate by the birth of a natural born son subsequent to the adoption. What reason is there for suggesting that a karta putra is in a better position than a Dattak son? It is not suggested that the contract in regard to this particular form of sonship involves a contract by the father to devise the estate to the adoptee. If that were established, it might be urged that the adoptee might

claim specific performance of the agreement against the person in actual possession of the estate agreed to be devised to him. If that were the position of Mr. Jayaswal, the answer would be that the plaintiff was admittedly a minor at the date of the adoption, and whatever the position may be in Hindu Law, a person in a British Court cannot sue for specific performance of an agreement entered into at a time when he was a minor. But if it is not the case of the plaintiff that there was a contract to devise the estate to him, what else can there be in the argument? It surely cannot be suggested that anyone can alter the rule of succession laid down by Hindu Law. To succeed in his argument Mr. Jayaswal must establish that it is the rule of Hindu Law that a karta putra must succeed to the estate of his adoptive father and that it is not open to his adopted father to defeat his interest either by a gift inter vivos or by a Will to take effect upon his death. For this proposition there is no authority, and I am unable to accept it.

Mr. Jayaswal relies upon a decision in *Kullean Singh* v. *Kirpa Singh and Bholee Singh* (1). In answer to a question put by the Court in that case the pundit thus described the ceremony of adoption in this particular form: "Let the person (intending to adopt) first consult a Brahmin, and, having discovered a propitious moment, let him, in the presence of the Brahmin, and of some friends or relatives, place something in the hand of the person to be adopted, and say to him: 'Be thou my adopted son, my goods and effects shall become thy property.' The person adopted will reply: I agree to become thy son'". Mr. Jayaswal relies upon the fact that it is part of the contract that the adopted father says: "My goods and effects shall become thy property," and so they will, unless the adoptive father makes a gift of the goods and effects or gives them away by his Will to take effect on his death. In my opinion the passage upon which Mr. Jayaswal relies does not establish that succession to the estate of the adoptive father is inherent in the status of a karta putra.

But apart from any other view it seems to me that this is not a very correct way of describing the ceremony. We have two latter cases: *Mt. Sutputte* v. *Indranaund Jha* (2) and *Ooman Dut* v. *Kunhia Singh* (3). In both these cases the ceremony is thus described: "The prescribed form for adopting a Kritrima son is as follows: In an auspicious hour let him bathe, and also cause the person whom he wishes to adopt to be bathed; let him present something at his pleasure, and say: 'Be you my son'; and let the son answer, 'I am become your son.' Then let him, according to custom, give a suit of clothes to the son. These are the legal conditions of adoption," and then it is said in the case in 2 Select Report at page 224 that "The adopted son will inherit the property of his adoptive father, even although the latter leave a widow." This is accepted by Mayne as the ceremony in the Kritrima form of adoption. He says as follows: "At an auspicious time, the adopter of a son, having bathed, addressing the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel, says: 'Be my son'. He replies: 'I am become thy son'. The giving of some chattel to him arises merely from custom. It is not necessary to the adoption. The consent of both parties is the only requisite; and a set form of speech is not essential:" (see S. 206.) It seems to me therefore that it cannot be urged that the plaintiff takes the estate of Khub Lal by virtue of his original contract with him.

The next question is whether he is entitled to any share in the estate of Khub Lal. This question admits that the natural born son was the proper person to succeed to the estate of Khub Lal; but the question still remains whether the adopted son is to be altogether excluded. Now, on this question different Smriti writers have laid down different rules; but we are concerned with the rule in the Mithila School. After quoting the various Smriti writers, Bachaspati Misra, who is of paramount authority in Mithila says as follows: "Manu and other legislators have said that, notwithstanding other kinds of some sons, the legitimate son alone receives the whole estate of his father, but they have also declared that the other sons are sharers of the estate. To remove this contradiction it must be understood that, if the legitimate son be

(1) 1 Sel. Rep. 11=5 Indian Decisions, O. S. 8.

(2) 2 Sel. Rep. 222=6 Indian Decisions, O. S. 529.

(3) 3 Sel. Rep. 192=6 Indian Decisions, O. S. 824.

virtuous, he shall receive the whole estate without giving a share to the others ; but if he be void of good qualities, and others possess them, they are entitled to have their respective shares, as has been stated above." In my opinion this is conclusive of the rights of the parties in this litigation. It was contended on behalf of the appellant by Mr. Jayaswal that in order to entitle a legitimate son, by which I understand a natural born son, to succeed, he must show that he is virtuous ; but the question does not arise because the natural born son in this case died soon after his birth and it cannot be suggested that he was not virtuous. If this particular form of adoption be the same as the kritrima form of adoption, then this passage in Vivada Chintamani (Tagore's Edition page 287) is conclusive of the rights of the parties. If, on the other hand, this particular form of adoption is not the same as kritrima form of adoption, as I am inclined to think, the rule laid down by Bachaspati Misra must still apply since he has made it clear that where a natural born son is in existence, he is entitled to exclude every other kind of son from sharing with him in the estate of his father.

In my opinion the suit was rightly dismissed by the learned District Judge and I must dismiss this appeal with costs.

Adami, J.—I agree.

Appeal dismissed.

★ A. I. R. 1926 Patna 94

DAS AND ADAMI, JJ.

Sripat Singh and *others*—Defendants—Appellants.

v.

Naresh Chandra Bose and *others*—Plaintiffs—Respondents.

Appeal No. 94 of 1921, Decided on 27th May 1925, from Original decree, of the Sub.-J., Purnea, D/- 8th October 1920.

(a) *Hindu Law—Damdupat—Rule does not apply to muffasil.*

The rule of damdupat is not applicable to the muffasil. Though the mortgage bond may be executed in Calcutta, yet, if the bond comprised properties which are in the muffasil the rule of damdupat cannot be applied. [P. 96, C. 1]

★ (b) *T. P. Act, S. 48—Property mortgaged for paying Government revenue — Court directing mortgage to have priority over pre-existing mortgage—Latter mortgage is postponed.*

Where a Receiver of property is authorised by the Court to mortgage the property and raise a loan for paying Government revenue and the Court orders the mortgage to have priority over a pre-existing mortgage and the money is utilised for the payment of revenue and to save the property from sale, the mortgage so sanctioned by the Court has priority over the pre-existing mortgage. [P. 97, C. 1]

(c) *Benami—Onus of proof is on party setting up plea.*

An ostensible purchaser must be assumed to be the real purchaser until the contrary is shown. [P. 98, C. 2]

★ (d) *T. P. Act, S. 74—Puisne mortgagee not impleaded in suit by prior mortgagee—Puisne mortgagee cannot redeem the property merely by paying the amount for which the property was purchased in auction.*

The right which a puisne mortgagee, who was not joined as a party to the suit of the prior mortgagee, has, is what he could have claimed if he had been a party to the suit, namely, a right to redeem the prior mortgage with a view to enforcing his own mortgage. [P. 100, C, 1]

(e) *T. P. Act, S. 60—Integrity of mortgage cannot be broken except by consent of all persons interested or by mortgagee—Consent of parties may be inferred from circumstances.*

The mortgage being one and indivisible security for the debt and every part of it, the mortgagor cannot redeem piecemeal, unless the integrity of the mortgage has been broken up by the act of the mortgagee. This rule will operate so as to prevent the mortgagor from claiming the right to redeem any particular property which may be included in mortgage security or the purchasers of fragments of the equity or redemption from claiming the right to redeem the fragments in which they may be interested and save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either partial interest in the subject, can, under the mortgage, get relief, except in consonance with the principle of indivisibility.

A person had a mortgage on two properties, with regard to one of them, by the consent of the parties and by order of Court a subsequent mortgage was created which was to have priority over the former mortgage. [P. 100, C. 2]

Held : that by this arrangment the parties must be deemed to have given up the right to claim the integrity of the mortgage.

(f) *T. P. Act, S. 81—Puisne mortgagee with notice of former mortgage cannot claim benifit of S. 81.*

A second mortgagee is not entitled to the benefit of S. 81 if he had notice of the previous mortgage. He is entitled to have the accounts taken on the footing of his mortgage and to a decree giving him the right to proceed against the surplus sale proceeds of the property. [P. 101, C. 1]

★ (g) *T. P. Act, S. 52—Scope*

A transfer made by order of Court is an exception to the section. [P. C.]

P. C. Manuk, S. M. Mullick and *Harihar Prasad*—for Appellants.

Hasan Imam, S. P. Sen, A. K. Roy, S. N. Bose and *S. C. De*—for Respondents.

Facts.—On the 10th May 1884 Lachmipat Singh and Chatrapat Singh executed a mortgage of Parganna Sripur in the District of Purnea and the house and premises No. 127, now numbered No. 147, Cotton Street in the town of Calcutta, in favour of Jadulal Mullick as a security for a sum of money lent and advanced by Jadulal Mullick to them. Bibi Jamehar Kumari, Defendant No. 4, is the widow of Chatrapat Singh, and Sripat Singh and Jagatpat Singh, Defendants Nos. 2 and 3, are the sons of Chatrapat Singh and they represent the interest of the original mortgagors in this litigation.

On the 7th June 1889 Srimati Saraswati Dassi, the widow and administratrix of Jadulal Mullick, instituted a suit, being Suit No. 253 of 1889, in the Original Side of the Calcutta High Court to enforce the mortgage bond of the 10th May 1884. She obtained a preliminary decree on the 1st August 1889 which was made absolute on the 19th January 1891.

On the 22nd March 1895, the Official Receiver of the Calcutta High Court was appointed Receiver of the mortgaged properties with liberty to mortgage the properties, which were the subject-matter of the litigation, to raise a sum of money for payment of Government revenue in respect of Parganna Sripur. The order of the Calcutta High Court expressly provided that the mortgage bond to be executed by the Official Receiver was to have priority over the mortgage bond of the 10th May 1884 in respect of Parganna Sripur.

On the 11th May 1895, the Official Receiver of the Calcutta High Court, as Receiver of the mortgaged properties, and under express order of the Calcutta High Court, borrowed Rs. 17,000 from Hari Charan Bose and as a security for the repayment of the money advanced with interest thereon mortgaged both Parganna Sripur and 147, Cotton Street, to him.

On the 2nd March 1896, Saraswati Dassi, the decree-holder in Suit No. 253 of 1889, assigned all her rights under the decree to Bibi Jamehar Kumari in consideration of the sum of Rs. 1,10,000 paid by Jamehar Kumari to her.

On the 26th March 1896 the Calcutta High Court passed an order giving the Receiver liberty to raise a further loan of Rs. 6,000 on second mortgage of Parganna Sripur, such mortgage to have priority over the mortgage of the 10th May 1884 in respect of Parganna Sripur.

On the 26th May 1896, the Receiver borrowed a sum of Rs. 6,000 from Brindaban Chandra Dutt and executed a second mortgage of Parganna Sripur in his favour. Brindaban Chandra Dutt has been cited as the 5th defendant in this litigation.

On the 10th April 1897 the Registrar of the Calcutta High Court put up 147, Cotton Street, to sale pursuant to the decree in Suit No. 253 of 1889 and Jamehar Kumari, the substituted decree-holder, purchased the property, free from all encumbrances, for the sum of Rs. 50,000.

On the 10th April 1910 Hari Charan Bose died leaving the plaintiff as his only son and heir under the Hindu Law by which he was governed.

On the 9th May 1919 the suit, out of which this appeal arose, was instituted by the plaintiff to enforce the mortgage bond of the 11th May 1895 and, in addition to the persons already mentioned, the Official Receiver of the Calcutta High Court was joined as the first defendant in the suit.

Das, J.—[After stating facts as set out above his Lordship proceeded]. Various contentions were raised by the defendants in their written statement and they have all been dealt with by the learned Subordinate Judge. As between the plaintiff and Sripat Singh and Jagatpat Singh, the main questions appear to have been, first, whether the plaintiff's suit was barred by limitation; secondly, whether there was legal necessity for the loan, and thirdly, whether the plaintiff was entitled to interest exceeding the principal sum advanced. The question as to whether the mortgage bond was genuine seems also to have been raised in the Court below. That question has been answered by the learned Subordinate Judge in favour of the plaintiff and Mr. Manuk appearing on behalf of defendants, Sripat Singh and Jagatpat Singh, very properly accepts the decision of the learned Subordinate Judge on this point.

In regard to the question of limitation, Mr. Manuk contended that the mortgage in suit was not an English mortgage; but it seems to us that it is unnecessary for us to express any opinion on this point since upon the finding of the Court below there can be no doubt that the suit is no

barred by limitation. There were various payments from time to time made by the mortgagor and the question in the Court below was whether these payments were genuine payments or whether the books of the Official Receiver were not forged in order to save the suit. All these payments were made by the Official Receiver and the cash book of the Official Receiver undoubtedly supports the case of the plaintiff. The last payment was made on the 8th July 1910 and the payment before that was made on the 28th February 1900. It was contended in the Court below that the entries made in the cash book of the Official Receiver were not genuine. Mr. Manuk has inspected the books of the Official Receiver and has very properly admitted those payments. He concedes that the suit is not barred by limitation and I do not propose to discuss the question any further in regard to the question of legal necessity. Mr. Manuk confined his arguments to the question of interest claimed in the suit. The interest claimed is 10 per cent. per annum with six monthly rest. In my opinion the interest claimed is very moderate and there is no reason to take the view that the interest is excessive.

In regard to the last question raised, the argument is founded upon the rule of damdupat. The Calcutta High Court has uniformly held and we agree with those decisions that the rule of damdupat is not applicable to the muffasil. It is quite true that the mortgage bond was executed in Calcutta, but the bond comprised properties which are in the muffasil and I am of opinion that we cannot apply the rule of damdupat in a case heard in Purnea.

The question as between the plaintiff and Jamehar Kumari is as to who is entitled to priority in respect of the mortgaged properties. Jamehar Kumari is the widow of one of the mortgagors ; but she took an assignment of the rights of the decree-holder in Suit No. 253 of 1889 in her favour. The extreme contention advanced on her behalf is that she is entitled to priority over the plaintiff's mortgage in respect both of Perganna Sripur and of the Cotton Street property. She contends that so far as the Cotton Street property is concerned, she purchased it at the Registrar's sale free from all encumbrance, and that she is entitled to retain it and to repel the attack made on it by the plaintiff in this litigation. In regard to perganna Sripur she contends that the utmost that can be said in favour of the plaintiff is that he is entitled to redeem her. The extreme contention on behalf of the plaintiff is that he is entitled to priority over the interest of Jamehar Kumari, first, because the money advanced by his father saved the property from loss or destruction ; and, secondly, because Jamehar Kumari is the benamidar of Chatrapat Singh. In regard to the last contention it is to be pointed out that the plaintiff did not suggest any case of benami in his plaint. Indeed he alleged in the 5th para. of the plaint that his father released No. 147, Cotton Street, Calcutta from all claim in respect of his mortgage and the plaint as originally filed certainly suggested that the plaintiff did not seek to enforce the mortgage by the sale of the Cotton Street property. This is a question in which the plaintiff is not really interested ; for it appears that Parganna Sripur is sufficient to meet his claim. But Brindaban Chandra Dutt, who has a second mortgage of Perganna Sripur is vitally interested in this question ; and he undoubtedly alleged a case of benami in his written statement. Brindaban Chandra Dutt contended that Jamehar Kumari was a benamidar for her husband who was then alive, that Hari Charan Bose did not release the Cotton Street property from all claim in respect of his mortgage and that he was entitled to have the debt of the plaintiff satisfied out of the Cotton Street property which was not mortgaged to him so far as such property would extend.

Now clearly the plaintiff is entitled to priority in respect of Perganna Sripur. It is not disputed that Government revenue to the extent of Rs. 16,000 in respect of Perganna Sripur was payable on the 28th March 1895 and that the Receiver had no funds in his hands out of which he could have paid the Government revenue. Perganna Sripur was therefore in imminent danger of being sold for non-payment of arrears of Government revenue. In these circumstances the Calcutta High Court passed an order with the consent both of the plaintiff and Chatrapat Singh that the Receiver should raise a loan to pay the Government revenue. The material portion of the order of the Calcutta High Court runs as follows :—

And it is further ordered with the like consent that the said Receiver be at liberty upon such terms and conditions as to rate of interest or otherwise as he may deem necessary to raise a sufficient sum by mortgage of the said properties comprised in the mortgage to the plaintiff for the purpose of paying the Government revenue payable in respect of the said zamindari Parganna Lot Sripur on the twenty-eighth day of March instant and that such mortgage be executed and registered by the said Receiver for and on behalf of the defendant and such mortgage to have priority over the existing mortgage of the said zamindari Parganna Lot Sripur."

In pursuance of this order the Receiver borrowed Rs. 17,000 from the plaintiff's father on the security of both the properties and there is conclusive evidence that with the money so raised he paid the Government revenue and saved the zamindari property from destruction. The evidence is also conclusive that the Receiver spent the entirety of the money so raised in paying Government revenue and in meeting certain incidental expenes.

In my opinion the plaintiff is entitled to what the Court gave him, namely, a first charge on parganna Sripur. An advance was made by the plaintiff in order to save pargana Sripur from loss or destruction ; and on principles which are well recognized in our Courts the advance so made is payable in priority to all other charges of earlier date. In my opinion the decision of the learned Subordinate Judge on this point is right and must be affirmed.

The next question is with reference to the Calcutta property. Mr. Manuk, appearing on behalf of Jamehar Kumari, strongly contends that the Calcutta property is not within the scope of the suit and that the learned Subordinate Judge should not have given any direction with reference to it. As I have pointed out, the plaintiff undoubtedly said in the plaint that his father released the Calcutta property from all claim in respect of his mortgage. He instituted the suit in Purnea and Mr. Manuk relies upon the allegation in the 11th para. of the plaint which runs as follows :—

"The property in suit being situated in zillah Purnea, thanas Bahadurganj and Kasba and district Purnea within the local limits of the jurisdiction of this Court, the cause of action arose in thanas Bahadurganj and Kasba on the 26th March 1896."

I have no doubt whatever that at the time when the plaintiff instituted the suit he was under the impression that he had no claim to put forward with reference to the Cotton Street property ; but he specifically asked that in default of payment by the defendants " the said mortgaged premises or a sufficient part thereof be sold under the direction of this Court." He filed the original mortgage bond with his plaint which showed that " the said mortgaged premises " consisted of the zamindari property and the Calcutta property.

Now, as I have said, the plaintiff is not so much interested in this question as Brindaban Chandra Dutt is ; and Brindaban denied that the plaintiff's father released the Calcutta property from all claim in respect of his mortgage. Thereupon the plaintiff enquired into the matter and on the 17th December 1909 he applied for amendment of the plaint. In his petition he stated that on enquiries made by him he had ascertained " that as a matter of fact the late Hari Charan Bose did not execute any release in the year 1910, or in any other year and the allegation relating thereto in the said para. 5 is a mistake." He asked for amendment of the plaint first by striking out from para. 5 the words of which exception was taken by Brindaban Chandra Dutt and by adding the following statement in the plaint, namely, " that your petitioner has been informed and believes that the said Premises No. 147, Cotton Street, Calcutta, was sold by the Registrar of the Calcutta High Court free from all encumbrances on the 10th day of April 1897 under an order of the said High Court made in the said Suit No. 253 of 1889 and dated the 5th day of April 1897, and the Defendant No. 4, Srimati Jamehar Kumari, was declared the highest bidder and purchased for Rs. 50,000."

I am unable to agree with the contention of Mr. Manuk that the Calcutta property was not within the scope of the suit. I quite agree that the plaintiff when he filed the plaint did not think that he had any claim to put forward in respect of the Calcutta property, but he undoubtedly asked the Court to pass a decree for the sale of " the said mortgaged

premises," if there was default of payment by the defendants within the time allowed by the Court, and he showed that "the said mortgaged premises" included the Calcutta property. He was undoubtedly labouring under a mistake when he said that his father had released the Calcutta property from all claim in respect of his mortgage; but he corrected his mistake; and there is no reason to take the view that the Court is not entitled to give him such relief as he may be entitled to in regard to the Calcutta property.

The next question is as to what relief the plaintiff is entitled to in regard to the Calcutta property. Jamehar contends that she has purchased the property free from all encumbrances and that she is entitled to hold it free from the encumbrance created in favour of the plaintiff. Mr. Manuk points out on her behalf that the mortgage in favour of the plaintiff's father was executed on the 11th May 1895, that is to say, four years after the final decree was passed in Suit No. 253 of 1889 and his extreme contention is that he is entitled to have what the Court gave him, namely, the property free from all encumbrance. It was faintly suggested by Mr. Manuk that the mortgage in favour of the plaintiff's father was affected by the rule of lis pendens; but in this Mr. Manuk is clearly wrong as the mortgage in favour of plaintiff's father was made under the order of the Court in Suit No. 253 of 1889. The case clearly comes within the exception recognized in S. 52 of the Transfer of Property Act.

The plaintiff, or to be more accurate, Brindaban Chandra Dutt, supports his case on two grounds: first, on the ground that the mortgage in favour of the plaintiff's father was made pursuant to the order of the Court; and, secondly on the ground that Jamehar Kumari was a benamidar for her husband Chatrapat Singh. So far as the first point is concerned, it is clearly without substance. The Calcutta property was not in any danger at all; and the money lent by the plaintiff's father did not save that property from loss or destruction. In the second place, the order of the High Court gave the priority to the plaintiff's mortgage over the bond of the 10th May 1884 in respect of Parganna Sripur only. The Court clearly recognized that it would be unfair to give the plaintiff's bond priority over the bond of 1884 in respect of the Calcutta property. In my opinion the first contention advanced on behalf of the plaintiff fails and must be overruled.

I now come to the question of benami which has been specifically raised by Brindaban Chandra Dutt in his written statement. The learned Subordinate Judge decided this issue against Jamehar Kumari; but, with all respect, I am unable to agree with his decision on this point. Jamehar Kumari is the ostensible purchaser of the property. An ostensible purchaser must be assumed to be the real purchaser until the contrary is shown. The onus is accordingly on the plaintiff to establish that the property was purchased by Chatrapat Singh in the name of his wife Jamehar Kumari.

Now what is the evidence on which the Subordinate Judge relies in support of his finding as to benami? In the first place, he refers to certain judgments and decree made in suits to which Jamehar was a party, but to which neither the plaintiff nor Brindaban was a party.

The facts in connexion with that suit, Suit No. 496 of 1910, are as follows: One Askaran Baid obtained a decree against Chatrapat Singh, and in execution of that decree he attached No. 147, Cotton Street, as belonging to Chatrapat. Jamehar Kumari thereupon laid a claim to that property and the claim was disallowed. Thereupon she instituted a suit which was Suit No. 496 of 1910 in the Original Side of the Calcutta High Court for a declaration that she was the absolute owner of the property and that the same might be released from the attachment effected at the instance of Askaran Baid. The Court of first instance dismissed her suit basing its decision on various judgments and decrees which were not inter partes. The case went up in appeal and Sir Lawrence Jenkins, giving the decision of the appeal Court, approached the case from the only standpoint from which it could be approached, namely, whether Jamehar Kumari had clearly established that she was the real purchaser, having regard to the fact that the claim case had been decided against her. In the course of his judgment, Sir Lawrence Jenkins said as follows: "I recognize that the value of this opinion, namely, the opinion of the learned Judge in the Court of first

instance, is in some measure discounted by the fact that it was in part based on the view expresed in earlier litigations, a class of evidence that wes used by the learned Judge to an extent that the law does not permit. But apart from this evidence, there are circumstances which clearly call for explanation and the onus in this case is on Jamehar to show affirmatively that not only the ostensible but the real title also is in her. She is a plaintiff who is calling in question in a suit contemplated by the Code (O. 21, R. 63), an adverse decision of the Court given, it is true, in a summury proceeding but conclusive, subject to the result of this suit. This is a suit, therefore, to alter or set aside a summary decision or order of the Court, and it is method of obtaining review. The plaintiff in the circumstances of this case cannot discharge the burden of proof cost on her by merely pointing to the innocent appearance of the instruments under which she claims. She must show that they are as good as they look." It is obvious that the decision in the earlier litigation upon which the learned Subordinate Judge has relied was based on the question of the onus of proof, it being held by the Court of appeal that Jamedar Kumari failed to establish that she was not only the ostensible but the real owner of the property.

In my opinion the judgment in that suit is inadmissible in evidence against Jamehar. In the present case the onus is clearly upon the plaintiff to prove that the apparent title is not the real title, and, in my opinion, the question must be decided on the evidence recorded in this case, not on the evidence which was recorded in Suit No. 496 of 1910. This being the position what evidence has the plaintiff adduced to prove that Jamehar is the benamidar of her husband? The learned Subordinate Judge says as follows: "Besides the judgment and decree we have also got evidence proving that Chatrapat used to hold each year a meeting of his own caste people in No. 147, Cotton Street, that Chatrapat had also recently mortgaged the house No. 147, Cotton Street, to one Bhagwan Das." The only evidence on the point is that of Ahir Chand Barman who was examined on behalf of the defendants. It is to be noted that the plaintiff has adduced no evidence on this point at all apart from tendering in evidence the plaint filed by Jamehar Kumari in Suit No. 496 of 1910 and the judgments and decrees of the Calcutta High Court in that suit. Ahir Chand says in his evidence that the property belonged to Jamehar Kumari who made a gift of it to her two sons by a deed of gift in 1918. In cross-examination he admits that Chatrapat mortgaged No. 147, Cotton Street, to Bhagwan Das and that there was a suit on that mortgage in the Calcutta High Court. He also admits as follows: "On the invitation of Chatrapat a meeting of punchaiti of the Jainas used to be held in Calcutta in Katik and Fagoon each year and always during Chatrapat's life time and that punchaiti some times used to be held in 147, Cotton Street, and also (then adds) sometimes in the house of Kesho Das Sital Chand Chowdhury." This is all the evidence on the question of benami. In my opinion this is wholly insufficient; and the learned Subordinate Judge should have decided this issue in favour of Jamehar Kumari. I admit that the case is suspicious, but suspicion cannot be regarded as a substitute for legal proof.

That being so, the plaintiff cannot claim priority in respect of the Cotton Street property. Jamehar Kumari, on the other hand, contends that the plaintiff has no claim to put forward in regard to the Calcutta property as she has purchased it free from all encumbrances. In my opinion, the contention of Jamehar Kumari on this point must be overruled. The plaintiff was not added as a party to the suit and his right to redeem could not be extinguished except by adding him as a party to the suit. Jamehar as the purchaser of the property represents the interest both of the mortgagor and the mortgagee. Now both the mortgagor and the mortgagee were consenting parties to the order of the 22nd March 1895 which gave the Receiver liberty to raise money by a mortgage of the properties which were the subject-matter of the suit. Neither the mortgagor nor the mortgagee could be heard to say that there was nothing to redeem since the final decree was passed so far back as the 19th January 1891. The security created in favour of the plaintiff was the result of the consent order of the 22nd March 1895, and in my opinion, the position of the plaintiff in regard to the Cotton Street property must be that of a puisne mort-

gagee who was not added as a party to a mortgage action by the first mortgagee against the mortgagor. In my opinion, the plaintiff is entitled to redeem and to sell the Calcutta property free from all encumbrances or to put up for sale his right of redemption which is undoubtedly property and is capable of being sold.

But then arises the important question as to the terms upon which redemption should take place should the plaintiff elect to sell, not his equity of redemption in regard to the Cotton Street property, but the property itself. Mr. Hasan Imam contends that, as Bibi Jamehar Kumari purchased the Cotton Street property for Rs. 50,000 we should direct that upon payment by the plaintiff to Bibi Jamehar Kumari of the sum of Rs. 50,000 he would be regarded as the holder of the first charge on the Cotton Street property with power to realize it in the usual way. I am unable to agree with this contention. The right which a puisne mortgagee, who was not joined as a party to the suit of the prior mortgagee, has, is what he could have claimed if he had been a party to the suit, namely, a right to redeem the prior mortgage with a view to enforcing his own mortgage. In order to determine the rights of the parties we must place them in the position which they occupied before the Cotton Street property was put up for sale, and it is obvious that we cannot allow redemption on the terms suggested by Mr. Hasan Imam. Mr. Susil Madhab Mullick appearing on behalf of Jamehar Kumari, on the other hand, contends that an account should be taken of what is due to Jamehar Kumari on the footing of the mortgage of the 10th May 1884 and that redemption can only take place in terms of the plaintiff paying to Jamehar Kumari what may be found due to her on the taking of such accounts. Now the position of the parties with regard to the mortgages may be re-stated. Although the mortgage in which Jamehar Kumari is interested as assignee is prior in date to that of the plaintiff, priority in respect of the Sripur property was given to the plaintiff by an order of the Court to which all the parties consented. The result is that though prior in date, Jameha Kumari is a subsequent incumbrancer in respect of the Sripur property by her own act or the act of her assignor. In regard to the Cotton Street property, Jamehar Kumari is clearly the prior encumbrancer. This being the position Jamehar Kumari tells the plaintiff as follows : "Althougrh I have no objection to your realizing your security by the sale of the Sripur property only I must insist on my security being valued as a whole if you claim the right to redeem my prior mortgage in regard to the Cotton Street property." Now the general rule is that a mortgage being one and indivisible security for the debt and every part of it, the mortgagor cannot redeem piecemeal, unless the integrity of the mortgage has been broken up by the act of the mortgagee. Now this rule will operate so as to prevent the mortgagor from claiming the right to redeem any particular property which may be included in the mortgage security or the purchasers of fragments of the equity of redemption from claiming the right to redeem the fragments in which they may be interested, and the rule is firmly established, that save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either partial interest in the subject, can, under the mortgage, get relief, except in consonance with the principle of indivisibility already referred to.

But the question is not of the plaintiff acquiring a partial interest in the subject and claiming the right to redeem that interest. He has got a mortgage of both the properties, and, though subsequent in point of time, his interest is that of a prior mortgagee in regard to Sripur. Now if the general rule applies, the position of the plaintiff must be substantially that of a subsequent incumbrancer both in regard to Sripur and the Cotton Street property. Jamehar Kumari says : "My security must be valued as a whole and redemption can only take place on terms of your paying me the whole of the mortgage debt due to me." Plaintiff replies : "If you compel me to adopt that position, you are virtually depriving me of my priority in regard to Sripur." In my opinion, having regard to the consent order of the 22nd March 1895, each of the parties, namely, Jamehar Kumari and the plaintiff must be deemed to have given up the right to claim the integrity of the mortgage security as against the other. By an arrangement between the parties, the plaintiff is the holder of the equity of

redemption in regard to the Cotton Street property, and Jamehar Kumari is the holder of the equity of redemption in regard to Sripur and, in my opinion, the equity between the parties cannot be worked out except by holding that there was an arrangement between them whereby the interest of each of the parties as representing the equity of redemption was separated and defined. It is well established that, where this is so, the rule as as to the indivisibility becomes inapplicable. In my opinion the plaintiff is entitled to redeem the prior mortgage of Jamehar Kumari by paying a proportionate amount of the mortgage debt due on the Cotton Street property, and Jamehar Kumari is entitled to redeem the prior mortgage of the plaintiff by paying a proportionate amount of the mortgage debt due on Sripur, and the value of the properties must be taken to be that at the date of the mortgage transaction in question. It is obvious that if either claims the right to redeem, an enquiry as to the value of the properties at the date of the transaction must be undertaken by the Court and the mortgage debt must be properly apportioned having regard to the result of the enquiry. As Jamehar Kumari has been in possession of the Cotton Street property for some time she will not be credited with interest from the date she took possession of the property which may be taken to be the 5th March 1898.

The only other question is whether Brindaban Chandra Dutt is entitled to have the debt due to the plaintiff satisfied out of the Cotton Street property so far as such property will extend. He relies upon S. 81 of the Transfer of Property Act, but clearly he is not entitled to the benefit of the section since he had notice of the mortgage in favour of the plaintiff's father. He advanced money with his eyes open and with full knowledge of all necessary facts : and it is impossible for him now to claim the benefit of S. 81 of the Act. He has asked for a decree in this suit, and I think he is clearly entitled to have the accounts taken on the footing of his mortgage and to a decree giving him the right to proceed against the surplus sale-proceeds of Sripur. There being no question of marshalling in this case, the plaintiff is entitled to elect against which of the two properties he should first proceed. If he elects to put up Sripur to sale and if there should be a surplus after satisfying his entire claim, Brindaban Chandra Dutt will be entitled to proceed against the surplus for the realisation of the debt due to him. Neither the plaintiff nor Brindaban Chandra Dutt is entitled to a personal decree against those who represent the interest of the mortgagors, and to this extent the decree of the lower Court must be set aside.

The decree passed by the Court below must be varied by providing as follows :—

(1) Let the following accounts be taken :

(a) an account of what will be due to the plaintiff for principal and interest on the mortgage of the 11th May 1895 and for his costs of the suit on the day next hereinafter referred to ;

(b) an account of what will be due to Brindaban Chandra Dutt for principal and interest on the mortgage of the 26th May 1896 and for his costs of the suit on the day next hereinafter referred to ;

(c) an account of what will be due to Bibi Jamehar Kumari for principal on the mortgage of the 10th May 1884 and interest from the date of the mortgage to the 5th March 1898 ;

(2) that if the defendant Bridaban Chandra Dutt pays into the Court the amount due to the plaintiff six months from the date hereof, the plaintiff shall assign his mortgage to him and that in default thereof, he shall be debarred all right to redeem the property, provided that he will be entitled to proceed against the surplus sale proceeds, if any, of parganna Sripur hereinafter expressly provided ;

(3) that in case of such foreclosure and if the defendant Bibi Jamehar Kumari pays into Court the proportionate share of the amount so due to the plaintiff in respect of parganna Sripur six months from the date hereof, the plaintiff shall assign his mortgage to her, and that, in default thereof, shall be debarred all right to redeem the property ;

(4) that in case of such foreclosure, and if the defendants Sripat Singh and Jagatpat Singh pay into Court the amount so due to the plaintiff six months from the date hereof, the plaintiff shall deliver up to the defendants Sripat Singh and Jagatpat Singh or to such person as they appoint all documents in his possession or power relating to the mortgaged property and shall, if so required, re-transfer the

property to the said Defendants free from the mortgage and all encumbrances created by the plaintiff or any person claiming under him but that, in default of such payment, and if the plaintiff pays to Bibi Jamehar Kumari the proportionate share of the amount due to Bibi Jamehar Kumari in respect of the Cotton Street property six months from the date hereof the mortgaged property or a sufficient portion thereof be sold, and that the proceeds of the sale after defraying thereout the expenses of the sale be paid into Court.

(5) that the sale-proceeds be applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs and that the surplus sale-proceeds of the Sripur parganna (if any) be applied in payment of what is declared due to the defendant Brindaban Chandra Dutt as aforesaid together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendants Sripat Singh and Jagatpat Singh :

(6) that should the plaintiff fail to pay Bibi Jamehar Kumari as provided in the fourth clause hereof, parganna Sripur as mortgaged to the plaintiff be sold and that the proceeds of the sale after defraying thereout the costs and expenses of the sale be paid into Court and applied in the manner provided in the preceding clause hereof.

And this Court doth remit this case to the Court below for the taking of the necessary accounts and for determination of : (1) what is the proportionate share of the mortgage debt due to the plaintiff in respect of parganna Sripur ; and (2) what is the proportionate share of the mortgage debt due to Bibi Jamehar Kumari in respect of the Cotton Street property.

Adami, J.—I agree.

Case remitted.

** A. I. R. 1926 Patna 102

DAS AND ADAMI, JJ.

H. G. Pereira—Petitioner.

v.

East Indian Railway—Opposite Party.

Privy Council Application No. 15 of 1925, Decided on 23rd June 1925, against the decision in First Appeal No. 23 of 1925.

** *Civil P. C., S. 109—Final order—Order allowing appeal under S. 5, Limitation Act, is not; but order refusing to allow would amount to, final order.*

Order extending the time for presenting an appeal to the High Court under S. 5 of the Limitation Act, and thus admitting the appeal is not a final order within the meaning of S. 109, Civil P. C., though an order refusing such extension would amount to a final order. [P. 102, C. 2]

S. N. Bose—for Petitioner.

N. C. Sinha, N. G. Ghose and *B. B. Mukerji*—for Opposite Party.

Judgment.—This is an application for leave to appeal to His Majesty in Council; and the only question which we have to decide is whether the order complained of is a final order within the meaning of S. 109 of the Civil Procedure Code. The order to which objection is taken in substance extended the time for presenting an appeal to this Court under S. 5 of the Limitation Act. A final order within the meaning of the section is an order which finally decides any matter which is directly at issue in the case in respect to the rights of the parties. We quite agree that if we had refused the application made to us under S. 5 of the Limitation Act, that refusal would have operated as a dismissal of the appeal, and, subject to the other provision of the section, the order would be appealable, not indeed as a final order but as " a decree passed on appeal." But where time is allowed under statutory sanction, and the appeal is admitted, the case obviously stands on a different footing. We have not decided, finally or otherwise, any of the matters in controversy between the parties in the litigation. All that we have done is to remove the bar under the Limitation Act, thereby enabling this Court to take cognizance of the appeal and to decide the rights of the parties. We must accordingly refuse the application with costs. Hearing fee : five gold mohurs.

Application refused.

A. I. R. 1926 Patna 103

DAS AND ROSS, JJ.

Satya Niranjan Chakravarty and *others* —Plaintiffs—Appellants.

v.

Sushila Bala Dasi and *others*—Defendants—Respondents.

Appeal No. 86 of 1921, Decided on 26th May 1925, against the original decree of the Sub-J., Jamtara, D/- 30th June 1924.

(a) *Landlord and Tenant—Mines and minerals—Right to, vests in landlord unless expressly divested.*

The mineral rights are in the zamindar and he is not divested of them by a lease of the land unless the minerals are expressly granted. [P 109 C 1]

(b) *Land Tenure—Ghatwali tenure—Ghatwal can be a mourashi mokarraridar—Distinction between ghatwali within and outside Regulation pointed out—Bengal Ghatwali Land Regulation (29 of 1814).*

A person may be a mourashi mokararidar and also a ghatwal. [1918 *P. H. C. C.* 305 and *A. I. R.* 1924 *P. C.* 5, *Ref.*] The distinction between a ghatwali within the regulation and ghatwali which is outside the regulation is that in the former case there is no tenure between the zamindar and the ghatwal who holds direct from the Government, while in the latter the tenure exists. In the former case, while the lands of the ghatwali are still deemed to be within the zamindari, the zamindar no longer pays the Government revenue for them and has, therefore, no claim to the underground rights; his only right connected with these lands is to receive the difference between the rent paid by the ghatwal and the amount of the Government revenue which was assessed on this part of the zamindari. If the Government does not claim the mineral rights there is no one to whom they can belong but the ghatwal. But in the latter case the zamindar still pays the Government revenue on these lands and if the ghatwal claims the minerals he must show some transaction which grants him the minerals either expressly or by necessary implication. [P 105 C 2; P 106 C 1]

(c) *Criminal P. C., S. 145—Party.*

A party's son having no possession or title is not bound by order against his father. [P 104 C 1]

Syed Hasan Imam, C. C. Das, L. M. Ganguli and *N. C. Ghosh*—for Appellants.

B. N. Mitter, Naresh Chandra Sinha and *B. B. Ghosh*—for Respondents.

Ross, J.—The plaintiffs are the owners of 12 annas 7 gandas share in four taluks: Jamjuri, Nagori, Chhota Ashna and Bara Ashna in pargannah Kundahit Kareya in the Santhal Pargannas. They allege that the principal defendants took the settlement of these taluks from their predecessors at an annual rental of Rs. 706 (sikka.) They themselves, being the zamindars, have all the sub-soil rights in the said taluks and the defendants have no right to the sub-soil or to the minerals. In 1912 the plaintiffs brought a suit for a declaration of their title to the minerals, but this suit was dismissed by the Subordinate Judge and on appeal, by the High Court on the ground that the Specific Relief Act did not extend to the Santhal Pargannas and on the ground that as no overt act was alleged against the defendants the plaintiffs were entitled to no relief. Thereafter, in June 1917, the defendants prevented the plaintiffs' agent from boring for minerals. They, therefore, claim a declaration of their right to the sub-soil and pray for a permanent injunction and damages.

The defence was that there had been a proceeding under S. 145 of the Criminal. P. C., regarding the right to the sub-soil of the disputed taluks which was decided against the plaintiffs and, as the present suit was not brought within three years of the decision in that case, it was barred by limitation. The defendants claimed that the mineral rights belonged to them. They alleged that Nagori and Jamjuri consisting of 60 mouzas formed ghatwali tenures belonging to the predecessors of their ancestor Mahadeo Sadhu, and that Chhota Ashna and Bara Ashna consisting of 35 mouzas formed ghatwali mouzas belonging to Ratan Singh and Gobinda Singh who, however, abandoned them, whereupon they were settled with Mahadeo Sadhu by Raja Bahadur Uz-Zaman Khan on the 15th of Baisakh 1189 at a rental of Rs. 706 (sikka) by a sanad. They claimed that under this sanad, as well as under the legal incidents of Birbhum ghatwali tenures, Mahadeo Sadhu had acquired a mokarrari mourashi istemrari and transferable interest in the said tenures with full rights in the surface and the sub-soil. They further pleaded that Raja Ram Ranjan Chakraburty and Rani Padma Sundari Debi, predecessors of the plaintiffs, brought a suit No. 60 of 1892 for enhancement of the rent of the disputed taluks against the Defendants Nos. 1 and 2 and the father of Defendant No. 3, and that this suit was compromised in terms which admitted the said defendants to be entitled to all sorts of rights in mokarari right in respect of the disputed mouzas.

Sixteen issues were framed and the Subordinate Judge recorded evidence on all the issues. But he decided only the twelth issue "was there any decision under S. 145 of the Criminal. P. C. of the disputed

mouza and is the suit barred by limitation ?" He held that the suit was barred and, therefore, dismissed it. The plaintiffs appealed to the High Court which, without deciding the issue of limitation, remanded the case for a decision of the other issues. The remaining issues have now been decided in favour of the plaintiffs ; except the issue on damages but as they failed on the issue of limitation, their suit was dismissed and they have appealed. (The judgment here dealt with the evidence about the existence of an order under S. 145 Cr. P. C. and continued.) Even if there had been a judgment of this kind it could have no effect in barring the present suit because the first party to the proceedings was the present plaintiff who at that time had neither title nor possession because his father was alive and was the owner and possessor of the estate : *Babajirao Gambhir Singh* v. *Laxmandas Guru Raghunath Das* (1) and *Bolai Chand Ghosal* v. *Samiruddin Mondal* (2). I am unable to believe that Ex. J. is a genuine document or that there was a proceeding or a decision under S. 145 of the Criminal P. C. I, therefore, hold that the suit is not barred by limitation on this ground.

It was further contended, however, that the suit is barred by six years' limitation because the cause of action for a declaratory decree was alleged in the suit of 1912 to have arisen in 1317, that is, 1910, whereas the present suit was not brought until the 3rd of December 1917. Similarly it is argued that the limitation for an injunction is six years and that this relief is also barred. But the suit of 1912 was dismissed on the ground that there was no overt act on the part of the defendants and, therefore, no cause of action. The present suit is for an injunction on a declaration of the plaintiff's title and the overt act which was alleged took place within six, months of the filing of the suit. The suit is, therefore, not barred by limitation on this ground. The appeal of the plaintiffs must' therefore, succeed unless the objections by the defendants result in the dismissal of the suit on the merits.

I shall now deal with these objections.

As already stated, the first title which the defendants set up is the title by the sanad granted by Raja Bahadur Uz-Zaman Khan (Ex. 1). This is a short document which purports to settle with Ruplal Sadhu, son of Mahadeo Sadhu, as an ancient ghatwali, mokarari taluks Jamjuri, Nagori Ashna Chota and Bara within Tappa Kundahit Kareya the jama of the 95 mouzas being Rs. 706 (sikka) annually. It declares that the grantee and his heirs have every right to remain in possession of the said taluks and mouzas including hills and mountains, jungles and pits, cultivated and waste lands of the entire mouzas above and below (zer-oo-bala) the taluks with all rights. The document is dated the 15th of Baisakh 1189 and is in the Persian language. The signature is illegible but it bears a seal with the name of Bahadur Uz-Zaman Khan. The learned advocate for the defendants relies on this document, The learned counsel for the plaintiffs contends that the document is a forgery, both on the internal evidence and on the fact that in a long course of litigation the document was never produced when its production was to have been expected. (The judgment then dealt with evidence indetail and proceeded). The conclusion seems to me to be inevitable that this document is not document upon which any Court can act. I hold, therefore, that the defendants have failed to establish their title to the minerals of the taluks in suit by express grant.

The second title relied upon by the defendants is that the lands in suit are a Birbhum ghatwali. There are numerous references in the judgments in the earlier litigation about this property, which, have been referred to above, to its being a ghatwali. Thus in Ex. L the District Judge held that the mahals were ghatwali mahals. The provincial Court at Murshidabad held that the lands had not been proved to be ghatwali, but the Sadar Dewani Adalat in view of the respondents' admission of the appellants' right to the possession of the lands the ghatwali taluks in dispute, on condition of payment of the actual jama, ordered that the appellants should be put in possession of these lands and should perform the ghatwali duties. So in Ex. M the provincial Court upheld the decision of the District Judge that the defendants should, on payment of the annual jama, perform the duties of ghatwali. In Ex. N the following passage occurs in the judgment of Robertson, J., which eventually prevailed " Though the disputed mouzas are not the ghatwali mahals settled by the Government under

(1) [1904] 28 Bom. 215=5 Bom. L. R. 932.
(2) [1892] 19 Cal. 646.

Regulation XXIX of 1814 and it appears that the settlement of those was not made by the Government servant, it seems that before the Settlement Tappa Khondahit Kareya which includes the disputed mauzas having been sold by auction the Government servant had nothing to do with the question of the ghatwali affairs thereof. But it is evident from the existing papers especially from the criminal Court rubakaris and parwanas produced by the appellants that according to the rules and custom the predecessors of the respondents' father and the respondents with their own employees had been supervising the ghatwali duties and performing the police duties and they are bound to guard the paths and thoroughfares and responsible for occurrences and liable to damages on account of stolen property like the ghatwal of the mahals settled by the Government". Stockwill, J., in his judgment, pointed out that the mahal was not a ghatwali mahal "as described in Regulation XXIX of 1814 and was not settled along with other ghatwali elakas, from the copy of the rubakari of the Judge of Zila Birbhum and the copy of the rubakari of the Collector, dated the 15th August 1834 which are received in this Court on requisition." In Ex. P it was held that these mahals being ghatwali mahals could not be sold in auction. But in a later judgment (Ex. Q) it wes decided according to the decision of the High Court that the second class of ghatwalis could be sold in auction. These classes of ghatwalis were defined in that judgment as first the ghatwali right mentioned in Regulation 29 of 1814, the rent whereof is paid direct to Government but in spite of the same it is considered to be a part of the zamindari of Birbhum, and they pay a portion of their fixed rent to the Raja of Birbhum. The second class of ghatwalis at first belonged to the first class ghatwalis, i. e., those who were in possession in the said manner in that right on condition of service but they instead of paying rent to the officers of Government pay rent to the zamindar. The third class of ghatwalis are like chakran and chaukidari lands and they hold possession of the same on condition of service." The argument is that although the lands in suit may not be a Birbhum ghatwali within the meaning of Regulation XXIX of 1814 yet that Regulation did not alter the status of the ghatwalis. All these ghatwalis had their origin in the same circumstances and all Birbhum ghatwals as such had a right to the minerals. Alternatively it is argued that if this is not shown yet, the Legislature in Act V of 1859, which was an exposition of the law as it stood, acknowledged that the ghatwalis under Regulation XXIX had the mineral rights and there is no ground for distinction between the first and the second classes. Reliance was also placed on the record of rights of Bara Ashna (Ex. 27), Chhota Ashna (Ex. 28), Jamjuri (Ex. 29) and Nagori (Ex. 30) where the names of the Sadhus are shown as maurashi mokarraridars in Part I which deals with proprietary rights and duties. Clause 10 of Part I states that "The proprietor shall enjoy all the rights and shall perform all the duties of a proprietor according to the customary or enacted laws locally in force, except as restricted by the record of rights." S. 12 of Regulation III of 1872 gives the Settlement Officer power to enquire into and decide and record the rights of zamindars and other proprietors, and also any other landed rights to which by the law and custom of the country any person may have local or equitable claim. S. 25 makes the record after a period of six months from the date of publication conclusive proof of the rights and customs therein recorded. Mr. McPherson in para. 88 of his Settlement Report expressly refers to mineral rights as being also covered by Part I, S. 10. The learned Subordinate Judge has relied upon the record of rights as showing the defendants to be maurashi mokarraridars and has inferred from this that they were not ghatwalis. This argument is unsound, because a person may be a maurashi mokarraridar and also a ghatwal, as for instance in the *Handwe* case [*Keshobati Kumari* v. *Satya Niranjan Chakraberty* (3) and *Kumar Satya Narain Singh* v. *Raja Satya Niranjan* (4)]. But the argument for the respondents, that because they are recorded in Part I as mokarraridars and Cl. 10 declares that the proprietors shall enjoy all the rights of a proprietor (which by implication include mineral rights), therefore they have the mineral rights appears to me inconclusive. Both the proprietors and the mokarraridars are

(3) [1918] P. H. C. C. 305.
(4) A. I. R. 1924 P. C. 5.

recorded in this part and there is no reason why the mineral rights would belong to the mokarraridars and not to the proprietors ; it is not suggested that they belong to both and as they are not expressly recorded as belonging to the mokarraridars, the question as between the proprietors and the mokarraridars must be decided independently of the record of rights. 'I take it then as established that these lands are ghatwalis which are not within Regulation XXIX of 1814 both because no settlement was made with the ghatwals such as is referred to in the Regulation and because it is admitted that the rent is paid not to the Government but to the zamindar. What then is the position as regards minerals ? Act V of 1859 applies only to ghatwalis within the meaning of the regulation and even with regard to them it does not confer the mineral rights but merely proceeds on the assumption (which may be erroneous) that they have these rights. The distinction between a ghatwali within the regulation and a ghatwali which is outside the regulation is that in the former case there is no tenure between the zamindar and the ghatwal who holds direct from the Government, while in the latter the tenure exists. In the former case, while the lands of the ghatwali are still deemed to be within the zamindari, the zemindar no longer pays the Government revenue for them and has, therefore, no claim to the underground rights ; his only right connected with these lands is to receive the difference between the rent paid by the ghatwal and the amount of the Government revenue which was assessed on this part of the zamindari. If the Government does not claim the mineral rights there is no one to whom they can belong but the ghatwal. But in the latter case the zamindar still pays the Government revenue on these lands, and if the ghatwal claims the minerals he must show some transaction which grants him the minerals either expressly or by necessary implication. It is not suggested that in the present case there is any such transaction. The ghatwal, whatever the origin of his estate may have been, undoubtedly and admittedly holds, and for more than a century has held, of the zamindar and unless the minerals have been expressly or by necessary implication granted to him (and of this there is no evidence) they must be held to have been reserved. In short, the position of the ghatwals of the second class is indistinguishable from that of the Digwars of Jharia and what Lord Macnaghten said of the Digwars in *Durga Prashad Singh* v. *Brojo Nath Bose* (5) is exactly applicable to the position of the defendants in the present case : " The two mauzas are within the plaintiff's zamindari. Both the Courts below have so held. The Permanent Settlement was made with the zamindar of Jharia. No separate settlement was made with the Digwar of Tasra, if there was a Digwar of Tasra at the date of the Permanent Settlement which seems more than doubtful. No attempt was made to prove that the mineral rights now in question were vested in the Digwar before or at the time of the Permanent Settlement if the lands were then held on Digwari tenure. Nor is there the slightest evidence tending to show or to suggest that the zamindar ever parted with his mineral rights to the Digwar. Mineral rights were vested in the ghatwals of pargannah Sarhat, in the north-western part of the Birbhum zamindari, but those ghatwals paid their rent direct to the Government, and in other respects they were in a very peculiar position. They were dealt with by Regulation XXIX of 1814. They obtained the right to lease the minerals by Act No. V of 1859. With every respect to the learned Judges of the High Court no inference can be drawn from the circumstances of their case that the Digwars in Manbhum had similar rights or powers."

The learned Subordinate Judge has laid down five tests of a Birbhum ghatwali tenure and has held that the defendants have failed by all these tests. It is certain that rents are not paid direct to Government and that the property has been partitioned on at least two occasions between members of the family once in 1834 when Gourhari Sadhu and Ruplal Sadhu, the sons of Mahadeo Sadhu took respectively 6 annas and 10 annas shares in the taluks, and again in 1899 in the compromise (Ex. 7) referred to above. I hold, therefore, that

(5) [1912] 39 Cal. 696=39 I. A. 133=16 C. W. N. 482=(1912) M. W. N. 425=11 M. L. T. 337=9 A. L. J. 462=15 C. L. J. 461=14 Bom. L. R. 445=23 M. L. J. 26 (P. C.).

as ghatwals the defendants have no right to the minerals.

The learned advocate for the defendants, however, strongly relied upon the third title, the petition of compromise in the suit of 1892 (Ex. J-1) as an acknowledgment by the plaintiff's predecessor that the defendants had every right and interest in the lands in suit. The learned Subordinate Judge in his judgment has quoted the material part of this document in the original Bengali and has given a translation. The words upon which the defendants rely are the words "the entire property detailed in the said schedule in all respects with all the rights and interests therein," and they contend that these words include the sub-soil rights. Now, in order to understand the effect of the compromise, it is necessary to read it along with the pleadings in the suit. The plaint (Ex. R) was simply a plaint in a suit for enhancement of rent. In the written statement (Ex. 10) the defendants pleaded that they were tenure-holders at a fixed and permanent rate liable to pay sikka Rs. 501 for Nagori and Jamjuri and sikka Rs. 205 Chhota Ashna and Bara Ashna and that the permanent nature of their tenure had been repeatedly admitted and acknowledged by the plaintiffs and that the plaintiffs' suit for enhancement of rent was not maintainable under S. 11 of Regulation III of 1872. This being the scope of the suit it is difficult to see how any admission with regard to sub-soil rights can be read into the document by which it was compromised. To read the document in this way is to put the plaintiffs in a worse position than they would have been in if their suit for enhancement of rent had been dismissed. No question of sub-soil rights was in issue or could have been in the contemplation of the parties. The plaintiffs simply admitted that they could not enhance the rent and the construction which the learned advocate for the defendants seeks to place upon this document cannot, in my opinion, be supported. The passage on which reliance is placed contains the words "mokarrari satwa" that is "in mokarrari right" and it seems to me that these words govern the whole clause. They lay down the ambit within which the rights are defined and the agreement comes to nothing more than this that the defendants have every possible right that a mokarraridar can have as such. The defendants read the words as admitting that they enjoy every sort of right but only as mokarraridars, that is, on condition of payment of the reserved rent; but to read the words in this way, in my opinion, begs the question as to what is meant by the mokarrari right because it implies that the mokarrari right imports the whole estate subject to the payment of a reserved rent. The argument is sought to be supported on the doctrine in *Abdul Aziz* v. *Appayasami Naicker* (6) and *Lloyd* v. *Guibert* (7), namely, that "the rights of the parties to a contract are to be judged by that law which they intended or rather by which they may justly be presumed to have bound themselves." It is further contended that this is a case of contract and not of grant and that the cases which decide that where there is a mokarrari lease, the minerals remain in the lessor unless granted expressly or by necessary implication do not apply, as the parties must be understood to have contracted understanding that the law was that a mokarraridar had the minerals.

The first case referred to was *Sriram Chakravarti* v. *Hari Narain Singh Deo* (8) in which it was decided by the Calcutta High Court that a permanent tenure-holder would possess all underground rights unless there was something express to the contrary. The learned Judge in deciding that case relied upon a passage in Mitra's Land Law of Bengal to the effect that "a person holding under a permanent lease in which there was no reversion to the landlord, has the right to open mines," and reliance was placed especially upon a passage in the judgment of Pratt, J., where he said: "But in this Province the grantors of such tenures consider that they have parted with all their interests in the soil and are entitled only to the quit-rent reserved." Now it is to be observed that no authority is given for this dictum while the statement in Mitra's Land Law of Bengal is expressly made as the opinion of the learned author and not as a statement of the Common Law. When this case came before the Judicial Committee:

(6) [1904] 27 Mad. 131=31 I.A. 1=8 C.W.N. 186=6 Bom. L. R. 7=8 Sar. 568 (P.C.).

(7) [1865] 6 B. and S. 100=1 Q. B. 115=35 L. J. Q. B. 74=13 L.T. 602.

(8) [1906] 33 Cal. 54=3 C. L. J. 59=10 C. W. N. 425.

Kumar Hari Narayan Singh v. *Sriram Chakravarti* (9), the decision of the High Court was reversed, and the passage in Mitra's Land Law of Bengal was referred to but preference was given to the statement of the law in Field's Introduction to the Bengal Regulations, page 36, where he says: "The zamindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his zamindari and the rights of mining, fishing and other incorporeal rights are included in his proprietorship." Their Lordships observed that : "It would seem, therefore, that Mr. Field did not regard his letting the occupancy right as presumptive evidence of his having parted with his property in the minerals," and they decided that the zamindar must be presumed to be the owner of the underground rights in the absence of any evidence that he had ever parted with them. Field's statement of the law was taken to be the correct statement of the Common Law on the subject.

The next case referred to was *Megh Lal Pandey* v. *Raj Kumar Thakur* (10) in which it was held by the High Court that the mokarrari lease of a mauza "mai huk hakuk" conveyed minerals which were not expressly reserved. This decision was reversed by the Judicial Committee in *Girdhari Singh* v. *Megh Lal Pandey* (11), where it was held that the expression "mai huk hakuk" in a mokarrari lease of land did not add to the true scope of the grant nor cause mineral rights to be included in it. Their Lordships observed that : "On the assumption that the expression means 'with all right's or may be properly amplified as 'with all right, title and interest,' such expressions in their Lordships' opinion do not increase the actual corpus of the subject affected by the pattah. They only give expressly what might otherwise quite well be implied, namely, that corpus being once ascertained there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be of rights of passage, water or the like which enure to the subject of the pattah and may even be deriveable from outside properties. It must be borne in mind also that the essential characteristic of a . lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter specially to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased. Their Lordships accordingly are of opinion that the words founded on do not add to the true scope of the grant nor cause mineral rights to be included within it." Similarly in *Sashi Bushan Misra* v. *Jyoti Prasad Singh Deo* (12), it was held that a talabi brahmottar grant at a fixed rent did not carry with it the mineral rights in the soil and that mineral will not be held to have formed part of the grant in the absence of express evidence to that effect. Finally in *Raghunath Roy Marwari* v. *Durga Prashad Singh* (13) it was held that where a zamindar grants a tenure of land within his zamindari and it does not clearly appear by the terms of the grant that the right to the minerals is included, the minerals do not pass to the grantee. The only case which was cited on behalf of the defendants as expressing what they contend to have been the Common Law on the subject was *Ali Quadir Syed* v. *Jogendra Narain Roy* (14), in which it was held that a patni lease which contained the words "darabust zamindari hakook" conveyed mining rights. That decision stands by itself and it relates to a patni lease which may give rise to different considerations, and moreover, whereas in the document now under consideration the words are "haq hakuk darabust mokarari" the words in the patni lease were "darrabust zamindari hakook." Now while it is true that the cases above referred to are cases on the construction of

(9) [1910] 37 Cal. 723=37 I. A. 136=11 C.L.J. 658=7 A.L.J. 633=12 B.L.R. 495=8 M.L. T. 51=(1910) M.W.N. 309=20 M.L.J. 569= 14 C.W.N. 746 (P.C.).

(10) [1907] 34 Cal. 358=5 C.L.J. 208=11 C.W. N. 527.

(11) [1918] 45 Cal. 87=44 I.A. 246=22 M.L.T. 358=15 A.L.J. 851=33 M.L.J. 687=3 P.L. W. 169=26 C.L.J. 584=(1917) M.W.N. 282=22 C.W.N. 201=7 L.W. 90=20 Bom. L.R. 64.

(12) [1917] 44 Cal. 585=44 I.A. 46=21 C.W. N. 377=15 A.L.J. 209=32 M.L.J. 245= (1917) M.W.N. 226=25 C.L.J. 265=1 P.L. W. 361=21 M.L.T. 303=19 Bom.L.R. 416= 6 L.W. 2 (P.C.).

(13) [1920] 47 Cal. 95=46 I.A. 158=17 A.L.J. 597=36 M.L.J. 660=23 C.W.N. 914=26 M. L.T. 76=30 C.L.J. 160=21 B.L.R. 895=10 L.W. 347 (P.C.).

(14) [1912] 16 C.L.J. 7.

deeds of grant, they lend no support to the contention that the Common Law of the country by which the parties to the present contract may be presumed to have bound themselves was that the minerals passed to the mokarraridar. If such was the Common Law, it should have been proved either by evidence or by numerous decisions which would have shown that this law was so notorious that nothing else could have been contemplated by the parties. The Judicial Committee has consistently held that this is not the law in Bengal and there is nothing in any of the cases to afford any ground for supposing that it was ever believed to be the law. On the contrary it has been held that the law has always been otherwise, namely, that the mineral rights are in the zamindar and he is not divested of them by a lease of the land unless the minerals are expressly granted. Consequently the words in the petition of compromise must be construed in their natural sense, namely, as acknowledging in the defendants all the rights that a mokarraridar as such can have and these rights do not include the right to the minerals. The third title set up by the defendants, therefore, also fails.

There remains only one small point which was urged on behalf of the defendants, that as the plaintiffs are only cosharers to the extent of 12 annas 7 gandas while one of the defendants Chain Kumari is not only guardian of one of the Sadhus, a minor, but is herself proprietor of a small share, the plaintiffs are not entitled to an injunction. Now the plaintiffs do not claim any injunction against Chain Kumari as proprietor. She is not said by the defendants to have given to them any right to work coal. If she herself is working coal no injunction is sought against her. Injunction is sought against strangers. The defendants do not allege that they have taken any settlement from Chain Kumari and evidently they cannot do so because this would go to the root of their own alleged title. There is no substance in this objection.

The result, therefore, is that the appeal is decreed with costs. The title of the plaintiffs to the sub-soil of the taluks Jamjuri, Nagori, Chhota Ashna and Bara Ashna, to the extent of their interest, is declared and it is further declared that the defendants have no right to the minerals of these mauzas; and it is ordered that an injunction do issue permanently restraining the defendants from working coal or other minerals lying on or under the said taluks, and from obstructing the plaintiffs in exercising their rights to the sub-soil in the said taluks. As the learned Subordinate Judge found that no damage had been proved, there will be no decree for damages. The plaintiffs are entitled to their costs in both Courts.

Das, J.—I agree.

Appeal dismissed.

✻ A. I. R. 1926 Patna 109

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

Commissioner of Income-tax, Bihar and Orissa.

v.

Shiva Prasad Singh—Opposite party.

Misc. Judicial Case No. 136 of 1924, Decided on 27th April 1925, referred by the Commissioner of Income tax.

✻ *Income-tax Act* (1922), *S.* 12—*Taxes payable under Act* 3 *of* 1914 *and Act* 4 *of* 1920 *are not to be deducted from royalty in determining assessable income.*

The taxes payable by the assessee under the Jharia Water-supply Act (B. and O. Act 3 of 1914) as well as the Bihar and Orissa Mining Settlements Act (B. and O. Act 4 of 1920) cannot be deducted from the royalty received by him in assessing the tax payable under the Income-tax Act: 34 *Cal.* 257 and 6 *P. L. J.* 62 *Appl.* [P. 119, C. 1]

Sultan Ahmad (*Govt. Advocate*)—for the Commissioner, Income Tax.

N. C. Sinha and *B. B. Ghosh*—for the assessee.

STATEMENT OF THE CASE BY THE COMMISSIONER OF INCOME-TAX.

The question for the decision of the High Court is whether an assessee who is assessed under S. 12 of the Income-tax Act, 1922, on income from "other sources" (consisting of royalties on coal), is entitled to have deducted, before the taxable income is determined, the cesses paid by him to the Jharia Water Board and the Mines Board of Health.

2. The facts are undisputed: the assessee is a zamindar who derives considerable income from royalties on coal; under the Jharia Water-supply Act and the Bihar and Orissa Mining Settlement Act, cesses are imposed on owners of mines and receivers of royalty. Under the Water-supply Act, the cess is assessed

on the actual amount of royalty received during the preceding calendar year, and. under the Mining Settlement Act, the demand is a percentage (at present 20 per cent.) of the average of the preceding three years' road-cess demand.

3. In my opinion such cesses are not deductible expenses under the law. Under S. 12 (2) of the Act, the only permissible allowance is any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the income. The Patna High Court held in Case No. 102 of 1920 [*Raja Jyoti Prasad Singh Deo, In the matter of* (1)] that road-cess could not be deducted before determining the assessable income from royalty (this was a decision under the Income-tax Act of 1918, but for the present purpose the relevant sections of the Income-tax Act of 1922 are practically identical). It is admitted on behalf of the assessee that this decision would apply to the present case if he were assessed to these local cesses on his net income and not on his gross income. His position is that if he receives Rs. 5,000 royalty and in turn pays Rs. 4,000 in royalty to a superior landlord he is assessed to water-cess on Rs. 5,000 and not on the net income of Rs. 1,000. This argument would not in any case apply to the cess payable to the Mines Board of Health which is based on the road-cess which is in turn calculated on the net profits. But, in my opinion, the argument has no validity even as regards the water-cess. In the case already referred to, the Court held that the payment of cess (i.e., road-cess) is a necessary expense arising in connexion with the ownership of royalties but it is in no sense an expenditure incurred for any purpose incidental to the making of the income. This remark applies equally to the cesses now under consideration. Moreover, income-tax is assessed on the net income ; in the example given above income-tax would be assessed on Rs. 1,000, less the expenses incurred in collecting the Rs. 5,000.

In *K.M. Selected Coal Company of Manbhum* ; *In the matter of* (2), the High Court of Patna held that the cesses in question could be legitimately deducted from the profits of a colliery (an assessment of a business under S. 10) before determining the assessable income. But that case was definitely and deliberately distinguished from the previous one mainly on the ground that the local cesses were not rates levied after the profits had been ascertained. In fact the colliery business pays on its raisings and despatches, irrespective of whether it made any profits at all.

Dawson Miller, C. J.—This matter comes before us on a case stated by the Commissioner of Income-tax under S. 66 (1) of the Income-tax Act, 1922. The assessee in the case is the Raja of Jharia who derives a considerable income as the owner of royalties which he receives under mining leases, of which he is the lessor in the Jharia coal-fields. The question for our opinion is whether in arriving at the taxable income derived from that source the assessee is entitled to deduct certain cesses or rates imposed upon the owner of such royalties under two local Acts, known as the Jharia Water-supply Act, 1914, and the Bihar and Orissa Mining Settlement Act, 1920. Under the former Act a cess is leviable within the area prescribed both upon the owners of coal mines and upon the holders of royalties from those mines. In the case of mine-owners who are themselves working the mines the cess is a cess on the annual despatches of coal and coke from the mine and would be payable apart altogether from whether any profit is derived from the actual working of the mine. In the case of a person receiving royalties from mines the cess is paid upon the royalties received at a certain rate which is determined by the Board with the approval of the Local Government subject to a maximum of 5 per cent. on the assessed amount of royalty. Under the latter Act of 1920 a somewhat similar rate is imposed under S. 23 both upon the owners of mines and upon persons who receive any royalty, rent or fine from such mines. In this case the assessment is based, in the case of owners of mines, on the actual output of their mines, and here again the assessment in the case of owners is apart from any profit that may or may not be derived from the working of the mine. In the case of receivers of any royalty, rent or fine, their assessment is calculated on a percentage of road-cess payable by such persons. At present the amount is one-fifth, or 20 per cent. of the average yearly road-cess payable by such

(1) [1921] 6 Pat. L. J. 62=2 Pat. L. T. 188= (1921) P. H. C. C. 81.
(2) A. I. R. 1924 Patna 670.

Persons in respect of their royalties during the last three years.

The only question which arises for decision in the case is whether under S. 12 of the Indian Income-tax Act these cesses or taxes can be deducted in arriving at the taxable income for the purpose of income-tax. It was decided in the case of *Jyoti Prasad Singh Deo* (1) that income derived from royalties came within S. 12 of the Income-tax Act which relates to income derived from "other sources" and not under S. 10 which applies to income under the head of "business." The deductions which may be made from the different classes of income mentioned in the Act are stated in detail in the different sections dealing with the different heads of income, and under S. 12 which applies to the present case it is provided that the tax shall be payable by an assessee under the head "other sources" in respect of income, profits and gains of every kind and from every source to which this Act applies if not included under any of the preceding heads. By Cl. (2) of the section—and this is the important part of the enactment—such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee. Now the only allowances or deductions which are permissible in the case of income derived from "other sources" referred to in S. 12 are those already mentioned in Cl. (2) of that section, namely, any expenditure incurred solely for the purpose of making or earning any income, profit or gain. It is contended in this case that the deductions leviable under the two Bihar and Orissa Acts to which I have referred are expenditure incurred for the purpose of making or earning such income. The case of the *K. M. Selected Coal Company of Manbhum* (2), was relied on in support of this contention. But the reasons for that decision do not apply in this case. There the assessee was the lessee of the mines and the income taxed was profits derived from business. The local taxes as already stated in such a case are levied on the output or despatches apart from the profits of the business and whether a profit is made or not, must be taken into account in ascertaining whether there is a profit which is subject to income-tax.

The present case appears to me to be governed by the principle adopted in the earlier case of *Raja Jyoti Prasad Singh Deo* (1). In that case this Court decided that in determining the taxable income derived from royalties, cesses payable under the Cess Acts, that is to say road-cess and public works cess, cannot be deducted in arriving at the taxable income under the head of "royalties" and the only question is whether there is any distinction between the case of a road-cess and the case of the cesses imposed under these two Acts. In that case it was argued, as has been argued here, that the taxes should be deducted in order to ascertain what was the actual income. It was pointed out, however, that the cess was leviable upon exactly the same income as the income-tax itself and, following the case of *Manindra Chandra Nandi* v. *Secretary of State* (3), which held that income-tax could not be deducted in order to ascertain the amount upon which the road-cess was leviable, this Court held that, similarly, you could not deduct the road-cess in order to ascertain the amount upon which the income-tax was leviable because both taxes were imposed upon the same income; and it was there pointed out that the liability to pay the road-cess resulted from the income having been made, and the payment of the cess could hardly be said to form a necessary part in the earning of the income which must come into existence before the liability to cess arises, and, although the payment of cess was a necessary expense arising in connexion with the ownership of royalty, it was nevertheless in no sense an expenditure incurred for any purpose incidental to the making of the income. No argument has been adduced before us in this case which distinguishes the case of the cesses imposed under these Acts from the case of road cess. It seems to me that in both cases the cess is imposed upon exactly the same income and the mere fact that income-tax is also imposed on that income is in itself no reason why the cesses should be deducted in order to ascertain the taxable amount of income any more than it is why the income-tax should be deducted in order to ascertain the amount of cess. I can see no distinction

(3) [1907] 34 Cal. 257=5 C. L. J. 148.

in principle between the present case and the case of *Raja Jyoti Prasad Singh Deo* (1) and in my opinion the Income-tax Commissioner arrived at a proper conclusion in the case which he stated for our opinion.

Jwala Prasad, J.—The royalties derived by the owners of lands containing minerals give rise to the following taxes :—

(1) Cess levied under the Cess Act (IX of 1880, B. C.) as amended by the Bihar and Orissa Act I of 1916. That cess is a cess on the annual net profits derived from the mines contained within the zamindari in the shape of royalty ;

(2) Cess levied under the Jharia Water-supply Act (Bihar and Orissa Act III of 1914) on royalties derived from mines, and

(3) A tax under the Bihar and Orissa Mining Settlements (Bihar and Orissa Act IV of 1920) assessed on the local cess payable by the zamindar who owns the lands in which the mine is situated.

It is thus clear that the sources of the three taxes are the same, namely, the amount of royalty received by the zamindar and each of them is to be assessed irrespective of what is paid under the remaining two Acts. Therefore the payments made with respect to any one of the aforesaid taxes cannot be taken into account in the assessment made for the tax payable under the other Acts. The result is that the taxes payable by the assessee in the present case under the Jharia Water-supply Act as well as the Bihar and Orissa Mining Settlements Act cannot be deducted from the royalty received by him in assessing the tax payable under the Income-tax Act of 1922. I, therefore, agree with the order of my Lord the Chief Justice.

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DAWSON MILLER, C. J., AND FOSTER, J.

Tilakdhari Lal and *another*—Appellants.

v.

Abdul Wahab Khan and *others*—Respondents.

Appeal No. 280 of 1921, Decided on 6th March 1925, against the original decree of the Sub.-J., Monghyr, D/- 28th April 1921.

Adverse possession—Cosharers—Mere exclusive possession of a portion for purposes of management is no ouster—A specific denial of other co-sharer's right to possession is necessary.

Possession of one cosharer lawfully acquired in the first instance may become adverse to the others, but mere occupation even for a long period creates no presumption of ouster. There must be open and notorious acts indicating a claim to exclusive ownership in denial of the rights of the other cosharers before adverse possession can begin to run. The only difference between the possession of a co-owner, and other cases is, that acts, which, if done by a stranger, would per se be a disseisin, are in the case of tenancies-in-common, susceptible of explanation consistently with the real title ; acts of ownership are not, in tenancies-in-common, acts of disseisin ; it depends upon the intent with which they are done and their notoriety ; the law will not presume that one tenant-in-common intends to oust another ; the facts must be notorious and the intent must be established in proof : [24 *C. W. N.* 1057, *Ref.*] The appropriation of profits cannot be regarded as notice to the cosharers that their title was repudiated : 32 *All.* 389, *Ref.* [P. 116, C. 2]

P. C. Manuk, L. K. Jha and *S. M. Naim*—for Appellants.

Sultan Ahmad, N. N. Sen and *P. K. Mukharji*—for Respondents.

Dawson Miller, C. J.—The appellants in this case instituted a suit for partition of an estate comprising four mouzas and bearing Tauzi No. 4920 on the revenue roll of the Collector of Monghyr. The appellants are admittedly entitled to a share in the estate amounting to a fraction over 7 annas of the whole. The defendant first party, Abdul Wahab Khan who alone has actively resisted the claim for partition, and who may be referred to as the respondent, is entitled to a 3-annas share whilst the remaining defendants classed as second party defendants are entitled amongst them to the remainder amounting to a fraction over 5 annas.

The estate was at one time part of a larger mahal but more than forty years ago, at some date not definitely specified, it was formed into a separate revenue paying estate bearing the tauzi number already mentioned. At the earliest time to which the evidence relates it belonged to three persons named Hansraj Singh, Tota Ram Singh and Bhakan Singh who admittedly held it in coparcenary. It is the case of the respondent that these three original proprietors separated and by a private arrangement partitioned the property between them by metes and bounds, each taking a third share but that certain of the uncultivated lands remained ijmal

Since then it is also said, that their successors or at least the successors of one of them have on more than one occasion made sub-divisions of their interests by formal partition. If this state of affairs can be made out then the plaintiffs would not be entitled to a partition of that which has already been transferred into separate ownership. The respondent also claims title by adverse possession of the land now in his actual possession. It is upon these questions that the determination of this appeal depends.

The Subordinate Judge accepted the evidence of the respondent's witnesses as sufficient to prove that a partition had previously taken place between the original proprietors and considered that the evidence of the appellant's witnesses was to some extent corroborative of the respondent's case. He also appears to have thought that the Record of rights finally published in 1903 supported the case of a previous partition. He further found that the respondent had acquired a title by adverse possession to that part of the estate in his actual possession.

The plaintiffs have appealed and contend that the verbal evidence in support of the respondent's case is not reliable and that the documentary evidence and the record of rights entirely support their case.

It is necessary to bear in mind that it is not disputed that for a number of years the different proprietors have had separate collections of rent from the tenants on certain portions of the land which rents they have appropriated to their exclusive use without claim to participation by other cosharers. In other portions of the land the tenants have paid their rent to each of the proprietors or sets of proprietors according to their shares in the estate, as would be the case where there is joint ownership, whilst other lands again have remained joint being uncultivated, and these are recorded as gair-mazrua in the Record of rights.

It is the appellants' contention that the estate originally consisted of three kinds of land, (a) kamat lands in the private and exclusive cultivation of the proprietors, (b) mal lands or lands in the possession of cultivating tenants, and (c) uncultivated lands including dhab jhil and jungle. There can be no doubt that some forty and odd years ago or thereabouts during the time of Hansraj Singh and his co-proprietors some arrangement was come to whereby possession of a portion of the lands was distributed between them. Whether this was merely for purposes of management or in pursuance of a formal partition of estate is the main question for decision. The appellants say that it was only the kamat lands that were thus divided and that the arrangement come to was for purposes of convenient management and as a *modusvi vendi* without any formal partition of the estate by metes and bounds, a thing not uncommon with regard to the proprietors' private lands in cases of joint ownership. The mal or rent-paying lands on which tenants were settled, according to the appellant's case, were not dealt with in this manner, each tenant continuing to pay rent as heretofore to the proprietors jointly according to their respective shares whilst the uncultivated jungle, jhil, and dhab lands also remained unappropriated. The kamat lands which are proprietors' private lands and over which the acquisition of occupancy rights by raiyats is restricted by the provisions of S. 116 of the Bengal Tenancy Act, may in cases where they are settled but not from year to year or for a term of years, become subject to occupancy right in the tenant and thus lose their original character. It is the appellants' case, that this change, has in course of time, taken place which partly accounts for the fact that rents are in some cases paid to a single proprietor or set of proprietors representing the share or interest in a share of one of the three original owners, whilst in other cases waste lands have become fit for cultivation and have been settled by one or other of the proprietors with the tenants who pay rent exclusively to him. There is nothing to show that the rents so paid have ever been proportionately distributed between the different landlords, but this, it is contended, would not in itself operate as an ouster; nor does it necessarily indicate a formal partition. The appellants point to the fact that over a considerable area of the estate the rents are paid to the proprietors jointly. This area, they say, forms the original mal lands and negatives a partition by metes and bounds, for had a partition taken place, such lands would inevitably have been divided as no one ever heard of a partition which left undivided the lands in possession of cultivating tenants paying rent for their

holdings. They also rely upon the fact that the lands in regard to which the respondent has now exclusive collection of rents are considerably in excess of his proportionate share of 3 annas which could not be the case if there had been a rateable distribution of the property by metes and bounds forty years ago.

The respondent on the other hand contends that the existing features may be explained by the fact that originally a portion only was under cultivation and the rest was parti land or dhab or jhil land uncultivated and not partitioned, but that this in time came to be reclaimed and settled with tenants by one or other of the proprietors on behalf of all, the tenants paying their rent to each proprietor according to his share. The defendant's witnesses in order to demolish the plaintiffs' theory have sworn that there never were any kamat lands in the estate at all, but the documentary evidence is conclusive on this point and shows that kamat lands existed and have retained their old name although their characteristic features have changed. They endeavour to explain the disproportionate share held by the respondent by saying that he took an inferior class of land from his transferrer, one of the original proprietors, and consequently got a larger area.

The present state of affairs may quite possibly be explained on either hypothesis. But there are, in my opinion, certain facts in the case which point strongly to the absence of any formal partition having taken place. If a formal partition into separate puttis had been effected we should expect to find at least some document to support it, but none has been produced.

It is said that khesras were prepared at the time of the original partition as well as at the subsequent partition between the respondent's father and Ram Kishun, the son of Hansraj Singh, but no trace of them remains.

The respondent's estate on the death of of his father was under the management of the Court of Wards which surely would have preserved these valuable documents had any such existed. One witness suggests that the respondent's khesra was stolen by one Nabi Buksh. He admits that although the thief was known no attempt was made to prosecute him or to recover it back. Another witness a Sub-Inspector of Police who was dismissed from the service in 1912 says that Nabi Buksh was prosecuted for stealing some papers from the box of Nawab Khan after his death.

Such documents as there are point to a conclusion favourable to the appellants. The respondent's title-deed of 1888 by which his father purchased his interest from Ram Kishun the son of Hansraj, one of the three original proprietors, although it recites the batwara partition by which the present estate Tauzi No. 1920 was separated from the parent mahal some time earlier, makes no mention of any subsequent partition between the three original proprietors although it must have happened only some ten years or so earlier on the respondent's case. What Nawab Khan, the father of the respondent purchased was a 3 annas share out of the 5 annas odd share of Ram Kishun and not any specific lands defined by metes and bounds. The deed also mentions mal and kamat lands.

In the suit brought by the Court of Wards on behalf of the respondent and his family against certain tenants under S. 10 of the Bengal Tenancy Act in 1903 for additional rent in respect of encroachments, the plaint states that amongst the proprietors there is a distribution of tenants, a very different thing from partition, and that some tenants are joint among the maliks of 16 annas. It further states that the defendants (the tenants in that suit) have cultivated baharsi and parti lands belonging, not to the plaintiffs, but to the proprietors without their permission and prays for additional rent for the additional area. Included in the reliefs sought is a prayer that the plaintiffs may be held competent to realize the same. This surely indicates a consciousness that the tenants, although paying their rents to them by the distribution, were not the tenants of land in their exclusive ownership, and implies that, apart from the distribution arranged between the owners, it would be necessary to make the other proprietors plaintiffs. In other words it indicates an agency on the part of the plaintiffs in that suit, bringing the case within the provisions of S. 188 of the Bengal Tenancy Act.

Again in 1917 Abdul Wahab Khan, the respondent, sued one of the tenants for rent. In the plaint he describes himself

as a share-holding proprietor of 3 annas out of 16 annas and states that his collections are separate from other cosharers, and he claims the whole rent as appertaining to his share. Surely this was meaningless if there had been a partition and the land had been divided amongst the 16 annas proprietors. It must be remembered that it is the respondent's case that where the rent is paid exclusively to a single proprietor, the land for which rent is paid is his exclusive property by the partition.

Finally the record of rights also shows that the proprietors are all jointly interested in the whole estate. There is only one khewat for them all, although they have in certain cases separate accounts with the Collector. Had there been a partition, this matter must have been brought to the notice of the Settlement Officers in preparing the record of rights finally published in 1903. and a khewat would have been prepared for each proprietor or set of proprietors with a separate denominational number but this was not done.

In view of these documents which appear to me to point only to one conclusion, the evidence of partition given on behalf of the respondent should be closely scrutinized. In so far as it relates to the partition between the original proprietors, it is of the flimsiest character. It is spoken to by men who were not particularly interested in it and who took no part in it, but merely saw some measurements taking place and were told that it was a partition.

The first witness upon this point after stating that it took place says that he was 10 or 15 years old at the time and has no recollection at all about it.

The next witness Dhautal Gope says he saw the amlas measuring the lands and they said that they were making a partition. He was not present at the kacherry where he says the partition took place. He does not know which putti was given to which of the parties.

The next witness, Bahore Das, says that raiyati lands and lands fit for cultivation were divided between the proprietors in his presence. After the subsequent partition between Ram Kishun and Nawab Khan he took settlement of 5 bighas from Nawab Khan. This land was covered over with jungle when he took settlement. This hardly looks as if that of which he took settlement was the land originally partitioned between the three proprietors which was cultivable land. He admits that he had rent receipts, but he did not produce them and pretends that he does not know if his land is described as kamat in those receipts.

The next witness Darbari says that there was a partition between the original proprietors of cultivated lands and lands fit for cultivation and the rest was left ijmal. He saw the amlas measuring the lands and he heard from people that a batwara was being made. He was cutting grass at the time. He had given evidence before the Deputy Collector, but he had no recollection when it was put to him of what he said on that occasion about this partition.

None of the other witnesses carry the case any further. A few more particulars are given about the later partition between Nawab Khan and Ram Kishun but these also are far from satisfactory. There is not a scrap of documentary evidence to support it and even if a division had been made between Nawab Khan and his vendor this would not be binding upon the other proprietors unless there had already been a partition of his vendor's share from that of the other proprietors.

The witnesses are not agreed as to the respective positions of the different puttis. None of them can speak as to the position of the different puttis under the partition between the three original proprietors. They contradict each other as to the position of the puttis sub divided between Nawab Khan and Ram Kishun. They say that boundary marks were placed, but there is no longer any trace of them. They deny that there were any kamat lands which is conclusively proved to be false. They suppress their rent receipts for no apparent reason, but other receipts of other tenants paying rents exclusively to the respondent were produced by the appellants and these show that their holdings were kamat lands.

One of the witnesses, Dhautal Gope, says that when the subsequent partition between Ram Kishun and Nawab Khan took place in mauza Dhamara, the whole of the lands in that mauza were measured. If Ram Kishun or Hansraj, his father, had already separated from the other two and got their own putti, the measurement of the whole village was quite

unnecessary and would not have taken place.

In view of the documentary evidence I feel quite unable to accept this class of evidence as reliable. The appellants' witnesses admit that the original proprietors separated in mess and partitioned their house and that there was a distribution of the kamat lands for purposes of convenient management as frequently happens in such cases but they deny a partition by metes and bounds. In some instances they use language which, if taken apart from the context, might imply a partition, but allowance must be made for this class of witnesses whose language is not always chosen with discrimination. There can be no doubt as to their intention and the evidence recorded is the result of both question and answer as taken down by the Court.

Upon a review of the whole of the evidence I am of opinion that no partition ever took place by metes and bounds between the proprietors.

With regard to the plea of the respondent that he has acquired a right by adverse possession, I also think his case fails. Every cosharer has the right to enter upon and occupy the common property and this in itself does not raise any presumption of a denial of the rights of the other cosharers. Nor is possession in such cases adverse. All the more so is this the case where they all agree for the purposes of convenient management that a certain area shall be occupied by certain cosharers. It may be conceded, however, that possession of one co-sharer thus lawfully acquired in the first instance may become adverse to the others, but mere occupation even for a long period creates no presumption of ouster. There must be open and notorious acts indicating a claim to exclusive ownership in denial of the rights of the other co-sharers before adverse possession can begin to run. As stated by Mookerjee, Acting C. J. in 19 0 in *Balaram Guria* v. *Shyama Charan Mondal* (1), "The law will never construe a possession tortious, unless from necessity; on the other hand it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful; and this upon the plain principle, that every man shall be presumed to act in obedience to his duty, until the contrary appears. In other words, the only difference between the possession of a co-owner, and other cases is, that acts, which, if done by a stranger, would per se be a disseisin, are in the case of tenancies-in-common, susceptible of explanation consistently with the real title; acts of ownership are not, in tenancies-in-common, acts of disseisin; it depends upon the intent with which they are done and their notoriety; the law will not presume that one tenant-in-common intends to oust another; the facts must be notorious and the intent must be established in proof." In that case two out of the four co-tenants had been in possession for fifty years paying rent and taking the profits. It was held that the two absentee co tenants had not lost their interest by adverse possession. Whether the principles enunciated were correctly applied to the facts of that case is immaterial. The principles referred to appear to me incontestable. In the present case I can find nothing in the evidence to indicate an ouster or even an intention on the part of the respondent or his predecessors to assert openly and clearly a hostile title. The respondent's title-deed by which he purchased what would appear to be an undivided share in the estate and his suits against the tenants which indicated a claim to collect rents as agent of all the proprietors points strongly in the opposite direction, and the Record of Rights of 1903, which shows at the most a separate collection from certain of the tenants is not only consistent with the appellants' case but seems to me to prove conclusively that the co-sharers at that time at least were joint proprietors of every portion of the estate as indicated in the khewat. The only fact which stands out in favour of the respondent on this part of the case is the failure to distribute the rents collected by him in excess of his share and the appropriation of the proceeds of the sale under the Land Acquisition Act. This may bar the appellants' right to their share in those profits and proceeds beyond the limitation period but it cannot, in my opinion, deprive them of their proprietary rights. "The appropriation of profits cannot be regarded as notice to the co-sharers that their title was repudiated." [See per Stanley, C. J. and Banerji J., in *Har Charan* v. *Binda* (2).] Whilst I find

(1) [1921] 24 C W. N. 1057=33 C.L.J. 344.

(2) [1910] 32 All. 389=7 A. L. J. 298.

certain indications that the respondent considered himself a cosharer only and not a separate proprietor, I can find nothing necessarily indicating a repudiation of the rights of the other co-owners in the land which he now claims as his own.

In my opinion the appeal should be allowed with costs to the appellants payable by the respondent first party, here and in the trial Court.

The decree of the trial Court should be set aside and in lieu thereof a preliminary decree for partition by metes and bounds, of the appellants' share as stated in the plaint should be passed.

Foster, J.—I agree.

This is an appeal by the plaintiffs in a partition suit. The plaintiffs, as part proprietors of Touzi Estate No. 4920 in the Monghyr Collectorate, sue for the division of the lands between themselves and the defendants. The estate comprises four entire villages, Damhara, Hardia, Balkunda and Bhutauli (otherwise known as Malpa). In itself it was created outside the memory of the present litigation by a partition of Tapa Chautam into three parts by the Collector. Out of the numerous parties now holding title as proprietors of this Touzi Estate No. 4920, only one of the defendants, Mr. Abdul Wahab Khan, has seriously contested the case, the others praying that if a partition be made they may be given separate takhtas. Mr. Abdul Wahab Khan's case is that this estate was partitioned some 40 years ago between the three proprietors of that time, Totaram Singh, Bhukhan Singh and Hansraj Singh (who had a son Ram Kishun Singh); and that these divisions have been sub divided on several occasions thereafter. He admits that there is still an undivided area within these four villages, but he accounts for that by saying that the lands were not at the time of partition fit for cultivation though they have in some parts subsequently become cultivable. He admits that he is in possession of better and more extensive lands than the other parties but he ascribes that to the fact that his father Nawab Khan took as his divided portion lands which for various reasons were considered to be of little value, but which have since been improved by labour and physical change. He also contends that he has acquired title to the lands which he holds in separate possession by adverse possession. He concedes that if the Court thinks it proper to partition the said Touzi estate, the ijmal portion only may be partitioned. It appears that the plaintiffs had before this present suit moved the Revenue Court for a Collectorate partition, but the application was rejected. We are not informed what were the reasons for this decision. The fundamental fact before us is that the proprietors or groups of proprietors have now separate collections of rent from specifically defined holdings of tenants over an area which is a considerable part of the four villages, the residue being joint a state of affairs which has subsisted for a long time. The most important question in this case will be whether the lands the rents of which are collected separately by the proprietors, are held in several or concurrent ownership ; in other words, whether the defendant Mr. Abdul Wahab Khan is correct in asserting that he has an exclusive title in the lands the rents of which according to the Record of Rights of 1903 are paid exclusively to him. As I have stated already, these four villages belonged originally to Totaram Singh, Bhukhan Singh and Hansraj Singh. At some date, of which we are not informed, these three persons separated in mess and admittedly partitioned their dwelling house. We are informed by the defendant's witness Darbari that Totaram died first then Hansraj and then Bhukhan. Now each one of these three persons transferred the whole or part of his interest. The predecessor-in-interest of Mr. Abdul Wahab Khan was Ram Kishun Singh, son of Hansraj Singh, deceased. His conveyance was made in 1888 to Nawab Khan, Abdul Wahab's father, and it passed a three annas share out of 5 annas 14 gandas of the whole estate. It seems to me to be a fact beyond question that Hansraj Singh was collecting rents separately from a known number of holdings and that he was interested jointly with Totaram and Bhukhan in the ijmal collections and lands, but this conveyance of 1888 of a three annas share to the defendant's father does not purport to be a conveyance by metes and bounds of any specified lands, or of a share within specified bounds. I may mention here, as I shall have to discuss the passage later on, that the property conveyed is described as "my whole and entire three annas pucca share which is a fraction of 5 annas 14 gandas pucca (the kuchha whereof by the parti-

tion is 8 annas 16-gandas taking it to be 16 annas) in revenue paying Mahal Malpa Touzi No. 49 .0." The other parties including the plaintiffs trace their title to one or other of these three persons Totaram, Hansraj and Bhukhan. Ram Kishun's remaining annas 11-gandas is now owned by two ladies. Looking at the Record of Rights of 1903 we see that Nawab Khan's son, then under the Court of Wards of estate Ratan, had separate collection of the rents of many holdings as well as joint interest in the ijmal lands, and the general evidence seems to prove that Ram Kishun Singh and Nawab had sometime subsequent to the purchase of 1888, for purposes of collection, distributed tenants between themselves.

So the two main issues in the case were whether there had been a previous partition, so as to debar in whole or part the plaintiffs from suing in the present suit, and whether the contesting defendant can make out a separate title by adverse posession. The suit was tried by the Subordinate Judge of Monghyr. He held that the defendant had proved the previous partitions which he alleged, and he also held that the defendant has been in adverse possession of the lands in his separate possession through his own tenants for over 30 yea s openly and in denial of the rights of his cosharer. He did not consider that the plaintiff would be entitled to partition the lands which were still in joint possession when he had sued for partition of the whole estate. He therefore, dismissed the suit. The plaintiffs appeal.

I shall first consider the question whether there was a partition between Hansraj Singh and his two cosharers, some forty years ago, as alleged There is, so far as I can find, no document exhibited which clearly points to such a partition. On the side of the plaintiffs the cadastral maps are put forward as showing, when compared with the Settlement Khatian of 1903, that the holdings from which separate collections of rent are made do not lie in three compact blocks. For instance, the red plots, those in which the contesting defendant has separate collections are in many cases isolated and scattered ; and so with the other cosharers' plots. In such circumstances, there would be a great chance of confusion, so it is surprising to find that this defendant's title deed of 1888 is a mere transfer of a share in the village and not of lands defined by metes and bounds. At least the vendor Ram Kishun would have been expected to define the boundaries of his own patti of 5 annas 14 gandas. When the vendor was making assurance of title he would surely not, if he was owner of a separated portion of the mahal, have averred that no settlement at reduced rent had been executed in favour of any person in the whole mahal, and undertaken personal liability for any such subsequently discovered. No doubt there is the mention of pucca and kutcha shares by partition, but this fact must be taken, for its explanation, in conjunction with the whole expression of the document as well as other facts. In Ex. X, the plaint in a proceeding of 1903 under S. 105 of the Bengal Tenancy Act, the plaintiff (this very defendant) suing alone asserted that there is distribution of tenants amongst the proprietors, and a particular proprietor realizes independently the rent of a particular tenant. He does not assert anything more than actual collection of rent and makes no mention of a partition of the mahal. In fact he claims that the tenants are liable to pay rent for the encroachments made upon lands belonging to the proprietors without their permission. So there is a distribution of tenants and no more, a common enough phenomenon in large estates held in tenancy-in-common. Such a distribution was undoubtedly made two years or so after the conveyance of 1888, between Ram Kishun Singh and Nawab Khan, and no doubt the distribution was formulated upon the kacha shares, Nawab Khan getting 8 annas 16 gandas and Raj Kishun Singh 7 annas 4 gandas of the total rental of the tenants under Ram Kishun's separate collection. It has been shown that the plaintiff's purchases of shares in the village (1904 to 1906 Exs. 2, 3, 5, 7) were similar to that of the contesting defendant in this respect, that there was no specification of separated lands within the mahal. Nor is any one of the very numerous conveyances that must have taken place, considerably increasing the original number of 3 cosharers, produced to show a state of several ownership. There are in the khewat of 1903 twenty cosharers, with nine separate revenue accounts. In 1917 Mr. Abdul Wahab Khan alone sued tenants for arrears of rent, alleging separate collection of rents from

the tenant defendants. This is equivocal, it does not necessarily assert separate ownership. We do not know what were the results of these suits. We do know that, a few months after the institution of these suits, this defendant put in his objection in the Collectorate partition case that preceded the present suit, alleging the existence of divided pattis, (Ex. 35). So the existing question was then *sub judice*.

As regards the question whether the separate collection of rents is to be attributed to a separation by partition of the shares of the proprietors, there is an important matter which calls for notice. The plaintiffs assert in the plaint that the bakasht lands in the village are the property of the proprietors, but are not held in due proportion to the shares of the proprietors. The contesting defendant in his written statement asserted that the lands of which separate collections are recorded in the Record of Rights are not kamat lands. The description of the lands may have arisen as an issue in the case under the Estates Partition Act. Certainly S. 77 indicates in the Explanation that kamat lands though held severally shall not be deemed to be lands held in severalty as representing several interests; and that the private arrangement which is to give a right to preference of a particular proprietor in a partition in respect of certain lands refers only to those lands held on a bona fide division of lands held by tenants. Now, we know that frequently the possession of kamat lands, the private and common property of the landlords, is allotted without reference to the shares. One landlord may be an absentee; his farm servants, ploughs and bullocks are not in the village, and it is not worth his while to put them there. If lands are waste but reclaimable, his co-sharers, unless and until they become openly hostile to his title, will not, by reclaiming the lands (an ordinary process in estate management), be able to assert adverse possession. This is, so far as I can judge, the reason why the Estates Partition Act excludes preferential claims in respect of landlords' private lands.

The plaintiffs' witnesses all describe as kamat the lands of which the collection of rents is several. The defendants' witnesses refuse to admit the existence of kamat. The Record of Rights (1903) make no mention of kamat, or its antithesis, mal; it makes no distinction between lands belonging to the proprietors personally and lands in the raiyati stock. In fact it implies that there is no subsisting kamat, because it states uniformly that the tenants have occupancy (kaimi) rights. I refer to S. 116 of the Bengal Tenancy Act.

The matter is one that is not only historically important. If, forty years ago, Totaram Singh and his two co sharers held a large area of kamat, a considerable part of which had to be reclaimed, they might for convenience of management, but not necessarily for severance of title, divide it up. If by subsequent settlements with raiyats the landlords' title to these kamat lands came to be diminished by the intrusion of occupancy rights, the lands might still be, in the mouths of laymen, such as the villagers who have given evidence, described, with an eye to their origin, as kamat; whereas the Record of Rights could never give room to such an incongruity. But if the lands were in their origin kamats we have an explanation of the long-standing distribution of management.

I find conclusive documentary evidence that there were originally extensive kamat lands, largely waste, increasingly reclaimable, in these four mouzas, and that they were held in separate possession by the co sharers. The defendant's and the plaintiffs' title-deeds mention kamat. The defendants' plaint of 1903 mentions land "belonging to proprietors." The certificates under the Public Demands Recovery Act, 1904, specify kamat lands. Going on through the documents in Part III, I could multiply instances of the existence of kamat. Mal is mentioned on page 84. My finding is that there is a very considerable area of these four villages which is clearly ancient kamat, but now obsolete as such, owing to the accrual of raiyati rights Unequal possession of such kamat lands can, in ordinary experience, be expected in India.

Now, let us consider more particularly the conditions of this mahal of four villages. Admittedly there has always been a considerable area uncultivated but reclaimable. The total area of the four villages is very large, and when there is a large proportion of kamat, one can understand that the retention of separate rent collecting and managing staffs by the vari-

ous proprietors might be necessary under tenancy-in-common, just as much as under several ownership. Another thing to remember is that here we have not a case of exclusive possession. The cosharers are receiving some of the rents separately; but that does not prima facie indicate any denial of title. But in fact, when all the co harers have been, so to speak, sitting at the same table since they came into possession, consuming the profits for so many years, I do not see how the Court can deem the condition of the property to have altered by course of law. In all such cases as this where one tenant in common gathers more from the common property than what he is entitled to keep, the legal conclusion is only that the cosharers who have suffered by this temporary exclusion can sue for accounts; there is no necessary conclusion of hostile possession. The khewat of the Record of Rights of Bhutauli (1903) is exhibited in full. It contains one serial number for the score or so of cosharers. This indicates that each of these cosharers has an interest in every part of the village. I do not see how it can be construed otherwise. R. 48 of the Rules under the Bengal Tenancy Act (which have the force of law) prescribes that the khewat shall show "the character and extent of proprietary interest." In the Survey Manual there are also some Board's Rules which in themselves are not very clearly expressed, have not the force of law, and are intended as general instructions. We do not know what particular rules were adopted in this Monghyr Settlement. But in view of R. 48, and in view of the fact that the character and extent of separation in proprietary interest is usually shown by serial numeration, it seems reasonable to hold that the form of this khewat indicates concurrent ownership throughout the whole village.

The defendants' oral evidence as to the partition has yet to be discussed.

His case is that Hansraj and his two cosharers divided each of the four villages into three pattis by way of partition, and that Hansraj's share amounting to 5 annas 15 gandas separated by metes and bounds devolved upon his son Ram Kishun. Ram Kishun sold three annas out of this to Nawab Khan and very shortly afterwards made a new partition with the 5 annas 15-gandas patti. Then Ram Kishun sold the residue of his share comprised in the patti of 2 annas and odd and again effected partitions with the purchasers. About these last partitions the witnesses are surprisingly silent. I proceed to consider broadly the evidence as to the earlier partitions.

The witnesses are fairly well agreed that Hansraj Singh's partition took place about 45 years ago, so we must expect only the elderly witnesses to be able to talk about it. The seventh witness for the defendant says that he was 10 or 15 years of age at the time and he has no recollection at all of the partition. The eighth witness was aged 50 at the time: but he cannot say which patti was given to which of the three cosharers. The next witness is aged 60. Like most of the other witnesses he cannot name or describe the Amin who did the measurement. He was, he says, present at the partition as a Jeth raiyat for eight days. One plot was dealt with at a time and allotted. Each of the three patwaris was taking notes. It is noticeable that nowhere in the documentary evidence is there any copy of these notes, nor any reference to them. The next two witnesses, aged 58 and 60 respectively, were bystanders and repeat vague hearsay. The last witness on this point, No. 12, is aged 72 years. It is surprising that he has so little to say about the partition. All that he contributes to the evidence is a statement, which he shortly after withdrew, that the three cosharers had each his kamat land in his patti, and he defines kamat lands as lands cultivated with the malik's plough and cattle. I am of opinion that this evidence does not suffice to prove a fact which must have been notorious. It is to be remembered that these villages cover a very extensive area and that the partition would have cost, time and labour and money.

The alleged partition between Nawab Khan and Ram Kishun has more evidence than the alleged earlier one. The seventh witness for the defendants states that Nawab Khan and Ram Kishun were joint for one year and then had a partition. The partition khesras (or lists of plots) were written on behalf of the two parties. He is a tenant of Bhutauli just like defendant's Witness No. 12, but these two men contradict each other as to the relative positions of the two pattis. This witness and some other witnesses speak of boundary marks having been placed,

which, of course, in such an intricate allotment of plots in an extensive area was advisable and at the same time laborious; but those boundary marks had disappeared when the survey and settlement commenced in 1900. The Witnesses Nos. 8 and 12 assert that in the course of this partition between Nawab Khan and Ram Kishun the total area of the respective villages was measured. This is an astonishing statement, if we are to believe that already these villages had been divided by metes and bounds into three separate properties in the former partition. Obviously if Ram Kishun had a separate patti it was only necessary to measure that patti for the purpose of sub-dividing it. Witness No. 15 makes an important statement that in this partition copies of the khesras were given to each of the parties. The partition was not made in his presence. Nawab Khan's copy of the khesra was stolen. The defendant does not account for the non-production of Ram Kishun's copy, nor has Ram Kishun been called though he is still alive. As with the alleged previous partition, we find hearsay and indefinite evidence. It appears to me that this evidence of the alleged second partition is wholly insufficient and unconvincing.

Much is made by the defendant of the statements of the plaintiff's witnesses in their cross-examination. They have certainly never admitted that these four villages were divided by partition. They have admitted, and I am quite prepared to believe them; for the record of rights and all the evidence support them—that there were some separate collections by the cosharers. It appears from the evidence of the patwari that there are seven separate collections in these villages. As the defendants stated in the proceeding under S. 105 (1903) there has constantly been a distribution of tenants among the proprietors. The proprietors were originally three in number, but in the course of time, as a result of alienations in detail, there came to be seven groups of separate collections. There is no question that at the same time a considerable area in these villages remained ijmal under joint collection. Admittedly in respect of these ijmal lands there has been no exclusion of any particular cosharer. No doubt the legal incidents of the old kamat have disappeared, but it appears to be satisfactorily shown that in the time of Totaram, Hansraj and Bhukhan there was a large kamat jagir within each of these four villages. This would account for separate possession by various cosharers. It is a more cheap and efficient method to divide the administration of the common estate than to place the entire management in the hands of one person. The practical defect of distributed administration is that when the estate becomes more sub-divided, it is increasingly difficult to call all the cosharers together for adjustment of account, and adjustment can hardly be made between less than all. This unsatisfactory state of affairs may continue till one of the cosharers with a large interest takes upon himself to demand a partition.

There has been some talk in the case on the defendant's side of improvements to the property effected at the cost of the defendant's father Nawab Khan. It is curious that both in his objection petition (Ex. 35) in the estates partition case of 1918 and in the mouth of his witnesses the defendant attributes these improvements solely to his father, who after all, died as long ago as 1894. No improvements since then have been asserted. There is no documentary evidence of specific improvements. The oral evidence is meagre. It is not quite clear from the witnesses' statements what method Nawab Khan adopted in encouraging reclamation. The actual payments deposed to, as made by Nawab Khan, are of trifling amounts, where the amount is stated. It should be remembered that the defendant's explanations of the disproportionately large area from which he is collecting separate rents is that his father took waste lands in plenty whilst Ram Kishun took cultivated lands; and the waste lands which were got so cheaply in the partition have now been reclaimed and become valuable. Learned counsel for the plaintiff has drawn up a tabulated statement abstracted from the record of rights showing a total area of all the mouzas of 8314 bighas and he finds from this record of rights that the defendant's three annas share has separate collection from holdings of 760 bighas whereas the plaintiff's separate collection of 5 annas 15 gandas comes from holdings covering 512 bighas. In such circumstances it is surprising that the evidence of the alleged extensive

reclamation is so meagre. It is probable that when the administration of the landlord's estate was allotted between the cosharers, the cosharer with the best and the strongest administration would get the lion's share in the steadily increasing reclamations for the reason that the tenants would be more disposed to come to him than to others for a settlement of the lands. Mr. Abdul Wahab Khan's estate was for a long time in the Court of Wards.

Much argument has been expended on the side of the defendant in connexion with the separate receipts by cosharers of compensation money when lands were acquired in 1902 for the railway. It appears that the revenue officials paid the landlords' compensation in the case where lands were under separate collection of rent to the landlord receiving the rent; and in the result the plaintiffs got a considerably smaller amount of money than the Court of Wards, acting on behalf of Mr. Abdul Wahab Khan. I do not think that any deduction from this fact can be pushed very far. No doubt all through these years the defendant has been owing the plaintiffs their proportionate share in his excessive realizations.

The learned Subordinate Judge's discussion of Issue No. 9 depends to an important extent on his previous finding, with which I disagree, that there had been a partial partition of the defendant's share. The separate receipt of compensation in the land acquisition proceedings is relied upon and also the record of rights as showing adverse possession. I cannot find any open exclusion of his cosharer's title in any act of the defendant or his father. As between cosharers, something more than mere separate possession is needed to prove adverse possession. Nowhere can I find any open repudiation of the cosharer's title. The admitted fact that the record of rights was made peaceably without a dispute would show the opposite.

There are plenty of authorities, which it appears to me needless to cite, for the proposition that the Court should not readily presume a tortious possession as between co-tenants; and that the appropriation of profits by one particular cosharer cannot be reasonably regarded as notice to the other cosharers that their title is repudiated. I may remark that this does not appear to me to be a case of long exclusive possession raising a presumption of ouster or conveyance. Here the facts are known and the possession has all along been by all the cosharers though unequally distributed. So I distinguish such cases as *Gangadhar* v. *Parashram* (3).

Appeal decreed.

(3) [1905] 29 Bom. 300: 7 Bom. L. R. 252.

✻ A. I. R. 1926 Patna 122

ADAMI AND SEN, JJ.

Jitendra Nath Chatterjee and *others*—Defendants—Appellants.

v.

Mt. Jasoda Sahun and *another*—Plaintiffs—Respondents.

Appeal No. 1344 of 1922, Decided on 1st July 1925, from the appellate decree of the Dist. J., Bhagalpur, D/- 27th July 1922.

(*a*) *Lease—Construction—Contract to hold premises for 11 years and after that to hold at thrice the rent or to take fresh settlement is enforceable—Contract Act, S. 74.*

An ejectment suit was compromised. The provisions of compromise were that up to 11 years the defendants were to hold the premises on a rent of Rs. 400 per year and that if the defendants wanted to occupy the premises after the expiry of 11 years, without taking a fresh settlement, they would have to pay rent at Rs. 100 per month.

Held: that what the parties intended was that, if the defendants wanted to occupy the premises after the expiry of 11 years, they could either take a fresh settlement or remain in occupation without a fresh settlement on a rent of Rs. 100 per month which the parties at that time thought would be a fair rent after the lapse of 11 years and that the terms were not penal and therefore they were enforceable: 17 *C. L. J.* 590, *Appl.*

[P 123, C. 1; P. 124, C. 2.]

✻ (*b*) *Contract Act, S. 74—Decrees whether on compromise or contest—Doctrine of penalty does not apply.*

The doctrine of penalties is not applicable to stipulations contained in decrees, whether passed on compromise or contest: 10 *Bom.* 435, *Rel. on.* [P. 125, C. 1.]

Hasan Imam, S. M. Mullick and *S. C. Mazumdar*—for Appellants.

P. C. Manuk, S. N. Palit and *N. N. Sen*—for Respondents.

Adami, J.—The plaintiffs in this case sued the defendants for house rent at the rate of Rs. 100 per month with interest from January 1918 to December 1920.

It appears that some 11 or 12 years previous to the suit the predecessor of the plaintiffs had sued the defendants and sought to eject them from the premises which are within the Municipality of Bhagalpur. The suit was compromised, and in April 1907, a decree was passed in terms of the compromise. Clauses 4, 5, 7 and 8 of the compromise included in the decree are to the following effect :—

"(4) That from January 1907, to December 1917 the defendants shall be entitled to occupy the premises mentioned in the plaint and pay rent at four hundred rupees per year (Rs. 400 per year) payable in four instalments of Rs. 100 each from January 1907 to December 1917, and the plaintiff shall have no right to eject the defendants from the premises for that period, namely, before December 1917. The defendants will, however, be at liberty to vacate the said premises at any time within the said period of 11 years on giving six months notice to the plaintiff.

"(5) That if the defendants want to occupy the premises after the expiry of 1917, without taking a fresh settlement, they shall have to pay rent at Rs. 100 per month.

"(7) That when the defendants give up the premises, they shall be bound to restore the premises to the condition in which it was at the time it was first settled with them.

"(8) That the plaintiff shall be bound to keep the premises in good repair during the period of the said 11 years.

After 1917, the defendants continued to occupy the premises ; they did not take a fresh settlement and held over until the date of the suit.

The defence to the suit was that Cl. (5) was a covenant for renewal and the stipulation that the defendants would have to pay Rs. 100 per month, if they wanted to occupy the premises without taking a fresh settlement, was by way of a penalty ; they claimed the right to continue paying rent at the rate of Rs. 400 a year.

The question in the suit was whether Cl. (5) was a renewal clause and whether the stipulation as to payment of rent at Rs. 100 per month was by way of penalty. The learned Subordinate Judge held that Cl. (5) did not contain a covenant for renewal of the lease, but that a fresh lease with fresh terms and rent could be taken at the expiry of the term of the lease. He held that the defendants did not execute any fresh kabuliyat, nor did they give notice to the appellant of their intention of doing it. He decreed the plaintiff's suit.

The learned District Judge came to the same opinion ; he held that there was no covenant for renewal and that Cl. (5) was not a penalty clause. He allowed interest only from the 27th December 1920, when a notice was served on the defendants by the plaintiff.

Mr. Hasan Imam before us argues that Cl. (5) contains a covenant for renewal and that the stipulation as to payment of a monthly rent of Rs. 100 is penal. He contends that Cl. (5) means that the defendants have the right to a renewal of the lease on the same terms if they do not want to take a fresh settlement, and that the stipulation as to payment of the monthly rent of Rs. 100 is intended only to force them to take a fresh settlement. At least if his contention is that the defendants have a right to renew the lease, on the same terms if they do not want a fresh settlement, it is difficult to understand what action the penalty would be attached to unless it is a failure to take a fresh settlement. He relies on the cases of *Guru Prasana Bhattacharji* v. *Madhusudan Chowdhry* (1) ; *Secretary of State for India* v. *A. H. Forbes* (2) ; and *Lani Mia* v. *Mohamed Yasin Mia* (3), with regard to the question of renewal. In my opinion, none of these three decisions altogether meets this case

In the first one the real question at issue was with regard to the meaning of the words dosra bundbast, that is to say, whether they meant a second settlement on the same terms or a different settlement. The words in the lease were : "On the expiry of the term I shall take a "dosra bundbast" ; the lease was in Bengali. It was held that, where there is a covenant for renewal, if the option does not state the terms of the renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself.

In the second case the lease provided that after the expiry of the term the lessor would have power to resettle

(1) [1922] 26 C.W.N. 901=35 C.L.J. 87.
(2) [1912] 16 C.L. J. 217.
(3) [1916] 20 C.W.N. 948.

the land with the lessee on a fair rent. It was held that the last clause was intended to be a covenant for renewal and that the Government was entitled only to alter the rent on renewal.

In the third case the lease contained a covenant that upon the expiry of the term the tenant would take a fresh settlement and that the landlord would grant him such settlement.

None of these cases, as I have said, meets the present case. It is clear from the clauses I have cited that the lessee was given three options, he could either leave the premises at the end of the term, or he could take a fresh settlement, meaning thereby a settlement on fresh terms as to rent, or he could hold on at a rent which was arranged to be at the rate of Rs. 100/- a month.

The decree and the compromise were drafted in English and the meaning of a fresh settlement is clear. It meant that the parties would meet and agree to the terms on which the lease was to be renewed. The clauses taken as a whole show that the plaintiffs were indifferent whether the defendants left at the end of the 11 years or stayed on. It was agreed that, if they did want to stay, they must either take a fresh settlement or remain on paying a rent, which the parties evidently agreed would be a fair one after the lapse of 11 years, at the rate of Rs. 100/- per month.

The case is almost exactly similar to the case of *Ganpat Singh* v. *Jasodhar Singh* (4). There the kabuliyats stated that after the expiry of a term of 5 years the defendant would cease to have any right to retain possession, but, in case he failed to execute a fresh kabuliyat, the landlords should have power to realize rent at Rs. 5/- per bigha on the strength of the said kabuliyats, and the defendant would have no objection to that. It was held that the plaintiffs were entitled to demand rent at the rate of Rs. 5/- a bigha and the stipulation of payment of rent at that rate was not a penalty by reason of the non-execution of fresh kabuliyats. It has been sought to compare this last cited case with the case of *Mir Abdul Aziz* v. *Karu* (5), but the latter is quite a different case. It was there provided that the tenant should give up the land on the expiry of the term and, if upon the expiry of the term he claimed a right of occupancy or caused a claim to be put up by any other person, he would be liable whilst holding over to pay a higher rent. It was held that the clause as regards the payment of higher rent being in the nature of a penalty was not enforceable. The penalty in that case was for the tenant's action in setting up a right of occupancy and claiming to be not liable to ejectment. That case too does not affect the question of renewal but only that of penalty. In my mind it is quite clear that what the parties intended was that, if the defendants wanted to occupy the premises after the expiry of 1917, they could either take a fresh settlement or remain in occupation without a fresh settlement on a rent of Rs. 100/- per month, which the parties at that time thought would be a fair rent after the lapse of 11 years.

With regard to the question of penalty, it is hard to understand how the clause as it is framed could be construed to intend a penalty. There was no obligation on the defendants to occupy the house or to take a fresh settlement and a penalty under S. 74 of the Contract Act will only follow some breach or obligation. There is no obligation in the present case. Mr. Hasan Imam has relied on the case of *John Pierpont Morgan* v. *Babu Ramjiram* (6) where it was held that where a lease contains a stipulation that the lessee shall pay mesne profits at an unduly high rate on failure to give up the land, which formed the subject matter of the lease, on the expiry of the term, the Court has power to alter the rate agreed upon as being in the nature of a penalty ; but in that case there was an obligation for the tenant to leave at the end of the term and the penalty was to cover any action of the raiyat in refusing to give up the land on the ground that he had an occupancy right.

However, in the present case it has to be remembered that Cl. (5) forms part of a decree, and I need only refer to the case *Shirekuli Timapa Hegda* v. *Mahablya* (7). It was there held that the doctrine of penalties was not applicable to stipulations contained in decrees. In that judgment Birdwood, J. cited the following remarks made by West, J. in

(4) [1913] 17 C.L.J. 590.
(5) [1913] 18 C.L.J. 95.
(6) [1920] 5 P.L.J. 302=(1920) P.H.C.C. 168= 1 P.L.T. 310.
(7) [1886] 10 Bom. 435.

the case of *Balprasad* v. *Dharnidhar Sukharam* (8). "The principles which govern the enforcement of contracts and their modification, when justice requires it, do not apply to decrees which, as they are framed, embody and express such justice as the Court is capable of conceiving and administering. The admission of a power to vary the requirements of a a decree once passed would introduce uncertainty and confusion. No one's rights would, at any stage, be so established that they could be depended on, and the Courts would be overwhelmed with applications for the modification on equitable principles, of orders made on a full consideration of the cases which they were meant to terminate. It is obvious that such a state of things would not be far removed from a judicial chaos ; and as ordinary decrees are thus unchangeable, so we think are those in which, through a special provision for the convenience of parties, their own disposals of their disputes are embodied. The doctrine of penalties is not applicable to such a class of cases ; and those who, with their eyes open, have made alternative engagements and invited alternative orders of the Court, must, if they fail to perform the one, perform the other, however greatly severe its terms may be."

The defendants, therefore, cannot put forward the doctrine of penalties in the present case considering that they held their premises under the terms of the compromise embodied in the decree.

With regard to the question of interest which forms the subject of the cross-appeal, in my opinion the learned District Judge was quite correct in disallowing interest previous to the 27th December 1920, not because the interest should be reckoned only from the date of notice but because the increase in the rent is so large that I think it is only fair that the defendants should not be called upon to pay more by way of interest.

I would dismiss the appeal and cross-appeal with costs.

Sen, J. — I agree.

Appeal dismissed.

(8) [1886] 10 Bom. 437 N.

✻ A. I. R. 1926 Patna 125

Ross, J.

Ashloke Singh and *others*—Defendants —Appellants.

v.

Bodha Ganderi — Plaintiff — Respondent.

Appeal No. 91 of 1923, Decided on 8th July 1925, from the appellate decree of the Sub.-J., Arrah, D/- 2nd August 1922.

✻ *Transfer of Property Act, S. 3—Mango tree gifted — Intention of the gift was that donee should enjoy fruit—The tree is immovable property—Registration Act, S. 2.*

The question whether a tree is a standing timber is a question of intention. If the intention is that the plaintiff should enjoy the fruit of the tree and not cut it down as timber, then it is immovable property and could only be conveyed by a registered instrument : 20 *Mad.* 58, *Foll.* (*English case-law discussed*). [P.126, C.1.]

Lakshmi Narain Singh and *Sarjoo Prasad*—for Appellants.

Parmeshwar Dayal—for Respondent.

Ross, J.—The subject-matter of this suit is a mango tree. The plaintiff respondent sought a declaration of his right to, and recovery of possession of the tree which he said had been given to him by one of the proprietors of the village by an unregistered and unstamped chithi, dated the 12th of Kartik 1315. The defendants pleaded that the plaintiff had no right to the tree and that the chithi being unstamped and unregistered was not admissible in proof of his title.

The learned Munsif dismissed the suit on the ground that the chithi operated as a deed of gift relating to immovable property ; that there was no evidence that the mango tree was taken only as standing timber ; but that the possession and enjoyment of the fruits of the tree by the plaintiff went to show that the plaintiff wanted to take an interest in immovable property, and that therefore the chithi ought to have been stamped and registered. The chithi was not produced, but it was admitted that it was neither stamped nor registered. The Munsif therefore held that the plaintiff had failed to establish his title to the tree. The learned Subordinate Judge reversed this decision. He held that the plaintiff had been in possession of the tree from 1319 until 1327. As the chithi was not produced, he was of opinion

that the legal position came to this that the plaintiff got the tree under an oral gift accompanied by delivery of possession. He held that under the definitions in the Transfer of Property Act and the Indian Registration Act "standing timber" is not immovable property; that in this part of the country planks of mango wood are often used for making leaves of doors and windows and similar other purposes; and that therefore the tree was standing timber, and consequently there was no necessity for a stamped and registered instrument. He therefore held that the plaintiff acquired a good title by the oral grant and decreed the suit.

The question in the appeal is whether the mango tree is moveable or immovable property. The learned advocate for the appellants contended that the question is a question of intention. If the intention was that the plaintiff should enjoy the fruit of the tree and not cut it down as timber, then it was immovable property and could only be conveyed by a registered instrument. Reference was made to S. 3 of the Transfer of Property Act, where it is declared that "Immovable property does not include standing timber, growing crops or grass" and it was argued that these three terms must be treated as ejusdem generis with the common idea of immediate severance. In Shephard and Brown's Commentary on the Transfer of Property Act, the learned commentators say: "In excepting standing timber, growing crops, and grass from the category of immovable property, regard has probably been had to the fact that they are all things usually contemplated as severable, or intended to be severed, from the soil. When such severance is not intended, but on the contrary it is contemplated that the purchaser of the trees should derive some benefit from their further growth, it is an interest in immovable property that the purchaser takes." In S. of the Indian Registration Act "Immovable property" is defined as including certain things, "but not standing timber, growing crops nor grass." Rustomji in his Commentary on this Act says: "If trees are sold with a view to the purchaser's keeping them permanently standing and enjoying them by taking their fruits or otherwise, the sale would be a sale of immovable property. The matter was very fully discussed in *Marshall* v. *Green* (1) where the question was whether a contract for the sale of growing timber was within the fourth section or the seventeenth section of the Statute of Frauds, that is, whether it was for a sale of an interest in land or of a chattel. In his judgment in that case Lord Coleridge, C. J., said, "I find the following statement of the law with regard to this subject, which must be taken to have received the sanction of that learned Judge, Sir Edward Vaughan Williams, in the notes in the last edition of Williams Saunders upon the case of *Duppa* v. *Mayo*, p. 395. The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land: but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold and the contract is for goods." . . . . . Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from any decisions on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees to be taken away immediately was not a sale of an interest in land, but merely of so much timber." Brett J., said in his judgment "If the thing not being *fructuous industrialis*, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself. Here the trees were timber trees and the purchaser was to take them immediately; therefore applying the test last mentioned, the contract was not within the 4th section." Grove J., said "It seems to me that in determining the question whether there was a contract for an interest in land, we must look to what the parties intended to contract for. In all the cases this was

(1) L. R. 1. C. P. D. 35=45 L. J. C. P. 153= 33 L. T. 404=24 W. R. 175.

been made the test. In the case of *Smith* v. *Surman* (2) it was argued by Russell Serjt., that " a sale of crops, or trees, or other matters existing in a growing state in the land may or may not be an interest in land according to the nature of the agreement between the parties and the rights which such an agreement may give, and that view was adopted by the Court in giving judgment . . . . . Here the trees were to be cut as soon as possible: but even assuming that they were not to be cut for a month, I think that the test would be whether the parties really looked to their deriving benefit from the land, or merely intended that the land should be in the nature of a warehouse for the trees during that period. Here the parties clearly never contemplated that the purchaser should have anything in the nature of an interest in the land ; he was only to have so much timber, which happened to be affixed to the land at the time, but was to be removed as soon as possible, and was to derive no benefit from the soil." The same view was taken in *Seeni Chettiar* v. *Santhanathan Chettiar* (3) by the Full Bench, where Collins C.J., said "It has long been settled that an agreement for the sale and purchase of growing grass, growing timber or underwood, or growing fruit not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land." Subramania Ayyar, J. said " It is scarcely necessary to observe that though standing timber is, under the Registration Act III of 1877, movable property only, still parties entering into a contract with reference to such timber may expressly or by implication agree that the transferee of the timber may expressly or by implication agree that the transferee of the timber shall enjoy, for a long or short period, some distinct benefit to arise out of the land on which the timber grows. In a case like that, the contract would undoubtedly be not one in respect of mere moveables, but would operate as a transfer of an interest in immovable property." It is true that a somewhat different view was taken in *Krishnarao* v. *Babaji* (4) where in a case very much like the present their Lordships observed " No doubt by the term " timber " is meant properly such trees only as are fit to be used in building and repairing houses. A mango tree, which is primarily a fruit tree, might not always come within the term, but in this respect the custom of a locality has to be considered;" and it was held with reference to the local custom that a mango tree was a timber tree and therefore an unregistered deed was admissible to prove its transfer.

The learned advocate for the respondent relied on the finding of the Subordinate Judge, that in this part of the country mango trees are timber, and he also referred to a decision of this Court in Second appeal No. 955 of 1922, where this was held to be common knowledge. That, however, was a case relating to trees which had been cut as timber. The present case is a case of a conveyance of a growing mango tree of which, according to the finding of the Subordinate Judge, the plaintiff continued to be in possession and to enjoy the fruits for a period of eight years In these circumstances, it seems to me impossible to hold that the tree was conveyed as standing timber. The parties intended that the plaintiff should enjoy the fruits of the tree for an indefinite period. The immediate, or approximately immediate severence of the tree from the land was not within the contemplation of the parties, as the subsequent events proved. Therefore, in my opinion, this tree was not sold as standing timber, but the transfer was a transfer of an interest in the land. The deed of gift therefore, required to be stamped and registered and the transfer could not be effected by an unregistered chithi or by an oral gift. In my opinion, therefore the plaintiff had no title to this tree and the decision of the learned Munsif was right.

I would, therefore, allow this appeal, set aside the decision of the Subordinate Judge and dismiss the plaintiff's suit with costs throughout.

Appeal allowed.

(2) 9 B. and C. 561=4 M. and Ry. 455=7 L. J. (O. S. K. B. 296.
(3) [1897] 20 Mad. 58=6 M. L. J. 281. (F. B.)
(4) [1900] 24 Bom. 31=1 Bom. L. R. 489

A. I. R. 1926 Patna 128

KULWANT SAHAY, J.

Jagannath Sahu and *another*—Defendants—Petitioners.

v.

Sheogobind Prasad—Plaintiff—Opposite Party.

Civil Revision No. 56 of 1925, Decided on 5th May 1925, from the decision of the District Munsif, Ranchi D/-3rd January 1925.

Civil P. C., O. 23, R. 1—Plaintiff bound to fail owing to substantial defect in plaint—Permission cannot be granted.

The fact that upon the case as made in the plaint the plaintiff could not succeed is no ground for allowing the plaintiff to withdraw from the suit with liberty to bring a fresh suit. Such permission can be granted only when the suit is bound to fail by reason of some formal defect or on other sufficient grounds analogous to those provided for in Sub-Cl. (a). [P 128 C 2

P. K. Mukerji—for Petitioners.

Guru Saran Prasad and *Dhyan Chandra*—for Opposite Party.

Judgment—This is an application in revision on behalf of the defendants against the order of the Munsif of Ranchi passed under O. 23, R. 1, Cl (2) of the Civil P. C granting the plaintiff permission to withdraw from the suit with liberty to institute a fresh suit in respect of the subject matter of the suit.

The learned Munsif has allowed the withdrawal on the ground that upon the case as made by the plaintiff in the plaint the suit could not succeed. The case made by the plaintiff in the plaint was that the property in dispute was the property of Mt. Jamuni, the maternal grandmother of the plaintiff and the plaintiff claimed the property as the assets of Mt. Jamuni claiming to be the heir of Mt. Jamuni. At the hearing of the suit the plaintiff wanted to adduce evidence to show that the property belonged to the husband of Mt. Jamuni and that the plaintiff inherited the property as the reversionary heir of the husband of the lady. The defendant objected to such evidence going in, on the ground that in the plaint he did not claim the property as the heir of Mt. Jamuni's husband. The learned Munsiff says that unless the plaintiff was the heir of Mt. Jamuni's husband the suit would not be successful, because the defendants had produced a Will alleged to have been executed by Mt. Jamuni and had applied for Probate of the Will before the District Judge, and the question was pending before the District Judge. He accordingly gave the plaintiff permission to withdraw the suit. Now, under O. 23, R. 1, the Court could allow a plaintiff permission to withdraw the suit with liberty to institute a fresh suit in respect of the same subject matter only when the suit is bound to fail by reason of some formal defect. Sub-clause (b) of Cl. (2) of R. 1, however, gives the Court power to allow the withdrawal of a suit on other sufficient grounds. The other sufficient grounds, however, have been held by this Court to be grounds analogous to those provided for in sub-Cl (a). In my opinion, the Court had no jurisdiction to grant permission to withdraw the suit, because upon the case as made in the plaint the plaintiff was bound to fail. There is nothing in the plaint or in the order of the Munsif from which it could be held that there was a formal defect or a defect of such a nature as would prevent the suit being properly tried. The fact that upon the case as made in the plaint the plaintiff could not succeed is no ground for allowing the plaintiff to withdraw from the suit with liberty to bring a fresh suit. The conditions under which a suit may be allowed to be withdrawn with permission to bring a fresh suit have been discussed by this Court in the case of *Mahendra Ram* v. *Singi Lal* (1). In my opinion, the learned Munsif was wrong in the present case to allow the suit to be withdrawn with liberty to bring fresh suit.

The order of the Munsif must be set aside, and the suit will proceed in the ordinary course. The petitioners are entitled to their costs hearing fee one gold mohur.

Order set aside.

(1) [1918] 3 P. L. J. 651.

* A. I. R. 1926 Patna 129

ADAMI AND KULWANT SAHAY, JJ.

Ibrahim Hussain Khan and *others*—Appellants.

v.

Sheopratap Narain—Respondent.

Appeal No. 140 of 1924, Decided on 15th May 1925, from the original decree of the Sub-J., Saran, D/- 29th March 1924.

(a) *Limitation Act, Art.* 182—*Execution application in continuation of previous application—Scope of both applications must be the same.*

In order to successfully contend that an application for execution should be considered to be a continuation of the first application, it is necessary for the decree-holder to show that the scope of the second application is the same as that of the previous application. [P. 130, C. 1]

* (b) *Execution of decree — Limitation—Objection to execution raised but dismissed—Appeal against the order by objector does not extend limitation.*

The filing of the appeal by objector against the order dismissing his objection against the execution of the decree does not operate as a bar to the decree-holder taking out fresh execution and, therefore, limitation for fresh application begins from the date of dismissal of the objection.

[P. 130, C. 1]

Noorul Hussain—for Appellants.

Jadubans Sahay—for Respondent.

Kulwant Sahay, J.—This is an appeal by the decree-holder against an order of the Subordinate Judge of Saran, dated the 29th March 1924, whereby he allowed the objection of the judgment-debtor and dismissed the application for execution.

The decree-holder obtained a mortgage-decree on the 28th February 1910. By this decree future interest was not allowed. There was an appeal by the defendant against the mortgage decree and a cross-appeal was filed by the plaintiffs as regards the future interest. The appeal was dismissed by the Calcutta High Court on the 30th July 1914 with costs amounting to Rs. 540-8-6. The cross-appeal of the plaintiff was dismissed for default. An application was made for restoration of the cross-appeal which was allowed and ultimately the cross appeal was decreed on the 16th February 1916, whereby the future interest was ordered to be added to the mortgage-money. The decree was amended accordingly on the 29th August 1917. Pending the hearing of the appeal in the High Court, the plaintiff decree-holder assigned his interest in the decree to one Rai Gulab Chand reserving to himself the costs which might be allowed to him in the appeal to the High Court. The assignee executed his decree and realized the mortgage money. The original decree-holder applied for execution of the decree for costs awarded by the High Court and for realization of future interest by an application filed on the 24th August 1918. This was registered as Execution Case No. 146 of 1918. Two objections were filed to this execution: one by the judgment-debtor and the other by the assignee of the decree. The objection of the assignee was that under the assignment future interest could not be realized by the decree-holder, but the assignee was entitled to the same. The objection of the judgment-debtor related to certain other matters. Both objections were disallowed, the objection of the assignee by an order of the 10th February 1919 and that of the judgment-debtor by an order dated the 12th February 1919. It appears that in the meantime the assignee had filed a formal application for execution for realization of the future interest and costs. This application was filed on the 18th January 1919 and was registered as Execution Case No. 9 of 1919. An objection was filed to this execution by the decree-holder and the application was ultimately dismissed on the 12th February 1919.

Three appeals were preferred to the High Court against these orders. Appeal No. 134 of 1919 was by the judgment-debtor arising out of the Execution Case No. 146; Appeal No. 154 of 1919 was by the assignee and arose out of the same Execution Case No. 146 and Appeal No. 127 of 1919 was also by the assignee against the order passed in his own Execution Case No. 9 of 1919. All these three appeals came on for hearing and were disposed of together by one judgment dated the 10th August 1920. The result was that future interests were declared to be realizable by the assignee and the costs only by the original decree-holder.

The application for execution out of which the present appeal arises was filed on the 10th August 1923 and the prayer was for the realisation of the costs by sale of the remaining mortgaged properties. With the application for execution, however, no list was given of the mortgaged properties, but subsequently a

list was filed setting out the properties which the decree-holder wanted to sell for realization of the costs.

An objection was filed by the judgment-debtor who was the Defendant No. 2 in the case on the ground that the application was barred by limitation and that the decree could not be realized from properties other than the mortgaged properties and the properties from which the decree-holder sought to realize his decree were not the mortgaged properties.

This objection has been allowed by the Subordinate Judge and the present appeal has been preferred by the decree-holder against the order allowing the objection.

As regards the question of limitation, it is clear that the present application was filed more than three years from the date of the execution which was filed on the 24th August 1919. It is, however, contended that on account of the objections filed by the judgment-debtor and the assignee of the decree the decree-holder was prevented from taking out fresh execution. The obstacle which in any way lay in the way of the decree-holder was, however, removed by the dismissal of the objections by the order of the Subordinate Judge passed on the 10th February 1919. After that there was no obstacle in the way of the decree-holder to take out execution of his decree. It is contended that the appeal to the High Court prevented him from taking out execution. The filing of the appeal against the order of the Subordinate Judge by the assignee of the decree could not in any way operate as a bar to the decree-holder taking out fresh execution.

It is next contended that the present application may be considered to be a continuation of the first application. This, however, cannot be considered to be a continuation of the first application; it is necessary for the decree-holder to show that the scope of the present applicationis the same as that of the previous application. This was laid down by this Court in *Kesho Prasad Singh* v. *Harbans Lal* (1). We find, however, that the present execution is against only one of the judgment-debtors named Bajrang Bahadur. The first application for execution was against two judgment-debtors, namely, Bajrang Bahadur and Sheopratap Narain. Moreover the first execution was for the realization of the costs as well as for future interest; the present execution is for the realization of the costs only. In the first execution the prayer was to proceed against the mortgaged properties. In the present case it has been found that the properties sought to be proceeded against are not the mortgaged properties Under the circumstances it is clear that the present application cannot be considered to be a continuation of the first application. The present application is, therefore, barred by limitation and cannot proceed.

As regards the second ground, it is conceded by the learned vakil for the appellant that the decree-holder cannot proceed against the other properties so long as the mortgaged properties are not exhausted. There is a finding that the present properties against which he now seeks to proceed are not the mortgaged properties, and it has not been proved that the mortgaged properties are not available for sale.

Under the circumstances there are no merits in this appeal and it must be dismissed with costs.

Adami, J.— I agree.

Appeal dismissed.

(1) [1920] 2 P. L. T. 22=(1920) P. H. C. C. 109.

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* A. I. R. 1926 Patna 130

DAS AND ADAMI, JJ.

The Midnapur Zamindary Co. Ltd.— Plaintiffs—Appellants.

v.

Ram Kanai Singh Deo and *others*— Defendants—Respondents.

Appeal No. 30 of 1922, Decided on 10th June 1925, from the original decree of the Sub-J. of Manbhum, D/- 17th December 1921.

(a) *Succession Act* (1865), *S.* 179—*'All the property of the deceased' in S.* 179 *includes property held as trustee.*

The words "all the property of the deceased" must be construed as meaning the actual property of the deceased, whether held by him for his own benefit or for the benefit of others: 12 *B. L. R.* 423, *Foll.* [P. 134, C.1]

(b) *Probate and Admn. Act, S. 90—Conveyance without sanction of Court is voidable only by person interested in property.*

Ordinarily an administrator ought to obtain the previous permission of the Court before conveying the property to a third party. But a disposal of the property by the administrator in contravention of the above rule, is only voidable at the instance of any other person interested in the property. In other words, if any objection is to be made to the conveyance of trust property that objection sohuld proceed either from the heirs of the deceased or the heirs of the beneficiaries recognized as such in the deed of declaration of trust. [P 134 C 2]

(c) *Lease—Permanent lease—Lessee never having got possession can yet sue for ejectment or damages and injunction.*

Delivery of possession is not necessary for the completion of a permanent lease under the Transfer of Property Act, and hence a lessee who never got pssession of the land can maintain an action for trespass or for injunction and damages. (*English law referred*). [P 135 C 1]

(d) *Possession—Underground rights—Owner not working the mines may be still in possession.*

The mere omission of the mineral owner to do anything with the subject-matter of his grant will not be a disseisin or dispossession of him in favour of the surface owner. [P 135 C 2]

* (e) *Tort—Action in trespass can be based on constructive possession.*

Constructive possession is a sufficient foundation for an action in trespass. [P 135 C 2]

(f) *Specific Relief Act, S. 54—Plaintiff not in possession can still sue for injunction in a proper case.*

A plaintiff though not in possession, is entitled to sue for injunction if he satisfies the Court that the injury which is apprehended will be either continuous or frequently repeated or very serious: *Wallis* v. *Hands*, (1893) 2 *Ch.* 75, *Expl.* [P 136 C 1]

(g) *Landlord and Tenant—Abandonment by tenant—Mineral rights—Mere non-user is not enough—Landlord treating lease as at an end is not enough unless adverse possession for statutory period is proved.*

Mere non-user does not amount to an abandonment of a tenancy of mineral rights nor does the fact that the proprietor treated the lease as having been surrendered or abandoned in itself prove abandonment by the tenant. What the proprietor understood is of no consequence unless he actually took possession of the demised land and retained possession for the statutory period: *Agency Co.* v. *Short*, (1888) 13 *A. C.* 793, *Ref.* [P 136 C 1, 2]

(h) *Landlord and Tenant—Dispossession of tenant by landlord—Mere refusal to recognize leaze is not enough.*

The refusal by the landlord to recognize lease of mining rights does not amount to dispossession of the lessee. What is wanted on the part of the proprietor is a positive act of dispossession so as to enable him to invoke the doctrine as to lapse of time. [P 137 C 1]

(i) *Adverse possession—Trespasser abandoning possession before statutory period is over—Rightful owner's title is not affected.*

The rightful owner including a lessee may invoke the doctrine as to constructive possession. He may for a time be dispossessed; but when the trespasser abandons possession before the statutory period is over, the rightful owner is in the same position in all respects as he was before the intrusion took place. [P 137 C 1]

P. C. Manuk, *A. Sen* and *S. N. Palit*—for Appellants.

Sultan Ahmed, *C. C. Das*, *L. N. Singh*, *S. M. Mullick* and *N. N. Sen*—for Respondents.

Das, J.—I think this appeal must succeed. The plaintiff Company claims the mineral rights in Perganna Barabhum under a permanent mokarrari lease granted by Raja Braja Kishore Singh Deo, the then proprietor of the Perganna, to one Kenny on the 12th November 1881; and the suit out of which this appeal arises was for a declaration of its title to those rights, for damages, and for a permanent injunction restraining the defendants from carrying on mining operations in the perganna.

The present proprietor (whose estate is under attachment under the provision of the Encumbered Estates Act) has been cited as Defendant No. 1 in the action; Defendant No. 2 is the manager of the estate appointed under the Act. On the 5th September 1911 the present proprietor granted a mining lease of the perganna for 999 years to Herambo Nath Banerji, cited as Defendant No. 3 in the action. Herambo, in his turn, granted a prospecting license to Guzder, the 5th defendant on the 11th February 1920. It is admitted that Guzder is actually carrying on underground operations through his agent, Chandan Singh named as Defendant No. 4. The suit was originally instituted against Defendants Nos. 1 to 4, the plaintiff not being aware that Chahdan Singh was the agent of Guzder. The plaint was subsequently amended and Guzder was added as a party to the suit on the 23rd November 1920.

The defendants contested the suit on grounds which are common to them. The Subordinate Judge has given effect to most of these objections and has dismissed the plaintiff's suit on the following grounds: first, on the ground that the

plaintiff Company has not established its title to the minerals: secondly, on the ground that the plaintiff Company, not being in possession of the thing demised, is incompetent to maintain an action for trespass and therefore for injunction; thirdly, on the ground that there was, by operation of law, an abandonment by Kenny of his interest under the lease of 1881, entitling the proprietor to enter into a fresh arrangement with Herambo; fourthly, on the ground that the suit is barred by limitation; and lastly, on the ground that the plaintiff Company is estopped from disputing the title of Herambo under the lease of the 5th September 1911.

I will first consider the question of title. As I have said, the then proprietor of Barabhum executed a permanent mokarrari lease in favour of Kenny on the 12th November 1881. The validity of the lease was unsuccessfully challenged by the defendants in the Court below, and it was not in controversy before us. We start then with this: that Kenny acquired a permanent, transferable and heritable interest in the minerals in Perganna Barabhum under the lease of the 12th November 1881. Now it appears that though the lease was taken by Kenny in his own name, he was in fact acting on behalf of himself and 11 other persons. On the 24th February 1882 Kenny executed what is called a deed of declaration of trust in which he declared that "he, his heirs, executors, administrators, representatives shall and will henceforth stand and be possessed of the said mines and minerals and all mining rights granted by the said patta . . . . in trust for the said several persons whose names are set forth in the first column of the second schedule hereto according to the shares and interests set opposite to their respective names in the second column of the second schedule hereto." It is not necessary to give the names of the persons interested in the patta of the 25th November 1881: it is sufficient to say that Kenny had three shares, out of 32 and that eleven other persons, whose names appear in the second schedule, had the remaining shares.

On the 28th January 1891 a Company was formed called the Barabhum Co. Ltd., with a view "to acquire lands for the mining purposes and mining rights of all kinds in Manbhum, Singhbhum and Chota Nagpur and elsewhere in British India and in particular the mining rights in Perganna Barabhum acquired by one Nathaniel Kenny under a perpetual lease from Maharaja Braja Kishore Singh, dated the 12th November 1881 and now vested in the said Nathaniel Kenny as trustee in terms of an indenture dated the 24th February 1882." On the 5th February 1891, an agreement for sale of the property which was the subject-matter of the mokarrari patta of the 25th November 1881 was entered into between Barabhum Co. Ltd. and a number of persons called the vendors including all the persons who, according to the deed of declaration of trust, were interested in the patta of the 25th November 1881. By this agreement the vendors agreed to sell to Barabhum Co. Ltd., the underground rights of Perganna Barabhum for the sum of Rs. 32,000 which was agreed to be paid and satisfied by the allotment to them of 320 shares in the capital of the Company. It appears that these shares were allotted to the vendors in the proportion in which they were interested in the lease of the 25th November 1881. It will be noticed that various persons are mentioned as vendors whose names did not appear in the deed of declaration of trust as being interested in the demised property; but the explanation is that these persons came to acquire an interest by subsequent transfers. Meanwhile Kenny died in England before the legal estate could be conveyed. He left a Will of which probate was taken in England. Mr. Foley, acting under instructions from the English executors, and as their constituted attorney, obtained Letters of Administration to the estate of Kenny from the Calcutta High Court on the 21st November 1905 "with effect within the province of Bengal." On the 29th January 1908 Foley, as the Administrator of the estate and effects of Kenny conveyed the property to the Company. On the 14th July 1916, the Company transferred its interest to Billinghurst and on the 14th July 1917, Billinghurst conveyed it to the plaintiff Company.

Now there is no dispute as to the validity or sufficiency of the transactions by which the Barabhum Co., Ltd., conveyed the property to Billinghurst and Billinghurst conveyed it to the plaintiff Com-

pany. The only question is as to the conveyance of the property to Barabhum Co., Ltd. Now Kenny's interest in the thing demised being admitted, what infirmity is there in the title of the plaintiff Company ? The learned Subordinate Judge attacks both the declaration of trust of the 24th February 1882, and the conveyance by Foley to Barabhum Co., Ltd., on the 29th January 1908. He attacks the declaration of trust on the ground that Kenny had no authority to declare himself a trustee for his co-sharers. The view of the learned Subordinate Judge on the point may be stated in his own words : "Under this deed Mr. Kenny constituted himself to be the trustee of the 11 other co-sharers. I do not think that he could constitute himself to be a trustee on behalf of the eleven. He could create a trust and make himself a trustee only in respect of his own property and not in respect of the property of others. He was therefore in my opinion not a trustee, but only a farzidar of those eleven persons in respect of the shares in the leasehold property." It is not necessary for me to say anything more than this that the view of the learned Subordinate Judge cannot be supported for a single moment. The legal title was in Kenny ; but as between him and his co-sharers he was entitled to a small share in the demised property. The deed itself states that the 11 persons, who had a beneficial interest in the demised property, had requested Kenny to execute a declaration of trust in respect of the property. It was but right and proper that Kenny should make an open declaration to the effect that though the legal title was in him, he was holding the property on behalf of himself and eleven other persons. The learned Subordinate Judge has entirely misunderstood the position. It is not that Kenny constituted himself a trustee on behalf of his co-sharers, but that he was, by construction of law, a trustee bound to convey the legal title to his co-sharers, whenever called upon to do so. This is all that the declaration of Kenny amounts to.

The learned Subordinate Judge next turned his attention to the agreement of the 5th February 1891 and found that it was not proved in accordance with law. The learned Subordinate Judge is entirely right when he says that it was for the plaintiff to prove that the twelve persons who were interested in the demised property or their representatives in interest actually executed this agreement. Now it appears that eight of these persons, representing 11 annas share in the subject-matter of the lease, executed this document through their constituted attorneys and it is quite true that there is no evidence in this case that these attorneys had any authority to execute the agreement on behalf of the 11 annas share-holders. The objection as to the sufficiency of proof was taken in the Court below and the learned Subordinate Judge decided, in my opinion, rightly, that no presumption arises under S. 90 of the Evidence Act as to an agent's authority which must be proved in the usual way. I agree that the plaintiff Company has not established that this agreement was executed by all the persons interested in the subject-matter of the lease of the 25th November 1881 ; but, in my opinion, the question as to the proof of this particular document does not fall to be considered. The learned Subordinate Judge made unnecessary difficulty for himself. We know that the legal title in the thing demised was in Kenny although there were various other persons beneficially entitled to specific shares in it. We may put out of our mind the agreement of the 5th February 1891. Kenny died ; and on his death probate was obtained of his Will in England. As I have said, Foley obtained Letters of Administration to the estate of Kenny "with effect within the province of Bengal" Now what is the position? Upon the grant of Letters of Administration to Foley, the demised land (which was then within the province of Bengal) vested in Foley as such administrator ; and Foley was competent to deal with the property in due course of administration. As will be remembered, Foley conveyed the demised property to Barabhum Co., Ltd., on the 29th January 1908. The learned Subordinate Judge objects to this transaction. He remembered that the declaration of trust showed that Kenny was a beneficial owner of only a small share in the property and that in regard to the remaining shares he was a trustee of eleven other persons ; and he thought that as Kenny's Will did not purport to deal with the legal title in the demised property, that title did not vest in Foley so as to enable him to convey it to Barabhum Co., Ltd.

Now it is quite true that Kenny did not deal with the demised property in his Will and the learned Subordinate Judge

is right in saying that "so far as this property is concerned, he died intestate." But even the estate of an intestate has to be administered in due course of law, and S. 179 of the Indian Succession Act says that the "executor or administrator as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." Now what is the meaning of the words "all the property of the deceased? There is high authority for the view that the words "all the property of the deceased" must be construed as meaning the actual property of the deceased, whether held by him for his own benefit or for the benefit of others: —See *De Souza* v. *Secretary of State* (1). There is no reason to doubt therefore that the demised property vested in Foley as such administrator under S. 179 of the Indian Succession Act.

The next question is whether Foley was entitled to convey the property to Barabhum Co. Ltd., Now before dealing with this question let me examine what Foley purported to do. The deed of conveyance of the 29th January 1908 recites the following transactions:—

First, the mokarrari patta of the 12th November 1881 granted by Raja Braja Kishore Singh to Kenny.

Second, the deed of declaration of trust by Kenny by which he declared that he, his heirs, executors and administrators and representatives should and would stand and be possessed of the subject-matter of the lease of 1881 in trust for the several persons whose names appeared in the second schedule of the deed.

Third, the agreement of the 5th February 1891 by which the persons then entitled to the subject-matter of the lease of the 25th November 1881 agreed to sell the mining rights conferred by that lease to Barabhum Co., Ltd., for Rs. 32,000 which sum should be paid and satisfied by the allotment to the vendors of 320 shares in the capital of the Company.

It then recites that the said shares have long since been allotted to the said parties and that ever since the completion of the agreement of the 5th February 1891 the Company has been in possession of the mining rights conferred by the said patta, but that the legal estate was still outstanding in Kenny. In these circumstances Foley, as the administrator of the estate of Kenny, transferred the minin rights conferred by the patta of the 25th November 1881 to Barabhum Co, Ltd.

Now, what is there to object to in the transaction? In point of form, the property stood in the name of Kenny, and Foley, as the administrator of the estate of Kenny, was competent to convey the property to Barabhum Co., Ltd., in due course of administration. If substance is to be regarded, then, there is no doubt that though the legal title was in Kenny the persons who were beneficially entitled to the property had already conveyed their interests to the Barabhum Co. Ltd., for valuable consideration, and were entitled to call upon Kenny or on the administrator after his death to convey the legal estate to Barabhum Co., Ltd. Now it may be said that Foley had no business to convey the property to Barabhum Co., Ltd., without the permission of the Court. The general rule established under S. 90 of the Probate and Administration Act is that ordinarily an administrator ought to obtain the previous permission of the Court before conveying the property to a third party. But then that section provides that a disposal of the property by the administrator in contravention of the rule stated in para. 3 of S. 90 is voidable at the instance of any other person interested in the property. In other words, if any objection was to be made to the conveyance of the 29th January 1908 that objection could proceed either from the heirs of Kenny or the heirs of the beneficiaries recognized as such in the deed of declaration of trust. The objection could neither proceed from the landlord nor from any other party claiming through the landlord. In my opinion the conveyance in favour of Barabhum Co., Ltd., is not open to attack. That being so, the plaintiff Company has clearly established its title to the demised property; for it is not disputed that the Barabhum Co., Ltd., validly transferred the property to Billinghurst on the 14th July 1916 and that Billinghurst validly transferred it to the plaintiff Company on the 14th January 1917.

The next point is whether the present suit by the plaintiff Company is maintainable. The learned Subordinate Judge has shown some research into the intricacies of the English common law. He says that neither the plaintiff Company nor its predecessors ever got possession of

(1) [1874] 12 B. L. R. 423.

the demised property ; and that that being so, the demise only gave the lessee a right of entry in the property or, which is the same thing, an *interessee termini* which is not sufficient as a foundation for an action for trespass or a suit for injunction and damages. Now, so far as I know, this doctrine has been applied in England only to leases for years ; it has, for instance, never been applied to what are known as freehold leases. Now the lease with which we are concerned is a perpetual lease, a lease creating a permanent, transferable and heritable interest in the thing demised, in which the landlord has no right of reversion. *Sonet Kooer* v. *Himmut Bahadoor* (2). A lease of this nature is, so far as I am aware, unknown to the Euglish common law, and I do not think that it is quite necessary to apply a doctrine applicable to English leases which is unknown to English Law In the next place it is as well to look to the definition of a lease in the Transfer of Property Act, a statute with which we should be acquainted. At common law, possession under the instrument is necessary to complete a lease, so that after a lease has been granted and before actual entry has been made by the lessee, he is for many purposes not a tenant. Under the Transfer of Property Act a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. It will be noticed that delivery of possession is essential to the completion of a lease under the Transfer of Property Act only where it has been made by oral agreement ; and a lease by oral agreement cannot be made where it is from year to year or for any term exceeding one year or reserving a yearly rent. Now if, as I hold, delivery of possession is not necessary for the completion of a permanent lease under the Transfer of Property Act, I do not see why we should import into our system the complications of English Law where delivery of possession is necessary to complete a lease. In the third place, what foundation is there for the suggestion that the plaintiff Company is not in possession? By possession is, and must be, meant possession of that character of which the thing is capable. We are concerned in this litigation with underground rights which are not capable of possession as a house, a watch or a ring is. For many purposes the law regards the right to possession as equivalent to possession, especially when the property is not in the actual possession of any one. It is quite true that the plaintiff Company has not yet worked the mines ; but "the mere omission of the mineral owner to do anything with the subject-matter of his grant will not be a disseisin or dispossession of him in favour of the surface owner:" (see Pollock and Wright on Possession, p. 87). Now obviously there is no question of a "disseisin" unless, to start with there is a seisin, and, in my opinion, the question, the omission of the mineral owner to work the mines does not show that he is not in possession of the mines. I hold that the plaintiff Company was in constructive possession of the thing demised and that constructive possession is a sufficient foundation for an action in trespass (Clerk' and Lindsell on Torts, 6th edition, 380). In the fourth place, it is not necessary to embarrass ourselves with a discussion as to forms of action known to English common law. If it were necessary to do so, one might say that though a person, not in possession, is not entitled to maintain trespass, he is entitled to maintain trover and to recover the value of personal chattels wrongfully converted by another to his own use. It is necessary to see what is the substance of the plaintiff Company's claim in this case. There is an injury to the plaintiff Company's right both actual and threatened. It has proved its title. It shows that the defendants or some of them have carried away coal which belong to it, and are threatening to carry more coal or convert that coal to their personal use. Is it to be supposed that the plaintiff Company has no remedy because it is not in actual possession of the thing demised ? Now, even at common law, a tenant having a mere *interessee termini* could maintain an action for damages for recovering the value of coal wrongfully converted by another to his own use and he could also maintain an action for injury to his rights:—*Gillard* v. *Cheshire Lines Committee* (3) and these are remedies which the plaintiff Company

(2) [1876] 1 Cal. 391=3 I. A. 92=25 W. R, 299=3 Sar. 608 (P. C.).

(3) 32 W.R. 943.

is seeking in this case. In regard to the question of injunction, the case upon which the learned Subordinate Judge relies does not in my opinion establish that a plaintiff, not in possession, is not entitled under any circumstances to injunction, even if he satisfies the Court that the injury which is apprehended will be either continuous or frequently repeated or very serious. The case of *Wallis* v. *Hands* (4) was decided on its own facts and is not an authority for the proposition that "a man having only *interessee termini* cannot bring a case for injunction." In my opinion the plaintiff Company is entitled to maintain this action.

The next question is whether there was by operation of law an abandonment or surrender of the lease by Kenny. There is no doubt that the plaintiff Company has not worked the mines; but there is ample authority for the view that mere non-user does not amount to an abandonment. The passage which I have already cited from Pollock and Wright may be referred to in this connexion. It is not necessary to cite authorities; for the principle is well recognized. The learned Subordinate Judge relies upon the following circumstances in support of his theory as to abandonment: He says that in 1901 the proprietor treated the lease as having been surrendered or abandoned. In 1904 the manager of the proprietor granted a prospecting license to Messrs. Mackinnon Mackenzie & Co., whose agent Robinson worked a particular kind of mineral called galena in one of the mouzas called Beldi; and the learned Subordinate Judge says that "the inference is that when the zamindar found that for a period of 20 years the lessee had not worked but had left the country, he inferred that the lessee had surrendered the lease and entered upon possession," and he says that, since the zamindar entered upon possession, the lease was extinguished. There is, in my opinion, neither principle nor authority in favour of the startling proposition laid down by the learned Subordinate Judge. A contention very much like the one which found favour with the learned Subordinate Judge was advanced before the Privy Council in *Agency Co.* v. *Short* (5), Lord Macnaghten in dealing with the contention said that in the case of mines the doctrine contended for might lead to starting results and produce great injustice. It is quite true that the proprietor treated the lease as having been surrendered in 1901: but what he understood is of no consequence unless he actually took possession of the demised land and retained possession for the statutory period. It is quite true that in 1904 he granted a lease to Messrs. Mackinnon Mackenzie & Co., and that Mackinnon Mackenzie & Co. worked the galena in one of the mouzas comprised within the perganna. It is not suggested that any of the subsequent lessees has been in possession for the statutory period. That being so, there was no abandonment of his interest by Kenny.

I will now deal with the question of limitation. The defendants rely upon the following facts as establishing that the plaintiff's suit is barred by limitation. On the 9th November 1909 a letter was written by Mathewson as putnidar of the perganna contending that the mining rights in the perganna belonged either to the Government or to him as representing the zamindar. This letter throws no light on the question of possession. On the 21st October 1905 the proprietor gave a mining lease to Sullivan. Admittedly Sullivan has never worked the mines and he surrendered the lease by registered document. No question of dispossession, therefore, arises. Between August 1904 and September 1905 Messrs. Mackinnon Mackenzie & Co. worked a particular kind of mineral called galena in village Beldi under a license from the Manager of the Encumbered Estate. The extent of that working is shown by the local inspection note of the learned Subordinate Judge and the amount of the working is to be found in Ex. R. It appears that they took Rs. 17,415 worth of galena and that they paid the Raja Rs. 162 as balance of the royalty due. It may be admitted that there was an ouster of the plaintiff Company or its predecessors in title by Messrs. Mackinnon Mackenzie & Co. of village Beldi comprised within the perganna between August 1904 and September 1905; but Messrs. Mackinnon Mackenzie & Co. entered upon possession without title for the proprietor had no power to grant a lease to Messrs. Mackinnon Mackenzie & Co. They ceased to work in September 1905; and the rightful owner, that is to

(4) [1893] 2 Ch. 75=62 L. J. Ch. 586=3 R. 351=68 L.T. 428=41 W.R. 471.
(5) [1888] 13 A. C. 793.

say, the plaintiff Company, or its predecessors-in-title, on Messrs. Mackinnon Mackenzie & Co., abandoning possession of the mouza was in the same position in all respects as it was before the intrusion took place. As Lord Macnaghten in *Agency Co.* v. *Short* (5) says : "There is no one against whom he can bring an action. He cannot make an entry upon himself." Time undoubtedly began to run as against the plaintiff Company in August 1904 in regard to mouza Beldi ; but in my opinion it ceased to run in September, 1905 when Messrs. Mackinnon Mackenzie & Co. abandoned possession of the mouza. On the 15th June 1906 the Manager of the Encumbered Estate wrote a letter to Messrs. Hoare Miller & Co., the managing agents of Barabhum Co. Ltd., informing them that the Raj ignored Kenny's lease. The Manager in his letter said : "The mining rights have remained latent from the date and year the lease was granted." Messrs. Hoare Miller & Co., replied to this letter which has not been put in by the defendants. On the 24th June 1906 there was another letter from the manager in which he repeated that the proprietor refused to recognize Kenny's lease. In my opinion the refusal to recognize Kenny's lease did not amount to dispossession. What was wanted on the part of the proprietor was a positive act of dispossession so as to enable him to invoke the doctrine as to lapse of time. As I have said, the rightful owner may invoke the doctrine as to constructive possession. He may for a time be dispossessed ; but when the trespasser abandons possession, the rightful owner, to quote the words of Lord Macnaghten, "is in the same position in all respects as he was before the intrusion took place." The letters, Exs. G-1 and G-2 throw no light whatever on this point. On the 9th April 1907 the Raj gave a lease to Gobind Bose. It is not suggested that Gobind Bose took possession by virtue of this lease or carried on any underground operations. One may therefore ignore Gobind Bose's lease. On the 5th September 1911 the Raj gave a lease to Herambo who in his turn granted a prospecting license to Guzder on the 5th June 1919 and again on the 11th February 1920. It is not suggested that Herambo, Defendant No. 3, took possession by virtue of his lease or that he carried on any underground operations. The plaintiff's cause of action arose for the first time when Guzder, through Chandan Singh, began to act under the prospecting lease. The suit having been instituted on the 14th June 1920 is amply within time.

The last question is as to estoppel. It is difficult to understand the view of the learned Subordinate Judge on this point. It is contended that "as the predecessors-in-interest of the plaintiff Company by not working the minerals in the perganna made the defendant believe that the zamindar had the right to settle the minerals and as in that belief he paid Rs. 25,000 as salami to him for the lease of the minerals, the plaintiff Company, is estopped from claiming a leasehold interest in the minerals as against him." In my opinion it is only necessary to state the proposition to reject it. I hold that there is no question of estoppel to be tried.

I would accordingly allow the appeal, set aside the judgment and the decree passed by the Court below. The plaintiff Company is entitled to a declaration of title in its favour and to a permanent injunction restraining the defendants and their agents and servants from working and appropriating the minerals in perganna Barabhum. The plaintiff Company is also entitled to its costs in this Court and in the Court below.

Adami, J.—I entirely agree.

✻ A. I. R. 1926 Patna 137

ADAMI AND KULWANT SAHAY, JJ.

Sudha Krishna Mukerji—Appellants.

v.

East Indian Railway Co.—Respondents.

Appeal No. 37 of 1922, Decided on 22nd May 1925, from the appellate decree of the Addl. Sub-J., Hazaribagh, D/- 27th September 1921.

✻ *Railways Act, S. 72—Risk Note A—Loss due to unsound packing is covered by the note—Admission of loss discharges burden on company's part.*

Risk Note A would absolve the Company from any responsibility for loss owing to the bad condition of the bags throughout the period of transit, and the period of transit would commence from the time that the bags were received and were carried to the train. The question of onus will not be the same in regard to the Risk Note in Form A as it is in regard to the Risk Note in From B. The two indemnities are quite different. It is not necessary for the defendant Company to prove that there has been such loss or damage as is contemplated in the Risk Note, where it is clear from the admissions that there was such loss and damage. [P 138 C 2]

B. C. De—for Appellant.

S. N. Bose—for Respondents.

Adami, J.—The plaintiff-appellants are merchants in Giridih. They ordered a consignment of rice from Burma and this consignment duly arrived at the Kidderpur docks in Calcutta. Their agent in Calcutta delivered this rice, which on weighment was found to amount to 2,473 maunds, to the East Indian Railway at the Kidderpur Dock. The Railway Company seeing that the bags in which the rice was contained were unsound and had holes in them, and that the seams were weak, refused to take the consignment unless the consignor agreed to sign a Risk Note in Form A. The Risk Note was signed by the consignor and showed that the weight of the rice delivered to the Railway Company was 2,473 maunds. The consignment was received on the 3rd November and was delivered at Giridih. On arrival at Giridih and on weighment of the consignment it was found that there were 2,268 maunds in the bags. The plaintiffs thereafter instituted the suit out of which the second appeal arises claiming damages for the shortage of the consignment delivered. The Munsif decreed the plaintiff's suit, but the Subordinate Judge has reversed the finding on appeal and has dismissed the suit except as regards the freight paid by the plaintiff for 108 maunds of the rice.

The line of argument taken up before us is that though it has been found that no loss can have happened during the time that the rice was actually in the train, since the seals on the wagon were found to be intact, the defendant Railway Company would have to show that the loss did not occur after the rice was received on the 3rd November and before it was put into the Railway wagon. It is argued that the Risk Note in Form A does not cover this period.

Now, in the first place, there is no evidence to show that the Railway Company stored the rice for any time before putting it into the train. It appears that it was taken from the steamer in the dock and put into the railway wagon as soon as possible. In the second place, there can be no doubt from the time when the rice was delivered to the Railway Company up to the time it was delivered at Giridih the consignment was in transit and was covered by the Risk Note in Form A.

The material portion of the Risk Note in Form A is as follows:—

"Whereas the consignment.....is in bad condition and liable to damage, leakage or wastage in transit, I the undersigned do hereby agree and undertake to hold the said Railway administration..... harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same."

It is clear in my mind that this Risk Note would absolve the Company from any responsibility for loss owing to the bad condition of the bags throughout the period of transit, and the period of transit would commence from the time that the bags were received and were carried to the train. It may be true that it was not found that any grain escaped while the rice was in the wagon, but it is quite possible that while the bags were being taken to the train the loss occurred owing to their bad condition. The Risk Note frees the Railway Company from responsibility for any loss arising from the condition in which the goods packed in these unsound bags might be delivered to the consignee. The learned Subordinate Judge has come to a definite finding that the loss was due to the defective condition of the packing and I think that that finding is sufficient to absolve the Company from responsibility.

It has been argued that the onus would fall on the defendant Company in the first place to show that the loss was one such as is contemplated by the Risk Note, and, I think, that the admission of the plaintiffs that the bags were in poor condition was sufficient to save the defendant from discharging such onus if such discharge was necessary. The question of onus will not be the same in regard to the Risk Note in Form A as it is in regard to the Risk Note in Form B. The two indemnities are quite different. It is not necessary for the defendant Company to prove that there has been such loss or damage as is contemplated in the Risk Note because it is clear from the admissions that there was such loss and damage.

There is no reason, I think, to interfere with the finding of the learned Subordinate Judge and I would, therefore, dismiss the appeal with costs.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 139

BUCKNILL, J.

Ramsakal Rai and *others*—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 248 of 1925, Decided on 11th June 1925, from an order of the S. J., Shahabad, D/- 17th March 1925.

Criminal P. C., S. 257—Magistrate deciding to call a witness should take steps to produce him but he can dispense with his presence if he finds it unnecessary.

As a general proposition it should be considered that once a Magistrate has given orders that a certain witness should be called he should take such steps as may be necessary and possible to enforce his attendance, but it cannot be suggested that in no case it is possible for the Magistrate, if he comes to the conclusion that the attendance of the witness is not really necessary, to dispense with that person's attendance. [P. 140, C. 2]

Devaki Prasad Sinha—for Petitioners.

D. L. Nandkeolyar—for Opposite Party.

Judgment.—This was an application in criminal revisional jurisdiction made by some persons who were convicted by the Deputy Magistrate of Arrah on the 16th of February last of offences punishable under the provisions of Ss. 143 and 379 coupled with S. 34, Indian Penal Code. The applicants appear to have been sentenced each to pay a fine of Rs. 50 under the provisions of S. 379, Indian Penal Code, and in default of payment thereof to undergo rigorous imprisonment for two months, no separate sentence was passed upon them in connexion with the provisions of S. 143, Indian Penal Code.

The only ground which has been put forward upon which it is urged that this Court should interfere, is because it is suggested that there has been a wrongful exercise of jurisdiction by the Deputy Magistrate in connexion with the procedure. It is unnecessary to go into the facts relating to the offences with which these men were charged further than to say that the affair related to blocking up of a water-course. In the course of the trial, which proceeded in the usual manner, a certain Sub-Inspector of Police was examined as a witness for the prosecution, he was cross-examined at considerable length by the defence. Now, it would seem that the defence wished to call this Sub-Inspector either as a defence witness or for the purpose of what was in effect further cross-examination: and on the 28th of January last it seems that the Magistrate at that time was ready to agree that this should be done. At a later stage, however, namely, on the 9th of February he altered his view. The note in the order sheet of the 28th of January last, so far as it is here material, reads: "The defence prays that Sub-Inspector of Sahar who had been summoned has not turned up to-day and his evidence is necessary. Summon him afresh." The Magistrate's note on the 9th of February last reads: "The defence filed a petition that the Sub-Inspector is not forth-coming to-day and that his examination is necessary as a defence witness. It appears that he was examined as a prosecution witness (No. 5) and he was cross-examined at length by the defence side. I have already granted two adjournments for this, and I cannot wait any longer for time now.

Now it is suggested that this action taken by the Deputy Magistrate is illegal. The Deputy Magistrate, in his explanation which appears to be dated about the 28th of May last, says:

"The Sub-Inspector in question was examined as a prosecution witness (No. 5) on 3-1-25.

Charge was framed against the accused on 14-1-25, and the accused persons had ample opportunity of cross-examining the Sub-Inspector before charge and after the charge.

The Sub-Inspector was cross-examined at great length by the defence side on 15-1-25, and then discharged.

Technically speaking, the Sub-Inspector could not have been summoned as a defence witness, under such circumstances. He could have only been summoned under S. 257, Criminal P. C., for further cross-examination, on the discretion of the Court, if the Court was satisfied that it was necessary. But no such necessity appears to have been mentioned in the petitions of the accused, dated 28-1-25 (vide flag A) and 9-2-25 (vide flag B). Even then I had granted two adjournments for this. But the Sub-Inspector was not available. So I did not think it proper to drag on the case any more, thereby causing delay in the administration of justice."

Now the defence applied to the Sessions Judge of Shahabad upon this point

and the learned Sessions Judge dealt with the matter on the 17th of March last. It is perhaps useful to refer to what the learned Sessions Judge has said in his judgment. It reads: "On behalf of the petitioners it has been urged that once the Magistrate had directed that the police Sub-Inspector should be re-called for cross-examination after the accused had entered on their defence, he was bound to insist, on his appearance. The proposition so stated is not without force. But in this case the petitioner had had an opportunity of cross-examining the Sub-Inspector before the framing of the charge and had cross-examined him at some length after the charge had been framed. The attendance of the Sub-Inspector therefore was not to be compelled unless it was necessary for the purpose of justice. It appears that his non-attendance on the first date, 28th January 1925, was due to the fact that he never received the summons till 31-1-25 (the application for his attendance made by the accused was filed so late as 23rd January 1925) and that it was due on the second date, 9th February 1925, to his inability to attend the Court owing to an accident. It is now said that the petitioners wished to question this officer for the purpose of finding out whether he had observed any sign of the placing of the karah in, or of the removal of the karah from, the pyne, a question of importance which they had omitted when the officer was cross-examined. I have consulted the record of the case, and am doubtful whether the Sub-Inspector could have afforded useful assistance to the Court on this point. There is no doubt but that pyne was blocked and that of the materials used for this purpose bamboos and paddy bundles formed a part; there is corroboration here of the prosecution story. I am not satisfied that this is a fit case for interference."

I entirely agree with what the learned Sessions Judge has written. The question of the sauce-pan appears to me to be one of very slight importance. As the learned Judge has pointed out, the principal matter was the blocking up of the pyne with various materials and what assistance could seriously have been afforded to the defence by the police officer's remarks upon a sauce-pan it is difficult to gather. Did I in the least think that the applicants had been in any way prejudiced by what has taken place I should have no hesitation in interfering, but as it has in no way been shown or proved to me that there has been the least prejudice against the applicants I do not think that it is proper that I should interfere. It may be said, as has been pointed out by the learned Sessions Judge, that as a general proposition it should be considered that once a Magistrate has given orders that a certain witness should be called he should take such steps as may be necessary and possible to enforce his attendance. I, however, am not prepared to assent to the suggestion that in no case it is possible for the Magistrate, if he comes to the conclusion that the attendance of the witness is not really necessary, to dispense with that person's attendance. In this case the circumstances were such that I think he was not only competent to dispense with this Sub-Inspector's further attendance, but that he was right in so doing.

The application, therefore, will be dismissed.

Application dismissed.

✻ A. I. R. 1926 Patna 140

MULLICK AND KULWANT SAHAY, JJ.

Badri Sahu and *others*—Decree-holders—Appellants.

v.

Pandit Peare Lal Misra and *others*—Judgment-debtors—Respondents.

Miscellaneous Appeal No. 58 of 1925, Decided on 23rd October 1925, against an order of the Sub-J., Muzafferpur, D/- 22nd December 1924.

✻ *Civil P. C., O. 21, Rr. 66 and 72—Price in proclamation is not an exact estimate—Court cannot compel decree-holder to bid up to or higher than the proclaimed price.*

There is no provision of law compelling the decree-holder to bid up to any sum that may be fixed by the Court. The valuation in the sale proclamation is intended primarily for the protection of the judgment-debtor and for giving information to the bidders at the auction sale. It is in no sense intended to be an exact estimate of the value of the property, and if in a sale properly published and conducted, the highest bid, whether of the decree-holder or any other person, is some figure below the figure given in the sale proclamation, it is not competent to the Court to compel the decree-holder to bid higher than that highest bid. [P. 141, C. 1]

Lakshmi Narayan Singh—for Appellants.

Mullick, J.—No one appears to oppose this appeal. It appears that the decree-holder valued the property for the purposes of sale proclamation at Rs. 1,600. At the sale the decree-holder bid up to Rs. 600, but the Munsif declined to allow him to purchase the property unless he bid up to Rs. 1,300. As the decree-holder was unwilling to do so the sale was not held and the execution case was dismissed. The decree-holder then appealed and the Subordinate Judge who heard the appeal agreed with the Munsif. The present second appeal is preferred by the decree-holder.

There is no provision of law compelling the decree-holder to bid up to any sum that may be fixed by the Court. The valuation in the sale proclamation is intended primarily for the protection of the judgment-debtor and for giving information to the bidders at the auction sale. It is in no sense intended to be an exact estimate of the value of the property and if in a sale, properly published and conducted, the highest bid, whether of the decree-holder or any other person, is some figure below the figure given in the sale proclamation, it is not competent to the Court to compel the decree-holder to bid higher than that highest bid.

The order of the Subordinate Judge will be set aside and the appeal will be decreed and the decree-holder's bid of Rs. 600 must be accepted.

Kulwant Sahay, J.—I agree.

Appeal allowed.

A. I. R. 1926 Patna 141

DAS AND ADAMI, JJ.

Bhatu Ram Modi and *another*—Defendants—Appellants.

v.

Fogal Ram—Plaintiff—Respondent.

Appeal No. 98 of 1922 Decided on 3rd November 1925, from a decision of the Sub-J., Hazaribagh, D/- 21st January 1922.

(a) Civil P. C., O. 20, R. 12—Decree for mesne profits passed—Application for ascertainment cannot be dismissed.

After decree for possession and mesne profits has been passed, the proceedings for the ascertainment of mesne profits cannot be dismissed, for the dismissal of those proceedings would operate as a dismissal of the suit itself. Dismissal of such proceedings is ultra vires: *A. I. R.* 1924 *P. C.* 198, *Foll.* [P. 142, C. 2]

(b) Civil P. C., O. 20, R. 12—Application for mesne profits—Law of limitation does not apply.

An application for mesne profits is an application in the suit itself and the law of limitation has no application to it so long as the suit is a pending suit. [P. 142, C. 2, P. 141, C. 1]

Sultan Ahmed and *S. N. Dutt*—for Appellants.

S. M. Mullick and *B. C. De*—for Respondent.

Das, J.—On the 25th August 1915 the Ramgarh Raj obtained a decree for possession of certain properties, for mesne profits up to the date of the decree "at the rate of the rent fixed in the lease with interest thereon at the rate specified in the said lease" and for subsequent profits "at the full rate recoverable under the law." The Ramgarh Raj obtained possession of the properties on the 22nd February 1916 and it therefore became entitled to mesne profits at the rate of rent up to the 25th August 1915 and at the full rate from the 25th August 1915 to the 22nd February 1916.

On the 23rd December 1915 the Raj presented an application for execution claiming Rs. 2,866-14 as mesne profits for eleven years up to the date of the decree and Rs. 1,069-11-9 as mesne profits from the date of the decree up to the 23rd December 1915. The application was presented as a simple application for execution of the decree, the Raj and its legal advisers having overlooked the fact that under the Code of Civil Procedure of 1908 ascertainment of mesne profits was a proceeding in the suit itself. Certain proceedings were taken and certain properties of the judgment-debtors were sold in this execution; but an objection having been taken the sale was set aside on the 8th December 1917 and the decree-holder was directed to file fresh execution. On the 13th August 1919 another execution case was started by the Raj. On the 11th November 1919 this was rejected as infructuous, because certain substitutions had not been effected. On the 7th March 1920 the third execution case was started. The judgment-debtors now for the first time raised the objection that mesne profits could not be ascertained in execution and that there was no application for ascertainment of mesne profits and that the application for

execution could not be converted into an application for ascertainment of mesne profits. On the 17th April 1920 the Court dismissed this application as barred by limitation. The Court also held that the proceedings could not continue, as mesne profits had not been ascertained which must be ascertained in a proceeding in the suit itself. The decision of the Court on the question of limitation was subsequently set aside by that Court on review and that decision was upheld by this Court. Having regard to this decision Fogal Ram, who meanwhile had purchased the decree from the Raj instituted the present proceedings on the 29th April 1920 for the ascertainment of mesne profits. His application has succeeded and the judgment-debtors appeal to this Court and they contend that having regard to the previous orders, namely, those passed on the 8th December 1917, 11th November 1919 and the 17th April 1920, the present application was not maintainable. The matter was heard before my learned brother and myself on the 5th May 1925 when we delivered judgment agreeing with the contention of the appellants. Mr. B. C. De thereafter appeared before us before we had signed the judgment and he asked for permission to argue the matters again before us. We acceded to the request and we have heard the parties fully to-day. In my opinion, having regard to the argument which have been advanced before us to-day, we must affirm the decision of the lower Court and dismiss this appeal.

The short point which falls to be considered is whether there is any power in a Court to dismiss an application for ascertainment of mesne profits. It is contended before us by Mr. Susil Madhab Mullick that a decree having been passed for ascertainment of mesne profits it was not competent to the Court at any stage to dismiss those proceedings, it being beyond the power of a Court to dismiss a claim which had already been decreed; and it was contended that if the previous applications be regarded as applications for the ascertainment of mesne profits, then the dismissal of those applications were from one point of view illegal and that in any case they could not prevent the decree-holder from inviting the Court to carry into effect the decree of the High Court dated the 25th August 1915. This view is supported by the decision of the Judicial Committee in *Lachmi Narain Marwari* v. *Balmakund Marwari* (1). That decision was pronounced in a suit for partition. A preliminary decree for partition was made and all that remained to be done was to carry the partition into effect. The Subordinate Judge accordingly fixed a date for hearing the parties as to how the partition was to be effected and gave them notice; but the plaintiff did not appear on the date fixed and thereupon the Subordinate Judge dismissed the suit for want of further proceedings. With reference to what was done by the Subordinate Judge, their Lordships said as follows. "After a decree has once been made in a suit, the suit cannnot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can apply to have it enforced;" and then their Lordships said this: "If, for instance, the Subordinate Judge has made an order adjourning the proceedings sine die, with liberty to the plaintiff to restore the suit to the list on payment of all costs and Court-fees thrown away, it would have been a perfectly proper order."

Now it seems to me that this case decides the present controversy between the parties. The decree of the 25th August 1915 in terms gave a decree to the plaintiff for mesne profits. There was, therefore, a valid decree which was operative and which the Court had to carry into effect. That decree was not set aside and it seems to me that the proceedings for the ascertainment of mesne profits could not be dismissed, for the dismissal of those proceedings would operate as a dismissal of the suit which had already been decreed by the Calcutta High Court.

The question only arises as it is contended before us that although in form the previous applications may have been applications for execution of the decree, in substance they were applications for ascertainment of mesne profits. I hold that if they were applications for the ascertainment of mesne profits, their dismissal was ultra vires and that it was open to the plaintiff to ask the Court to ascertain the mesne profits. It is well established that an application for mesne

(1) A. I. R. 1924 P. C. 198.

profits is an application in the suit itself and that the law of limitation has no application to it so long as the suit is a pending suit.

Mr. Sultan Ahmed ingeniously argued before us that a distinction should be drawn between a suit and a claim which may be involved in the suit. He admits that the suit having been decreed it was not in the power of the learned Subordinate Judge to dismiss the suit; but he contended before us that the claim for mesne profits stood on a different footing. I am unable to agree with this contention. The only part of the suit that remained was that dealing with the question of mesne profits payable to the plaintiff; and in any view the claim for mesne profits had in distinct terms been decreed by the Calcutta High Court, and that being so, that claim could not be dismissed by the learned Subordinate Judge.

I would accordingly dismiss this appeal. There will be no order as to costs.

It was brought to our notice that the lease does not provide for the payment of any interest. That being so, the plaintiff will be only entitled to mesne profits at the rate of rent fixed in the lease up to the date of the decree.

Adami, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 143

BUCKNILL AND ROSS, JJ.

Deonarayan Singh—Judgment-debtor—Appellant.

v.

Ram Prasad and *another*—Decree-holders—Respondents.

Appeal No. 52 of 1925, Decided on 19th June 1925, from the appellate order of the Dist. J., Gaya, D/- 18th December 1924.

Limitation Act, Art. 182—Setting aside of sale under O. 21, R. 90, Civil P. C.—Second application for execution after the setting aside of sale is in continuation of the first one in which sale was held—Decree-holder's right revives on the date of setting aside the sale.

A landlord decree-holder applied for execution of a rent-decree when the Executing Court held that the execution should proceed as on the basis of a money-decree and not as a rent-decree. It proceeded in that way, and the sale of certain property of the judgment-debtor was actually confirmed and the case was dismissed on full satisfaction. On the same day, the judgment-debtor put in a petition to set aside the sale under the provisions of O. 21, R. 90, and eventually the sale was set aside; the decree-holders then applied once more to execute their decree as a rent-decree.

Held: that the second application should be treated as a continuation of the preceding application inasmuch as the prayers in both were to execute the decree as rent-decree and further that the decree-holder's right to execute the decree revived on the day the sale was set aside.

[P 142 C 2, P 144 C 1]

S. N. Roy—for Appellant.

Ragho Prasad—for Respondents.

Bucknill, J.—This was a second appeal. The appellant was a judgment-debtor in a suit brought by the respondents who were decree-holders. The present appeal arises out of certain execution proceedings. Apparently as long ago as 24th July 1920 the respondents obtained a decree against the appellant. On the 21st May 1923 the decree-holders presented a petition for execution, and on the 19th November 1923 it would appear that a sale took place of the property. I may say that it would seem that this decree was obtained by the respondents as co-sharer landlords and notice had been issued by them against other cosharer landlords under the provisions of the Bengal Tenancy Act. For some reason or other this notice was stated not to have been properly served and the Munsif, before whom the matter in execution then was, insisted that the execution should proceed as a money-decree and not as a rent-decree. It appears to have proceeded in that way. The sale was actually confirmed on the 20th December 1923 and we are told that the case was dismissed on full satisfaction. However, according to the information before us, on the same day, (that is on the 20th December 1922), the judgment-debtor put in a petition to set aside the sale under the provisions of O. 21, R. 90. Now, we are told that the ground upon which it was asked that the sale should be set aside was that the price in the sale proclamation at which the property was valued was not adequate. Eventually, on the 8th March 1924, the sale was set aside, and on the 24th of the same month the decree-holders then applied once more to execute their decree.

They still asked to execute the decree in precisely the same manner as they had asked to execute it in the first instance, namely, as a rent-decree. Now to this the judgment-debtor objected on the principal ground that the application was more than three years from the date of the original decree. As I have said, the original decree was dated the 24th July 1920, the first application for execution was dated the 21st May 1923 and this last application for execution was dated the 24th March of last year. Now, the decree-holders have maintained that limitation does not apply. They contend that the present application should be treated as essentially a continuation of the preceding application. The Munsif of Gaya, after hearing the parties, came to the conclusion that this present application was rightly to be regarded as a continuation of the preceding one and accordingly, by his order dated the 26th July 1924 disallowed the objection which had been made to the present application for execution. The judgment-debtor appealed from this decision to the District Judge of Gaya, who on the 18th December, confirmed the Munsif's decision. Now, before the District Judge, it would seem that not only was this point as to the present application being not in continuation of the previous application urged but also that the present application was not of the same character as the first application. I think it is simplest to deal with the latter of these two questions first.

It is quite clear that the first application for execution was an application to execute the decree as a rent-decree. It seems true that owing to the decision of the Munsif at that time, and owing to the fact that he found that there had been some failure of service on the cosharers, the actual decree which was executed was a money-decree, but, as has been pointed out by the learned District Judge, the present application for execution is to renew the application for execution as a rent-decree and not as a money-decree, and I presume that the service will be properly effected upon this occasion. I am, therefore, unable to see how it can be seriously contended that the first and the second applications are not the same.

With regard to the first point: I think that it is important to observe that during all material periods under consideration the decree-holders had de facto and de jure obtained the realization of their decree. It was not until the 8th March 1924 that it was possible for them to have taken any further step. According to the position as it then stood their claim had been satisfied by a sale of the property. It was not until that satisfaction was negatived, as I have just mentioned, that he was in a different position. He could have taken no step in the *interim* to apply for further execution or for a renewal of execution; for, had he done so, he would obviously have been met with the rejoinder that as matters stood his decree had already been realized in full satisfaction; that he should be prevented when the sale was set aside from applying to obtain what was justly due to him by execution would obviously to my mind be a gross inequity.

However, the learned advocate, who has appeared for the appellant here, has suggested that the present application is not in law a continuation of the preceding application. I should like, however, to point to a case which has been decided in this Court: *Kaniz Zohra* v. *Syam Kisen* (1), in which the position which obtains here, except in one point, to which I propose presently to refer, was there substantially the same. In that case decided by the then Chief Justice (Sir Edward Chamier) and Mr. Justice Jwala Prasad it would appear that a decree had been obtained by the plaintiff in a suit on the 20th June 1905. In August 1906 the first application for execution was made. It would seem that this application for some reason was dismissed; probably, (although it is not clear from the report) because it was not proceeded with. A second application was made in July 1909 and the judgment-debtor's immovable property was sold in satisfaction of the debt on the 14th December 1909. But on the 12th February 1910 the sale was set aside at the instance of the judgment-debtor; on what ground I do not find it stated. On the 10th December 1912 the decree-holders made their third and last application asking the Court to sell the identical property in satisfaction of their decree (which, of course, still subsisted) which had been sold on the 14th December 1909. It was contended in that case

(1) [1917] 2 Pat. L. J. 115=1 P. L. W. 73=(1917) P. H. C. C. 133.

by the judgment-debtor, who objected to the proposed third application for execution, that the application could not be regarded as a continuation of the preceding application and that it was out of time. The learned Chief Justice, in referring to this argument has dealt with the position as it appears to him to exist in cases where this same difficulty arises as it often must. He remarks :—

" It may often happen that proceedings taken upon an application for execution remain pending in an original Court or appeal for several years and may result in an order setting aside a sale of immovable property many years after the application for execution was presented and many years after any of the dates indicated in the third column of Art. 182 of the First Schedule of the Limitation Act. This has often been pointed out by the Courts, and in order to get over the difficulty some Courts have held that a subsequent application should be treated as an application made in continuation of the application made before the sale, and other Courts have held that such an application is governed by Art. 181 of the First Schedule to the Limitation Act, and that the decree-holder is entitled to three years from the date on which the sale is set aside within which to make a further application. It seems certain that the Legislature could not have intended that further execution of a decree should be prevented by the fact that execution proceedings remained pending in the Courts for many years."

I think (if I may be permitted to say so) that those words express the equitable views of the position which should obtain in a case such as that which is now before us. The learned advocate for the appellant has suggested that although the remarks, to which I have referred, of the then Chief Justice of this Court may be applicable to what he calls execution under the general law, they are not applicable to cases where the execution relates to suits which fall within the ambit of the Bengal Tenancy Act. He points to S. 29 of the Limitation Act and shows how it indicates in sub-Cl. (*b*) of Cl. (1) that " nothing in the Limitation Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India." He points to the Bengal Tenancy Act and in particular to Item No. 6 of Part III, Sch. III. He observes that there is a period of limitation given. I may point out that clearly the period which is there given is one of three years. This period refers to an application made under the Act in a suit between landlord and tenant and not being decreed for a sum of money exceeding Rs. 500. Now he points out that in this case the sum did not exceed Rs. 500. He then refers to the times from which the period of limitation begins to run. They are (1): the date of the decree or order; or (2), where there has been an appeal, the date of the final decree or order of the appellate Court; or (3), where there has been a review of judgment, the date of the decision passed on the review. He suggests that in the case of setting aside of an execution proceeding, (that is to say, in this case the setting aside of the sale which has taken place in an execution proceeding), none of these three categories (except perhaps the first) apply. Whether this is so or not (that is to say, whether it may come under sub-S. (3) or not) does not to my mind matter. If there was no provision in this Part III, Sch. III, for a case such as that which is before us, then it seems clear that S. 29 of the Limitation Act has no application and the matter falls within the provisions of the ordinary law as has been laid down by the late Chief Justice of this Court in the case to which I have referred. Obviously it would be a matter of the greatest hardship if, in circumstances such as those which have been disclosed in the present case, a decree-holder, not clearly through his own fault and certainly not by fraud but for one reason or another, should have his sale, which has been carried out in execution of his decree under which he was entitled to recover from the judgment-debtor what was due to him, set aside, and should on that account be prevented from eventually recovering by further execution proceedings the sums to which he was entitled. In my view, therefore, the District Judge and the Munsif were quite right in the orders which they made.

The appeal must, therefore, be dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.

✻ A. I. R. 1926 Patna 146

BUCKNILL, J.

Sheo Charan Singh—Decree-holder—Petitioner.

v.

Kishno Kuer and *another*—Judgment-debtors—Opposite Party.

Civil Revision No. 95 of 1925, Decided on 4th June 1925, from an order of the Dist.-J., Gaya, D/- 16th February 1925.

✻ *Civil P. C., O. 21, Rr. 66 and 72—Auction-purchaser, whether decree-holder or not, cannot be compelled to bid higher than or up to the proclaimed price.*

There is no legal necessity for a bidder at an auction-sale, whether he be a decree-holder at whose instance the property is being put up for sale or whether he be an outside person, to purchase the property at the full price at which it may have been valued in the sale proclamation. On the contrary it would seem that after all the value of the property which is thus put up to auction is really only that which it will actually fetch at that auction assuming of course that there is no fraud or malpractice with regard to the bidders and that the sale has been reasonably and properly made public. [P.146,C.2.]

Brij Kishore Prasad—for Petitioner.

Siva Nandan Rai—for Opposite Party.

Bucknill, J.—This is an application in Civil Revisional Jurisdiction made to this Court under somewhat curious circumstances.

The applicant obtained a decree for rent against the opposite party here in the Court of the Munsif of the 1st Court of Gaya. Having obtained his decree he then applied for execution. It would seem that there were four properties which were put up for sale and the Court allowed the decree-holder (that is, the applicant here) to bid for the properties at the sale. There seems no doubt that the valuation which was put on the properties was, that the first was put at Rs. 46, the second at Rs. 1,470, the third at Rs. 3,075 and the fourth at Rs. 55. There is nothing on the record or before me to indicate in any way that the sale proclamations were not duly published and in fact on the 21st January last the sale was proceeded with. It would appear from the record that there were other bidders besides the decree-holder. Now the Munsif made a curious order on the 22nd of January, that is to say, the day after the sale. He placed in his order-sheet the following words:

"Decree-holder did not bid for the valuation fixed by the Court. The case is dismissed, vide order passed on the sale proclamation."

When we turned to the sale proclamation we saw that the note or order there reads:

"The decree-holder does not wish to bid up to the value fixed by the Court. The property on sale is 28·45 acres Nakli, Bhaoli and Belagan lands. The decree is for Rs. 566-9. He wants to purchase the property for a nominal value. This cannot be allowed, as the decree-holder did not care to bid for more, so I dismiss the case."

Now it is very difficult to see how on the language of these two orders it was really altogether open to the Munsif to adopt the course which he did. I do not know that there is any legal necessity for a bidder at an auction-sale, whether he be a decree-holder at whose instance the property being sold is being put up for sale or whether he be an outside person, to purchase the property at the full price at which it may have been valued in the sale proclamation. On the contrary it would seem that after all the value of the property which is thus put up to auction is really only that which it will actually fetch at that auction assuming of course that there is no fraud or malpractice with regard to the bidders and that the sale has been reasonably and properly made public. I have no doubt that there is a good deal of force in what is urged by the learned vakil who appeared for the opposite party, namely that owing to there being a number of sales conducted on the same day it was not very feasible for the Munsif to have recorded at great length his reasons for his order in the order-sheet. There is nothing except the suggestion contained in the order which is endorsed on the sale proclamation where the Munsif says that the decree-holder wants to purchase the property for a nominal value which leads one to suppose that there was anything improper or wrong in the way in which the sale had been made public or in the way in which the bids took place. On the other hand, there is certainly this to be said in favour of the Munsif's view, namely, that so far as the second property was concerned the amount which was in fact bid was a very trifling one compared with the value

which was put upon the property in itself. In that instance it will be observed that whilst the value was Rs. 1,470 the price bid was Rs. 232. As regards the third property put up for sale the difference was very much worse; for, there, whilst the value was Rs. 3,075 the bid for it was Rs. 231. What I think the Munsif should have done was to have expressed his views as to the unsatisfactory nature of the sale in clearer terms and to have given his reasons which ought to be substantial ones for declining to proceed with the sale. I do not think that the reasons which he has given are good reasons for dismissing the execution case; for so far as we can see, the decree-holder had done nothing really wrong in refusing to bid up to the total value which had been fixed on the property. I think the Munsif's order should have been, after having set out his reasons, to have ordered that there should be an issue of a fresh sale proclamation under circumstances of proper publicity which would ensure that at the next auction when the property should be put up for sale there should be suitable bidders. Under such conditions no doubt the properties would fetch whatever they were really worth and what the public was ready to pay for them. It may be said with regard to the first and fourth properties that the prices which were offered were substantially equivalent to the prices at which the two properties were valued and that is certainly so. At the same time these two properties are of very little account aggregating just Rs. 101 in value. It does not, therefore, seem desirable to split these two properties away from the other two or to regard the two properties entirely separately.

I should mention that after the decision by the Munsif it would seem that the decree-holder preferred some sort of appeal to the District Judge of Gaya. What exactly happened before the District Judge it is difficult to understand. From the order-sheet of the 5th February there seems to be a note by the serishtadar saying, that the order complained of is not appealable (vide O. 43, R. 1 and S. 104, Civil P. C.). On the same day the District Judge minutes: "Put up in presence of pleader." No date is mentioned as to when it should be put. But on the 16th February we get an order of the District Judge: "Pleader absent. File." Whether this is tantamount to the dismissal of the appeal or whether this is tantamount to the adjournment of it I do not know. However to my mind the conclusion is after all the same, for although the matter has come up to this Court by way of complaint against what appears to have been the serishtadar's order of the 5th February, there is also a complaint quite clearly made that the order which the Munsif passed on the 22nd January was illegal. I have no hesitation in coming to the conclusion that the order which was passed by the Munsif on the 22nd January is an unsatisfactory one.

It must be set aside and the Munsif ordered to re-instate the execution cases to direct that a new sale proclamation shall be issued and that such precautions should be taken with regard to the publicity of the conditions under which the sale will be held so as to ensure that a reasonable and proper sale will be held upon the date fixed. There will be no order for costs in this application.

Order set aside.

✻ A. I. R. 1926 Patna 147

ADAMI AND SEN, JJ.

Hitendra Singh and others— Petitioners.

v.

Maharajadhiraj of Darbhanga—Opposite Party.

Application for refund of excess Court-fees paid on the Memorandum of Appeal in First Appeal No. 206 of 1920, Decided on 10th June 1925.

✻ *Court-Fees Act* (7 *of* 1870), *S.* 5—*Appeal wrongly assessed by Taxing Officer—Refund of Court-fees cannot be ordered by the High Court.*

The High Court has no power to interfere with the order passed by the Taxing Officer regarding the amount of Court fees. His order though wrong, is final and there is no power of appeal, review or revision against it: [*A. I. R.* 1923 *Patna* 137 and *A. I. R.* 1924 *Patna* 310, *Ref.*] The appellants may, however, apply, to the Board of Revenue to grant a refund or some alleviation in the matter. [P.148,C.1]

S. M. Mullick and *L. K. Jha*—for Petitioners.

Sultan Ahmad—for the Government.

Judgment.—This is a petition for the issue of a certificate by this Court for the

refund of Rs. 2,427-8, paid as Court-fee on a Memorandum of Appeal filed before this Court.

The petitioners filed a suit on the 24th July 1918, paying a Court-fee of Rs. 572-8. They lost the case in the trial Court and appealed to this Court, paying again the same Court-fee as had been paid on the plaint. The matter was reported by the Stamp Reporter to the Taxing Officer and the Taxing Officer decided that the Court-fee due on the Memorandum of Appeal was Rs. 3,000, and the petitioners accordingly paid the deficit.

When the appeal came before a Bench of this Court the matter of the Court-fee payable on the plaint was considered and it was decided that that Court-fee of Rs. 572-8 was sufficient.

It is now claimed that by reason of the decision of a Bench of this Court the petitioners are entitled to a refund of Rs. 2,427-8.

It has been settled by this Court in a series of decisions, namely, *Ram Sekhar Prasad Singh* v. *Sheonandan Dubey* (1) and *Sheopujan Rai* v. *Kesho Prasad Singh* (2); as well as in the case of *Ram Sumran Prasad* v. *Gobind Das* (in the matter of an application in First Appeal No. 189 of 1922); that in a case like this, this Court has no power or jurisdiction to interfere with the order passed by the Taxing Officer which is final and against which there is no power of appeal, review or revision. These cases conclude the matter and prevent us from interfering or in any way holding that the decision of the Taxing Officer was incorrect, and his decision must stand. We have, therefore, no power to order a refund of the Rs. 2,427-8.

The petitioners are entitled to some sympathy owing to the difference in the decision between the two authorities and the best that they can do is to move the Board of Revenue to grant a refund or some alleviation in the matter.

The appliction is rejected.

Application rejected.

(1) A. I R. 1923 Patna 137.
(2) A. I. R. 1924 Patna 310.

✻ A. I. R. 1926 Patna 148

ADAMI AND BUCKNILL, JJ.

G. I. P. Railway—Defendant—Appellant.

v.

Datti Ram and *another*—Plaintiffs—Respondents.

Second Appeal No. 126 of 1923, Decided on 10th July 1925, against the decision of the District Judge, Saran, D/- 24th November 1922.

✻ (a) *Railways Act, S. 72—Risk Note B is a special contract complete in itself—Company admitting loss need not prove it.*

Risk Note B is the ordinary and most usual contract for the carriage of goods entered into between merchants and the Railway Companies in India. It is very simple in its language; it forms a complete special written contract between the consignor and Railway Company. The Railway takes the goods at a rate of freight lower than the ordinary rate; in consideration for so doing the consignor undertakes to absolve the Company from all responsibility for any loss, destruction, deterioration of or damage to the goods whilst in transit from any cause whatever subject to the following exceptions. These exceptions provide that if a whole consignment (of one or more complete packages forming part of a whole consignment) is lost, then the Company will be responsible if the loss is due: (a) to the wilful neglect of the Railway administration; or (b) to theft by its servants or agents or (c to wilful neglect of its servants or agents. Wilful neglect cannot be held under the contract to include: (a) fire; (b) robbery from a running train; (c) any other unforeseen event or accident. Therefore in a suit by consignor the onus of proving that loss was occasioned under one of those exceptions contained in the contract under which alone the Company could be held responsible lies upon the plaintiffs. Although it is very difficult for consignor to prove what happened to the goods when in the Railway's custody, the difficulty does not relieve a plaintiff from proving negligence on the part of the Railway's servants. If the Company admits the loss, they need not prove it. Though the defendant Company fails to prove theft from the running train, the onus is still on the plaintiff to prove neglect or theft by Railway servants. The failure to prove theft from running train does not give rise to the inference that theft was committed by its servants: *Smith Limited* v. *Great Western Railway Company*, (1922) 1 *A. C.* 178, *Rel. on*; 45 *Bom.* 1201, *Dist.* [P 150, C 1]

(b) *Railways Act, S. 72—Risk Note B signed—Consignor cannot go behind it and sue under ordinary law.*

A plaintiff consignor cannot go behind his special contract (i.e., Risk Note B) with the Company and sue the Company for damages for non-delivery under normal statutory liabilities as are imposed upon parties to a contract under the Contract Act and upon Railways as carriers under the Railways Act. [P. 150 C 1]

Md. Hasan Jan—for Appellant.

B. N. Mitter—for Respondents.

Bucknill, J.—This was a second appeal from a decision of the District Judge of Saran, dated 24th November 1922, by which he modified a decision of the Munsif of Chapra, dated 16th March of the same year. The appellant was the Great Indian Peninsula Railway through its agent in India; this Company was the defendant in a suit brought by the plaintiffs (the respondents here) who are merchants of Chapra town. The plaintiffs' suit was of familiar type: their firm ordered a bale of cloth from a Bombay merchant; it is admitted it was duly sent under Risk Note B and was duly placed in the appellant Company's custody; it is also common ground that it was never delivered.

The plaintiffs sued the appellant Company for the value of the goods lost (Rs. 869-14-9), the freight (Rs. 5-15) and loss of profit (Rs. 75) or Rs. 948-13-0 in all. They averred that they believed that the bale had been lost through the negligence of the appellant Company's servants.

The appellant Company pleaded various defences; they admitted the loss but alleged that it was due to "running train theft," and that, therefore, they were absolved by Risk Note B from liability. The appellant Company, however, called no evidence whatever in support of their allegation of "running train theft." Whether the plaintiffs' evidence proved any negligence on the part of the appellant Company or not was a matter of difference of opinion between the Munsif and the District Judge.

The case, however, proceeded on the usual lines; the plaintiffs tried to prove negligence on the part of the defendant Company, but all that their sole witness could aver was that he supposed that the Company's servants must have been negligent because the plaintiffs had never received their bale of cloth. I need hardly say that such an assertion by itself is of no value as proof of negligence. The Munsif, therefore, holding that the plaintiffs had failed to prove any negligence, dismissed their suit with costs.

The District Judge, when the appeal came before him, thought that negligence should be inferred "from all the circumstances." He, therefore, reversed the Munsif's decision and gave judgment for the plaintiffs for the price of the cloth with costs, but not for the alleged loss of profit which he did not consider had been proved.

It is important to ascertain on what grounds the District Judge arrived at this conclusion. In the first place he points out how impossible it was for the plaintiffs to prove what happened to the cloth when in the Railway's custody; but this, though I may say at once that it is a constant difficulty in almost every case of this type, does not relieve a plaintiff from proving negligence on the part of the Railway's servants. The District Judge next remarks that the Company alone can know what happened to the bale whilst in its custody and that, therefore, under S. 106 of the Evidence Act, the onus is on the Company of proving what happened to the goods; but this view is contrary to all the Indian and English case-law and authority; vide, e. g., *Smith* v. *The Great Western Railway Co.* (1); the onus of proving negligence in these cases lies on the plaintiff; the Railway Company is not bound in law to assist the plaintiff to fasten liability on itself. The District Judge further observes that the whole consignment was lost and that although the Railway pleaded theft on a running train, it had made no attempt to prove any such theft; and that therefore the onus of avoidance of liability lay, by this plea in defence, upon the Company; it is possible that, more closely examined, there may be some force in this reasoning, but I propose to deal with this point at a later stage.

This District Judge then states that the plaintiffs could get no information from the Company as to what had happened to the cloth; but this does not, according to the authorities, relieve the plaintiffs from proving negligence. The District Judge next remarks that, from the plaintiffs' evidence and the admitted facts in the case, the only reasonable conclusion was that the loss was due to the negligence of the Company's servants; but I have already pointed out that the plaintiffs' testimony was of no evidential value; whilst the only material admissions in the case were that the bale was duly given to the Company's custody and was lost in a running train theft; neither of which circumstances threw any liability on the Company.

(1) [1922] 1 A. C. 178=91 L. J. K. B. 423=27 Com. Cas. 247=38 T. L. R. 359.

Lastly, the District Judge seems to think that a plaintiff can in some manner go behind his special contract (i. e., Risk Note B) with the Company and sue the Company for damages for non-delivery under such normal statutory liabilities as are imposed upon parties to a contract under the Indian Contract Act and upon Railways as carriers under the Indian Railways Act; but this view again is, I fear, contrary to the best authority. There have been so many decisions on cases of this type reported in Indian law reports that I think it is as well to try and express very simply a few of the more important features which emerge from them.

What is known as Risk Note B is, we are informed, the ordinary and most usual contract for the carriage of goods entered into between merchants and the Railway Companies in India. It is very simple in its language; it forms a complete special written contract between the consignor and Railway Company. The Railway takes the goods at a rate of freight lower than the ordinary rate; in consideration for so doing the consignor undertakes to absolve the Company from all responsibility for any loss, destruction, deterioration of or damage to the goods whilst in transit from any cause whatever subject to the following exceptions. These exceptions provide that if a whole consignment (or one or more complete packages) forming part of a whole consignment) is lost, then the Company will be responsible if the loss is due: (a) to the wilful neglect of the Railway administration; or (b) to theft by its servants or agents; or (c) to wilful neglect of its servants or agents. Then there is a proviso that wilful neglect cannot be held under the contract to include (a) fire, (b) robbery from a running train, (c) any other unforeseen event or accident.

A, then, a merchant, consigns goods by B, a Railway Company, to C, another merchant, under a contract contained in the Risk Note B: the goods are never delivered to C. A (or C, acting really on A's behalf or as A's principal; for there is no direct contract between B and C) sues B for damages for the loss of his (A's) goods or, if one so likes to phrase it, for damages for breach of contract in that B has not delivered the goods to C as B, undertook so to do. What is A's cause of action? It is solely on account of a breach by B of the contract between A and B. What is that contract? It is an agreement between A and B reduced into writing in the form of Risk Note B. What contract must A sue on? Only on the only contract existing between A and B, i. e., the Risk Note B. Can A ignore the Risk Note and sue B for damages for non-delivery basing his claim on statutory liabilities imposed generally upon those who make contracts or particularly upon a Railway Company under the provisions of the Indian Contract Act and the Indian Railways Act respectively? The answer is in the negative; A cannot do so; he has to base his claim on his existing and actual contract with B, i. e., the Risk Note B. A then sues B upon and for damages for breach of the contract, i. e., the Risk Note B made between them. B, to take the simplest case, admits the loss in the Company's statement of defence. By the express terms of the contract B is not liable for loss save under certain specific circumstances. Who has to prove those circumstances under which B is liable? Clearly not B for it can hardly be contemplated seriously that B is bound to assist A in fastening responsibility upon B. So it is A upon whom the onus falls of showing that B is responsible for the loss.

There have, it is true, been cases—even of quite recent date—in which it has been held that it is not sufficient for B to admit the loss in his statement of defence but that B must adduce evidence to prove such loss [e. g., *Gilabhai Punsi* v. *The East Indian Railway Company* (2) and *Jamnadas Baldevadas* v. *The Burma Railway Company* (3): but these were decisions given prior to the case of *Smith* v. *The Great Western Railway Company* (1); and it is difficult to understand why B should be called upon to prove what he expressly admits: the point also has been fully discussed and dealt with in this Court in the decisions of Mullick, J., and myself in the *G. I. P. Railway Company* v. *Jitan Ram Nirmal Ram* (4), in which we held that the contention was incapable of support. A who may know nothing, and indeed is not likely in most instances to know any-

(2) [1921] 45 Bom. 1201=23 Bom. L. R. 525.
(3) [1921] 64 I. C. 295.
(4) .. I. R 1923 Patna 285.

thing, as to how or where his goods vanished, or why they were not delivered, can aver in his statement of claim what he pleases ; he can state, if he wishes, that the loss was due to any or all of the exceptions under which alone B is liable ; but, assuming that B admits the loss, A, if he is to be successful in his claim, must prove that the loss was in fact due to one of the exceptions under which B is responsible. It is often asked how he can do so ; it is obviously not an easy task as it may well frequently be that B, at the mercy of any unscrupulous member of its staff or the victim of clandestine theft by outsiders, knows no more as to the disappearance of the goods than A himself : A's only chance would appear to lie in the administration of searching interrogatories and the calling of servants of B as his (A's) witnesses. If he proves nothing his claim must fail : B need not say or do anything beyond admitting the loss.

All the above points have been dealt with at length in the recent decision of Mullick, J., and myself to which I have referred above. But it is frequently observed that if the law is as above stated it seems very hard as the position of A is almost hopeless. The answer to this comment is very simple ; it is that the contract is itself a hard one, but that A has a complete remedy in his own hands, namely, not to seek to have his goods carried at a reduced rate and under the terms of such a hard contract as Risk Note B, but pay a higher freight and have his goods carried under another form of contract under the terms of which B has to assume a far fuller responsibility.

I mentioned at an early stage of my judgment that one of the reasons why the District Judge thought that the appellant should be held responsible was that the Railway Company had pleaded in its defence that, the loss was due to a running train theft but that it made no attempt to prove that allegation. There seemed at one stage to be some force in the argument which was thus put forward in support of this part of the District Judge's decision. It was contended for the respondent that this admission by the appellant Company was an admission that there had been a theft and that as the Company failed to prove that it was a theft on a running train (satisfactory evidence of which would clearly have permitted the Company to escape any liability) it might be inferred that the theft was committed by the appellant's agents or servants ; or at any rate, that as they had admitted a theft it was incumbent upon the appellant Company to show that it was not theft by their own agents or servants but theft either as pleaded on a running train or at any rate by some outsiders not in their service or not their agents. It is, however, impossible upon further consideration to come to the conclusion that this argument is a sound one. In the first place the admission or plea is not of theft at large but of a specific form of theft, i. e., on a running train. In the second place, even if the defendant Company failed to prove or to adduce any evidence in support of such an allegation, it cannot be held that a necessary inference must be drawn that the theft was committed by the Company's servants or agents ; for although there might have been a theft, it might have been by persons who were or were not the servants or agents of the Company ; whilst, in order to prove that the Company was liable to the plaintiffs for the loss, it was primarily necessary (the onus being upon the plaintiffs) for the plaintiffs to show that the theft (whether or not committed on a running train) was effected by the Company's servants or agents ; and this of course the plaintiffs made, and no doubt could make, no attempt to do. Lastly it was quite unnecessary, according to the authorities, for the Railway Company to do anything more than to prove or admit the loss ; and, having done that, the onus of proving that that loss was occasioned under one of those exceptions contained in the contract under which alone the Company could be held responsible lies upon the plaintiffs. As a matter of fact this very point appears to have been dealt with by Odgers, J., in the Madras High Court in the case of *The Madras and Southern Mahratta Railway Co., Ltd.* v. *B. Krishnaswami Chetty* (5). That case was one in which there appeared, superficially, to exist considerably greater reasons for drawing an inference that the theft had been committed by the Railway Company's servants than would be justifiable in the present case now before this Court. In the case decided by

(5) A. I. R. 1925 Mad. 133.

Odgers, J., the Railway Company pleaded in defence robbery from a running train and actually produced evidence in order to try and prove that allegation. The Company, however, failed to prove that the theft was one committed on a running train although they did show that when the train carrying the goods arrived at a certain station the Guard found the doors of one of the covered vans open and the plaintiffs' bale of goods missing from it. The learned Judge in his decision remarks: "One is very much tempted to think that where the Railway Company has five or six of its servants travelling in the train it is not necessary to look to any outside agency to found a case of theft. But I cannot say that that has been established by evidence. In a similar case in *B. B. and C. I. Railway Company* v. *Ranchhodlal Chotalal and Co.* (6), which also arose on this Risk Note B, the learned Judges point out that though the defendants have failed to prove theft from the running train, the onus is, of course, still on the plaintiff to prove neglect or theft by Railway servants. This, they point out, should have been done before any question is reached of robbery from a running train as that, namely, robbery from a running train is an exception to wilful neglect. It has also been established in *Narayana Aiyar* v. *The South Indian Railway Company, Ltd.* (7), that the onus is upon the plaintiff to establish how the loss or deterioration was caused though there the Risk Note was Form H. The case in *The Madras and Southern Mahratta Railway Co., Ltd.* v. *Mattai Subha Rao* (8), cited by the learned counsel for the defendant does not seem to me to touch the case. I am, therefore, with great reluctance, constrained to come to the conclusion that the plaintiff has no remedy on this Risk Note B on the evidence as it stands. The suit must, therefore, be dismissed. The question is whether I should inflict costs on the plaintiff. The defendant, as stated, attempted to prove loss by robbery from a running train and assumed that onus at the trial and failed. This is, as I pointed out, wrong. I do not think that the plaintiff suffered any prejudice from that procedure, but on the whole, I am inclined to dismiss the suit without costs."

The first judgment referred to by Mr. Justice Odgers: *B B. and C. I. Railway Company* v. *Ranchhodlal Chotalal and Co.* (6), is precisely to the same effect as that of the learned Judge.

Under these circumstances I fear that this appeal must be allowed and the decree of the District Judge of Saran set aside and that of the Munsif of Chapra restored.

One can only observe once again that, although it may seem that the decisions in these cases bear hardly upon those whose goods are carried by Railway Companies in this country under Risk Note B, the contract is one which involves those who thus confide their goods for carriage to a Railway Company in greatest difficulty in recovering compensation in the case of their loss; the substantial remedy against such a state of affairs lies, however, in the hands of the individual who is in no way bound to enter into a contract of such a type which in effect places him at the mercy of the Railway Company with which he enters into such an agreement.

Adami, J.—I agree.

Appeal allowed.

(6) [1919] 43 Bom. 769=21 Bom. L. R. 779.
(7) A. I. R. 1924 Mad. 388.
(8) [1919] 43 Mad. 617=38 M. L. J. 360=(1920) M. W. N. 198=11 L. W. 358=28 M. L. T. 49.

A. I. R. 1926 Patna 152

ROSS, J.

Ramkhelawan Sahu and *another*—Defendants Nos. 1 and 2—Appellants.

v.

Kuldip Sahay and *others*—Plaintiffs—Respondents.

Appeal No. 514 of 1922, Decided on 23rd June 1925, from the appellate decree of the Sub-J., Arrah, D/-23rd February 1922.

Words "kharij jama" import "independent proprietor".

Prima facie the word kharij jama import that the owner of the kharij jama land is an independent proprietor. [P. 153, C. 2]

S. M. Mullick and *N. N. Sinha*—for Appellants.

Akbari Rai, T. N. Sahay and *D. N. Verma*—for Respondents.

Judgment.—This is an appeal from a decision of the learned Subordinate Judge of Arrah affirming a decision of the

Munsif granting a decree to the plaintiffs in a suit (so far as is now material) for a declaration that they have a right of way from their garden, Plot No. 254 of Khata No. 45 to the Local Board road in village Rajokher over Plot No 245 belonging to Defendants Nos. 1 and 2 which intervenes between the garden and the road.

Defendant No. 7 is the landlord and he did not contest the suit. Defendants Nos. 1 and 2 who did contest the suit had taken settlement of Plot No. 245 from Defendant No. 7 in 1918. The suit was brought in 1920.

The main contention on behalf of the Appellants-Defendants Nos. 1 and 2 is that the Courts below have erred in holding that the plaintiffs have acquired this right of way by prescription, because they are tenants of Defendant No. 7 and could neither prescribe against their landlord nor against Defendants Nos. 1 and 2 who are tenants under the landlord. It is contended that for two years before the suit Plot No. 245 was in settlement from the landlord and before that it was parti and that consequently the plaintiff must have prescribed against their landlord and his tenants and that this is impossible in law. This argument rests on the fact that in the record of rights the plaintiffs are recorded in the khatian, and it is argued that, therefore, they must be tenants of the landlord. The record of rights shows that the plaintiff's ancestor purchased the land in 1849 and that the land is kharij jama. The Munsif took the view that this meant that the land was excluded and not settled with the zemindar at the time of Permanent Settlement and that the title of the plaintiffs was, therefore, independent of that of the zemindar of the village. The learned advocate for the appellants referred to S. 3, Cl. (3) of the Bengal Tenancy Act where "tenant" is defined as "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." Reference was also made to *Gokkul Sahu* v. *Jodu Nundun Roy* (1), where it was held that a rent free brahmotar sanad operated as a special contract but for which the brahmotardars would be liable to pay rent and that the brahmotardars were tenants within the meaning of the Act. Now while it is quite clear that the mere fact that no rent is paid does not necessarily mean that the plaintiffs are not tenants of the landlord and while the fact that they are entered in the khatian to some extent supports the argument of the appellants, yet the case really turns on the effect of the entry "kharij jama." In Wilson's Glossary "kharij jama" is translated as meaning "separated or detached from the rental of the state as lands exempt from rent or of which the revenue has been assigned to individuals or institutions." In N. James' Settlement Report of Patna "kharij jama" is defined as "land allowed free to zemindars as reward for some special service, by a Provincial Governor, and so to be distinguished from altamga grants." Prima facie, in my opinion, the word imports that the owner of the kharij jama land is an independent proprietor. The land has been included within the zemindari of Defendant No. 7, but it has evidently never been resumed and could not now be resumed and consequently the relation of landlord and tenant does not exist between the parties. In his judgment the learned Subordinate Judge has merely referred to the finding of the Munsif on this point and has not discussed the matter further evidently, as appears from a later passage in the judgment, because it was not argued before him. I see no convincing ground for holding that the Munsif was wrong in deciding that the plaintiffs had a title independent of the zemindar with regard to this land. This view also finds some support from the consideration that the landlord did not contest the case.

It was also argued that the plaintiffs had not proved that they used this path as of right and that there is no evidence of this. The learned Munsif went into this part of the case fully and came to the conclusion from the nature of the user that the enjoyment had been as of right. The learned Subordinate Judge disbelieved the evidence that was given by the defendants that the user had been with the permission of the landlord and found that the evidence of the plaintiffs' witnesses proved that the user of the passage by the plaintiffs was as of right. This was an inference which it was open to the Courts below to draw and I see no reason to doubt the correctness of their finding.

The appeal is dismissed with costs.

Appeal dismissed.

(1) [1890] 17 Cal. 721.

✻ A. I. R. 1926 Patna 154

MULLICK, AG. C. J. AND KULWANT SAHAY, J.

Hemchandra Mahto and *others*—Plaintiffs—Appellants.

v.

Prem Mahto—Defendant—Respondent.

Letters Patent Appeals Nos. 4 and 5 of 1924, Decided on 23rd July 1925, against the judgment of Das, J.

(a) Civil P. C., S. 47—Partition suit—Decree directing separation of plaintiff's share only but leaving shares of defendants joint—Separate suit by defendants inter se for separate possession of shares is not barred.

If a decree is passed in a partition suit, the parties thereto whether arrayed as defendants or as plaintiffs, are in the position of plaintiffs, and in regard to properties that may be allotted they are exactly in the position of decree-holders. In such a case the decree can be executed by any party and a separate suit for possession is barred by S. 47. But if the partition decree merely directed the separation of the shares of the plaintiffs in the partition suit and left the shares of the defendants joint amongst themselves, the defendants cannot execute that decree and there is nothing to prevent defendants from bringing a fresh suit for partition of the lands jointly allotted to them. [P. 155, C. 2]

✻ *(b) Court-fees Act, S. 7 (iv) (b)—Partition suit—Defendants need not pay Court-fee—Stamp Act, S. 2 (15).*

There is nothing in the law which requires a defendant in a partition suit to pay Court-fees in order to have his share separately allotted to him, he is merely to ask for it in his written statement, and it is open to the Court to order the shares to the defendants in a partition suit to be separated as amongst themselves. The decree that is finally drawn up in the partition suit has to be stamped as an instrument of partition under the Stamp Act and except the stamp duty levied on the decree, no other duty as Court-fee is payable by the defendants. 29 *Bom.* 79, *Ref.* 23 *Bom.* 188 and 23 *Bom.* 184 *Dist.* [P. 156, C. 1]

Subal Chandra Mazumdar—for Appellants.

A. B. Mukharji—for Respondent.

Kulwant Sahay, J.—Mouza Kaluhar in Manbhum was owned by a large number of co-sharers. In 1913 a partition suit was brought by some of the co-sharers in the Court of the Subordinate Judge of Purulia which was registered as Suit No. 219 of 1913. In that suit the present plaintiffs and defendants were all arrayed as defendants. A preliminary decree was passed on compromise on the 12th September 1914, wherein the shares of all the co-sharers were determined. A Commissioner was appointed to effect partition by metes and bounds. The Commissioner effected the partition and made allotments to all the co-sharers who were parties in the suit; and in accordance with the report and allotments of the Commissioner the Court made a final decree on the 19th June 1916. The case of the plaintiffs in the two suits giving rise to the present appeals was that by the said partition, lands were separately allotted to them. In Suit No. 1172 the plaintiffs claimed that 1 bigha, 19 kathas out of plot No. 83 of the Commr.'s map was separately allotted to them in Suit No. 1173, 1 bigha 2 kathas in plots Nos. 83 and 83-A was also separately allotted to them. Their case is that when they wanted to take possession of these lands they were obstructed by the present defendants who were also defendants in the partition suit and hence they brought the present suits for declaration of title and recovery of possession. The defendants pleaded that they were not aware of the partition alleged by the plaintiffs: that there was no compromise in the said partition suit that the Commissioner had no authority to partition the shares of the other co-sharers except those of the plaintiffs in the said partition suit; and there was an objection taken to the effect that the present suits were barred under S. 47 of the Civil P. C.

The learned Munsif overruled the objections of the defendants and made decrees in favour of the plaintiffs in the two suits. On appeal by the defendants the learned Subordinate Judge confirmed the decrees of the Munsif. The Defendant No. 3 thereupon came up in second appeal to this Court.

It may be noted that the plaintiffs in the two suits were different but the defendants were the same in both the suits; and the second appeals to this Court were by the Defendant No. 3 alone.

Two points were raised in the second appeal which were heard by Mr. Justice Das sitting singly. The first point was that the preliminary decree in the partition suit, which was a consent decree was not binding upon the Defendant No. 3 inasmuch as he was a minor at the time the said consent decree was passed but that the petition of compromise was not signed by his guardian *ad litem*, and that, therefore, the said decree was wholly void as against him. The second point taken was that S. 47 of the Civil P. C. was a bar to the suit. The learned Judge of this Court

held that the findings of the Subordinate Judge were not sufficient or satisfactory and that the points raised by the appellant could not satisfactorily be determined by him, and he accordingly set aside the decrees of the Subordinate Judge and remanded the case for re-hearing.

Against this decision of Mr. Justice Das the present appeals have been filed by the plaintiffs under the Letters Patent.

As regards the first objection, namely that the Defendant No. 3 being a minor, and the petition of compromise not being signed by any one on his behalf and, therefore, the preliminary decree being void, it appears that this objection was not taken in either of the Courts below. From the judgment of the learned Subordinate Judge it appears that the objection taken before him was that the guardian of the Defendant No 3. did not obtain the permission of the Court to enter into the compromise and that the decree, therefore, was ultra vires. The learned Subordinate Judge disallowed this objection on the ground that there was nothing on the record to show that the Court had not granted permission to the guardian of the Defendant No. 3 to compromise the suit. The objection taken in this Court was different from the objection taken before the Subordinate Judge, and, in my opinion, he ought not to be allowed to take this objection for the first time in second appeal. The decision of this question depends on findings of facts which the Courts below were not asked to decide. Moreover, it is admitted that in the final decree which was passed in the partition suit on the 19th June 1916, there was no defect whatsoever. The Defendant No. 3 is evidently bound by this final decree and, in my opinion, there is no substance in this objection and there was no necessity of a remand to enquire into this point.

As regards the second objection, namely, the bar of S. 47 of the Civil P. C., I am of opinion, that the decision of Mr. Justice Das is correct. The first Court overruled this objection on the ground that the plaintiffs in the present suit were defendants in the previous partition suit and they were not the decree-holders and so they could not have got possession in execution of the decree. The learned Subordinate Judge on appeal observes that the effect of the partition decree declaring what specific lands were allotted to the plaintiffs in the present suits was to make that decree a declaratory decree so far as they were concerned, and as a declaratory decree is incapable of execution the present plaintiffs could not enforce the same by execution, and that, therefore, the present suits were not barred by the provisions of S. 47 of the Civil P. C. Mr. Justice Das rightly points out that the view taken by the Courts below was incorrect. He observes that if a decree is passed in a partition suit, the parties thereto whether arrayed as defendants or as plaintiffs, are in the position of plaintiffs, and in regard to properties that may be allotted they are exactly in the position of decree-holders. No doubt, as was observed by Mr. Justice Das, if the partition decree merely directed the separation of the shares of the plaintiffs in the partition suit and left the shares of the defendants joint amongst themselves, the defendants could not execute that decree and there was nothing to prevent those defendants from bringing a fresh suit for partition of the lands jointly allotted to them. The view, therefore taken by the lower Courts was incorrect.

Mr. Justice Das, however, remanded the case for a determination as to what was the position of the parties in the present suits under the final partition decree. In my view the materials on the record are sufficient to dispose of this question in this Court, and the remand seems to be unnecessary. The final partition decree is on the record, and it directs that a decree be passed in accordance with the report, map and allotment papers of Babu Radha Ballabh Sarkar, the Commissioner appointed in the suit, and that the report, map and allotment papers do form a part of the decree and it awards costs to the plaintiffs in the suit. It is admitted by the present plaintiffs, and it also appears on reference to the allotments made by the Commissioner that the lands now claimed by the plaintiffs in the present suits were allotted to them in the previous partition case and the final decree in the partition suit directs that the allotments made by the Commissioner be confirmed. The present plaintiffs were, therefore, in a position to take delivery of possession of the lands allotted to them by executing the final partition decree. It is argued that there is no direction in

the final decree for possession being delivered to the present plaintiffs over the lands allotted to them ; but there is no such direction even in favour of the plaintiffs in the partition suit. It is clear that the decree intended that each of the parties should take possession in accordance with the allotments made by the Commissioner. As regards the payment of Court-fees by the present plaintiffs, who were defendants in the partition suit, in order to enable them to obtain possession of their shares, I see nothing in the law which requires a defendant in a partition suit to pay Court-fees in order to have his share separately allotted to him ; he was merely to ask for it in his written statement, and it is open to the Court to order the shares of the defendants in a partition suit to be separated as amongst themselves. The decree that is finally drawn up in the partition suit has to be stamped as an instrument of partition under the Stamp Act and except the stamp duty levied on the decree, no other duty as Court-fee is payable by the defendants ; see *Nawab Mir Sadruddin* v. *Nawab Nuruddin* (1). A contrary view appears to have been taken in *Abdul Khadar* v. *Bapubhai* (2) and *Murarrao* v. *Sitaram* (3). But these two cases do not appear to be pure suits for partition. At any rate no provision of the law has been referred to in these cases. In the present case we find that a final partition decree was prepared by the Court and although there is nothing on the record to show it, it must be presumed that the decree was properly passed after payment of the stamp duty. In my opinion, therefore, there is no necessity of a remand in the present case and it is clear on reference to the final partition decree that it was open to the present plaintiffs to obtain possession of the lands allotted to them, on taking out execution of the decree. That being so the present suit for recovery of possession of the lands which were admittedly allotted to them in the previous partition are evidently barred by S. 47 of the Civil P. C.

I would, therefore, modify the order passed by Mr. Justice Das and allow the second appeals filed in this Court by the Defendant No. 3 and dismiss the plaintiffs' suits altogether. The respondent will get his costs throughout,

Mullick, Ag. C. J.—I agree.

Order modified.

(1) [1905] 29 Bom. 79=6 Bom. L. R. 834
(2) [1899] 23 Bom. 188
(3) [1899] 23 Bom. 184.

✻ A. I. R. 1926 Patna 156

DAS AND ADAMI, JJ.

Ramdhani Singh and *others*—Plaintiffs—Appellants.

v.

Kewal Mani Bibi and others—Defendants—Respondents.

Appeals Nos. 635 and 66 of 1923, Decided on 27th July 1925, from a decree of the Addl. Dist. J., Patna, D/- 16th April 1923.

✻(a) *Evidence Act, S 92—Evidence to show non existence of an agreement is admissible.*

Though evidence to vary the terms of an agreement in writing is not admissible under S. 92, yet evidence to show that there is not an agreement at all is admissible. Therefore, it is open to the Court to examine the surrounding circumstances with a view to enable it to decide whether the parties intended to arrive at any agreement in regard to the subject-matter of the suit : *A. I. R.* 1925 *P. C.*, 75, *Foll.* [P. 158, C. 1, 2]

(b) *Bengal Tenancy Act, S. 29—Tenant must prove that he is an occupancy raiyat before invoking aid of S. 29.*

S. 29 only applies to the case of an occupancy raiyat, and before invoking the aid of S. 29 the tenant must prove that he is an occupancy raiyat in regard to the rent claimed lands. [P. 159, C. 1]

P. C. Manuk and *S. Dayal*—for Appellants.

Hasan Imam, *Brijkishore Prasad* and *S. M. Mullick*—for Respondents.

Das, J.—On the facts found by the learned Additional District Judge he was right in passing the decrees which he did pass. Two questions have been argued before us by Mr. Manuk on behalf of the defendants-appellants : first that the inclusion of 1 cottah of land in Patna city was a fraud on the registration law and that the registration obtained by its means was invalid ; and, secondly, that the enhancement of rent in the leases which were also the basis of the suits constituted an infringement of S. 29 of the Bengal Tenancy Act and cannot be supported by a Court of law.

I will first consider the point in regard to the registration. The written statement raises the following case : "In order only to get the registration made at

Jhauganj, an imaginary plot of land in Mohalla Diwan in the city of Patna was included in the patta and kabuliyat. These defendants did not take in settlement the land in Mohalla Diwan in the city of Patna, nor was any contract made with regard to the settlement thereof, nor did the defendants ever get possession of the same. Hence the aforesaid kabuliyat is illegal, void and inoperative, and the same cannot be binding on the defendants. The plaintiff's suit on the basis of patta and kabuliyat like this is not tenable and is fit to be dismissed at once." The Court of first instance found that the plot of land in Mohalla Diwan in tha city of Patna did not exist and in this view he came to the conclusion that the inclusion of this property was a fraud on the registration law. The lower appellate Court has reversed the finding of fact of the Court of first instance on this point. The learned Judge says as follows : " I have examined the evidence on the point and the case-law relating to the matter and am disposed to differ from the finding of the learned Munsif and to hold that the kabuliyats were valid, and were not fraudulent documents, and had been entered into with the knowledge and consent of both the parties and that the properties were real existing properties and not fictitious or non existent. This appears to be clear from the depositions of the three consenting defendants themselves given before the Court below. The finding that the plot of land in Mohalla Diwan is "existing property and not fictitious or non-existent" is a finding of fact which is binding on us in second appeal.

This is not disputed by Mr. Manuk ; but he contends that the learned Judge should have considered the other point raised by him, namely, whether there was any intention on the part of the parties to deal with the plot of land in Mohalla Diwan. Now, in my opinion, the question was not raised in this form in the written statement. The whole point made in the written statement is that "an imaginary plot of land in Mohalla Diwan in the city of Patna was included in the patta and kabuliyat. There is no suggestion that the parties did not intend to deal with this property on the assumption that it did exist. Mr. Manuk relies on the judgment of the Court of first instance and contends that that Court expressly found that the parties did not intend to deal with this property ; but I can find no support for this argument in the judgment of the learned Munsif. He no doubt refers to the contention on the part of the defendants that they never got possession of the Diwan Mohalla properties and that it was never intended that they should get possession of them and that these properties were included only to facilitate registration at Jhauganj. But the finding of the learned Munsif is that "these areas are only fictitious." That this was the only finding will appear from the cases to which he refers and discusses. In dealing with these cases, which were obviously cited on behalf of the plaintiffs, he says as follows :—"In the first of these cases it transpired later that the executants' interest had become extinguished in the property mortgaged, and without knowledge of this the parties entered into a bona fide mortgage of same. In the second case the existence of the property mortgaged was not denied. In the third it was actually found the mortgagor intended this small property should also be a security for the mortgage debt. Thus in none the question arose of the non-existence of the property;" and he concludes as follows : " In the present case it is plainly alleged in the written statement the property in Diwan Mohalla was a fictitious one. The kabuliyats in the recitals in them make no mention of them, and hence it was incumbent on plaintiff to adduce some evidence of existence of those properties. In absence of such evidence the case is covered by the case of *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (1) and the registration of Jhauganj is invalid and plaintiff cannot take advantage of these kabuliyats."

It will appear from the judgment of the learned Munsif that the only question which he intended to try and did try, was whether the properties alleged to be fictitious by the defendants did exist. He found that they did not exist and he held that the inclusion of those properties was a fraud on the registration law,

That being so, how are we entitled now in second appeal to go into the question of the intention of the parties ? It has been contended on behalf of the respondents that having regard to S. 92 of the

(1) [1914] 41 Cal. 972=41 I. A. 110=27 M.L.J. 80=(1914) M. W. N. 462=16 M. L. T. 6=18 C. W. N. 817=19 C. L J. 484=16 Bom. L. R. 400=12 A. L. J. 774=1 L. W. 1050 (P. C.)

Evidence Act the Court is not entitled to go into the question of intention. I am unable to agree with this contention. The authorities establish that though evidence to vary the terms of an agreement in writing is not admissible, yet evidence to show that there is not an agreement at all is admissible. In *Pym* v. *Campbell* (2), Erle, J., said as follows: "The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional, and if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement, and, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive and cannot be varied by parol evidence; but in the present case the defence begins one step earlier: the parties met and expressly stated to each other that though for convenience they would then sign the memorandum of the terms yet they were not to sign it as an agreement until A was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should, therefore, always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." And Lord Campbell said: "I agree. No addition to, or variation from, the terms of a written contract can be made by parol; but in this case the defence was that there never was any agreement entered into." This case was followed in *Guddalur Ruthna* v. *Kunnattur Arumuga* (3). The last-mentioned case was decided without reference to the Indian Evidence Act and probably before the Evidence Act came into operation. But the principle of that case was affirmed by the Judicial Committee in a judgment delivered by it on the 5th of December 1924. So far as I know that case has not been reported; but the judgment has been pronounced in Privy Council Appeals Nos. 21, 31 and 32 of 1923 [*Baijnath Singh* v. *Vally Mahomed Hajee Abba* (4)]. In delivering the judgment of the Board Sir Lawrence Jenkins said as follows: "It is true, as was laid down in *Balkishen Das* v. *Legge* (5) that under S. 92 of the Indian Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. But in the view their Lordships take of the circumstances of this case the section and the ruling have no application to it." The learned Judge then proceeded to say as follows: "The preamble to the Evidence Act recites that 'it is expedient to consolidate, define and amend the Law of Evidence' and S. 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances." I am of opinion, therefore, that it was open to the Court to examine the surrounding circumstances with a view to enable it to decide whether the parties intended to arrive at any agreement in regard to the Diwan Mohalla property; but in the view which I take of this case the question is a question of fact and should have been raised by the defendants specifically. It should certainly have been raised by them in the Courts below. The judgment of the learned Munsif is silent on this point and so is the judgment of the lower appellate Court. I must, therefore, hold that the only question which was raised by the defendants in the Courts below and the only question discussed by the Courts below is whether these properties were fictitious properties or not. That being so, it is not open to us to enter into the question whether the parties intended to enter into an agreement with regard to these lands.

The next question relates to the applicablity of S. 29 of the Bengal Tenancy Act. Now, in order to understand the point, it ought to be pointed out that the registered kabuliyats were executed in 1322. By these kabuliyats the defendants took

(2) [1856] 6 El. and Bl. 370=25 L. J., Q. B. 277 =2 Jur. N. S. 611=4 W. R. 528.
(3) 7 M. H. C. 189.
(4) A. I. R. 1925 P. C. 75.
(5) [1900] 22 All. 149=27 I. A. 58=4 C. W. N. 153=2 Bom. L. R. 523=7 Sar. 601 (P. C.).

leases of the lands comprised in the kabuliyats from 1323 to 1329 at a rent of Rs. 5 per bigha. It appears, however, that the defendants were actually in possession of the properties comprised in the leases ever since 1301 and that they were paying a rent of Rs 3 per bigha. It is, therefore, contended on behalf of the defendants that there was an enhancement of rent by the fresh arrangement of 1322 and that the rent was enhanced so as to exceed by more than 2 annas in the rupee the rent previously payable by the raiyat.

S. 29, it will be noticed, only applies to the case of an occupancy raiyat and before invoking the aid of S. 29, the tenant must prove that he is an occupancy raiyat in regard to the rent-claimed lands. Now these lands are admittedly diara lands and S. 180 provides that a raiyat who holds land of the kind known as char or diara shall not acquire a right of occupancy until he has held the land in question for 12 continuous years; and the section further provides that until he acquires a right of occupancy in the land, he shall be able to pay such rent for his holding as may be agreed on between him and his landlord.

On the admitted facts, therefore, there is no room for the application of S. 29 of the Bengal Tenancy Act unless the defendants establish that they had held the lands in question for twelve continuous years. The learned Judge in the Court below accepted the contention of the plaintiffs that the defendants have not "been successful in proving continuous possession." Mr. Manuk in this Court contends that the learned Judge should have considered the evidence with a view to find out whether the defendants have been in continuous possession of any portion of the land comprised in the lease. He says that it may be that he has not been in continuous possession for 12 years of the entire block of land comprised in his lease; but he contends that it is possible that he may have been in possession for 12 continuous years of some portion of the land and that inasmuch as the learned Additional District Judge has not dealt with this point we should remand the case to him to enable him to decide the point. The onus of establishing an exception under S. 180 of the Bengal Tenancy Act was upon the defendants, and it was for them to make a specific point in regard to the applicability of S. 29 in the written statement; but they have not made such a case in the written statement. No doubt the Courts examined the contentions in regard to the applicability of S. 29 but a new point is made before us, namely, that although the defendants may have failed to prove that they were in possession for 12 continuous years of the entire block of land, they may succeed in proving that they were in possession for 12 continuous years of some portion of the land. I find that the learned Munsif in the course of his judgment says: "The defendants themselves could not give verbally what area they were in possession of in which year." It is extremely unlikely that a remand would be productive of any good; for the defendants have no evidence on the point and the papers of the landlords could not possibly identify the lands which have been in the possession of the defendants, the lands being subject to inundation and there being no Record of Rights in regard to them. Having regard to all these facts and especially having regard to the fact that the defendants have not made out a case under S. 29, I must decline to remand the cases to the lower appellate Court to enable it to decide the point contended before us.

I must dismiss these appeals with costs.

Adami, J.—I agree.

Appeals dismissed.

A. I. R. 1926 Patna 159

BUCKNILL, J.

Mohammad Sadiq—Appellant.

v.

Basgit Sah and *others*—Respondents.

Appeal No. 1321 of 1922, Decided on 10th June 1925 from the appellate decree of the Sub-J., Motihari, D/- 19th September 1922.

Civil P. C., O. 26, R. 12—If Commissioner's report is unsatisfactory another Commissioner should be appointed.

The fact that the Commissioner had made a muddle of his enquiry should not in any way prejudice any party. If it is found that the Commissioner's work is unsatisfactory, the proper procedure is to appoint another commissioner who would carry out the work more

satisfactorily and not to give a finding considering that report of the Commissioner only. [P 160, C 1, 2]

Hareswar Prasad—for Appellant.

Judgment.—This is a second appeal. It is a very simple matter although it is unfortunate that owing to some apparent misunderstanding there have already been no less than three or four judgments written in connexion with the matter. The appellant, who was the plaintiff, brought a suit for a declaration of his raiyati title to a certain plot of land and for recovery of possession thereof. Now, apparently, when the case came before the Munsif in the first instance he decided in the plaintiff's favour. But on appeal to the Subordinate Judge, it would seem that, on the ground that the Commissioner who had been appointed to ascertain the proper demarcation and site of the property in question had not been cross-examined, the Munsifs' judgment was set aside and that the matter was remanded to the Munsif in order that the commissioner might be cross-examined. The matter went back to the Munsif and the Munsif after having had the Commissioner cross-examined, on this occasion dismissed the plaintiff's case. The ground upon which he dismissed the case appears, so far as I can see, to have been that the Commissioner had made some mistakes in the way in which he had set about his work, and in consequence, the Munsif thought that the plaintiff had failed to prove his case, he, apparently, not relying upon any evidence other than that of the Commissioner. The Munsif then sent the matter back to the appellate Court with his recommendation and the Subordinate Judge came to the conclusion that the Munsif's finding was correct. Again, so far as I can see, the ground for this decision was simply that the Commissioner had made a bungle of his investigation. Now, this application came up for admission in second appeal, and on its admission it seems to have been pointed out that the fact that the Commissioner had made a muddle of his enquiry should not in any way have prejudiced the plaintiff's position in the case. I have no doubt that what the Munsif should have done, if he found that the Commissioner's work was unsatisfactory, was to have appointed another Commissioner who would carry out the work more satisfactorily or, at any rate, in a manner intelligible and suitable to the Munsif's understanding. In these circumstances, I think it is clear that this appeal must be allowed with costs and that the case must again unfortunately go back to the Munsif to be re-tried; and, so far as I can see, it would be highly desirable that another Cmmissioner should be appointed to make such observations and demarcations as are necessary to show whether or not the plaintiff's claim is sustainable. The learned vakil who at one time appeared for the respondents to this appeal has appeared in Court this morning and has informed me that he has no instructions with regard to this matter. The respondents, therefore, to this appeal have not been represented before me.

Appeal allowed.

✻ A. I. R. 1926 Patna 160

MULLICK, AG. C. J. AND KULWANT SAHAY, J.

Jogendra Prasad Narayan Sinha—Defendant—Appellant.

v.

Mangal Prasad Sahu—Plaintiff—Respondent.

Misc. Appeal No. 188 of 1924, Decided on 24th July 1925, from an order of the Sub-J., Muzafferpur, D/- 2nd August 1924.

(a) *Limitation Act, Art.* 182—*Application though in accordance with law may be defective for some other reason.*

An application may be in accordance with law and yet the applicant may not be entitled to any relief on account of circumstances other than there being any defect in the application itself. [P 161 C 2]

(b) *Limitation Act, Art.* 182—*Rules* 11-14 *of O.* 21 *complied with—Application is in accordance with law.*

An application is one made in accordance with law if the particulars required by O. 21, Rr. 11 to 14 of the Civil P. C. are supplied: *A. I. R.* 1924 *Patna* 23, *Foll.* [P 161 C 2]

✻ (c) *Limitation Act, Art.* 182—*Issue of notice under O.* 21, *R.* 22, *is step-in-aid though the application is not in accordance with law.*

Even if an application for execution be not one in accordance with law a notice issued under O. 21, R. 22, upon that application would be a step which would give a fresh start for limitation: 25 *Cal.* 594 (*F. B.*) and 15 *All.* 84 (*F. B.*), *Rel. on.* [P 162 C 1]

Janak Kishore and *A. P. Upadhya*—for Appellant.

K. P. Jayaswal, C. J. Bannerji, S. M. Gupta, S. K. Gupta, S. K. Mitra and *M. C. Dutt*—for Respondent.

Kulwant Sahay, J.—This is an appeal by the judgment-debtors against an order of the Subordinate Judge of Muzaffarpur dismissing their objection to the execution of a decree on the ground of limitation.

The decree which was a mortgage-decree was passed on the 25th January 1918 in favour of two brothers Gauri Prasad and Mangal Prasad and on the 25th January 1921 an application was made for execution of the decree by Mangal Prasad alone on the allegation that by a partition between the two brothers Mangal Prasad was entitled to the entire amount covered by the decree. Notice of this application was given to the judgment-debtors who filed an objection on the ground that Mangal Prasad alone was not entitled to execute the whole decree.

The learned Subordinate Judge, it appears, ultimately allowed the objection. He held that under a private partition between the parties Mangal Prasad was entitled to only one-third of the amount covered by the decree, and that the remaining two-thirds had been allotted to his minor sons who were living under the guardianship of their mother.

This objection was allowed by the Subordinate Judge on the 5th September 1923. On the 10th September 1923 Mangal Prasad applied to the Executing Court to strike off the execution case saying that he would file a fresh application in continuation of the first application and the execution case was struck off on the 20th September 1923.

The present application was then filed on the 21st September 1923 by Mangal Prasad and his two minor sons. Objection has been taken to this application by the judgment-debtors on the ground that the present application cannot be treated as a continuation of the first application and if it be treated as a fresh application then it is barred by limitation.

The learned Subordinate Judge has disallowed this objection holding that the present application must be treated as one in continuation of the first application. He has also held that the first application was an application in accordance with law and that, therefore, the present application which was filed within three years from the first application was also within time. He further found that limitation was saved by reason of the explanation to Art. 182 of the Limitation Act inasmuch as as an application by any one of joint decree holders shall take effect in favour of all of them. He accordingly disallowed the objection of the judgment-debtors and they have come up in appeal to this Court.

In my opinion, the decision of the learned Subordinate Judge appears to be correct. The first application which was filed on the 25th January 1921 must be treated as an application in accordance with law. It fulfils all the requirements of O. 21, Rr. 11 to 14 of the Civil P. C. It has been contended on behalf of the judgment-debtors that this application was dismissed on the ground that it was not an application upon which any relief could be granted to the decree-holders and that, therefore, it could not be treated as an application in accordance with law, but an application may be in accordance with law and yet the applicant may not be entitled to any relief on account of circumstances other than there being any defect in the application itself. It has been held in *Bhagwat Prashad Singh* v. *Dwaraka Prosad Singh* (1) that under Art. 182, Cl. (5) of the Limitation Act, an application is one made in accordance with law if the particulars required by O. 21, Rr. 11 to 14 of the Civil. P. C. are supplied. In the present case, we find that all the particulars required to be stated in an application for execution by Rr. 11 to 14 of O. 21 had been given in the first application. The application of the 25th January 1921 must, therefore, be treated as an application made in accordance with law.

The present application, which was filed on the 21st September 1923 was admittedly within three years of the first application and, was, therefore, within time. Furthermore it appears that on the first application an order had been made for issue of notice under O. 21, R. 22. Under Cl. (6) of Art. 182 a fresh period of limitation began to run from date of the issue of that notice. That notice was issued on 23rd May 1921 and, therefore, the issue of the notice also saves the present application from limitation.

Even if it be contended that the first application was not in accordance with law the issue of the notice would give a fresh start for limitation. In *Gopal Chunder Manna* v. *Gosain Das Kalay* (2),

(1) A. I. R. 1924 Patna 23.
(2) [1898] 25 Cal. 594=2 C. W. N. 556 (F. B.).

a Full Bench of the Calcutta High Court held that even if the application for execution be not one in accordance with law a notice issued under O. 21, R. 22 upon that application would be a step which would give a fresh start for limitation. The same view was taken by a Full Bench of the Allahabad High Court in *Dhonkal Singh* v. *Phakkar Singh* (3). In this view of the case it is not necessary to consider whether the present application can be taken to be one in continuation of the first application. Mr. Jayaswal, who appears for the respondent has not laid any stress upon this point and it is not necessary to consider it.

In my opinion, there is no substance in the appeal and it must be dismissed with costs.

Mullick, Ag. C. J.—I agree.

Appeal dismissed.

(3) [1893] 15 All. 84=1893 A. W. N. 36 (F. B).

A. I. R. 1926 Patna 162

DAS AND ROSS, JJ.

Subedar Rai and *another*—Defendants—Appellants.

v.

Rambilas Rai and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 1062 of 1922, Decided on 2nd June 1925, from the appellate decree of the Dist. J., Shahabad, D/- 22nd May 1922.

Bengal Estates Partition Act, S. 119 - Partition proceedings are not binding on tenure-holder even though he is one of the proprietors.

If, in the course of a partition proceeding any question arises as to the extent or otherwise of the tenure, as the tenure-holder is not in general a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the revenue authorities for the purposes of partition between the proprietors. Even if therefore the tenure is set up by a person who is also a proprietor, and is a party to the proceedings, it would be unreasonable to hold that a party who has appeared before the revenue authorities in his character as a proprietor, should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings. 37 *Cal.* 662 *Foll*; and 16 *C. W. N.* 639, *Ref.* [P 163, C 1]

Sultan Ahmed and *Manohar Lal*—for Appellants.

S. M. Mullick and *P. K. Mukherji*—for Respondents.

Ross, J.—The plaintiffs brought this suit on the allegation that 25 bighas of land was their ancestral guzashta kasht from before the time when in 1909 their ancestor acquired a half-anna share in the proprietary interest in the village. In certain partition proceedings the Deputy Collector recorded this land as the plaintiffs' kasht land; but on appeal the Collector ordered that the land should be recorded in the khasra as zerait and the partition was made accordingly. The plaintiffs claimed a declaration that the land was their kasht land and possession and mesne profits. The defence was that the land was zerait and that the suit was barred by the provisions of the Estates Partition Act.

The learned Subordinate Judge held that the plaintiffs had failed to prove their title; and, further, that S. 119 of the Estates Partition Act barred the suit. The learned District Judge reversed both these findings. He held that the plaintiffs had proved that they had possessed this land as raiyats at least since 1899 and that they had acquired the status of occupancy raiyats in the land. With regard to S. 119 he was of opinion that as the order in the partition case which was contested in this suit was made under Chapter VI of the Act, S. 119 had no application, and that there was nothing in the Act that barred the suit which was instituted by the plaintiffs in their capacity of raiyats. The defendants have appealed.

With regard to the first finding it was contended by the learned Counsel for the appellants that inasmuch as the land was under water up to 1908, it was impossible that the plaintiffs could have acquired occupancy rights in the same. Now there is only one piece of evidence which refers to the land being under water, as appears from the judgment of the Subordinate Judge, viz., Ex. A, a written statement by the mortgagee in a suit for redemption. The learned District Judge has dealt with this evidence and has held that a recital of this kind is of no value as evidence of fact. He was entitled to hold that opinion and in that view no objection can be taken to his finding of fact as to the status of the plaintiffs.

The substantial question in the appeal is as to the effect of S. 119 of the Estates Partition Act. Two cases were referred

to by the learned counsel for the appellants : *Chaudhary Kesari Sahai Singh* v. *Hitnarayan Singh* (1) ; and *Anil Kumar Biswas* v. *Rash Mohan Saha* (2). Neither of these cases deals with an order under Chapter VI. They were both cases between proprietors and the substance of the partition was directly in issue in both. S. 119 clearly barred the plaintiff's suit in both cases and these authorities throw no light on the present case where the plaintiffs are not asserting any right as proprietors but are claiming a raiyati right acquired long before they became proprietors. On the other hand in *Janki Nath Chowdhry* v. *Keli Narain Roy Chowdhry* (3), the question was as to a miras right held by one who was also a proprietor in the village. In that case also it was argued that there had been a decision of the revenue authorities against the plaintiff as to the reality and extent of his tenure and that it was not open to him to have the matter re-agitated in the civil Court. On this argument their Lordships observed as follows : "No authority has been shown in support of this proposition. On the other hand, there are obvious and weighty reasons upon which such a contention ought to be overruled. It is manifest that if, in the course of a partition proceeding, under Act VIII of 1876, any question arises as to the extent or otherwise of the tenure, as the tenure holder is not a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the revenue authorities for the purposes of partition between the proprietors. It is merely an accident that, in the case before us, the tenure is set up by a person who is also a proprietor and is a party to the proceedings in that character. It would, in our opinion, be unreasonable to hold that a party who has appeared before the revenue authorities in his character as a proprietor, should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings." This language applies precisely to the present case. Similarly in *Lakhi Choudhry* v. *Akloo Jha* (4), the question was discussed with regard to an order passed under Chapter VI and their Lordships said : "In the second place S. 119 of the Estates Partition Act specifies the orders of the revenue authorities which cannot be questioned by a suit in any civil Court. An order under S. 45 or S. 46 is not one of the orders mentioned in S. 119. The reason for the exclusion is obvious. The determination by the revenue authorities is of a summary character and it cannot be taken to conclude finally a question of title between one of the proprietors and a stranger to the proceedings." The same view has been taken in this Court in *Baldeo Sahi* v. *Brajnandan Sahi* (5). A partition deals with the rights of proprietors and, so far as raiyati lands are concerned, they are only entitled to a distribution of the rents. It could not have been the intention of the Act that the rights of tenants should be conclusively determined by the record of rights prepared for the purpose of partition ; and that this is so is clear from the fact that Chapter VI and S. 111 are not covered by S. 119. There is, in my opinion, nothing in that section to bar the present suit. The learned Subordinate Judge was of opinion that S. 119 must bar the suit because the effect of decreeing the plaintiffs' suit would be to upset the whole partition. In my opinion that is not so. S. 89 provides for the case of dispossession of the proprietor of a separate estate by a decree of a Court of competent jurisdiction and enacts that in such case the partition shall not be disturbed, but such proprietor shall be entitled to recover from the proprietors of the other separate estates formed by the partition such compensation as may be fair and equitable. That section does not apply in terms to the present case ; and there is no reason why the principle should not be applicable. If the value of the defendants' estate is reduced by the declaration of the plaintiffs' raiyati right in this land, their remedy, in my opinion, would be to seek compensation from the other proprietors ; but there is no ground in justice why the fact that a partition has been made on the basis that this land is proprietor's land should debar the raiyat from asserting his raiyati right.

I would, therefore, dismiss this appeal with costs. As it appears that during the pendency of the suit possession was deli-

(1) [1920] 1 P. L. T. 507.
(2) A. I. R. 1924 Cal. 245.
(3) [1910] 37 Cal. 662=15 C. W. N. 45.
(4) [1912] 16 C. W. N. 689.
(5) [1918] 3 P. L. W. 266= (1918) P. H. C. C. 164.

vered and the plaintiffs were dispossessed the decree will entitle them to recover possession with mesne profits.

Das, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 164

DAS AND ROSS, JJ.

Sagar Mull—Defendant—Appellant.

v.

Hira Maharaj and *others*—Plaintiffs—Respondents.

Appeal No. 44 of 1925 and Civil Revision No. 23 of 1925, Decided on 24th June 1925, from the appellate decree of the Dist. J., Monghyr, D/- 3rd November 1924.

(a) *Civil P. C., Sch. 2 para. 16—Appeal on grounds other than those in para. 16 is incompetent.*

No appeal lies from an award on grounds other than those specified in para. 16 (2). [P. 165, C. 1]

(b) *Appeal—Right to second appeal—First appellate Court hearing appeal, where no appeal lay—Second appeal lies.*

Where no appeal lay to the lower appellate Court, but an appeal was entertained and decided:

Held ; a second appeal lies to the High Court. [P. 165, C. 1]

S. M. Mullick and *N. N. Sen*—for Appellant.

Hasan Imam, N. C. Sinha, N. C. Ghosh and *Niamutullah*—for Respondents.

Ross, J.—This is an appeal against an order of the learned District Judge of Monghyr reversing a decision of the Munsif and remanding the suit for trial on the merits. The suit was brought by Plaintiff No. 1, Hira Maharaj, and his minor son against the six defendants who are said to be members of the Committee of the Lakhisarai Gausala. The suit was for specific performance of an agreement for sale of a plot of land entered into by the defendants with the Plaintiff No. 1 on the 18th of December 1920. The parties entered into an agreement to refer the matter to arbitration and a petition was presented on behalf of the minor plaintiff for leave to enter into this agreement and permission was granted by the Court. As the award was not submitted by the time limited by the Court, after several adjournments had been given, the arbitration was superseded on the 27th of March 1921 and the case was fixed for hearing for the 30th. On that date another application was made by Plaintiff No. 1 and the defendants to refer the suit again to arbitration. This was granted and the same arbitrators were appointed and they submitted their award on the following day.

The Munsif passed a decree in accordance with the award and dismissed the suit. The learned District Judge held that the reference to arbitration was illegal inasmuch as no permission was granted to the minor plaintiff to enter into the agreement by which the case was submitted to the arbitrators on the second occasion. He therefore set aside the decree and remanded the suit for trial on the merits.

On behalf of the appellant, who is Defendant No. 6, the contentions are : first, that no appeal lay to the District Judge ; secondly, that the question of permission to the minor plaintiff did not arise inasmuch as it was only Plaintiff No. 1 who asked for relief ; thirdly, that no permission was necessary because O. 32, R. 7, does not control para. 1 of Sch. 2 to the Code ; and, lastly, that even if permission was ordinarily necessary, it was not necessary in this case as Plaintiff No. 2 was joint with his father the karta of the family, and was therefore represented by him.

On behalf of the respondents it is contended in the first place that even if no appeal lay to the District Judge he has passed a proper order such as the Court would have passed on an application by the plaintiff under S. 115 and, therefore, this Court should not interfere ; secondly, that the supersession of the arbitration on the 27th of March cancelled all the proceedings in arbitration up to that date and it was necessary to obtain fresh permission for the minor plaintiff to enter into an agreement to refer the suit to arbitrators; and thirdly, that permission was necessary because O. 32, R. 7, controls para. 1 of Sch. 2 ; and, therefore the reference to arbitration was without jurisdiction and the order passed by the District Judge was right.

Now para. 15 of Sch. 2 states the grounds on which an award can be set aside. These are for the trial Court to consider ; and the ground now taken fell to be considered and was considered by that Court and it was decided that the award was not invalid on that ground.

Under para. 16, therefore, the Court had to pronounce judgment according to the award and it did so. Cl. (2) of that paragraph states the grounds on which an appeal may be taken against such a decree viz., that it is in excess of the award and not in accordance with it. No such ground was taken before the District Judge and therefore no appeal lay. This is plain on the language of the section itself and the authorities are clear: *Ghulam Khan* v. *Muhammad Hassan* (1), *Lutawan* v. *Lachya* (2) and *Khudi Ram Mahto* v. *Chandi Charan Mahto* (3). The case which the learned District Judge has relied upon, *Benodelal Pakrasi* v. *Pran Chandra Pakrasi* (4) was decided in 1898 under the old Code and before the decision of the Judicial Committee and is no longer law. The learned counsel for the respondents did not attempt to support this part of the judgment and conceded that no appeal lay to the District Judge. But as the District Judge entertained and decided the appeal there is a second appeal to this Court. That second appeal must be decided according to law and the judgment of the District Judge must be set aside.

As to the contention of the respondents that this Court should not interfere when a proper order has been made, this argument can be raised only in answer to an application for the exercise of the revisional jurisdiction of the Court. This is not the case here; nor is there any application by the respondents against the order of the Munsif; consequently this point does not arise. Moreover, even if it did arise, this contention could not succeed because it rests on a pure technicality. The defect is formal only, because on the first reference to arbitration permission was accorded to Plaintiff No. 2; and there is no ground for supposing that it would have been refused on the second occasion.

But on the merits it is clear that the appellant is entitled to succeed. I do not propose to enter in the question whether O. 32, R. 7, controls para. 1 of Sch. 2—a question on which there has been much difference of opinion; nor need I discuss the argument that Plaintiff No. 1 represented Plaintiff No. 2 so as to make it unnecessary for the Court to grant permission to Plaintiff No. 2 to agree to arbitration. But the plaint itself shows—and the prayer is specific—that only Plaintiff No. 1 prayed for judgment. No relief was sought for Plaintiff No. 2 and he was in no way interested in the suit. The agreement of which specific performance was sought was entered into by the defendants with the Plaintiff No. 1 and he alone was entitled to enforce it.

On every ground I am of opinion that the decision of the learned District Judge is wrong and must be set aside. The appeal is therefore decreed with costs throughout and the decree of the District Judge is set aside and that of the Munsif is restored.

The application in revision is dismissed.

Das, J.—I agree.

Appeal allowed.

(1) [1902] 29 Cal. 167=29 I.A. 51=6 C.W.N. 226=12 M.L.J. 77=4 Bom. L.R. 161=8 Sar. 154 (P.C.).
(2) [1914] 36 All. 69=12 A.L.J. 57 (F. B.).
(3) [1916] 1 P.L.J. 306=2 P.L.W. 377.
(4) [1911] 14 C.L.J. 143.

✻ A I. R. 1926 Patna 165

MULLICK, AG. C. J., AND KULWANT SAHAY, J.

East Indian Railway Co. — Defendant —Appellant.

v.

Gobardhan Das—Plaintiff—Respondent.

Second Appeal No. 393 of 1923, Decided on 22nd July 1925, from a decision of the Sub.-J., Ranchi, D/- 20th January 1923.

✻ (a) *Railways Act, S. 72—Risk note B—Consignor pleading loss to himself—Railway need not plead loss to them but may simply plead the risk note.*

In order to make the risk note applicable it is sufficient that the plaintiff-consignor pleads loss to himself. It is not necessary for the defendant Railway to give evidence that the goods have been lost to him also. Therefore if the plaintiff admits the loss then all that the defendant has to do in the written statement is to plead the contract. He is not required to bring any evidence to support his plea. If the plaintiff is astute to plead not loss but only non-delivery, even in that case the defendant need only plead the contract and he will be relieved from the duty of calling evidence: *A. I. R.* 1923 *Patna* 285, *Foll*; 45 *Bom.* 1201 *not Foll. A. I. R.* 1924 *Patna* 25 and *A. I. R.* 1924 *Cal.* 725, *Dist.* [P. 166, C. 1, 2]

✻ (b) *Railways Act, S. 72 — Risk note B—Wilful neglect means deliberately doing or abstaining from doing an act which the party is bound to do.*

"Neglect" means the omission to perform a duty and implies that a man does something which ought either to be done in a different man-

ner or not at all, or that he omits to do something which ought to be done. But wilful neglect goes far beyond this and implies that the party knew that he should do a particular act and that he deliberately abstained from doing it. There may be cases where neglect may be deliberate and yet not wilful as for instance when the act is not that of a free agent. Apart from such cases it may be said that every omission is wilful because everyone must be presumed to have intended the ordinary consequence of his act. But the mere presumption of law for the purpose of fixing responsibility is not sufficient. [P 167 C 1 & 2]

N. C. Sinha and *N. C. Ghosh*—for Appellant.

S. Dayal—for Respondent.

Mullick, Ag. C. J.—On the 24th February 1921, the plaintiff consigned to the defendant Company 25 bags of coriander seed at Howrah and on the 20th September 1921, he consigned 125 bags of sugar at the Kidderpore Docks for delivery at Giridih to himself. It is admitted by the plaintiff that 16 bags of sugar and one bag of coriander seed were lost and the present claim is for Rs. 782 as damages.

The defendant set up a risk note in form B and declined to give any account of what had become of the goods.

The Munsif decreed the suit and on appeal the Subordinate Judge affirmed that decree.

The present second appeal is preferred by the defendant.

The sole question is whether the risk note absolves the defendant from liability. The Subordinate Judge thought that the risk note did not apply because this was a case not of loss but of non-delivery and in his opinion a loss to the plaintiff is not sufficient and the defendant must give proof of loss to himself. He relied on the case of *Ghela Bhai Punsi* v. *E. I. Ry. Co.* (1). But it has been held in *G. I. P. Ry. Co.* v. *Jitan Ram Nirmal Ram* (2) that in order to make the risk note applicable it is sufficient that the plaintiff pleads loss to himself and that it is not necessary for the defendant to give evidence that the goods have been lost to him also. Reference was made in that case to the judgment of the House of Lords in *Smith Ltd.* v. *Great Western Railway Company* (3) and *Ghela Bhai's* case (1) was dissented from. The same view has been taken in other cases in this Court and I think we must follow the *cursus curiae*.

Our attention has been drawn to *East Indian Railway Company* v. *Sukhdeo Das and Gobardhan Das* (4) where a learned Judge of this Court sitting alone held that the risk note did not apply because the defendant had not pleaded loss within the meaning of the special contract. It would seem that the decision in that case turned upon the special language used in the written statement. But the *G. I. P. Ry. Co.* v. *Jitan Ram Nirmal Ram* (2) is quite clear and lays down the following rules (1): where a contract contains an exception and a proviso the party who desires to take the benefit of the exception must (if the contract requires it) not only plead the exception but prove it, and when that has been done the other party who desires to take the benefit of the proviso, which is in reality an extrinsic covenant by way of defeasance, must prove that the subject-matter is not within the exception; (2) upon the special contract in risk note B the burden of proof lies in the first instance upon the defendant to show that there was such loss as is contemplated by the risk note and the onus is then shifted upon the plaintiff to show that the loss was due to the wilful neglect of the defendant.

Therefore if the plaintiff admits the loss, then all that the defendant has to do in his written statement is to plead the contract. He is not repuired to bring any evidence to support his plea. If, as is frequently the case, the plaintiff is astute to plead not loss but only non-delivery, even in that case the defendant need only plead the contract and he will be relieved from the duty of calling evidence.

The question really turns upon the construction of the risk-note. Does it intend that loss to the plaintiff only will be sufficient to bring it into operation or does it intend otherwise? In my opinion the answer is that the decision in *G. I. P. Ry. Co.* v. *Jitan Ram Nirmal Ram* (2) was correct and the contract requires that loss to the plaintiff is sufficient to bring it into operation. If the goods are being wrongfully withheld by the Railway Company and have not been lost to them, I see no hardship to the plaintiff in construing the risk note to cover such a case. The plaintiff would then be entitled to an immediate decree on the ground that the goods have been lost to him by reason of the wilful neglect of the defendant to

(1) [1921] 45 Bom. 1201=23 Bom. L.R. 525.
(2) A.I.R. 1923 Patna 285.
(3) [1921] 1 K.B., 237.
(4) A.I.R. 1924 Pat. 25.

deliver. If the defendant has good grounds for detaining the goods he must prove them. Therefore, in my opinion, the learned Subordinate Judge's finding that the failure of the defendant to give any account of the disappearance of the goods proves that the goods have not been lost within the meaning of the risk note cannot be supported, and the risk note also applies where the plaintiff only pleads non-delivery. In truth, in most cases the real object of asking the defendant to call evidence of loss to himself is not to test the correctness of the defendant's allegation but to get by cross-examination some evidence of wilful neglect so as to found a claim under the proviso.

A contrary view has recently been taken in the Calcutta High Court in the *East Indian Railway Company* v. *Joypat Singh* (5). In arriving at the conclusion that loss to the plaintiff is not sufficient the learned Judges in that case have relied upon the language of the English Carriers Act of 1830 and the decision of Baron Parke in *Hearn* v. *London and South Western Railway Company* (6). But my respectful opinion is that the English Carriers Act is not in pari materia with the Indian Railways Act; and having regard to the fact that a carrier under the English Act is an insurer which a railway company in India is not, I do not think we are compelled to give the word "loss" the same meaning here as in the Carriers Act.

If then the risk note applies is the plaintiff entitled to succeed on the ground of wilful neglect on the part of the Railway? The learned Subordinate Judge's judgment on this point is as follows: "The position of the plaintiffs was such that it was not possible for them to make anything more than a general statement of the fact of negligence as inferred from all the circumstances. And they are not to blame if they have not been able to make out by means of cross-examination the specific acts of negligence because the available evidence on the question of loss has not been placed before the Court." If that is the position, I cannot see upon what evidence the learned Subordinate Judge comes to the finding that there has been wilful neglect. "Neglect" means the omission to perform a duty and implies that a man does something which ought either to be done in a different manner or not at all, or that he omits to do something which ought to be done. Here the defendant's duty was that of a bailee, namely, to take such care of the goods as a prudent man would have taken of his own goods. The degree of care required depends on the circumstances of each case. The plaintiff must show that the defendant did something which a prudent man in his circumstances, and having regard to the previous course of dealing, would not have done. There is no such evidence.

The defendant in cross-examining one of the plaintiff's witnesses suggested that he the plaintiff had, as a matter of fact, locked the wagons with his own locks, but that was denied. The learned Subordinate Judge does not find that it was the defendant's duty to supply locks to the wagons and there is no evidence that the defendant did not take that care which he would ordinarily take of his own goods or of the goods of his other consignors in transit.

Then the learned Subordinate Judge says that if the goods were stolen before they were loaded there must have been neglect. That does not follow. He also says that if they were delivered to a wrong party there must have been neglect. There is no proof that they were delivered to a wrong party.

There is, therefore, no legal evidence of neglect at all,

But wilful neglect goes far beyond this and implies that the defendant knew that he should do a particular act and that he deliberately abstained from doing it. There may be cases where neglect may be deliberate and yet not wilful, as for instance when the act is not that of a free agent. Apart from such cases it may be said that every omission is wilful because everyone must be presumed to have intended the ordinary consequence of his act. But the mere presumption of law for the purpose of fixing responsibility is not sufficient. The plaintiff must show that the neglect was not accidental and that the person knew that mischief would result from his conduct or that there was an indifference to his duty to ascertain whether such conduct was mischievous or not. In *Lewis* v. *Great Western Railway Company* (7) the question was whether there had been wilful misconduct in

(5) A.I.R. 1924 Cal. 725.
(6) [1855] 10 Ex. 793.
(7) [1887] 47 L.J., Q.B. 131=3 Q.B.D. 195=31 L.T. 771 26 W.R. 255.

packing certain cheeses in London and Lord Justice Bramwell expressed himself on the subject as follows: "I cannot, however, say that there was evidence here to show that the packers who were in London, which [illegible] great place for the exporta[illegible] Cheshire cheeses, knew that they were doing wrong, or at all events that they were aware that there might be mischief resulting from it, and that they improperly did not inform themselves as to whether there would be, or would not be, mischief resulting."

In my opinion there was no legal evidence of wilful neglect here and therefore the plaintiff is not competent to succeed.

The result is that the appeal will be decreed with costs throughout.

Kulwant Sahay, J.—I agree.

Appeal allowed.

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* A. I. R. 1926 Patna 168

BUCKNILL AND ROSS, JJ.

Tunia—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 296 of 1925, Decided on 23rd July 1925, from an order of the S.-Judge, Arrah, D/- 1st June 1925.

* *Penal Code, S. 193—Giving false answers to questions which should not have been asked but were asked—Perjury is committed but sentence should be light.*

If one answers questions put to one in a judicial proceeding when one has sworn to tell the truth and if one's answers are not true, one commits perjury, whether those questions which one answers are not questions which should have been or could have been properly asked. The sentence, however, in such cases should not be very severe. [P 169 C 1]

P. C. Roy—for Petitioner.

Niamatulla—for Opposite Party.

Bucknill, J.—This was an application made in criminal revisional jurisdiction. It was made by one Mt. Tunia, a young woman, who was convicted by a Magistrate of the First Class at Arrah of an offence punishable under the provisions of S. 193 of the Indian Penal Code, that is to say, with having committed perjury in the course of a judicial proceeding. She was sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 200, and in default of payment thereof, to serve a further term of two months' rigorous imprisonment. From her conviction and sentence the applicant appealed to the Sessions Judge of Shahabad; but on the 1st of June last the appeal was dismissed summarily.

The circumstances which have led up to the prosecution of this woman and her conviction are certainly somewhat peculiar. It would seem that at the end of July last year a burglary took place in the house of a lady residing in the town of Arrah. A man named Tara Prasad, who is in the employment of this lady, reported the burglary to the Police; and upon being asked whether he had any suspicion as to by whom the offence had been committed, he is said to have replied that he thought that it was not improbable that one Ramsakal Singh of Gonouli might have been concerned in the matter. He added that this Ramsakal Singh lived in the same mahalla where the burglary had been perpetrated, that his (Ramsakal's) uncle was on bad terms with the lady whose house had been broken into and that Ramsakal himself was the associate of evil persons.

As a result of what had taken place at the police station, it would seem that, on the 27th of August last, this Ramsakal instituted proceedings against Tara Prasad charging him with having committed an offence punishable under the provisions of S. 500 of the Indian Penal Code that is to say, with having committed defamation. Tara Prasad was put on his trial; we are informed at the Bar that he was eventually acquitted. What defences he put forward I do not know; but it would seem that, amongst them, must have been one which contemplated some plea in the nature of justification, for he called as a witness in the defence the applicant here. So far as I can gather his object in calling this woman was to show that she was a woman of easy virtue and had been the kept mistress of the man Ramsakal Singh, and I suppose that it would have been urged that if it could have been shown that Ramsakal Singh had kept company with a woman of ill-repute, the suggestion made by Tara Prasad in the statement which he made to the police, when reporting the burglary, that Ramsakal was the asso-

t e of evil companions might have been d in some measure to be justifiable. Now, when the applicant was put into the witness-box, she does not appear to have realized that it was in no way incumbent upon her to answer any questions which might have reflected upon her own probity or virtue and it is somewhat remarkable to notice that no attempt at protecting her from having to reply to questions of that nature appears to have been offered to her by the officer who was trying the case. On the other hand it would seem that she was interrogated very fully as to her morality and as to her immoral association with Ramsakal Singh ; how such a proceeding could have been allowed unless she had been (which she was obviously not) willing to assist Tara Prasad by blackening her own character, it is difficult to understand. However, the fact remains that she was asked a variety of questions of the character which I have mentioned and that she answered in a manner protective of her own character. There is, however, not the least doubt that a number of her answers were not true ; she had been put upon her oath and it is, of course, needless for me to point out that if one answers questions put to one in a judicial proceeding when one has sworn to tell the truth and if one's answers are not true, one commits perjury, whether those questions which one answers are not questions which should have been or could. have been properly asked. After the applicant had given her evidence which I may point out was, of course, not in favour of Tara Prasad, she was eventually charged as I have mentioned above, tried, convicted and sentenced. I think that it must be admitted that the circumstances were extremely difficult and painful for the applicant, she was placed in an unenviable position and, no doubt, was completely ignorant of her right to refuse to answer questions which would reflect upon her own character and had the unpleasant alternative either of telling the truth and admitting that she was a loose woman, or as she did, of telling untruths and making herself out better than perhaps she really was.

It is, however, I think, not unimportant to observe the actual averments which were made against her which formed the basis of the charge of perjury brought against her. Although it is true that superficially some of these questions do not appear in themselves to be such as if answered truthfully would have thrown any discredit upon the applicant's character, yet, on further examination, they will all be found to be connected more or less closely with the illicit association which it was being attempted to be proved had existed between the applicant and Ramsakal Singh. The first untrue statement which she is alleged to have made is that she did not know this man at all. There can be no doubt from the evidence of at least six witnesses and from documentary evidence as well that this was not true. The second statement was that she had never stated that Ramsakal Singh, this particular individual, used to visit her frequently. This again was, undoubtedly, not a true statement. The statement in which she is, alleged to have perjured herself was that she denied that the person named Ramsakal against whom and herself a woman named Dularia in 1923 had brought some criminal proceeding was the same Ramsakal as that concerned in the case which was being, brought against Tara Prasad. Again there can be no doubt that this statement was not true. The fourth question which she is said to have answered untruthfully was that she denied that when her house had been entered for the purpose of executing some legal purposes Ramsakal had been found there in her company. This, however, again was undoubtedly shown to be a falsehood. The fifth and the last answer which she is said to have made falsely is the point blank avowal that she was not the mistress of this Ramsakal. The Magistrate has stated that the evidence of all the witnesses for the defence and indeed of the main prosecution witnesses shows that this statement was, as he terms it, "a deliberate lie." There can, therefore be no doubt whatever that this woman in the witness-box made statements which were untrue, and which she knew to be untrue. There are however, obviously reasons for coming to the conclusion that her position was allowed to be one which it ought not to have been allowed to be. I think that she ought to have been informed that it was in no way incumbent upon her to reply to questions her answers to which might, if true, have reflected upon her moral character.

Under these circumstances, although there undoubtedly has been a commission of the offence to which I have referred it seems to me that the sentence is altogether too severe. We are informed by the learned advocate who appears for the applicant that the applicant has already served 21 days in jail. I am satisfied, in my own mind, that this is an ample punishment for the offence committed under the remarkable circumstances to which I have drawn attention. Whilst, therefore, affirming the conviction, the sentence of imprisonment which was passed upon the applicant will be reduced to that period of imprisonment which she has already served. The fine of Rs. 200 will be remitted and if it has already been paid it must be refunded

Ross, J.—I agree.

Sentence reduced.

✻ A. I. R. 1926 Patna 170

MULLICK AND ROSS, JJ.

Thakur Sao and *others*—Petitioners.

v.

Abdul Aziz—Opposite Party.

Criminal Revisions Nos. 58 and 59 of 1925, Decided on 7th May 1925, from an order of the Dist. Mag., Patna.

✻ (a) *Criminal P. C., S. 133—Only when denial of right is a pretence Magistrate can make order absolute.*

The first duty of a Magistrate in a case under S. 133 is to determine whether any public right exists, and if the party against whom proceedings have been taken denies that there is any public right, the Magistrate has to determine whether that denial is bona fide or a mere pretence. Only when he is satisfied that the denial is a mere pretence can he proceed to make his order absolute. If he finds that the denial is bona fide, his jurisdiction is ousted and he has no authority to enquire further. The Magistrate is not entitled to demand that the evidence shall be sufficient to satisfy him that no public right exists. The only condition is that upon the materials before him the Magistrate must have no reason to think the evidence false. The Magistrate has no jurisdiction to weigh the evidence and to determine on which side the balance leans. [P 171, C 1]

✻ (b) *Criminal P. C., S. 139-A (2)—Reliable evidence supporting denial of right ousts jurisdiction.*

The intent of S. 139-A (2) is that the Magistrate should neither encroach on the jurisdiction of the civil Court which alone can determine the existence of such a public right as is referred to, nor fail to exercise his own jurisdiction. The criterion is that he should find evidence to support the denial which he can pronounce reliable. That is necessary and it is sufficient to oust his jurisdiction. [P 171, C 2]

K. B. Dutt, S. P. Verma, Manohar Lal and *S. N. Sahay*—for Petitioners.

Sultan Ahmad, Muhammad Hasan Jan, Fakr-ud-din and *Ahmad Raza* — for Opposite Party.

Mullick, J.—A dispute having arisen between the Hindus and Muhammadans residing within the cantonment of Dinapur regarding the use of a ghat on the river Sone, the Sub-Divisional Magistrate of Dinapore on the 14th January last issued two orders which form the subject of the present applications before us.

One of these orders declares the "ghat" to be public and purports to have been made under S. 139-A, Criminal P. C. The Magistrate had issued a notice under S. 135 of the Code calling upon Deonarain Pande, the priest of the temples, to show cause why he should not remove certain enclosures and a signboard indicating that it was private property. The other order was made under S. 144 of the Code and prohibited six of the leading Hindus from restraining the Muhammadans from using the ghat.

It appears that the bank down to the water of the river is the property of Government and that 40 or 50 years ago a Hindu resident of the locality obtained permission to erect two or three temples on the bank and to construct a flight of steps for the use of bathers.

The case of the Hindu is that they have acquired an exclusive right to use the steps and that the Muhammadans are not entitled to use the same as of right.

The learned Magistrate proceeded to hold an inquiry under S. 139-A of the Criminal P. C. as to Deonarain's claim that the ghat was private property and as to his denial that there existed any public right in respect thereof, he took the evidence of five Hindus and of a number of Muhammadans, and the conclusion to which he came was that the Hindu witnesses though reliable were mistaken in imagining that there was no public right.

Now it is contended that the law does not give the Magistrate the power to find whether in fact the denial is true or false and as soon as a bona fide dispute has been made out, the Magistrate must hold

his hand and refer the parties to the civil Court.

The law, previous to the Code of 1923 as expanded in judicial decisions, was that as soon as the party cited appeared before him the Magistrate's first duty in a case under S. 133 of the Code was to determine whether any public right existed, if the party denied that there was any public right, the Magistrate had to determine whether that denial was bona fide or mere pretence. Only when he was satisfied that it was pretence could he proceed to make the order absolute. If, however, he found that the denial was bona fide, his jurisdiction was ousted and he had no authority to enquire further.

Now S. 139 of the present Code appears merely to have confirmed this view of the law and given statutory expression to it. The section provides that if in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent civil Court; and if he finds that there is no such evidence he shall proceed, as laid down in S. 137 or S. 138 as the case may require.

The law, therefore, requires first of all that the party shall appear before the Magistrate and deny the existence of the public right in question. Secondly, that he shall produce some reliable evidence, and, thirdly, that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction ceases to exist.

Now it is contended that the Magistrate is entitled to demand that the evidence shall be sufficient to satisfy him that no public right exists. The section, however, requires evidence and not proof and the only condition is that upon the materials before him the Magistrate has not reason to think the evidence false. The Magistrate has no jurisdiction to weigh the evidence and to determine on which side the balance leans.

Moreover, there was evidence which, if believed, supported the claim made by the petitioners. It is not disputed that the witnesses are thoroughly honest in what they say; but the Magistrate says that they are mistaken in thinking that the ghat is not public. That is a matter for the civil Court and, in my opinion, the Magistrate has no jurisdiction to inquire any further into the actual existence of the public right claimed by the Muhammadans.

In this view of the case the order of the learned Magistrate of the 14th January 1925, will be set aside and he will be directed to stay all further proceedings in the case. The order under S. 144, Criminal P. C., has spent its force and no orders are required in respect of it.

Ross, J.—I agree. It seems to me that the intent of S. 139-A (2) is that the Magistrate should neither encroach on the jurisdiction of the civil Court which alone can determine the existence of such a public right as is referred to, nor fail to exercise his own jurisdiction. The criterion is that he should find evidence to support the denial which he can pronounce reliable. That is necessary and it is sufficient to oust his jurisdiction.

Order accordingly.

✻ A. I. R. 1926 Patna 171

JWALA PRASAD AND ADAMI, JJ.

Goswami Laloo Lal Sharma—Appellant.

v.

Radhey Lal Goswami and *others*—Respondents,

Miscellaneous Appeal No. 153 of 1924 Decided on 24th November 1924, for staying the proceedings of the Court of the Dist. J., Mathura.

✻ (a) *Civil P. C., S. 151—Injunction against person outside jurisdiction can be issued if he has submitted to jurisdiction—Injunction—Civil P. C., Ss. 10, 22 and O. 39.*

Although a Court will not issue any injunction against a person not within its jurisdiction, yet when that person has submitted to its jurisdiction, the Court will in the ends of justice restrain that party from doing anything which it considers is improper and will amount to an abuse of the process of the Court. 1 *P. L. T. 277 Foll.* [P 173, C 1]

T. N. Sahay—for Appellant.

K. P. Jayaswal, G. N. Mukherjee, Fazl Ali and *B. C. De*—for respondents.

Judgment.—This is an application to stay the proceedings instituted pending in the Court of the District Judge of Mathura for the grant of Letters of

Administration with respect to the estate of one Mohan Lal. The applicant in that Court is Manu Lal, son of Kishori Lal, brother of Mohan Lal. The opposite parties in that case are Laloo Lal, son of Mohan Lal, Radhey Lal Goswami and others, sons of the daughter of Mohan Lal. Previous to the institution of the proceedings in the Mathura Court, Laloo Lal had applied to the District Judge of Patna for the grant of Letters of Administration to the estate of his father Mohan Lal. The application was opposed by the aforesaid Goswamis, the sons of Mohan Lal's daughter. Manu Lal was also made a party and entered appearance, but afterwards ceased to take any interest in the proceeding. That application was made on the 17th September 1923 and terminated in the final order of the District Judge passed on the 14th June 1924, by which the application of Manu Lal was refused. Against that order Manu Lal has appealed to this Court, and has now applied for an ad interim stay of proceedings in the Court at Mathura in the United Provinces, pending the disposal of the appeal here.

On the 7th of August 1924 an order for ad interim stay of the proceedings before the District Judge of Mathura was made by this Court pending the disposal of the present application. Now the applicant has come up before us for determination as to whether the ad interim injunction should continue pending the disposal of the appeal or it should be withdrawn.

The Goswamis, that is, the daughter's sons of Mohan Lal, have appeared through Mr. Jayaswal. He supports the application of Laloo Lal. Manu Lal, who is the applicant in the Mathura Court for the grant of Letters of Administration to him, however, opposes this application. He contends that the application should be made in the Court of the District Judge of Mathura for stay of proceedings under S. 10 of the Civil Procedure Code, and that no injunction should be issued against him restraining him from proceeding with his application in the Mathura Court. It is admitted on all hands that the point at issue, both in the appeal pending before us and in the proceedings in the Mathura Court, are one and the same. The proceeding out of which the appeal to this Court has arisen was started long before the application made by Manu Lal in the Mathura Court. Upon these admitted facts the suit at Mathura cannot proceed and the trial of that suit is barred by S. 10 of the Code of Civil Procedure. It is true that an application for stay of proceedings under S. 10 of the Code should have been made in the Mathura Court. Upon the facts stated by the parties an application for the grant of Letters of Administration could be instituted either at Patna or at Mathura and as a matter of fact the proceedings have been taken in both the Courts. This circumstance brings the case within S. 22 of the Code read with S. 23, and the Court can determine in which of the two Courts the proceedings shall proceed. Manu Lal was made a party in the proceedings before the District Judge of Patna and he entered appearance. No objection was, however, made by him as regards the proceedings instituted in the Patna Court or that those proceedings should have been stayed. He quietly went to Mathura and instituted a fresh proceeding and allowed the proceedings at Patna to continue and to be dealt with and determined by the District Judge of Patna. He, therefore, submitted to the jurisdiction of the Patna Court. Having thus submitted to the jurisdiction of the Patna Court he cannot frustrate the appeal in this Court by simultaneously going on with his proceedings in the Mathura Court. It is, therefore, to my mind, obvious that the proceedings at Mathura should not go on until the disposal of the litigation here. The Code has carefully avoided the chance of any clash in the decision of two Courts either in the same High Court or in different High Courts with respect to the same point at issue arising between the same parties. When the suits and proceedings are in the Courts subordinate to the same High Court the matter does not present any difficulty and can be effectively dealt with by that High Court. Difficulty, however, is felt in dealing with such matters when they are pending in Courts subordinate to two High Courts, for one High Court has no control over the Courts subordinate to another High Court. To meet these difficulties the Code has made provision in two sections, viz. Ss. 10 and 22. These express provisions are further fortified by the power

vested in the Court for issuing injunctions against persons who are either within the jurisdiction of the Court or have submitted to its jurisdiction. Therefore the provisions contained in Ss. 10 and 22 are supplemented by those contained in O. 39 relating to injunctions and to those which lie in the inherent power of the Court. It is certain that in the circumstances of the case the proceedings in the Mathura Court should not go on and be stayed.

The question of procedure then, to my mind, will not at all stand in dealing with the matter. Whereas under S. 10 the party should apply to the Court in which the subsequent suit or proceeding is instituted under S. 22 this Court has jurisdiction to make an order that the appeal in this Court shall proceed. This order under S. 22 has the effect of stopping the proceedings in the Mathura Court. This has been the view arrived at by me in the case of *Firm Ram Kumar Sheochand Rai* v. *Firm Tula Ram Nathu Ram* (1), and, although this Court will not issue any injunction to Courts subordinate to another High Court, yet the order passed by this Court under S. 22 is final; and it will not be open to any other Court in India to dispute it and to allow suits and proceedings to proceed in any other Court than that in which this Court directs. Again, although the Court will not issue any injunction against a person not within its jurisdiction, yet when that person has submitted to the jurisdiction, the Court will in the ends of justice restrain that party from doing anything which it considers is improper and will amount to an abuse of the process of the Court. The reason why an injunction should not issue against a person residing outside the jurisdiction of the Court is that an injunction on a person if disobeyed cannot in that circumstance be enforced, but a party to a proceeding pending in this Court or in Courts subordinate to this Court is amenable to this Court. Manu Lal was a party in the Court below and entered appearance and did not object to the jurisdiction of that Court and therefore he made himself liable in personam to this Court, vide *Amar Kumar Mukherjee* v. *B. Coventry* (2). Again, he is a respondent in this Court and has entered appearance. Therefore an injunction can issue against him restraining him from proceeding with the suit in the Mathura Court.

It has, however, been contended that an injunction against Manu Lal will not at all interfere with the Mathura Court and that Court in spite of such an injunction can continue the proceedings in that Court. That contingency may not be apprehended. So long as Manu Lal is personally responsible to this Court an injunction against him, restraining him from doing any act, is a sufficient check upon any proceeding being adopted by him in the Mathura Court.

The case, we are told, is not a complicated one, nor is it a heavy case. Most of the papers are in English and will not be required to be translated. The appellant is ready to deposit the printing costs which has now been estimated by the office for printing the paper-book. Therefore the preparation of the paper book can be expedited and so also the hearing of the appeal. The ad interim order passed by this Court on the 7th August 1924, should, therefore, continue until the disposal of the appeal, the hearing of which is directed to be expedited. On behalf of Manu Lal an undertaking has been given that he will not proceed with the proceedings in the Mathura Court if the hearing in this Court is expedited. In the circumstances there will be no order as to costs.

(1) [1920] 1 P. L. T. 277=(1920) P. H. C. C. 285.
(2) A. I. R. 1925 Patna 710.

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* A. I. R. 1926 Patna 173.

MULLICK AND ROSS, JJ.

Sitaram Das—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 82 of 1925, Decided on 14th May 1925, from a decision of the S. J., Bhagalpur, D/- 19th December 1924.

* (a) *General Police Act* (5 *of* 1861), *S.* 30—*Section gives police power to control procession, but not to forbid.*

Section 30 of the Act gives the police power to control processions. In order that this power may be exercised the Act in certain circumstances authorizes the police to require persons to apply for licenses. The object of this is that adequate arrangements for control may be made in time. But the police have no power to forbid the issue

of a procession. The power to control does not include the power to forbid. [P 174, C 2]

(*b*) *General Police Act* (5 *of* 1861) *S.* 30—*Issue of licenses—Signing and giving for delivery is sufficient.*

In the Act the word " issue " has not been defined; but it signifies that, if the D. S. P. or Assistant D. S. P. signs the license and delivers it to some one with directions that it shall in due course be delivered to the applicant, the license has been issued within the meaning of S. 30. [P 174, C 2]

* (*c*) *General Police Act* (5 *of* 1861), *S.* 30—*Once license is applied for, the applicant may take out his procession.*

Once an application is made in time the applicant is free to take out his procession whether the license had by then been issued or not. If the license has been issued, he is bound to obey the conditions whether it has been delivered or not: if, on the other hand, it has not been issued he is bound only to see that the general law was not broken. [P 175, C 1]

S. N. Sahay—for Petitioner.

Assistant Govt. Advocate—for the Opposite Party.

Mullick, J.—The petitioner has been fined a sum of Rs. 5 for committing an offence under S. 32 of the General police Act (Act V of 1861).

It appears that in August 1923, the Superintendent of Police of Bhagalpur, acting under S. 30 of the General Police act (Act V of 1861) issued a general notice on the residents of certain quarters in the town of Bhagalpur requiring that all persons directing or promoting processions should apply to him for a license. On the 21st August 1924 the petitioner applied for a license to take out a religions procession. On the same day a license was prepared and signed by the Deputy Superintendent of Police, but on the back of it an endorsement was made by a police officer named Mr. Hare to the following effect:

" The petitioner must certify on the application that he understands the provisions under which the pass is issued. This license will not be issued until this is done. "

The petitioner never came for his license nor was it sent to him; but the petitioher on the 23rd August took out his procession. No disturbance took place and in fact the local Sub-Inspector, having learnt that the procession would issue, deputed certain police officers to accompany it.

The Deputy Magistrate, who tried the case, sentenced the petitioner to a fine of Rs. 75 but on appeal the Sessions Judge reduced it to Rs. 5 holding that the offence was technical.

In my opinion the petitioner has committed no offence at all. S. 30 of the Police Act gives the police power to control processions. In order that this power may be exercised, the Act in certain circumstances authorizes the police to require persons to apply for licenses. The object of this is that adequate arrangements for control may be made in time. Clause (3) of S. 30 gives the police power to define the conditions on which a procession shall be permitted to take place. If any of these conditions are broken, the offence is punishable under S. 32. Similarly if there is a failure to apply for license, there is a violation of an order issued under S. 30 and, therefore, an offence punishable under S. 32. But, so far as I can see the police have no power to forbid the issue of a procession. The power to control does not include the power to forbid.

Section 30 does not prescribe how the conditions of a license are to be made known to the applicant; but it is implied, I think, that the application shall be made in sufficient time to permit of the conditions being communicated to the applicant. Ordinarily a day would be fixed by the police for the applicant's appearance to take the license or arrangements would be made by him for its delivery to him or to his agent. If the applicant chooses to take out his procession after applying for his license and without waiting to acquaint himself with the conditions he does so at his own risk provided the license has been issued. In the Act the word " issue " has not been defined; but, I take it that it signifies that if the District Superintendent or Assistant District Superintendent of Police signs the license and delivers it to some one with directions that it shall in due course be delivered to the applicant the license has been issued within the meaning of S. 30. In the present case if Mr. Hare intended that the issuing should not be complete till the license was actually delivered to the applicant in person, then the position is that the petitioner applied in time but did not wait for the issue of the license. In that case also it cannot be said that the petitioner has disobeyed any order passed under S. 30. S. 30 required him to make an application in

time and he made it. As I understand the law he was free to take out his procession on the 23rd August whether the license had by then been issued or not. If the license had been issued, he was bound to obey he conditions whether it had been delivered or not; if on the other hand, it had not been issued he was bound only to see that the general law was not broken. The power of control and dispersal given to the Police by the Act was sufficient to secure the public safety.

The learned counsel for the petitioner has also brought to our notice that the general notification in this case was issued so long ago as August 1923 and it is urged that S. 30 of the Act does not contemplate that prohibitory orders of this nature should remain in force for such long periods. There is no restriction in the section itself, but it is obvious that some revision of the term is from time to time indicated with reference to local conditions.

The result is that the conviction and the sentence are set aside and it is directed that the fine, if paid, be refunded.

Ross, J.—I agree.

Conviction set aside.

A. I. R. 1926 Patna 175

ROSS, J.

Kesho Prasad Singh—Plaintiff—Appellant.

v.

Ram Swarup Ahir and *others*—Defendants—Respondents.

Appeal No. 9 of 1923, D cided on 1st July 1925, from the appellate decree of the Sub-J., Arrah, D/- 18th September 1922.

Bengal Cess Act (1880), *Ss.* 41 *and* 107—*Valuation statement prepared under the Act—Status of tenant under Bengal Tenancy Act is not affected—Civil Courts cannot question the statements.*

According to S. 107 what is done under the Cess Act is done only for the purposes of that Act and has no other effect on the rights of persons. It does not in any way modify the conclusive effect given by S. 93 to the cess valuation. In determining the amount of cess payable the fact that the tenants are recorded in the Record of Rights as tenants at fixed rates is strictly irrelevant. The question is not as to the status of the defendants under the Bengal Tenancy Act, but is as to their status and liability for the purposes of the Cess Act which under S. 41 must be determined according to the entries in the cess valuation statement. The status of the defendants under the Bengal Tenancy Act is in no way affected by this valuation which stands by itself and the civil Courts have no jurisdiction to interfere with it. [P. 176, 1, 2]

L. N. Singh—for Appellant.

P. Dayal—for Respondents.

Judgment.—This is an appeal from a decree of the Subordinate Judge of Arrah, varying a decree passed by the Munsif of Buxar. The plaintiff is the appellant. He sued the defendants for rent and cess for 1325 to 1328 and the only question is as to the amount of cess legally payable by the defendants.

The plaintiff's case was that the defendants were tenure-holders within the meaning of the Cess Act, that the annual value of their holding was Rs. 95-4-0 as entered in the cess valuation papers; that the rent of their holding, as entered in the Record of Rights, was Rs. 31-0-6, and that consequently under S. 41. Cl. (2) of the Cess Act the defendants were liable to pay cesss at the rate of one anna in the rupee calculated on the annual value of the holding, namely, Rs. 95-4-0, less half an anna in the rupee on the rent of the holding: Rs. 31-0-6. The defence was that the defendants were cultivating raiyats within the meaning of the Cess Act, and that they were liable only to pay cess under S. 41, Cl. (3) at the rate of half an anna in the rupee upon the rent of their holding, Rs. 31-0-6.

The Munsif held that the defendants were liable to pay cess at half an anna in the rupee on the annual value of their holding which was Rs. 95-4-0. There was an appeal by the plaintiff and a cross-appeal by the defendants. The plaintiff's appeal was dismissed and the cross-appeal was allowed and it was held by the Subordinate Judge that the defendants were liable to pay cess at half an anna in the rupee on Rs. 31-0-6. The plaintiff has come up to this Court in second appeal.

The argument on behalf of the appellant is that under S. 93 of the Cess Act the civil Courts have no jurisdiction to question the cess valuation. Section 93 provides that: "Every valuation under this part shall be open to revision by the Commissioner or Board of Revenue, and not otherwise." Now the cess valuation statement shows the names of the defendants in column 1 which is headed: "Name of zemindars, tenure-holders and sub-

tenure-holders." In column 2 of which the heading is "Nij-jote and other assessed areas of landlords" is entered Rs. 63-3-0. In column 3 which is headed "Raiyatwari lands" is entered Rs. 32-1-0. The total valuation is given in column 7 as Rs. 95-4-0 and that is the total of columns 2 and 3. Column 8, which is headed "Revenue or rent on which deduction under S. 41 is allowable," shows an entry of Rs. 31-0-6. The appellant contends that, on this document, it must be taken for the purposes of the Cess Act that the defendants are tenure-holders ; that the annual value of their holding is Rs. 95-4-0 and that deduction is allowable under S. 41 on the rental of Rs. 31-0-6 ; in other words, that this document establishes the plaintiff's claim.

The argument on behalf of the respondents is that the defendants are recorded in the Record of Rights as tenants at fixed rates at a rental of Rs. 31-0-6 and that they must, therefore, be assessed as cultivating raiyats, and that their liability is determined by S. 41, Cl. (3). The argument based on S. 93 is sought to be answered by a reference to S. 107 which says : "Nothing in this part contained, and nothing done in accordance with this Act, shall be deemed to affect the rights of any person in respect of any immovable property or of any interest therein except as otherwise expressly provided in this Act." Now the meaning of this section is clear, namely, that what is done under the Cess Act is done only for the purposes of that Act and has no other effect on the rights of persons. It does not in any way modify the conclusive effect given by S. 93 to the cess valuation. The fact that the defendants are recorded in the Record of Rights as tenants at fixed rates is strictly irrelevant to the present question. The question is not as to the status of the defendants under the Bengal Tenancy Act ; the question is as to their status and liability for the purposes of the Cess Act. The Revenue authorities have determined that the defendants are tenure-holders and that the annual value of their holding is Rs. 95-4-0 of which Rs. 63-3-0 is in respect of lands held by themselves and Rs. 32-1-0 is in respect of lands let out to tenants.

It is argued for the respondents that the question in the suit is as to the defendants' liability to pay and that this has to be determined under S. 41 and involves the question of the defendants' status. But it is not their status under the Bengal Tenancy Act that is in question, but their status under the Cess Act and their liability under S. 41 must be determined according to the entries in the cess valuation statement. This statement was compiled in the presence of the defendants ; and, if they were aggrieved at the entry, they ought to have appealed to the Commissioner or to the Board of Revenue as provided by S. 93. Not having done so, they are concluded by the entry in the valuation statement.

It is obvious that a great injustice would be done to the plaintiff if the defendants' contention were to prevail. The plaintiff has been made liable for cess on a valuation of which one of the items is the annual value of the defendants' tenure. If it were now held that the defendants were not tenure-holders, then the liability for this cess will fall on the plaintiff alone through no fault of his, but because the defendants had failed to contest the entry. In my opinion it was for the Revenue authorities to decide whether the defendants were tenure-holders of cultivating raiyats for the purposes of the Cess Act and in this matter the entry in the Record of Rights is wholly irrelevant. The status of the defendants under the Bengal Tenancy Act is in no way affected by this valuation which stands by itself and the civil Courts have no jurisdiction to interfere with it.

I would, therefore, allow this appeal with costs and decree the plaintiff's suit in full. The plaintiff is entitled to his costs in all the Courts.

Appeal allowed.

** A. I. R. 1926 Patna 176

MULLICK AND MACPHERSON, JJ.

Siban Rai—Petitioner.

v.

Bhagwant Dass and *another*—Opposite Party.

Criminal Revision No. 104 of 1925, Decided on 12th June 1925, from an order of the Dist. Mag., Darbhanga, D/- 6th January 1925.

***Criminal P.C., S. 439—*High Court will interfere only in exceptional cases e.g., where there is denial of fair trial—In cognizable cases, private prosecutor has no locus standi at all** (*Mullick, J. Macpherson, J. Contra*).

Per Mullick, J.—The power of interference in revision should be most sparingly exercised and only in cases where it is urgently demanded in the interests of public justice, e.g., cases in which there has been a denial of the right of fair trial and which attract the operation of S. 107 of the Government of India Act. In cognizable cases the private prosecutor has no position at all and that if the Crown decides to let an offender go, no other aggrieved party can be heard to object that he has not taken his full toll of private vengeance. The Crown and not the complainant is always the party. [P 177, C 2; P 178 C 1

Per Macpherson, J.—The High Court possesses the power to set aside an acquittal under S. 439 on being moved by a private person, and this power is not restricted to cases where there has been no trial, or where there has been a denial of the right of fair trial. It cannot be laid down that in every case of a prosecution for a cognizable offence the private prosecutor in India has no position at all in the litigation. Neither principle nor authority supports the view that an application under S. 439 against an acquittal is not maintainable in a private prosecution where the offence charged is cognizable. [P 178 C 2, P 179 C 2]

Ali Imam and *S. A. Sami*—for Petitioner.

Ram Prasad—for Opposite Party.

Sultan Ahmad—for the Crown.

Mullick, J.—In this case the Second Class Magistrate of Samastipur found that Mahanth Ganga Das had title and possession in an asthal at Waini and that the accused Bhagwat Das and Narain Das had forcibly dispossessed him and committed criminal house trespass in a building appertaining to the asthal. He therefore convicted the accused under S. 448 of the Indian Penal Code and sentenced them to a fine of Rs. 50 each.

In appeal the District Magistrate of Darbhanga found that the story of forcible dispossession was false and that Bhagwat Das and Narain Das were in possession and that they had successfully resisted an attempt by Siban Rai, the servant of Ganga Das, to forcibly evict them from the asthal. He found that the accused had no right to stay in the asthal against the will of Ganga Das; but at the same time the case of Ganga Das being false in material particulars, he acquitted the accused.

An application in revision is now made before us to set aside the acquittal, and the question arises whether this Court should interfere.

Ganga Das made an application to the Local Government requesting it to lodge an appeal under S. 417 of the Criminal Procedure Code, but the Local Government refused on the ground that the case was not one of sufficient public importance.

In now asking us to interfere in revision the petitioner relies upon the following cases of the Calcutta High Court-*Shaikh Bazu* v. *Raika Singh* (1); *Harai Chandra Nama* v. *Osman Ali* (2); *Nabin Chandra Chakrabarty* v. *Rajendra Nath Banerjee* (3). In these cases a re-hearing was ordered by the High Court on the ground that there had not been a sufficient trial in the Court below; the decisions were based on the special facts of each case, but it was not till *Faujdar Thakur* v. *Kasi Chaudhuri* (4) that any attempt was made to define the principles upon which the High Court will interfere in revision. That case was noticed with approval by this Court in *Gulli Bhagat* v. *Narain Singh* (5) and by a Full Bench of the Madras High Court in *A. T. Sankaralinga Mudaliar* v. *Narayana Mudaliar* (6), and I think it is now settled that the power of interference in revision should be most sparingly exercised and only in cases where it is urgently demanded in the interests of public justice.

The rule of course does not apply to cases where there has been no trial. For instance, in *Jitan Dusadh* v. *Domoo Sahu* (7) this Court set aside an acquittal in revision because an acquittal had been entered without trial and under an error of law. In that case the complainant having died the Magistrate refused permission to the complainant's son to proceed with the case and acquitted the accused, and the District Magistrate moved the High Court in revision. On the other hand, in *Rajkishore Dubey* v. *Ram Pratap* (8), a Division Bench (Mullick and Macpherson, JJ.) of this Court

(1) [1914] 18 C.W.N. 1244=15 Cr. L.J. 722.
(2) [1917] 27 C. L. J. 226=19 Cr. L. J. 321.
(3) [1917] 18 Cr. L. J. 519.
(4) [1914] 42 Cal. 612=19 C. W. N. 184=21 C. L. J. 53=16 Cr. L. J. 122.
(5) A. I. R. 1924 Patna 286.
(6) A. I. R. 1922 Mad. 502.
(7) [1916] 1 P. L. J. 264=20 C. W. N. 862=18 Cr. L. J. 151=2 P. L. W. 409.
(8) Cr. Rev. No. 229 of 1923.

declined to interfere even though there was a clear error in the lower appellate Court's judgment. We have not been shown any case in which a High Court has interfered in revision on the ground that the inferences drawn from evidence were erroneous.

In my opinion the Legislature does not intend that a private party shall secure by an application in revision a right which is reserved for the Crown only. The High Court has the right to interfere but will only do so in very exceptional cases, which, it may be stated, generally, are cases in which there has been a denial of the right of fair trial and which attract the operation of S. 107 of the Government of India Act. Nor does it intend that the High Court will interfere in revision to correct an error when another remedy exists.

In England where any member of the public may set the criminal law in motion, there is no procedure at all for setting aside an acquittal. In France, where the law permits in most criminal cases a private injured party to intervene as a *partie civile*, the right of appeal against an acquittal is accorded only to the Crown. Neither system permits a private prosecutor to control the proceedings if the Crown objects.

Nor is the private prosecutor's control any greater under the Indian law though he is entitled in certain cases to compound with the offender: see *Jamuna Kanth Jha* v. *Rudra Kumar Jha* (9).

I am still therefore of the opinion which I expressed in *Gulli Bhagat* v. *Narain Singh* (5) that in cognizable cases the private prosecutor has no position at all and that if the Crown, which is the custodian of the public peace, decides to let an offender go, no other aggrieved party can be heard to object that he has not taken his full toll of private vengeance. These observations were made with reference to a private party's power to get an acquittal set aside in a cognizable case which had been conducted by Public Prosecutor; but if it were necessary here I would be prepared to hold that they apply with equal force to acquittals in all cases. The Crown and not the complainant is always the party: see *Queen-Empress* v. *Mururji Gokul Das* (10) and *Gaya Prasad* v. *Bhagat Singh* (11).

If that view is correct, then the circumstance that in the present case Mahanth Ganga Das, in spite of delivery of possession by the civil Court, is being deprived by the judgment-debtor of the enjoyment of his rights, is no ground for our interference in revision. There has been no denial of the right of fair trial. The District Magistrate has considered the evidence and if he has come to a wrong conclusion, it certainly cannot be said that there has been no fair trial. He has found that the complainant's story that the accused came with a mob and drove out Ganga Das's servants was false and that Bhagwat Das was in possession and that it was the complainant who attempted to forcibly eject him. If the true facts had been put by the complainant before the Court, I have no doubt that he would have succeeded, and if Bhagwat Das persists in occupying the land and house which formed the subject-matter of the civil Court decree against him, the criminal Courts are still open to him. The present application is misconceived and is dismissed.

Macpherson, J.—I agree to the order proposed.

In my opinion the application must fail on the simple ground that it is not even possible to say that the acquittal by the appellate Court (which rightly found that the case which petitioner set out to prove was false) was not in the circumstances warranted. If an appeal had been preferred by the local Government under S. 417, it would have failed for the same reason.

The question whether a private person has any locus standi to move the High Court against an acquittal, and if so in what circumstances has, however, been argued at length and claims an expression of opinion.

I agree with the Government Advocate when he concedes that the High Court possesses the power to set aside an acquittal under S. 439 on being moved by a private person. But I am unable to accept his contention that

(9) [1919] 4 P. L. J. 656=(1920) P. H. C. C. 42=20 Cr. L. J. 848.

(10) [1888] 13 Bom. 389.

(11) [1908] 30 All. 525=35 I. A. 189=10 Bom. L. R. 1080=4 M. L. T. 204=12 C. W. N. 1017=8 C. L. J. 337=18 M. L. J. 394=5 A. L. J. 665=14 Bur. L. R. 318=11 C. C. 371 (P. C.).

that power is either in law or under the practice of the Courts in India, definitely restricted to cases where, as in *Damoo Sahu* v. *Jitan Sahu* (7) there has been no trial, or where there has been a denial of the right of fair trial. All that can be said to be established is that in that class of cases at least the Court will in a proper case set aside an acquittal at the instance of a private party. No doubt the High Court will in exercising its power of revision under S. 439 observe the limitations which established practice has imposed upon appeals under S. 417. But though in practice the broad rule of guidance that the Court will only interfere in revision with an acquittal, at least in a case where there has been a trial, sparingly and only where interference is urgently demanded in the interests of public justice. [*Faujdar Thakur* v. *Kasi Chaudhuri*, (4)] may be accepted, it appears dangerous to go further. I was a party to the decisions in *Rajkishore Dubey* v. *Ram Partap* (8) and *Gulli Bhagat* v. *Narain Singh* (5) decided on successive days, but my considered opinion is to be found in the subsequent decision in *Ganga Singh* v. *Rambhajan Singh* (12) where, after referring to the cases above cited, I said "But it is not possible nor would it be expedient to lay down a general principle. The Court will interfere where the circumstances require it."

In particular I am not prepared to subscribe to the view that in every case of a prosecution for a cognizable offence the private prosecutor in India has no position at all in the litigation. It might possibly be contended that at least where the prosecution has in fact been a public or, as it is designated, a police prosecution the private prosecutor has no position at any stage. I doubt whether even such a contention is tenable, though of course the Court acting in revision would in such a case enquire earnestly why the Crown has not appealed. But in any event the criterion cannot be whether the police could under the law arrest without warrant for the offence under trial irrespective of whether they did so and initiated a public prosecution under the Code of Criminal Procedure; it is open to the private prosecutor to initiate criminal proceedings by complaint without the intervention of the police, and where that has been done, and the prosecution has not been taken over by the Crown, a private prosecutor cannot in my judgment be said to be without position in the litigation even if the offence is cognizable. The majority of prosecutions for criminal trespass and house trespass which are conizable offences are private. I cannot hold that either principle or authority supports the view that an application under S. 439 against an acquittal is not maintainable in a private prosecution where the offence charged is cognizable.

Again too much stress may easily be laid upon the remedy available under S. 417 even in police cases. An appeal against acquittal is a special weapon in its armoury which a local Government judiciously reserves for exceptional occasions, and which is only used after most anxious consideration and in cases which are themselves of great public importance or in which a principle is involved. It cannot be expected that Government will dull the edge of that salutary provision by utilizing it freely in cases which, though of importance to individual subjects, are of no, or of little, general interest. Actually therefore, a remedy under S. 417 is practically non-existent in the less heinous cases whether they are private or public prosecutions. Yet where justice fails in this country, it undeniably does so at least as much by erroneous acquittal as by erroneous conviction.

In my judgment it is neither necessary nor expedient to lay down or even suggest any limitations in this regard beyond the practice of the High Court in appeals under S. 417 and the principles which guide the Court in receiving and determining under S. 439 applications for the exercise of their powers of revision in respect of convictions. I would adhere to the view expressed by Jenkins, C. J., in *Foujdar Thakur* v. *Kasi Chaudhuri* (4) read in the light of the observations of the same Judge in *Emperor* v. *Bankatram Lachiram* (13) and *Mahomed Ali* v. *Emperor* (14) as to the spirit which should guide the Courts in the exercise of their discretionary powers in revision. The result may in practice not differ greatly

(12) A. I. R. 1925 Patna 165.

(13) [1904] 28 Bom. 533=6 Bom L. R. 379

(14) [1913] 41 Cal. 466=14 Cr. L. J. 497=18 C. W. N. 1

from that which would be obtained by laying down and following detailed rules. Doubtless the Court will only interfere in revision with an acquital in an exceptional case. But the supreme consideration is that the Court should exercise its discretion untramelled in each case as it arises.

Application dismissed.

A. I. R. 1926 Patna 180

DAS AND ROSS, JJ.

Tarkeshwar Prasad Tewari—Appellant,

v.

Devendra Prasad Tewari—Respondent

Appeal No. 265 of 1921, Decided on 20th June 1924, from the Original decree of the Addl, Sub-J., Patna. D/-14th September 1921.

(a) *Evidence Act, S. 76—Plaint is not a public document.*

Certified copy of a plaint is not admissible in proof of age of the signatory as plaint is not a public document. [P 181, C 1]

(b) *Patna High Court Rules, R. 30—Construction.*

Rule 30 must be construed as subject to Rr. 1 nd 4. [P 181, C 1]

C. C. Das, S. M. Gupta, Ram Prasad and *Janak Kishore*—for Appellant.

S. P. Sen and *A. T. Sen*—for Respondent.

Ross, J.—The question in this appeal is a pure question of fact and relates to the origin of Tarkeshwar, Defendant No. 1.

Sheo Prasad Tiwari had two sons, Ram Partap alias Halkhori and Maheshwar Dutt alias Duttan. Ram Pratap had two sons, Ramrup and Ramsuraj, by his wife Parbati. The plaintiff Debendra Prasad Tiwari is the son of Ramrup and his wife Hartalika. The question for decision in the suit is whether Tarkeshwar is the posthumous son of Ram Suraj and his wife Harnandan Kuer. Ram Pratap died in 1899. The plaintiff alleges that both his sons were then minors and the management of the property was assumed by Maheshwar Dutt. Even after he attained majority Ramrup was incapable of managing his estate being of weak intellect and dissolute habits. His mother then formed the idea of marrying one of her sons in the family of a man of affairs and accordingly Ram Suraj was married to Harnandan Kuer, the granddaughter of one Nanku Pande, who is described in the plaint as "a successful tout practising in the district of Patna possessed of great tact and fully capable of understanding business and managing zamindari affairs". Nanku Pande then took up the management of the estate acting in consultation with Maheshwar Dutt.

The plaintiff alleges that Ramsuraj died on the 23rd of Bhado 1313 two years after his marriage. On the death of Ramsuraj Nanku Pande took Harnandan Kuer to his house at Machuatoli in Patna and set up Tarkeshwar who was the son of one Banke Singh, a constable, by his mistress as the son of Ramsuraj and Harnandan Kuer. Maheshwar Dutt is also alleged to have had illicit connexion with the mistress of Banke Singh and to have acted in collusion with Nanku Pande in this matter. In 1317 Ramrup also died. The main case is stated in paragraphs 17 and 18 of the plaint in these words : "To the best of the plaintiff's knowledge on enquiry no son or daughter was born to Ramsuraj Tiwari of the womb of Mt. Harnandan Kuer. When Ramsuraj Tiwari died he was only 13 years old and could not possibly beget a child at that age, and it was not at all a fact that Mt. Harnandan Kuer was pregnant at the time of his death. Defendant No. 1 is not at all the son of Ramsuraj Tiwari nor did the latter beget him nor was he born of the womb of Harnandan Kuer. On the other hand he was born of the womb of Banke Singh's mistress and his father is Banke Singh resident of mouza Bairia." The plaintiff claims a declaration that the Defendant No. 1 is not the son of Ramsuraj Tiwari and has no title to the property of the family and a decree for confirmation of his possession or recovery of possession (His Lordship then discussed the oral evidence and proceeded).

The documents referred to in this connexion are these ; Ex. R which has been discussed above : Ex. X 37 this is the certified copy of a plaint dated the 10th of March 1900 which purports to have been signed by Ramrup for self and for Ramsuraj Tiwari minor. I doubt whether this document was admissible in evidence. The learned Subordinate Judge apparently followed the ruling in *Shazada Mohamed*

Shahabuddin v. *Daniel Wedgeberry* (1). The soundness of this ruling has been questioned by Field (Law of Evidence, 7th Edition, p. 236) and Woodroffe (Law of Evidence, 7th Edition p. 528) in their commentaries on the Evidence Act. It has not been followed on the Original Side of the Calcutta High Court. I can see no ground for making a distinction between plaints and written statements nor is there any reason why the certified copy of one should be admissible in evidence while the certified copy of the other is not. Neither is a public document. In my opinion Ex. X-37 should not have been admitted in evidence. (The judgment further dealt with the documentary evidence and continued.) I find nothing in these papers which convincingly establishes Tarkeshwar's ancestry as alleged by the defence.

The result is that the appeal must be dismissed with costs.

Permission was given in this case by the learned Registrar to the appellant to have type written copies of the papers prepared instead of the ordinary printed paper-book. The learned Registrar apparently relied upon the provisions of R. 30 in Ch. 9 of the rules of the High Court which empowers him to exempt any appellant or respondent from the operation of the whole or any part of the rules of the Chapter. Now R. 1 directs that the paper book shall be printed in accordance with the directions therein laid down. R. 4 provides that in every case in which an appeal has been admitted the Registrar shall cause a paper-book to be prepared in accordance with the rules of this Chapter with the proviso that in small or urgent cases where good cause has been shown the Registrar may allow any party to put in typed copies. The construction placed upon R. 30 makes the proviso to R. 4 superflous and R. 30 must be construed as subject to Rr. 1 and 4. In my opinion the learned Registrar had not authority to exempt the appellant from having a printed paper-book prepared in this case.

Das, J.—I agree.

Appeal dismissed.

(1) 10 B. L. R. App. 31.

A. I. R. 1926 Patna 181

MULLICK AND ROSS, JJ.

Tulshi Prasad Ram—Appellant.

v.

(*J. A. W. Wilson*) *Chairman, Dumraon Municipality*—Respondent.

Appeal No. 488 of 1922, Decided on 14th May 1925, from a decision of the Sub-J., Second Court, Arrah, D/- 13th February 1922.

Bengal Municipal Act (3 *of* 1884), *Ss.* 6 (3), *and* 85-*A*—*Adjacent plots held by same person as owner, one by survivorship and the other by purchase, constitute one holding—Separate assessments are not legal.*

Where two adjacent plots of land are held by the same person as owner, they must be deemed to be held by him under one title and constitute one holding within the meaning of S. 6 (3). It makes no difference that one plot was acquired by survivorship and the other by purchase. In such a case the owner of the plots is liable only to an assessment in respect of the plots under S. 85-A of the Act and not to separate assessments in respect of each plot. [P. 181, C. 2, P. 182, C. 2]

K. P. Jayaswal, S. M. Gupta and *Janak Kishore*—for Appellant.

Rai Guru Saran Prasad and *Anand Prasad*—for Respondent.

Mullick, J.—The appellant holds four plots of land in the Dumraon Municipality. Plot No. 7 is his ancestral property and Plot No. 8 was purchased in the name of his son; again Plot No. 49 is his ancestral property and Plot No. 50 has been acquired by purchase. The Dumraon Municipality have assessed the appellant with personal tax on the footing that he is the occupier of four holdings. He contends that Plots Nos. 7 and 8 form one holding and Plots No. 49 and 50 one holding and that he is liable to assessment only in respect of two holdings. He has been assessed Rs. 84 on each of the Plots Nos. 7 and 8 and Rs. 28 on each of the Plots Nos. 49 and 50. He claims that he is liable to pay Rs. 84 on Plots Nos. 7 and 8 and Rs. 28 on Plots Nos. 49 and 50.

The question is whether Plots Nos. 7 and 8 constitute one holding within the meaning of S. 6 (3) of the Bengal Municipal Act. It is clear that the plots being adjacent are bounded by one set of boundaries. The only question is whether they are held under one title. The appellant's interest is ownership. It makes no difference that he has acquired it in respect of one plot by survivorship and the other

by purchase. There is no reason why we should read the word "title" in S. 6 as "title-deed." The provision that the land shall be held under one title or under one agreement means that where the assessee has no title, but holds under an agreement without any interest in the land, then all plots covered within the same set of boundaries and by the same agreement will form one holding. The proviso in the Explanation to S. 6 (3) is not relevant to the discussion now before us.

In my opinion Plots Nos. 7 and 8 form one holding and the appellant is liable only to one assessment in respect of it under S. 85-A of the Act. The same observation applies to Plots Nos. 49 and 50.

The result is that the appeal succeeds and is decreed with costs in all Courts in proportion to a claim of Rs. 122.

Ross, J.—I agree.

Appeal allowed.

A. I. R. 1926 Patna 182

KULWANT SAHAY, J.

Harihar Singh and *others*—Appellants,

v.

Emperor—Opposite Party.

Criminal Appeal No. 116 of 1924, Decided on 9th September 1924, against an order of the S. J., Shahabad.

Penal Code, S. 34—All accused abetting or aiding each other by presence or other acts in the commission of the act are equally liable.

The question whether a particular criminal act may be properly held to have been "done by several persons" within the meaning of the section cannot be answered regardless of the facts of the case. In order to convict a person for an offence with the aid of the provisions of S. 34 it is not necessary that that person should actually with his own hand commit the criminal act. If several persons have the common intention of doing a particular criminal act and if in furtherance of that common intention all of them join together and aid or abet each other in the commission of the act, then although one of these persons may not actually with his own hand do the act, but if he helps by his presence or by other acts in the commission of the act, he would be held to have done that act within the meaning of S. 34. *A. I. R. 1924 Cal. 257, Foll.*

[P. 183, C, 2, P. 184, C. 1]

Hyder Imam—for Appellants.

Govt. Pleader—for Opposite Party.

Judgment.—The appellant Harihar Singh has been convicted by the Sessions Judge of Shahabad under S. 324, Indian Penal Code, and sentenced to 18 months' rigorous imprisonment; and the appellant Jugal Singh has been convicted under S. 324/34, Indian Penal Code, and sentenced to 6 months' rigorous imprisonment. They have been found guilty of voluntarily causing hurt to one Brahamdeo Singh who is distantly related to the appellants. The prosecution story shortly stated is as follows:—

Harihar Singh is the uncle of Jugal Singh. One Charittar Singh, who was also charged along with the appellants for an offence under S. 324 read with S. 34, Indian Penal Code but has been acquitted by the learned Sessions Judge is a cousin of Harihar Singh two or three degrees removed. The complainant Brahamdeo Singh is also a distant cousin of Harihar Singh. Harihar Singh had another cousin Kartik Deó Singh who died about ten years ago leaving a young widow Mt. Piaro Kuer. This Kartik Deo Singh was the first cousin of Harihar Singh. The complainant Brahamdeo Singh had some intrigue with the widow Mt. Piaro Kuer and about 2 or 2-1/2 years ago he eloped with the widow and went to Calcutta with her. The widow, however, left Brahamdeo Singh at Calcutta and there is no trace of her. The appellant Harihar Singh and the members of his family were highly enraged with Brahamdeo Singh for taking away the widow and for fear of the appellants and his family, Brahamdeo Singh stayed at Calcutta for about 2 or 2-1/2 years and accepted service there as the gateman in the Howrah Railway Station. It is alleged that Brahamdeo Singh had left three nephews at his house at Brarhi when he went to Calcutta, and in his absence the appellants vexed the nephews so much that they had to leave the house and they went to reside with a relative of theirs in a different village. Brahamdeo Singh returned to his village about four months before the occurrence. He first went to the place where his nephews were living and then he came to his house at Brarhi. He found that the doors and shutters of his house had been taken out and everything else had been removed and the two appellants and Charittar Singh were sitting in the court-yard of the house. He enquired from them as to what had become of the doors and shutters upon which the appellants and Charittar Singh chased him with the

object of beating him with lathis. Brahamdeo Singh fled from the place and went direct to Buxar where he filed a complaint before the Sub-Divisional Magistrate. Upon a report of the Police the Sub-Divisional Magistrate summoned the appellants and Charittar Singh and a case under Ss. 447 and 352, Indian Penal Code was started against them. Brahamdeo Singh was living at the place of his relatives or friends at different places and on the 10th February 1924, a Court peon Abdul Mian went to Brarhi to serve summons upon the witnesses in the case under S. 447 against the appellants. Brahamdeo Singh went to Brarhi to have the summons served and was sitting at the darwaja of Bahadur Singh, Prosecution Witness No. 10. The summonses, however, could not be served upon the witnesses inasmuch as none of the witnesses was found at his home and the Court peon left the place at about 1 p.m. The complainant, however, stayed in the dhaba of Bahadur Singh and Nirbhai. Bahadur Singh and Rampalak Singh and others were also sitting in the same dhaba. It is alleged that while Brahamdeo Singh was lying down in the dhaba with his head supported on the palm of his hand and was talking with Rampalak Singh Witness No. 5, the appellants and Charittar Singh came at the dhaba, the appellant Harihar Singh being armed with a sword and the appellants Jugal Singh and Charittar Singh being armed with lathis and while Charittar Singh and Jugal Singh stood at the entrance of dhaba Harihar Singh struck Brahamdeo Singh with a sword twice. The first blow hit him on the left kneecap upon which Brahamdeo Singh stood up, and while he was getting up Harihar Singh aimed a second blow with the sword which Brahamdeo Singh warded off, but in doing so had his two fingers of the left hand injured. The witness Rampalak Singh attempted to seize the sword and he was also slightly injured. The complainant Brahamdeo Singh fled from the place through one of the doors of the dhaba and went straight to the police station where he lodged his first information at 7 p. m., the occurrence having taken place in the afternoon of the 10th February 1924. (His Lordship after discussing evidence confirmed the conviction and sentence on Brahamdeo Singh and proceeded as follows.)

As regards Jugal Singh he has been convicted under S. 324 read with S. 34, Indian Penal Code. The evidence so far as he is concerned is clear that he went to the place of occurrence with Harihar Singh and had a lathi in his hand; that he stood at the door with the lathi while Harihar Singh struck Brahamdeo with the sword. There is evidence that when Brahamdeo Singh wanted to run away Jugal obstructed his passage and prevented him from getting out of the dhaba. That he came with Harihar Singh and was standing at the entrance of the dhaba with the lathi in his hand is deposed to by almost all the prosecution witnesses and there is no reason to differ from the learned Sessions Judge about his presence with the lathi at the place of occurrence. The question is, whether he can be convicted under S. 324 read with S. 34, Indian Penal Code. In order to make him liable under S. 324 it is necessary to prove that the criminal act of assaulting Brahamdeo was done by Jugal Singh also. It has been argued by the learned counsel for the appellants that upon the evidence it is clear that Jugal Singh did not take part in the assault and, therefore, he is not a person by whom the criminal act was done in the present case as provided by S. 34 of the Indian Penal Code. S. 34 provides that when a criminal act is done by several persons in furtherance of the common intention of all each of such persons is liable for that act in the same manner as if it were done by him alone. The question is whether in the present case the criminal act, namely, the assault upon Brahamdeo Singh was done by Jugal Singh within the meaning of S. 34, Indian Penal Code. The question as regards the proper meaning and effect of S. 34 has been the subject of consideration in a large number of cases. The latest case in which the question was very exhaustively considered by a Full Bench of the Calcutta High Court is the case of *Emperor* v. *Barendra Kumar Ghose* (1). In that case all the previous cases dealing on the point were very exhaustively considered and it was held that the question whether a particular criminal act may be properly held to have been "done by several persons" within the meaning of the section cannot be answered regardless of the facts of the case. In order to convict a person for an offence with the aid of the

(1) A. I. R. 1924 Cal. 257 (F. B.).

provisions of S. 34 of the Penal Code it is not necessary that that person should actually with his own hand commit the criminal act. If several persons have the common intention of doing a particular criminal act and if in furtherance of that common intention all of them join together and aid or abet each other in the commission of the act then although one of these persons may not actually with his own hand do the act, if he helps by his presence or by other acts in the commission of the act, he would be held to have done that act within the meaning of S. 34.

Reliance has been placed by the learned counsel for the appellants upon the case of *Strughan Patar* v. *Emperor* (2). The facts of that case, however, have no application to the present case. It was distinctly found in that case that the appellant Strughan had no intention to kill Upendra Mahto and that he did not assist the actual murderers in any way to accomplish their object. In the absence of any evidence of common intention there could be no conviction under S. 302 of the appellant Strughan for murder read with S. 34 of the Indian Penal Code. In the present case upon the evidence there can be no doubt that both Jugal and Harihar Singh had the common intention of assaulting Brahamdeo Singh and that Jugal was actually present and actively took part in the commission of the act by Harihar Singh. Upon the evidence in this case the conviction of Jugal Singh under S. 324 read with S. 34 is a proper conviction and there is no ground to interfere with his conviction or sentence either.

The result is that the conviction and sentence of both the appellants are confirmed and the appeal is dismissed.

Appeal dismissed.

(2) [1919] 20 Cr. L. J. 289.

A. I. R. 1926 Patna 184

BUCKNILL AND MACPHERSON, JJ.

Peari Dai and *others*—Appellants.

v.

Naimish Chandra Mitra and *others*—Respondents.

Appeal No. 1372 of 1922, Decided on 16th June 1925, from the appellate decree of the Sub-J., Bhagalpur, D/- 15th July 1922.

Registration Act, S. 49— A plaintiff permitting his agent to grant a lease and induct lessee into possession cannot be allowed to succeed merely on a plea that the document was not registered —Equity—Part performance.

Where the manager of the plaintiffs asked for their consent to grant a lease for five years and got the permission in a very definite form from the plaintiffs by a letter authorizing him to grant the lease and the lessees were inducted into actual possession.

Held: that the plaintiffs cannot be allowed to succeed against their own nominees to avoid the lease simply because the document which was given by their agent to the lessee did not comply with the provisions of S. 49 of the Act, i.e., not registered as it would be most inequitable.

[P. 186, C. 2]

S. K. Mitter—for Appellants.

C. M. Agarwala and *S. N. Sahay*—for Respondents.

Bucknill, J.—This is a second appeal. The appellants were the plaintiffs in an action which they brought against a number of defendants for a declaration of their (the plaintiffs') right, title and interest to the extent of two-thirds share in a mahal called Aratghat; they also applied for recovery of khas possession to the extent of their share and they asked for an adjudication that the defendants first party were trespassers and had acquired no title as lessees to the ghat by virtue of any valid settlement made to them on behalf of the plaintiffs. The facts in the case are extremely simple and the large majority of them are not even in issue. The plaintiffs were the owners of two-thirds share in this mahal; the principal value of this mahal appears to have lain in the fact that there was a ferry and that tolls were levied and collected at the ghat. It was the usual practice to let out the ghat to a lessee but it is said that sometimes the proprietors kept it in their own hands. Now, there is no doubt that the defendant second party was until some time in 1918 the Naib or manager of this property on behalf of the plaintiffs or some of them. In 1917 this Naib the defendant second party whilst in the

plaintiff's employment made a proposal to the plaintiffs with regard to the future letting out of the ghat ; a written application or proposal appears to have been made by the Naib to the proprietors saying that he had the opportunity of effecting a lucrative lease with some persons who he knew were anxious to acquire the rights in the ghat. The proposal contained the suggestion that these applicants would give Rs. 200 annually (which was considerably more than what up to that time had been paid) and that the lease should be for five years. The Naib asked for instructions and orders. This seems to have taken place on the 15th July 1917. Now, on the 31st July of that year an order was passed by the proprietors in connexion with this application ; it was simply to the effect "Naib will do the needful." This was followed later by a formal letter from the proprietors to the Naib definitely accepting the offer and telling him to issue a parwana to the new lessee. On the 1st October 1917 it seems that the Naib did give a hukamnama or parwana to the new lessees.

The Munsif found all these circumstances as facts. He found definitely that all these transactions had taken place. He found that the lessees had actually been put into possession ; he found that a quarrel had arisen between the plaintiffs and their Naib and that they had alleged that he had fraudulently granted this lease with their assent. This, however, he did not believe and he would undoubtedly have given judgment for the defendants had it not been that he was led to form an opinion upon a point of law which is the only point which has been seriously argued before this Court. This point was that the defendants relied upon the parwana to which I have already referred. It was urged before the Munsif that the lease or parwana must be registered as it purported to be a lease of immovable property granted for five years and that, as it was not registered, it was impossible for it to be referred to or looked at by the Court and that in consequence the defendants were unable to prove that they had got any title. The Munsif, remarking that he could not see his way to invoke any equity in favour of the defendants, held that there could have been no valid settlement by lease, and in consequence he decided in favour of the plaintiffs and ordered that their suit be decreed with costs.

Now, this decision of the Munsif of Bhagalpur, which was dated the 22nd April 1921, was the subject of an appeal to the Subordinate Judge of that place who by his judgment of the 15th July 1922 affirmed in every respect, save one, the decision to which the Munsif came. He, however, was of the opinion that it was not impossible to invoke equity in favour of the defendants and he came to the conclusion that it was necessary and proper to do so.

In consequence, as a matter of course, he had to reverse the judgment of the Munsif ; he allowed the appeal and ordered that the plaintiff's suit be dismissed.

The point which I have referred is the only point which is of any importance in this case. It has been argued very strenuously by the learned counsel who has appeared for the appellants that it is impossible to invoke equity in favour of the defendant. He bases his argument upon S. 49 of the Indian Registration Act. This section reads :

"No document required by S. 17 to be registered, shall

(a) affect any immovable property comprised therein or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

Now, it is admitted here that this lease for five years ought to have been registered. The learned counsel has suggested that as under the provisions of S. 49, sub-S. (c) a document required to be registered shall not, unless registered, be received as evidence of any transaction affecting such property or conferring such power, this hukumnama could not be looked at all by the Court nor could any equity be utilized as arising from it in favour of the defendant. He refers in this connexion to an instructive case *Sanjib Chandra Sanyal* v. *Santosh Kumar Lahiri* (1). The learned Judge (Mr. Justice Rankin) who decided that case held that he could not permit a document which was not registered but which ought to have been registered to be received in evidence as evidential of the title of a plaintiff who was seeking to enforce his right under that unregistered

(1) A.I.R. 1922 Cal. 486.

document. On the other hand, however, a case of equal importance: *Mahomed Musa* v. *Aghore Kumar Ganguli* (2), has been brought to our notice. That was a decision of their Lordships of the Privy Council and there it was laid down very specifically that "when the actings and conduct of the parties are founded upon, as in the performance or part-performance of an agreement, the *locus penitentiae* which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete is excluded. For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon." Now, it is, of course, difficult to say definitely that equity will override completely the specific provisions of Ss. 17 and 49 of the Indian Registration Act and in the case of *Nilkanth Bhimaji* v. *Hanmant Eknath* (3), Mr. Justice Heaton in referring to the Privy Council case which I have just mentioned draws attention to the necessity of guarding oneself in stating definitely that the decision of their Lordships was intended to affect adversely the proper construction or maintenance of those sections of the Registration Act to which reference has been made. His Lordship says:

"I feel quite certain that their Lordships of the Privy Council in giving judgment in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) did not intend either to modify or to limit that part of the enactment of the Indian Legislature, which appears as Ss. 17 and 49 of the Indian Registration Act, nor do I believe that the Privy Council ever have intended by their judgments to modify or limit that which has been enacted by the Legislature in India. So the effect of Ss. 17 and 49 of the Indian Registration Act remains as totally unaffected as before by anything that is said in the case of *Mohamad Musa* v. *Aghore Kumar Ganguli* (2)."

Now in this case before us it seems to me that it can be dealt with quite unhampered by any question of admissibility of this document. Personally I think that it is admissible and that equity can be invoked from it although it should have been registered and that we could draw an equity in favour of the defendant. But even if it was not admissible there was ample material upon which a Court may come to the same conclusion to which the Subordinate Judge has come, namely, that the equity here is clearly in favour of the defendant and must be given to him in relief. What have we here in coming to the same conclusion from another point of view? We have findings of fact which show clearly that the Naib, that is to say, the manager of the plaintiffs asked for their consent to grant a lease for five years at Rs. 200 per annum to the lessees. He got this permission in a very definite form from the proprietors and he actually put the lessees into possession. The terms upon which the lease was to be granted appear clearly not only in what he offered in the application for instructions which the Naib made to the proprietors but in the proprietors' letter authorizing him to grant the lease. How it can be seriously suggested after that that there was not a completed transaction not only on the face of the papers themselves but by a part performance, namely, the induction of the lessees into actual possession, I cannot understand. To allow the plaintiffs to succeed against their own nominees simply because the document which was given by the plaintiffs' agent to the new lessee did not comply with the provisions of S. 49 of the Registration Act would appear to me most inequitable. In these circumstances I think that in this case the Subordinate Judge has taken the proper course. He has come to the conclusion that there was no ground for allowing the plaintiff to eject the defendants who were their own lessees. They could not take advantage of some flaw in a document which has been produced by the defendants in order to show that their lease did not comply with the terms of the Registration Act nor could it be allowed that the lease which the defendants possessed against their own landlord should be defeated at his application.

I think, therefore, that this appeal should be dismissed with costs.

Macpherson, J.—I agree to the order proposed: this appeal should be dismissed with costs.

Appeal dismissed.

(2) [1915] 42 Cal. 801=42 I.A. 1=17 Bom. L.R. 420=21 C.L.J. 231=28 M.L.J. 548=19 C.W.N. 250=13 A.L.J. 229=17 M.L.T. 143=2 L.W. 258=(1915) M.W.N. 621 (P.C.).

(3) [1920] 44 Bom. 881=22 Bom. 992.

* A. I. R. 1926 Patna 187

MULLICK AND KULWANT SAHAY, JJ.

Thakurji Sri Jugal Sarkar and *others* —Plaintiffs—Appellants.

v.

Raj Mangal Prasad and *others*—Defendants—Respondents.

Appeals Nos. 1314 and 1315 of 1922, Decided on 11th November 1925, from the appellate decrees of the Sub-J., Muzaffarpur, D/- 22nd June 1922.

* (a) *Riparian rights—Upper owner cannot appropriate whole water of natural stream for irrigation—Such right can be acquired by prescription.*

For ordinary purposes such as drinking and watering cattle the upper proprietors are entitled to appropriate if necessary the whole of the water of a natural stream; but for extraordinary purposes such as the irrigation of their fields, they are entitled only to take so much as will not reasonably diminish the volume of water in the river [*White* v. *White*, (1906) *A. C.* 72.] But if a higher proprietor establishes that he has been in possession from time immemorial of the right to appropriate the whole of the water the law will not prevent him from acquiring the right. [P. 188, C. 1]

(b) *Easements Act, S.* 17—*Profits a prendre do not include right to water.*

S. 17 is intended to apply not not to rights of irrigation in natural streams but to rights in the nature of profits a prendre which do not include a right to water. [P. 188, C. 2]

* (c) *Civil P. C., S.* 100—*Question of fact based on no evidence will be interfered with.*

The High Court ought not to interfere in second appeal with a finding of fact so long as there is some evidence to support it, but where the lower Court has arrived at his findings without evidence and the trial is bad the High Court will interfere. [P. 188, C. 2]

P. C. Manuk, J. P. Singh and *Bhagwan Prasad*—for Appellants.

S. M. Mullick, L. K. Jha and *S. Saran* —for Respondents.

Mullick, J.—The plaintiffs in this litigation allege that a watercourse called the Mangrooha river, which flows past the villages of Madanpur, Azamgarh, Bacharpur and Manik Chauk from north to south is a natural stream and that the plaintiffs who are the residents of Bachapur have from time immemorial obstructed it by a bundh or dam measuring 107 feet in length, 31 feet in breadth and 11 feet in height and that the defendants who are residents of Manik Chauk and Azamgarh have caused injury to them by cutting it. The plaintiffs accordingly ask: (1) for a declaration that the defendants are not entitled to cut the dam; (2) for a declaration that the plaintiffs are entitled to maintain and repair the dam; and (3) that the defendants should be restrained by injunction from interfering with the right of the plaintiffs to maintain and repair and from doing any acts harmful to them.

The Munsif found that the water-course in question was not a natural stream. He also found that the plaintiffs had established that from time immemorial the dam in dispute of the dimensions claimed had been maintained by them for the irrigation of their fields. He accordingly decreed the suit.

In appeal the Subordinate Judge differed on all points. He held that the water-course was a flowing river and that the defendants, the residents of Manik Chauk, had a right to use the water to the same extent as the plaintiffs and that the plaintiffs had no right to maintain a dam of the dimensions claimed for the purposes of irrigation so as to diminish the supply to which the defendants are entitled. He found that in fact the dam in question completely deprived the defendants from any water at all.

Against this judgment the plaintiffs prefer the present second appeals.

Now the first question for decision is whether the water-course is or is not a natural stream. The Munsif has found that the bed of the water-course has been ploughed up and cultivated in several places and that there are already two dams existing to the north, one at Madanpur and the other at Majhaulia. Evidence was given by the plaintiffs to show that the water-course was fed by rain-water and apparently the view taken by the Munsif was that whatever may have been the original condition of the water-course the channel at present consists of a series of pools which are filled with water only during the rains and to which the law of natural streams does not apply.

Now the Subordinate Judge has made a very inadequate examination of the evidence upon this point. He does not consider the grounds given by the Munsif for holding that no connected channel exists. Apparently the learned Subordinate Judge thinks that as the water-course is called a *nadi* it must be a natural stream. In my opinion there has been an error of

procedure in the trial of this issue and the plaintiffs are entitled to a fuller examination of the evidence before the finding of the Munsif can be set aside.

The next point is whether assuming that this is a natural stream the plaintiffs have established a right to obstruct it to the injury of the defendants. Now the law on the subject in this province is well settled. For ordinary purposes such as drinking and watering cattle the plaintiffs are entitled to appropriate if necessary the whole of the water ; but for extraordinary purposes such as the irrigation of their fields they are entitled only to take so much as will not reasonably diminish the volume of water in the river. The plaintiffs, however, contend that they are entitled either by twenty years' user as of right or by prescription to appropriate the whole of the water for irrigation purposes. The defendants contend that such an absolute right cannot be acquired either as an easement or in any other way. The learned Subordinate Judge accepts this view and relies on *White* v. *White* (1) In my opinion the learned Subordinate Judge has taken an erroneous view of the decision in this case. There the higher proprietor claimed the right to appropriate as much water as he required for his mill on the ground that the Crown had given him a grant of the whole water in the river, and the learned Judge held that such a grant was repugnant to the ordinary law of rivers and could not be conceived and that the proprietor had established the user of only 1,200 cubic feet of water per minute and that his claim to a prescriptive right to more than 6,000 cubic feet per minute or to as much water as he liked had failed. Lord Robertson in his judgment expressly points out that the rule of prescription is *tantum prescriptum quantum possessum*. It was nowhere held in that case that if a higher proprietor establishes that he has been in possession from time immemorial of the right to appropriate the whole of the water the law will not sanction his title to do so. So it has been held in *Wright* v. *Howard* (2) ; *Mason* v. *Hill* (3) *Debi Prasad* v. *Jaynath* (4); and *Balbhadra Prasad* v. *Sheikh Barkat Ali* (5). On the other hand it is contended on behalf of the defendants that the Indian Easements Act, though not applicable in this province, may be regarded for the purpose of ascertaining the general or common law principle applicable. S. 17 of the Indian Easements Act declares that a right which would tend to a total destruction of the subject of the right, or of the property on which, if the acquisition were made, liability would be imposed, cannot be acquired by prescription, and it is argued that the upper proprietor cannot be allowed to convert the river into a pond and thereby destroy the flowing stream. Here the right to appropriate the water is a negative easement appurtenant to the land of the upper proprietor and the water, though diverted, is not destroyed. S. 17 of the Easements Act is intended to apply not to such rights but to rights in the nature of profits a prendre which do not include a right to water. I do not think, therefore, that the principle of that section is applicable to this case.

The law applicable here is either S. 26 of the Indian Limitation Act of 1908 or the general law of prescription. Under that law every right peaceably enjoyed as an easement, and as of right without interruption for the prescriptive period, becomes absolute and indefeasible after the expiry of such period. The plaintiffs are, therefore, entitled to succeed if they can prove enjoyment as alleged for the necessary period.

Apart from this question of law which, in my opinion, has been wrongly decided by the learned Subordinate Judge there is a further difficulty in the way of the respondents. Before the Munsif the parties went to trial on the issue whether the plaintiffs were entitled to maintain a dam of the dimensions described in the plaint. The defendants made a categorical denial to the effect that no dam of any kind had ever existed at this place. The Munsif disbelieved the evidence that no bundh had existed and he found that the evidence as to dimensions was unrebutted. On appeal the respondents shifted their ground and induced the learned Subordinate Judge

(1) [1906] A. C. 72=75 L. J. P. C. 14=94 L. T. 65.
(2) [1828] 57 E. R. 76=(1828) 1 Sim. and S. T. 190=1 L. J. O. S. Ch. 94=24 R. R. 169.
(3) [1882] 110 E. R. 114.
(4) [1897] 24 Cal. 865=24 I. A. 60=7 M. L. J. 120=1 C. W. N. 401=7 Sar. 209 (P. C.).
(5) [1906] 11 C. W. N. 85=4 C. L. J. 370.

to adopt a middle course, namely, that the plaintiffs had proved a right to maintain a "bundh," but that they had not proved that the bundh should be 107 feet long, 31 feet wide and 11 feet high. The learned Subordinate Judge states that the defendants allege that in 1321 the length as well as the height was altered by the plaintiffs so as to completely obstruct the water flowing down to their village. We have been unable to find any authority for this statement. There is nothing in the written statement or the depositions to support this finding. Apart from the objection that a party cannot be allowed to plead inconsistent facts, or to give proof at variance with his pleading, it is clear that there is nothing in the evidence produced by the defendants upon which this inconsistent finding can be based. The learned Subordidate Judge was no doubt competent to come to such a finding from the plaintiffs' own evidence, but on this point the evidence is one-sided and unrebutted as the Munsif puts it. Again the learned Subordinate Judge's statement that there is no evidence on behalf of the plaintiffs to prove that the bundh, as it exists at present, existed from before 1326, is quite contrary to the evidence recorded. It is true that one witness, P. W. 2, states that the bundh was 160 feet long, 31 feet wide and 11 feet high. It is explained by the appellants here that "160" was a mistake for "107" the two words in Hindi to express these lengths being very similar. Be that as it may, there was plenty of other evidence to the effect that the disputed bundh is the one which has existed from time immemorial. The learned Subordinate Judge has committed a mistake of record in saying that no such evidence existed.

The other evidence upon which the Subordinate Judge has relied consists of certain documents filed by the defendants to show that in a dispute between the villagers of Madanpur and Manik Chauk before an Assistant Settlement Officer it was agreed that a diversion made by the Madanpur villagers from a point north of the Madanpur bundh should not be kept completely closed by means of a dam erected by the Madanpur villagers, and that for a certain number of days the water in this diversion should be allowed to flow so as to go down south to Manik Chauk. The learned Subordinate Judge infers from this that the bundh at Bacharpur could not have been 160 feet long, 31 feet wide and 11 feet high. It was found in that case that there was a "bundh" of some kind at Bacharpur and the learned Judge infers from the conduct of the Manik Chauk villagers that the bundh could not have been high or long enough to obstruct the whole of the water. Before coming to this finding we had to find that the diversion brought the water back into the channel above the Bacharpur bundh and that at the time of the Magistrate's order the Manik Chauk people got their water over or through this bundh. There is no such finding by the learned Subordinate Judge and the inference does not follow that because the diversion through Madanpur was allowed to be kept open for a certain number of days for the benefit of Manik Chauk, therefore, the bundh at Bachharpur could not have been of the dimensions alleged in the plaint. The plaintiffs, on the other hand, assert that the water did not come back to the river but found its way to Manik Chauk if at all over the fields of Madanpur. The learned Subordinate Judge has, therefore, committed an error af law in drawing the inference.

Further the plaintiffs are entitled again to object that the defendants ought not to be allowed to give proof inconsistent with their pleading.

It is no doubt true that this Court ought not to interfere in second appeal with a finding of fact so long as there is some evidence to support it, but here it would seem that the learned Subordinate Judge has arrived at his findings without evidence and that the trial is bad. It is also not clear to what extent he has been affected by his erroneous view as to the rights of a lower proprietor against a higher proprietor.

The result is that in our opinion the appeals must succeed and the decree of the learned Subordinate Judge must be set aside. He will re-hear the appeals according to law, but the parties will not be entitled to adduce any further evidence. As no objection was taken to the competency of the defendants to adduce evidence to show that a dam of different dimensions has been maintained by the plaintiffs the Subordinate Judge will be entitled to consider all the evidence adduced ,but he will of course

also take into consideration the inconsistency between pleading and proof as a factor in determining the weight to be attached to such evidence. There being no materials for giving the plaintiffs relief in respect of any bundh of smaller dimensions their suit must either be decreed in full or dismissed.

Costs will abide the result.

Kulwant Sahay, J.—I agree.

Case remanded.

A. I. R. 1926 Patna 190

ADAMI AND BUCKNILL, JJ.

G. I. P. Ry. Co.—Defendants—Appellants.

v.

Rameshwar Prasad and *another*—Plaintiffs—Respondents.

Appeal No. 140 of 1923, Decided on 1st July 1925, from the appellate decree of the District Judge, Saran, D/- 27th November 1922.

Railways Act, S. 72—Risk Note B—Admission of loss by Railway—Railway Company need not prove the fact of loss—Consignor must still prove loss by negligence.

In a suit by consignor where goods are sent under Risk Note B admission of loss by Railway dispenses with proof of fact of loss but does not relieve the plaintiff of his burden of proving loss due to neglect of Railway Company. *Smith Ltd.* v. *Great Western Ry. Co.*, (1922) 1 1 *C.* 178, *Ref.* and 45 *Bom.* 1201, *Dist.* [P 191 C 1]

Mohammad Hasan Jan—for Appellants.

Sambhu Saran.—for Respondents.

Bucknill, J.—This is a second appeal. The appeal is from a decision of the District Judge of Saran, dated the 27th November 1922, by which he reversed a decision of the Munsif of Chapra, dated the 20th January of the same year.

The appellants are the Great Indian Peninsula Railway Company through their Agent at Bombay; the respondents are Rameshwar Prasad and another. The suit was one of the type with which all the Courts in India are sufficiently familiar; it was for recovery of a sum of money from the Great Indian Peninsula Railway for the price of a bale of cotton goods which should have been delivered to the plaintiffs but which was never delivered to them.

The plaintiffs, in their plaint, after setting out the facts, alleged that they believed that the bale (which was a portion of a consignment of bales) had been lost in transit on account of the gross negligence of the defendants and they claimed that the defendants were bound to indemnify them for the loss. There was no doubt that the consignment of bales of goods was sent from some merchants in Bombay to the plaintiffs who were cloth dealers in Chapra; there is equally no doubt that the goods were delivered to the appellants at Victoria Terminus, Bombay, for carriage under the well-known Risk Note B. It is also a fact which is common ground that when the goods arrived at Chapra, one whole bale was found missing. Now in answer to the plaintiff's claim the appellants pleaded firstly that they admitted the loss but that the loss did not occur on their line of Railway; they alleged that they had handed over the goods intact to the East Indian Railway Company which had not been made a party to the suit; in any case they stated further that the loss was not due to the negligence of Railway servants.

Now, when the case came before the Munsif, he came to the conclusion that the plaintiffs had entirely failed to prove negligence on the part of the Railway Administration, and he, therefore, held that, on that view of the case, the suit must be dismissed. In this decision, he was, of course, following the numerous cases which have been decided in the Courts in India and which are substantially all of one tenor, namely, that in a suit brought under such circumstances as this suit was brought, it is necessary that the plaintiff should show that the Railway Company is responsible for the loss of goods. The Munsif, however, considered a somewhat curious question which does not seem to have been raised in the pleadings but which appears to have been put forward in the course of the trial before him. It was suggested by the plaintiffs that the Risk Note was not binding on the parties because it had been in fact signed by some person who had no authority so to do from the consignors in Bombay. The Munsif was of the opinion that the individual who in fact signed the Risk Note had no authority so to do given to him by the consignors. He, therefore, came to

the conclusion that, as the Risk Note had not been signed by any person who had authority to do so on behalf of the consignors, it did not bind the parties and that, therefore, presumably the appellant Company was not able to avail itself of any of the exceptions in the Risk Note which purport to exempt the appellant Company from liability under the conditions therein specified.

Now when the case went on appeal to the District Judge, the District Judge came to the conclusions precisely opposite on both these points to those at which the Munsif had arrived. He was satisfied in the first place that the person who did sign the Risk Note clearly had authority from the consignors so to do; although that authority was not an express but an implied one. He, therefore, held that the plaintiffs were bound by it. I might, however, point out that there would still be another objection to the endeavour of the plaintiffs successfully to raise this question. It is quite clear that with regard to the consignment as whole, the plaintiffs, by accepting a large portion of the consignment, adopted the contract which is contained in the Risk Note "B"; they are, therefore, bound by that contract; and whether, or not the person who signed it had the consignors' authority, the plaintiffs would not be able now to contend that they were, or are, not bound by the terms of the special contract embodied in that Risk Note. Apart from that however, there is here also the finding of fact by the District Judge that the individual who signed the Risk Note did have authority from the consignors. This finding is based upon the evidence which was given in the case on behalf of the plaintiffs themselves.

With regard to the other question, that is to say, whether the plaintiffs had proved (what they were bound to prove if they were to be successful) negligence on the part of the appellants, the District Judge again differed from the Munsif. He came to the conclusion, for certain reasons to which I will refer seriatim, that the plaintiffs had satisfied him that the loss was really due to the negligence of the appellants. These reasons are three in number one is that the Company: produced no evidence of any kind. I need hardly point out that, according to the authorities both in India and in England and notably in the case decided by the House of Lords in *Smith Limited* v. *Great Western Railway Company* (1), it is not necessary for the defendant Railway Company in a case such as this to produce any evidence at all. Where a special contract is sued upon by a plaintiff (such as in this suit was sued upon) it is for the plaintiff to show that the Railway Company is liable to him for loss occasioned to the goods which had been carried by the Railway Company on his behalf. This reason, therefore, given by the learned District Judge is not a reason which could be properly held by him as being in any way evidential of negligence on the part of the appellant here. The second reason which he gives is what he refers to as "the admitted facts" in the case. The only admitted facts in the case which are really material were the facts that the consignment was actually made, that the goods were entrusted into the care of the appellants, and that they were lost; there were no other material facts admitted in the case and, from these facts alone, again the law is clear as laid down in this country and in England that no inference evidential of negligence on the part of the appellant here could possibly be drawn. The third, and undoubtedly the most important, reason which he gives is what he refers to as the "plaintiffs own evidence." Now if the plaintiffs had produced any witness who had been able to prove in any way that there had been any negligence of any kind on the part of the appellant or by their Agents or servants, (for a corporate body can only after all act through its Agents or servants) there is little doubt but that the plaintiffs might have succeeded. It is sufficient, however, I think for this Court to hold that, merely because the District Judge states that having regard to the plaintiffs' own evidence no other reasonable conclusion can ba come to other than that the loss was due to the negligence of the Company's servants, the matter is by such a statement precluded from being considered in second appeal. In a case such as this it is important to see what in fact was said in evidence by any witness who appeared for the plaintiffs. In this case I fear that what was said by the only witness who appeared for the plaintiffs was in no sense any proof of negli-

(1) [1922] 1 A. C. 178=91 L. J., K. B. 423=27 Com. Cas. 247=88 T. L. R. 359.

gence but only an assertion thereof. The only witness who was called by the plaintiffs merely stated as follows.—" Because the bale has not been delivered to me so I say that it has been lost on account of the negligence of the Railway Companies. (I may say that in the suit as originally brought the Bengal and North Western Railway Company through its Agent at Gorakhpur was a second defendant.) I need hardly, I think, point out that a mere assertion of this kind is of no evidential value whatever as proof of negligence on the part of the appellant. If one was to hold that it was, all the difficulties which surround plaintiffs in bringing a suit of this kind, would at once disappear, for all that would be necessary for them to do, in order to throw the whole of the onus upon the defendant Company of bringing itself within the exceptions in the Risk Note " B " which purport to exempt him from liability, would be to make a mere assertion by a witness on behalf of the plaintiffs that he believed that the loss which was admitted was due to the negligence of the Railway Company's servants. I think that it is obvious that such a statement as this is as of little evidential value in this case as are the other two reasons which have been given in the decision of the District Judge. The judicial comments which have been passed not only in this country but also in England upon the difficulties which a plaintiff, who has entered into a contract of the nature of Risk Note " B " encounters, have been severe, and, if I may say so well founded But such strictures on a Railway Company hardly properly lie within the domain of the Courts , for it is, I take it, always open to a person, who wishes to consign his goods for carriage by a Railway, not to enter into a contract such as is set out in the Risk Note " B " which entails upon him such immense difficulties in the event of his wishing to recover from the Railway Company for loss or damage of the goods which he has consigned to it to take to their destination. By this time I think it ought to be publicly known that it would appear that the onus of proving wilful negligence lies upon the plaintiff who brings the suit for recovery of what has been lost on a Railway Company's lines if he sues upon the special contract which is embodied in the Risk Note " B. " It has been suggested that in this particular case the mere admission by the Railway Company of the loss is not sufficient to prove that loss and reference was made to a case decided by a Bench of the Bombay High Court [*Ghelabhai Punsi* v. *East Indian Railway Company* (2)] in which their Lordships thought that a mere admission by a Railway Company in their favour that the goods were lost was not sufficient to prove that the goods had been in fact lost. I need only point out that this case was decided before the case in the House of Lords to which I have already referred. There the matter is fully dealt with and I think that an admission of loss must be regarded as a position which it is open to the defendant Railway Company to take up. After all it does not appear to me that it is necessary for a person to give strict proof of what he himself admits. All the points in the present appeal have been recently dealt with by Mullick, J., and myself in the case of *G. I. P. Railway Co.* v. *Jitan Ram Nirmal Ram* (3).

Under these circumstances, and I must confess with some sympathy for the respondents, I feel that the only possible course in this case is that the appeal must be allowed and the suit dismissed.

There will be no order as to costs.

Adami, J.—I agree.

Appeal allowed.

(2) [1921] 45 Bom. 1261=23 Bom. L. R. 525.
(3) A. I. R. 1923 Patna 825.

✻ A. I. R. 1926 Patna 192

ADAMI AND SEN, JJ.

Mt. Batisa Kuer—Plaintiff — Appellant.

v.

Raja Ram Pandey and *others* — Defendants—Respondents.

Appeal No. 1254 of 1922, Decided on 24th June 1925, from the appellate decree of the Addl. Sub.-J., Saran, D/- 18th August 1922.

✻ (a) *Adverse possession — Plea of, may be raised in appeal for the first time, if based on original pleadings.*

Ordinarily the principle holds good that adverse possession should be distinctly raised in the pleadings and should also form the subject-matter of an issue, but a party may be allowed to succeed on a

title by adverse possession pleaded for the first time in the Court of appeal if such a case arises on facts stated in the pleadings and the party is not taken by surprise. [P 193 C 2 ; P 194 C 1]

(b) *Limitation Act, S. 9—Limitation begun in lifetime of full owner is not suspended on his death.*

Limitation having once commenced to run in the lifetime of a full owner cannot be taken to be suspended if he dies and is succeeded by a limited owner. [P 194 C 1]

N. N. Sinha—for Appellant.

H. N. Prasad—for Respondents.

Sen, J.—This appeal arises out of a suit by the plaintiff-appellant for a declaration that a deed of zerpeshgi, dated the 20th December 1907, executed by Mt. Inderbaso in favour of the Defendant No. 1, was fraudulent and collusive and without legal necessity ; that the said mortgagor had no right or title to execute the zerpeshgi deed and that, therefore, it was not operative on plaintiff who had inherited the land in dispute from her father Sadhu Dubey.

The case of the plaintiff was that one Sheo Dubey had two sons, Nakched and Chulhai ; that Nakched had a son Dukhi Dubey and Chulhai had a son Sadhu Dubey ; that Dukhi and Sadhu were joint; that Dukhi died and Sadhu came into the family property by survivorship ; that after Sadhu's death his widow Mt. Jharo succeeded her, and that after Mt. Jharo the plaintiff inherited the property in suit from her father. The plaintiff alleged that Inderbaso Kuer, the widow of Dukhi, illegally and fraudulently executed a deed of zerpeshgi, dated the 20th December 1907, in favour of her brother, the Defendant No. 1, who in turn assigned the mortgage in favour of Defendant No. 2. The case for the defence was that the plaintiff was not the daughter of Sadhu and Jharo ; that Dukhi and Sadhu were not joint when Dukhi died ; that upon Dukhi's death Inderbaso Kuer succeeded to his property and upon her death her daughter Sona Kuer succeeded. The Defendant No. 1 alleged that he was the daughter's son of Inderbaso, that is, the son of Sona Kuer and not the brother of Inderbaso Kuer, as alleged by the plaintiff.

The learned Munsif held that the plaintiff was the daughter of Sadhu Dubey ; that the zerpeshgi deed was fraudulent and collusive ; that Dukhi died whilst living joint with Sadhu and that Defendant No. 1 is the brother of Inderbaso ; and he decreed the suit. On appeal, the learned Subordinate Judge affirmed the finding that the plaintiff was the daughter of Sadhu ; but he held that, even assuming that Inderbaso, the mortgagor of Defendant No. 1, had no title to the land in suit, the Defendant No. 1, having got possession of the land in 1907 on the basis of his zerpeshgi, and having continued in possession for over 12 years his title was perfected by adverse possession. He, therefore, allowed the appeal and dismissed the suit.

It is contended before us : first, that the question of adverse possession was not in issue and that the Court of appeal was not competent to raise it or pass his decision on it ; secondly, that the question whether Dukhi or Sadhu were joint or separate was not gone into by the Court of appeal ; that he should have gone into the question fully.

There is no doubt that title by adverse possession does not appear to have been raised in the pleadings, but the principle has often been laid down that a party may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of appeal if such a case arises on facts stated in the pleadings and the party is not taken by surprise. The learned Subordinate Judge bases his decision on the following facts. He finds that as early as 1898 in the cadastral survey Inderbaso Kuer's name is recorded in the survey khatian, and he observes that this entry must be regarded as a presumptive piece of evidence of possession of Mt. Inderbaso. He finds that in 1901 there was a zerpeshgi in favour of Defendant No. 1 granted by Inderbaso Kuer ; he finds that in 1907 the zerpeshgi in suit was executed ; that the dues of the previous bond were satisfied out of the consideration of the disputed zerpeshgi in favour of Defendant No. 1. These two old registered bonds, he observes, executed so long ago as 1901 and 1907, show that Mt. Inderbaso exercised acts of possession over the disputed land. He also records it as an admitted fact that Sadhu, the father of the plaintiff-appellant, "died 7 or 8 years ago," and that the defendant's possession over the land in suit commenced during Sadhu's lifetime, and further that admittedly he is still in possession. He also states that the witnesses of the plaintiff had to admit that plaintiff never got possession of the land in suit ; that in fact not a single

witness examined by the plaintiff spoke a word about the possession of the plaintiff or her predecessor Sadhu over the land in suit. It is also found that at the revisional survey of 1919, the name of Defendant No. 1 was entered as being in possession as zerpeshgidar of Inderbaso. Now most of the material facts above mentioned were stated in the pleadings and evidence was gone into in detail on all the points. On the principle laid down in the case of *Lilabati Misrain* v. *Bishun Choubey* (1) the learned Subordinate Judge rightly comes to the conclusion that limitation, having once commenced to run in the lifetime of a full owner cannot be taken to be suspended if he dies and is succeded by a limited owner. Upon the facts found and upon the facts appearing in the pleadings, I am inclined to think that the finding as to adverse possession is well sustainable. Ordinarily the principle no doubt holds good that adverse possession should be distinctly raised in the pleadings and should also form the subject-matter of an issue ; but where the fact is so clear and unmistakable that the plaintiff has never been in possession of the land claimed for nearly 22 years, and where, on the other hand, possession is exercised adversely to him as found in the present case, I see no reason for interference.

The appeal is dismissed with costs.

Adami, J.—I. agree.

Appeal dismissed.

(1) [1907] 6 C.L.J. 621.

A. I. R. 1926 Patna 194

ADAMI AND SEN, JJ.

Ramjee Prasad — Defendant — Appellant.

v.

Rai Bishundutt and *others* — Respondents.

Appeal No. 54 of 1923, Decided on 27th July 1925, from the appellate decree of the Dist. J., Muzafferpur, D/- 23rd June 1923.

Lim. Act, S. 14—"Civil Proceeding" does not include application under Land Registration Act, S. 28 S. 29 and S. 42—Land Registration Deputy Collector is not "Court."

The term "civil proceeding" used in S. 14 is not meant to cover an application made under Ss. 28 and 29 or S. 42 of the Land Registration Act and the Land Registration Deputy Collector cannot be called "a Court" for the purpose of deciding cases under those sections.

[P. 195, C. 2 ; P. 196, C. 1]

Sivanandan Ray and *Satyadeo Sahay* —for Appellant.

T. N. Sahai—for Respondents.

Adami, J.—The plaintiff in this suit sought for a declaration of his title, to and confirmation of, his possession in certain shares in the estate of Bishunpur Sad. Previous to 1896, the plaintiff's share was shown in the Register D of the Land Registration Department to be 2 annas 16 gundas 1 kowri 1 krant 1 dant. In 1896 the estate was partitioned and divided into eight puttis , one of these was the residuary putti which is the subject of the suit.

Shortly stated, the plaintiff's case is that after the partition the shares of the various cosharers in the residuary putti were entered in the name of one of the sharers only, and the separate shares of the different cosharers were not shown. Rai Brahma Dutt, who alone was shown in Register D, seems to be the brother of the plaintiff.

The plaintiff, in February 1902, purchased an eight annas share in the putti at an auction sale held in execution of a mortgage decree , and in June 1902, he applied for the registration of his name in respect of the purchased share. He was registered for 7 annas 14 gundas share and was left jointly recorded with the other cosharers for the rest of the share The plaintiff afterwards, in 1912, applied to the Land Registration Department under S. 42 of the Land Registration Act, pointing out that the Register D did not show his shares separately as had been shown in the register previous to the partition. The Deputy Collector held that S. 42 did not apply and rejected his application. The plaintiff then made another application under Ss. 28 and 29 of the Act, making the same request as he had before, namely, that his shares should be separately recorded. The defendants, 1st and 2nd parties to this suit, both objected before the Deputy Collector, and on the 7th of May 1914 the Deputy Collector found that a question of title was involved and that he could not decide the case ; he rejected the application telling the petitioner that he might go to the civil Court, if so advised, for a declaration

of his specific interest in each of the three villages which formed the putti.

The plaintiff then instituted the present suit on the 30th July 1914. According to his plaint, the Defendant No. 1, Ramjee, had been recorded in the register for a larger share than he was entitled to, and the plaintiff sought to have some part of this share taken from Ramjee, and also a portion of a share taken from another defendant and added to his own share.

It is unnecessary in this second appeal to mention the shares claimed; it is sufficient to say that both the Courts below have found that the plaintiff is entitled to the share he claims. The Subordinate Judge, however, dismissed the suit of the plaintiff finding that the Defendant No. 1 or his vendors had been in possession of the shares claimed by the plaintiff since 1902 at least, and that the plaintiff had never been in possession of those shares.

On appeal the learned District Judge, agreeing with the Subordinate Judge as to the title of the plaintiff, found with regard to the present appellant, Defendant No. 1, that he was recorded in Register D for a considerably larger share than he was entitled to, and, after considering the question of limitation, and finding that the time taken in prosecuting his case before the Land Registration Department would be excluded, he decreed the plaintiff's suit as against Defendant No. 1 and directed that 18 gundas out of the Defendant No. 1's share in village Bakarpur should be transferred to the plaintiff and 3 gundas of Defendant No. 1's share in Mirpur should be similarly transferred, while 11 gundas out of the share recorded in the name of the defendant's grandfather should be recorded in the plaintiff's name. The plaintiff was also declared to be entitled to be recorded for eight annas 12 gundas out of the group entry relating to village Doberkothi.

The main question which arises in this second appeal is whether the decision of the learned District Judge regarding limitation was correct. The learned advocate for the appellant does not attack the findings come to as to the amount of shares of the parties and in fact he could not, as these are findings of fact.

Mr. Sivanandan Ray points out that, according to the findings, the plaintiff has never been in possession since February 1902 at least, when the entry of the defendant's shares was made in the Land Registration Department Register D, that the shares are held by the cosharers exclusively, and since the suit was not instituted till the 30th July 1914 and the entry of the Defendant No. 1's shares was made in the Land Registration Department Register D in February 1902, more than 12 years have elapsed and the suit must be barred.

The Defendant No. 1 has been recorded separately for his share in the Land Registration Department, and, as shown by the learned District Judge, where the cosharers are found to have exclusive possession of a specific and stated share, limitation may run against the other cosharers claiming that share in a suit.

The learned District Judge has found that the time taken in prosecuting his case before the Land Registration Deputy Collector, and before the Commissioner and the Board of Revenue in appeal, that is to say, from the 23rd of November 1912 to the 7th of May 1914, should be excluded under the provisions of S. 14 of the Indian Limitation Act, 1908. That section runs as follows: "In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

The question is whether the proceeding in the Land Registration Department can be called a civil proceeding and whether the Land Registration Deputy Collector can be held to be a Court for the purposes of the section; thirdly, whether the cause of action is the same in this suit as it was in the Land Registration Department, and whether it can be said that the cause is one which, from defect of jurisdiction or cause of a like nature, the Land Registration Deputy Collector was unable to entertain.

I have myself grave doubts on each of these points. I do not think that the term "civil proceeding" used in the section is meant to cover an application made under Ss. 28 and 29 or S. 42 of the Land Registration Act, nor do I think that the Land Registration Deputy Collector could be called a "Court" for the purpose

of deciding cases under those sections. Then again, though the cause of action is in both cases the record made in the Land Registration Register D, after the partition, the relief sought before the Deputy Collector was different from the relief sought here. Before the Deputy Collector the plaintiff merely asked that his share should be separately shown and he stated what he alleged that share was. Before this Court the plaintiff seeks to have his title declared and to be confirmd in possession, or, in the alternative, to recover possession. It is difficult to say that the Land Registration Deputy Collector had no jurisdiction to order that the register should show the shares separately; but it was found that really the question was one of title and, therefore, the Deputy Collector refused to deal with it. I do not think that it can be said that the Deputy Collector was unable to entertain the application before him from defect of jurisdiction or other cause of a like nature. The plaintiff really sought to have his title declared by the separate record of his shares in the Register D and the proper venue for obtaining the relief he really wanted was the civil Court. Instead of going to the civil Court he went to the Land Registration Department, and when the Deputy Collector had decided that the case was one in which title had to be decided instead of at once coming to the civil Court, the plaintiff prosecuted his case in appeal before the revenue authorities. In my opinion S. 14 of the Limitation Act will not save the suit from limitation.

The learned District Judge has relied on the case of *Girjanath Roy Chowdhory* v. *Ram Narain Das* (1), where the plaintiff was allowed under S. 14 to deduct the period during which he was bona fide seeking redress from the revenue authorities who had no jurisdiction to deal with the question raised by him, and the suit was held to be not barred by lapse of time. In that suit the question was very shortly dealt with, and I think is distinguishable from the present case.

The Defendant No. 1 had bought shares in three villages from admitted cosharers in 1886, 1902 and 1905; he was recorded in Register D in 1902 with regard to the lands purchased in 1886 and 1902, and his vendor was recorded in 1902 in respect of the lands bought by the defendant in 1905, and the trial Court found that the defendant and his vendors had been in possession ever since and the plaintiff had never been in my possession. The suit was instituted more than 12 years after February 1902, and in opinion the learned Subordinate Judge was correct in finding that the suit was barred by limitation as against Defendant No. 1.

The learned advocate for the respondent raised an objection to the appeal on the ground that Defendant No. 1 had sold his interest in the patti in 1919 and, therefore, he had no right to appeal. I do not think that this contention can be upheld; for it is quite clear that it is due to the defendant's vendees that his title to the shares should be supported and upheld. It seems that an application was made for substitution, but it was rejected by the Court.

I would, therefore, allow the appeal, set aside the decree of the learned District Judge, so far as it affects the shares which are the subject-matter of this appeal, and dismiss the suit as against the Defendant No. 1. Each party will pay his own costs throughout.

Sen, J.—I agree.

Appeal allowed.

(1) [1893] 20 Cal. 264.

A. I. R 1926 Patna 196

KULWANT SAHAY, J.

Chhakauri Lall—1st Party.

v.

Isher Singh—2nd Party.

Criminal Reference No. 70 of 1924, Decided on 6th November 1924, made by the Dist. Mag,. Gaya.

Criminal P. C., S. 147—Proceedings against gumasta alone are not illegal.

Order under S. 147 against the gomashta of a proprietor is not illegal, and the omission to add the proprietor as a party to the proceeding is a mere irregularity, or at the most an error of law and does not render the proceedings illegal, especially when the gomashta files written statement on behalf of the proprietor and contests on his behalf. [P. 197, C. 1 and 2]

Nawal Kishore Prasad II—for 1st Party.

Shiveshwar Dayal—for 2nd Party.

Kulwant Sahay, J.—This is a reference made by the District Magistrate of Gaya, recommending that the order passed under S. 147 of the Code of Criminal

Procedure by the Deputy Magistrate, directing the second party to desist from putting in earth on a weir, should be set aside. The reason upon which the learned District Magistrate recommends that the order should be set aside is that in the proceeding under S. 147 the second party was one Isher Singh who was the gomashta for the 9 annas Tikari Raj and the proprietor was not made a party. It appears that the first party, who is a proprietor of village Khaira, objected to the second party, the Gomashta of the Tikari Raj, putting earthwork on a certain weir which had the effect of diverting water into his own village Khaira with the apprehension of submerging the whole village. The learned District Magistrate is of opinion that the real party interested in the dispute is the proprietor, namely, the Maharaja of the 9 annas Tikari Raj, and that the Maharaja himself or his duly appointed *mukhtear-am* should have been made a party and not the gomashta, as it is possible that the gomastha might be dismissed or transferred to another place and the order would not be binding upon the Tikari Raj or any other gomashta when he comes in place of Isher Singh. He has referred to certain cases where it is held that the person really interested should be made a party in the dispute. There can be no doubt that it was desirable that the person really interested ought to have been made a party, but I am not satisfied that the proceeding will be illegal or without jurisdiction because the gomashta, and not the proprietor, was made a party to the proceeding. The cases referred to by the District Magistrate have almost all been referred to in the Full Bench case of the Calcutta High Court in *Dhondhai Singh* v. *Follet* (1) where it was held by the Full Bench that there is jurisdiction under S. 145 of the Code of Criminal Procedure to make an order in favour of a person who claims to be in possession of the disputed land as agent to, or the manager for, the proprietors when the actual proprietors are not residents within the appellate jurisdiction of the High Court. In *Bhola Nath Singh* v. *Wood* (2) a Division Bench of the Calcutta High Court distinctly held that the fact that the manager, and not his employer, the Zamindar, has been made a party to a proceeding under S. 145 of the Code of Criminal Procedure, is a mere irregularity, or at most an error of law which does not affect the Magistrate's jurisdiction.

No doubt, under the amended provisions of the Code of Criminal Procedure, orders under Ss. 145 and 147 can be revised by the High Court not only on the question of jurisdiction, but also on the question of illegality, but I do not find any illegality in the Magistrate's making the order under S. 147 against Isher Singh, who as gomashta, filed the written statement on behalf of Tikari Raj and set up the claim of the Tikari Raj to put up earthwork on weir. The learned vakil appearing for the petitioner is unable to cite any authority which would go against the decision in the cases reported in (1) and (2) referred to above.

I am unable to accept the recommendation of the learned District Magistrate. The order under S. 147 will, therefore, stand.

Reference refused.

(1) [1903] 31 Cal. 4 3=7 C. W. N. 825 (F. B.).
(2) [1904] 32 Cal. 287.

A. I. R. 1926 Patna 197

MULLICK, AG. C. J., AND KULWANT SAHAY, J.

Sib Sahai Lal and *others*—Appellants.

v.

Bijai Chand Mahtab—Respondent.

Appeal No. 915 of 1924, Decided on 22nd July 1925, from the appellate decree of the Addl. Sub-J., Bhagalpur, D/- 26th April 1924.

(a) *Bengal Tenancy Act, S. 53—Contract not made with reference to boundaries but a specific block not specifiable except by area—Area is the essence—Additional area found with tenant—Tenant is liable to pay enhanced rent.*

When the contract of tenancy is made not with reference to any boundaries or a specific block otherwise identifiable but for a certain area at a certain rental, the area is of the essence of the contract and by subsequent excess found upon measurement renders the raiyat liable to pay additional rent. [P 200, C 1]

(b) *Bengal Tenancy Act, S. 52—Landlord should show additional area in tenants' possession to claim additional rent—Onus then is on tenant to prove that the additional area belonged to him previously.*

For the purposes of S. 52 it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which rent was last

paid. The onus is then shifted on the tenant to show that the excess land used previously to belong to the holding and was lost by alluvion or otherwise. [P 200 C 1]

(c) *Evidence Act, S. 352—Jamabandi prepared by landlord is admissible to show basis of assessment.*

A jamabandi prepared by the landlord, though not binding upon the tenant is admissible as evidence that since the creation of the tenancy rent has been assessed and that such assessment was on the basis of a certain area : 25 *C. W. N.* 204, *Foll.* [P 201 C 2]

S. M. Mullick and *S. N. Palit*—for Appellants.

Sultan Ahmad and *S. C. Mazumdar*—for Respondent.

Mullick, Ag. C. J.—The plaintiff brought 47 suits against different tenants for arrears of rent for the years 1327, 1328 and 1329 F. S. He also at the same time claimed additional rent for excess area under S. 52 of the Bengal Tenancy Act alleging that by a measurement made in the course of partition proceedings in 1910 and 1911 it was found that the area in the possession of the tenants was in excess of the area for which rent had been previously paid. He also claimed an enhancement under S. 30 (b) on the ground that there had been a rise in the average local prices of staple food crops. He also claimed enhancement under S. 30 (d) on the ground that the lands had been improved by the fluvial action of the river Kosi.

Three suits were compromised and one was decreed ex parte. In the remaining 43 cases the Munsif disallowed the prayer for enchancement under S. 30 (d), but he allowed, in a modified form, the prayer for enhancement under S. 30 (b). He also allowed the claim under S. 52. He made decrees against the tenants in accordance with these findings.

Thereupon the tenants in 35 cases appealed to the District Judge. The appeals were heard by the Subordinate Judge whose decision was as follows :—

(a) The learned Subordinate Judge affirmed the Munsif's decree for enhancement on the ground of a rise in the price of food-grains.

(b) He affirmed the Munsif's finding that the quality of the land had not been shown to have improved and his decree, dismissing the claim under S. 30 (d), Bengal Tenancy Act.

(c) He affirmed the Munsif's finding that the standard of measurement was a lugga of 6 & 1/2 cubits.

(d) Disagreeing with the Munsif he found that the tenancies which, according to the evidence, have existed for a period of 700 years were not created after measurement, and he modified the Munsif's decree and allowed an enhancement under S. 52 only in some of the cases.

As the learned Subordinate Judge's judgment seems somewhat obscure at first sight, it is necessary to examine it with reference to the pleadings and the judgment of the trial Court. Now in the plaint the plaintiff distinctly makes the case that the mauzas from time immemorial have been settled with tenants after proper measurement with a lugga of 6 & 1/2 cubits and that the measurements were entered in the rent roll kept by the zamindar and in the receipts granted to the raiyats, and that in accordance with the said practice the defendants used to take settlement for specified areas at specified rates per bigha. The plaintiff then alleges that from about 1305 to 1313 F. S. the lands were inundated by the river Kosi, and that in 1314 the defendants encroached upon the khas lands of the plaintiff, and that in 1316 a cadastral survey was made, and it was found that the defendants were holding lands in excess of the area originally settled with them. At the trial the plaintiff produced the jamabandis for the years 1314, 1315 and 1316, also some karchas and counterfoil rent receipts. From the Munsif's judgment it would appear that the jamabandis show the area, the rate per bigha and the total rental. The karchas show the area and the rental. The counterfoil rent receipts contain the same particulars, and on the back of them appear the thumb-impressions of the raiyats.

At the trial one of the issues (No. 14) was : " Is there any system of measurement prevalent in the village where the plaint lands are situate ?" This was answered by the Munsif in the affirmative. The Munsif appears to have held not only that the standard of measurement was 6 & 1/2 cubits, but also that there was a practice of measurement in the mauza such as is referred to in Cl. (6) of S. 52 of the Bengal Tenancy Act.

That clause provides that if such a practice is established then the Court may presume that the area specified in a patta, kabuliyat or rent roll has been entered in such patta, kabuliyat or rent roll after measurement and the Munsif gave effect to this presumption and found that the areas shown in the jamabandis and the other papers were entered after measurement.

The Subordinate Judge accepts the Munsif's finding as to the length of the standard of measurement, but does not find that there was any measurement before entering the areas in the papers.

But in the course of the trial the plaintiff appears to have made an alternative case. He contended that even if his allegation of measurement was not accepted, and it was held that the jamabandi and other papers referred to an assumed area, still he was entitled to additional rent upon the difference between the present area and such assumed area.

The learned Munsif accepted this alternative contention although it did not arise upon his findings.

The Subordinate Judge took a middle course and he held that the areas entered in the papers were in fact assumed areas, and where the difference between the present area and the assumed area was small he declined to decree enhancement. He thought that it was quite possible that in these cases the area was under-estimated and that the area of the holding, at the time of its origin, was the same as that fixed by the partition proceedings. He appears to have founded his decision upon the principle of mutual mistake.

But where the difference was large the Subordinate Judge held that the raiyat must have encroached upon the zamindar's land. The learned Judge found that the encroachment took place not upon the zamindar's khas lands, of which he had none in the neighbourhood, but upon the lands of other raiyats paying rent to him. But as the law is that encroachments, whether upon the landlord's khas lands or upon those of third parties, must always enure to the benefit of the landlord, the learned Subordinate Judge held that in these cases the difference between the present area and that shown in the landlord's papers constituted an excess upon which the raiyat was liable to pay additional rent.

The Subordinate Judge accordingly dismissed 17 of the appeals.

In the remaining 18 appeals he disallowed the prayer for enhancement under S. 52 while maintaining the enhancement under S. 30 (b).

We have now before us 33 second appeals.

In 18 the landlord appeals against the Subordinate Judge's decree disallowing enhancement under S. 52.

In 15 appeals the tenants appeal against the Subordinate Judge's decrees allowing enhancement under S. 52.

It is urged that the Subordinate Judge's finding is that as the plaintiff has failed to show what was the area of the holdings at the time of their origin he is not entitled now to claim rent on any excess area, and that the operative part of the judgment is inconsistent with the findings.

In my opinion the findings, when properly understood, justify the decree; and it is desirable first to consider the scope of S. 52. Now excess area may be acquired by a tenant: (a) by encroachment on waste or unoccupied land of the same estate belonging to his landlord; (b) by alluvion; or (c) by encroachment on the lands of a third person. The tenancy may be created by reference to boundaries. In such a case the operative part of the contract lies in the enumeration of the boundaries and any reference to area is merely descriptive and does not affect the identity of the subject-matter of the grant.

Next, a tenancy may be created by the grant of a block of land described otherwise than by reference to boundaries. Here again any incorrect assertion as to the area will be merely false description and will not affect the liability for the rent reserved. In either of these two cases the rental may be either a lump sum without reference to rates or a lump sum based upon a rate or rates per unit of measurement

The third case arises when a tenant squats upon the land of the zamindar and there is an implied contract of tenancy to pay fair and equitable rent upon all the land in his possession at any time. Strictly speaking S. 52 is not necessary to fix liability for excess area under

such a contract. The liability for excess area arises upon the contract itself.

The fourth case arises when the contract is made not with reference to any boundaries or a specific block otherwise identifiable, but for a certain area at a certain rental. In such a case the area is of the essence of the contract and by subsequent excess found upon measurement renders the raiyat liable to pay additional rent. In determining the area demised the parties may either resort to measurement or they may agree to accept an assumed figure. In either case S. 53 operates. In the cases before us there is no finding that the original grant was for land within any specified boundaries or comprised in a specified block. The Subordinate Judge finds that there was no measurement before the grant and I think he intends to find that the settlement was for an assumed area. He does find that there was no rate per bigha ; but that question is not material. The sole question is whether the rent reserved in 1314 was for an area less than the present area.

For the purposes of S. 52 it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which rent was last paid. The onus is then shifted on the tenant to show that the excess land used previously to belong to the holding and was lost by diluvion or otherwise. As I read the learned Subordinate Judge's findings I think he holds that the landlord's papers show that in 1314 and subsequent years the tenants were paying the rents noted against their names for areas assumed by both parties to be correct and that they would be liable to pay additional rent : (1) if the jambandis of 1314 recorded a new contract ; or (2) if the assumed areas were in accord with the state of affairs at the origin of the tenancies.

As the case of neither party was that there was a new contract of tenancy the only question for decision that remained was : What was the area at the origin ? For this purpose the learned Judge accepted the jamabandi papers as evidence but he declined to give that weight to them that the Munsif gave, and he held that in some of the cases they were inaccurate. The Munsif held that as there was a practice of measurement in the mauza the jamabandis must be taken to be accurate and conclusive as to the area of the holdings at their origin. The Subordinate Judge declined to accept the oral evidence upon this point and he drew attention to the fact that the papers previous to 1314 had not been produced and he thought that the areas shown in the jamabandi of 1314 might well be the area of the holdings at the time of their origin in those cases where the excess discovered in 1316 was only slight. On this point the learned Government Advocate, on behalf of the landlord, attacks the learned Judge's finding on the ground that he did not consider the whole evidence in the case. It is pointed out that no reference is made to the fact that the tenants placed thumb-impressions upon the counterfoil rent receipts and that there is no discussion of the evidence of some of the witneses who prove the measurements. As the Subordinate Judge had the whole evidence before him his finding in favour of the tenants with reference to these cases is, I think, conclusive.

Therefore the Second Appeals Nos. 1454 to 1471 of 1924 preferred by the landlord must be dismissed with costs. I do not think there is any ground for the suggestion that the learned Judge was labouring under the impression that the landlord must prove measurement in 1314. It is clear that he did not consider that necessary. And as to the onus which rested upon the tenants to show that the present area is not in excess of the original area, though it is not quite clear whether the Subordinate Judge has correctly placed the burden, the learned Judge has come to a finding on the evidence on both sides and the question of the burden of proof becomes academical.

In regard to the cases in which the difference is large, the learned Subordinate Judge takes the view that the jamabandi of 1914 is approximately correct and the large difference shows that the excess is real. The position taken by the learned Subordinate Judge is perhaps not very logical, but he was entitled to find in which cases the jamabandi area was not the original area and his finding is conclusive.

Therefore Second Appeals No. 915 and 963 to 976, which have been preferred by the tenants, are dismissed with costs.

Before concluding it is necessary to refer to *Manindra Chandra Nandi* v. *Kaulat Sheikh* (1). In this case the landlord produced jamabandis and rent receipts showing the area in certain years and he claimed additional rent on excess area found in the possession of the raiyat in a subsequent year. Their Lordships of the Calcutta High Court held that the claim could not be allowed, but in affirming the decision of the lower appellate Court, which was conclusive as a finding of fact, their Lordships reviewed the previous law on the subject in Bengal and made certain observations upon which, though obiter, considerable stress has been laid by the learned vakil for the tenant appellants before us. The material passage of the leading judgment runs as follows :

"I take it to be the settled rule of this Court that when a letting upon the basis of a measurement is proved the tenant has prima facie to show that the rent was a consolidated rent for all the land within specific boundaries, but that in the absence of such proof the mere production of such dakhilas as those now in evidence does not suffice to throw any onus on the tenant. The position then is simply that the landlord has failed to establish the fact of excess area because he has failed to show with sufficient certainty what the area in fact was for which the rent was originally reserved. There is no reason whatever forbidding a landlord from proving, if he can, a contract of the nature indicated in *Dhrupad Chandra Koley* v. *Huri Nath* (2), but entries of area and rate in dakhilas or jamabandis do not suffice to prove this by themselves in the absence of further material throwing light upon the original conditions of a holding whose origin is beyond the reach of direct evidence."

The learned Judges appear to have been disinclined to accept the view taken in this Court in *Maharaja Keshav Prasad Singh* v. *Tribhuan* (3), where it was held that statements of area in the landlord's papers whether after measurement or not were evidence for the purpose of ascertaining what the area was for which the rent shown in jamabandi was being paid. It would seem that the learned Judges were of the opinion that unless the jamabandis were prepared after measurement no claim for enhancement could be founded upon them. In their view the settled rule of the Calcutta High Court was that an assumed area could never be a foundation for such a claim. It does not appear, however, that the case of *Durga Priya Choudhuri* v. *Nazra Gain* (4), was considered by the learned Judges. There Mookerjee, C. J., observed that a jamabandi prepared by the landlord, though not binding upon the tenant was admissible as evidence that since the creation of the tenancy, rent has been assessed and that such assessment was on the basis of a certain area ; and in remanding the case the learned Chief Justice gave the following directions : "The District Judge will first consider whether since the date of the last assessment of rent, land has been added to the holding by encroachment, accretion or in like manner. If this is answered in the negative, he will consider whether the rent was assessed at a consolidated sum for the entire tract in the possession of the tenant, whatever its area might turn out to be, or whether the rent was assessed on an area fixed by estimate or determined by measurement. If the rent was not fixed as a consolidated sum the plaintiff is entitled to additional rent." This view of the law is in accord with that which had been taken in this Court in 1917 in *Maharaja Keshav Pd. Singh's* case (3). It was subsequently affirmed in *Lalla Sheo Kumar Lal* v. *Ramphal Das* (5), and in our opinion the learned Subordinate Judge was right in taking the landlord's papers into consideration in ascertaining whether the excess in the cases before him was real or fictitious.

The result is that all the appeals before us are dismissed with costs.

Kulwant Sahay, J.—I agree.

Appeals dismissed

(1) A. I. R. 1924 Cal. 374.
(2) [1918] 22 C. W. N. 826=27 C. L. J. 563.
(3) [1917] 2 Pat. L. J. 276=1 P. L. W. 400.
(4) [1921] 25 C. W. N. 204.
(5) [1920] 58 I. C. 959.

A. I. R. 1926 Patna 202

MULLICK AND ROSS, JJ.

Amrit Lal Seal — Decree-holder — Appellant.

v.

Jagat Chandra Thakur and *others*—Judgment-debtors—Respondents.

Appeal No. 182 of 1924 and Civil Revision No. 393 of 1924, Decided on 19th March 1925, from the appellate order of the Dist. J., Santhal Parganas, D/- 19th May 1924.

(a) *Santhal Parganas Settlement Regulation* (3 *of* 1872), *S.* 27 (1) *and* (2)—" *Any Court* " *in sub-S.* (2) *does not include a Court executing decree under Civil P. C.*

" Any Court " in sub-S. (2) of S. 27 means a Court vested with jurisdiction to question the correctness of the decree. Powers of a Court executing a decree are derived from S. 47 of the Civil P. C., and that Court cannot refuse to attach and sell property as directed by the decree under execution although the decree is in contravention of sub-S. (1) of S. 27 o Regulation 3 of 1872. Regulation 3 of 1872 certainly prohibits any Court from recognizing a transfer as valid if made in contravention of sub-S. (1), but the Court must be engaged in a proceeding in which it has jurisdiction to investigate the legality of the transfer. In other words, the proceeding must be properly constituted and the investigation necessary. [P. 204, C. 1 ; P. 205, C. 1]

(b) *Execution of decree—Mortgage decree—Executing Court cannot entertain objection that property ordered to be sold in decree is not saleable—Such objection may be entertained in the case of money decree.*

Where the jurisdiction of the executing Court is based on a decree for sale it is not open to the executing Court to refuse to carry out the sale so long as the decree exists in full force and effect. An objection that the property is not saleable can be made by the judgment-debtor in the case of a money decree either before, and under certain circumstances even after, confirmation, but in the case of a mortgage decree the objection cannot be taken in an execution proceedings because it is an attack upon the validity of the decree : 28 *Mad.* 84, *Disa.* [P. 204, C. 1]

(c) *Civil P. C., S.* 47—*First appellate Court deciding that property comprised in the decree is not saleable—Second appeal lies.*

Where the first appellate Court, disagreeing with the executing Court decided that a part of the property ordered to be sold in the decree not being saleable, the whole sale must be set aside.

Held ; that this decision under S. 47, Civil P. C., has the force of a decree as it finally decides a question of right between the parties to the suit and a second appeal lies. [P. 208, C. 1]

N. C. Sinha and *S. S. Bose*— for Appellant.

Jagannath Prasad and *Bindheswari Prasad*—for Respondents.

Mullick, J.—Jagat Chandra Thakur is a mulraiyat to the extent of 8 annas 5 and 1/3 pies share in mauza Matiara. Jamabandi No. 46 in the Survey and Settlement record is his official mulraiyati jote, and Jamabandi No. 43 is his ancestral holding and is called the mulraiyater jote, and he has a joint undivided share in it with others. It appears that both jotes are security for the rent which he has to collect and pay to the proprietor of the village and are saleable in execution of a rent decree.

Jagat Chandra mortgaged his mulraiyati interest in mauza Matiara together with his entire nij-jote jamabandis 43 and 46 to the appellant Amrit Lal Seal who brought the properties to sale on the 29th June 1923 in execution of his mortgage decree. The judgment-debtor thereupon filed an application to set aside the sale on the grounds referred to in O. 21, R. 90, Civil P. C., and also on the ground that the interest of his co-sharers in Jamabandi No. 43 not being saleable only his interest in the jamabandi could pass by the sale.

The Subordinate Judge found that all the recorded tenants were parties to the mortgage decree and that the entire jote was saleable.

He also found that it was not open to the mulraiyat to raise this objection in execution as he had not appealed against either the preliminary or the final decree in the mortgage suit.

With regard to the allegation that there had been irregularities in the conduct of the sale, he found that the area notified for sale was 124 bighas 1 katha 2 dhurs, while the correct area was 161 bighas, 19 kathas, the former figure comprising only the paddy and the bari lands and the latter including the unproductive jungle lands also. The property was valued at Rs. 4,000 in the sale proclamation and was purchased by one Chatradhari Singh for Rs. 7,100, and the learned Judge found that there was a misstatement as to the exact sum due upon the decree but that the correct calculation was made subsequently and the amount notified at the time of the proclamation. The learned Judge further found that the above irregularities did not cause the property to be sold for an inadequate price. The judgment-debtor's assertion that the value of the lands was Rs. 20,000 was not accepted, and the

decree-holder's estimate of Rs. 7,000 was considered reasonable.

In appeal the District Judge found that the bidders were not misled either by the valuation put in the sale proclamation or by the statement as to the amount of the decretal debt. With regard to the under-statement of the area, the learned Judge found that though the judgment-debtor had failed to prove what was the value of the property the irregularity was sufficient to invalidate the sale.

He accordingly set the sale aside.

It is quite clear that the learned Judge had no jurisdiction to set aside the sale for an irregularity which did not cause any substantial loss; and the decree-holder's application in revision must succeed.

Civil Revision No. 393 of 1924, therefore, is allowed with costs.

The learned Judge, however, has decided in the judgment-debtor's favour on a more serious point which is the subject of Second Appeal No. 181 of 1924.

Disagreeing with the Subordinate Judge he holds that Jote No. 43, not being saleable, the whole sale must be set aside. This decision under S. 47, Civil P. C., has the force of a decree as it finally decides a question of right between the parties to the suit and a second appeal lies.

Now it is to be observed that in the mortgage suit at no stage did the mulraiyat or any of his cosharer defendants take the plea of non-saleability, and in the circumstances I do not see how in the execution stage the mulraiyat can object to the sale of the property. The Court cannot refuse to execute the mortgage decree unless there is a clear statutory injunction in that behalf. It is true there can be no estoppel in the presence of an illegality, and the learned Judge points to S. 27 of Regulation III of 1872 (the Sonthal Parganas Settlement Regulation) which runs as follows: "Cl. (1): "No transfer by a raiyat of his right in his holding or any portion thereof, by sale, gift, mortgage, lease or any other contract or agreement, shall be valid unless the right to transfer has been recorded in the record of rights, and then only to the extent to which such right is so recorded."

"Clause (2): No transfer in contravention of sub-S. (1) shall be registered, or shall be in any way recognized as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction."

"Clause (3): If at any time it comes to the notice of the Deputy Commissioner that a transfer in contravention of sub-S. (1) has taken place, he may in his discretion, evict the transferee and either restore the transferred land to the raiyat or any heirs of the raiyat who has transferred it or re-settle the land with another raiyat according to the village custom for the disposal of an abandoned holding."

The record of rights states that the mulraiyati is entitled to transfer by a single transaction his entire mulraiyati right in the village including his private holding, but that the successor to a mulraiyat, whether acquiring by inheritance or transfer, is not entitled to enjoy his rights or to perform his duties until he has been recognized by the Sub-divisional Officer. It also states that it is a raiyat's duty to observe whatever orders Government may pass forbidding the transfer, sub-division or sub-letting of holdings.

What the Government orders are with regard to transfer does not appear in the record of rights published in the Sonthal Parganas Manual of 1912 which is the only material publication produced before us, and it has not been shown on what authority the learned Judge finds that the mulraiyat in this case has transgressed the law.

The record of rights does state that the rights of a recorded mulraiyat are not subject to partition by gift, transfer, inheritance or otherwise; from this it only follows that a mulraiyat cannot sell or mortgage less than his interest in a mulraiyater jote. In the present case there is nothing to show that he has contravened the law in this respect. Again, without the mortgage deed, it is impossible to say whether he has mortgaged only an undivided fractional interest or the whole jote as his own, but in either case there would be no evasion of the law. If it is a fact that the whole jote is not his and that some of the other judgment-debtors have an interest therein, then, if there is any prohibition by Government against the sale of their shares, the mortgage decree was wrong in directing the sale of the entire undivided holding. The error, however, is not apparent on the

face of the record and without further evidence it is impossible to say that the decree was either illegal or without jurisdiction.

But apart from this there is a defect in the learned Judge's proceedings which goes to the root of jurisdiction, for it is clear that it was not open to the learned Judge at all to question the correctness of the mortgage decree.

Assuming that the trial Court has wrongly ordered the sale of the interest of the cosharers, does S. 27 of the Sonthal Parganas Settlement Regulation authorize any Court that may choose to do so to set aside the decree. I think not. "Any Court" in sub-S. (2) of S. 27 means a Court vested with jurisdiction to question the correctness of the decree. The execution Court's powers are derived from S. 47 of the Civil Procedure Code, and, in my opinion, that Court cannot refuse to attach and sell Jote No. 43 even if satisfied that the decree was wrong. He was not entitled to enter into any inquiry as to the correctness of the decree or the jurisdiction of the Court which passed it. Here it did not even appear on the face of the decree that it was without jurisdiction. The Court was bound to assume that the decree had been made with jurisdiction and that there were no Government orders prohibiting the sale of the jote. Certainly the trial Court in the mortgage suit would have been justified in declining to sell the property if the prohibition exists; so again would the execution Court if there had been only a simple decree for money, but where the jurisdiction is based on a decree for sale it is not open to the execution Court to refuse to carry out the sale so long as the decree exists in full force and effect. An objection that the property was not saleable could have been made by the judgment-debtor in the case of a money decree either before, and in *Durga Charan mandal* v. *Kali Prasanna Sarkar* (1) it was held that the objection could under certain circumstances be made even after confirmation. But in the case of a mortgage decree the objection cannot be taken in an execution proceeding because it is an attack upon the validity of the decree.

S. 60 of the Civil Procedure Code provides that the house of an agriculturist is exempted from attachment and sale in execution of a decree, but it was held in *Bhagwan Das* v. *Hathi Bhai* (2) that where a mortgage decree has been passed for the sale of an agriculturist's house, the execution Court could not refuse to execute the decree notwithstanding the provisions of S. 266 of Act 10 of 1877 which corresponds to S. 60 of the present Civil Procedure Code. In *Ramdayal* v. *Narpat Singh* (3) in a second appeal against the mortgage decree itself the Court gave effect to the exemption and dismissed the claim for the sale of the hypothecated property. In *Bholanath* v. *Mt. Kishori* (4) two of the learned Judges, disagreeing with the third Judge held that S. 60 was only a bar in a proceeding for the execution of a money decree and that a mortgagee who has obtained a decree for the sale of an agriculturist's house is entitled to have it sold in execution. The Court accordingly gave a decree for the sale of the house in second appeal.

These cases illustrate the principle that an execution Court cannot go behind the decree.

On the other hand in the *Raja of Vizianagram* v. *Dantivada Chellayya* (5) it was held that S. 5 of the Hereditary Village Officers Act (Madras Act III of 1895) made it obligatory upon a Court executing a mortgage decree to go behind the decree and to refuse to sell village inam lands though their sale was ordered by the decree. The decision was based upon the rule that prohibitions having some object of public policy in view must be literally and strictly enforced and that the principle of personal estoppel does not apply The rule may be admitted, but the question is whether any Court can interfere to put the statute in force except in the course of a properly constituted proceeding over which he has jurisdiction. In this last-mentioned case their Lordships of the Madras High Court held that the execution Court was competent to refuse to sell the inam lands; but, with great respect, it seems to me that this was giving a right to the execution Court to review the judgment of the trial Court on a question of fact. It follows that if such a right is recognised there is nothing to prevent a conflicting decision in the execution Court both as to the facts and the

(1) [1899] 26 Cal. 727=3 C. W. N. 586.

(2) [1879] 4 Bom. 25.
(3) [1911] 33 All. 136=8 A. L. J. 190.
(4) [1912] 34 All. 25=8 A. L. J. 1045.
(5) [1905] 28 Mad. 84=14 M.L.J. 468.

law on the issue of saleability. Such a result could not possibly have been contemplated.

The language of S. 27, Cl. (2) of the Sonthal Parganas Settlement Regulation is perhaps more express and peremptory than that of S. 60 of the Civil Procedure Code, but the same restriction applies. The enactment certainly prohibits any Court from recognizing a transfer as valid if made in contravention of sub-S. (1); but the Court must be engaged in a proceeding in which it has jurisdiction to investigate the legality of the transfer. In other words the proceeding must be properly constituted and the investigation necessary. In my opinion the Court hearing the appeal from the original decree could have investigated its correctness, but not the execution Court. Therefore, so long as that decree stood, neither the Subordinate Judge sitting as a Court of execution under S. 47, Civil P. C. nor the District Judge in appeal from him, was competent to question it. The learned District Judge's order, therefore, being without jurisdiction, must be set aside.

The appeal is decreed with costs which will be paid by the judgment-debtor-respondents only.

The sale will be confirmed.

Ross, J.—I agree.

Appeal allowed.

✻ A. I. R. 1926 Patna 205

DAWSON-MILLER, C. J., AND FOSTER, J.

Sri Sri Baidyanath Jiu—Defendant—Appellant.

v.

Har Dutt Dwari and *others*—Plaintiffs—Respondents.

Second Appeal No. 625 of 1923, Decided on 6th November 1925, against a decision of the Dist. J., Santal Parganas, D/- 7th May 1923.

✻ *Limitation Act, S. 10—Suit to recover remuneration as dwaris of temple is not covered by S. 10—Art. 100 applies, but not Art. 131 nor Art. 102.*

A suit by the dwaris of a temple for recovery of certain dues claimed by them as payable as remuneration in respect of their services in connexion with the temple is not a suit covered by S. 10. Such a suit is governed by Art. 120 and neither by Art. 102 nor by Art. 131.

[P. 205, C. 2, P. 206, C. 1]

There is a vast distinction between a suit brought to establish a periodically recurring right and a suit brought to enforce payments due as remuneration for the performance of services arising out of that right. Art. 131, was intentionally drafted so as to include merely a suit to establish a right: 38 *Mad.* 916, (*F. B.*), 34 *Bom.* 349 and 34 *All.* 246, *Discussed.* [P. 207, C. 1]

N. C. Sinha and *B. B. Ghose*—for Appellant.

A. B. Mukherjee and *B. B. Mukherjee*—for Respondents.

Dawson-Miller, C. J.—The plaintiffs who are respondents in this case are three dwaris of the celebrated temple of Baidyanath at Deoghar. They have instituted this suit to recover certain dues which they claim to be payable to them as remuneration in respect of their services in connexion with the temple. The remuneration consists of payments, for the greater part in kind which are said to be due for special services in connexion with the performance of the home puja and to a small extent in cash in respect of other services. The suit was instituted originally against Sadhupadhya Umesha Nand Jha who was the high priest in charge of the temple of Sri Sri Baidyanath, but pending the suit, sometime in 1920, the high priest died and as there was a dispute about the succession a Receiver was appointed to take charge of the properties of the temple and he (the Receiver, Babu Suresh Chandra Chaudhury) has been substituted in place of the original defendant.

Amongst other defences to the suit it was contended on behalf of the defendant that the claim which covers a period of 13 years before the institution of the suit was barred or partly barred by limitation. On the other hand, the plaintiffs contended that S. 10 of the Limitation Act applied to a suit of this nature and consequently that no period of limitation applied in the case. This view was accepted by the learned District Judge whose judgment is the subject of this appeal. The contention apparently is that the suit is one for the purpose of recovering part of the trust property or the proceeds thereof from the hands of those who are responsible for its distribution. It seems to me that it is impossible to regard a suit of this nature as coming within the purview of S. 10. The plaintiffs, although no doubt they are entitled out of the proceeds of the property belonging to the temple to certain pay-

ment in the nature of wages and to certain remuneration, cannot, in my opinion, be said to be bringing this suit for the purpose of following the trust property in the hands of the trustee. Their claim is not one which has been shown to be in any way charged upon the trust property although no doubt the payments made to them must come out of the proceeds of the endowment, but if one were to hold that this is a suit coming within S. 10 then it seems to me that it would equally follow that any claim by a servant or other person who had a right to be paid remuneration even for wages would equally be bringing a suit within the meaning of S. 10. It is sufficient to say that, in my opinion, S. 10 has no application to the present suit.

It was contended by the appellant, in the first place, that the claim was one for wages and was covered by Art. 102 of the Limitation Act, which provides for a suit for wages not otherwise expressly provided for by the schedule, the period being three years from the date when the wages accrued due. Alternatively he relied on Art. 120 which provides a 6 years period of limitation. The respondents who sue on behalf of themselves and the other dwaris attached to the temple although they are in a sense servants of that institution hold in fact an hereditary office. They are bound to perform certain services and by way of emolument they are entitled to certain specific payments. Although the services, on the occasions when they officiate, are performed only by a few of them the fees to which they are entitled are distributed amongst the whole body of the dwaris. They are not paid a regular recurring wage, but certain fees as emoluments attaching to the hereditary office. It does not appear to me that a case like this is one which is governed by Art. 102 of the Limitation Act. I do not consider that the payments made in this case which were almost entirely payments made in kind, so much ghee per year, can come under the head of wages.

It was contended by the respondents that if S. 10 had no application then Art. 131 applied to the case. That article provides for a suit to establish a periodically recurring right and the period of limitation is 12 years from the time the plaintiff is first refused the enjoyment of the right. There have been conflicting decisions in the High Courts in India as to the applicability of that article in cases where the claim is not for the establishment of a periodically recurring right, but for the remuneration arising by reason of the right itself. The High Court at Madras has taken the view that Art. 131 of the schedule applies to a suit to recover sums due under such a right whether there is a prayer for declaration of the plaintiff's right or not and in the case of *Manavikrama Zamorin Raja Avergal of Calicut* v. *Achutha Menon* (1) a Full Bench of the Madras High Court after expressing some doubt as to the propriety of earlier decisions of the same Court eventually arrived at the conclusion that those decisions should not be interfered with. In fact the Chief Justice states his opinion thus : " If this matter had been res integra I should have been disposed to hold that Art. 131 should be construed as applying to a suit brought for the purpose of obtaining an adjudication as to the existence of an alleged periodically recurring right, and not to a suit in which it was sought to recover moneys alleged to be due by reason of the alleged right." He felt, however, that the earlier decisions of the same Court ought not to be overruled and Mr. Justice Sankaran Nair who agreed with him admitted that the question was not free from doubt. Mr. Justice Oldfield also agreed with the learned Chief Justice for the reasons stated by him. That decision undoubtedly finds some support also from a decision of the Bombay High Court, *Sakharam Hari* v. *Laxmipriya Tirtha Swami* (2). After expreseing the opinion that a cash allowance due from one temple to another was in the nature of nibandha or immovable property, the Court there held that where it was annually payable the right to payment gave to the person entitled a periodically recurring right as against the person liable to pay, and the right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and also those which have become actually due. As against these decisions we have a different view taken by the High Court at Allahabad.

(1) [1915] 38 Mad. 916=26 M. L. J. 377=15. M. L. T. 226=(1914) M. W. N. 228 (F. B.).
(2) [1910] 34 Bom. 349=12 Bom. L. R 157.

In the case of *Lachmi Narayan* v. *Turabunnissa* (3), it was held that the words of Art. 131 are altogether inapplicable to a suit to recover arrears of payments due under a registered contract and an earlier case of the Chief Court of the Punjab was followed in preference to the view held by the Madras High Court.

It seems to me that there is a vast distinction between a suit brought to establish a periodically recurring right and a suit brought to enforce payments due as remuneration for the performance of services arising out of that right. In the present instance a suit has been brought, and went on appeal to the High Court and was finally decided in July 1920 in which the present plaintiffs sued the present defendant for a declaration of the very right in respect of which the remuneration is now claimed. Having had their right declared in that suit they then brought the present suit claiming not to establish their right, which is already established by the decree of the High Court, but to recover the remuneration due to them for the hereditary services which they had not been paid, and which in fact they had not been allowed to perform, pending the dispute between the parties. I think that some light can be thrown upon this matter by reference to Arts. 128 and 129, which almost immediately precede the article in question. It is quite clear from a perusal of those articles, one of which applies to a suit by a Hindu for arrears of maintenance and the other by a Hindu for a declaration of his right to maintenance, that the framers of this Act, had clearly in mind the distinction between a suit for a declaration of a right and a suit claiming arrears of remuneration arising out of the exercise of that right, and had it been the intention to include both classes of suit under Art.131, I think that we should have found words appropriate to that effect. It seems to me that Art. 131 was intentionally drafted so as to include merely a suit to establish a right.

In these circumstances as none of these articles appear to be applicable to the facts of the present case one must look to the general Art. 120 which the appellant relied on, if Art. 102 should not apply; and this appears to me to be the article applicable to the present case. It provides for a suit for which no period of limitation is provided elsewhere in the schedule and the period of limitation is 6 years from the date when the right to sue arises. If that article is applicable, as I think it is, it follows that the claim of the plaintiffs in this case is barred beyond six years back from the period when the suit was brought.

(3) (1911) 34 All. 246=9 A. L. J. 297.

The result is that the decree of the learned District Judge will be varied by limiting the amount recoverable to the dues falling within 6 years from the date when the suit was instituted. I think that the appellant is entitled to his proportionate costs of this appeal.

Foster, J.—I agree.

Decree varied.

✻ A. I. R. 1926 Patna 207

MULLICK AND ROSS, JJ.

Kali Rai—Petitioner.

v.

Tulsi Rai and *others*—Opposite Party.

Civil Revision No. 463 of 1924, Decided on 8th April 1925, from an order of the Sub.-J., Godda, D/- 8th July 1924.

(a) Civil P. C., O. 34, R. 1—Mortgage suit by Hindu joint family—Non-joinder of members is fatal only where strong reasons exist.

Unless there are very strong reasons for doing so a mortgage suit will not be dismissed on the ground that the other members of the joint family have not been joined as plaintiffs. [P. 208, C. 1]

✻ *(b) Civil P. C., O. 1, O. 34, R. 1 and S. 115—Refusal to add a party as plaintiff—S. 115 does not apply—If fair trial would be denied, Government of India Act, S. 107, will apply—Government of India Act, S. 107.*

S. 115 is clearly not applicable where the lower Court has refused in the exercise of its jurisdiction to add a party as plaintiff. Possibly S. 107 of the Government of India Act might apply to cases where the result is a denial of the right of fair trial. [P. 208, C. 2]

S. S. Bose—for Petitioner.

L. K. Jha—for Opposite Party.

Mullick, J.—This application must be rejected.

In a mortgage suit brought by the petitioner's uncle, Tulsi Rai against certain persons styled the Ojhas, upon a bond executed in 1916 and standing in the name of the petitioner's uncle Tulsi Rai, the Ojhas objected that the petitioner Kali Rai was a necessary party inasmuch as his father Raghunath had had a share in

the money which was originally lent to the defendants. It was also alleged by the defendants that the bond of 1916 was merely a renewal of an old bond of 1904. After the defendants took this objection as to non-joinder the petitioner came forward with a petition praying to be joined as plaintiff in the suit. That petition has been disallowed by the Subordinate Judge and hence this application in revision to us.

It is quite clear that the addition of the petitioner as a plaintiff will cause great inconvenience in the trial of the mortgage suit. It would be altogether out of the scope of that suit to introduce into it a conflict between the plaintiffs and a person who claims adversely to them. The question whether there had been in fact a partition in 1904 between Tulsi Rai and Raghunath is one which will require much evidence unnecessary for the mortgage suit, and I agree with the learned Subordinate Judge that to join the petitioner as a plaintiff would be improper and inconvenient.

The petitioner, however, now says that he is quite willing to be joined as a defendant. That again is a position which he cannot be allowed to take up. It is quite conceivable that the petitioner's appearing in the role of a defendant will raise obstacles in the way of the plaintiffs which were altogether unforeseen and the balance of convenience decidedly requires that the petitioner should be left to bring a separate suit against the plaintiffs if he has any share in the bond upon which the suit has been brought.

It is contended that the non-joinder of the petitioner may possibly entail the dismissal of the suit. It has, however, been held in this Court that, unless there are very strong reasons for doing so, a mortgage suit will not be dismissed on the ground that the other members of the joint family have not been joined as plaintiffs. In any event if the suit is dismissed the petitioner will not be affected and the only objection the petitioner can raise is that there may possibly be a multiplicity of suits. In the circumstances of this case such a result cannot be avoided, if the plaintiff denies to assert his claim to the mortgage money.

With regard to a question whether S. 115 of the Civil Procedure Code applies, and whether we have jurisdiction to interfere, it seems that there has in this case been no refusal on the part of the Subordinate Judge to exercise jurisdiction. He may have exercised it wrongly, but it cannot be said that there has been any failure on his part to exercise jurisdiction. In *Rabbaba Khanum* v. *Noorjehan Begum* (1) the same point came up before the Calcutta High Court and it was held that a refusal to add a party as a defendant could not be revised under S. 622 of the Civil Procedure Code which corresponds to the present S. 115. On the other hand, there are other cases of the Calcutta High Court where the Court has revised the decision of a lower Court in the matter of joinder of parties : see for instance, *Jugal Krishna Mullick* v. *Phul Kumari Dassi* (2) and *Dwarka Nath Sen* v. *Kishori Lal Gosain* (3). These cases, however, were decided on their own facts, and it is not clear whether the Court was acting under S. 115 or its general powers of superintendence. In my opinion S. 115 is clearly not applicable. Possibly S. 107 of the Government of India Act might apply to cases where the result is a denial of the right of fair trial. In the present case there has been no such denial and therefore we cannot interfere in exercise of our powers of superintendence.

In my opinion the merits are altogether against the petitioner and, therefore, the application must be dismissed with costs.

Hearing fee : one gold mohur.

Ross, J.—I agree.

Application dismissed.

(1) [1886] 13 Cal. 90.
(2) [1918] 44 I.C. 564.
(3) [1910] 14 C.W.N. 708=11 C.L.J. 426.

A. I. R. 1926 Patna 209

MULLICK AND ROSS, JJ.

(*Bibi*) *Khodaijatul Kobra* and *others*—Decree-holders—Appellants.

v.

Harihar Missar and *others*—Judgment-debtors—Respondents.

Appeals Nos. 171 and 172 of 1924, Decided on 18th March 1925, from the appellate Orders of the Dist.J., Gaya, D/- 23rd April 1924.

(*a*) *Civil P. C., Ss. 37 and 38—Court passing decree abolished and re-established—It can execute decree if it could try the suit to which decree relates.*

Where the Court which passes a decree is abolished but is subsequently re-established, it can execute the decree provided it would have jurisdiction to try the suit to which the decree relates if it were instituted at the time of the application for execution. [P 209 C 2]

(*b*) *Civil P. C., S. 37 (b)—A Court that is abolished can be revived.*

Even if a Court ceases to exist it can again be revived and if another Court of the same designation is established within the district with the same jurisdiction it can be said that it is the same Court. 4 *C. L. J.* 473, *Dist.* [P 210 C 1]

Nurul Hasan—for Appellants.

S. N. Roy—for Respondents.

Mullick, J.—These two appeals arise out of two orders made by the District judge of Gaya on the 23rd April 1924 setting aside two orders made on the 15th December 1923 by the Additional Subordinate Judge of that district.

The events leading up to the last mentioned orders were as follows: Two decrees were made on the 21st August 1920 by the Additional Subordinate Judge of Gaya. Some time afterwards, it is not known on what precise date, the Court of the Additional Subordinate Judge was abolished and the business of that Court was transferred to the 3rd Subordinate Judge's Court. Subsequently the Additional Court was re-established, and on the 27th August 1923 two applications were made to it for the execution of those decrees, and on the 15th December 1923 the Court held that it had jurisdiction to entertain the applications.

Against this decision two appeals were preferred before the District Judge who disagreed with the Additional Subordinate Judge and held that the Additional Subordinate Judge had no jurisdiction and that the execution applications must be dismissed.

Now the matter turns upon Ss. 37 and 38 of the Civil Procedure Code of 1908. The learned District Judge is of opinion that the Additional Subordinate Judge's Court having ceased to exist, the present additional Subordinate Judge's Court cannot be the Court which passed the decree, and, therefore, is not competent to entertain the execution application. The learned Judge does not address himself to the latter part of sub-Cl. (b) of S. 37 which provides that if the Court of first instance has ceased to exist or to have jurisdiction to execute the decree, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such a suit, shall be included within the expression "the Court which passed the decree." Therefore, even if it be held in this case that the Court of first instance has ceased to exist, the present Additional Subordinate Judge would have jurisdiction to execute the decree if he has jurisdiction to try the suit to which the decree relates. Now there is nothing on the record to show that the present Additional Subordinate Judge has not got jurisdiction to try the suit. Ordinarily Additional Subordinate Judges have jurisdiction over the whole district, and unless that jurisdiction has been curtailed by an express order made by the Local Government under S. 13 of the Civil Courts Act or in consequence of re-arrangement of business made by the District Judge under sub-Cl. (2) of that section it must be assumed that the Additional Subordinate Judge has jurisdiction to try the suit and therefore also to execute the decree.

In point of fact I doubt if it can be said that the Court of the Additional Subordinate Judge has ceased to exist. What has happened is that the Court was temporarily abolished and was re-established and that at the time when the application for execution was made it was in fact in existence. It is contended that the expression "ceased to exist" means "is not in existence at the time when the application for execution is made." If that view is accepted, then the Court of the present Additional Subordinate Judge, being the Court which

passed the decree, has jurisdiction to execute. The argument of the respondents is that if a Court once ceases to exist that Court cannot again be revived, and that although another Court of the same designation is established within the district with the same jurisdiction, it cannot be said that it is the same Courts. Now "Courts" in the Civil Courts Act are designated by their titles, and if there are more Courts than one of the same designation, then they are further distinguished by numerals. If the officer presiding over the Court of the 1st Subordinate Judge is temporarily transferred and after an interval another officer is appointed to preside over that Court it would not be a straining of ordinary language to hold that the 1st Court ceased to exist but has been re-established. I am of opinion that in this case the Court of the present Additional Subordinate Judge, being a Court of the same designation, bears the impress of the identity of the Court which was abolished.

In this view the latter part of S. 37, Cl. (b) is not required for the purpose of this case; nor has the third sub-clause of S. 13 of the Civil Courts Act any application.

Reference has been made to S. 17 of the Civil Courts Act; that also has no application to this case, because it does not relate to execution proceedings.

The decision in *Tara Chand Marwari* v. *Ram Nath Singh* (1) appears at first sight to be against the view which we have just taken; but on an examination of the facts of the case it would seem that the decision there turned upon the question whether there was at the time when the application for execution was made any additional Subordinate Judge in the district. Apparently there was not and therefore the permanent Subordinate Judge of the district assumed jurisdiction over the case. But while the execution case was proceeding, another officer was posted to the district as Additional Subordinate Judge and the question arose whether the permanent Judge ceased to have jurisdiction to continue the execution proceedings which were pending before him. It was held that he had jurisdiction to continue the proceedings. Reference was incidentally made in that decision to S. 17 of the Civil Courts Act, but it is not clear how that section applied.

(1) [1906] 4 C. L. J. 478.

The result is that upon the provisions of the Civil Procedure Code it seems quite clear that the learned District Judge's order cannot be supported and that the Additional Subordinate Judge's order was correct.

The appeals, therefore, will be decreed with costs. There will be separate costs in each case.

Ross, J.—I agree.

Appeals decreed.

✻ A. I. R. 1926 Patna 210

JWALA PRASAD, AG. C. J. AND MACPHERSON, J.

Rameshwar Singh Bahadur — Appellant.

v.

Mt. Rajo Chowdhrain—Respondent.

Civil Revision No. 185 of 1924, Decided on 7th July 1924, against the order of the Munsif, Madhubani, D/- 9th February 1924.

✻ *Civil P. C., O. 21, R. 58—Rule does not apply to rent decrees by virtue of Bengal Tenancy Act, S. 170.*

By virtue of S. 170, O. 21, R. 58 does not apply to an execution of a rent decree.

A landlord is not bound to go beyond his own record to enforce his claim for arrears of rent and any person not recorded as a tenant must seek his remedy elsewhere and cannot be permitted to stand in the way of the landlord selling the holding for the realisation of the decree obtained against his recorded tenant. [P 211 C 1]

Sambhu Saran—for Appellant.

B. C. De—for Respondent.

Jawala Prasad, Ag. C. J.—This application is directed against the order of the Munsif of Madhubani, dated 9th February 1924 allowing a claim of the opposite party preferred under O. 21, R. 58 of the Code of Civil Procedure. The facts are that the holding in question was recorded in the name of Janakman Thakurain and Keshwar Thakur. Keshwar Thakur is dead and the name of Janakman Thakurain according to the evidence notably of the witnesses on behalf of the opposite party alone stands recorded in the landlord's sherista. The opposite party claims about 1 bigha 18 Cotthas 11 & 1/2 dhurs out of the entire holding of 5 bighas odd under a gift made to her by her father Keshwar

Thakur. Her name has not been recorded in place of Keshwar Thakur in the landlord's sherista. The landlord therefore obtained a rent decree with respect to arrears of rent due from the holding against Janakman Thakurain. In execution of that rent decree he has proclaimed the holding for sale. The attachment and sale proclamation were issued simultaneously inasmuch as the decree to be executed was a rent decree. The decree is on the record and it clearly shows that it is a rent decree. The learned Court below has allowed the claim of the opposite party principally upon the ground that her possession as a daughter of Keshwar Thakur is not disputed.

The learned Munsif has not come to a definite finding as to whether the gift upon the basis of which the opposite party claimed a portion of the holding in dispute has been established or not. No deed of gift has been filed and it is admitted in evidence that no deed of gift was registered. One of the witnesses simply says that a deed of gift was executed but was not registered. The claim of the opposite party was not based upon inheritance but upon the aforesaid gift made by Keshwar Thakur. The Court below has, therefore, misapplied its mind to the consideration of the case. It has not also taken into consideration the provisions of S. 170 of the Bengal Tenancy Act by virtue of which O. 21, R. 58 does not apply to an execution of a rent decree and that is upon the principle that a landlord is not bound to go beyond his own record to enforce his claim for arrears of rent and any person not recorded as a tenant must seek his remedy elsewhere and cannot be permitted to stand in the way of the landlo d selling the holding for the realization of the decree obtained against his recorded tenant. The order of the Court below is therefore set aside and the claim of the opposite party, Rajo Chowdhrain is disallowed with costs. The application is allowed with costs.

Macpherson, J.—I agree

Application allowed

A. I. R. 1926 Patna 211

MACPHERSON AND SEN, JJ.

Ramyad Dusadh and *others*—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 231 of 1925 Decided on 27th July 1925, against the decision of the S. J., Patna.

Criminal P. C., (Amended 1923), S. 162—Statement before police cannot be used to meet a suggestion of defence nor to support testimony of the deponent—Infringement of S. 162 is not necessarily fatal to conviction if decision is based on other admissible evidence.

A statement by a person to the police in the course of the investigation of an offence cannot be used for any purpose at the trial of that offence except to contradict the evidence given at the trial by that person. In particular it cannot, even if admitted to contradict, be used to corroborate the evidence of that person or to meet a suggestion of the defence. Where, however, the judgment of the lower appellate Court deals at length with the case of each of the petitioners independently of the inadmissible evidence and there is overwhelming direct and positive evidence against each accused and the accused have also not been prejudiced in any way, the infringement of the provisions of S. 162, Criminal P. C., is under S. 167 of the Evidence Act, not a ground for a new trial or for the reversal of the decision of the lower Court.

[P. 212, C. 2; P. 213, C 1, 2]

Ali Imam and *Pande Narsingh Sahi*—for Petitioners.

H. L. Nandkeolyer—for the Crown.

Macpherson, J.—This application in revision is made by six petitioners against their conviction under S. 147 of the Indian Penal Code by the Deputy Magistrate of Patna and their sentence of eight months' rigorous imprisonment, with an order under S. 106 of the Code of Criminal Procedure, which have been affirmed on appeal by the Sessions Judge.

The prosecution case was briefly as follows: Jaglal Mahto of Niamatpur, whose barahil is Ramyad Dusadh, the first petitioner, has had civil and criminal litigation with Bislal Mahto, son of Rameshwar Mahto of Dhanauti. On the 31st May 1924, about 12-30 a.m., while neighbours and relatives of Rameshwar were sleeping in the open space outside his house and Bislal on the osara, a mob of 30 or 40 men including petitioners, who, except Komal are related, came armed with lathis (Nabha with a garasa) in search of Bislal and his father. Before the invaders were driven off by the

villagers of Dhanauti they inflicted serious, and in some cases dangerous, injuries pn six of the Mahtos of Dhanauti, most of which were due to lathi blows, but some of which were probably caused by a garasa, as in the case of Pati, Bala and perhaps Lochan, from all three of whom a "dying declaration" was recorded, as they appeared to be in a critical state.

A charge under S. 147 with common object to cause hurt to the men injured and also a charge under S. 326 read with S. 149, were framed against all the accused except Nabha who was separately charged under S. 148 and 326.

Various defences were raised, such as, that the case was falsely brought from ill-feeling, that the injuries were really caused by Mahadeo, Chedi and others in the daytime at some other place and that Komal was ill at Koilwar. The Magistrate negatived these defences, and as stated, convicted the petitioners of rioting, giving Nabha the benefit of the doubt as to whether he carried and wielded a garasa.

Before us Sir Ali Imam claims: (1) an acquittal because so much of the evidence has been disbelieved that it is unsafe to convict at all and, failing an acquittal, (2) a remand for the re-hearing of the appeal on the ground that evidence has been used against, the petitioners which the law enjoins shall not be used.

As regards the first of these pleas a perusal of the judgments forthwith places its invalidity beyond all doubt, The Magistrate merely found the evidence inconclusive as to whether Nabha had a garasa and injured Pati and Bala with that weapon and gave him the benefit of the doubt, while he refrained from convicting the other accused under S. 326 read with S. 149 for the reason, an unsound one, that the actual person "who had committed the offence under S. 326 had not been traced." These conclusions are not at all fundamental to the whole prosecution case, and they do not vitiate or indeed affect the findings of the trial Court in respect of the charge of rioting, which has been sustained on appeal.

The basis of the second plea is the following paragraph in the judgment of the appellate Court:

"Next, as to the suggestion that the prosecution witnesses were really beaten only by Mahadeo, Chedi and others, who are mentioned by a few of the witnesses along with the accused persons in the statements made before the police, it rests on no evidence whatsoever. It would be quite different if the accused had not been mentioned at all before the police, but the cross-examination by the defence has made it clear that they were so mentioned. The question whether Mahadeo and others should have been sent for trial along with the accused is one with which it is not necessary to deal. Two defence witnesses D. Ws. Nos. 2 and 3, say that Kalicharan and Rameshwar, accused, cultivate land of Husaini, but mention no quarrel in this connexion.

It is urged that the provisions of S. 162 of the Code of Criminal Procedure have here been ignored by the appellate Court and that the folly of the counsel appearing on behalf of the defence in bringing out in cross-examination that the accused has in fact been mentioned by the prosecution witnesses before the police, would make no difference to its inadmissibility in evidence under that provision.

Now, as has been indicated in the decision in *Badri Chaudhri* v. *King-Emperor* (1), the provisions of the new S. 162 (1) of the Code of Criminal Procedure stringently exclude from use for any purpose in a criminal trial any statement to the police whether recorded or not recorded except to contradict within very strict limitations a statement made at the trial by a prosecution witness. It must be considered first whether this provision has been infringed, and if it has, it must further be considered what the effect of the infringement is.

As regards the first point, it is contended that the statement of the witnesses that the petitioners were mentioned by the prosecution witnesses to the police is entirely inadmissible in evidence but nevertheless has been used by the Sessions Judge as an answer to the defence case that persons not sent up by the police alone beat the prosecution witnesses. The contention cannot be gainsaid. A statement by a person to the police in the course of the investigation of an offence cannot be used for any purpose at the trial of that offence except to contradict the evidence given at the trial by that person. In particular it cannot, even if admitted to contradict, be used to corroborate the evidence of that person or for

(1) A.I.R. 1926 Patna 20.

the purpose to which it has been put in the present instance, namely, to meet a suggestion of the defence. Prima facie therefore it would seem that the provisions of S. 162 (1) of the Code of Criminal Procedure have been infringed.

In the present case, however, the infringement appears to have had no effect. The sentence in the judgment of the appellate Court in which it occurs is unnecessary for the argument. It has justly been pointed out by the learned Sessions Judge that the suggestion that only persons not on trial who had been mentioned during the investigation in addition to the petitioners were the assailants, had no evidence in support of it, and immediately after it is pointed out that it is necessary to consider whether the said persons should have also been placed on trial. The passage objected to simply sets out the truism that if petitioners had not been mentioned before the police the suggestion which has already been found to be based on no evidence, would have been weighty. Now if the Petitioners desired to rely upon the fact that a prosecution witness had not mentioned the names of petitioners to the police as showing that his testimony in Court was unworthy of credit, it was upon them to prove that he had in fact not done so. The record shows that they failed to adduce such proof. There is thus no basis for the suggestion in the appellate Court that the appellants were not among the assailants and it was superfluous for the Sessions Judge to refer in that connexion to the inadmissible item of evidence which went much further than was necessary for the rejection of the suggestion. The suggestion moreover had been dealt with by the trial Court and negatived on grounds which cannot be questioned in point of law or of fact. In my judgment the infringement had no effect on the decision.

The matter has, however, practically no significance in the present case. The judgment of the appellate Court deals at length with the case of each of the petitioners; and independently of the evidence objected to and admitted, there is overwhelming direct and positive evidence against each which is admissible, has not been in the slightest measure rebutted and is entirely reliable. The petitioners have also not been prejudiced in any way. Under the circumstances the improper admission of the evidence objected to is, under S. 167 of the Indian Evidence Act, 1872, not a ground for a new trial or for the reversal of the decision of the appellate Court and there is no grouud for interference in revision.

I would, therefore, discharge the rule and dismiss this application.

Sen, J.—I agree.

Application dismissed.

A. I. R. 1926 Patna 213

SEN, J.

Rameshwar Singh Bahadur—Petitioner.

v.

Puran Chandera Mansili—Opposite Party.

Civil Revision, Decided on 13th July 1925.

(a) *Bengal Tenancy Act, S. 158-B—Tenure passes to purchaser only after actual sale under decree.*

Under S. 158-B the tenure passes to the purchaser when it is sold in execution of rent decree. Until the sale takes place the tenant recorded in the landlord's serishta must be deemed to have been the person in whom the tenure was vested. [P. 214, C. 1]

(b) *Civil P. C., O. 21, R. 58—Rule does not apply to rent decrees by virtue of Bengal Tenancy Act, S. 170.*

The provisions of S. 170 are clearly imperative and they lay down that the provisions of the Civil P. C., as to claim cases viz., O. 21 ,R. 58, shall not apply to a tenure or holding attached in execution of a decree for arrears of rent thereof. A.I.R. 1926 *Patna* 210 *Rel. on.* [P. 214, C. 1]

Murari Prasad and *Sambhu Saran*—for Petitioner.

Judgment.—The petitioner instituted a rent suit under. S. 148 (a) of the Bengal Tenancy Act against Mewa Lal Kamath who was recorded in the petitioner's serishta for arrears of rent for the years 1326 to 1329 making the Babus of Madhubani the cosharer landlords parties to the suit. On the 22nd February 1923 he obtained a decree. He thereafter took out execution complying with the provisions of S. 158-B of the Bengal Tenancy Act and serving notices on the cosharer landlords. The sale preclamation and notices were issued simultaneously. On the 13th January 1925 the opposite party preferred a claim

under O. 21, R. 58 of the Code of Civil Procedure; they alleged that they had purchased the holding at an auction sale in execution of a rent decree for the years 1324 to 1327 obtained by the Madhubani Babus against the same tenant and obtained possession thereof by virtue of the dakhaldehani given to them on the 24th December 1924. It appears, however, that when the decree was obtained by the petitioner, the sale to the claimants had not taken place. The decree in favour of the Madhubani Babus was executed on the 15th February 1923 and the sale in favour of the claimants took place on the 18th July 1923; that is, about five months after the decree in favour of the petitioner. The learned Munsif held that at the date when the petitioner obtained his rent decree, there was no tenure of Mewa Lal in existence, it having already passed to the claimants. This view appears to be wrong; for under the provisions of S. 158-B of the Bengal Tenancy Act the tenure passes to the purchaser when it is sold in execution of rent decree. Until the sale took place the tenant, who was recorded in his serishta must be deemed to have been the person in whom the tenure was vested. The petitioner, therefore, was quite competent to bring a suit, as he did under the provisions of S. 148-A of the Bengal Tenancy Act and to execute his decree under the provisions of S 158-B of the Bengal Tenancy Act.

The point that arises whether in the events that happened and in view of the provisions of S. 170 of the Bengal Tenancy Act the opposite party are entitled to put in any claim under O. 21, R. 58 of the Code of Civil Procedure. The learned Munsif entertained and allowed the claim holding that inasmuch as there was no tenure in existence at the date of the petitioner's decree, the provisions of S. 170 would constitute no bar to a claim being put forward. This view appears to be unsound. The provisions of S. 170 are clearly imperative and they lay down that the provisions of the Civil Procedure Code as to claim cases shall not apply te atenure or holding attached in execution of a decree for arrears of rent thereof. This view is supported by many rulings amongst others by an unreported ruling: vide judgment of Jwala Prasad, Ag. C. J., in Civil Revision No. 185 of 1924, *Rameshwar Singh* v. *Rajo Chaudhrain* (1) which likewise lays down the principle that a landlord is not bound to go beyond his own record in order in enforce his claim for arrears of rent and any person not record as a tenant must seek his remedy elsewhere and cannot be permitted to stand in the way of the landlord selling the holding for the realization of the decree obtained against his recorded tenant."

I, therefore, think that the Court below was not competent, in view of the provisions of S. 170 of the Bengal Tenancy Act, to entertain the claim in regard to the subject-matter of execution.

The application is allowed; the order of the Munsif is set aside. The execution may now proceed.

Application allowed.

(1) A. I. R. 1926 Patna 210.

A. I. R. 1926 Patna 214

JWALA PRASAD AND MACPHERSON, JJ.

Ramchandra Modak—Accused—Applicant.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 255 of 1925, Decided on 8th July 1925, from an order of the J. C., Ranchi, D/- 14th April 1925.

(a) *Criminal P. C., (amended by Act 18 of 1923), S. 256—Sufficient time must be given to the accused to consider for further cross-examination of prosecution witnesses after charge is framed.*

The words inserted by the amendments indicate the intention of the Legislature that sufficient time should be given to an accused to consider whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge, and it is only in special cases that the Magistrate can require him to state forthwith if he so wishes. [P 215, C 2]

(b) *Criminal P. C., S. 256—S. 256 does not apply before charge is framed.*

Section 256 does not apply before a charge is framed. Therefore, the statement of the pleader of the defence made before framing of the charge to the effect that he no longer required the attendance of the prosecution witnesses does not deprive the accused of his right to further cross-examine the prosecution witnesses after the framing of the charge under the section. [P 215, C 2]

(c) *Criminal P. C., S. 256—Magistrate cannot insist on the accused to deposit costs of witnesses before recalling for cross-examination.*

A Magistrate has no power while passing an order on an application under S. 256 to impose

a condition upon the accused to deposit costs for the purpose of recalling the prosecution witnesses for cross-examination. [P. 216, C. 1]

(d) *Penal Code, S. 19—A person, not designated as a Judge, is a Judge only when exercising jurisdiction in a case.*

A person other than one who is officially designated as a Judge and who is empowered to give a definitive judgment, is a Judge only when he is exercising jurisdiction in a suit or in a proceeding. [P. 217, C. 1]

(e) *Criminal P. C., S. 539—Affidavit before Magistrate having no seisin over the case is not valid.*

An affidavit made before a Magistrate in a case over which he has no seisin is not valid and cannot be used in High Court: 14 *Cal.* 653 and 8 *C. W. N.* 40, *Dist.* [P. 217, C. 2]

S. N. Basu for *A. K. Gupta*—for Petitioner.

H. L. Nandkeolyar—for the Crown.

Jwala Prasad, J.—The trial in this case seems to have been vitiated by the omission on the part of the Magistrate to comply with the provisions of S. 256 of the Code of Criminal Procedure.

The witnesses for the prosecution were examined on the 23rd of February 1925, and were cross-examined and then discharged as the pleader for the defence no longer required their attendance. The charge was framed the following day, namely, on the 24th February. The accused pleaded not guilty and cited defence witnesses. Later on Mr. Ghatak, pleader from Ranchi, appeared on behalf of the accused for the first time and stated that he wished to cross-examine the prosecution witnesses after the charge was framed. This request was evidently made under S. 256 of the Code of Criminal Procedure.

As a matter of fact, the section requires that after the charge is framed and the accused pleads not guilty or claims to be tried: "he shall be required to state, *at the commencement of the next hearing of the case, or if the Magistrate for reasons to be recorded in writing so thinks fit forthwith*, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged."

The procedure indicated herein was not observed, and the accused was not required to state whether he wished to cross-examine any of the prosecution witnesses. The words italicized have now been inserted in the section by the amending Act XVIII of 1923 and indicate the intention of the Legislature that sufficient time should be given to an accused to consider whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge, and it is only in special cases that the Magistrate can require him to state forthwith if he so wishes. The pleader for the petitioner, however, expressed a desire that the witnesses should be recalled for the purpose of cross-examination.

Therefore, the irregularity committed by the Magistrate in not asking the accused to state if he wished to cross-examine seems to have been practically condoned, and the accused expressly stated that he wanted to avail himself of the provisions of S. 256 and to exercise his right to cross-examine the prosecution witnesses after the charge.

The Magistrate as well as the learned Sessions Judge refers to the statement of the pleader for the defence made on the 23rd of February, before the charge was framed, stating that he did not any longer require the attendance of the prosecution witnesses, as showing that opportunity was given to the accused to cross-examine the witnesses under S. 256. This apparently is a misconception, for on the 23rd of February the stage for applying S. 256 had not been reached. No charge was framed, and the cross-examination of the prosecution witnesses before the charge was under the previous Ss. 252 and 253. Therefore, the statement of the pleader of the defence made on the 23rd of February would not deprive the accused of his right to further cross-examine the prosecution witnesses after the framing of the charge under S. 256 of the Code.

The Magistrate did, as a matter of fact, direct the prosecution witnesses to be present on the 25th of February at Bundu for the purpose of being further cross-examined. This, no doubt, was an order passed under S. 256 of the Code of Criminal Procedure, but the accused could not avail himself of it inasmuch as his pleader did not go to Bundu and an application was then made to the Magistrate stating that the accused could not bring his pleader to an out-of-way place such as Bundu.

The Magistrate then passed an order directing the witnesses to be produced upon the accused depositing the cost of their attendance, and fixed the 7th of March for this purpose. This order the Magistrate states to be under S. 257, Cl. (2), of the Code ; but that stage had not yet arrived inasmuch as the further cross-examination of the witnesses after the charge was to be under S. 256 of the Code and full and proper opportunity was not given to the accused for that purpose. There was no application on behalf of the accused under Cl. (1) of S. 257 applying to the Magistrate to issue any process for compelling the attendance of the prosecution witness for the purpose of cross-examination, and consequently Cl. (2) of that section did not apply. The application of the accused made on the 24th of February and renewed on the 25th was an application under S. 256 of the Code, and the Magistrate so treated it. Therefore the Magistrate's order under Cl. (2) of S. 257 of the Code imposing a condition upon the accused to deposit costs for the purpose of summoning, that is, for the purpose of recalling the prosecution witnesses, is wrong and without jurisdiction. If the order be taken to come under S. 256, as is contended for by the learned Assistant Government Advocate, then the condition imposed by the Magistrate of depositing the expenses for recalling the prosecution witnesses is ultra vires. That section does not lay down any condition, nor does it vest the Magistrate with any such power.

It is then urged that such a power must be deemed to exist in the Magistrate as being inherent in him. There is no room for such a suggestion. The Code has expressly laid down the procedure for trial under Chapter 21, and S. 257 expressly vests the Magistrate with discretion to require expenses to be paid by an accused. There being no such discretion vested under S. 256, the power cannot be invoked upon the ground of its being inherent in the Court. The Magistrate had no power to alter in any way the procedure laid down in those sections for the conduct of the case.

The result is that the conviction of the accused is set aside and the case is sent back to the Magistrate to try it from the stage it had reached on the 24th of February after the framing of the charge and to dispose of it after compliance with the provisions of S. 256 of the Code of Criminal Procedure.

The learned counsel on behalf of the petitioner urged that the case should be tarnsferred to the file of some other Magistrate. We do not see any reason to accede to this request, for we find nothing on the record to indicate that the Sub-divisional Officer, who tried the case, has any bias against the accused.

Another question has arisen in this case which has nothing to do with the present case. The application in revison filed in this Court by the accused was not sworn to before the Commissioner appointed by this Court ; in lieu thereof an affidavit sworn to before the Subdivisional Magistrate of Ranchi was filed in this case. The question is whether this affidavit can be legally used in this Court.

Section 539 of the Code of Criminal Procedure deals with affidavits and affirmations to be used before any High Court or any officer of such Court. It requires that such affidavits and affirmations should be sworn and affirmed before such Court or the Clerk of the Crown, or any commissioner or other person appointed by such Court for that purpose, or any Judge, or any commissioner for taking affidavits in any Court of Record in British India, etc. It is said that the Sub-divisional Magistrate of Ranchi is a Judge within the meaning of S. 539 and consequently the affidavit in question could be sworn before him. Reliance is placed upon S. 19 of the Indian Penal Code which defines the word "Judge" as denoting :

"Every person who is empowered by law to give in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment."

The Code of Criminal Procedure does not define the word "Judge," but S. 4 Cl. (2), adopts the definition of words given in the Indian Penal Code which are not expressly defined in the Code. Therefore, the definition of the word "Judge" given in S. 19, Indian Penal Code, would apply to the word "Judge" used in S. 539 of the Code of Criminal Procedure.

It is, therefore, said that the learned Sub-divisional Magistrate of Ranchi is empowered to give a definite judgment and so he must be deemed to be a "Judge" within the meaning of the word in S. 539.

The illustrations to S. 19 of the Indian Penal Code would, however, show that a person other than one who is officially designated as a Judge and who is empowered to give a definitive judgment, is a Judge only when he is exercising jurisdiction in a suit or in a proceeding. So far as that suit or proceeding—revenue, civil or criminal—is concerned he is a Judge, but he is not a Judge when he has not the seisin of the case in which he can give a definitive judgment. This is obvious from the last words of the section under which a body of persons may come under the definition of "Judge" when it is empowered by law to give a judgment, such as arbitrators, but arbitrators can come within the term "Judge" only when dealing with a case on reference to their arbitration. I need not quote the illustrations which seem to support the aforesaid view. It would be sufficient to refer specifically to Cl. (d) which says :

"A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a judge."

No doubt, such a Magistrate is empowered to give a definitive judgment in other cases which he is trying ; still as he is not empowered to give a definitive judgment in the case in which he is only empowered to commit he is not a judge for the purpose of that case.

The Sub-divisional Magistrate of Ranchi had not the seisin of the criminal case before us and he could not pronounce any judgment in respect of that case. Therefore, he is not a judge within the meaning of the term in S. 539 of the Code.

A reference to S. 539-A, Cl. (2), will show that a Magistrate would not come within the meaning of the word "Judge" in S. 539. That clause says :

"An affidavit to be used before any other than a High Court under this section may be sworn or affirmed in the manner prescribed in S. 539, or before any Magistrate."

The "Magistrate" here is differentiated from the officers mentioned in S. 539 and, therefore, he cannot come under S. 539 and is not empowered to have an affidavit sworn before him.

No doubt under S. 139 of the Code of Civil Procedure a Magistrate is expressly empowered to receive an affidavit. That has no application to the present case, inasmuch as we are dealing with a criminal case tried by the Magistrate.

There is no authority on all fours with the present case and there seems to be a dearth of cases upon the point. There are only two cases *Iswarchunder Guho, in the matter of the Petition of* (1) and *Dinobundhu Nundy* v. *Sm. Hurrymutty Dasee* (2). The latter case related to an affidavit in connexion with a civil case and it was held that the affidavit was valid as coming under S. 139 which empowered a Magistrate to receive an affidavit and to administer an oath. This has no application to the present case. The other case did not relate to an affidavit to be used in the High Court and even then it was held that a Deputy Magistrate had no power to administer an oath to a person making an affidavit.

Therefore, the affidavit in this case is not a valid one and cannot be used in this Court.

The rule of the Court is as laid down in Chapter 3 of the Patna High Court Rules, viz.:

"The facts stated in every petition shall be verified either by the solemn affirmation of the petitioner or by an affidavit to be annexed to the petition."

The application in the present case has not been properly sworn or affirmed, and the facts stated, therein cannot, therefore, be used by the petitioner. Therefore, we cannot act upon the application in the present case as regards the facts stated therein.

We have, however, dealt with the case upon the order sheet and the law on the subject, and consequently the irregularity in the affidavit does not affect the decision given by us.

Macpherson, J.—I agree. The order proposed is a necessity in the circumstances. The mistaken application of S. 257 (2) by the Sub-divisional Magistrate of Khunti practically amounted to non-compliance with the provisions of S. 256 which is of fundamental importance in the trial of an accused person.

(1) [1887] 14 Cal. 653.
(2) [1904] 8 C. W. N. 40 (Notes.).

The Crown has, however, suggested that we should not interfere with the conviction because the affidavit by which the application in revision is supported is not one contemplated by S. 539 of the Code of Criminal Procedure which sets out the Courts and persons before whom affidavits to be used before a High Court may be sworn. The Sub-divisional Magistrate of Ranchi before whom the affidavit supporting the petitioner's application was sworn is not one of the Courts or persons named in S. 539. He has not been appointed by the High Court either personally or ex officio for the purpose of the section. Obviously, therefore, an affidavit to be used in the High Court can only be sworn before him if he is a Judge within the contemplation of the section. But it is manifest from S. 19 of the Penal Code read with the illustrations thereto and S. 4 (2), of the Code of Criminal Procedure that a Magistrate is not a Judge within the meaning of these Codes except in relation to a case on his own file and there also only in certain circumstances. The new S. 539-A of the Code of Criminal Procedure also gives countenance to this view. The affidavit filed on behalf of petitioner is accordingly not one which can be used in the High Court and also is not one such as is required under R. 3, Ch. III of the Rules of the Patna High Court. But though the objection is made out it is technical only and should not prevail at this stage even though it might have constituted good ground for refusal to issue a rule when the defective application was lodged. The rule has been heard out on the merits, also in the course of the hearing it has appeared that the facts stated in the petition, which is faultily verified, are matters of record and indeed they are not disputed on behalf of the Crown. Moreover, regard being had to the nature of the illegality in the trial and to the fact that the Magistrate had some ground for believing the petitioner to be eccentric, I should, if necessary, be disposed to treat the case as one which has come to the knowledge of the High Court otherwise than on application wherein the Court should of its own motion exercise its powers under S. 439, of the Code of Criminal Procedure.

** A. I. R. 1926 Patna 218

Full Bench

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

Ram Golam Sahu and *others*—Defendants—Petitioners.

v.

Chintaman Singh—Plaintiff—Opposite Party.

Civil Revision No. 183 of 1925, Decided on 22nd December 1925, on reference by Das and Ross, JJ., against an order of the Sub-J., Bhagalpur, D/- 9th September 1924.

* (a) *Civil P. C., S. 115—Power should not be exercised where technicalities are served at expense of justice.*

The powers of revision should not be exercised in cases where by so doing the Court would be giving effect to mere technicalities of procedure at the expense of manifest justice.

[P 222 C 1]

** (b) *Court-fees Act, S. 11—Court-fee is payable on future mesne profits from date of suit but cannot be ordered to be paid on pain of dismissal of suit even on ascertaining the profits:*

Per Full Bench.—Court-fee is payable in respect of a claim for future mesne profits: that is to say, mesne profits from the date of the institution of the suit up to the date of realization. The Court has no jurisdiction to require the plaintiff to pay additional Court-fee upon his claim for future mesne profits as a condition for proceeding with the investigation of the claim, and has no jurisdiction to dismiss the proceedings if the additional Court-fee is not paid. 3 *P. L. J.* 67; 1 *P. L. T.* 235, *Cons.* 15 *Bom.* 416, *not Foll.*; 33 *Cal.* 1232 *Foll.*

[P 224 C 2]

(c) *Civil P. C., O. 7, R. 2—Valuation will refer to profits before and after suit where both are claimed.* Per Mullick, J.

Order 7, R. 2 requires that some estimate should be made in the plaint in respect of mesne profits. If plaintiff claims mesne profits both in respect of the period antecedent to the suit and also the period subsequent thereto, the valuation will be held to refer to both periods. If he sues for mesne profits in respect of only one of these two periods, the valuation will be held to refer to that period only.

Per Jwala Prasad, J.—Neither O. 7, R. 2 of the Code of Civil Procedure nor S. 7, Cl. (iv) (f) of the Court-Fees Act would apply to unascertained future mesne profits.

[P 225 C 2 P 228 C 1]

* (d) *Civil P. C., O. 47, R. 1—Wrong dismissal of application for ascertainig mesne profits for non-payment of Court fees cannot be reviewed, but it can be restored under Civil P. C., S. 151.* Per Jwala Prasad, J.

Application of the decree-holder for ascertainment of mesne profits was dismissed on account of non-payment of Court-fee can be restored under S. 151, Civil P. C. but not by way of review: 35 *All.* 331 *(P. C.) Foll.* [P 226 C 2]

(e) *Civil P. C., O. 20, R. 12—Application is no plaint; it can be oral*—Per Jwala Prasad, J.

Application for ascertainment of mesne profits cannot be said to be a plaint. [29 *C. W. N.* 959, *Foll.*] No written application is necessary for asking for an investigation into it and a verbal application is sufficient for the plaintiff to demand an enquiry into the matter. [P 227 C 1]

(f) *Court-fees Act. S. 11—First part applies to final decree including future profits*—Per Jwala Prasad, J.

Under the present Code, the Court can determine past and future mesne profits in the suit itself and make a decree called a final decree for the mesne profits capable of execution. The first paragraph would apply to such a decree also. [P 229 C 1]

N. C. Sinha, *S. M. Mullick* and *S. N. Bose*—for Petitioners.

N. N. Sinha and *B. P. Sinha*—for Opposite party.

Order of Reference to a Full Bench by Das and Ross, JJ. (4-11-1925).— This application is directed against the order of the learned Subordinate Judge of Bhagalpur, dated the 9th September 1924, restoring certain proceeding, for the ascertainment of mesne profits under the provision of O. 9, R. 4 of the Code. The material facts are these: On the 15th September 1914 the opposite party instituted a suit against the petitioner for declaration of title to, and for recovery of, certain properties fully described in the plaint. He claimed mesne profits up to the date of the suit and "from the date of the suit to the date of direct possession." He assessed the mesne profits payable to him up to the date of the institution of the suit at Rs. 10,000 and paid Rs. 505 as Court-fee payable on that amount. In regard to the future mesne profits, he said as follows: "The amount of mesne profits from the date of the suit to the date of recovery of possession may be determined during the pendency of the suit or in the execution stage, and the plaintiff may be directed to furnish Court-fee on the amount of mesne profits that may be determined." The plaintiff failed in the Court of first instance, but succeeded in obtaining a decree in this Court which directed that "the mesne profits shall be ascertained in execution." The decree of the High Court was affirmed by the Judicial Committee of the Privy Council on the 9th June 1921.

On the 7th June 1924 the opposite party applied for the ascertainment of mesne profits and claimed that a very large sum of money would be found due to him on such ascertainment. It appeared that on the claim now put forward on behalf of the plaintiff, Rs. 2,421-12-0 was payable by him as Court-fee, and on the 21st July 1924 the Court directed him to pay that amount as a condition for the ascertainment of mesne profits and fixed a definite time within which it was to be paid. The Court subsequently extended the time for payment of the money from time to to time and ultimately dismissed the application for the ascertainment of mesne profits on the 30th August 1924 on account of failure on the part of the opposite party to pay the Court-fee. On the 9th September 1924 the opposite party applied for restoration of the proceedings and the learned Subordinate Judge restored the proceedings under O. 9, R. 4 of the Code. It is this order which is the subject-matter of the application before us.

It may be conceded that O. 9, R. 4 of the Code has no application to this case and that the learned Subordinate Judge was not justified in restoring the proceedings under that particular provision of the Code. But the petitioners are invoking the revisional jurisdiction of this Court; and it is well settled that the Court should not exercise its revisional jurisdiction except in aid of justice. Whether we should interefere in this case depends on whether the Court had any jurisdiction to dismiss the proceedings for the ascertainment of mesne profits on the ground that the opposite party failed to pay the Court-fee within the time fixed for such payment. If we are satisfied that that order was without jurisdiction, we should not be justified in setting aside the order which is the subject-matter of the present application, although we are satisfied that O. 9, R. 4 of the Code under which the Court acted has no application to this case.

Order 7, R. 2 of the Code provides that "where the plaintiff sues for mesne profits or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for." S. 7

paragraph 1 of the Court-fees Act provides that Court-fee is to be paid "according to the amount claimed," "in suits for money (including suits for damages or compensation, or arrears of maintenance, of annuities, or of other sums payable periodically)." Section 11 of the Court-fees Act provides that "where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is paid within such time as the Court shall fix, the suit shall be dismissed." It has been held that Court-fees are payable under S. 7, paragraph 1, only upon the mesne profits claimed antecedent to the suit and that a plaint is not liable to stamp duty in respect of mesne profits subsequent to the suit. Whether this be the right view or not may be open to some doubt; but there is no room for controversy that in regard to future mesne profits, S. 11 is at least applicable and that there is no jurisdiction in the Court to insist upon the payment of additional Court-fee as a condition for proceeding with the enquiry that may be claimed by the plaintiff and to dismiss the proceedings for ascertainment of mesne profits if the Court-fee be not paid.

The following cases may be referred to in this connexion:—*Ramkrishna Bhikaji* v. *Bhima Bai* (1), *Saminatha Vellala Thevan* v. *Muthusawmi Vellala Thevam* (2), *Maiden* v. *Janakiramayya* (3), *Bunwari Lal* v. *Daya Sunker Misser* (4), *Dwarka Nath Biswas* v. *Devendra Nath Tagore* (5), *Bhupendra Kumar Chakravarty* v. *Purna Chandra Bose* (6), *Bhupendra Kumar Chakravarty* v. *Purna Chandra Bose* (7) and *Chedi Lal* v. *Kirath Chand* (8).

It will be noticed that although there is a divergence of judicial opinion on the question whether Court-fee is at all payable in respect of a claim for mesne profits subsequent to the suit, there is no decision which supports the view that a Court is entitled to call upon the plaintiff to pay additional Court-fee on a claim for future mesne profits as a condition for making the inquiry relative thereto. Section 11 of the Court-Fees Act seems to me to be perfectly clear, and in my opinion there is no doubt whatever that the Court acted without jurisdiction in dismissing the proceedings for the failure on the part of the opposite party to pay the additional Court fee demanded. There are, however, two cases of this Court which support the view of the petitioners. In *Nand Kumar Singh* v. *Bilas Ram Marwari* (9) the plaintiffs sued for setting aside a revenue sale, for possession of the disputed property, and for recovery of mesne profits to be ascertained in execution proceedings. The plaint did not disclose the amount claimed as mesne profits and no Court-fee was paid on the plaint. The Court gave the plaintiffs a decree for possession and awarded them mesne profits from the date of the decree and directed that the same were to be ascertained in the execution proceedings. Subsequently a question arose as to whether the mesne profits were payable from the date of the decree of the Court of first instance or from the date of the Privy Council decree. The executing Court decided that mesne profits were payable from the date of the Privy Council decree and the plaintiffs appealed to this Court paying a Court-fee of Rs. 2 on the memorandum of appeal. It was objected that the Court-fee paid was insufficient. It will be noticed that the mesne profits awarded to the plaintiffs were in respect of the period subsequent to the suit, and the decisions both of the Bombay High Court and of the Culcutta High Court establish that on such a claim no Court-fee is payable. In deciding the point contended before the High Court, Mr. Justice Chapman said as follows: "In regard to the amount of the Court-fee payable it cannot be said to be a case in which the value of the appeal cannot be ascertained. The appellant hopes, if he succeeds in this appeal, to obtain a large sum which he has stated in his plaint. The Court-fee payable is, therefore, in my opinion an ad valorem fee.

(1) [1891] 15 Bom. 416.
(2) [1910] 20 M. L. J. 98.
(3) [1898] 21 Mad. 371.
(4) [1909] 13 C. W. N. 815.
(5) [1906] 33 Cal. 1232.
(6) [1917] 43 Cal. 650=15 C. W. N. 506=13 C. L. J. 132.
(7) [1914] 24 I. C. 232.
(8) [1878-80] 2 All. 682 (F. B.).
(9) [1917] 3 P. L. J. 67=1 P. L. W. 781.

In expressing this view we are conscious that we are departing from what was considered to be the practice, and it would, in our opinion, be fair to allow the appellant time until Monday, the 26th February 1917, to amend the valuation in his plaint. Now that he is aware that he will have to pay an advalorem Court-fee he may, if he thinks it desirable, amend the valuation in his plaint. If he does so he will be limited to the amount stated in his plaint and will not be permitted to recover any amount in excess of that. On that date an order will be given giving the appellant time to pay the Court-fee." Mr. Justice Roe, concurring with M. Justice Chapman expressed himself in these words: "A suit for mesne profits is a suit for money demanded as damages or compensation, and in that sense it is to be assessed with an advalorem fee even if it be regarded as a suit for an account. The Court-fees Act, S. 7 (iv), in its last clause is peremptory that any such suit shall be approximately valued. The same provision has now been introduced into the Civil Procedure Code. The old practice of allowing plaintiffs to include in a suit for land a suit for money as mesne profits without paying any Court-fee upon the mesne profits was undoubtedly wrong, and in my view a circular should be issued to the lower Courts drawing attention to this error of practice." This view was accepted without any discussion in *Ram Bilas Singh* v. *Amir Singh* (10).

It will be noticed that there is no discussion in either of these cases as to the principle governing a question of this nature. No cases were cited before their Lordships and it does not appear that their Lordships were aware of the decisions of the Calcutta High Court, of the Bombay High Court, of the Madras High Court and of the Allahabad High Court on this point. I am myself unable to agree with these decisions and I am clearly of opinion that those cases were wrongly decided.

This being the position, what order should be passed in this case? I am clearly of opinion that we should not interfere with the order passed by the learned Subordinate Judge in this case if we are satisfied that the order dismissing the proceedings for the ascertainment of mesne profits was without jurisdiction. In my opinion the order dismissing those proceedings was without jurisdiction: but as there are two decisions of this Court in which a different view was taken, and with which I do not agree, we refer the following questions for decision by a Full Bench.

(1) Is any Court-fee payable in respect of a claim for future mesne profits, that is to say, mesne profits from the date of the institution of the suit up to the date of the realization?

(2) Has the Court any jurisdiction to require the plaintiff to pay additional Court-fee upon his claim for future mesne profits as a condition for proceeding with the investigation of the claim, and has it any jurisdiction to dismiss the proceedings if the additional Court-fee is not paid?

Under the Rules of this Court, we refer the case for the final decision of the Full Bench.

(10) [1920] 1 P. L. T. 235.

Opinion of the Full Bench.

Dawson-Miller, C. J.—This is an application in revision asking us to set aside an order of the Subordinate Judge of the Bhagalpur, dated the 9th September 1924, restoring to his file a petition for ascertainment of mesne profits which had previously been dismissed for non-payment of the Court-fee.

The plaintiff, who is the opposite party in the present application, sued the defendants, who are the present petitioners, for possession of certain lands together with mesne profits up to the institution of the suit. The mesne profits were valued in the plaint at Rs. 10,000 and covered the period of three years before the institution of the suit. The Court-fee, amounting to Rs. 505, was paid in respect thereof when the plaint was filed. The plaintiff also claimed an enquiry as to future mesne profits for the period between the institution of the suit and delivery of possesssion. In 1919, after failing in the trial Court, he obtained a decree in the High Court for possession, together with mesne profits, and by the decree it was ordered that mesne profits should be ascertained in execution. That decree was subsequently affirmed by an order of the Privy Council on the 9th June 1921. The plaintiff subsequently applied for possession of the property and finally obtained it on the 23rd June 1922; and under his decree he would be entitled to mesne profits up to that date. On the 7th June 1924 he presented an application to the Sub-

ordinate Judge for ascertainment of the amount of mesne profits up to the date of delivery of possession in June 1922. The amount estimated in his application included the sum of Rs. 10,000 as the mesne profits for the three years preceding the institution of the suit upon which sum, as stated, the Court-fee had already been paid. The value of the subsequent mesne profits payable up to the date of delivery of possession was estimated in the application at Rs. 1,36,000. The Subordinate Judge ordered that the Court-fee payable upon this amouut should be deposited before proceeding with the enquiry. A date was fixed for payment which was subsequently extended up to the 29th August 1924. The Court-fee was not paid by that date, and on the 30th August the Subordinate Judge ordered that the application should be dismissed for default. On the 9th September the plaintiff applied for restoration of the application for ascertainment of mesne profits and offered to pay the Court-fee. The application was heard on the 13th September, when the Subordinate Judge granted the application, restored the case to his file and directed the Court-fee to be deposited which was done the same day

The Subordinate Judge purported to act under O. 9, R. 4 of the Code of Civil Procedure. The judgment-debtors then applied to this Court in its revisional jurisdiction to set aside the order of the 13th September. The application was heard by a Division Bench consisting of Mr. Justice Das and Mr. Justice Ross. The learned Judges were of opinion that the case could not be restored under O. 9, R. 4 which provides for restoration only under certain conditions which did not exist in the present case. They refused, however, to interfere under the Revisional jurisdiction of the Court on the ground that the previous order of the 30th August, dismissing the application for ascertainment of mesne profits for default in payment of the Court-fee, was itself without jurisdiction. If they were right on that point, then I agree with the view expressed by the learned Judges that the powers of revision should not be exercised in such a case ; for by so doing the Court would be giving effect to mere technicalities of procedure at the expense of manifest justice. There are, however, two decisions of this Court which the learned Judges considered were in conflict with their opinion as to the liability to pay Court-fees for future mesne profits as a condition precedent to their ascertainment. The case was accordingly referred to a Full Bench for determination.

The plaintiff has contended, first, that no Court-fee is leviable at all in respect of future mesne profits, that is, for the period between the institution of the suit and the date of possession ; and secondly, that, even if leviable, the fee cannot be exacted before the amount of such profits has been ascertained as directed by the decree, and that the Court has no jurisdiction to exact payment as a condition precedent to the ascertainment of the profits or to dismiss an application on the ground of non-payment of such fee at that stage.

The determination of these questions depends upon the interpretation of certain sections in the Court Fees Act and in the Civil Procedure Code. Sec. 7 (1) of the Court Fees Act provides that the amount of fee payable in suits for money (which would include the present claim) shall be computed according to the amount claimed and by O. 7, R. 2 of the Civil Procedure Code, where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed : but where the plaintiff sues for mesne profits the plaint shall state approximately the amount sued for. When the suit was instituted in 1914 the only mesne profits that could be estimated were those which had already accrued due and these were estimated, as already stated, and the proper Court-fee was paid thereon with the plaint. No cause of action had arisen at that time with regard to future mesne profits, for no amount was due and no estimate could be made with respect to a future claim which might or might not arise. The Civil Procedure Code, however, provides by O. 20, R. 12 that where a suit is for the recovery of possession of immovable property and for rent or mesne profits the Court, in addition to granting a decree for possession and mesne profits up to the institution of the suit, may also direct an enquiry as to the mesne profits from the institution of the suit until either delivery of possession to the decree-holder, or relinquishment of possession by the judgment-debtor, or the expiration of three years from the date of the decree, whichever event first occurs.

This provision was no doubt inserted in the Code in order to prevent multiplicity of suits, as without it a further suit would be necessary in order to recover the rents and profits for the period during which the decree-holder was kept out of possession after the suit. The relief provided by this enactment is not an immediate right to any ascertained amount, or to any amount which is capable of being estimated, but a right to an enquiry only, in case the plaintiff should be kept out of possession after the institution of the suit and no special Court-fee appears to be provided for such relief. Where such an enquiry is directed by the Court then O. 20, R. 12 (2) provides that a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such enquiry.

Under the Code of 1882, as under the present Code of 1908, the Court could either determine at the trial the amount of mesne profits due before institution and pass a decree for such amount or it could order an enquiry, whilst with regard to future mesne profits it could only order an enquiry. In this respect there is no difference between the two Codes, but by S. 244 of the old Code questions regarding the amount of any mesne profits as to which the decree had directed an enquiry were to be determined by the execution Court, whilst under the present Code of 1908 there is no such provision and the enquiry may take place either before the trial Court itself, or in such manner as it may direct, and a final decree must then be passed in accordance with the result of the enquiry. Under the old law when the executing Court held the enquiry no Court-fee was ever paid or exacted, so far as I am aware, as a condition precedent to the holding of an enquiry as to future mesne profits, but S. 11 of the Court Fees Act provides as follows :—

" 11. In suits for mesne profits or for immovable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed."

The section contemplates two cases in which provision is made for exacting an additional Court-fee after the profits have been ascertained. The first paragraph would appear to relate to a case where the profits claimed before institution of the suit had been ascertained in the trial Court and provides for payment of a fee upon the excess amount found due, under penalty of having the execution stayed if the fee is not paid. The second paragraph appears to apply to all cases of past or future mesne profits which have been ascertained in execution and provides for payment of a Court-fee upon the excess of the profits so ascertained over and above the amount claimed and paid for in the plaint and the fee payable is the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits eventually ascertained. In such case the Court may fix a time within which the additional fee should be paid and may dismiss the suit for default of payment. As in the present case the mesne profits, past and future, were directed to be ascertained in execution, it would appear that the second paragraph of S. 11 applies It is clear, to my mind, from this section, that the fee payable is not the fee upon an estimated amount stated in the petition, but upon excess of the amount actually found due by the enquiry over and above the amount upon which the fee has already been paid. From, this it would follow, and indeed the language of the section seems clear enough, that no excess fee can be claimed until the actual amount due has been ascertained. In other words, the fee payable is not calculated by reference to the amount estimated in the petition but by reference to the amount actually ascertained on enquiry.

It was contended, however, that the application for ascertaining future mesne profits should be treated as either a supplementary or amended plaint, and viewed from this aspect the Court-fee on the amount estimated in the application should be paid on the presentation of the application as if it were a plaint. This argument would no doubt be entitled to consideration if it were put forward in support of what the law ought to be, but I can find nothing either in the Civil Procedure Code, or in the Court-fees Act, which enacts that an application to hold an enquiry directed by the decree and to which the decree-holder is already entitled under his decree, should be treated as a plaint, and I agree with the view expressed by the learned Judges of the Division Bench in the order of reference that the Subordinate Judge in dismissing the application for ascertainment of mesne profits on the 30th August was exceeding his jurisdiction.

I wish to add a word about the case of *Nand Kumar Singh* v. *Bilas Ram Marwari* (9) which was relied on as expressing a contrary view. The question in that case was whether the fee payable was an ad valorem fee or a fee calculated on some other basis, and the question arose in respect of the fee payable, not on a plaint, but on a memorandum of appeal. The appeal was by the plaintiff as decree-holder against an order of the executing Court deciding that mesne profits were payable from the date of the decree of the Privy Council and not from the date of the original decree of the trial Court which had decreed possession and directed that mesne profits should be ascertained in execution, and which had been affirmed by the Privy Council. The judgment-debtors raised, amongst other points, a preliminary objection that the fee paid on the memorandum of appeal was insufficient and that it ought to have been an ad valorem fee on the value of the appeal calculated on the difference between the total estimated profits claimed and the estimated profits for the period allowed. The Court decided that the fee payable on the memorandum of appeal was an ad-valorem fee and should be calculated on the value of the appeal estimated at the amount of the profits claimed for the period disallowed under the order appealed from. That question does not arise in the present case and it is not necessary now to express an opinion on the correctness of the decision. The ground upon which it is based may possibly be in conflict with the view I have already expressed upon the present case, but I prefer to reserve my judgment upon the correctness of the decision itself until the matter directly arises for consideration.

The subsequent case of *Ram Bilas Singh* v. *Amir Singh* (10), decided in 1918 by a Division Bench of which I was a member, followed the decision in *Nand Kumar Singh's* case (9) to the extent that the fee payable on the memorandum of appeal was an ad valorem fee, but in neither of those cases does it appear to have been argued that the excess fee could only be exacted after ascertainment of mesne profits and when the excess amount had been definitely determined.

There is some authority for the proposition that no Court-fee can be exacted at any time in respect of future mesne profits even after ascertainment: see *Ram Krishna Bhikaji* v. *Bhima Bai* (1). This view, however, has not found favour in the Calcutta High Court. In *Dwarka Nath Biswas* v. *Devendra Nath Tagore* (5) it was held by Rampini and Harington, JJ., that where past and future mesne profits had been claimed and a Court-fee had been paid with a plaint on the estimated mesne profits up to the date of suit and both classes had been subsequently ascertained in execution, S. 11 of the Court-fees Act applied and the Court-fee on the future mesne profits so ascertained could be demanded on pain of having the suit dismissed if not paid within the time fixed. In my opinion the Calcutta view is right and under S. 11 of the Court Fees Act a fee is claimable upon future mesne profits after ascertainment.

If I am right in the view already expressed, it follows that a Court-fee is payable on future mesne profits but it can only be exacted after the amount has been ascertained by enquiry, and the Court has no jurisdiction to dismiss an application for enquiry for non-payment of Court-fee in advance.

I consider that we should in the particular circumstances of this case and in the ends of justice refuse to exercise our powers of revision even though technically the order complained of, dated the

13th September may have been wrong. By setting aside the order complained of we should be depriving the plaintiff of the right which was improperly withheld from him by the previous order and be perpetrating an injustice for the sake of a technicality of procedure which has nothing to commend it. The application is dismissed but in the circumstances we think that each party should bear his own costs.

Mullick, J.—I agree with the learned Chief Justice. By reason of the special provisions of O. 7, R. 2 and O. 20, R. 12 of the Code of Civil Procedure a plaintiff may in a suit for recovery of possession of immovable property also claim: (a) mesne profits which have accrued on the property prior to the institution of the suit; or (b) an inquiry as to such mesne profits or (c) an inquiry as to mesne profits from the institution of the suit until delivery of possession to the decree-holder or relinquishment of possession by the judgment-debtor with notice to the decree-holder or the expiration of three years from the date of the decree whichever event first occurs. The Code of 1882 required that an inquiry into mesne profits should be made in execution; but the Code of 1908 has effected a change and now all such inquiries must be made in the suit itself and there must be a final decree setting the amount due. The decree directing that the plaintiff be put in possession is final. So also is a decree for a specific sum on account of mesne profits which have accrued due prior to the institution of the suit. If, however, the Court considers it necessary to direct an inquiry then the order for such inquiry is always a preliminary decree. With regard to the mesne profits which have accrued due subsequent to the institution of the suit, the Court cannot make any order except an order for enquiry and that must always be a preliminary decree. The Code does not prescribe any special form in which the application is to be made for holding the enquiry; nor is it necessary to consider here what is the period of limitation for making such an application. One view is that there can be no period of limitation as it is the duty of the Court to carry out that which is ordered by its preliminary decree: see *Puran Chand* v. *Radha Kishun* (11). That question, however, does not arise in the present case; the only question we have to consider here is whether the applicant, when he applies for the inquiry which the Court has ordered, should put any, and if so, what valuation upon his application. Now O. 7, R. 2 requires that some estimate should be made in the plaint in respect of mesne profits. It may be contended that this refers only to mesne profits which have accrued before the institution of the suit and that it cannot refer to mesne profits which have accrued since the institution of the suit for which the cause of action has not yet arisen. In my opinion the answer is that for the protection of the revenue the law compels the plaintiff to make a valuation of some kind. If he claims mesne profits both in respect of the period antecedent to the suit and also the period subsequent thereto, the valuation will be held to refer to both periods. If he sues for mesne profits in respect of only one of these two periods, the valuation will be held to refer to that period only. The provision is not based on any logic; it is purely fiscal and arbitrary and compels the plaintiff to make an estimate even though he may have no materials for doing so. When the Court by its final decree has determined the total amount of mesne profits due in respect of both or either of the periods, as the case may be an application must be made in the form prescribed for the execution of decrees in the execution department; and S. 11 of the Court-fees Act then comes into play and empowers the execution Court to stay the execution of the decree till the Court-fee on the difference, if any, between the valuation contained in the plaint and the amount ascertained in the final decree has been paid.

But there may be cases where a decree has been passed under the old Code directing that the inquiry into mesne profits be made in the execution department. Such is the decree in the case now before us and it becomes the duty of the execution Court to make the inquiry. In such a case the latter part of S. 11 of the Court-fees Act operates to protect the revenue. This part of S. 11 of the Court-fees Act requires that the execution of the decree shall be stayed until the additional fee, if any, be paid within the time fixed by the Court,

(11) [1892] 19 Cal. 132 (F. B.)

and that in default the suit shall be dismissed. But the Court cannot demand that the Court-fee or any portion of it shall be paid before it has completed its enquiry.

Nor does the argument, which I think must be accepted, that since the present Civil P. C. came into force there can be no application in execution for holding an enquiry to ascertain the amount of mesne profits and that all such applications must be regarded as applications in the suit, affect the matter. The decree-holder is not liable to make with his application any deposit of Court-fee as a condition precedent to the inquiry. The deficit Court-fee, if any, can only be demanded from him under S. 11 of the Court-fees Act after the decree has been put in execution.

The fact is that the application to the Court to ascertain the mesne profits after a preliminary decree has been made is not in any sense a plaint and there is no statute for the levy of ad valorem fee on it. The object of levying ad valorem Court-fees on claims for money is to secure revenue; it has no reference to the labour expended by the Court upon the adjudication of the claim and the decree-holder is entitled to demand that the taxing statute must be strictly construed.

Therefore, there being no provision for taxing an application for enquiry whether in the suit or in execution the Subordinate Judge was wrong in dismissing the application.

Finally there was nothing in *Nand Kumar Singh* v. *Bilas Ram Marwari* (9) to justify his order. I have examined the record of that case and find that the suit was for recovery of possession of land and for mesne profits from the date of dispossession to that of recovery of possession; but the decree awarded mesne profits only from the date of the decree to that of recovery of possession. In the course of execution a dispute arose as to whether the date of the decree was the date of the trial Court's decree or the date of the decree subsequently made by the Privy Council, and an appeal was preferred to the High Court on this point. The High Court held that before the memorandum of appeal could be entertained the appellant must first pay ad valorem Court-fee on the value of the appeal which was the amount of mesne profits which he hoped to recover if the appeal was decreed in his favour. The Court also held that as in the trial Court the plaintiff had omitted to estimate the value of the mesne profits claimed he must amend the plaint and pay deficit Court-fees thereon. There was nothing in the order of the High Court to suggest that the Court required the decree-holder to pay in the execution Court any ad valorem Court-fee as a condition precedent to the holding of the inquiry.

I agree, therefore, that neither *Nand Kumar Singh's* case (9), nor *Ram Bilas Singh* v. *Amir Singh* (10), which follows it, affects the decision of the case now before us.

Jwala Prasad, J.—The questions referred to by the Division Bench of this Court for decision to the Full Bench are:

(1) Is any Court-fee payable in respect of a claim for future mesne profits; that is to say, mesne profits from the date of the institution of the suit up to the date of the realization?

(2) Has the Court any jurisdiction to require the plaintiff to pay additional Court-fee upon his claim for future mesne profits as a condition for proceeding with the investigation of the claim, and has it any jurisdiction to dismiss the proceedings if the additional Court-fee is not paid?

The circumstances under which the reference has been made are as follows: (After stating facts his Lordship proceeded.)

The judgment-debtor has come to this Court in revision and contends that the order of the Subordinate Judge, dated the 9th September 1924, restoring the application of the plaintiff decree-holder for ascertainment of mesne profits, which was already dismissed on account of non-payment of Court-fee, is bad inasmuch as O. 9, R. 4 has absolutely no application. He further contends that the order of the Subordinate Judge dismissing the application could not be set aside except upon a review to that Court or in an appeal to this Court. This contention assumes that the plaintiff had a right of a review of or an appeal from the order of the 30th August 1924 dismissing his application for ascertainment of mesne profits. It is obvious that the order of the 30th August was not capable of review. The right of review is given by O. 47 of the Code of Civil Procedure and can only be exercised

within the limitation prescribed by R. 1 of that Order and is dependent upon a discovery of a new matter or evidence which, after the exercise of due diligence, was not within the knowledge of or could not be produced by the plaintiff at the time when the decree or order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient cause. The grounds enumerated in that rule, upon which the review is permissible, do not exist in this case and the words "any other sufficient cause" have been held to refer to causes which are ejusdem generis with those specifically mentioned in the rule. Therefore the order of the Subordinate Judge of the 30th August was not capable of review.

There cannot be any appeal from that order inasmuch as it was not a decree within the meaning of the word as defined in S. 2, Cl. (2). The learned advocate on behalf of the applicant relies upon the last part of Cl. (2) which says that "the decree shall be deemed to include the rejection of plaint." This assumes that the application of the plaintiff for the ascertainment of mesne profits was a plaint. This is wholly an untenable position. The plaintiff's application can in no sense be said to be a plaint. The plaintiff had already filed his plaint when he instituted the suit which ultimately resulted in a decree in his favour for possession and mesne profits. That plaint was presented under O. 4, read with O. 6 and O. 7, and S. 26 of the Code. The application for ascertainment of mesne profits was filed either by way of an execution of the decree based upon the plaint already filed by him, or for an enquiry under O. 20, R. 12 of the Code in pursuance of the preliminary decree which was passed on the foot of his plaint. Such an application cannot be said to be a plaint. The learned advocate has invented a felicitious expression and calls the application a supplementary plaint. But there is no provision in the Code for presenting a supplementary plaint. Even applications for amendment of plaints or addition of parties or reliefs do not count as plaints. It is not necessary to pursue the point further inasmuch as the learned advocate, towards the close of his argument, admitted that it was not a supplementary plaint and pointed out to us the latest decision of the Calcutta High Court in the case of *Bidhyadhar Bachar* v. *Manindra Nath Das* (12), wherein it has been clearly held that such an application is not a plaint. Therefore the rejection of the plaintiff's application cannot stand on the same footing as the rejection of a plaint under O. 7, R. 11 (c) on account of the failure of the plaintiff to supply the requisite stamp paper within the time fixed by the Court; and the order rejecting the application is not a decree within the meaning of S. 2 (2) of the Code of Civil Procedure and hence there is no appeal from this order. In refusing the application the Court refused to exercise jurisdiction, and this Court can, in revision, direct the lower Court to entertain the application and proceed according to law. The lower Court also can suo motu disregard its order refusing the application as ultra vires.

The next question is : Could the Court dismiss the application on the ground that it was not properly stamped ? S. 6 of the Court-fees Act prohibits acceptance of a document chargeable in the first or second schedule of the Act, unless in respect of such a document there be paid a fee of an amount not less than that indicated by either of the said schedule as the proper fee for such document. The schedules do not require a petition for the ascertainment of mesne profits to bear an ad valorem Court-fee and the application was properly stamped with a Court-fee of 12 annas prescribed in Sch. II of the Court-fees Act for all applications to the subordinate Courts. Therefore the application could not be dismissed upon the ground that it did not bear proper Court-fee. The learned Subordinate Judge had no jurisdiction to reject the plaint originally filed upon the ground that it did not bear proper Court-fee. The plaintiff claimed past mesne profits, which, according to him, approximately amounted to Rs. 10,000 as required S. 7, R. 2 of the Code of Civil Procedure and paid a Court-fee thereon under S. 7, Cl. (iv) (f) of the Court-fees Act. He also prayed for determination of his right to future mesne profits. The amount of future mesne profits was not ascertainable at that time on account of the uncertainty of time during which the plaintiff would be out of possession as well as the uncertainty of the profits

(12) A. I. R. 1925 Cal. 1076 (F. B.).

which the defendant would be expected to reasonably earn from the land approximately. To take the extreme case, the land might be submerged by water and remain so after the institution of the suit till the plaintiff recovered possession of the property and in that case there would be no profit earned by the defendant which could be claimed as mesne profits by the plaintiff. Therefore to ask the plaintiff to state in his plaint the "approximate amount of mesne profits" would be to ask him to value his relief upon an imaginary figure. This position is so absurd that the Legislature has not thought it fit to compel the plaintiff to value the future mesne profits or to pay any Court-fee thereon at the time of filing the plaint. Neither O. 7, R. 2 of the Code of Civil Procedure nor S. 7, Cl. (iv) (f) of the Court-fees Act would apply to unascertained future mesne profits. No Court-fee is payable upon future mesne profits until after the amount is already ascertained.

It is only to avoid multiplicity of suits that the plaintiff, in a suit for possession, is entitled to ask in his plaint, not only for the past profits which had accrued at the date of the institution of the suit, but also future mesne profits from the date of the suit up to the date of delivery of possession to him; and when the plaintiff claims mesne profits, past and future, the Court may in the same suit, while decreeing the suit for possession, determine the amount of mesne profits. The present Code of Civil Procedure, 1908, lays down the procedure for determining the mesne profits in O. 20, R. 12. Under S. 196 of the Procedure Code (Act VIII of 1859), the Court could provide in the decree for the payment of mesne profits from the date of the suit until the date of delivery of possession to the decree-holder. S. 197 provides that the Court could determine the amount prior to the passing of a decree for land or pass a decree for the land, reserving an enquiry into the amount of mesne profits in the execution of the decree according as it appeared most convenient. Similar were the provisions made in the later Code (Act XIV of 1882) in Ss. 211 and 212 with this difference that under the latter section the enquiry into and determination of the mesne profits to be incorporated and named in the decree for possession was limited to the period prior to "institution of the suit;" whereas in Act VIII of 1859 it was up to the "passing of the decree for the land." But in these Acts there was no specific provision for the determination by the trial Court and incorporation in the decree the amount of mesne profits from the date of the institution of the suit or decree up to the date of the delivery of possession. This, therefore, used to be done under the old Acts in execution proceedings and, as pointed out by this Court in *Harakhpan Misser* v. *Jagdeo Missir* (13), much divergence of opinion prevailed as to whether an application for ascertainment of future mesne profits in the execution proceedings was governed by the three years rule of limitation; vide *Gangadhar Manika* v. *Balkriskna Soiroba Kasbekar* (14); *Ramana Reddi* v. *B. Babu Reddi* (15) and *Puran Chand* v. *Roy Radha Kishun* (11). The present Code has made it clear that the Court which passes a decree for possession of land may direct an enquiry as to the mesne profits both prior to the institution of the suit and subsequent thereto up to the delivery of possession, or up to three years whichever date is earlier. No Court-fee used to be paid when the old Codes of Civil Procedure were in force before the future mesne profits were determined, whether they were determined in the execution proceedings or in proceedings in continuation of the suit. The present Code, in providing for the enquiry as to mesne profits by the Court passing a decree for possession of land, does not purport in any way to affect the law as to the time when the Court-fee is payable with respect to future mesne profits. It has simply amalgamated the provisions of the old Codes spread in several sections and has clearly defined the power of the Court passing a decree with respect to the holding of an enquiry and ascertaining the mesne profits which was somewhat vague and doubtful in the old Acts. The Court-fees Act (VII of 1870) remains unaltered and the change in the Procedure Code as to the mode of or the forum in which the enquiry is to take place does not alter the time when the Court-fee upon future mesne profits is payable. It must be presumed that the Legislature did not

(13) A. I. R. 1924 Patna 781.
(14) [1921] 45 Bom. 819=23 Bom. L. R. 263.
(15) [1914] 37 Mad. 186=24 M. L. J. 96=13 M. L. T. 79=(1913) M. W. N. 114.

intend to effect any change in this respect and that the law as to the Court-fee governing the matter which existed prior to the present Code was considered by the Legislature to be sufficient to meet the present situation created by the Code of 1908, whereby the Court passing a decree for possession can declare the plaintiff's rights to recover mesne profits and then hold an enquiry to ascertain the amount of mesne profits and embody the same in a final decree capable of execution.

Both under the new and the old Codes the plaintiff need only state "approximately the amount of mesne profits sued for" and upon the amount so stated he is required to pay ad valorem Court-fee under S. 7 (iv) (f) of the Court-fees Act at the time of filing the plaint. But the amount actually found due to him may exceed the rough valuation stated by him in the plaint. For this contingency the Court-fees Act makes provision in S. 11. This section is split up in two parts or paragraphs. The first relates to the excess amount found upon an enquiry in the suit itself and incorporated in the decree of the Court. Under the old Code the Court could determine the amount of mesne profits pendente lite up to the institution of the suit and pass a decree for it along with a decree for possession. The Court could not, under the old Act, determine the future mesne profits in the suit and pass a decree therefor. Under the present Code, the Court can determine past and future mesne profits in the suit itself and make a decree called a final decree for the mesne profits capable of execution. The first paragraph applied in practice formerly to a decree for mesne profits which accrued up to the institution of the suit. Inasmuch as under the present Code, a decree may be passed in the suit itself, called the final decree, for future mesne profits as well, hence the first paragraph would apply to such a decree also. The change in the Procedure Code did not necessitate any change in the first part of S. 11, as the words employed therein are sufficient to cover such a decree. Where the plaintiff in his plaint for recovery of possession of immovable property claims a determination of his right to past and future mesne profits, his suit is a "suit for immovable property and mesne profits" in terms of S. 11. Mesne profits, past and future, are to be regarded in such a plaint as one entire claim for mesne profits, to use the language of Chief Justice Sargent in the case of *Ram Krishna Bhikaji* v. *Bhima Bai* (1). In such a case the plaintiff "approximately states the amount of past mesne profits which had already accrued to him at the time the suit is instituted" and accordingly values the amount of mesne profits, which, at that time, was not capable of ascertainment, becomes so and is actually ascertained by the Court and a decree is passed thereon under O. 20, r. 12. If the amount of mesne profits thus found and decreed exceeds the amount of past mesne profits approximately stated by the plaintiff, S. 11, para. 1 says that "the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the amount of profits or the amount so decreed would have been paid to the proper officer." Under this clause the Court-fee upon the future mesne profits is not to be paid until the same has been actually determined and no time is to be fixed for the payment of such a Court-fee, nor the claim for mesne profits is to be dismissed on failure to pay the Court-fee. The penalty in this clause is that the decree for mesne profits whether past or future, 'shall not be executed' until the excess Court-fee is paid. In the Full Bench case of the Calcutta High Court referred to above *Bidhyadhar Bachar* v. *Manindra Nath Das* (12), where after the plaintiff had obtained possession of the property and applied under O. 20, R. 12, for the ascertainment of future or pendente lite mesne profits and valued his claim at Rs. 3,000, and the question was whether this valuation affected the jurisdiction of the Munsif who had decreed the suit, it was held that the plaintiff's valuation in the application did not affect the jurisdiction of the Munsif which he originally had, at the time the suit for possession was brought, to enquire into the mesne profits. The decision was based upon the view that the plaintiff in such a case is not required, nor is it possible for him, to value even approximately the amount of mesne profits pendente lite, which must vary according to the period the defendant retains possession of the property. It was further observed that the plaintiff is not required to value the

subsequent mesne profits in advance or at a higher value than is leviable by law, i. e., the value of mesne profits claimed up to the date of the institution of the suit; he cannot value subsequent mesne profits in advance. It follows from the above observations in that case that the plaintiff in the present case could not be asked to pay any Court-fee upon the amount of mesne profits stated by him in his application for ascertaining the actual amount of mesne profits due to him. This view is supported by the case of *Sellanuthy* v. *Ramaswami* (16).

In the present case the High Court which passed the decree for possession directed that the mesne profits "shall be ascertained in the execution." If the application of the judgment-debtor was an application to ascertain the mesne profits in execution proceedings, the second clause of S. 11 would apply to it. The second clause says that where the amount of mesne profits is left to be ascertained in the course of the execution of the decree and if the profits so ascertained exceed the profits claimed, then the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. Thus if this clause applied the Court could not ask the plaintiff to pay any Court-fee until the amount was ascertained, much less could it make the payment of Court-fee a condition precedent for the enquiry as to the amount payable as mesne profits. Section 11 of the Court-fees Act is the only provision under which additional Court-fee could be demanded upon mesne profits and under that clause no fee is demandable until the actual amount is ascertained and found in excess of the amount for which Court-fee has already been paid whether the enquiry for ascertainment of mesne profits is made in the course of the suit or in execution proceedings. If the decision of this Court in the case of *Nand Kumar Singh* v. *Bilas Ram Marwari* (9), and the circular issued on the strength of it lay down a different rule, I would respectfully differ from it. The decision does not quote any authority in support of it nor does it take into consideration the true meaning and import of the provisions in the Court-fees Act. In the case of *Maiden* v. *Janakiramayya* (3), where in a suit for land with mesne profits a decree was passed for the plaintiff in which the amount of mesne profits was left to be determined in execution, the date from which they should be computed being the date of the suit, the defendant appealed against the decree on the ground that he should not have been decreed to pay either mesne profits or cost. He did not pay any Court-fee and it was held that no Court-fee was payable in respect of the mesne profits subsequent to the institution of the suit. This case supports the view that no Court-fee is payable for future mesne profits unless it is ascertained. Therefore the order of the Court refusing to ascertain the mesne profits before the Court-fee was paid upon the amount mentioned in the plaintiff's application seems to me to be illegal and without jurisdiction. In reason also it would appear to be so, for the plaintiff might be found entitled to much more or much less than the amount of mesne profits named by him in the application. My answer, therefore, to the second question is in the negative, viz., that the learned Subordinate Judge had no jurisdiction to require the plaintiff to pay additional Court-fee as a condition for proceeding with the investigation of the claim, nor had he any jurisdiction to dismiss the proceedings if the additional Court-fee was not paid.

I have already held that there is no provision in the Court-fees Act for payment of the Court-fee demanded by the Court and the application for ascertaining the mesne profits, therefore, could not be rejected. Supposing for argument's sake that no enquiry into the amount of mesne profits could be made unless Court-fee upon the mesne profits claimed by the plaintiff in his application was paid beforehand, no written application was necessary for asking for an investigation into it and a verbal application was sufficient for the plaintiff to demand an enquiry into the matter. The Court-fee was actually paid on the 13th September, and it appears from the order-sheet that the Court was asked to hold an enquiry. Therefore there was before the Court on the 13th September a proper Court-fee paid with a prayer for holding an enquiry into the amount of mesne profits. The

(16) [1908] 12 M. L. J. 66.

Court had no right to refuse to enter into an enquiry for ascertaining mesne profits, and as a matter of fact, it proceeded to enquire into the matter. If the order of the 30th August 1924 was without jurisdiction, the order of the 13th September 1924, though wrongly stated to have been passed under O. 9, R. 4, should be deemed to have been really passed by virtue of the inherent jurisdiction of the Court vested by S. 151 for the ends of justice. The operative part of the order of the 9th September is contained in the concluding sentence of the order. It restores the application which was dismissed implying thereby that the order passed without jurisdiction on the 30th August was set aside. In the case of *Debi Buksh Singh* v. *Habib Shah* (17), the plaintiff's suit was dismissed for default. It appears that the plaintiff had died before the dismissal and that subsequently upon an application of his son, the order was set aside under O. 9, R. 9, Code of Civil Procedure. But on appeal by the defendant, the Judicial Commissioner set aside the order as the application was not made within the 30th day under O. 9, R..9 of the Civil P. C. Lord Shaw set aside the order of the Judicial Commissioner of Oudh and observed as follows: "By the Code of Civil Procedure, 1908, it is provided that 'nothing in this Rule shall be deemed or otherwise affecting the inherent powers as may be necessary for the ends of justice or to prevent abuse of the process of the Court.' In their Lordships' opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from S. 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But S. 151 could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taken advantage of."

The Subordinate Judge, in the present case, had, therefore, inherent power to set aside his order dismissing the application and to treat it as null and void and this should be the view taken of his subsequent order restoring the application though it purports to have been passed under a wrong section of the Code of Civil Procedure.

As to the first question, it seems to me that in spite of some divergent views taken in some cases, the Court-fee is leviable upon the amount of mesne profits for a period subsequent to the date of the institution of the suit when that sum is actually ascertained. There is no provision in the Court-fees Act exempting such a claim from the payment of duty. On the other hand, S. 11 clearly indicates that fee is leviable upon future mesne profits. The plaintiff could restrict his claim to the mesne profits which accrued up to the date the suit for possession was instituted and reserve his claim with respect to future mesne profits for a subsequent suit, for the cause of action for future mesne profits had not then arisen. The future mesne profits which were incapable of being estimated at the time when the suit for possession was instituted can become ascertainable and capable of valuation at a future date, and there is no reason why the plaintiff would not have to pay Court-fee when the amount is actually ascertained.

His liability to pay Court-fee, therefore, does not cease, because in the suit for possession he was permitted for the sake of convenience and to avoid multiplicity of suits, to include in one suit a claim for past and future mesne profits. The real distinction seems to be that no Court-fee is payable upon future mesne profits until they are ascertained, but when ascertained they are chargeable with duty under S. 11, the failure to pay which causes the penalty imposed by that section. This view is supported by the case of *Dwarka Nath Biswas* v. *Devendra Nath Tagore* (4).

The answers which I have given above to the questions referred to this Bench for decision lead to the conclusion that the defendant's application should be dismissed and the Rule discharged.

As regards costs, I agree to the order proposed by Hon'ble the Chief Justice.

Das, J.—I agree with my Lord the Chief Justice.

Foster, J.—I agree generally; but in particular I wish to express my agreement with the view propounded in the judgment of my learned brother Jwala Prasad, J., as to the applicability of the

(17) [1913] 35 All. 331=40 I. A. 150=16 C. C. 194=17 C. W. N. 829=11 A. L. J. 625=18 C. L. J. 9=15 B. L. R. 640=14 M. L. T. 33=(1913) M. W. N. 566=25 M. L. J. 148. (P. C.).

second clause of S. 11 of the Court fees Act to the provisions of the present Civil Procedure Code in respect of suits for recovery of land and for ascertainment of mesne profits.

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* A. I. R. 1926 Patna 232

MULLICK, AG. C. J. AND JWALA PRASAD, J.

Jagwa Dhanuk—Appellant.

v.

King-Emperor—Opposite party.

Death Reference No. 7 of 1925 with Criminal Appeal No. 101 of 1925, Decided on 26th June 1925, from a decision of the S.-J., Monghyr, D/- 4th June 1925.

* (a) *Evidence Act, S. 54—Evidence of bad character to prove motive for the crime or otherwise relevant is not excluded.*

Evidence of bad character cannot be given for the purpose of showing that the accused were of such a disposition that they were likely to commit the crime charged. But that prohibition does not in any way affect evidence which is required to prove a motive for the crime or which is otherwise relevant. 47 *Cal.* 671 and *A. I. R.* 1923 *Bom.* 71, *Dist.* [P 234 C 1]

(b) *Evidence Act, S. 133—Approver should be corroborated also in material points as to the part played by his accomplices.*

It is not sufficient that the approver should be corroborated with regard to the actual commission of the crime itself; for such corroboration merely shows that he himself took part in the offence. Experience requires that the approver should also be corroborated in material points as to the part played by his accomplices. The amount of corroboration in this respect as indeed in respect of all corroboration of an approver's evidence, must depend upon the view which the Court takes of the approver's character and of his general demeanour in the witness box. [P 235 C 1; 2]

(c) *Interpretation of Statutes—General and special enactments—Extent to which special enactment overrides general enactments depends on language of special Act.*

To what extent the provisions of a special enactment override the provisions of a general enactment must depend upon the language of the special Act. [P 236 C 2]

(d) *Criminal P. C., (Amended 1923), S. 62—Section excludes completely statements made during investigation except for limited purposes—Statements of accused, not amounting to confession are still admissible—Evidence Act, S. 27.*

No doubt S. 162 of the Criminal P. C. of 1923 has altered the previous law so as to completely exclude statements made by witnesses during the course of an investigation, except for certain limited purposes, yet the statements of accused persons, provided they do not amount to a confession, are still admissible in law. The main object of the Legislature in effecting the amendment was to prohibit the use of the statements of prosecution witnesses as corroboration under S. 157 of the Evidence Act. The general provisions of the law with regard to the admissibility of statements made by accused persons like other admissions do not seem to be affected. [P 236 C 2]

* (e) *Criminal P. C., S. 360—Deposition not read over to witness but read by witness himself—Deposition is legal evidence.*

Although the deposition of a witness is not read over to him, but the witness reads it himself still the deposition is legal evidence. [P 237 C 1]

Mullick, Ag. C. J.—The appellant Bhaghambar Rout alias Bhagwa is the father of the appellant Jagwa Dhanuk. It is alleged that these two appellants, with the third appellant Rama Rout, murdered a shop-keeper and money-lender named Ramdhani on the night of Thursday, the 12th February 1925. Ramdhani's home was in mauza Dariapur but he had a shop at Gangto, which is about three miles off by road. About 3 a. m. on the morning of Friday, the 13th February, Ramdhani left his shop telling his brother Gobind aged 16 that he would be back about 10 a. m. He was not seen again but his body was found in course of the day at a cremation ground at which there is a temple of Mahadeo and which lies in a jungle on a hill about 4 miles from Gangto. It was obvious that he had been murdered and information was given about 6 p. m. by Nasir Khan, chowkidar, to the Sub-Inspector of the Kharagpur police station. The Sub-Inspector arrived at the place of occurrence on the morning of the 14th. In consequence of certain information obtained from a zamindar named Babu Sailendra Nath Kar, who was spoken of in the trial as Sailu Babu, suspicion fell upon one Dallo Kumar.

On the 16th February, Dallo was placed before the Superintendent of Police who had come to direct the investigation. It is said that he then made a statement the contents of which are not in evidence. On the 18th Dallo made a full statement in the nature of a confession to the investigating Sub-Inspector Satya Kinkar Mukherji. He took the Sub-Inspector immediately afterwards to the cremation ground and showed him the way by which the deceased went with the three appellants and himself from the house of Ramu at Lauriya to the cremation ground. Dallo pointed out the marks made by the iron-shod heels of the deceased's shoes in a wet barley field

belonging to one Bansi Rout. According to Dallo, the appellants were habitual thieves who disposed of their stolen property through the deceased and on the night in question Ramdhani had been decoyed by the appellants from his shop on a promise by the appellants that they would give him a considerable quantity of gold and silver. Dallo pointed out to the Sub-Inspector two hollows in the ground where the stolen property was said to have been concealed. He states that at the first place which is near a place marked on the Sub-Inspector's map as the Surdun Bandh, no property was found and that therefore, one of the appellants said that it had probably been removed by the other members of the gang and that it would be necessary to go to the Mahadeo temple and to search the tank on the hill. The deceased was then taken to the tank and there he was attacked by Jagwa with a Sindh katti (a piece of iron used by Indian burglars), by Bhagwa with a knife and by Ramu with a Santoli pharsa. Ramdhani was killed instantly and a sum of Rs. 84, which was found on his person was taken by Bhagwa. Thereafter Ramu took the handle off the head of the pharsa by knocking it against a stone and threw it away. Dallo pointed out the jungle into which the handle had been thrown and the evidence is that there the handle was found. Dallo also pointed out the place on the hill where Bhagwa gave Rs. 25 out of the Rs. 84 to Ramu. He himself was offered Rs. 5 which he refused on the ground that it was insufficient. Then a quarrel arose and the appellants prepared to assault him. He then ran away and he pointed out to the Sub-Inspector the route along which he returned.

After the discovery of the above facts from the confession of Dallo, the Sub-Inspector arrested Dallo and the appellants. On the same day he searched the houses of the appellants and found hidden away in an earthen pitcher in the house occupied by Bhagwa and Jagwa and by Naku, the brother of Bhagwa, a knife which was identified by Dallo as the weapon with which Bhagwa had inflicted the wound on the left side of Ramdhani's head. In the committing Magistrate's Court Bhagwa admitted the ownership of this knife, but in the Sessions Court he denied it. I dot not think there can be any doubt that the knife was found in his house and that it belongs to him. A short iron weapon which might be ordinarily used for making holes in mud walls was also found in the same house; but Dallo says that this was not the sindh katti with which Bhagwan was armed. The pharsa, which Ramu is alleged to have used, has not been found nor has the Sindh katti alleged to have been used by Jagwa.

The post-mortem examination on the body of Ramdhani was made on 15th February and it was then discovered thad there were two wounds on the head which had been caused by a sharp instrument: (1) an incised wound 2-1/2" inches long by 1/3 inch down to the bone behind the right ear and (2) a punctured wound 3/4 inch by 1/2 inch by 1 inch deep in the left temporal region above the left ear. The police had apparently assumed that the wound on the right side of the head had gone right through to the other side, but the post-mortem report shows that there were two separate wounds and that they were probably made by different kinds of weapons, the first a sharp cutting weapon and the second by a sharp pointed weapon. The skull at the back of the head was extensively fractured and it was obvious that the head had been severely battered with a heavy blunt weapon.

The post-mortem is sought by the prosecution to be used as corroboration of Dallo's statement. It is urged that after his arrest on the 18th February Dallo was taken to Monghyr where he was kept in prison and that on the 26th he repeated his confession before Rai Krishna Bahadur. Deputy Magistrate, which was recorded under the provisions of S. 164 of the Criminal Procedure Code.

It is suggested that Dallo had no knowledge of the post-mortem report and that the striking agreement between his account and the post-mortem report in contrast with the original police view is strong corroboration of the truth of his statement.

When placed upon their trial the appellants pleaded not guilty and alleged that a false case had been instituted against them by Sailu Babu who was the master of Dallo and had enmity with the zamindar of the appellants.

The four assessors at the trial were unanimously of opinion that the appellants

were guilty and the Sessions Judge of Monghyr agreeing with them has found the appellants guilty of an offence under S. 302 of the Indian Penal Code and sentenced them to death.

The case turns upon the evidence of the approver Dallo. He was offered a pardon on the 19th March and he was examined as a witness for the prosecution in the Court of the committing Magistrate. There is no inconsistency between his confession of the 26th February, his deposition before the committing Magistrate. on the 19th March and his deposition in the Sessions Court. (The judgment then stated facts as disclosed by Dallo and continued.)

The learned Judge was very favourably impressed with Dallo's behaviour in the witness-box and he was satisfied that he was a witness of truth. He appears, however, to have admitted the evidence relating to Dallo's association with the appellants for the purpose of committing thefts and burglaries and of Ramdhani's association with the appellants as a receiver of stolen property with considerable reluctance on the ground that it was evidence of bad character which was not admissible under any circumstances. The position appears to have been misconceived. Evidence of bad character cannot be given for the purpose of showing that the accused were of such a disposition that they were likely to commit the crime charged. But that prohibition does not in any way affect evidence which is required to prove a motive for the crime or which is otherwise relevant. Learned counsel for the appellants has taken the same objection before us and has relied upon *Emperor* v. *Panchu Das* (1) and *King-Emperor* v. *Haji Sher Mahomed* (2). But these cases are not relevant to the point before us which is whether it was open to the prosecution to prove that Dallo and the appellants and Ramdhani had been engaged in offences against property and that the quarrel which arose out of their association was a motive for the murder of Ramdhani.

It may be asked why should the appellants have taken Dallo with them on the night of the murder. It is in evidence that the appellants knew that Dallo had played them false with regard to the projected burglary in Basdeo's house and Dallo himself admits that he had been beaten several times by the appellants on this account and that when the dispute took place about the division of the money found upon Ramdhani immediately after the murder his previous treachery was brought up against him. In these circumstances, argues the learned counsel, it is impossible that Dallo should have been taken. The reply, however, is that either Dallo knew too much of the appellants to be left out or it was considered necessary to involve him still further in order that his mouth might be shut for good. We can only speculate but it is possible that the appellants thought that if Dallo joined in the murder it would not be possible for him to make any disclosure without endangering his own life. However that may be the fact remains that the assessors were satisfied that Dallo's story upon this point was correct.

Then it may be asked why should Dallo confess at all. Unfortunately we have no information as to what steps were taken on the 14th and 15th to induce him to appear before the Superintendent of Police, nor do we know what statement he made to him, nor do we know what happened on the 17th. But there is evidence that Sailu Babu was taking a very active part in assisting the police and it is possible that it was on information supplied by him that the suspicions of the police were attracted towards Dallo and the appellants. Dallo is evidently a person of weak character and upon his own admission he was treated by his accomplices with contempt. It sometimes happens that a criminal's courage fails him in the end and that he without any pressure or inducement gives out the whole truth.

There is also corroborative evidence given by Aklu that Dallo was seen coming along the Dariapur road about sunrise on the morning of the 13th from the east and that he carried Akul's bundle for him as far as his house. This is also corroborated by a party of musicians, namely, Digo, Rohan and Balo who were going along the road from west to east.

Finally there is corroborative evidence that Ramdhani was in need of money and that on the 13th he borrowed Rs. 19 from witness Muralidhar. He also borrowed Rs. 50 from one Saggam Singh, but there

(1) [1920] 47 Cal. 671=34 C. L. J. 402=24 C. W. N. 501 (F. B,
(2) A. I. R. 1923 Bom. 71.

is some doubt as to whether this loan was made on the 12th or a day or two before. In the committing Magistrate's Court Saggam Singh said that he had made the payment on the 12th but in the Sessions Court he said that it was one or two days earlier. These payments corroborate Dallo's statement that the appellants were pressing Ramdhani for money and also his allegation that a sum of Rs. 84 was found in Ramdhani's purse immediately after the murder.

Finally there is one other item of corroboration to which reference should be made. Four small note-books and 12 sheets of loose accounts were found in Ramdhani's pocket. There are numerous entries, says the Sessions Judge, in these account books and papers showing petty transactions between the appellants and Ramdhani and in the note-book, Ex. IV, there is an entry showing against the name of Ramu Rs. 95-13-9 as "chupka" and Rs. 32-11-8 as "sagri." Now sagri means open account and chupka means secret account. It is suggested that this latter entry relates to money paid to Ramu for stolen property. With regard to Dallo there are no entries but Sheonarain states that Ramdhani told him that Dallo owed 21 maunds of paddy. Against Naku, brother of Bhagwa, the entries amount to a total of Rs. 48.

I am satisfied that the entry against Ramu showing Rs. 95 odd due on account of "chupka" corroborates Dallo's story that Ramdhani was the receiver of stolen property from the hands of Ramu.

Having therefore given the evidence my most careful consideration, I agree with the learned Sessions Judge and the assessors that Dallo was a witness to the murder. He himself does not admit that he struck any blow but simply states that he kept watch. Now self-exculpation is always a reason for suspecting an approver's evidence but here the corroboration in other respects was such and the general demeanour of the witness was so satisfactory that the assessors and the learned Judge had no difficulty in accepting Dallo's testimony and I agree with them.

But the authorities show that it is not sufficient that the approver should be corroborated with regard to the actual commission of the crime itself for such corroboration merely shows that he himself took part in the offence. Experience requires that the approver should also be corroborated in material points as to the part played by his accomplices. Therefore it is necessary to see what corroboration there is to show that the appellants before us took part in the offence in the manner alleged by the approver.

The amount of corroboration under this head as indeed in respect of all corroboration of an approver's evidence must depend upon the view which the Court takes of the approver's character and of his general demeanour in the witness-box. Here the Court and the assessors have found that in regard to the time, place and manner in which the crime was committed the approver has told the truth. That finding must naturally affect the quantum of corroboration required as to the remainder of his story. One must also enquire what motive the approver had for concocting a false story. On behalf of the appellants it is urged that Dallo was the creature of Sailu Babu. Of this there is no evidence. Then it is urged that Sailu Babu is at enmity with the zamindar of the appellants. Of this also there is no evidence, and the defence that Dallo was a ready tool in the hands of Sailu Babu has, in my opinion, been rightly rejected by the lower Court.

Coming next to the actual items of corroboration upon which the prosecution rely we have first of all the evidence as to the movements of Ramdhani on the Wednesday and Thursday preceding the murder. The evidence is that about sunset on the Wednesday Gobind was coming back from the family house at Dariapur to the shop at Ganta and met Ramdhani at Lauriya. Ramdhani was then on his way home. About 9 p. m. Gobind set out on the return journey to his house and met Ramdhani near Ramu's house and saw him talking to Ramu. Ramdhani told him to go on and that he would be coming later. The night Ramdhani never came home at all, and Gobind on going to the shop in the early morning of the 12th (Thursday) found Ramdhani there. At midday the appellant Bhagwa came to the shop and had some conversation with Ramdhani. Gobind was not permitted to hear the conversation because Ramdhani told him not to listen and sent him off to Dariapur to purchase some articles for the shop. About half a pahar before evening (which would be about 4 P. M.), Gobind returned to the shop and he and

his brother took their evening meal together. At 5 A. M. on the morning of the 13th Ramdhani got up and said he was going out. Gobind asked him where he was going and Ramdhani merely said he would be back at 10 A. M. Neither Ramu nor Bhagwa gives any explanation of the conversation with Ramdhani. Of course having regard to the fact that both Bhagwa and Ramu were old customers this evidence is not conclusive of guilt, but so far as it goes, it is corroboration of the approver's story that the intention of the appellants was to decoy Ramdhani somehow or other to the house of Ramu on the night of Thursday.

Next there is the finding of the knife. There is, however, this to be said that knives of this description are common. Dallo, however, does swear that this was the knife with which Bhagwa was armed and there is the fact that Bhagwa attempted to deny his ownership of the knife in the Sessions Court. Then counsel has argued that it is strange that when the sindh katti which was used by Jagwa seems to have been thrown away or concealed, Jagwa's father should have been so careless as to keep the knife. That of course is an argument which has weight, but I think that upon the evidence, the identification is sufficient. The knife is one which could be used for domestic purposes and possibly Bhagwa either did not wish to part with it or thought that even if found it would not raise any inference of guilt against him.

The third item of corroboration against the appellants is the finding of the notebooks and the account papers in Ramdhani's pocket. This indicates that Ramdhani set out that night in order to settle accounts with Ramu, Bhagwa and Jagwa. On the other hand it is argued that there are other entries in the account books and it is quite possible that Ramdhani may have gone out to visit some of his other debtors. The cumulative effect of the whole of the evidence is such that the hypothesis must be rejected. Taken by itself no item may be conclusive, but when the whole evidence in the case is considered I think the corroboration is sufficient.

Having regard to the time when the journey was made and the precautions which, according to the evidence of Dallo, were observed by the appellants much direct evidence of the association of Ramdhani with the appellants on that night could not be expected. The question is whether the above evidence connecting the appellants with him is sufficient to satisfy us that it would be safe to act upon Dallo's account. I think after consideration of all the circumstances that the answer is in the affirmative.

It may be said that Ramdhani was killed by footpads but that would not account for the finding of his body at the Mahadeo temple unless it was carried to that place from some other place where the murder was committed. The finding of the earring and the armlet are also inconsistent with such a theory. It was suggested in the lower Court that Ramdhani was killed in the course of an intrigue. The answer is that there is nothing to suggest that he was a man of loose character. Further the simple answer to all these theories is, if Dallo is believed there is no place for any of them.

Finally the learned counsel for the appellants who has evidently devoted much care to the preparation of the case and has argued it with fairness and ability has raised two points of law which require some discussion.

The first was as to the admission of Dallo's statement to the police on the 18th February.

Now only such portions of that statement have been admitted as led to the discovery of any fact. S. 27 of the Indian Evidence Act permits confessions to be admitted for this limited purpose. I think it must be admitted that S. 162 of the Criminal Procedure Code of 1923 has altered the previous law so as to completely exclude statements made by witnesses during the course of an investigation, except for certain limited purposes not here material. The learned counsel, however, argues that the prohibition also extends to the statements of accused persons. Now comparing the corresponding provisions of the Code of 1882 and the relevant amendment made therein by the Codes of 1898 and 1923, I think it is clear that the statements of accused persons provided they do not amount to a confession are still admissible in law. To what extent the provisions of a special enactment such as the Criminal Procedure Code override the provisions of a general enactment such as the Indian Evidence Act must depend upon the language of the special Act, but reading the present

Ss. 161 and 162 of the Code, I think it is clear that the main object of the Legislature was to prohibit the use of the statements of prosecution witnesses as corroration under S. 157 of the Indian Evidence Act. The general provisions of the law with regard to the admissibility of statements made by accused persons like other admissions do not seem, in my opinion, to be affected. If it were otherwise, Ss. 27 and 28 of the Evidence Act must be considered repealed. It surely cannot have been the intention of the Legislature to effect such a repeal by implication. It is important for the Court to know what was the defence made by the accused at the earliest moment. If S. 162 is given the meaning which the learned counsel now seeks to give to it, accused persons would be most seriously prejudiced and the only object of S. 163 of the Criminal Procedure Code would be to enable police officers to get clues for the purpose of investigating the charge. If that were the case the Court would be deprived of much valuable material for testing the truth of the case for the defence. To shut out corroborative evidence comprising statements made by defence witnesses during the investigation is prejudicial enough, but unless compelled to do so I do not think we ought to add to the prejudice by shutting out exculpatory statements by the accused ; and if the amendment of 1923 does not operate to exclude such statements then S. 27 of the Indian Evidence Act remains unrepealed.

The other point of law is that the confession recorded by the Deputy Magistrate on the 26th February is not legal evidence because the Deputy Magistrate who proved it read over his deposition himself and did not have it read over to him in the hearing of the accused. It is urged that the provisions of S. 360 of the Criminal Procedure Code have been violated and that as the accused could not hear what the witness was reading there was no compliance with the law. Although it has been held elsewhere that S. 360 requires that the deposition of a witness shall be read over in the presence of the accused and that it is not sufficient to allow the witness to read it himself I do not think there is any authority in this Court to that effect. In the absence of any such authority I think that the deposition was legal evidence.

The result, therefore, is that upon a consideration of the whole of the evidence in the case we are not satisfied that there is any ground for interfering with the finding of the learned Sessions Judge. The case was tried with great care by the learned Judge and the assessors who are all residents of the locality and well acquainted with the conditions of life amongst the class to which the approver and the accused belong have come to the unanimous conclusion that the approver should be believed. In these circumstances, the convictions must be upheld and the sentence of death which has been passed upon the appellants is affirmed.

Jwala Prasad, J.—I agree.

Sentence affirmed.

✻ A. I. R. 1926 Patna 237

ADAMI AND BUCKNILL, JJ.

Badri Gope and *others*—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 341 of 1925, Decided on 27th October 1925, from an order of the S. J., Monghyr, D/- 26th June 1925.

✻ *Penal Code, S. 186—Attachment under invalid writ—Attached property claimed by owner judgment-debtor from attaching peon's possession—Peon delivering possession of property—No hurt caused to peon—Judgment-debtor is not guilty under S. 186.*

A decree having been passed against B a writ of attachment was drawn up and made over to the civil Court peon. The peon went to B's house together with the identifier. B was away but his mother was there. The peon attached a bullock and a calf and proceeded to take them away in company with the identifier and a servant of the decree-holder. When the party had proceeded some distance the judgment-debtor with two other men came running up and obstructed the party. He claimed back the cattle. The writ was shown to them, but in spite of this, they assaulted the identifier. There was no assault on the peon who gave up the cattle when he saw the identifier being assaulted. The writ was afterwards found to be without seal of the Court and thus invalid.

Held: that though judgment-debtor and his associates had no knowledge of this defect, in their defence they were entitled to rely on its invalidity and that no offence was committed by them under S. 186 of the Penal Code. [P 238, C 1, P 239, C 1]

Mihir K. Mukherji—for Petitioners.

Asstt. Govt. Advocate—for the Crown.

Adami, J—The facts of this case are very simple. A decree having been

passed against Badri Gope a writ of attachment was drawn up and made over to the civil Court peon, Lalji Misser, who, on December 3rd, 1924, went to Gobindpur where Badri lives, together with the identifier, Ramcharan Tanti. Badri Gope was away from home when they arrived at his house, but his mother was there. The peon attached a bullock and a calf and proceeded to take them to Monghyr in company with the identifier and a servant of the decree-holder.

When the party had proceeded and reached a well, situated three miles along the road from Jamalpur to Monghyr, the petitioner, Badri, with the two other petitioners came running up and obstructed the party. The writ was shown to them, but in spite of this, they assaulted the identifier and rescued the cattle. They were prosecuted under S. 186, I. P. C., found guilty under that section and sentenced to rigorous imprisonment for one month each. Their defence was a total denial of the attachment and of the occurrence.

When the case came up for trial it was found that not only had a careless mistake been made in dating the writ but also that the writ did not bear the seal of the Court, as required by the provisions of O. 21, R. 24 (2).

On appeal the learned Sessions Judge upheld the conviction and sentence, distinguishing the present case from the cases relied on by the appellants, *Khidir Bux* v. *Emperor* (1) and *Sheik Nasur* v. *Emperor* (2), on the ground that here there was no resistance to attachment, but a rescue, a considerable time after the attachment, so that no right of private defence arose. He held that a technical defect in the warrant could not give the appellants the right forcibly to rescue property of which they had lost possession.

Now the provisions of O. 21, R. 24 (2) are mandatory and an attachment made under a writ which does not bear the seal of the Court, as required by that rule, is an invalid and illegal attachment, as has been held by Mullick and Thornhill, JJ. in the case of *Khidir Bux* v. *Emperor* (1). The defect is not a mere technical one: the presence of the seal of the Court to give authority to the writ is an obviously imperative safeguard.

The writ being thus invalid and the attachment illegal, if resistance had been made to its execution at the time the cattle were being attached, there can, I think, be no question that the petitioner Badri, would be held to be free from liability for his action as long as no excessive force was used: *Khidir Bux* v. *Emperor* (1); *Sheik Nasur* v. *Emperor* (2); *Arjun Suri* v. *Emperor* (3); *Mohini Mohan Banerji* v. *Emperor* (4); *Debi Singh* v. *Queen-Empress* (5); *Tannakilal Mandar* v. *King-Emperor* (6).

The question to be decided here is whether when an illegal attachment has been made in the absence of the judgment debtor and the property has been taken into possession by the civil Court peon and has been in his possession for some time, the judgment-debtor commits an offence when he obstructs the peon and takes back his property. The learned Sessions Judge has held that in such circumstances no right of private defence of property still exists.

The learned Assistant Government Advocate follows this same line of argument. He contends that, in attaching the cattle under a writ which he believed to be valid, the civil Court peon was not committing an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which was an attempt to commit any of those offences, and therefore the right of private defence of property, as described and defined in S. 97 of the Indian Penal Code, did not subsist, and he further contends that, even if ordinarily there would be such right of private defence, the provisions of S. 99 of the same Code would prevent the petitioners pleading that right because the peon was acting in good faith under colour of his office, though owing to the defect in the writ his action may not have been strictly justifiable by law. He explains that the effect of S. 99 was not taken into consideration in the cases on which the petitioners rely.

In the case of *Bisu Haltar* v. *Emperor* (7)

(1) [1919] 3 P. L. J. 696=20 Cr. L. J. 139.
(2) [1910] 37 Cal. 122=14 C. W. N. 282=11 Cr. L. J. 128.
(3) [1918] 3 P. L. J. 106=19 Cr. L. J. 385.
(4) [1916] 1 P. L. J. 550=3 P. L. W. 64=18 Cr. L. J. 39.
(5) [1901] 28 Cal. 399=5 C. W. N. 413.
(6) Cr. Rev. No. 156 of 1920.
(7) [1907] 11 C. W. N. 836=6 C. L. J. 127=6 Cr. L. J. 88.

Stephen and Cox JJ., and in that of *Shaikh Moinuddin* v. *Emperor* (8), Jwala Prasad, J., did consider the effect of the words "not strictly justifiable by law" and held that, where the warrant is altogether invalid and illegal, the words will not take away the right of private defence.

In the present case the question of private defence of property hardly arises. The petitioner came upon the peon taking his cattle along the road and claimed them. The peon showed him a writ which was of no force because it bore no seal of the Court (though probably Badri did not notice this). The peon not being able to justify his possession of the cattle, the petitioner committed no offence in taking them. There was no assault on the peon, who gave up the cattle when he saw the identifier being assaulted. It was fortunate for the petitioners that the writ proved to be an invalid one; they can have had no knowledge of this but in their defence they were entitled to rely on its invalidity.

The cases of *Reg.* v. *Boyle* (9), *Reg.* v. *Williams* (10), *Reg.* v. *Knight* (11), show that under the law of England the petitioners would not, in the circumstances of this case, be held liable to punishment.

As to the effect of S. 99 of the Indian Penal Code a clear explanation has been given by Sir John Edge, C. J. and Burkitt, J. in the case of *Queen-Empress* v. *Dalip* (12). If in the present case the petitioners had assaulted or caused grievous hurt to the peon, under S. 99 they would not have been able to plead the right of private defence of property as a justification, because the peon was acting in good faith under colour of his office, though his attachment of the cattle may not have been justifiable by law.

After careful consideration, I am of opinion that in the circumstances of this case, the conviction of the petitioners under S. 186 should not be upheld, and I would set aside the conviction and sentences and acquit them.

Bucknill, J.—I agree.

Conviction set aside.

(8) Cr. Rev. No. 36 of 1921.
(9) 7 Cox C. C. 428.
(10) [1800] 2 Car. and Ker. 1001=4 New Sess. Cas. 137=1 Den. C. C. 529=T. and M 235 =19 L. J. M. C. 126=14 Jur. 115.
(11) [1908] 73 J. P. 15.
(12) [1896] 18 All. 246=(1896) A. W. N. 48.

✻ A. I. R. 1926 Patna 239

MULLICK AND KULWANT SAHAY, JJ.

Badri Narayan Singh—Defendant—Appellant.

v.

Kailash Gir—Plaintiff—Respondent.

Appeal No. 35 of 1923, Decided on 11th December 1925 against the appellate decree of the Addl. Sub-J., Shahabad D/- 21st November 1922.

✻ (a) *Hindu Law—Religious office—Mahanths are only managers of the institution and no property is vested in them.*

The Mahanths of maths, called by whatever names, are only the managers or custodians of the institution and in no case is any property conveyed to or vested in them; nor are they "trustees" in the English sense of the word, although they are answerable as trustees in the general sense for mal-administration: *A. I. R.* 1922 *P. C.* 123, *Foll.*; 27 *Mad.* 435, *not foll.*

[P. 240, C. 2]

✻ (b) *Hindu Law—Alienation by Mahant—Limitation for setting aside such alienation by succeeding Mahanth does not begin afresh from the date of his succession, but dates back to the death of the vendor Mahanth.*

In a suit to set aside an alienation made by a predecessor Mahanth the successor Mahanth cannot get a fresh start for the purpose of limitation from the date of his succession as Mahanth. The possession of the transferee becomes adverse from the date of the transfer if the transfer is without any legal and justifying necessity and even though his possession is permissive during the lifetime of his vendor Mahanth, the cause of action in any event accrues on the death of his vendor and not on the date of the succession of the successor Mahanth: 23 *Cal.* 536; 37 *Cal.* 885 (*P. C.*) and 17 *C. W. N.* 873, *Appr.*

[P. 241, C. 1; 2]

N. N. Sinha and *B. P. Sinha*—for Appellant.

P. Dayal and *Raghunandan Prasad*—for Respondent.

Kulwant Sahay, J.—This is an appeal on behalf of the defendant in an action in ejectment. The only important question for decision in the appeal is the question of limitation.

The Plaintiff-Respondent is the Mahanth of Noornagar, otherwise called Jalpura, and he brought a suit for a declaration that a deed of sale executed by Ram Kishun Gir, a former Mahanth of the math, to Tilak Singh, an ancestor of the defendant, in the year 1894, was not binding upon him; and that it did not convey any title inasmuch as the vendor Mahanth had no right to sell the property which was a property endowed to the math, without any justifying necessity of the math. The present suit

was instituted on the 29th of July 1921. The defendant in his written statement alleged inter alia that he and his ancestors had been in adverse possession for more than twelve years and that the suit was accordingly barred by limitation.

The learned Munsif held that the defendant had been in possession of the land at least from the year 1895 and that the plaintiff and the math represented by him had been out of possession for about 27 years before the suit. He held that the article applicable was Art. 144 of Sch. 1 of the Indian Limitation Act and that the defendant was in adverse possession since after the death of Ram Kishun Gir, he being of opinion that during the lifetime of Ram Kishun Gir the possession of the defendant was permissive possession. He accordingly dismissed the suit.

On appeal the learned Subordinate Judge held that time began to run as against the plaintiff when he became the Mahanth of the math. It appears that since Ram Kishun Gir, there have been three Mahanths of the math, namely, Sheodhyan Gir, Ganesh Gir and the plaintiff Kailash Gir. The learned Subordinate Judge was of opinion that the Mahanth for the time being was a tenant for life and any alienation of the math property made by him which was not for the benefit of the math was valid during his lifetime and that if the successor of the vendor did not sue the purchaser for more than 12 years he would be barred only for the period that he remained the Mahanth of the math, and that after him his successor would have a fresh start of limitation from the time of the death of his predecessor. He accordingly held that as the suit was brought within 12 years of the death of the plaintiff's immediate predecessor, Mahanth Ganesh Gir, the suit was not barred by limitation. He accordingly decreed the suit with costs.

The defendant has now come up in second appeal against this decision, and as I have said above the only question is as to whether the suit is barred by limitation.

The determination of this question depends on the determination of the status of the Mahanth of a math. The property admittedly was endowed property and belonged to the math. The question as regards the true position of a Mahanth of a math in relation to the properties belonging to the math or to any idol in the math has been considered in a number of cases. His position has been expressed variously in various decisions. Sometimes his position is described as that of a life-tenant, sometimes as that of a trustee, in some cases he is described to hold the position of a guardian of a minor, and in some cases he is described as corporation sole. The question, however, was considered by the Privy Council in a very recent case in *Sri Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (1), and it was held that the Mahanths of maths, called by whatever names, are only the managers or custodians of the institution and that in no case is any property conveyed to or vested in them ; nor are they " trustees " in the English sense of the word, although they are answerable as trustees in the general sense for mal-administration. The learned Subordinate Judge was of opinion that the position of a Mahanth of a math was that of a life-tenant. This view was taken by the Madras High Court in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (2) where the learned Judges observed that the Mahanth is, as he would be described in England, a " corporation sole " having an estate for life in the permanent endowment of the math and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution ; but in a later Full Bench decision of the same Court in *Kailasam Pillai* v. *Nataraja Thambiran* (3) it was held that it could not be predicated of the head of a math that as such he holds the math properties as a life-tenant or trustee. The view taken in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (2) was disapproved by the Privy Council in the case of *Sri Vidya Varuti Tirtha Swamigal* v. *Balusami Ayyar* (1) referred to above. The learned Subordinate Judge was wrong in his view that the position of each succeeding Mahant was that of a life-tenant.

The question as to whether each succeeding Mahant gets a fresh start of limitation from the date of his succes-

(1) A. I. R. 1922 P. C. 123.
(2) [1904] 27 Mad. 435=14 M. L. J. 105.
(3) [1910] 33 Mad. 265=7 M. L. T. 1=19 M. L. J. 778 (F. B.).

sion as mahanth was directly raised and considered in several cases. In *Nilmony Singh* v. *Jagabandhu Roy* (4), Banerji, J., after considering the position of a Mahant of a math, held that although it is true that an idol holds a property in an ideal sense, and its acts relating to any property must be done by or through its manager or shebait, yet that does not show that each succeeding manager gets a fresh start as far as the question of limitation is concerned on the ground of his not deriving title from any previous manager. The succeeding shebaits were considered as forming a continuing representation of the idol's property. In *Damodar Das* v. *Lakhan Das* (5) it was held by the Privy Council affirming the decision of the High Court at Calcutta, that the property vested not in the Mahant but in the legal entity, the idol, the Mahant being only its representative and manager and that the title of transferee from the Mahanth became adverse to the right of the idol and of the senior chela as representing that idol and that the suit brought by the successor of that chela was barred by limitation. In *Madhusudan Mandal* v. *Radhika Prasanna Das* (6), it was held by Mookerjee and Beacheroft, JJ., that the effect of a lease granted by a shebait in excess of his authority is not to give each succeeding shebait a new cause of action for setting aside the alienation, and adverse possession commences from the date of the original disposition of the property and is not interrupted by the death of the original shebait and the succession of the new shebait, and that each succeeding shebait does not get a new start for the purpose of limitation.

It is clear from these authorities that the plaintiff in the present case could not get a fresh start for the purpose of limitation from the date of his succession as Mahant. The possession of the transferee became adverse to the institution from the date of the transfer upon the finding that the transfer was without any legal and justifying necessity; but even assuming that his possession was permissive during the lifetime of the vendor Ram Kishun Gir, the cause of action in any event accrued on the death of Ram Kishun Gir, and it is admitted that Ram Kishun Gir died more than 12 years before the suit. The succeeding Mahanth represented the institution completely and the defendant did acquire a title by adverse possession for more than 12 years, not only from the date of his purchase, but also from the death of the vendor.

I am, therefore, of opinion that the decision of the learned Subordinate Judge cannot stand. The result is that the appeal is decreed. The decree of the Subordinate Judge is set aside and that of the Munsif restored. The appellant is entitled to his costs in all Courts.

Mullick, J.—I agree.

Appeal decreed.

(4) [1896] 23 Cal. 536.
(5) [1910] 37 Cal. 885=37 I. A. 147 :12 Bom. L. R. 632=20 M. L. J. 624=8 M. L. T. 145 =7 A. L. J. 791=(1910) M. W. N. 303=12 C. L. J. 110=14 C. W. N. 889 (P. C.).
(6) [1912] 17 C. W. N. 873=16 C. L. J. 349.

A. I. R. 1926 Patna 241

ADAMI AND KULWANT SAHAY, JJ.

Kuldip Singh and *others*—Defendants—Appellants.

v.

Kumar Kamakhya Narain Singh—Plaintiff—Respondent.

Appeal No. 151 of 1922, Decided on 16th December 1925, from the Original Decree of the Addl. Sub.-J., Hazaribagh D/- 17th February 1922.

Landlord and Tenant—Mokarrari grants are life grants—Grantee's heirs continuing in possession adversely to landlord after grantee's death—Landlord's suit for actual possession is not maintainable.

Mokarrari grants convey only a life-interest to the grantees and not a heritable interest. Such interest comes to an end on the death of the grantee and if the grantee's heirs continue in possession therefter, claiming adversely as permanent mokarraridars to the landlord, the landlord's suit for actual possession is not maintainable after the statutory period. A tenancy can only be created when both the contracting parties agree to the terms thereof.

Where the landlord was claiming a right to resume the village on the death of the original grantees, while the heirs were claiming a permanent and heritable interest and were willing to pay rent as istamrari mokarraidars but the landlord was not willing to accept rent from them in that capacity.

Held: that the parties were not ad idem and no tenancy from year to year can be held to have been created under circumstances: *A.I.R.* 1924 *Pat.* 572; *A.I.R.* 1925 *Pat.* 216; *A.I.R.* 1925 *Pat.* 357 and *A.I.R.* 1925 *Pat.* 499, *Ref.*

[P. 242, C. 2, P. 243, C. 1]

Bankim Chandra Dey—for Appellants.

Sultan Ahmed, *L. N. Singh* and *S. M. Mullick*—for Respondent.

Kulwant Sahay, J.—This is an appeal by the defendants against a decree made by the Additional Subordinate Judge of Hazaribagh in a suit for resumption of a village named Kharika which was granted in istamrari mokarrari by an ancestor of the plaintiff who is the present proprietor of the Ramgarh Estate under a deed dated the 21st April 1865. The mokarrari grant was to two brothers Ramcharan Singh and Indranath Singh. Indranath Singh died in 1867 and Ramcharan Singh in 1897. The present defendants are the heirs or the assigns of the original grantees.

The plaintiff's case is that his right to re-enter accrued on the death of Ramcharan Singh, but that the defendants continued in possession as tenants from year to year notwithstanding the determination of the original tenancy on the death of the last surviving grantee; and that this continuance of possession was with the assent of the landlord. He asserts that at the time of the preparation of the record-of-rights the defendants for the first time asserted that they had the status of permanent and heritable tenure-holders as istamrari mokarraridars. Thereupon notices to quit were issued on behalf of the landlord in the year 1915 and again in 1917. As doubts were entertained as regards the due service of these notices, another set of notices were issued in August 1919, but in spite of due service of the said notices the defendants refused to give up possession. The suit was accordingly instituted on the 1st of April 1920 for ejectment of the defendants.

The principal defence was that the original grant was a permanent and heritable grant and not a mere life-grant to the original grantees; and, secondly, that the suit was barred by limitation.

The learned Subordinate Judge has held that the mokarrari grant conveyed only a life-interest to the grantees and that it was not a permanent and heritable grant. On the question of limitation the learned Subordinate Judge held that the suit was not barred by limitation. He accordingly decreed the suit and directed khas possession of the village to be awarded to the plaintiff by evicting the defendants therefrom, and he also awarded mesne profits to the plaintiff.

The defendants have come up in appeal this Court.

The nature of a mokarrari grant made by the Ramgarh Estate has been considered in a number of cases brought by the Ramgarh Estate against the heirs or assigns of various mokarraridars under similar istamrari mokarrari grants, and it is now authoritatively settled that mokarrari grants similar to the one in dispute in the present case conveyed only a life-interest to the grantees and not a heritable interest. The finding of the learned Subordinate Judge on this point has not been challenged in appeal before us.

The only substantial question for determination in the case is the question of limitation. The case made by the plaintiff in the Court below was, that although his right of re-entry accrued on the death of the last surviving grantee, yet the heirs of the original grantees were allowed to continue in possession as tenants from year to year and that the tenancy from year to year was determined by the notices to quit served in 1915 and again in 1917 and in 1919. On behalf of the defendants it was contended that no tenancy from year to year was created and that ever since the death of the last surviving grantee they have been in adverse possession, and that the right of the plaintiff to re-enter had been extinguished by lapse of time. The learned Subordinate Judge has found it as a fact that the defendants never paid rent for the disputed village since the death of the last surving mokarraridar Ramcharan Singh This finding is based upon a consideration of the evidence in the case and has not been challenged on behalf of the respondent. The learned Subordinate Judge, however, was of opinion that the defendants never asserted an adverse interest. He referred to the evidence of the plaintiff's record-keeper, Sheosahai Lal, and held that this evidence shows that the defendants were permitted by Raja Ram Narain Singh to remain in possession of the disputed village as yearly tenants and that such orders were passed by the Raja in the Sambat year 1962 or 1963; and that this was sufficient indication of an assent on the part of the landlord to the continuance of the tenancy and that such assent created a yearly tenancy and that the possession of the tenants which was that of tenants by sufferance was converted into that of tenants from year to year. I am of

opinion that the learned Subordinate Judge was wrong in this conclusion. The only evidence on the point is the evidence of the plaintiff's record-keeper, Sheosahai Lal. His evidence is in general terms. There is nothing in his evidence to show that so far as the present defendants were concerned there was any assent on the part of the landlord to treat them as tenants from year to year. The record-keeper speaks of the grant of marfatdari rent-receipts to the heirs or assigns of the deceased mokarraridars, and in the present case it is clear that no rent was ever paid by the defendants. The deposition of the record-keeper, therefore, in my opinion, cannot be accepted so far as the present defendants are concerned. The order of the Raja was, according to this witness, a verbal order, and there is nothing in writing to show that such an order was passed. The witness comes to speak after the lapse of a number of years, and even, assuming that such a general order was passed, there is nothing to show that the defendants were aware of it. Moreover, a tenancy can only be created when both the contracting parties agree to the terms thereof. In the present case we find that the Ramgarh Raj was claiming a right to resume the village on the death of the original grantees, while the heirs on the other hand, were claiming a permanent and heritable interest. The heirs were no doubt willing to pay rent as istamrari mokarraridars but the landlord was not willing to accept rent from them in that capacity. The parties were not ad idem and in my opinion no tenancy from year to year can be held to have been created upon the circumstances established in the present case. In 1901 the Ramgarh Raj brought a suit against Narsingh Dayal Sahu to resume a village granted under a similar istamrari mokarrari grant. This case went up to the Calcutta High Court and the decision of the Calcutta High Court is reported as *Narsingh Dayal* v. *Ram Narain* (1). Chakouri, son of Indranath, one of the original mokarraridars, was examined as a witness for the defendant in that case, and in the course of that deposition he had asserted that on the death of the original mokarraridars the heirs were in possession as permanant mokarraridars. This was a clear assertion of adverse possession. Then again it appears, in 1904, the Raja made an attempt to take direct possession of the village and succeeded in getting kabuliyats executed by the tenants, but he could not take actual possession and the defendants continued in actual possession by receipt of rent from the tenants. This was also an assertion by the defendants of an adverse interest. The adverse interest, however, claimed by the defendants was the interest of a permanent and heritable tenure-holder.

(1) [1903] 30 Cal. 888.

The points raised in the present case are similar to those raised and decided by this Court in *Hari Gir* v. *Kumar Kamakhya Narain Singh* (2), *Ramrachya Singh* v. *Kumar Kamakhya Narain Singh* (3), *Charan Mahto* v *Kumar Kamakhya Narain Singh* (4) and *Kumar Kamakhya Narain Singh* v *Bechu Singh* (5). In all these cases it was held that under circumstances very similar to the circumstances of the present case, the heirs or assigns of the original mokarraridars were in possession adversely to the landlord, and that there was no creation of a tenancy from year to year as asserted by the landlord. It is not necessary to discuss the point at any length in the present case, as it is conceded by both sides that the cases referred to above cannot be distinguished from the facts of the present case. I would, therefore, hold that the possession of the defendants in the present case was adverse to the landlord since the death of the last surviving grantee, and that the suit so far as the prayer for a decree for ejectment is concerned must be dismissed.

There was, however, a claim for arrears of rent and cesses for the years 1974-1976 Sambat, and the learned Subordinate Judge made a decree for arrears of rent for those years. There is no reason why this part of the decree should not be affirmed. The decree of the learned Subordinate Judge will, therefore, be modified. The decree awarding direct possession to the plaintiff will be set aside, and the decree awarding rent and cesses for the years 1974-1976 will be affirmed. As regards the costs, the principal question was the question of limitation and the appellants have succeeded; they are, therefore,

(2) A.I.R. 1924 Patna 572.
(3) A.I.R. 1925 Patna 216.
(4) AI.R. 1925 Patna 357.
(5) A.I.R. 1925 Patna 499.

entitled to their costs in this Court as well as in the Court below.

Adami, J.—I agree.

Decree modified.

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* A. I. R. 1926 Patna 244

JWALA PRASAD, J.

Jang Bahadur Singh and *others*—Accused—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 417 of 1925, Decided on 23rd October 1925, against a decision of the Dist. Mag., Palamau, D/- 18th June 1925.

* *Penal Code, S. 425—No mischief is committed by damage done to one's own property.*

A got a decree for possession of land with mesne profits and took out execution which was struck off for want of notice under Civil P. C., O. 21, R. 22. He took out a fresh execution, but before it was concluded the judgment-debtor raised a crop on the land which was taken away by servants of the decree-holder. In an action for mischief against the servants;

Held: that they were not guilty of mischief as the crop, though raised by the judgment-debtor, really belonged to the decree-holder whose right thereto had been declared by a competent Court.

[P 245 C 1, 2]

B. C. De—for Petitioners.

Harihar Prasad Singh and *Devaki Prasad Sinha*—for the Crown.

Judgment.—This is an application to set aside the conviction and the sentence passed upon the petitioners under S. 426 of the I. P. C. The subject-matter of the accusation against the petitioners is said to be that the petitioners cut away about 10 maunds of unripe paddy crop from a field measuring about 5 bighas in village Gurturi. The occurrence took place on the 3rd November 1924 and the paddy cut away was sown in Asarh 1331 corresponding to June or July 1924. Cutting of the paddy is not denied, but the petitioners urge that they had right to cut the crop and, therefore, they have committed no offence in doing so. The petitioners are servants of Rameswar Bhagat and the complainant is a servant of the Raja of Ranka. Between Rameswar Bhagat and the Raja of Ranka there has been litigation over, amongst others, the village Gurturi where the land in question in this case is situate. Rameswar Bhagat brought an action in ejectment against the Raja of Ranka, which was for recovery of possession with mesne profits of village Gurturi along with some other villages. The suit was dismissed by the Subordinate Judge, but was decreed by this Court, the judgment whereof is reported in 1918 P. H. C. C. 156 : [*Rameswar Bhagat* v. *Girwar Prasad Singh*.] This Court set aside the decision of the Subordinate Judge and gave a decree to the plaintiff Rameswar Bhagat in 1917 for possession with mesne profits from the date of dispossession to the date of delivery of possession. It was confirmed by their Lordships of the Judicial Committee in appeal by the Raja in April 1922. The decree of the Privy Council was put in execution by Rameswar Bhagat and the delivery of possession was effected on the 25th September 1923. On the 4th October 1923, the Raja put in an objection to the delivery of possession upon the main ground that the proceedings in execution leading up to the delivery of possession were null and void and inoperative inasmuch as the execution was proceeded with, without notice having been served upon the judgment-debtor under O. 21, R. 22 of the Code of Civil Procedure. This objection prevailed and the delivery of possession was set aside on the 20th February 1924. At that time there was no crop on the land and obviously the crop which was on the land when the delivery of possession was effected was harvested and the decree-holder admitted that the crop was removed by the Raja inasmuch as he had grown it previous to the delivery of possession. This incident is only important inasmuch as the Courts below have held, and perhaps rightly, that the Raja would not have allowed the decree-holder to grow the paddy crop thereafter in the following Asarh i. e., June or July 1924, the subject-matter of the present case under S. 426. The decree-holder Rameswar Bhagat put the decree again into execution on the 27th November 1924, and got the notice served on the 8th June. The judgment-debtor filed an objection on the 8th July 1925, which is still pending. It is obvious from the above account of the two execution proceedings, as well as from the various orders passed in the last execution case, that the Raja is strenuously opposing the delivery of possession of the property to the decree-holder Rameswar Bhagat and

certainly he would not have allowed him to grow the crop in question. So far the finding of the Court below is correct. The question then is whether Rameswar Bhagat committed any mischief in removing the crop in question which was grown by the judgment-debtor, the Raja of Ranka. The Magistrate convicted the accused upon the following finding :

"I find that there is overwhelming evidence to show that the paddy belonged to the Raja of Ranka and the three accused forcibly cut it when it was not sufficiently ripe and the prosecution has fully proved the case against all the three accused."

This finding has been upheld by the lower appellate Court and certainly the accused persons would have been guilty if the crop in question belonged to the Raja of Ranka. It was no doubt grown by him but, it did not belong to him. The decree of the High Court, which was confirmed by the Privy Council, adjudicated upon the right and title of the decree-holder in the land in Gurturi. It has been declared that the lands belonged to Rameswar Bhagat and that the Raja of Ranka is a mere trespasser. The decrees have further held that Rameswar Bhagat is entitled to the mesne profits of the property which is the lands in Gurturi. Cl. 12 of S. 2 gives the definition of "mesne profits" thus :

"Mesne profits of property means those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

The Raja of Ranka being a trespasser has no right either to the lands or to the profits thereof, namely, the crops which he might raise thereon. If he raised the crops the benefit of it would go to the decree-holder. Therefore the crop raised by the Raja in law does not belong to him but belongs to the decree-holder Rameswar Bhagat.

It is concluded that no mischief is committed by a person with respect to damage done to his own property. Under S. 425 mischief must be done to the property belonging to another person, but where a person's right is declared by a civil Court he commits no mischief by damaging the property. Here no loss can be caused to the Raja of Ranka ; for he can always ask the Court in which the execution is pending to take into account the paddy which has been removed by the petitioners. Jackson, J. in the case of *Empress* v. *Rajcoomar Singh* (1) observed as follows :

"Now it is clear from the decision of the civil Court, which was then in force, that Shama Churn Lahiri was not at that time legally entitled to have those bamboos put together in that place in the form of a naubutkhana, and consequently there was no causing of wrongful loss in the act done by the accused persons."

The principle laid down in the case of *Parmeswar Singh* v. *Emperor* (2), may be applied to the case in hand. The authorities upon the question were discussed by me in the case of *Ram Kishun Singh* v. *Emperor* (3). I held there :

"A rightful owner is entitled to physically turn out a trespasser or one trying to infringe upon his right. A person exercising this right should, however, not use more force than is reasonable to defend his possession from a trespasser."

In the present case the petitioners are not alleged to have used any force. They went quietly and cut away the crop in question. It is not incumbent upon the decree-holder to obtain possession of the property through Court. If he can turn out the judgment-debtor peacefully without using unnecessary force he will save the trouble of going to the executing Court. It is only when a decree-holder finds that it is not possible for him without breach of the peace to obtain possession of the property or properties decreed in his favour in the civil Court that he resorts to execution proceedings.

The dispute at best, between the parties is of civil nature wherein the appropriation of rent by the judgment debtor from the tenants as well as the appropriation of profits from the bakasht lands will all be taken into account in determining the amount of mesne profits that the judgment-debtor is liable to him for the period during which he was in wrongful possession of the property. It is wrong in principle to punish a person who obtains a decree from a civil Court after contest

(1) [1877] 3 Cal. 573=1 C. L. R. 352.
(2) [1911] 38 Cal. 180=15 C. W. N. 224=11 Cr. L. J. 582.
(3) A. I. R. 1922 Patna 197.

for his trying to recover possession of the property without using force. The wrong is done by the judgment-debtor who still clings to the property in spite of the decree of the Courts against him and not the decree-holder who tries to recover possession of the property decreed to him without resorting to force.

The application is allowed. The rule is made absolute and the conviction and sentence of the petitioners are set aside The fine, if realized, will be refunded.

Application allowed

✻ A. I. R. 1926 Patna 246

JWALA PRASAD, J.

(*Sheikh*) *Abdul Ghaffar* and *another* — Appellants.

v.

F. B. Downing and *others* —Respondents.

Reference in Appeal No. 135 of 1922, from original decree to the Taxing Judge, Decided on 17th November 1925.

✻ *Court-fees Act Sch 2, Art. 10—Written power of appointment filed even by a barrister must be stamped.*

The power of appointment in writing filed by an advocate, whether he is a barrister or not, authorizing him to make or do any appearance, application or act on behalf of his client, would require a Court-fee payable upon a vakalatnama as prescribed in Art. 10, Sch. 2, of the Act [P 249 C 1]

S. M. Niamatullah —for Appellants.

L. N. Singh—for the Crown.

Judgment.—This is a reference to me as a Taxing Judge under S. 5 of the Indian Court-fees Act. The question is whether a particular document requires any stamp. The document is a letter of appointment given by two persons, Sheikh Abdul Ghaffar and Sheikh Abdul Jabbar, appellants in First Appeal No. 135 of 1922 pending in this Court, to Mr. S. M. Naimatullah, Barrister-at-law, who has been enrolled as an advocate of this Court. The letter of appointment runs as follows

"Dear Sir,

"I/we hereby appoint you to act and plead on my/our behalf in the above-noted case and to make or withdraw all deposits that may have to be made or withdrawn on my/our behalf in connexion with the said case." It bears the following heading: "F. A. No. 135 of 1923, *Sheikh Abdul Ghaffar* (Appellant-Respondent) v. *F. B. Downing* (Respondent—Opposite Party)."

This is in accordance with the Notification No. 57, dated the 15th September 1925, published in the Gazette on the 7th October 1925, which runs as follows:

"Notwithstanding anything contained in O. 3, R. 4 (3) of the First Schedule of the Code of Civil Procedure, 1908, no advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognized agent or by some other agent duly authorized by power-of-attorney to act in this behalf; or unless he is instructed by an attorney or pleader duly authorized to act on behalf of such person."

Previous to the aforesaid notification no advocate who was a barrister was required to present any document empowering him to act by virtue of Cl. (3) of R. 4 of O. 3 of the Code of Civil Procedure. The first clause of that rule requires that the appointment of a pleader to make or do any appearance, application or act for any person shall be in writing and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of attorney to act in this behalf. The word "pleader" is defined in S. 2, Cl (15), Civil P. C., as "any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court." Therefore, in order to exempt an advocate from the necessity of filing his appointment by his client in writing, Cl. (3) of R. 4 of O. 3 was enacted. The effect of the recent notification referred to above is to dispense with Cl. (3) of R. 4 and an advocate has now to file his appointment in writing as any other legal practitioner in the High Court. The appointment is for the purpose of authorizing him to make or do any application or appearance or act on behalf of a suitor in this Court. R. 1 of O. 3 enacts "any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by

any law for the time being in force, be made or done by the party in person or by his recognized agent or by a pleader duly appointed to act on his behalf." The subsequent rule defines "recognized agents" as including amongst others, persons holding power-of-attorney, authorizing them to make and do such appearance or applications or acts on behalf of such parties. Therefore the letter of appointment authorizing an advocate to make or do appearance or application or act on behalf of any party in a litigation in this Court is a power-of-attorney. It is distinguishable from a power-of-attorney given to one who does not belong to the legal profession inasmuch as an advocate is a pleader within the meaning of the term as defined in the Code of Civil Procedure. The letter of appointment being a power-of-attorney is not a document exempted from payment of stamp duty; for all powers-of-attorney are chargeable to duty whether they come within the definition of a power-of-attorney given in Cl. 21 of S. 2 of the Stamp Act or are powers-of-attorney which go by the special name of vakalatnamas or mukhtarnamas. The former are chargeable with duty prescribed in Art. 48, Sch. 1, of the Indian Stamp Act and the latter under Act 10, Sch. 2, of the Court-fees Act. There can, therefore, be no doubt that the letter of appointment in question in the present case filed by Mr. Naimatullah and for the matter of that any similar power-of-attorney called by whatsoever name filed by an advocate, whether he is a barrister or not, must bear a stamp duty. Formerly the barrister-advocates were exempted from filing their appointment in writing and therefore there could be no question of their payment of any duty; but since they are now required to put in their appointment in writing for the specific purposes of making or doing any appearance, application or act on behalf of any suitor in this Court or in the Courts subordinate to this Court the letter of appointment must be stamped with duty. Under the old rules also the power-of-attorney in question was chargeable with duty; for it authorizes Mr. Naimatullah to withdraw deposits in Court on behalf of his client.

It was ruled long ago by Sir Edward Chamier, C. J., that if a barrister wanted to perform the functions of a pleader he must file a vakalatnama: vide letter No. 5306, dated the 15th August 1917, from the Registrar of this Court to the Registrar of the Circuit Court, wherein it is stated that counsel must file a written authority similar to that required from vakils to enable him to withdraw money. In the case of *Laurentius Ekka* v. *Dukki Koeri* (1), I have referred to the case of Mr. Misra, a barrister-advocate of this Court, practising at Cuttack. He applied for refund of money on behalf of his client and filed a petition under his own signature without filing a vakalatnama. The learned Chief Justice observed that if Mr. Misra wanted to perform the functions of a pleader he must file a vakalatnama. This view has been maintained in this Court in several cases and a practice has been established of not allowing refund of money to an advocate unless he is especially authorized in that behalf and files duly stamped vakalatnama. The stamp law requires that a refund of money can only be made to a person holding a power-of-attorney duly stamped from the person on whose behalf withdrawal is sought. Therefore, in so far as the letter of appointment in question authorizes Mr. Naimatullah to withdraw deposits on behalf of his client, it is chargeable with a Court-fee prescribed for a vakalatnama under Art. 10, Sch. 2, of the Court-fees Act irrespective of the notification in question. The power-of-attorney authorized Mr. Naimatullah to act in the appeal on behalf of his client and the object of the Taxing Officer in referring the case to me is for the purpose of having a decision upon the general question whether a power of appointment which authorizes an advocate to act, who is a barrister or not, should be stamped as a vakalatnama under Art. 10, Sch. 2, of the Court-fees Act; for he says that the question is one of importance and is likely to be raised frequently until the matter is finally decided. The general question is whether a power of appointment, which authorizes an advocate of this Court to make or do any appearance, application or act on behalf of his client, should be stamped as a vakalatnama under the Court-fees Act. The recent notification requires an advocate of this Court, whether he is a barrister or not

(1) A. I. R. 1926 Patna 73.

to file a power of appointment in writing for the purpose of acting, appearing or making application on behalf of his client. I have already held that such a power of appointment must bear a stamp as a power-of-attorney either under Art. 48. Sch. 1, read with Cl. 21, S. 2 of the Stamp Act or as a vakalatnama or mukhtarnama under Art. 10, Sch. 2, of the Indian Court-fees Act.

It was held in the Full Bench case of *Parmanand* v. *Sat Prasad* (2) that a document purporting to authorize the person in whose favour it was executed, who was not a certificated mukhtar or pleader, to appear and do all acts necessary for the execution of a decree of a Court, outside the United Provinces, which had been transferred to a Court in those Provinces for execution, required to be stamped as a power-of attorney with a one-rupee stamp and not as a vakalatnama or mukhtarnama. To the same effect is the Full Bench decision of the Madras High Court in a *Reference under S.* 46 *of the Indian Stamp Act*, 1879 (3). The distinction drawn is based on the principle that a pleader should file a power-of-attorney called mukhtarnama or vakalatnama as provided for in Art. 10, Sch. 2, of the Court-fees Act; whereas any person who is not a pleader may file a power-of-attorney as provided for in the Stamp Law.

Now the word "pleader" as defined in S. 2, Cl. 15 of the Code of Civil Procedure, includes an advocate, a vakil and an attorney of a High Court; and his appointment to make or do any appearance, application or act for a suitor, will, for the purpose of R. 4, O. 3. Cl. (1), be an appointment of a pleader. Inasmuch as the appointment in writing of a pleader under R. 4, O. 3, requires a fee prescribed for the power-of-attorney known by the name of vakalatnama in Art. 10 of Sch. 2 of the Court-fees Act, a similar power of appointment in writing filed by an advocate, whether he is a barrister or not, will also require a stamp prescribed for a vakalatnama. It is contended that the word "vakalatnama" applies to a power-of-attorney given to a vakil and consequently a power-of-attorney given to an advocate would not come under the word "vakalatnama" mentioned in Art. 10, Sch. 2, of the Court-fees Act.

Reference has been made to the Legal Practitioners Act which recognizes three classes of practitioners called vakils, pleaders and advocates; and it is said that the word "vakalatnama" used in the aforesaid Art. 10 of the Court-fees Act refers or ly to the power-of-attorney filed by a vakil and not to a power-of-attorney filed by an advocate. The argument ignores the fact that the pleaders of the subordinate Courts, who are not vakils in the special sense of the term as not being entitled to practise in the High Court, are also required to file vakalatnamas for which a fee is payable as prescribed in Art. 10, Sch. 2, of the Court-fees Act, The word "vakil" used in Art. 10 does not, to my mind, refer to the special class of practitioners known as "vakils." It is a vernacular word and connotes in English a document which authorizes one person to represent another. The word "vakil" itself means an agent or representative authorized to conduct any business on behalf of another person; and in the Muhammadan law, persons who conduct marriages on behalf of the principals are called vakils. Persons who conduct a case in Court for another came subsequently to be called vakils and such agents were recognized in the Law Courts prior to the establishment of the British Courts in India and any pleader practising in the lower Courts even now is popularly called a vakil though he is not a vakil in the special sense of the term which applies only to one entitled to practise in the High Court. The word "pleader," as used in the Code of Civil Procedure, includes a "a vakil" and an "advocate," and in the Government of India Act, S. 101 (d), a vakil is described as a pleader of a High Court. Art. 10 of the Court-fees Act uses the word "vakalatnama" as meaning a power-of-attorney executed for the conduct of any case in a Court, and its various provisions indicate that the word "vakalatnama" relates to a power filed by a legal practitioner to conduct a case on behalf of a suitor irrespective of the class to which that legal practitioner belongs. The word "vakalatnama" there refers to a power-of-attorney filed by a pleader as used in the Code of Civil Procedure, S. 2, Cl. 15 and O. 3, R. 4. Therefore a power-of-attorney filed by an advocate

(2) [1911] 33 All. 487=8 A. L. J. 878.
(3) [1886] 9 Mad. 358 (F. B.).

would also come under the category of vakalatnama mentioned in Art. 10 of the Court-fees Act, when it authorizes an advocate for the purpose of conducting a case to make or do any appearance, application or act on behalf of his client.

I, therefore, hold that the power of appointment in writing filed by an advocate, whether he is a barrister or not, authorizing him to make or do any appearance, application or act on behalf of his client. would require a Court-fee payable upon a vakalatnama as prescribed in Art. 10, Sch. 2, of the Act.

Order accordingly.

A. I. R. 1926 Patna 249

JWALA PRASAD, J.

Gangadhar Misra—Plaintiff — Appellant.

v.

Rani Debendrabala Dasi—Defendant—Respondent.

Reference, Decided on 20th October 1925, made by the Taxing Officer, Cuttack.

Court Fees Act, S. 7 (iv) (c)—Declaratory suit—Plaintiff obtaining adinterim injunction in lower Court, but losing the suit and in appeal seeking same relief—Ad interim prayer brings the case under Cl. (c).

Where in a declaratory suit the plaintiffs obtained an ad interim injunction in the lower Court but there they lost the case and in appeal sought reliefs which they had sought in the first Court;

Held; that the ad interim prayer is a substantial prayer which makes the relief a consequential one bringing the case within S. 7 (iv) (c). 39 *Cal.* 704, *Rel. on.* [251, C, 1]

The facts are stated in the Order of Reference by the Taxing Officer as follows:

This Court-fee matter arises out of an appeal by the plaintiffs. The suit was brought on the footing that they were the tankidars of mouza Pratap Ramchandrapur with its two independent off-shoots of Bakshibad and Dianbad and that as such they were entitled to realize rents from their "khatak" or subordinate tankidars the defendants numbered 4 to 187. The "peskash jama" (or tanki revenue) of the mauzas was to be paid to Government not direct, but through the zamindars, Defendants 1 and 2, who, however, according to the plaint fraudulently got themselves recorded in the Settlement khewats as having "khas dakhali" or direct zamindari rights in the mauzas. These dakhali rights were also affirmed by the revenue Court in a suit, No. 1313 of 1917-18, brought by the zamindars, against the appellants and some of the subordinate tankidars, for the rents of Bakshibad and Dianbad. The zamindars also brought a similar rent suit, No. 1865 of 1923-24, regarding the parent mauza of Pratap Ramchandrapur. According to the plaint, this is what led to the institution of the suit; and the prayers made were: (ka) that it be declared that Defendants 4 to 187 have no relationship of landlord and tenant with defendants 1 to 2 but are "khatak" tankidars under the plaintiffs and have been paying the "tanki jama" to them; and (kha) that a decree may be passed awarding to the plaintiff such other reliefs as they may be entitled to. There was also a prayer for the costs of the suit with future interest, but that will obviously not affect the category or valuation of the suit and can be left out of account.

The plaintiffs valued the suit at Rs. 11,000 for jurisdictional purposes, and they paid a Court-fee of Rs. 15 on the ground that the suit was one for a declaration pure and simple. They valued the appeal in the same way and paid the same Court-fee on it. The Stamp Reporter objected that this was not a pure declaratory suit, since a cloud having been cast on their title, the appeal, like the suit, sought in effect to get rid of that cloud and clear up the title and possession of the plaintiffs-appellants. On the authority of the two Patna cases *Harnarayan* v. *Suresh Pandey* (1) and *Rachhya Raut* v. *Mt. Chandoo* (2), he considered that the appellants ought to pay an ad valorem fee on the market-value of the mauzas in dispute. This view was not accepted by the appellants, and the matter was thus referred to me under S. 5 of the Court Fees Act. The learned vakil for the appellants has contended before me that the appeal, like the plaint, has been properly stamped, for the reasons given by the learned Subordinate Judge in dealing with Issues 4 and 3. He has also urged that if ad valorem fees be held payable, the valuation should be made, on the lines of S. 5 (v) of the Act, at ten times the amount annually

(1) [1921] 63 I. C. 203.
(2) A. I. R. 1923 Pat. 113.

payable to Government for these mauzas, lying as they do in a temporarily-settled estate.

I desire to refer at the outset to some confusion that seems to have occurred owing to the way in which the plaint has been framed. The Stamp Reporter thought that relief was prayed for in respect of two mauzas (Bakshibad and Dianbad) only ; and the learned vakil for the appellants also was unable to tell me why exactly the third and parent mauza (Pratap Ramchandrapur) had been brought in. A careful perusal of the plaint, with particular reference to paragraph 18 shows that relief was prayed for in respect of all the three mauzas. The result is that the deficit, if any, will have to be calculated with respect to all the three mauzas.

Turning now to the contentions before me, the first question is whether the suit can be properly regarded as a declaratory suit within the meaning of Art. 17 (iii) of the second schedule of the Act. The learned vakil for the appellants adopts the reason given by the learned Subordinate Judge for answering this question in the affirmative ; and that reason is that, being in joint possession, the plaintiffs could not consistently have prayed for any relief but the declaration that they are entitled to realize the tanki rents from the subordinate tankidars. But *Raj Krishna Dey* v. *Bipin Behari Dey* (3) is an example of a case where a suit brought for a declaration that the plaintiff was shebait, notwithstanding an entry in the collectorate register that he was joint with the defendant, was held to be not a pure declaratory suit. It is true that in that case the plaintiff has to add a prayer for consequential relief on an objection made by the defendant under S. 42 of the Specific Relief Act ; but even so, the case is a complete answer to the contention that in the present case the plaintiffs could not have asked for any but a declaratory relief. Objections under S. 42 of the Specific Relief Act are, however, matters for the Court and not for the Taxing Officer, as the learned vakil has rightly urged before me. But is it quite correct to say that the plaint in the present case did really ask for any other relief ? In the first place, there is that prayer (kha) for such other reliefs as the plaintiffs may be found entitled to ; and it seems to me that the prayer does not cease to be a prayer for further relief merely because it is couched in general terms. Secondly, the plaint is unmistakably designed to reduce the three mauzas into the possession of the plaintiffs to the exclusion of the zamindars, and almost inevitably foreshadows an injunction in respect of the rent suit of 1923-24 brought by the zemindars. This view is confirmed by the fact that, during the progress of the suit the plaintiffs actually moved for and obtained such an injunction and as far as can be gathered from the order-sheet of the suit, the provisional injunction issued by the learned Subordinate Judge is in force at the present moment. In a somewhat similar case *Deokali Koer* v. *Kedar Nath* (4), the first two prayers, which were for declaratory reliefs, were followed by a prayer for any other relief " which the Court may find the plaintiff entitled to." The declarations sought were found to be not warranted by S. 42 of the Specific Relief Act. but before coming to the conclusion that the suit was not one " to obtain a declaratory decree " where no consequential relief is prayed " Jenkins, C. J., observed that " the third prayer expressly seeks relief, though it is general in its terms." In confirmation of the view apparently, that consequential relief was prayed for in that case, his Lordship proceeded to refer to the interim injunction obtained by the plaintiff, and remarked that an injunction is consequential relief. Were it not for the fact that *Deokali's* case (4) can, not altogether without force, be distinguished on the ground that the declaration sought in the present case is substantially warranted by S. 42 of the Specific Relief Act, I should have considered myself bound on the authority of that ruling to hold that the present is not a suit within Article 17 (iii) of the second schedule of the Court Fees Act. Coming to the second contention on behalf of the appellants, it seems clear on the authorities that in the face of the prayer for the declaration, the present suit cannot be regarded as one for possession within S. 7 (v) of the Court Fees Act : vide *Harihar Prasad Singh* v. *Shyam Lal Singh* (5), *Dhakeswar Prasad*

(3) [1913] 40 Cal. 245=17 C. W. N. 591=16 C. L. J. 194.

(4) [1912] 39 Cal. 704=16 C. W. N. 838.

(5) [1913] 40 Cal. 615.

Singh v. *Jivo Chaudhury* (6), *Ugramohan* v. *Lachmi Prasad* (7), *Shama Prasad Sahi* v *Sheoparsad Singh* (8) and *Khetramohan Mahapatra* v *Ganesh Lal* (9).

I am, therefore, inclined to hold that the present suit comes under S. 7 (iv) of the Court-Fees Act, which provides for suits "to obtain a declaratory decree or order where consequential relief is prayed," and as the plaintiffs (with whom I am at present concerned in their capacity of appellants only) seem to be seeking relief in respect of all the three mauzas, they ought, in my opinion, to pay ad valorem fees on Rs. 11,000, their own valuation of the subject-matter of the suit and appeal. But I have not been able to find any direct authority for or against my view. There are reported decisions in which it has been laid down that we ought not to look beyond the plaint in determining Court-fees, but the contrary seems to have been done and the object and effect of plaints considered in several other reported cases. The questions that arise for decision in the present Court-fee matter are :

(1) Whether a general prayer for relief such as is found in (kha) in the present case, will suffice to convert what would otherwise be a declaratory suit into a suit within S. 7 (iv) (c) of the Court-fees Act : and

(2) Whether such a general prayer for relief, taken with the interim injunction subsequently obtained by the plaintiffs, will have that effect.

These questions are of general importance, in my opinion, and must, therefore, be referred for decision under S. 5 of the Act. Let the papers be therefore, placed, before the Taxing-Judge at Patna for a final decision under S. 5 of the Court Fees Act.

Jwala Prasad, J.—This is a reference made by the Registrar of the Cuttack Circuit Court relating to revenue.

The plaintiffs-appellants must pay ad valorem Court-fee under S. 7 (iv) (c) of the Court-Fees Act. Two reliefs are sought for in the plaint, (ka) that it be declared that Defendants 4 to 188 have no relationship of landlord and tenant with Defendants 1 and 2, but are "khatak" tankidars under the plaintiffs and have been paying the "tanki jama" to them; (kha) any other reliefs to which the plaintiffs may be entitled may be granted to them. The third prayer is for costs which may be ignored.

The general relief contained in (kha) does by itself subject the plaint to the liability of ad valorem Court-fee inasmuch as such a prayer is almost customary and being vague and indefinite is never deemed to be a substantial relief. The prayer (ka) is couched in terms that would make it declaratory but the plaintiffs have obtained an ad interim injunction in the lower Court which still subsists. The plaintiffs have lost the case and in appeal seek reliefs which they had sought in the first Court. The ad interim prayer is a substantial prayer which makes the relief a consequential one bringing the case within S. 7 (iv) (c) of the Court Fees Act. In the case of *Krishna Das* v. *Hari Charan* (10) the plaintiff had described the suit as one for declaration of title with consequential relief, although the relief was in the nature of a declaration only. Therefore there was no dispute as to the category in which the suit fell. But the case of *Deokali Kuer* v. *Kedar Nath* (4) lends strong support to the view which I have taken. In that case there was no specific prayer in the memorandum of appeal for an interim injunction and there was, as in the present case, only a prayer for declaration of plaintiff's title. But in that case, as in the present, there was an interim injunction in the Court below on the application of the plaintiff and that was construed by Sir Lawrence Jenkins, C. J., as bringing the case within S. 7 (iv) (c).

The questions put in the reference are answered as above and the plaintiff is bound to pay ad valorem Court-fee.

Order accordingly.

(6) [1918] 3 Pat. L. J. 448.
(7) [1920] 5 Pat. L. J. 339.
(8) [1920] 5 Pat. L. J. 394.
(9) [1921] 6 P. L. J. 101=2 Pat. L. T. 607.
(10) [1911] 14 C. L. J. 47=15 C. W. N. 823.

A. I. R. 1926 Patna 251

ROSS, J.

Krishna Chandra Gauntia — Defendant—Appellant.

v.

Raja Mahakur — Plaintiff — Respondent.

Second Appeal No. 26 of 1924, Decided on 29th July 1924.

Court Fees Act (1870), *S. 7 (v)—Suit for possession.*

Where the suit is one for possession of land after determination of the question of title and the title is gone into, the case falls within S. 7 (v) and the Court Fee is payable on the market-value of the land : 27 *Mad. L. J.* 475 ; 24 *C. W. N.* 151, *Foll.* ; 17 *C. W. N.* 120, *Dist.* ; 16 *C. L. J.* 375. *Expl.* [P. 253, C. 1]

Facts are stated in the order of the Taxing Officer as follows:

This is a Court-fee matter, arising out of a suit instituted by the respondent for declaration of title, as an occupancy raiyat, to and recovery of possession of 9·31 acres of gounti raiyati land. According to the plaint, the appellant had first settled the disputed land with the plaintiff-respondent on an annual rental of four purugs of paddy; and had later on agreed to settle the land with the plaintiff in perpetuity for a nazarana or salami of Rs. 300 ; but had afterwards dispossessed him and succeeded against him in a proceeding under S. 145 of the Criminal P. C. For the purposes of the Court-fee and the jurisdiction, the suit was valued under S. 7 (v) (b) of the Court Fees Act at five times the annual rental of Rs. 3 (which was taken to be the equivalent of the four purugs of paddy). The first Court decreed the suit ; and the defendant appeals to this Court, after an unsuccessful appeal to the lower appellate Court, and has, on both occasions, valued the appeal in the same manner as the respondent valued the suit. The Assistant Registrar as Stamp Reporter would treat the suit as one, not under S. 7 (v) (b), but under S. 7 (iv) (c), of the Court Fees Act, and would assess the Court-fee in each Court on Rs. 300, taking this amount as a minimum for the market-value of the disputed land since the plaintiff had set up a settlement on a salami of that amount. If this be correct there would be a deficit of Rs. 26-6-0 in the Court-fee on the plaint and, if that should bind the appellant, also on each of his two appeals.

It has, however, been urged on behalf of the appellant that S. 7 (iv) (c) cannot apply as against him, because the decree of the first Court, which is all that he is interested in getting upset, shows that no declaration was treated as sought and none was given either: *Ramakrishna Reddi* v. *Kotta Koti Reddi* (1) and *Haidari Begum* v. *Gulzar Bano* (2). I am inclined to accept this contention as sound.

It has been further urged that the suit being one between landlord and tenant for recovery of possession of land from which the tenant-plaintiff had been dispossessed, S. 7 (xi) (e), of the Court Fees Act, should be held to apply and the matter valued according to the rent of the preceding year, namely, four purugs of paddy. But S. 7 (xi) (e) speaks of a tenant being "illegally ejected" and these words have been held to differ in scope from the word "dispossessed," in *Sundar Mal Marwari* v. *Murray* (3). This interpretation was, however, not followed in *Jamla Singh* v. *Kingsley* (4), but this latter ruling does not bear on the Court Fees Act. I am thus inclined to think that the appeal must be valued not under S. 7 (xi) (e) but under S. 7 (v) of the Act.

The learned vakil for the appellant has not been able to show me that if S. 7 (v) be held to apply, the matter comes within clause (a) or (b) or (c) of S. 7 (v). The valuation must, therefore, be based on "the value of the subject-matter" or "the market-value of the land." In order to avoid delay and cost of an enquiry on this point the learned vakil has agreed that Rs. 300 might, in the circumstances, be taken as the value of the subject-matter of the appeal. He has, however, asked me to refer to the Taxing Judge the question whether this matter is not governed by S. 7 (xi) (e) as a question of general importance, especially in view of the facts that *Sunder Mal Marwari* v. *Murray* (3), was not followed in *Jamla Singh* v. *Kingsley* (4), and there is no ruling of the Patna High Court on the point. Even if S. 7 (xi) (e) be held to apply, the taking of four purugs (1 purug=7 maunds) as equal to Rs. 3 only is manifestly wrong and the learned vakil has—again to avoid delay and cost—agreed that the annual rent may be taken to be worth Rs. 50. Under the provisions of S. 5 of the Court Fees Act I direct that the matter be placed before the Taxing Judge for final decision. The points arising are:

(i) Whether the suit falls under sub-S. (iv) (c) or (v) or (xi) (e) of S. 7 of the Court Fees Act

(ii) Whether the appeal should be valued under sub-S. (iv) (c), (v) or (xi) (e) of S. 7 of the Court Fees Act.

(1) [1907] 30 Mad. 96=16 M. L. J. 458 (F. B.).
(2) [1914] 36 All. 322=12 A. L. J. 481.
(3) [1912] 16 C. L. J. 375.
(4) [1913] 17 C. W. N. 1201.

Ross, J.—No one appears in this case. The cases referred to on the question, whether the case falls within S. 7 (xi) (c) of the Court Fees Act or not, are not of much assistance. The decision in *Sunder Mal Marwari* v. *Murray* (3) really proceeded on another ground, namely, that the suit was not one between landlord and tenant only, but also between the tenant and other persons who claimed to have acquired an interest from the landlord. The construction of two words "illegally ejected" suggested in that decision is obiter and does not appear to be a final decision. On the other hand in *Jamla Singh* v. *Kingsley* (4) there is a decision that illegal ejectment is included in dispossession, but that was not a decision on the Court Fees Act.

The decisions in *Bala Sidanta* v. *Perumal Chetti* (5) and *Pramatha* v. *Amiraddi* (6) indicate that in a suit under S. 7 (xi) (c) of the Court Fees Act the Court will not try a question of title. The present suit is one for possession of land after determination of the question of title and the title was gone into. The case in my opinion falls within S. 7 (v) of the Act and the Court fee is payable on the market-value of the land, i. e., Rs. 300.

Reference answered.

(5) [1915] 27 M. L. J. 475=1 L. W. 641.
(6) [1920] 24 C. W. N. 151.

A. I. R. 1926 Patna 253

MULLICK AND KULWANT SAHAY, JJ.

Ramsunder Isser and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 158 of 1925, Decided on 5th November 1925, against an order of the Sess. J., Darbhanga, D/- 29th August 1925.

(a) *Criminal P. C., S. 227—Alteration of charge from S. 436 to S. 436 read with S. 149 does not take away operation of notification requiring S. 436 offence triable by jury—Trial of altered charge with assessors is void—Criminal P. C. S. 269.*

Where by a notification the Government had directed that in a particular district certain offences, including an offence under S. 436, I. P. C. were to be tried by a jury and not with the aid of assessors, and the S. J., of that district upon a commitment of the accused with charge under S. 436 altered the charge to one under S. 149 read with S. 436 and tried the case with the help of assessors,

Held: that the trial was void as being without jurisdiction. The trial of an offence under S. 149 read with S. 436 is a trial under S. 436 as the Court must always first determine whether the offence under S. 436 has been committed by an individual and next whether S. 149 makes the participators responsible. Exactly same is the case with S. 34, I. P. C.

Held: further that the Sessions Judge ought not to have withdrawn the charge under S. 436 and substituted that under S. 149 read with S. 436 which put the accused under a disadvantage as they were deprived of the right of trial by jury, the assessor's opinion being less final on a question of fact than the verdict of a jury. [P. 254, C. 1, 2]

(b) *Penal Code, S. 149—Guilt of principal is guilt of participator and not a separate offence.*

It is true S. 149 is an offence in respect of which there has been participation. It prescribes a new set of conditions to which the section shall become applicable, but in the end the guilt of the person shall be the guilt attaching to the principal's crime. [P. 254, C. 1]

Hasan Imam, *B. N. Mitter*, *G. N. Mukerji* and *D. L. Nandkeolyar*—for Appellants.

H. L. Nandkeolyar—for the Crown.

Facts.—The complainant alleged that the zamindar with the help of his servants made an attack on his house and caused his hut to be set on fire. The tahsildar of the zamindar also made a cross-complaint that the complainant and his people wrongly rescued certain buffaloes which were seized as they were found grazing and destroying some grass fields. The police found the complainant's case to be false and declined to send up the zamindar and his people for trial.

Mullick, J.—(His Lordship after stating facts the most important of which are stated above proceeded as follows.) The Sub-Divisional Magistrate, however, thought that there was a prima facie case and he directed a charge-sheet to be sent up against the five appellants and eventually he framed charges under S. 436 I. P. C. and S. 436 read with S. 109, I. P. C., against the appellants and committed them for trial to the Court of Sessions.

In the Sessions Court a curious procedure was adopted. The charge framed by the Sub-Divisional Magistrate upon the evidence recorded by him as regards the offence of arson and abetment of arson was dropped and a new charge of which there had been no mention in the committing Magistrate's Court was added at the suggestion of the Public Prosecu-

tor, namely, one under S. 149 read with S. 436, I. P. C. The alteration had an important bearing upon the trial for in the Darbhanga district certain offences including an offence under S. 436 and specially enumerated in a notification published in the official Gazette on 11th September 1921, are triable by jury. All other offences remain triable by assessors. In the opinion of the learned Sessions Judge an offence under S. 149 read with S. 436 not being an offence under S. 436, but a separate offence the accused could not claim the right of trial by jury.

Therefore the first question that arises is one of jurisdiction. Was the learned Judge right in holding that a trial for an offence under S. 149 read with S. 436 and a trial for an offence under S. 436 are trials for different offences so that the notification does not apply. It may be contended that neither S. 34, I. P. C., nor S. 149 create distinct offences and that they are merely rules of evidence or of common law which fix liability upon joint wrong-doers. On the other hand it may be argued that just as specific provision has been made for abetments, attempts and conspiracies and they are treated as separate offences, so also does S. 149 create a distinct and separate offence and that the offence of one who participated is not the same as that of him who set fire to the house. Some support for this view might at first sight seem to be furnished by the judgment of Lord Sumner in *Barendra Kumar Gosh* v. *Emperor* (1). Lord Sumner there speaks of S. 149 creating a specific offence and dealing with the punishment of that offence alone, but the learned Judge was there merely considering the difference between S. 34, S. 149 and S. 114 of the Penal Code and in particular whether any of these sections were redundant and how far they overlapped. He came to the conclusion that although Ss. 34 and 149 overlap they do not wholly cover the same field, and as regards S. 114 his opinion was that it was evidentiary and not punitory. The observations of his Lordship do not affect the questions now before us. It is true S. 149 is an offence in respect of which there has been participation. It prescribes a new set of conditions to which the section shall become applicable, but in the end the guilt of the person shall be the guilt attaching to the principal's crime. Now when the notification of the 11th September 1921, declares that the trial of an offence under S. 436 must be by jury and not by assessors, the assessors are incompetent to determine whether a certain set of facts constitute the offence. It follows that the disability continues where the inquiry is whether upon the additional set of facts widening the field of liability prescribed in S. 149 the accused has rendered himself punishable for the same offence. The trial remains a trial under S. 436, the Court must always first determine whether that offence has been committed by an individual and next whether S. 149 makes the participators responsible, and so it is with S. 34 also. The trial in the present case was a trial for the offence of arson and by no stretch of argument can I persuade myself that the object of the notification was that while Amrit Gope would have been triable by a jury those who assisted in the prosecution of the common object of the unlawful assembly were triable by assessors, whose opinion was less final on a question of fact than the verdict of a jury.

We cannot tell on the facts before us for what reason the alteration of the charges was made. It was open to the learned Sessions Judge to add an alternative charge, but I do not think that it was a proper exercise of discretion to withdraw the charge, which the committing Magistrate thought to be proved and put the accused under a disadvantage by substituting another so that he might be deprived of the right of trial by jury.

In my opinion, therefore, the trial was held without jurisdiction and the question is whether we should order a re-trial. (His Lordship then dealt with the evidence and held that the circumstances disclosed did not justify conviction and that it was not necessary to order a re-trial and in conclusion set aside the conviction).

Kulwant Sahay, J.—I agree.

Conviction set aside.

(1) A. I. R. 1925 P. C. 1.

* A. I. R. 1926 Patna 255

DAWSON MILLER, C. J., AND MACPHERSON, J.

Sita Ram Singh—Appellant.

v.

Khub Lal Singh—Respondent.

Second Appeal No. 814 of 1924, Decided on 27th May 1925, from a decision of the Sub-J., Patna, D/- 20th July 1922.

Evidence Act, S. 32—Admission by a Hindu widow regarding the existence of a loan cannot be split into two but must be considered as a whole for ascertaining the purpose of loan.

An admission by a Hindu widow that she borrowed a loan for a particular purpose cannot be split up into two parts making one part admissible and the other inadmissible, but must be admitted as a whole for the purpose of ascertaining the purpose and nature of the loan under S. 32.

[P. 255, C. 2]

Manuk and *S. Dayal*—for Appellant.

Sultan Ahmad and *S. N. Rai*—for Respondent.

Dawson-Miller, C. J.—In my opinion the matters in dispute in this case are concluded by the finding of fact of the lower appellate Court. The suit was brought by the reversioners of Ramautar Singh against the mortgagees under a mortgage granted by his widow Dhanwanti Kuer after his death to secure payment of a sum of Rs. 400. The mortgage hypothecated certain property which formed part of the estate of her husband. That was in the year 1905. A suit was brought during the widow's lifetime by the mortgagees on the mortgage. They succeeded in that suit and put up the property for sale in execution of the decree and themselves purchased it. The widow died in 1920 and the present suit was brought by the reversioners claiming to recover the property.

The question for determination in the suit is whether the mortgagees were entitled to a charge upon the whole estate or only upon the life-interest of the widow. and that again depends upon whether the sum borrowed was borrowed by the widow for purposes of legal necessity. The allegation of the defendants is that of the Rs. 400, Rs. 226 had been borrowed in order to pay for Dhanwanti's husband's sradh. Rs. 174, the balance, was for the cost of litigation and maintenance. The evidence shows that although the income of the estate was about Rs. 2,000 still, after her husband's death, Dhanwanti Kuer, the widow, was unable to get the estate into her possession. Therefore it seems highly probable that she was in a position in which it might be necessary to borrow the money for her expenses. Both the trial Court and the Subordinate Judge on appeal found that the money was borrowed by Dhanwanti Kuer for purposes of legal necessity and that she was in need of money at the time. That decision, however, has been challenged on the ground that the learned Subordinate Judge admitted in evidence a statement of Dhanwanti Kuer, who, as I have intimated, was dead at the time when the present suit was brought, made in a previous suit in the year 1908 in which she stated that she took a loan from Faujdar Singh and Sheoraj Singh to defray the expenses of the funeral rites of her husband. The learned Judge accepted that statement as admissible under S. 32, Cl. (3), of the Indian Evidence Act. It has been contended that the only part of that admission contrary to her pecuniary interest is the fact that she took the loan and not the remaining part that she took the loan for a particular purpose. I am not able to agree to this proposition. I think the whole statement must be taken in order to ascertain exactly what the nature of this loan was. There might be a difference in her pecuniary liability, certainly in the liability of the estate she at that time represented if the loan was borrowed for necessary expenses or if the loan was borrowed for purposes which were not to be regarded as necessary expenses, and I do not see very well how you can split up the admission into two parts. The whole thing works together and each part is necessary to explain the other. This I think is the view which has been taken in dealing with cases of this sort ever since the old case of *Higham* v. *Ridgway* (1), which was decided in the year 1823. The learned Judge accepted that statement which was not necessarily conclusive and not necessarily binding upon the reversioners but which I think he was entitled to accept as a corroboration of the defendant's story that in fact the money had been borrowed by Dhanwanti Kuer for purposes of legal necessity, and the further statement of one of the defendants himself that he had made enquiries at the date when the money was borrowed and he found that it was required by Dhanwanti

(1) [1823] 2 Sm. L. C. 348.

Kuer in order to pay for her husband's sradh. The learned Judge said :

" Having regard to the statement of Mt. Dhanwanti Kuer, above alluded to I see no reason to doubt the evidence of these witnesses that Rs. 200 was borrowed by Dhanwanti for her husband's sradh. It is clear from her deposition also that litigation commenced soon after her husband's death."

That is really the only criticism which has been made of this judgment and it does not seem to me that the criticism is a sound one. The matter is concluded by the findings of fact and I do not think that the learned Judge took into consideration any evidence which he was not legally entitled to consider.

The appeal will be dismissed with costs.

Macpherson, J.—I agree.

Appeal dismissed.

✻ A. I. R. 1926 Patna 256

DAWSON-MILLER, C. J., AND MACPHERSON, J.

Ambika Prasad Singh—Assessee.

v.

Commissioner for Income-tax, Bihar and Orissa—Opposite Party.

Misc. Judicial Case No. 147 of 1924, Decided on 11th June 1925.

✻ *Income-tax Act* (11 *of* 1922), *S.* 14 (1)—*Section does not apply when a member receives income from property not taxed as joint property.*

The whole object of the section is to exempt from taxation in the hands of an individual that which has already been taxed in the hands of the joint family as such. If, however, the individual receives an income aliunde from property which has not been taxed, as that of a Hindu joint family, then it would appear that the provisions of S. 14 have no application whatever. [P 256, C 2]

K. P. Jayaswal and *N. P. Prasad*—for Assessee.

Sultan Ahmad—for Opposite Party.

Dawson-Miller, C. J.—This is a case stated for the opinion of the Court by the Income-tax Commissioner under S. 66, sub-section (1), of the Income-tax Act, 1922.

The assessee, Ambika Prashad Singh, is the father of the present proprietor of the 9-annas Tikari Raj. The assessee has no interest in that property, but his son, the proprietor, has been in the habit of making him an allowance yearly out of the proceeds of the property of the Tikari Raj. Upon that the assessee has been assessed to income-tax and the question which is submitted for our opinion in this case is formulated by the Income-tax Commissioner thus :

" The question for the determination of the High Court is whether, when a man receives an annual allowance from his son out of a property which the son inherited from his maternal grandfather, this sum is exempt under the provisions of sub-S. (1) of S. 14 of the Indian Income-tax Act, 1922."

S. 14, sub-S. (1), provides as follows :

" The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

The learned Commissioner was of opinion that as the assessee received this sum as an allowance from his son and not by reason of any right to share in the proceeds of the Tikari Raj, that property not being the property of an undivided Hindu family he did not come under the provisions of S. 14, sub-S. (1). His view of that section is that it only applies to cases where the assessee receives the income in the capacity of a member of a Hindu undivided family. If he receives it as a mere gratuitous allowance to which he is not in law entitled by reason of being a member of a joint family then he does not come under the provisions of S. 14. That is the only question which has been submitted for our opinion.

It is contended by Mr. Jayaswal on behalf of the assessee that if he is joint with his son for any purpose, and he contends that in the present case he is joint for some purposes, then anything which he may receive from his son is received by him as a member of a Hindu undivided family. I cannot think that the section bears any such interpretation. The whole object of the section is to exempt from taxation in the hands of an individual that which has already been taxed in the hands of the joint family as such. If, however, the individual receives an income aliunde from property which has not been taxed as that of a Hindu joint family, then it would appear that the provisions of S. 14 have no application whatever. In my opinion the learned Commissioner took a correct view of the section and the question propounded for our opinion must on the facts stated be answered in the negative.

Macpherson, J.—I agree.

A. I. R. 1926 Patna 257

KULWANT SAHAY, J.

Raghunandan Thakur—Defendant—Appellant.

v.

Babu Kishundeo Narain Mahta and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 298 of 1922, Decided on 27th March 1925, from a decree of the Dist. J., Darbhanga, D/- 6th December 1921.

Deed — Construction — Conveyance of land—Difference between boundaries and area given —Land actually comprised within the boundaries should be treated as conveyed.

Where a land conveyed is described by boundaries as well as by area, if there is a difference between the boundaries and the area, the land actually comprised within the boundaries will be treated to have been conveyed: 18 *C. L. J.* 541, *Foll.* [P. 257, C. 2]

Sant Prasad—for Appellant.

S. M. Mullick, S. N. Bose and *Nawal Kishore Prasad No.* 2—for Respondents.

Facts.—This was an appeal by the Defendant No. 1 against the decree of the District Judge of Darbhanga, dated the 6th December 1921, whereby he confirmed a preliminary decree for partition made by the Munsif of Samastipur. A suit for partition was brought by the plaintiffs on the allegation that in execution of a rent decree obtained by the Darbhanga Raj against one Bhagwat Lal a certain holding consisting of several survey plots within two khata numbers were sold and purchased by the plaintiffs and Defendants Nos. 1 and 2. The Defendants Nos. 3 and 4 were alleged to be the benamidars of the plaintiffs in whose name the sale was concluded, the said Defendants Nos. 3 and 4 being the servants of the plaintiffs. Their case was that half the holding was purchased by the plaintiffs in the names of the Defendants Nos. 3 and 4 and the remaining half was purchased by the Defendants Nos. 1 and 2. The present suit was brought for partition of the holding so purchased amongst the plaintiffs and the Defendants No. 1 and 2. The Defendant No. 2 admitted the title of the plaintiffs and expressed his readiness for the partition. The Defendants Nos. 3 and 4 admitted that they were the benamidars for the plaintiffs. The Defendant No. 1 alone contested the suit. Various objections were taken by the Defendant No. 1 which were all disallowed by the Munsif. On appeal only one of the points taken by the Defendant No. 1 was pressed and that related to one of the plots sold at the rent sale, namely Survey Plot No. 6234 in Khata No. 151. The defence was that before the execution sale the defendant had purchased this Plot No. 6234 along with other lands from the old tenant Bhagwat Lal under a private purchase and that he was in possession thereof and that what was sold in the rent sale was only 14 dhurs out of the total area of 1 bhiga 3 kathas 12 dhurs which was the area of Plot No. 6234. He, therefore, contended that the plaintiffs were entitled to partition only 14 dhurs of plot No. 6234 and not the entire area of 1 bigha 3 kathas and 12 dhurs. Both the Courts below refused to entertain this objection of the Defendant No. 1. On a construction of the sale certificate, the plaint and the decree in the rent suit they came to the conclusion that what was sold was the entire Survey Plot No. 6234 and not only 14 dhurs out of the area comprised in the plot.

Kulwant Sahay, J.—(His Lordship stated facts as set out above and proceeded.) In second appeal it is contended that the construction put upon the sale certificate is erroneous. It has further been contended that the suit was barred by S. 66 of the Code of Civil Procedure. As regards the first contention, on referring to the sale certificate, it appears that Plot No. 6234 was described by boundaries; and admittedly, as found by the Munsif, the boundaries given cover the entire Plot No. 6234, and are not confined to only 14 dhurs out of Plot No. 6234. The area given in the sale certificate is no doubt only 14 dhurs. There is a further description of this plot by giving the number of trees standing thereon. The learned Munsif has held that the trees which are given in the sale certificate as standing on Plot No. 6234 and which were sold and purchased by the auction-purchasers were not confined to the 14 dhurs but were scattered upon the entire Plot No. 6234. Where a land conveyed is described by boundaries as well as by areas, if there is a difference between the boundaries and the area, it is settled law that the land actually comprised within the boundaries will be treated to have been conveyed.

In the case of *Gossain Das Kundu* v. *Mrittunjoy Agnan Sardar* (1), the sale certificate under which the parties had purchased gave boundaries of parcels sold as well as the area of each plot. There was a difference between the areas and the boundaries and it was held that the purchaser took plots as defined by the boundaries and if within those boundaries there was more or less land than that stated in the sale certificate, he obtained a title to whatever was contained within those boundaries. This case is exactly applicable to the facts of the present case. Here also the sale certificate gives the area of the Plot No. 6234 as well as the boundaries. The area given does not tally with the bounderies. The boundaries cover a larger area than what is shown in the certificate. Therefore the entire area included within the boundaries must be considered to have been sold. Over and above the boundaries we have got a description of the trees which have been found to stand scattered over the whole Plot No. 6234. I am, therefore, of opinion that the learned District Judge was right in holding that what was sold and purchased by the auction-purchasers was the entire Plot No. 6234 and not only 14 dhurs out of this plot. No doubt it is admitted that some of the other plots included in the sale certificate cover an area less than the old holding of Bhagwat Lal, but in the case of those plots the description given is, "minjumla" that is, not the entire plot, but only a portion thereof. In the case of Plot No. 6234 there is no such description.

As regards the second contention of the learned vakil for the appellant that the suit is barred by S. 66 of the Code of Civil Procedure, it is enough to say that having regard to the fact that the Defendants Nos. 3 and 4 disclaimed their title under the purchase and admitted the title of the plaintiffs. S. 66 of the Code does not operate as a bar to the present suit. This question does not appear to have been raised in appeal before the learned Judge.

This appeal must be dismissed with costs.

Appeal dismissed.

(1) [1913] 18 C.L.J. 541.

A. I. R. 1926 Patna 258

MULLICK A. C. J. AND KULWANT SAHAY, J.

Rup Lal Singh—Plaintiff.

v.

Secretary of State for India—Defendant.

Civil Reference No. 1 of 1925, Decided on 27th July 1925, made by the Sub-J. Muzaffarpur.

(a) *Tort—Secretary of State—Donee of the power exercising it unreasonably is guilty of tort. (per Mullick, Ag. C. J.).*

When a statute confers a power it implies that the donee of that power shall be competent to do all that is needful for its exercise subject to the limitation that he cannot go beyond what is reasonable. If, in order to carry out the law, he does something which the Courts consider in the circumstances unreasonable, he will be guilty of a tort. [P 259 C 1, 2]

(b) *Bengal Troops Transports and Travellers Assistance Regulation* (11 *of* 1806), *S.* 3 (1)—*Native officer can impress cart against owner's consent.*

In case of carts let on hire, the native and police officer referred to in paragraphs 3 and 4 of S. 3, Cl. 1 can legally impress them against the consent of their owner. [P 259 C 2]

S. Saran—for Plaintiff.

L. N. Sinha—for Defendant.

The following facts appear from the order of reference:

It appeared that in order to facilitate the march of a detachment of cavalry through his district the Collector of Muzaffarpur ordered a native officer to provide the troops with bullock carts. The native officer, acting under Regulation XI of 1806, impressed a number of carts which had been hired by the appellant, Ruplal Singh, for the purpose of carrying out a contract for the repair of certain roads. The Subordinate Judge of Muzaffarpur found that the impressment was made against the will of the appellant. He further found that as a result of such impressment the coolies collected by the contractor were idle for two days and that he had to pay them during this time. The contractor claimed as damages the pay of the coolies. The Subordinate Judge was of opinion that a claim for damages would lie if the act of the Secretary of State, who was the Defendant No. 1 in the suit brought by the appellant, was a tort. But he was doubtful of the scope of Regulation XI of 1806 and, under O. 46, of the Civil P. C, he referred the case to the High Court for an opinion on S. 3 of the

Regulation. The question put by him was:

Whether the Native and Police officer referred to in paragraphs 3 and 4 of the first clause of S. 3 of Regulation XI of 1806 can legally impress a cart let on hire against the consent of the owner.

Mullick, A. C. J. — The native officer is directed by paragraph 3 of S. 3 of the Regulation to provide the troops with whatever bearers, boatmen, carts and bullocks may be necessary to prosecute their route. The next paragraph empowers him in case of difficulty to seek the assistance of the nearest police officer who is to afford his aid in providing the number of persons and of carts and bullocks required. The section does not in terms empower the native officer or the police to impress any carts or bullocks against the will of their owner but it is obvious that this is intended. It is not necessary here to consider whether private carts can be seized; but as regards carts ordinarily let out on hire it is impossible to conceive that when a regiment is on the line of march the refusal of the owner would be sufficient to oust the jurisdiction of the officer concerned. That could not have been intended by S. 3 having regard to the object for which it was enacted. This is made clearer by comparison with S. 8 which relates to the supply of carts, etc., to military officers not commanding or proceeding with a corps or detachment and to other persons passing through the country. The third paragraph of this section, by implication, empowers the police officer to impress carts kept for hire and to compel bearers and boatmen who are accustomed to act as such to undertake such involuntary service. From this it would appear that in the case of regiments on the march it is certainly open to the native officer or the police officer to impress carts or bullocks which are ordinarily let out for hire.

It is contended on behalf of the plaintiff that the Regulation could not have intended to empower the native officer to use means which were contrary to law and thereby encroach upon the liberty of the subject. But the answer to this is that when a statute confers a power it implies that the donee of that power shall be competent to do all that is needful for its exercise subject to the limitation that he cannot go beyond what is reasonable. If, in order to carry out the law, he does something which the Courts consider in the circumstances unreasonable, he will be guilty of a tort. The answer, therefore, to the question put by the learned Subordinate Judge, in my opinion, is in the affirmative.

Kulwant Sahay, J.—I agree that in case of carts let on hire, the native and police officer referred to in paragraphs 3 and 4 of S. 3, Cl. 1, of the Regulation can legally impress them against the consent of their owner.

Reference answered in the affirmative.

✻ A. I. R. 1926 Patna 259

DAS AND ROSS, JJ.

Khudi Rai—Appellant.

v.

Lalo Rai and *others*—Respondents.

Appeal No. 1266 of 1922, Decided on 12th June 1925, from the appellate decree of the J. C., Chota Nagpur, D/- 26th July 1922.

✻ *Civil P. C., O. 23, R. 1—Application made for permission to withdraw with liberty to bring fresh suit on same cause of action—Permission granted—No mention made about liberty to bring suit—Liberty to bring fresh suit will be deemed as granted.*

Where an application is made by a plaintiff to withdraw from a suit with liberty to bring a fresh suit on which an order is passed giving the permission to withdraw from the suit, although nothing is said in the order as to the plaintiff's liberty to institute a fresh suit on the same cause of action, that order ought to be read along with the petition and construed as granting permission to file a fresh suit; 35 *Cal.* 990, *Foll.* [P 260 C 1]

S. K. Mitter—for Appellant.

G. S. Prasad—for Respondents.

Das, J.—I am unable to agree with the view taken by the learned Judicial Commissioner. The plaintiff instituted a suit for arrears of rent and the defence which found favour with the learned Judicial Commissioner, was that the suit was barred inasmuch as the plaintiffs instituted a previous suit in respect of the same cause of action, but withdrew it. It appears that in the previous suit the plaintiffs presented a petition for liberty to withdraw from the suit with permission to bring a fresh suit. The Court, however, gave the plaintiffs permission to withdraw from the suit, but did not in terms give them liberty to bring a fresh suit. The learned Judicial Commissioner

takes the view that the order operated as a refusal of the permission. With this view I am unable to agree. There is a decision of the Calcutta High Court which is to the effect that where an application is made by a plaintiff to withdraw from a suit with liberty to bring a fresh suit on which an order is passed giving the permission to withdraw from the suit although nothing is said in the order as to the plaintiff's liberty to institute a fresh suit on the same cause of action, that order ought to be read along with the petition and construed as granting permission to file a fresh suit; See *Golam Mahamed* v. *Shibendra Pada Banerjee* (1). This view was accepted by the Madras High Court in *Narayana Tantri* v. *Nagappa* (2).

It appears that there were other points which were not dealt with by the learned Judge. It is true that the learned Judge says that this was the only point pressed before him, but the learned vakil for the respondent says that it was unnecessary to press other points because the learned Judicial Commissioner accepted the contention that the suit was barred.

I would allow the appeal, set aside the judgment and the decree passed by the learned Judicial Commissioner and remand the case to him to be disposed of according to law. The appellant is entitled to the costs of this appeal. Costs incurred in the Court below will be costs of the appeal which will be determined by the learned Judicial Commissioner.

Ross, J.—I agree.

Appeal allowed.

(1) [1908] 35 Cal. 990=12 C. W. N. 893.
(2) [1918] 34 M. L. J. 515 (F. B.).

A. I. R. 1926 Patna 260

ADAMI AND KULWANT SAHAY, JJ.

Mathura Prasad Singh and *others*—Defendants—Appellants.

v.

Jageswar Prasad Singh—Plaintiff—Respondent.

Appeal No. 87 of 1923, Decided on 8th January 1926, from the original decree of the Spl. Sub-J., Palamau, D/- 18th February 1923.

Chota Nagpur Encumbered Estates Act (6 of 1876, before amendment by Act 8 B and O. C., of 1922), S. 8, Cl. (1) and S. 12, Cl. (2)—Scheme of payment of debts by manager, and approval of scheme by Commissioner—Period during which estate is under protection under Encumbered Estates Act is excluded in computing limitation—Manager incurs no liability in drawing up scheme—Determination of debt by manager is not judicial decree.

There is no doubt that the Act, is inartistic in its drafting. Too strict interpretation cannot be placed on S. 12. It could never have been in contemplation of the Legislature that the mere approval by the Commissioner of a scheme should for ever deprive all creditors of redress. The first clause of S. 3 becomes ineffectual when the vesting order itself is cancelled by a subsequent notification by merely drawing up a scheme for payment. The manager does not make himself liable to creditor since there is no contract between the manager and the creditor. The determination of a debt by the manager is not a judicial proceeding and his decision as to what the debt is does not amount to a decree. The word "bar" in regard to pending proceedings in Cl. 1 of S. 3 means that all pending proceedings shall be stayed. [P. 262, C. 1, 2]

Ganga Charan Mukerji—for Appellants.

S. M. Mullick and *Hareshwar Prasad Singh*—for Respondent.

Adami, J.—This appeal arises out of a suit for the recovery of Rs. 20,705-7-1 as principal and interest due upon a handnote executed by Defendant No. 1 as karta of the family on behalf of himself and his brother Defendant No. 2. The handnote was executed in favour of the father of the plaintiff on the 18th of October 1902, for a sum of Rs. 6,198. The loan was taken for the purpose of meeting the cost of litigation and saving the joint family property. On the 18th of June 1904, the defendants applied to the Deputy Commissioner for protection under the Chota Nagpur Encumbered Estates Act, and on the 30th of October 1904 an order was passed vesting their estate under a manager under the provisions of the Act. The order was published in the Gazette on the 11th of January 1905. After publication of the order the manager called upon the creditors to submit their claims. The defendants in their application had given a list of their debts and the second item in the schedule is this debt of Rs. 6,198 on the bond of 18th of October 1902. Interest at 1 per cent. per month had risen to Rs. 829-11 and the total debt was Rs. 7,027-11. The application was signed and verified by both the defendants. The manager proceeded to determine the claims under S. 8 of Act VI of 1876 and the defendants admitted the

claim. The manager thereafter drew up a scheme for the repayment of this debt of Rs. 6,198 and interest Rs. 914. That scheme is Ex. 4. The scheme was submitted to the Commissioner under S. 11 of the Act and was approved by him. According to S. 11 a scheme "when approved by the Commissioner shall be carried into effect." I am referring to Act VI of 1876 as it stood before the Amending Act, Behar and Orissa Act, VIII of 1922. The manager, however, failed to carry out the scheme so far as it affected this debt, and no money was received from him by the plaintiffs.

On the 21st of June 1921 the estate was released from the operation of the Act by notification under order from the Board of Revenue. The notification was published in the Gazette on the 13th of July 1921. The notification did not state under what section the release was ordered. It merely stated that the provisions of the Act had ceased to apply to the proprietor of the estate. Thereafter the plaintiff, Lalu Jageshwar Prasad Singh, instituted a suit out of which this appeal arises on the 9th of May 1922. The plaintiff claims that the period during which the estate was under protection of the Act should be excluded in computing limitation. The plaint also alleges that the defendants admitted the debt both when they submitted their application for protection and also when the manager was determining the claim.

The defendants pleaded that the suit was barred by limitation and that there was no legal necessity for the loan in 1902. Defendant No. 1 admitted execution of the handnote, but denied that consideration had passed. He alleged that in 1904, when he was intending to apply for protection under the Chota Nagpur Encumbered Estates Act, knowing that he had a daughter to marry and that it would be hard to obtain money from the manager, he executed several handnotes in collusion with and in favour of various relatives, so that those relatives might submit claims to the manager and get the money from him and make the money over to the defendant so that he could spend it on his necessary expenses. Defendant No. 2 denied that he was any party to the loan, or that Defendant No. 1 borrowed the money for family necessity. He alleged that he was separate from Defendant No. 1 and was not bound by the handnote.

The learned Subordinate Judge considered with great care the question whether the period during which the estate was under protection could be excluded when computing the period of limitation. He noticed that the second clause of S. 12 of the Act does not meet the present case, because the estate was released after the Commissioner had given approval, and, therefore, the provisions of the sixth clause to that section could not be applied to the case in their strict interpretation; but he found himself unable to put a strict interpretation upon the section and found that the sixth clause provides in general terms for all cases where the estate is released from management, before the debts have been paid off. He held that S. 12 applied to the case and that the plaintiff was entitled to the benefit of the section. He also found that the provisions of S. 15 of the Limitation Act applied and enabled the plaintiff to exclude the period of protection. He disbelieved the defendant's story about the absence of consideration and also the story about the taking of the money in order to provide for the defendant's daughter's marriage. He held that Defendant No. 1 borrowed the money as karta of the joint family for the purposes of the family and that Defendant No. 2 was liable. He decreed the plaintiff's suit.

Mr. Ganga Charan Mukherji has argued this appeal with great ability on behalf of the defendants-appellants. The main part of his argument has been devoted to the question of limitation. The three questions which arise under this head are: Whether S. 12 of the Chota Nagpur Encumbered Estates Act, Cl. 6, saves the suit from being barred by limitation; secondly, whether if S. 12, Cl. 6 does not apply, S. 15 of the Limitation Act applies; and, thirdly, whether there was such acknowledgment by the defendants as would save the suit from being barred by limitation. Mr. Mukherji has taken us through the sections of the Encumbered Estates Act and his argument is that the first clause of S. 3 of the Act is an absolute bar to all proceedings and suits after the publication of an order under S. 2 of the Act. He points out that the sixth clause of S. 12 refers only

to release covered by Cl. 2 of the section, that is to say .

If the Commissioner at any time before a scheme has been approved by him under S. 11 thinks that the provisions of this Act should not continue to apply to the case of the holder of the said property or his heir.

In the present case the estate was released after approval of the scheme by the Commissioner, and, therefore, the sixth clause cannot apply and there can be no revival of claims. His contention is that the first clause of S. 3, which is the bar to all proceedings still holds good even though the estate has been released because sub-Cl. 6 of S. 12 does not apply in the circumstances of this case. There is no doubt, as has been often remarked, that the Chota Nagpur Encumbered Estates Act, 1876, is inartistic in its drafting. That this has been recognized with regard to such circumstances as we find in the present case is shown by the amendments made by the Legislature by the Bihar and Orissa Act, VIII of 1922, whereby in S. 4 the following words have been added to the second clause of S. 12 :

Or if after the scheme has been so approved an application is made under S. 11-B, for the relinquishment of the property.

The framers of the Act do not seem to have contemplated that when a scheme has once been approved and has to be carried into effect under S. 11, there could be release under any circumstances other than those mentioned in the first three clauses of S. 12, and as the Act stood before the amendment of 1922 the strict wording of the Act seems to show that no revivor was contemplated in circumstances other than those mentioned in cl. 2 of S. 12. The learned Subordinate Judge has, I think, taken the right view in holding that too strict interpretation cannot be placed on S. 12.

S. 3, it is true, states that on the publication of order under S. 2 all pending proceedings shall be barred and all processes, executions and attachments for or in respect of debts and liabilities shall become null and void, whereas the second and third clauses are limited in their operation to the period during which such management continues. It is contended that save in the case mentioned in S. 12, Cl. 6, the bar shall be absolute and that no process or execution or attachment can, after the publication of an order under S. 2, be served or made.

But surely when the order itself is cancelled by a subsequent notification, the effect of the first clause of S. 3 disappears. It could never have been in contemplation of the Legislature that the mere approval by the Commissioner of a scheme should for ever deprive all creditors of redress. But I think it is quite clear that, even were it to be held that as the Act is drafted no revivor of proceedings is allowed. the provisions of S. 15 of the Limitation Act must apply. Though the word "bar" is used with regard to pending proceedings in Cl. 1 of S. 3, its real meaning is clearly that they should be stayed, for Cl. 6 of S. 12 shows that in certain circumstances proceedings may be revived. In the present case we have not to do with proceedings which were pending at the time the notification was published; the question is whether any process can issue or any suit be instituted after the order of release. Cl. 1 of S. 3 states that processes, execution and attachments shall become null and void on the publication of an order under S. 2. After that order has been cancelled, there is no bar to any process, execution or attachment ; there has really been merely a stay. The order under S.2 bringing the estate under protection was a vesting order staying all proceedings, and under S. 15 of the Limitation Act I am satisfied that there should be a revivor, the period of protection being excluded. I would refer to the case of *Raja Jyoti Prasad Singh Deo* v. *Ranjit Singh* (1). It is true that there Das, J., did not consider the difficulty which we have now before us with regard to the wording of Cl. (2) of S 12 ; but it may be that in that case the point did not arise. The general principles, however, are given as to the right of revivor. I am quite satisfied that the plaintiff is entitled to exclude the time during which he was barred from suing on the debt due to him by reason of the estate being under protection. Mr. Mukherji has argued that after the manager had examined the claim and had judicially determined the debt under S. 8 of the Act, the plaintiff could have sued the manager within three years of the determination of the debt ; but I think that this contention cannot in any way be upheld, for under the wording of Cl. 1 of S. 3 any such suit would be barred. Secondly

(1) A. I. R. 1922 Patna 287.

it is contended that when the manager heard the claims and determined the debt and thereafter drew up a scheme, he was in fact contracting with the plaintiff to pay the debt in a certain manner and within a certain time; and when in 1916, which was the last date of payment under the scheme, he had failed to pay to the plaintiff, the plaintiff might have sued him on the contract; but it is clear that in a case like this there was no contract between the manager and the plaintiff. The manager determined the scheme without reference to the wishes of the plaintiff. Thirdly, it is argued that even, if a suit in respect of such determined debt was barred during the period of management, what would revive after release from management would be the debt determined by the manager and not the original debt. In the present case the manager determined the original debt to be due but decided that he would pay interest at 6 per cent. and not at 12 per cent. per annum. After the release the whole scheme came to nothing and anything arranged in the scheme would not affect the revival of the original debt at the original rate of interest. Mr. Mukherji would have us hold that the determination of a debt by the manager is a judicial proceeding and his decision as to what the debt is amounts to a decree. But here the orginal and determined debts are exactly the same and so the point does not arise. I must hold that the plaintiff was entitled to exclude the period of management. It is certainly hard on the defendants that their debts should have been allowed to accumulate for so long a time as 19-1/2 years: but it has to to be remembered that through the protection of the Act the defendant's property has been preserved.

The plaintiff has also suffered in not being able to obtain repayment of the debt during so long a period. The debt would be barred, even if the period of management were excluded, if the defendants had not in 1904 acknowledged their indebtedness. The schedule to their application in 1904 cites and admits the debt. That application is signed and verified by both the defendants. Again when the debt was examined by the manager under S. 8 the Defendants both admitted it, and in his written statement Defendant No. 1 acknowledged that he admitted the debt before the manager. These acknowledgment save the claim from the bar of limitation. (His Lordship then discussed the findings regarding passing of consideration and legal necessity and proceeded). I can see no reason to differ from finding arrived at by the learned Subordinate Judge, and I would, therefore, dismiss the appeal with costs.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

A. I. R. 1 926 Patna 263

DAS AND ROSS, JJ.

Jhapsi Sao and *others* — Plaintiffs—Appellants.

v.

Bibi Aliman and *others*— Defendants—Respondents.

Second Appeals Nos. 55, 116 and 263 of 1923, Decided on 1st December 1925, from a decision of the Dist. J., Patna, D/- 9th November 1922.

Bengal Tenancy Act (8 *B. C. of* 1885), *S.* 22 (2)—*Collectorate partition after purchase of ratyati holding by a co sharer—Allotment as bakasht land to takhta of another co sharer—Partition does not take away privilege of purchasing co-sharer—Bengal Estates Partition Act* (5 *B. C. of* 1897), *S.* 119 *is no bar.*

The fact that revenue authorities allotted certain lands as bakasht lands does not estop the co-sharer holding direct possession of the said lands under S. 22 (2) from continuing to hold them in his khas occupation on payment of rent to the co-sharer to whose takhta it has been allotted. Such a defence is not barred by S. 119 of the Bengal Estates Partition Act since the allotment made by the revenue officers is not contested. S. 22 (2) confers a privilege on the purchasing co-sharer which is in derogation of the common law right of the other co-sharers as stated in the judgment of the Judicial Committee in *A. I. R.* 1924 *P. C.* 144. Partition only removes the necessity for the limitation on the effect of the purchase and would set free the holding to be operated upon by the ordinary provisions of the law. In other words, S. 22 (2) imposes a limitation on the rights of the co-sharers for the benefit of the purchasing co-sharer, and there is no reason why this limitation should be removed by reason only of a partition taking place: *A. I. R.* 1925 *Pat.* 547, *Appr.* [P 265 C 1, 2]

P. C. Manuk and *S. M. Mullick*—for Appellants.

Sultan Ahmed, *Hassan Jan* and *Ahmad Raza*—for Respondents.

Facts.—These three appeals were directed against the judgment of the learned District Judge of Patna affirming

a decision of the Subordinate Judge in suits brought by the plaintiffs for recovery of possession of certain lands as being bakasht lands to which they were entitled as the result of a partition. Mauza Dariapur Hasan was originally an estate bearing Tauzi No. 88 in the Patna Collectorate. It was first partitioned in the year 1901, and on that partition one of the takhtas created was a takhta of 14 annas 15 dams which became Tauzi No. 5146. One of the proprietors of that estate was Dr. Abdulla. The record of rights was finally published on the 22nd of February 1911 when the lands in suit were recorded as bakasht lands subject to the incident that they were held by the defendants by virtue of purchase on payment of a proportionate share of rent to their cosharers; that is to say, as being held under S. 22 (2) of the Bengal Tenancy Act. In 1912 further partition proceedings in respect of Tauzi No. 5146 began and certain orders were passed by the Board of Revenue which will be referred to later. The share of Dr. Abdulla became Tauzi No. 5146 (new) and this estate was subsequently sold to the plaintiffs. The plaintiffs brought these suits to recover possession of the lands held by the defendants. The Courts below held concurrently that the lands in suit were acquired by the defendants or their ancestors by purchase. There was no finding that the lands were acquired by the defendants or their predecessors before they became cosharers in the village. The learned District Judge held that on this finding the defendants were entitled to continue to possess the lands on payment of rent under S. 22 (2) of the Bengal Tenancy Act, and that they were not liable to be ejected from cultivating possession.

Ross, J.—(After stating facts as set out above his Lordship proceeded). The contentions on behalf of the plaintiffs-appellants are: first, that the defendants are estopped by the judgment of the Board of Revenue in the partition proceedings from claiming to retain possession of these lands; secondly, that the claim of the defendants is virtually one contesting the allotment made by the Board of Revenue and cannot be entertained under S. 119 of the Estate Partition Act; and thirdly, that the acquisition of these holdings by the defendants as co-proprietors was an acquisition for the benefit of all the proprietors and that they were not entitled to retain possession of the lands after partition of the estate, the plaintiffs' remedy against exclusive possession by any cosharer being a suit for partition. The first two contentions do not call for any detailed consideration. It is true that the defendants gave up their claim that these lands were raiyati lands, in the partition proceedings, and that the lands were allotted as bakasht lands by the Board of Revenue in order to equalize the amount of bakasht lands held by the different proprietors in the different takhtas; it is true that the judgment of the Board of Revenue shows that the allegation that lands were raiyati lands was not pressed before the Board, but there is nothing to show that the defendants gave up the position recorded in the record of rights that they held the lands under S. 22 (2). The order of the Board of Revenue was that if the arrangement suggested in the judgment could be made without any valid objection, effect should be given to it; otherwise the existing arrangement would have to stand. It appears that effect was given to the arrangement suggested and the partition was confirmed.

Subsequently it was brought to the notice of the revenue authorities that there had been a misunderstanding and that the lands which were allotted as bakasht were not lands of which direct possession could be given. But as the partition had been confirmed, nothing resulted from these subsequent proceedings except certain pious observations. The contention of the learned counsel for the appellants is that the judgment of the Board of Revenue gave them a clear title to direct possession of these lands and that the subsequent proceedings were ultra vires. The subsequent proceedings were without any effect and did not purport to effect anything. But the judgment of the Board of Revenue whether due to a misunderstanding or not, could not take away any title to the possession of these lands which was in the defendants, and did not purport to do so. Strictly speaking all that it declared was that the lands were bakasht lands, and this is not denied. But whether they were bakasht lands of which direct possession would be given to the proprietor of the takhta in which they were

situated on partition is another question altogether and is unaffected by the judgment of the Board of Revenue. Nor do I see how S. 119 of the Estates Partition Act can assist the appellants. That is a section which bars certain suits and it is not available to the plaintiffs in these actions and to argue that the defence is in effect contesting the allotment made by the Board of Revenue is in my opinion begging the question at issue.

The main argument on behalf of the appellants rests on certain observations of the Judicial Committee in *Midnapore Zamindari Company Ltd.* v. *Naresh Narayan Roy* (1) where it is said that partition is the remedy which a co-owner has if he and his other co-owners cannot agree as to how the lands which they hold in common should be managed ; and further:

" if the Midnapore Company has in fact been cultivating any of these lands, it cannot by such separate use of the lands, have acquired any jote rights in them. Even if the Midnapore Company purchased any jote rights in lands held in common by the cosharers, such a purchase would in law be held to have been a purchase for the benefit of all the cosharers, and the jote right so purchased would by the purchase be extinguished."

Now this general statement of the law must be read subject to the provisions of S. 22 (2) of the Bengal Tenancy Act, where the consequences of the purchase of an occupancy holding by a person jointly interested in the land as proprietor are enacted. Learned counsel relies on the language of that sub-section and contends that if it be construed strictly it has no application after partition occurs. The section enacts that a co-proprietor acquiring an occupancy right in land " shall be entitled to hold the land subject to the payment to his co-proprietors ...of the shares of the rent which may be com time to time payable to them."

He argues that as from the moment of partition there are no longer any co-proprietors, the sub-section ceases to have any operation ; and the land must be treated as ordinary bakasht land falling to the direct possession of the proprietor of the takhta to which it is allotted. In principle I do not see why this consequence should ensue. S. 22 (2) confers a privilege on the purchasing cosharer which is in derogation of the common law right of the other cosharers as stated in the judgment of the Judicial Committee, quoted above. I do not see what there is in partition to take away that privilege. On the contrary it would appear that the partition only removes the necessity for the limitation on the effect of the purchase and would set free the holding to be operated upon by the ordinary provisions of the law. In other words, Section 22 (2) imposes a limitation on the rights of the cosharers for the benefit of the purchasing co-sharer ; and there is no reason why this limitation should be removed by reason only of a partition taking place. That no undue stress is to be laid on the word "co-proprietors' in the sense contended for by the appellants would appear from the decision of this Court in *Bambahadur Lal* v. *Gungora Kuer* (2) where the status conferred by S. 22 (2) was discussed and it was held that the status created was a peculiar status which attached to the cosharer so long as he remained a co-sharer ; it was held that when the cosharer parted with his interest in the estate he lost the right to retain land under that section. But in referring to the decisions where it had been held that on partition the purchasing cosharer was entitled to retain possession of land recorded in his name under S. 22 (2) of the Bengal Tenancy Act, Kulwant Sahay, J. said,

"In these cases the interest of the co-sharer who had purchased the holding did not cease, he continued to be the proprietor after the partition and hence it was held he was entitled to retain possession."

His right to possession was therefore, not limited to the period of the co-proprietorship, but continued because the co-proprietor continued to be a proprietor (though of another *takhta*) after the partition. The authorities bearing directly on the question are conclusive in favour of the respondents. In *Ram Prasad* v. *Gopal Chand* (3) the precise question now under consideration was dealt with and it was held that the defendants could not be ejected from such lands upon partition, and that the legislature never intended nor did the language of section 22 (2) give rise to the interpretation that the co-proprietor acquiring an occupancy holding by purchase, although entitled to retain possession on payment of rent to his cosharers, must give it up the moment the estate in which the land is situate is partitioned among

(1) A. I. R. 1924 P. C. 144.

(2) A. I. R. 1925 Patna 547.

(3) [1921] 2 P. L. T. 163

the co-proprietors. The same view was taken in *Nandkishore Singh* v. *Mathura Sahu* (4) where the argument that the purchasing co-proprietors ceased to be co-proprietors after the partition and that the partition effected a complete change in the status was dealt with and was negatived. A similar view was taken in *Basdeo Narain* v. *Radha Kishun* (5), a case which dealt with S. 22 (2) of the Act as it stood before the amendment in 1907. In that case their Lorships observe as follows:

Now if this be correct, something must happen subsequent to the acquisition of the holding by the cosharer landlord to put an end to the holding. It is suggested that the partition between the cosharer landlords puts an end to the holding; but in my judgment there is no foundation for this argument in the Bengal Tenancy Act and we have not been referred to any cases which support the argument put before us by the learned vakil appearing on behalf of the respondents.

Learned counsel for the appellants relied on the decision in *Quamuddin Khan* v. *Ramyad Singh* (6) as laying down a different principle. Now that case was expressly decided on the ground that it was not a case under S. 22 (2) of the Bengal Tenancy Act, and the decisions referred to above, which were considered, were not dissented from but were distinguished precisely on that ground. The lands in that case were treated as ordinary bakasht lands of the maliks without more, which on partition would necessarily go to the proprietor of the takhta to which they were allotted.

On the principle and on authority I am of opinion that the decision of the learned District Judge in this case was correct and that the appeals should be dismissed with costs.

Das, J.—I agree.

Appeals dismissed.

(4) A. I. R. 1922 Patna 193.
(5) A. I. R. 1922 Patna 62.
(6) A. I. R. 1922 Patna 354.

✻ A. I. R. 1926 Patna 266

DAS AND FOSTER, JJ.

Ishwardas Marwari and *another*—Judgment-debtors—Appellants.

v.

Biseswar Lal Marwari and *others*—Decree-holders—Respondents.

Appeal No. 256 of 1924, Decided on 30th November 1925, from an order of the Sub-J., Manbhum, D/- 16th August 1924.

✻ (a) *Civil P. C., O. 21, R. 92—Notice—There is no limitation for notice under the rule.*

Art. 166 of the Limitation Act provides a period of 30 days for an application to set aside a sale in execution of a decree. There is no limit of time under the Limitation Act for serving notices upon the persons affected by the order under *R.* 92 : 4 *P. L. T.* 491, *Foll.* [P 267 C 1]

✻ (b) *Civil P. C., O. 21, Rr. 90 and 92—All parties affected by an application under R. 90 need not be parties to the application, but that they should have notice.*

It is not necessary to have all the parties affected by the application as parties to the application. The whole object of the rule is to provide that no adverse order should be passed in the absence of the persons affected by the order, and R. 92 protects all the persons who may be affected by an adverse order. As an application under O. 21, R. 90 is in the suit itself, all the decree-holders are already parties to the proceeding; the auction-purchaser is the only person who is not a party to the suit. [P 267 C 2]

S. C. Mazumdar and *B. P. Varma*—for Appellants.

A. B. Mukherji and *U. N. Banerji*—for Respondents.

Das, J.—Biseswar Lal Marwari, Begraj Marwari and Kissen Lal Marwari obtained a decree for R. 33,587 as against the appellants, and in execution of the decree put up to sale the property which is the subject-matter of the present application. At the auction sale, the property was purchased by the decree-holders as also by one Salegram Marwari. The sale took place on the 23rd and 24th June 1924. On the 23rd July an application was presented on behalf of the appellants under the provision of O. 21, R. 90 of the Code for setting aside the sale. In the cause title of that application Biseswar Marwari and Salegram Marwari appeared as the opposite party. A point was taken before the Court below that the application was not maintainable inasmuch as two of the decree-holders were not made parties to the application. The point found favour with the learned Subordinate Judge

with the result that he dismissed the application without investigating the merits of the case. Hence the appeal to this Court.

Article 166 of the Limitation Act provides a period of 30 days for an application to set aside a sale in execution of a decree. The article refers to the application under O. 21, R. 90 of the Code which provides for an application to set aside a sale on the ground of material irregularity or fraud in publishing or conducting it. R. 92 provides that no order shall be made by the Court until notice of the application has been given to all persons affected thereby. The learned vakil appearing for the appellants contends that there is no limit of time under the Limitation Act for serving notices upon the persons affected by the order and that the learned Subordinate Judge should have acceded to his application for having notices served on the decree-holders. In my opinion the contention is right and ought to be upheld. This view has been taken both by the Bombay High Court and in our Court. In *Ganesh Bab Naik* v. *Vithal Vaman Mahalaya* (1) the auction-purchaser was not made a party to the proceedings under O. 21, R. 89 of the Code, and it was contended that the application was not maintainable in the absence of the auction-purchaser. Scott, C. J., with the concurrence of Chandavarkar, J., in dealing with the point said as follows :

> The first point in this appeal is a preliminary point taken by the auction-purchaser that he was a necessary party to the application of the judgment-debtor under O. 21, R. 89 and that the application is bad as he was not made a party to it within thirty days. The contention is based upon the decision of the Allahabad High Court in *Ali Gauhar Khan* v. *Bansidhar* (2). The point, however, is now provided for by the Civil Procedure Code of 1908. O. 21. R. 92, which says that where in the case of an application under R. 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale, provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

A similar view was taken by this Court in *Mt. Bibi Zainab* v. *Paras Nath* (3). The decision of this Court is binding on us, and it is a decision with which I entirely agree. The learned advocate appearing on behalf of the respondents contends that an application under O. 21, R. 90, cannot be entertained by the Court unless all the persons affected by the application are named in the cause title. With great respect, I think that R. 92 meets the objection completely. There is no particular meaning in the contention that it is necessary to have the parties affected by the application as parties to the application. The whole object of the rule is to provide that no adverse order should be passed in the absence of the persons affected by the order, and R. 92 protects all the persons who may be affected by an adverse order by providing that :

> no order shall be made unless notice of the application has been given to all persons affected thereby.

In one sense all the decree-holders are already parties to the proceeding ; for an application under O. 21, R. 90 is an application in the suit itself and therefore it seems to me that they are all parties to the proceeding. The auction-purchaser is the only person who is not a party to the suit ; but so far as the auction-purchaser in the present case is concerned, he was cited as an opposite party in the proceedings under O. 21, R. 90. In my opinion the learned Subordinate Judge should have acceded to the application of the decree-holders and issued notices upon those decree-holders who were not named in the cause title as the opposite party.

I would accordingly allow the appeal, set aside the order passed by the Court below and remand the case to that Court for disposal according to law. Costs are reserved and will be dealt with by the learned Subordinate Judge.

Let the record be sent down at once.

Foster, J.—I agree.

(1) [1913] 37 Bom. 387=15 Bom. L. R. 244.
(2) [1893] 15 All. 407=(1893) A. W. N. 173.
(3) A. I. R. 1924 Patna 37.

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* A. I. R. 1926 Patna 267

ADAMI, J.

Sheo Prasad and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 25 of 1926, Decided on 18th February 1926, against, an order of the Judicial Commissioner Ranchi, D/- 21st November 1925.

* *Penal Code, S. 415—Merely taking thumb-impression on a blank piece of paper is not sufficient.*

Mere taking thumb-impression on a blank piece of paper is not sufficient to prove an intention to use the paper dishonestly and does not constitute an offence under S. 415. [P 269, C 1]

Rai Guru Saran Prasad and *S. R. Sen Gupta*—for Petitioners.

Judgment.—The Petitioners Nos. 1 and 2 were convicted in the trial Court under S. 417 read with S. 511 and sentenced to rigorous imprisonment for three months and a fine of Rs. 50 each; the third petitioner, a constable, was sentenced to three months' rigorous imprisonment with a fine of Rs. 20 under S. 417 read with S. 114 of the Indian Penal Code. On appeal the convictions, under S. 417 read with S. 511, of the first two petitioners have been changed to convictions under S. 417; the conviction of Petitioner No. 3 under S. 417 read with S. 114 was maintained. The sentences have been maintained.

The Petitioner No. 1 is the landlord of village Narekela and Petitioner No. 2 is his relation.

There had been a paddy looting case in the village and the sub-Inspector, accompanied by the constable, Petitioner No. 3, went to the village in order to take recognizance from certain tenants who were to be witnesses in the case. The Sub-Inspector stayed at the house of Petitioner No. 1. The witnesses were called to that house to give recognizance to appear. The Sub-Inspector was sitting in the room, and the first and second petitioners as well as the constable were also there. Before thumb-impressions were taken on the recognizance bonds, it was suggested that it would be well first to test the ink with which the impressions were to be taken. The witnesses were therefore called forward to give their sample thumb-impressions on a blank piece of paper; one of them refused, but the others allowed the constable to ink their hands, and their impressions were taken on the blank piece of paper. The Petitioner No. 1 supplied the paper, and after the impressions were put on it took it away. The next day the witnesses, who had put their thumb-impressions on the paper went to their padree, the Rev. Father Bodson, and told him what had happened and expressed to him a fear that the landlord, with whom their relations were strained, might use the blank piece of paper with the thumb-impressions upon it for the purpose of bringing a case against them. The padre went to the police station and told the Sub-Inspector the fears of the villagers and the Sub-Inspector promised to get the paper back. Next day the constable, Petitioner No. 3, was sent to the village from the police station and recovered the blank piece of paper from the Petitioner No. 2 and tore away from it the portion containing the thumb impressions. The thumb impressions were taken on the 28th November 1924. Nothing more was done till the 13th February 1925 when the Sub-Divisional Officer of Gumla went on tour to the village. There he was told by the tenants that they were frightened that the Petitioner No. 1 might make use of the document on which they had put their thumb-impressions. Their statement was taken and was treated as a complaint, and proceedings were started against the three petitioners, and they were convicted of an attempt to cheat and, in the case of Petitioner No. 3, of an abetment of the offence of cheating.

An appeal was made to the Deputy Commissioner, Ranchi. He held that the facts showed, not an attempt to cheat, but a substantive offence of cheating and altered the convictions accordingly.

The learned Judicial Commissioner was then moved to refer the case to this Court, but he refused; for he found that the appellate Court had come to the right conclusion in finding that the petitioners had committed the offence of cheating.

The prosecution case was that the petitioners intended from the first to obtain from the tenants thumb-impressions on a blank piece of paper by representing to them that the reason for taking the thumb-impressions was in order that the ink to be used might be tested, and that their dishonest or fraudulent intention was afterwards to convert the blank piece of paper into some document which they might use against the tenants for their own end.

Both the Courts below have found that the action of the petitioners amounted to more than a preparation for the offence. Evidently the Courts held that the petitioners fraudulently or dis-

honestly deceived the tenants, and thus intentionally induced them to put their thumb-impressions on the blank paper, an action which they would not have taken if they had not been deceived by the petitioners; also that the action, which the tenants were deceived into taking was likely to cause damage or harm to the tenants in body, mind, reputation or property. There can be no doubt that, if the petitioners had this fraudulent or dishonest intention and deceived the tenants and thus induced them to give their thumb-impressions, on the wording of S. 415 the offence of cheating would be complete when the action was taken. But there are elements in this case which, to my mind, cannot bring the action of the petitioners under the purview of S. 415. In the first place, with regard to the intention, it is assumed that the petitioners intended to convert the blank piece of paper into some written instrument and to use it for their own purpose dishonestly. Had the petitioners gone one step further and made any entry on the blank piece of paper, if they had begun writing the words " I promise ; " there might have been some good reason for concluding that the intention was to use this paper for dishonest purposes. But in the present case all we have is a blank piece of paper with thumb-impressions upon it; there is nothing written on the paper, and that being so, there is hardly sufficient to show a dishonest intention. It is not enough to assume that probably the intention of the petitioners was to convert the blank paper into a written document. Were we to find that the mere presence on the paper of thumb impressions was sufficient to show an intention to use that paper dishonestly, then the hobby of autograph collecting would be a dangerous one.

Then again the Court must be satisfied that the tenants were deceived. One tenant refused to give his thumb-impression : the other tenants in their evidence state that they gave their thumb-impressions unwillingly. It is clear, I think, thumb-impressions were given by these tenants not under the impression so much that they were being used as a test, but because the Sub-Inspector and the constable were present and they were told to put their thumb-impressions on the paper. Their action in going to the padre next day and telling him what their fears were would point to the fact that they were not deceived. To my mind the elements necessary for constituting the offence of cheating were not all present in the present case. There may have been a preparation to cheat but the action of the petitioners fell short of an attempt at cheating and the substantive offence of cheating. No attempt was ever made to use the blank piece of paper, and, so far as we know, nothing was ever written on it. The petitioners could not even be prosecuted for an attempt at forgery until they had made some entry on the blank paper which would show a stage going further than mere preparation,

The convictions of the petitioners must be set aside and they must be acquitted and set at liberty the fines, if paid, will be refunded.

Convictions set aside

✻ A. I. R. 1926 Patna 269

DAS AND FOSTER, JJ.

Mt. Rajdulari Bibi and *others*—Plaintiffs—Appellants.

v.

Mt. Krishna Bibi and *another*—Objectors—Respondents.

First Appeals Nos. 193 and 206 of 1924, Decided on 9th December 1925, against the decision of the Dist. J., Bhagalpur, D/- 23rd June 1924.

✻ *Will—Execution—Proof— Ordinarily parties propounding must prove the due execution—Party writing Will getting benefit under it—Court must be careful in satisfying itself that the instrument expresses the true will of the testator, but this is the rule of prudence and not of law—Evidence Act, S.* 101.

It is not open to doubt that the onus probandi lies in every case upon the party propounding the Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. But the onus is in general discharged by the proof of capacity and the fact of execution from which the knowledge of and assent to its contents by the testator will be assumed. This is the general rule, but if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is

removed and it is judicially satisfied that the paper propounded does express the true will of the deceased *Barry* v. *Butlin* [(1838) 2 *Moor P. C.* 480, *Ref.*; *Tyrrell* v. *Painton* (1894) *Pro. Dv.* 151, *Ref.*] But the rule mentioned above that a Court should be cautious is a rule of prudence not a rule of law. The circumstance is at most a suspicious circumstance of more or less weight according to the facts of each particular case, but in no case amounting to more than a circumstance of suspicion, and the benefit to be derived by such writer must be a pecuniary benefit, a legacy, for instance, more or less of a substantial nature. [P 270, C 1, 2]

P. C. Manuk, *S. M. Mullick*, *A. T. Sen*, *G. S. Prasad*, *Kailashpati*, *G. P. Das*, *Shiveshwar Dayal*, *Navadwip Ch. Ghose* and *N. C. Roy*—for Appellants.

K. P. Jayaswal, *S. M. Gupta*, *T. N. Sahay*, *L. K. Jha*, *Hassan Jan* and *Murari Prasad*—for Respondents.

Das, J.—This appeal arises out of an application for probate of an instrument dated the 24th July 1923, and purporting to be the Will of Raghunandan Lal who died on the 31st August 1923. He left behind him two daughters Rajkumari Bibi and Sarat Kumari Bibi, the widow of a deceased brother Krishna Bibi, a sister Rajdulari Bibi and two sons of the sister, Lachmi Prosad, and Hari Prosad. By the alleged Will five persons Rai Bahadur Sakhi Chand, Rai Bahadur Suraj Prosad, Ganesh Lal, Madhusudan Das and Maulvi Jamaluddin were appointed executors and trustees and, subject to certain legacies, the whole of the estate was, in substance, devised to the trustees with directions that they should open a fund called "Raghunandan Poor Students Fund" and give scholarships and pecuniary assistance to the poor boys of the colleges and schools in the province of Bihar irrespective of religion or creed. The legacies provided by the Will are as follows:

Rs. 500 per month to each of his daughters from generation to generation;

Rs. 150 per month to Krishna Bibi;

Rs. 500 to his sister Rajdulari and after her death to her sons;

Rs. 300 to Ram Bibi, widow of a deceased uncle of the testator and after her death to her son Sri Krishna Das and

Rs. 200 to his cousin Madhusudan Das.

On the 27th February 1924, four of the executors nominated in the Will, namely, Rai Bahadur Sakhi Chand, Ganesh Lal, Madhusudan Das and Maulvi Jamaluddin applied for grant of probate to them, and caveats were filed on behalf of the daughters of the deceased as also on behalf of his sister-in-law Krishna Bibi. We are not concerned in these proceedings with the caveat filed on behalf of Krishna Bibi who supported it by an affidavit in which she raised the question as to whether the testator had power to execute the Will in question. The eldest daughter Rajkumari Bibi beyond filing the caveat took no further part in the proceedings; but there was an active opposition on the part of the youngest daughter who was a minor and who was represented in those proceedings by her father-in-law. Two important questions of fact were raised on her behalf, first whether the deceased had testamentary capacity to execute the Will; and secondly, whether there was undue influence exercised on the deceased by Jamaluddin. The learned District Judge has answered both these questions in favour of the propounders of the Will; and the decision of the learned District Judge on these points has not been challenged before us on behalf of Sarat Kumari Bibi. But the learned Judge rejected the application for probate on the ground that there was no sufficient evidence that the deceased was aware of the contents of the Will and that the Will expressed his intention; and the only point which we have to consider in this appeal is whether the learned District Judge was right in rejecting the application for grant of probate on the very narrow ground assigned by him.

The principal incidents in connexion with the execution of the Will according to the case of the propounders may be shortly stated. The testator dictated the instructions of the Will to Hasan Ali a few days before the Will was actually executed. Hasan Ali, according to the evidence of the propounders of the Will, evidence which has been accepted by the learned District Judge, had taught the testator Urdu in his younger days and had kept up some sort of connexion with the testator ever since. Now these instructions were taken down by Hasan Ali in two or three loose sheets of paper and were made over by the testator to Jamaluddin on the 21st July, with instructions that he should take them to Mr. Ranjit Sinha, a leading vakil practising at Bhagalpur, and have a Will drafted by the vakil on the footing of these instructions. On the evening of the 21st July, Jamaluddin saw Babu Ranjit Sinha

and the latter dictated a Will to him in Urdu. On the morning of the 22nd July, Jamaluddin read out the Will as drafted by the vakil to the testator and made over both the instructions and the draft Will to the testator. On the 23rd July, the testator gave the draft Will to Jamaluddin and asked him to make another copy of it omitting the 12th paragraph containing the appointment of executors and trustees and the appointment of Jamaluddin as the life manager of the estate. According to the evidence of Jamaluddin the object of the testator was to take the opinion of Rai Bahadur Surja Prasad on the draft prepared by Mr. Ranjit Sinha without letting him know that he was proposing to appoint him one of the executors and trustees under the Will. The deceased then sent for Rai Bahadur Surja Prasad, a leading vakil practising in Bhagalpur, and the latter came to see him that evening about 6 p. m. The copy of the draft prepared by Ranjit Babu, that is to say, the draft as dictated by Ranjit Babu with the omission of the 12th paragraph of it, was then read out to the Rai Bahadur in the presence of the testator and the Rai Bahadur proposed to take it home with him and to consider the matter the next morning. This was acceded to and the Rai Bahadur took the draft with him. On the morning of the 24th July, Jamaluddin saw the Rai Bahadur who made certain verbal alterations in the draft. Under instructions from the testator Jamaluddin then made a fair copy of the draft adding the missing paragraph. He then read it out to the testator who approved of it. At about 2 o'clock that day, the testator accompanied by Jamaluddin and his medical attendant Satish Babu motored to the office of the District Sub-Registrar and sent for the Rai Bahadur from the District Court. The Rai Bahadur came to the motor-car where the deceased was waiting for him and the deceased then executed the Will in the presence of the Rai Bahadur and Satish Babu, who put their signatures as attesting witnesses. Jamaluddin then signed the Will as the scribe thereof. The whole party then walked into the office of the District Sub-Registar and the testator presented the Will in a sealed cover for being deposited with the Sub-Registrar. The Sub-Registrar asked him whether he had executed the Will voluntarily and "with an understanding of its contents" to which the testator answered in the affirmative. The testator left for Calcutta on the 25th July, where he died on the 31st August.

Before dealing with the grounds assigned by the learned Judge in support of his conclusion a little more in detail it will be useful to refer to the 12th paragraph which seems to me to be the key to the decision. That paragraph runs as follows :

> For carrying out the above mentioned provisions I, the executant, appoint five trustees : (1) Rai Bahadur Babu Sakhi Chand, Superintendent of Police at present manager of the Jagannath Temple residing at present at Puri (2) Rai Bahadur Surja Prasad, son of Babu Ras Behari Sahay, deceased, Vakil, resident of Mahalla Khanjarpur, district Bhagalpur, (3) Babu Ganesh Lal, my Knalera brother-in-law (cousin-in-law) resident of Mahalla Guzri, Patna City, (4) Babu Madhusudan Das, son of Babu Ram Narayan Das, deceased, (who is) my relative, resident of Mahalla Golaghat, Bhagalpur and proprietor of the Gopal Steam Press, Bhagalpur (5) Maulvi Jamaluddin Khan, the present manager of my estate, resident of Mahalla Imamnagar, district Bhagalpur. The said Maulvi has up to this time been serving me faithfully and conscientiously and he is acquainted with everything. He is therefore assigned the position of manager for life in addition to that of a trustee. His montly salary for manager's work is fixed at Rs. 250. Over and above this salary, proper conveyance charges shall be given to him, and travelling and daily diet expenses shall be given as in my time, or the trustees may make proper arrangement therefor in such manner as they may think proper. In case of increase of the income of the estate, the trustees shall allow him such increment of salary as may be decided upon by them. This item of expenditure shall be a charge on my estate under the head establishment charges. Travelling expenses both ways etc. shall be paid to trustees Nos. 1 and 3 when they shall come over on business of the estate and the same rule shall apply to the trustees living at a distance. This (item of) expenditure shall be a charge on my estate under the head—Allowance to trustees.

The learned Judge refers to the evidence to show that Jamaluddin took an active part in the preparation of the Will and he refers to the 12th paragraph of the Will to show that Jamaluddin took a benefit under the Will ; and professing to be guided by *Barry* v. *Butlin* (1) and *Tyrrell* v. *Painton* (2) he thought that probate should not be granted unless those propounding the Will satisfied the conscience of the Court that the testator knew and approved of the contents of the Will. Now it happened that the testator,

(1) [1838] 2 Moor. P. C. 480.
(2) [1894] P. D. 151.

who was an educated man and was a Municipal Commissioner and had served his town as Honorary Magistrate, signed the Will in the presence of Rai Bahadur Surja Prasad, a witness whose testimony cannot be impeached in any Court of law and was in fact not impeached in the arguments before us. It also happened that the testator himself went to the office of the District Sub-Registrar and deposited the Will with him under the provision of the Indian Registration Act and that in answer to a question put to him by the District Sub-Registrar, he said that he had executed the Will" with an understanding of its contents." But the learned Judge thought that the case was one in which the signature of the testator did not carry with it the presumption of knowledge of the contents of the Will ; and, as in his view there was not sufficient evidence of knowledge he thought that it was not a case in which he should pronounce in favour of the validity of the Will.

It is not open to doubt that the onus probandi lies in every case upon the party propounding the Will ; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. But the onus is in general discharged by the proof of capacity and the fact of execution from which the knowledge of and assent to its contents by the testator will be assumed. This is the general rule ; but on this an exception has been engrafted which was stated in these words in *Barry* v. *Butlin* (1).

> If a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does not express the true will of the deceased.

As was said in *Tyrrell* v. *Painton* (2) :

> the principle is that whenever a Will is prepared under circumstances which raise well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed ;

but it is obvious that the rule to which expression is given in the two cases cited above is a rule of prudence not a rule of law ; and it is worth while stating the following passage from the judgment of Baron Parke to show the meaning and the extent of the rule upon which the learned Judge in this case has so largely founded his judgment :

> All that can be truly said

said the learned Baron

> is that if a person, whether attorney or not, prepares a Will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case ; in some of no weight at all, as in the case suggested, varying according to circumstances ; for instance, the quantum of the legacy and the proportion it bears to the property disposed of, and numerous other contingencies, but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased.

Now, is there a suspicion inherent in the Will itself that it does not express the mind of the testator ? The learned Judge says that Jamaluddin, the writer of the document, takes a considerable benefit under the Will and that that is a circumstance which must excite the suspicion of the Court. The benefit, in my opinion, must be a pecuniary benefit, a legacy, for instance, more or less of a substantial nature ; but in this case Jamaluddin does not take a legacy under the Will. All that is provided for in the Will is that Jamaluddin should be retained as manager for life at a salary of Rs. 250 per month. (His Lordship then discussed the circumstances under which Jamaluddin was appointed the manager under the Will and proceeded.) In my opinion it is satisfactorily established that the testator knew and approved of the contents of the Will.

I would allow the appeal, set aside the order passed by the Court below and direct that probate do issue. In regard to the question of costs, most serious charges were made against Rai Bahadur Surja Prosad and Jamaluddin by Jugal Kishore Prosad, the father-in-law of Sarat Kumari Bibi. I think that he should pay the costs incurred by the petitioners in this Court and in the Court below. We assess the hearing fee in this Court at Rs. 1,500. This judgment will govern the other appeal and there will be no order for costs in that appeal.

Foster, J.—I agree.

Appeal allowed.

A. I. R. 1926 Patna 273

BUCKNILL, J.

Madras and *Southern Mahratta Ry. Co.*—Defendant No. 2—Petitioner.

v.

Firm, Gopal Rai Ram Chunder—Plaintiff—Opposite Party.

Civil Revision No. 114 of 1925, Decided on 11th June 1925, against a decision of the Small Cause Court Judge of Bhagalpur, D/ - 4th December 1924.

(a) *Damages—Breach of contract—Railway Company entrusted with goods to be carried—Route not fixed—No delay in delivery—Railway is free to carry goods by any route.*

Where there was no contract on behalf of the Railway Company that they would carry the goods by any particular route and there was nothing except the name of the place of despatch and the name of the place of consignment contained in the contract between the parties concerned.

Held: so long as the goods were delivered at the place of consignment and so long as they were delivered in due course, i. e., within a reasonable time, it mattered not to the plaintiffs or to anyone else by what particular route the goods may have been, for the convenience of the Railway Company, despatched by the carriers.

[P. 274, C. 1]

(b) *Damages—Suit for—Cause of action based on breach of contract—Damages based on delay cannot be claimed.*

Where the suit as framed is not one brought in tort for damages due to loss occasioned to the plaintiffs on account of the retardation in delivery but simply for compensation for the loss of the articles which were found missing, the action is founded on breach of contract and in no sense on tort based upon the delay and damages founded on delay cannot be claimed.

[P. 274, C. 2]

N.C. Sinha, N.C. Ghosh and *B.B. Ghosh*—for Petitioner.

B. C. Sinha and *R. A. N. Sinha*—for Opposite party.

Judgment.—This is an application in civil revisional jurisdiction made under somewhat peculiar circumstances. The matter relates to a suit brought by the opposite party here against among other defendants the Madras and Southern Marhatta Railway Company on behalf of which Company the present application has been made. The facts in the case were very simple.

The plaintiffs in the suit were consignees of some packages of cloth; these packages of cloth were despatched from Bangalore City in the south of India to Bhagalpur station on the Bengal and North - Western Railway Company's system. The route by which the goods were actually to travel was not of course indicated in any of the papers which formed the contract between the consignors, the consignees and the Railway Companies over whose systems the goods might travel. There might have been a variety of Railways over the lines of which the packages might have gone; at any rate we know the East Indian Railway Company, the Bengal and North-Western Railway Company, and Madras and Southern Mahratta Railway Company were or might have been concerned. Now there is no doubt that when the consignees came to take delivery of the packages there was a shortage of 21 seers of cloth in one package; no one knows and no one can tell where or how this missing cloth was abstracted or why the shortage existed. The plaintiff in due course brought a suit for compensation for the loss of these articles and it was heard before the Small Cause Court Judge at Bhagalpur. The action of course was for damages for breach of contract and on the face of the contract had there been no intervening circumstances the suit would no doubt have been impossible to defend; but as is so often the case in these cases relating to the carriage of goods by Railways in India the Company, that is to say, the applicants here, had contracted with the party, for whom they were carrying these goods under special terms. The special terms are contained in what is known as risk note; the person on behalf of whom the goods are carried obtains their carriage at a low rate or what is frequently termed a special reduced rate; but in consequence of obtaining the carriage of his goods at this low rate he absolves specifically the Railway Company from responsibility for loss under certain circumstances. The principal points of importance in the present risk note which covered the articles in question in this case are to the effect that the Railway Company is to be held not responsible for any loss, destruction, deterioration or damage to any of the goods consigned except in the event of any complete parcel being lost under circumstances which could be shown to be due to the wilful neglect of the Railway Administration or to other circumstances, such as, theft and the like to which I need not here refer as they are

not material. The defence, therefore, of the Railway Company was simply that they were protected from the claim made by the plaintiffs by virtue of the exemptions from liability contained in this risk note to which I have referred. It is very difficult to see how the Small Cause Court Judge came to the conclusion that the plaintiffs could succeed. However, he seems to have arrived at this conclusion on grounds which I must say appear to me to be erroneous. In the first place, he seems to think that, because the goods did not travel so far as they possibly could on the Bengal and North-Western Railway Company's system, they had been despatched or carried on what he calls a wrong route. There is, however, to my mind no force in such a suggestion ; there was no contract on behalf of the Railway Company that they would carry the goods by any particular route ; there is nothing except the name of the place of despatch and the name of the place of consignment contained in the contract between the parties concerned ; it appears to me that so long as the goods were delivered at the place of consignment and so long as they were delivered in due course, i. e., within a reasonable time, it mattered not to the plaintiffs or to anyone else by what particular route the goods may have been, for the convenience of the Railway Company or for what other reason we do not know, despatched by the carriers. The Small Cause Court Judge has also based his finding in favour of the plaintiffs upon another ground and that is that there was delay in delivery of the goods. As a matter of fact it does not appear to me that there was undue delay in the delivery of goods ; the plaintiff could have obtained delivery earlier than they did ; but there was considerable correspondence and discussion as to whether the plaintiffs would take delivery without conditions or what is known as open delivery, that is to say, delivery under protest. There is, however, a far more important objection to the case being decided in favour of the plaintiffs on the ground of delay and this is that the suit as framed was not as one brought in tort for damages due to loss occasioned to the plaintiffs on account of the retardation in delivery but simply for compensation for the loss of the articles which were found missing. Certainly the action was founded on breach of contract and in no sense on tort based upon the delay. There were no damages proved to have been sustained by the delay in the delivery and the action was brought simply upon the question of whether or not there had been breach of the contract and whether or not the Company was liable in view of the exemptions which were contained in the Risk Note Form H. I am quite unable to see how the plaintiffs can in this case succeed. I think the decision of the Small Cause Court Judge was wrong in law. The route was immaterial and the idea that there were any damages, due to delay, appears to me to be quite untenable. The action should have been dismissed, and although one must feel some sympathy with the plaintiffs in respect of their loss it is quite clear to my mind that if they accepted the provisions of the Risk Note Form H they must put up with the loss.

Under these circumstances the decision of the Small Cause Court Judge of the 4th of December last must be set aside and the suit must be dismissed. There will be no order as to costs of this Court.

Suit dismissed.

✻ A. I. R. 1926 Patna 274

DAS AND ROSS, JJ.

Muhammad Ibrahim and *others*—Decree-holders—Petitioners.

v.

Chhattoo Lal and *others*—Judgment-debtors—Opposite Party.

Civil Revision No. 328 of 1925, Decided on 5th January 1926, from the order of the Munsif, Muzaffarpur, D/- 20th June 1925.

✻ *Civil P. C., S. 41—Court to which decree is transferred for execution ceases to have jurisdiction after it has taken action under S. 41.*

The mere striking off of an application for execution does not terminate the jurisdiction of the Court to which the decree is sent for execution to execute the decree ; but the jurisdiction ceases as soon as the Court takes action under S. 41 and certifies to the Court which passed the decree the circumstances attending the failure on the part of the transferee Court to execute the decree. [P. 275, C. 2]

Khursaid Husain and *Syed Ali*—for Petitioners.

T. N. Sahai and *A. N. Lal*—for Opposite Party.

Das, J.—This application is directed against the order of the learned Munsif of Muzaffarpur, dated the 29th June 1925. The circumstances are these: On the 18th May 1925 the petitioners obtained a decree for Rs. 144-5-9 against Chhattoo Lal in the Court of Small Causes in Calcutta. On the application of the petitioners, the Small Cause Court, Calcutta, sent the decree for execution to the Muzaffarpur Court under the provisions of S. 39 of the Code of Civil Procedure. The petitioners applied for execution in accordance with law: but ultimately, on the 21st May 1924, his execution case was dismissed for default and the learned Munsif in seisin of the matter certified to the Calcutta Small Cause Court the circumstances attending the failure to execute the decree. The order of the learned Munsif is not before us, but we must presume that he acted under S. 41 of the Code of Civil Procedure. Thereafter certain properties belonging to the judgment-debtors were sold at the instance of Mohan Prosad Sahu who had obtained a decree as against the judgment-debtors and there being assets of the judgment-debtors in the hands of the Muzaffarpur Court the petitioners applied, on the 20th April 1925, for attachment of the surplus sale-proceeds which amounted to Rupees 3,436-15-3. On the 27th April 1925 Rs. 1,432-15-9, out of the surplus sale-proceeds in the hands of the Muzaffarpur Court, was attached at the instance of the petitioners, the Court at the same time directing that the petitioners should obtain another order from the Calcutta Small Cause Court transferring the decree for execution to that Court. The order of the Calcutta Small Cause Court transferring the decree for execution to the Muzaffarpur Court was received on the 30th April 1925. Thereafter other decree-holders who had obtained decrees as against the judgment-debtors came in and the surplus sale-proceeds were attached at the instance first of Mohan Prosad, then of Bihari Lal and lastly of Sham Narain Singh. On the 24th June 1925 the petitioners applied for liberty to withdraw Rs. 1,432-15-9 out of the surplus sale-proceeds. They contended th at their attachment was first in order of time and that they were entitled to withdraw the sum attached without reference to the rights of the other attaching creditors. Similar applications were presented on behalf of the other attaching creditors and they applied for rateable distribution of the assets. The learned Munsif took the view that S. 73 of the Code of Civil Procedure did not apply to the facts of the case and that the distribution of the assets could only be made in order of respective attachments. That being the position, the petitioners contended that their attachment being first in point of time, they were clearly entitled to withdraw the sum of Rs. 1,432-15-9 from the Court. In dealing with that application the learned Munsif came to the conclusion that the attachment at the instance of the petitioners was wholly irregular inasmuch as the Muzaffarpur Court was no longer in seisin of the execution case and it is the propriety of this order which is the subject-matter of the application before us.

I am of opinion that the view taken by the learned Munsif is correct and that this application must be dismissed. I entirely agree that the Court executing a decree sent to it has the same powers in executing such decree as if it had been passed by itself; but the point is whether on the 27th April 1925, the date of the order of attachment of Rs. 1,432-15-9, the Muzaffarpur Court had any jurisdiction over the matter. It will be remembered that on the 21st May the Muzaffarpur Court had not only dismissed the execution case for a default but acted under the provision of S. 41 of the Code of Civil Procedure. Various cases have been cited before us by Mr. Khursaid Hussain but those cases decide that the mere striking off of an application for execution does not terminate the jurisdiction of the Court to which the decree is sent for execution to execute the decree; but at the same time those cases recognize that the jurisdiction ceases as soon as the Court takes action under S. 41 of the Civil P. C. and certifies to the Court which passed the decree the circumstances attending the failure on the part of the transferee Court to execute the decree. In the Full Bench case of *J. G. Bagram* v. *J. P. Wise* (1) the question was whether or not a Court to which a decree passed by another Court has been transmitted under the provisions of S. 286 of Act VIII of 1859 was competent of

(1) 1 B. L. R. 91=10 W. R. 46 (F. B.).

its own authority to entertain a fresh application for execution after the first application had been struck off by itself for default. It will be noticed that in the Code of 1859 there was no provision similar to the one contained in S. 223 of the Code of 1882 or S. 41 of the present Code. In dealing with this point Mr. Justice Mitter said as follows:

It will be further observed that the law does not contain any express provision as to how and when the execution records are to be re-transmitted to the Court by which the decree was passed. I do not mean to say that such a thing cannot be done at all, but all that I mean to say is that it can be done only when an order to that effect has been received from the said Court, or from some other Court exercising appellate jurisdiction over the matter.

It was clearly recognized by Mr. Justice Mitter in the Full Bench case to which I have referred that the jurisdiction to execute a decree by a Court to which the decree is sent for execution ceases when an order is passed by that Court to the effect that it is unable to execute the decree. In delivering the judgment of the Full Bench, Peacock, C. J., said as follows:

The order for striking off the application for execution of the decree did not strike the copy of the decree off the records of the Court to which it was sent for execution; and so long as it remains there, the Court to which it was sent may deal with it, and any application for execution of it, as if it was a judgment of that Court.

But in this case the decree was no longer in the record of the Muzaffarpur Court on the 27th April 1925. This was the view which, I think, was taken by Mookerjee, J., in *Manorath Das* v. *Ambika Kant Bose* (2). That learned Judge said that the Court to which a decree is transferred for execution retains its jurisdiction to execute the decree until the execution had been withdrawn from it or until it had fully executed the decree and had certified the fact to the Court which sent the decree or had executed it so far as that Court was able to do within its jurisdiction and certified that fact to the Court which sent the decree. In my opinion S. 41 of the Code makes it quite clear that the Court to which a decree is sent for execution has no jurisdiction to deal with execution case after it takes action under S. 41 of the Code.

I would dismiss this application with costs. Hearing fee: two gold mohurs.

Ross, J.—I agree.

Application dismissed.

(2) [1909] 13 C. W. N. 533=9 C. L. J. 443.

* A. I. R. 1926 Patna 276

JWALA PRASAD AND BUCKNILL, JJ.

Sadhu Saran Pandey—Appellant.

v.

Nand Kumar Singh and *others* — Respondents.

Second Appeal No. 84 of 1923, Decided on 4th November 1925, in connexion with the setting aside of the abatement order in the appeal.

* (*a*) *Civil P. C., O. 22, R. 4—One of the heirs brought on record in time—Suit or appeal does not abate.*

Where a respondent dies leaving more than one heir, and one of the heirs is substituted as heir on the record within time but substitution of the names of the other heirs is made after the time allowed, appeal will not abate under R. 4 of O. 22. *A. I. R.* 1925 *Patna* 123, *Foll.* [P 276 C 2]

* (*b*) *Civil P. C., O. 22, Rr. 4 and 9—Each of the appellants is entitled to apply under the rules independently.*

Each one of the appellants is entitled to prosecute the appeal and to apply for setting aside abatement and for substitution. [P 277 C 1]

A. K. Ray and *Ambicapada Upadhya*—for Appellant.

Sambhu Saran—for Respondents.

Judgment.—This is an application to set aside abatement and substitution of the persons named in the petition as heirs of the deceased respondent. Notices of the appeal were served upon respondents Nand Kumar Singh, Ramsingar Singh and Mathura Prasad Singh. Thereafter Nand Kumar Singh died, in whose place the appellant substituted the name of his widow, Mt. Ramkali Koer At a subsequent stage it turned out that Nand Kumar had another widow named Sheoratan Koer and that Mathura Prasad Singh was also dead leaving his widow Sri Krishna Koer. The appellant therefore applied for setting aside the abatement and for substitution of the co-widow Sheoratan Koer, as an heir of Nand Kumar Singh in addition to the first widow already brought on the record. They also applied for substituting Sri Krishna Koer in place of Mathura Prasad Singh.

As far as Nand Kumar Singh is concerned there is no difficulty; for Ramkali, one of his widows, was brought on the record within time and the appeal did not, therefore, abate so far as he was concerned. In accordance with the authority of this Court in the case of *Lilo Sonar* v. *Jhagru Sahu* (1) and in consonance with R. 4, of O. 22, the appeal against

(1) A. I. R. 1925 Patna 123.

Nand Kumar Singh could not abate, as one of his heirs was already on the record. The bringing in of Sheoratan Koer on the record is only for the purpose of the final disposal of the appeal.

As regards Mathura Prasad Singh the contention has been that the application for substitution of his widow in his place was not made in time, nor was the application for setting aside abatement. There has been, no doubt, a great delay in making the application in this behalf; but the circumstances of the case show that the appellant came to know of the death as alleged by them at a time which is well within the time they are entitled to make an application for setting aside the abatement. The notice upon Mathura Prasad was duly served and the appeal has far advanced. No doubt the appellant is required to be diligent in prosecuting his appeal; but after he gets the notice served upon the respondent he is not required to watch the movements of the respondent and as to whether he is dead or alive. The law, therefore, is that he must make an application within ninety days of his knowledge of the death; but it has to be seen whether the date of knowledge has been falsely alleged. There is no reason why the appellant who has been prosecuting this appeal so diligently would allow the appeal to abate if he had known of the death of Mathura Prasad Singh earlier than what is stated in his application. Mr. Sambhu Saran says that the appellant must have known of the death of Mathura Prasad at least on the 20th of September 1924, when notice of a rent suit brought by the widow of Mathura Prasad against one of the appellants was served upon him. In support of this contention he has filed a certified copy of a notice of the aforesaid suit. The service return shows that the appellant refused to give the receipt. This in itself does not show that the summons or notice was actually served upon the appellant. Moreover, the notice to one of the appellants is not notice to all, and there is nothing to indicate that the appellant apprised the death of Mathura Prasad to the rest of the appellants. Each one of the appellants is entitled to prosecute the appeal and to apply for setting aside abatement and for substitution. Therefore the certified copy of the notice filed by Mr. Shambu Saran is not conclusive upon the point.

In the circumstances of the case I would set aside the abatement and allow substitution as prayed for. The name of Sri Krishna Koer be substituted in the place of Mathura Prasad Singh, deceased. The name of Sheoratan Koer, co-widow of Ramkali Koer, be included as a respondent and a legal representative in place of Nand Kumar Singh.

Application allowed.

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* A. I. R. 1926 Patna 277

ADAMI, J.

Fariduddin Ahmed—Petitioner.

v.

Abdul Wahab—Opposite Party.

Civil Revision No. 477 of 1925, Decided on 18th February 1926, against the order of the Dist. J., Patna, D/- 30th November 1925.

* *Civil P. C., O. 26, R. 4—Plaintiff having no choice of forum—Commission may be issued for his examination.*

The general ground on which an application to examine a plaintiff on commission is refused is that the plaintiff has his choice of forum and therefore should not be allowed to ask for his examination elsewhere than in the Court in which he has instituted his suit.

Where the petitioner applied for the removal of a guardian appointed by Court and for his own appointment as guardian in a particular Court and he had no choice of forum, and he himself and also the minor whose guardian was sought to be removed had been residing within the jurisdiction of that Court and it was only because he got a post elsewhere that he had removed from the jurisdiction of the Court.

Held: that commission should be issued for his examination outside the jurirdistion of the Court: *A. I. R.* 1925 *Pat.* 125, *Dist.* [P 277 C 1]

K. Hussain Ali Khan and *S. M. Wasi*—for petitioner.

W. H. Akbari and *Ghulam Mohammad*—for Opposite Party.

Judgment.—This application is directed against an order of the District Judge of Patna, directing a commission to issue for the examination of the opposite party and his wife at Dacca. The opposite party is a Reader in Arabic at the Dacca University; his wife is a girl aged about 19 who is the daughter of the petitioner. The petitioner had been appointed the certificated guardian of the girl and her property before her marriage to the opposite party. Last June when the opposite

party was living in Patna, where his wife's property is situated, he made an application for the removal of the petitioner from the guardianship and for the appointment of himself in his place. The girl was then residing with her father. The wife was enceinte, and the opposite party, who had got the appointment of Reader in the Dacca University, took away his wife from her father's care to Dacca, and since then the opposite party and his wife have been residing in Dacca. In October or November last, when the case came on before the District Judge, the opposite party applied to be allowed to be examined on commission in Dacca, and, after hearing the objection of the petitioner, the District Judge ordered the commission to issue for the examination both of the opposite party and of his wife. The ground given by the Opposite Party for the issue of such commission was that his wife was likely to be giving birth to a child in the near future and that she would not be able to leave Dacca, nor would he himself be able to leave her in that condition; also as Reader in Arabic at the University, it would be difficult, if not impossible, for him to leave his duty.

The grounds taken before this Court are that, though a commission may be issued for the examination of a defendant or witnesses, it is irregular to grant such a commission in the case of the plaintiff who has had the choice of forum and must abide by his choice. It is also urged that it will cause great harassment to the petitioner if he has to go to Dacca, and also, if the girl is under the charge of her husband at the time the examination is conducted on commission, it is likely that the opposite party will be able to have influence with her.

With regard to the argument that in the case of a plaintiff a commission should not issue outside the jurisdiction, the learned advocate has relied on the case of *Muhammad Akbar Ali Khan* v. *Herbert Francis* (1). There the plaintiff, residing in London, had instituted a suit against the defendant, residing in Patna in the Patna Court, and applied for his examination on commission in London. Das, J., after reference to the several cases, held that the plaintiff, having had the choice of forum was not entitled to claim to be examined on commission outside the jurisdiction. The cases of *Sarat Kumar Ray* v. *Ram Chandra Chatterji* (2), *Nadin* v. *Bassett* (3) and *Ross* v. *Woodford* (4) were relied on. The general ground on which an application to examine a plaintiff on commission is refused is that the plaintiff had his choice of forum and, therefore, should not be allowed to ask for his examination elsewhere than in the Court in which he has instituted his suit.

In the present case the opposite party had no choice of forum; he himself was residing in Patna and so were his wife and the pesitioner, and his wife's property was situate also in Patna. It was only because he received the appointment of Reader in Arabic at the Dacca University that he had to go to Dacca.

Under the circumstances of this case, I think that the order of the District Judge should be upheld. However, the issue of a commission to Dacca will cause the petitioner expense and trouble, and I think it should be directed that the costs of the commission to the petitioner should be deposited by the opposite party before the commission issues and I would direct accordingly. Also, if it can be managed, the learned District Judge should direct that the examination of the wife of the opposite party should be conducted in the presence of an officer of the Court at Dacca elsewhere than in the opposite party's house.

Subject to these modifications, the application is rejected. Hearing fee: two gold mohurs.

Application partly allowed.

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(1) A. I. R. 1925 Patna 125.

(2) A. I. R. 1922 Cal. 42.

(3) [1884] 25 C. H. D. 21=53 L. J, Ch. 253 =32 W. R. 70=49 L. T. 454.

(4) [1894] 1 Ch. 38=63 L. J. Ch. 191=70 L. T. 22=8 R. 20=47 W. R. 188.

* A. I. R. 1926 Patna 279

ADAMI AND BUCKNILL, JJ.

Nilmadhab Chaudhury and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals No. 80, 81 and 86 of 1925, Decided on 23rd July 1925, from a decision of Asst. Sessions J., Saran, D/- 28th March 1925.

* (a) *Criminal P. C., S. 337—Approver disclosing offences other than that he is charged with, while making full disclosure, should not be proceeded against for the further disclosed offences.*

Where an accomplice has been allowed to become an approver and in his confession he discloses offences other than that which was the subject of the charge against him and from liability to answer for the consequences of which he was, even wrongly, under the impression that he had freed himself by his confession and pardon; the Crown should not proceed against him for such other offences. No question can arise where the offence clearly pardoned and that or those further disclosed by the approver are obviously closely linked together. [P. 286, C. 1, 2]

(b) *Criminal P. C. (as amended in 1923), Ss. 164 and 1—Change by amendment is made to allow Presidency Magistrate to record confession—Application of Code to police is, but to Magistrate is not, barred by S. 1—(Per Adami, J.).*

The change by amendment of 1923 is made to allow a Presidency Magistrate to record a confession in the course of a police investigation. Although S. 1 bars the application of the Code to the police it does not bar an application of the Code to a Magistrate or any Magistrate not being a police officer. [P. 282, C. 2]

(c) *Criminal P. C., S. 164—Confession—Evidence Act, S. 24—(Per Adami, J.).*

The Code itself contains no provisions as to the confession being made in open Court. [P. 283, C. 1]

(d) *Criminal P. C., S. 164—Accused asked as to his willingness to make voluntary statement, his reply in the affirmative and warning him subsequently is sufficient—(Per Adami, J.).*

It is sufficient compliance with the law if the accused when asked whether he wishes to make a statement voluntarily, replies that he does, then he is warned that any statement he might make would be used as evidence against him and even then he replies that he is willing to make a statement. [P. 283, C. 2]

(e) *Evidence Act, S. 24—Approver*

The hope of being made an approver does not show that the confession is not voluntary. [P. 282, C. 2]

(f) *Criminal P. C., S. 164, and Ch. XIV—Construction*

Even though the police in Calcutta may not conduct their investigations in precise accordance with the provisions of Ch. XIV, to construe S. 164 which would exclude its utilization in Calcutta during the police investigation at any time afterwards before the commencement of the enquiry or trial, is to read it in a somewhat strained and unnatural sense: *A. I. R. 1925 Cal. 587; 15 Cal. 595 (F. B.), Dist.* [P. 287, C. 2]

Ali Imam, B N. Mitter, H. N. Bose and *K. N. Mitra*—for Appellants.

Sultan Ahmed—for the Crown.

Adami, J.—The three appellants have been found guilty of the offence of criminal conspiracy and have been sentenced to three years' rigorous imprisonment and a fine of Rs. 50 each under S. 120 B of the Indian Penal Code; the appellant Nilmadhab has been sentenced to six years' rigorous imprisonment and a fine of Rs. 100 under S. 467 and to three years' and a fine of Rs. 50 under S. 420; the other two appellants have received like sentences under Ss. 467 and 420 read with S. 34 of the Indian Penal Code. Nilmadhab Chowdhry has also been sentenced to one year's rigorous imprisonment under S. 419.

The case for the prosecution has been set out in a very careful judgment by the learned Assistant Sessions Judge in great detail and with much care. It is not necessary therefore to state here more than a short story of the circumstances.

The appellants Nilmadhab Chowdhry, Haripado Mukherjee and Sudhir Kumar Bannerjee in 1921 were residing in Calcutta. The first named kept a baker's shop, the third named a tobacconist shop, and Haripado Mukerjee was employed as a telegraphist at the Central Telegraph Office. Haripado and Sudhir used to meet at Sudhir's shop and talk over their straitened circumstances. Haripado was a relation of Sudhir and one day told him that he had hit on a plan for getting money. He said that it would be easy to obtain money by means of bogus telegraphic money orders; it would only be necessary to forge telegraphic money order forms and place them in the clip in the Telegraph Office and then arrange for some one to be at the office of receipt to take over the money covered by the telegraphic money order. Sudhir told Nilmadhab of this plan and they asked Haripado to come and see them. He, however, did not come at first for he had gone away, so a telegram was sent to a man in Chittagong to find out what his address was. Haripado saw this telegram in the Telegraphic office, and came to see Sudhir and Nilmadhab, and plans were then made. (Then the judgment stated their plans proposed to be carried out

in different places and proceeded.) Nilmadhab accepted the pardon and gave evidence before the committing Magistrate and in his deposition made a full statement of what had happened in 1921 in connexion with the telegraphic money orders to Chapra as also of the tapping of the telegraphic wires and of the forgery of the Government currency notes in 1923. Haripado and others were committed to the Criminal Sessions of the Calcutta High Court and there again Nilmadhab gave evidence, but at the Sessions his evidence related only to the note forgery case and he was not allowed to make statements as to the previous events. The result of the trial was that Haripado and his fellow accused were acquitted by Mukerjee, J, and the jury.

Thereafter, on the strength of the previous investigation in 1921, and the confessions of the three appellants, they were put on trial before the Assistant Sessions Judge of Saran and have been convicted as stated at the beginning of this judgment. Each of the appellants has lodged a separate appeal, but the three have been heard together.

Before the committing Magistrate and also before the Assistant Sessions Judge, the appellant Nilmadhab claimed that the pardon tendered to him in Calcutta in the Note forgery case absolved him from prosecution with regard to the present case in Chapra; but the Courts have overruled the objection. In his behalf Sir Ali Imam now claims before us, that having been tendered the pardon in the note forgery case, which is known as the Masjidhari case, the prosecution of Nilmadhab is unwarranted, and that he ought to be granted the protection of the Crown.

I have cited above the application for tender of pardon and the order granted by the Magistrate in Calcutta. From the order it is clear that the pardon related to the case of a big and widespread conspiracy to forge and utter Government currency-notes and Nilmadhab was required to make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. It can be argued, as it has been argued, that the order shows clearly that the pardon was intended to extend only to the case then on inquiry, and also it is reasonable to argue that the conspiracy for the forging of the Government currency notes was an absolutely distinct conspiracy from that which had as its object the obtaining of money by bogus telegraph orders; two years elapsed between the two conspiracies. Strictly speaking I think there would be good ground for holding that the conspiracies were different and the cases also were separate. But there are several considerations which lead one to think that Nilmadhab, at the time he accepted the pardon and undertook to make a full discovery of all the circumstances conceived that the pardon covered all the events which were disclosed by him in his confession and his statement before the committing Magistrate. Nilmadhab had made a confession which showed the connexion of the appellants with one another right from March 1921 and he gave a connected narrative of events since then, leading up to the forgery of the currency notes. The inquiring Magistrate allowed him to make a statement in his deposition of all those occurrences, and in fact two witnesses were called from the Telegraph Department to give evidence as to the telegraph money order fraud, which had really nothing to do with the Masjidbari case. Had it been the intention to confine the pardon only to the forgery case it would have been the duty of the Magistrate to warn Nilmadhab against making any incriminating statements in his evidence which were not relevant to the forgery case; but no such warning was given. Nilmadhab had made a full confession and it is likely that he considered it incumbent upon him, under his promise, to make:

> A full and true disclosure of the whole of the circumstances within his knowledge relative to the offence.

to include in his evidence a narration of the part he and his associates had played in the fraud at Chapra. The fact that the inquiring Magistrate allowed him to give evidence of these previous activities shows I think that he considered that his enquiry covered them, and the prosecution also called witnesses who had nothing to do with the note forgery case, but deposed with regard to the bogus telegraph money orders.

Sir Ali Imam has relied on the case of *Queen-Empress* v. *Ganga Charan* (1).

(1) [1888] 11 All. 79=(1888) A. W. N. 289.

There a person was charged before a Magistrate at Benares with offences punishable under Ss. 471, 472 and 474 of the Penal Code, having made a confession to a Magistrate in respect of those offences. In that confession he mentioned that part of the forgery had been committed in Calcutta and he was sent down to Calcutta and there charged before a Magistrate with offences punishable under Ss. 467, 473, and 475. The Magistrate at Calcutta tendered him a pardon and it was accepted, and the approver gave evidence for the prosecution. The prosecution failed, but the pardon was not withdrawn. Subsequently the Magistrate at Benares continued the trial there under Ss. 471, 472 and 474. Ganga Charan pleaded not guilty; but he did not specifically plead his pardon as a bar. It was held in that case by Straight, J., that the terms of the pardon granted to the accused by the Calcutta Magistrate protected the accused from trial at Benares. That case was somewhat different to the present one, because there the offence at Calcutta was mixed up with the offence at Benares and they were cognate cases. In the present case the offence with which Nilmadhab is now charged cannot be said to be an offence cognate with the offence in the Masjidbari case; a long interval of time separated the two; still the remarks made by Straight, J., in his judgment have application to the present case. He said:

> Though approvers may be infamous persons they are nevertheless entitled to have faith kept with them by the Courts, and in dealing with the question as to what a pardon is to cover, and how far it is to extend, I should not be inclined to apply too technical tests and should rather look to substance than mere matters of form.

He referred to the wording of S. 339 Criminal P. C. as to the consequences that follow on a non-compliance by an approver with the conditions of his pardon and its withdrawal; and said:

> He may be tried for the offence in respect of which the pardon was tendered or for any other offence of which he appears to have been guilty in connexion with the same matter. . . . .It must be borne in mind that in countenancing these pardons to accomplices the law does not invite a cramped and constrained statement by the approver; on the contrary it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence, or offences, as to which he gives evidence, and when he has given his evidence, I do not think that the question, of how far it is to protect him; and what portion of it should not protect him, ought to be treated in a narrow spirit.

In a note by Mr. Greaves to the 4th edition of Russel on Crimes, Vol. III, page 597, it is said:

> If however, the prisoner, having been admitted as an accomplice to one felony be thereby induced to suppose that he has freed himself from the consequences of another felony, the Judge will recommend the indictment for such other felony to be abandoned. Where an accomplice made a disclosure of property which was the subject-matter of a different robbery by the same parties under the impression that by the information he had given previously as to the robbery of other property he had delivered himself from the consequence of having the property he so disclosed in his possession Coleridge, J. recommended the counsel for the prosecution not to proceed against the accomplice for feloniously receiving such property.

Then again the learned Judge says:

> I need not point out the importance, when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence, which may be capable of corroboration, and this is what I understand the Criminal Procedure Code to mean when it speaks of a full and true disclosure of the whole of the circumstances within his knowledge.

I agree with the learned Government Advocate that this case I have cited is not altogether on all fours with the present case, but I do think that the appellant Nilmadhab understood that in order to carry out his promise he had to make a full disclosure of everything he knew and therefore told about the proceedings at Chapra in 1921.

Sir Ali Imam has pointed out, too, that it would be most unsafe that there should be any impression allowed to gain ground that a promise of pardon once tendered can be broken by the Crown. There are indications throughout the inquiry before the Magistrate in Calcutta that the Chapra case was held to be in some way connected with the Masjidbari case.

Had it been the intention to confine the pardon only to the Masjidbari case, the appellant should not have been allowed to make any statements in his deposition with regard to the earlier occurrences.

Though technically the contention of the Crown is correct, I think that in this case it is right to give Nilmadhab the benefit of any doubt there may be as to his understanding of the pardon and to hold that the pardon granted in Calcutta should excuse him from prosecution in the present case. On

those grounds I would acquit the appellant Nilmadhab.

On behalf of the appellant Haripado, his counsel, Mr. Bose, contends in the first place that the confession made by Haripado was not a confession covered by Ss. 164 and 364 of the Code of Criminal Procedure ; and, even assuming that the confession could be recorded under those sections, there were such grave irregularities and such disregard of the provisions of the Code with regard to the manner in which the confession should be recorded that Haripado's confession should be held to be inadmissible. He urges that the evidence to prove that the confession was made voluntarily is wanting and that without the confession there is little or no evidence to prove the charges against Haripado.

Mr. Bose has relied chiefly on the judgment of Mukherjee, J., in the Masjidbari case This judgment is reported in *Emperor* v. *Panchlowari Dutt* (2) and I may say that Mr. Bose has adopted all the arguments used by the learned Judge in that case,

The point taken is that, under S. 1 of the Code of Criminal Procedure, the Code does not apply to the police in the towns of Calcutta and Bombay, and as S. 164 lies within Chapter XIV of the Code which is headed "Information to the Police and their powers of investigation" an investigation by the police in Calcutta is not made under the Code. It is argued that the confessions were made in the course of an investigation by the police and, therefore, the Code does not apply. The learned Judge, as also the learned counsel, rely on the case of *Queen-Empress* v. *Nilmadhab Mitter* (3). It was there held that S. 164 does not apply to a confession made before a Presidency Magistrate. That decision was come to before the amendment of the section in 1923. Before the amendment the section began : "Every Magistrate not being a police officer may" but in 1923 before those words, the words

> Any Presidency Magistrate, any Magistrate of the 1st Class and any Magistrate of the 2nd Class, especially empowered in this behalf by the Local Government may if he is not a police officer

were substituted. It is quite obvious that the change was made to allow a Presidency Magistrate to record a confession in Calcutta in the course of a police investigation, otherwise the amendment seems altogether meaningless. S. 1 bars the application of the Code to the police ; it does not bar an application of the Code to a Magistrate or any Magistrate not being a police officer. We cannot believe that the amendment was made without the intention of giving a Presidency Magistrate power to record a confession. It is sought to be explained that the addition of the words "Any Presidency Magistrate" has been made in order to allow such a Magistrate to record confessions where the police have conducted an investigation outside Calcutta. The Assistant Sessions Judge has decided the point, which he fully considered, by finding that as a matter of fact the investigation into the present case was made in Chapra and had concluded in September 1921.

S. 164 allows the recording of a confession by a Presidency Magistrate to be made at any time after a police investigation has closed so long as it is before the commencement of the inquiry or trial. In the present case the investigation at Chapra had closed and the confession was recorded before the commencement of the trial. If the confession was not made under the Code of Criminal Procedure then the rest of the arguments by Mr. Bose regarding irregularities and contraventions of the provisions of the Code of Criminal Procedure will have little or no force.

Mukerjee, J., in his judgment, having found that the confession was not recorded under the Code, comes to the conclusion that S. 80 of the Evidence Act will not apply to the confession which came before the Court without any presumptive force of its own, and its admissibility must be judged as that of any other evidence ; and, after citing the rules drawn up by the Government of Bengal for the recording of confessions and noticing that some of those rules had not been observed by the Presidency Magistrate who recorded Haripado's confession, states—

> The position would have been quite different if the confession did not stand before me divested of the presumption under S. 80 of the Evidence Act and had been duly recorded under some provisions

(2) A. I. R. 1925 Cal. 587.
(3) [1888] 15 Cal. 595 (F. B.).

of the law, or, at any rate, if I was able to hold that all proper precautions had been taken in recording them.

The learned counsel, following Mukherjee, J.'s judgment, contends that the confession is bad because Haripado was arrested on the 4th December and was kept in custody of the police until he made his confession before the Magistrate on the 13th.

Elsewhere in his judgment Mukherjee, J., stated that he absolutely disbelieved the allegations made by Haripado that he had been tortured or illtreated or induced by the police to make his confession, but yet he thinks that the custody of the accused by the police was against the rules and had an effect on his decision as to the voluntary character of the confession. As a matter of fact the rules of the Calcutta Police are not the same as the provisions of the Code as to the detention of accused persons. It appears that, according to the custom of the Calcutta Police, the accused are kept in custody by the police during an investigation but are produced every day before the Deputy Commissioner who sees them and questions them as to whether they have been illtreated by the police or whether any inducement has been held out to them; and in this case we have evidence that this custom was observed and no complaints were made to the Deputy Commissioner by Haripado or Sudhir.

The next contention is that under the rules the confession should have been recorded in open Court, whereas the evidence shows that the Presidency Magistrate on subsequent days had Haripado brought to his house where a statement of his confession was continued. The Code itself contains no provisions as to the confession being made in open Court. On the first date the Magistrate recorded the confession in Court, after taking every precaution to see that no police were present. It is complained that the confessions were recorded piecemeal, but it was unavoidable owing to their length. It would have been better perhaps if during the period of the confession the accused had not been returned to the custody of the police at night; but there is nothing to show in this case that Haripado was in any way tampered with.

The next objection is that the Presidency Magistrate did not properly warn Haripado and did not tell him that he was a Magistrate. The Magistrate was called as a witness and states that, to the best of his memory, he did warn Haripado that he was a Magistrate, and he has also given full evidence that he was quite satisfied that the confessions were made voluntarily.

I have read through the confession and the warnings given by the Magistrate to Haripado, and in my opinion they fully meet the requirements of the law. The Magistrate states that before he recorded the confession he took the precaution that he was satisfied that there was no police officer in Court and that he questioned Haripado as to the time during which, and the places where, he had been under the control of the police. Haripado told him that he was arrested at 4 a.m. on the 4th December and was taken to the Bartola thana on a Saturday and was sent from Lal Bazar Police office at 2 p. m. on the 13th December to have his confession recorded. It may be that the Magistrate might have obtained more details as to the police custody but I think there was sufficient compliance with the law. Haripado was asked whether he wished to make a statement voluntarily and he replied that he did, and then he was warned that any statement he might make would be used as evidence against him; but Haripado replied that he was willing to make a statement.

It was next contended that the confession is bad because it is recorded in English. Haripado is a Bengali and so was the Magistrate; but it appears that he made his confession partly in English and partly in Bengali, a mixture of both. Under the circumstances I hold that in recording the confession in English the provisions of S. 364 were complied with. Haripado knows English well and he read through his statement and corrected it, showing that he fully understood it.

It is hinted that Haripado made his confession under the impression that, if he confessed, he would be made an approver, and, therefore, the confession is bad. It may be that he did hope to be made an approver, but unless this inducement was held out to him by some person in authority, the thought in his own mind will not affect the admissibility of the confession. There is no sign of this

inducement having been held out to him. He made a very full and convincing confession which bears every sign of being voluntary and has no traces in it of being tutored or invented. As a matter of fact Haripado was kept in custody with Nilmadhab and Lalit, who had also confessed, and when it was proposed to segregate the men they expressed their desire to remain together.

Haripado retracted his confession by a petition dated the 23rd December which was filed in Court on the 27th. It is stated that the retraction was made because Haripado saw that he was not going to be made an approver. The hope of being made an approver does not show that the confession was not voluntary.

It was lastly urged that as the confession was retracted it can only be acted upon if there is strong corroboration, and it is contended that in the present case corroboration is wanting; for instance the evidence that Haripado had consorted with Sudhir and Nilamdhab is scanty and the Assistant Sessions Judge has relied on certain evidence to prove association which really carries no proof. It was pointed out that the fact that Haripado and Nilmadhab both dealt with the same Kabulis in borrowing money can have little effect in the present case, since the evidence shows that the borrowing was in 1923, whereas the present offence was committed in 1921. But the confessions show that these men joined in borrowing money from Kabulis from the start, and the evidence that afterwards in 1923 they were still borrowing together is corroborative. Prosecution Witness No. 26 says that he never heard Haripado and Nilamadhab talking together in the baker's shop, but he saw them together.

Then Mr. Bose dealt with the point that the learned Assistant Sessions Judge had drawn inference against Haripado from the evidence that he had taken leave from the telegraph office on several occasions. He was present on the two days when telegraphic money orders in this case were despatched from Calcutta. He contends that no inference should be drawn from this. But it is striking that Haripado was present on those days and had been absent both before and afterwards. The confession of Haripado, though retracted, is strongly corroborated by the confessions of Nilmadhab and Sudhir and those two confessions are strongly corroborated by the mass of evidence which has been recorded in this case. Haripado is an intelligent man and was a telegraphist and would be able to act, as he is said to have done by Nilmadhab and Sudhir, showing the other two how to prepare bogus money orders while he himself would have the opportunity to place them in the clip.

In my opinion the confession of Haripado was made voluntarily and is corroborated, and I have no doubt in my mind that his conviction was correct.

With regard to Sudhir, the learned vakil who appears for him has stated that his arguments are the same as those of Mr. Bose on bahalf of Haripado. But the case against Sudhir is supported also by the evidence of witnesses who saw him at Chapra as well as by the other confessions. In each of these confessions the accused implicates himself to the same degree as he implicates the other accused. Even were there no confession by Sudhir, the oral evidence on the record is fully sufficient to prove his guilt; for he has been fully identified by Sahebjan and the witnesses from Darbhanga. I have no doubt about his guilt.

It has been contended that the sentences passed on these appellants are too severe. But considering the seriousness of the offence and the amount of which they have cheated the Government and the public, I do not think that the sentence of six years' imprisonment which they are called upon to undergo is by any means too severe. I am not inclined to reduce it.

The learned Assistant Sessions Judge has written an exceedingly good and careful judgment which meets every one of the arguments put forward on appeal before us fully and completely. He has shown the greatest care in dealing with the documentary evidence and in explaining the methods which are followed in despatching telegraphic money orders through the Calcutta telegraph office. He has taken the greatest pains over the case and shown that he has fully understood and considered every point in it.

The result of the appeal is that the appellant Nilmadhab Chowdhury will be

acquitted and set at liberty, and the appeals of Sudhir and Haripado are dismissed.

Bucknill, J.—The learned counsel, Sir Ali Imam, who has appeared for the appellant Nil Madhab Chowdhury has only raised before us one point upon his client's behalf. It is simply that he was granted a pardon in a criminal case the circumstances in which were relative to the offence of which he has been convicted in the present proceedings which are now before this Court ; and that in view of this pardon he cannot properly be convicted of the offence of which he has actually been convicted. In order to appreciate this plea, it is necessary to ascertain exactly what took place. (Here his Lordship reiterated the facts as stated in the previous judgment and proceeded.) Now the learned Government Advocate who has appeared here in support of the present conviction of the appellant, suggests that the admission at the Magisterial enquiry of all this evidence to which I have just referred, was a blunder ; and he points to the fact, in support of his suggestion, that at the trial it was all dropped ; no questions being then asked by the standing counsel for the Crown of the appellant and of other witnesses relating to the money order frauds. It may here be mentioned that the prosecution failed and that the accused in the note forgery case were all acquitted. There can be no question but that the appellant fulfilled all the conditions under which his pardon was granted.

But the appellant was then proceeded against in connexion with the money order frauds : he was tried before the Assistant Sessions Judge at Sıran ; he at once raised the plea that in view of the pardon which had been granted to him in the Masjidbari note forgery case he could not be put on his trial in connexion with the money order frauds. This defence having been raised as a plea in bar was heard by the Additional Sessions Judge, who decided the point against the appellant ; against this order the appellant appealed to this Court ; the matter came before Mr. Justice Mullick and myself and we ordered that he should be allowed definitely to take this plea at the trial. The point was heard before the Additional Sessions Judge at the trial and was argued at considerable length. The learned Additional Sessions Judge came to the conclusion that the note forgery case was in no way associated with the money order frauds and that consequently the pardon granted to the appellant did not extend so far as to protect him against a prosecution for his participation in the latter crime. The matter, however, is not quite so simple as it might at first sight appear.

One of the most important considerations is as to why the appellant should have been allowed to implicate himself in offences other than the note forgery if it was not thought by those who represent the Crown directly or indirectly that such other offences were associated with or relative to the note forgery case. Another important consideration is as to from what consequences the appellant was under the reasonable impression that he had delivered himself when he received a pardon in consideration of his turning approver. It is true that when he made his confession it had not apparently been then mooted to him that he might obtain a pardon and be called as a prosecution witness, but he was allowed without any warning to implicate himself in most serious crimes which were not then the subject-matter even of enquiry, far less of any threatened charge against himself. Although it can be argued that the three branches of crime in which the appellant admitted that he had taken part were not in point of time or partly in point of character directly connected with each other, it is idle to contend that they did not form a part of the doings of a criminal association of persons, the membership of whose band varied to some extent but remained constant, so far as the appellant and his co-accused Haripado were concerned.

Then, again, with full knowledge that the appellant had hopelessly involved himself in a series of offences, the Public Prosecutor, when suggesting that the appellant should be allowed to become an approver, puts forward as a reason the suggestion that the whole plot must be brought to light and selected the appellant as the most suitable of the accused for utilization by the Crown as a prosecution witness because of the fact that the appellant had already made a full disclosure of the whole conspiracy. Undoubtedly the language of the pardon it-

self is restricted because it merely speaks of the case being one of a big and widespread conspiracy to forge and utter Government currency notes; but, on the other hand, the pardon is offered if the appellant makes a full and true disclosure of the whole of the circumstances within his knowledge relative the offence. How then can one infer what were at that time thought to be the whole of the circumstances relative to to the offence? What did the appellant think they were and what did the Public Prosecutor and the Additional Presidency Magistrate also think they were? To my mind from the fact that the whole of the incidents relating to the money order frauds and the tapping of the telegraphs was given in evidence at the magisterial enquiry indicates that the impression of the appellant, the Public Prosecutor and the Additional Chief Presidency Magistrate was that those incidents were relative to the note forgery case. Had that impression not existed, it would indeed be difficult to contemplate either that the appellant should have given evidence relating thereto or that the Public Prosecutor or the Magistrate could possibly have allowed so much testimony in no way relevant or relative to the note forgery case to have been given.

The fact that later on at the trial itself, the standing counsel thought fit not to allow a repetition of this evidence to be adduced does not seem to me to affect the position. I have no doubt that, had he been asked the necessary questions the appellant would have reiterated what he had said before, but he was simply not called upon to do so. That fact cannot in the least affect the position as it existed when he was offered and accepted the pardon nor the attitude of mind of the appellant, the Public Prosecutor and the Magistrate when the pardon was tendered, agreed to and granted.

The case known as *Garside's* case (4) (of which report the Library of this Court does not unfortunately contain a copy but which is quoted in Russell on Crimes, 4th Ed. Vol. 3, p. 597) supports my view that, where an accomplice has been allowed to turn King's Evidence (i. e. has been, as it is termed in India, permitted to become an approver), and in his confession discloses offences (in that case another robbery by the same parties but quite distinct from the robbery the subject-matter of the charge) other than that which was the subject of the charge against him and from liability to answer for the consequences of which he was (even wrongly) under the impression that he had freed himself by his confession and pardon, the Crown should not proceed against him in connexion with such other offences. No question can of course arise where the offence clearly pardoned and that or those further disclosed by the approver are obviously closely linked together; such as, for instance, occurred in the case of *Queen-Empress* v. *Ganga Charan* (1) but a remark of Straight, J in his judgment in that case is well worthy of note; it is this:

> It must be borne in mind that in countenancing these pardons to accomplices the law does not invite a cramped and constrained statement by the approver; on the contrary it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences as to which he gives evidence; and when he has given his evidence, I do not think that the question of how far it is to protect him and what portion of it should not protect him, ought to be treated in a narrow spirit.

I myself cannot but think that the course of events in this case, namely, the confession, the knowledge of the Public Prosecutor of the full reference in it to the money order frauds, the wide language used in the Public Prosecutor's application and in part of the Magistrate's offer of pardon, the connexions (such as they were and small though they might be) between the offences disclosed and the admission at the magisterial enquiry of evidence as to the money order frauds show that, at the time of the pardon, it was undoubtedly thought by all concerned that the disclosures as to the money order frauds were really relative to the note forgery case.

In this view, therefore, the appellant's appeal must succeed.

It is suggested by the learned Government Advocate that the Magistrate had no power to grant such a pardon of so wide a character. This must of course depend upon whether the disclosures relating to the money order frauds were really relative to the note forgery case but even if the Magistrate was wrong in thinking that they were both relevant or

(4) [1884] 2 Low, 18.

even relative it would not be, I think, in the contemplation of the Crown that if its Court purported to grant such a pardon such Court's action should be jettisoned to the grave jeopardy of the subject.

For the above reasons I think that the appeal of the appellant Nilmadhab Chowdhury must be allowed, that his conviction and sentences must be quashed and that he must forthwith be set at liberty.

With regard to the appeals of the other two appellants Haripado and Sudhir, I have had the advantage and opportunity of reading the judgment of my learned brother with which I may say at once that I entirely agree and to which I desire only to add a few words. With regard to the intention of the Legislature in amending S. 164 of the Criminal P. C. in 1923 by the introduction of the words "Any Presidency Magistrate," an examination of what took place in the Legislative Assembly leaves no doubt. On the 31st January 1923 (see *Legislative Assembly Debates, Vol. III, Part II*, 1923, *page* 1747) it will be found that Sir Henry Moncrieff Smith in moving the amendment said :

> Sir, before we leave sub-Cl (1) of Cl. 34, I should like to invite the attention of the House to what is obviously a somewhat serious omission in the clause as drafted by the Joint Committee. It has till just this moment escaped the notice of the House. In the way it is drafted no Presidency Magistrate can record a statement or a confession. I think this is a most serious defect and I should like to ask the indulgence of the House to enable me to move an amendment which will remedy that defect. The amendment will run as follows: "That in sub-Cl. (i) of Cl. 34, before the word 'Any Magistrate' the words Any Presidency Magistrate be inserted.
>
> The motion was adopted.

It may of course justly be said that what the intention of the Legislature was is not really material when a tribunal is called upon to place a construction upon the words of a section in an enactment; but I thought that it would be as well to dissipate any doubt there might be with regard to what was in fact the intention of the Legislative Body. It is quite true that in the case of *Emperor* v. *Panchkori Dutt* (2), Mukherji, J., has held that S. 164 of the Criminal P. C., does not apply to a confession recorded in a presidency town in the course of a police investigation not held under the orders of a Presidency Magistrate under Ss. 155 and 156, sub-S. 3 of the Criminal P. C. With every respect to the opinion of that learned Judge I cannot but think that in coming to his decision he has relied upon the case of *Queen-Empress* v. *Nilmadhab Mitter* (3), but that case was decided prior to the amendment to which I have made reference above.

I am at a loss to understand how S. 1 of the Criminal P. C., can be regarded as preventing a Presidency Magistrate from recording a confession in accordance with the provisions of S. 164 he is not a Commissioner of Police or a member of the Police force. It is said that S. 164 can only be utilized when an investigation is being made by the police under the provisions of Chapter 14 of the Code or at any time afterwards before the commencement of the inquiry or trial resulting from such an investigation, and that as in Calcutta investigations by the police are not effected under the provisions of Chapter 14 the operation of S. 164 cannot be brought into play. I can only say that in my view this is a narrow construction of the section with which I do not feel that I can agree, although I am far from suggesting that it is not a possible construction. In my opinion, even though the police in Calcutta may not conduct their investigations in precise accordance with the provisions of Chapter 14, a construction of S. 164, which would exclude its utilization in Calcutta during a police investigation or at any time afterwards before the commencement of the enquiry or trial is to read it in a somewhat strained and unnatural sense.

As for the remaining points raised by the learned counsel for these two appellants I can only say that I could see no ground for thinking that there was any irregularity in the way in which the confessions were recorded nor the least indication that they were not entirely voluntary. They bore too intrinsic evidence of truth and though the appellants have now retracted them, they were in my opinion most amply corroborated.

Appellant No. 1 *acquitted.*
Other appeals dismissed

* A. I. R. 1926 Patna 288

MULLICK, AG. C. J., AND KULWANT SAHAY, J.

Debi Prasad—Plaintiff—Appellant.

v.

Jaldhar Mahton and *others*—Defendants—Respondents.

Letters Patent Appeal Nos. 20 and 21 of 1924, Decided on 15th July 1925. from a judgment of P. R. Das, J.,D/- 27th November 1924.

* (a) *Civil P. C., S. 11—Erroneous decision.*
An erroneous decision on a point of law can be res judicata ; *A. I. R. 1924 Patna 265, Foll.* [P. 288, C. 2]

* (b) *Civil P. C., S. 11—Cause of action recurring one—Still matter directly and substantially in issue is res judicata.*
Even if the cause of action for a suit is a recurring one, every matter decided in a previous suit may be res judicata which was substantially and directly in issue. [P. 288, C. 2]

B. C. Sinha—for Appellant.

Murari Prasad—for Respondents.

Mullick, Ag. C. J.—A suit for rent for the years 1315 to 1317 F. was brought by the appellant against the respondents or their predecessors in the year 1910 in the Court of the Munsif of Barh. The plaintiff alleged that the defendants were his raiyats and were liable to pay chauraha rent which is rent paid in rice.

The Munsif found that the defendants were the plaintiff's raiyats but that they were not liable for the rent inasmuch as the plaintiff had omitted to show them as his raiyats in Part II of a road cess return which he had filed in the course of a previous revaluation. He accordingly dismissed the suit.

The case was finally taken on appeal to the High Court, and in 1917 Mr. Justice Atkinson affirmed the Munsif's finding and held that S. 20 (b) of the Road Cess Act was a bar to the plaintiff's claim.

The rents for the years 1318 to 1321 F. have become barred by limitation and the present suit is brought for the years 1322 to 1325 F.

The defence taken by the tenants is that the judgment ,in the previous case raises a bar under S. 11 of the Civil P. C. The Munsif, and the District Judge in appeal, both decided against the defendants' contention and decreed the plaintiff's suit. In second appeal Mr. Justice Das has found that Mr. Justice Atkinson's decision, even if it was erroneous, was res judicata and that the present suit cannot succeed.

Since the judgment of Mr. Justice Atkinson in the previous suit it has been held by a Division Bench of this Court that it is immatarial whether a landlord in his cess revaluation return enters a raiyat's land in Part I or Part II and that so long as the land is contained in the return the landlord is entitled to recover his rent. Assuming, therefore, that Mr. Justice Atkinson's decision was wrong the question is whether S. 11 of the Civil P. C. makes that decision res judicata for the purposes of the present suit. The question depends on whether the point now in issue was directly and substantially in issue in the previous suit. It does not appear from anything that has been said in the judgment of the Courts below that the matter was not raised in the previous suit or that it was only incidentally raised : nor has the learned vakil for the appellant to-day shown us anything from the pleadings in the previous suit which would lead us to hold that the issue was not identical in the two cases or that it was not directly and substantially raised. He rests his argument before us almost entirely upon the fact that the view of the Cess Act taken by Mr. Justice Atkinson has been pronounced to be wrong by a later decision of this Court and he contends that an erroneous decision on a point of law can never be res judicata.

This point has been considered in *Ramlal Malikand* v. *Deodhari Raj* (1), and unless we are prepared to make a reference to a Full Bench we must follow that judgment. In my opinion that reasoning contained therein is correct and the present suit is barred by res judicata. It is now settled that even if the cause of action for a suit is a recurring one every matter decided in the suit may be res judicata which was substantially and directly in issue. The result is that the appeal will be dismissed with costs.

The judgment will also govern Letters Patent Appeal No. 21 of 1924.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

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(1) A. I. R. 1924 Patna 265.

* A. I. R. 1926 Patna 289

JWALA PRASAD, J.

Parshan Sahi and *others*—Plaintiffs—Appellants.

v.

G. L. Richardson and *others*—Defendants—Respondents.

Appeal No. 18 of 1923, Decided on 16th November 1925, from the appellate decree of the Addl. Sub-J., Muzaffarpur, D/- 18th September 1922.

* *Civil P. C., S. 11—Application challenging validity of a compromise decree under S. 151 dismissed—Subsequent suit for the same purpose is not barred—Civil P. C., S. 151.*

Dismissal of an application under S. 151 challenging the validity of a compromise decree is not a bar to a subsequent suit brought for the purpose of avoiding the decree on the ground of fraud. 18 *C. W. N.* 1204 *Dist.* 39 *I. C.* 891, *Foll.* [P 29 2C 1]

L. N. Sinha—for Appellants.

S. Dayal and *Sambhu Saran*—for Respondents.

udgment.—The plaintiffs are the appeHants. They ask for an adjudication of their title to and confirmation of possession over 1 bigha, 9 kathas, of land situate in mauza Yusufpatti, pargana Morwah Khurd, bearing tauzi Nos. 4388 and 4390. They also seek to recover Rs. 173-8-0 as the price of sugarcane raised on the disputed land, and an injunction restraining the defendants first party from paying the price of the sugarcane to the defendants second party. The disputed land is a part of a holding consisting of 6 bighas 9 kathas and 1 dhur. The holding belonged to the defendants second party and one Abdhu Singh. It was sold in an execution sale and was purchased in the name of Plaintiff No. 1, Parshan Sahi, on the 19th May, 1896 (vide sale certificate, Exhibit M, which shows the area sold to be 3 bighas and not 6 bighas as claimed by the plaintiffs). The plaintiffs base their title upon this auction-purchase and upon a compromise said to have been filed subsequently in Suit No. 360 of 1918 whereby the defendants and Abdhu Singh relinquished their claim to the land. The plaintiffs say that in spite of the said compromise the defendants brought a Small Cause Court suit against the defendants first party and obtained a decree for the price of the sugarcane which was supplied by the plaintiffs to the defendants first party who now refuse to give the price of the sugarcane to the plaintiffs.

The plaintiffs base their cause of action upon this refusal and on account of resistance of the possession by the defendants. Defendants second party, on the other hand, contend that at the auction sale they purchased the property in the farzi name of the Plaintiff No. 1 who is their close relation and that the alleged compromise is fraudulent, void and inoperative and that they and not the plaintiffs are entitled to the price of the sugarcane. The defendants first party have no objection to the payment of the price of the sugarcane to the party who may be held by the Court to be entitled to receive the same. The real contest is therefore between the plaintiffs and the defendants second party, and several issues were raised in the trial Court. The only important issues tried in the lower appellate Court are:

(1) Have the plaintiffs got any title to the disputed land? and

(2) Is the compromise decree binding on the defendants?

The Courts below have concurrently held that the plaintiffs have failed to prove their title to the land in dispute, and that in spite of the purchase being in the name of the Plaintiff No. 1, the defendants continued to be in possession of the property. They have further held that the auction-purchase was only farzi; that the real purchasers were the defendants second party in the name of their close relation, Parshan Sahi, whose father Ramdihal was the maternal uncle of Ramdhari, Defendant No. 5, and that Abdhu Singh is a full brother of Ramdhari. The lower appellate Court has further held that neither any dakhaldehani was taken out by the plaintiffs nor any chalan for payment of the purchase money has been produced and though the sale took place prior to 1896 and the finally published record-of-rights in 1897, yet the name of Parshan was not substituted therein. Similarly the batwara papers of 1915 contained the name Awadh Singh in respect of several plots including Plots Nos. 12 and 24 which are the disputed ones. His name also appears in Exhibits E, J and J (a) In the criminal case (Exhibit N) Defendant No. 5 was found to be in possession. It has not been shown before me that the

finding of the Court below as to the purchase being farzi in the name of Plaintiff No. 1 and the continuity of the possession by the defendants over the property in spite of the sale is in any way vitiated by the Court in not having taken into consideration any relevant evidence on the record. The finding of the Court below that the plaintiff did not acquire any title by the auction purchase of 1896 in the name of Plaintiff No. 1, is a finding of fact and not open to challenge in second appeal. As to the compromise (Exhibit 4) the Court below in concurrence with the trial Court has come to the conclusion that it was a fraudulent one. The compromise petition was filed in a Suit (No. 360 of 1919) after the aforesaid criminal case was upheld. Under this compromise, Ramdhari, Defendant No. 5, and Abdhu relinquished all claims to the entire land. The compromise, as stated therein, was to be given effect to by executing a registered deed. No registered deed was however executed. The compromise petition has not been legally proved and Defendant No. 6 who is son of defendant No. 5, is no party to it. The Court below has held that it has not been proved that the defendants had any knowledge of the terms of the compromise petition. The finding of the Court below that the compromise petition is fraudulent and inoperative is again a finding of fact and cannot be challenged in second appeal.

The learned advocate on behalf of the appellants has, however, urged that the compromise has become final and is not open to challenge by the defendants in this suit. In support of this contention he has referred to the case of *Kailash Chandra* v. *Gopal Chandra* (1). In that case, after the compromise was filed in a suit and decree prepared in accordance therewith one of the plaintiffs applied to the Court for a review of the decree and to set aside the compromise and his application was based upon the allegation that he had not consented to the compromise. The review petition was dismissed by the trial Court. Subsequently a suit was brought by another plaintiff along with the plaintiff who had applied for the review of the judgment. The ground of attack to the compromise taken in the suit was the same as in the review petition, viz., that the plaintiffs had given no consent to the compromise. It was further suggested that there was fraud. The alleged fraud was, however, negatived and the only ground of relief was the absence of consent. It was held that the dismissal of the petition of review was a bar to the subsequent suit contesting the validity of the compromise filed in the previous suit. It seems to me that the aforesaid case was decided upon the principle of res judicata inasmuch as the review matter and the subsequent suit were founded upon the same ground, viz., the absence of the consent to the compromise in question. The parties and the subject-matter of the relief sought were the same in both the proceedings in the suit and the review. The matter in controversy in the review proceeding and in the suit was decided and the relief sought was refused and the Court which dealt with the review-matter was competent to deal with the suit. All the conditions embodied in S. 11 of the Code of Civil Procedure were fully satisfied.

The learned advocate on behalf of the appellant, however, contends that the principle of the aforesaid case would apply to the present case inasmuch as the defendants had challenged the compromise decree in an application made by them under S. 151 of the Civil Procedure Code and their petition was rejected. There is no substance in this contention. The application under S. 151 was not an application which the defendants could, as a matter of right, press. It simply invoked the inherent power of the Court In the next place the matter was not gone into in the Court below and the application under S. 151 was dismissed summarily upon the ground stated by the Munsif that he could not, under the provision of S. 151, give the defendants the relief which they sought. There was no decision as to whether the compromise was fraudulent or not in the miscellaneous application of the defendants under S. 151 of the Civil Procedure Code and no res judicata can apply to a matter left undecided. The defendants in the present case stand on a firmer ground. They attack the compromise upon the ground of fraud. The learned Chief Justice, Sir Lawrence Jenkins, in the case referred to above, clearly stated that in the review question the allegation of fraud was negatived. In

(1) [1914] 18 C. W. N. 1201=26 I. C. 125.

the present case the ground of fraud urged to impugn the validity of compromise by the Court below has been upheld. The case will, therefore, be governed by the principle laid down by this Court in the case of *Ramratan Singh* v. *Khublal Gope* (2). The defendants were quite competent to take the plea of fraud in order to avoid the compromise and fraud having been once established, the compromise is void and cannot stand.

The result is that the decision of the Court below is affirmed and the appeal is dismissed with costs.

Appeal dismissed.

(2) [1917] 39 I. C. 891.

✻ A. I. R. 1926 Patna 291

DAS AND FOSTER, JJ.

Goberdhan Das and *another* —Objectors-Appellants.

v.

Jagat Narain—Respondent.

Appeal No. 48 of 1925, Decided on 15th February 1926, from an order of the Dist. J., Saran, D/- 5th December 1924.

✻ *Provincial Insolvency Act, Ss.* 56 (3), 4 *and* 5 *—Ss.* 56 (3) *implies that Court must have appointed Receiver in insolvency and that the power to recover property is reserved to the Court—Enquiry by the Court must be a judicial inquiry.*

Two inferences seem to be deducible from S. 56 (3) : first, that the Court before it takes any action under this sub-section in the way of realization of property must have appointed a Receiver ; and that means a Receiver in insolvency and not a Receiver *ad interim* before the adjudication. Secondly, the power to remove property from the possession of any person is reserved to the Court.

S. 4 read with S. 5 intends that the Court in such matters of forcible realization of property is to act with the procedure and no doubt with the judicial caution of a civil Court. Under S. 4 decision of a dispute between the debtor and the debtor's estate on the one hand, and claimant against it on the other, is to be final and binding ; and under S. 5 the Court in regard to the proceedings under the Act is to have the same powers and to follow the same procedure as it has and follows in the exercise of original civil jurisdiction. An enquiry by the so-called Receiver would not after adjudication be an enquiry of a person having authority under the Act, and he has no power to make any decision as is mentioned in S. 68, nor would a Receiver in insolvency have power under S. 56 to remove property from the possession of others than the insolvent.

[P. 291, C. 2, P. 292, C. 1, 2]

Hareshwar Prashad Sinha—for Appellants.

Ram Prasad—for Respondent.

Foster, J.—It appears to me to be beyond question that the appellants have right on their side in the matter before us. They are the sons of one Girdhar Das, who came into Court, so far as the papers before us indicate, as early as 29th March 1924. He as a creditor lodged an objection to the application of another creditor for the adjudication of insolvency of Goberdhan Das. It was not till the 2nd August 1924, that Goberdhan Das was adjudged an insolvent. Meanwhile a local pleader, Babu Jagat Narayan, had been appointed *ad interim* Receiver. Unfortunately the Court overlooked at the time of the adjudication the necessity of the formal appointment of a Receiver in insolvency invested with the powers and duties indicated in Ss. 56 and 59 of the Provincial Insolvency Act. Three days after the adjudication, the present appellants, who are the sons of Girdhar Das, although they had not been subsituted in place of their father, put in a petition asking that an enquiry be held as to the ownership of a house in Mahalla Ratanpure in Chapra town by the Receiver. It appears that this house had been recorded by the Receiver as the property of the insolvent and in fact as his only immovable property. The substitution of the present appellants in the place of their father took place a few days later, and when they next appeared before the Receiver they undoubtedly appeared as party-creditors and they were claiming the house to be their own. Now, it is quite clear that the Court could before adjudication depute the Receiver *ad interim* to collect evidence as to the assets of the insolvent, but it is clear that the Receiver could not in a claim case of this nature pass the final order. In S. 56 (3) of the Act it is laid down that when

the Court appoints a Receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof : provided that nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.

Two inferences seem to be deducible from the phraseology of this enactment. The Court, before it takes any action under this sub-section in the way of realization of property, must have appointed a Receiver ; and that means a Receiver in insolvency and not a Receiver *ad interim* before the adjudication.

Secondly, the power to remove property from the possession of any person is reserved to the Court. Another matter to be noticed in the new Insolvency Act is that the new S. 4 read with S. 5, which was the old S. 47, apparently intends that the Court in such matters of forcible realization of property is to act with the procedure and no doubt with the judicial caution of a civil Court. Under S. 4 the decision of a dispute between the debtor and the debtor's estate on the one hand, and claimant against it on the other, is to be final and binding; and under S. 5 the Court in regard to the proceedings under the Act is to have the same powers and to follow the same procedure as it has and follows in the exercise of original civil jurisdiction. Now, what I deduce from this is that the claimants who are here in appeal have a right to be heard judicially and to have from the Court a final decision before the property is wrested from their possession. No doubt after the order under appeal the property has been taken possession of. But if that act has been ultra vires it can only be ignored. The appellants did, as I have said, put in a petition before the Receiver in August last after they had been subsituted in place of their father as creditors and as claimants. They applied for time continually, and in fact they do not appear to have taken any active step in the presence of the so-called Receiver. So in November we find that the so-called Receiver reported the fact to the Court. The Court then had the responsibility before it of carrying out the law which I have quoted from Ss. 56 and 4 and 5 of the Provincial Insolvency Act. But instead of holding an enquiry the Court passed an order on the 15th November 1924 to the effect that the possession of the house with all other things mentioned in the Insolvency petition be given to the Receiver through the Nazir. This order was passed without the slightest attempt at making an enquiry. Again, on the 5th December, the District Judge passed the second order which is the order under appeal. He mentioned that the present appellants had prayed that they might be allowed to adduce evidence in support of their claims having been unable to do so previously on account of malarial fever. As he was not satisfied with this explanation of the appellants' previous conduct, he rejected the application.

Now it is perfectly obvious that the learned Judge had no power under the law to reject that application on these grounds. An enquiry by the so-called Receiver would not after adjudication be an enquiry of a person having authority under the Act. The Court had no evidence whatever before it and had never in fact taken measures to hear the evidence in respect of this claim. The so-called Receiver had no power to make any such decision as is mentioned in S. 68 of the Act; nor, as I have said before, would a Receiver in insolvency have power under S. 56 to remove property from the possession of others than the insolvent.

It appears to me therefore that the order under appeal was one which was entirely without jurisdiction. It is now the Court's duty to appoint a Receiver in the regular manner; and in regard to the claim before it to pass a judicial decision as if this claim was a question agitated in an original civil Court following the same procedure so far as it can be followed. The decision thus arrived at after hearing the appellant's evidence, and such evidence as the Receiver may adduce, will obviously have the force of a decree under S. 4 and will be appealable to the High Court under S. 75. As the case stands there has as yet been no judicial treatment of this claim. I would therefore order accordingly allowing the appeal. The appellants will get their costs out of the estate.

DAS, J.—I agree.

Appeal allowed.

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* A.I.R. 1926 Patna 292

ADAMI AND BUCKNILL, JJ.

Firangi Singh

v.

Durga Singh

Criminal Reference No. 63 of 1925, Decided on 6th November 1925, made by the Dist. Mag., Gaya, on 25th July 1925.

* *Criminal P. C., S. 249—S. 249 does not apply to warrant cases—Order of release in a warrant case under S. 249 is void and proceedings cannot be re-opened at the instance of a private party—Criminal P. C., S. 403.*

S. 249 is only intended to apply to summons cases instituted otherwise than upon complaint

and not to warrant cases. If an order of release si passed in a warrant case under S. 249, the order is void and the case still being on the file a fresh case respecting the same offence cannot be started on a complaint by a private party. [P. 273, C. 2]

Manohar Lal—for Reference.

H. L. Nandkeolyar and *K. P. Jayaswal*—against Reference.

Bucknill, J.—This was a reference made to this Court by the District Magistrate of Gaya under the provisions of S. 438 of the Criminal Procedure Code. This reference came before Macpherson, J., on the 2nd of September last and that learned Judge, thinking that a novel point arose in connexion with it, referred the matter to a Bench : the learned Judge also considered that it was desirable that the Crown should appear,

The difficulties which have occasioned this reference arose out of some rather confused criminal proceedings ; and to what appear to be some mistakes in procedure made by two Sub-divisional Officers which under the circumstances are not perhaps surprising. The position may be thus shortly explained. Last October there was a dispute about irrigation between the inhabitants of two villages called Kunj and Chari in the Gaya district. As a result no less than three cases were started. What is called Case No. 1 was a summons case ; the charge was under S. 143 of the Penal Code and was against the men of both the villages. What is called Case No. 2 was a warrant case drawn up against certain persons under the provisions of Ss. 148, 323 and 430 of the Penal Code. It was against villagers of Kunj and in connexion with that case a man of Chari village had been injured. What is called the third case was also a warrant case. This was directed against the villagers of Chari. All the cases came before the Sub-divisional Officer. He tried Case No. 2 but kept Cases Nos. 1 and 3 pending until the result of the trial with which he was proceeding. The upshot of Case No. 2 was that he convicted the accused. He then, in respect of the Case No. 1, passed an order (as he was entitled to do) under S. 249 of the Code of Criminal Procedure stopping the proceedings and releasing the accused. In Case No. 3 he also passed a similar order, purporting to act under S. 249 ; he also directed the case to be entered as false.

No question arose as to the Sub-divisional Officer's power to deal as he did deal with the first case. But a question does arise whether he had any power to deal with Case No. 3 (a warrant case) under the provisions of that section. But in Case No. 2 there was an appeal and the Sessions Judge reversed the decision of the Sub-divisional Officer, and set aside the conviction. The Sub-divisional Officer's order of conviction took place on the 23rd March last and his two orders relating to Cases Nos. 1 and 3 were made on the same day. The learned Sessions Judge's decision was on the 6th May last. The next thing which happened was that on the 16th June the person who had been the informant in the Case No. 3 applied to the Sub-divisional Officer (who was not the same individual as the Sub-divisional Officer who had tried Case No. 2) making what purports to be a complaint ; at any rate he was examined on oath by the new Sub-divisional Officer ; he sent for the connected records , and on the 26th of June he passed an order summoning the accused.

The District Magistrate in his reference suggests that both the orders of the Sub-divisional Officers of the 27th March 1925, purporting to stop Case No. 3 under the provisions of S. 249 of the Code of Criminal Procedure and that of his successor of the 26th June summoning the accused on what appears to be a complaint made by the informant in Case No. 3 are wrong and should be set aside. There seems no doubt that both these orders must be set aside. In the first place there appears to be no good authority of any kind for suggesting that S. 249 can be utilized in respect of a warrant case. The heading of Chapter XX of the Code of Criminal Procedure which comprises Ss. 241—249 refers to the " trial of summons cases by Magistrate " and, as has been pointed out by the learned Assistant Government Advocate, it is quite clear that, upon a perusal of Ss. 247—249, the last-named section is only intended to apply to summons cases instituted otherwise than upon complaint. It is true that Mr. Sohoni on page 614 of his work on the the Code of Criminal Procedure (11th edition) seems to think that the procedure contemplated under S. 249 might be applicable to warrant cases ; but it is

an old section, and so far as can be ascertained there is no case which lays down such a proposition. Indeed from reading the preceding sections it certainly seems evident that S. 249 only deals with summons cases instituted otherwise than upon complaint. S. 247 relates to summonses issued upon complaint and what the Magistrate's duties are if the complainant does not appear. S. 248 contemplates the possibility of withdrawal of a complaint by a complainant whilst S. 249 contemplates the powers of a Magistrate as to stopping cases and releasing the accused in any case instituted other than upon complaint. This order therefore thus made by the Sub-divisional Officer on the 23rd March last is obviously one which he could not make, and although it is in effect of no value it is, I think, desirable, in order that, there should be no future difficulty, that we should formally declare that it is illegal and, so far as may be if at all necessary, set it aside.

Now, although it has been suggested that what the complainant in Case No. 3 did when he came up before the new Sub-divisional Officer with his petition on the 16th of June last amounted only really to an informal drawing of the attention of the Sub-divisional Officer to the fact that Case No. 3 was still in existence on his file and had not been disposed of. I do not think that such a suggestion can on examination be seriously entertained; nor was it, I think, very seriously put forward by the learned counsel who in effect appeared in support of what the Sub-divisional Officer had directed by his order of the 26th June. The fact remains that it would seem that the Sub-divisional Officer treated the petition as a complaint; he examined the accused on oath and in this way he seems to have treated the matter as one of which cognizance was being taken under the provisions of S. 190 (1) (b) of the Code of Criminal Procedure; in other words as a fresh affair. It need hardly perhaps be pointed out that, as the order made by his predecessor on the 23rd March purporting to act under S. 249 was void, the case was still really on his file and cognizance had already been taken of it under S. 190 (1) (a).

It has been suggested, somewhat tentatively, that the order in Case No. 3 made by the Sub-divisional Officer on the 27th March last, although purported to be made under S. 249, might be regarded as one made properly under S. 253 (2) as it is argued that the upshot is really the same and that it is merely a difference of form. I am not prepared to say that there is no difference in the effect of stopping a case under S. 249 and the discharge of an accused under S. 253 (2); but in this case I do not think that such a question is material or really arises because the Sub-divisional Officer expressly purported to deal with the matter under S. 249 and in addition ordered that the case should be entered as false. Now in his order of the 26th June the new Sub-divisional Officer after reciting what had previously taken place and the order made in the third case observes:

> Durgi Singh, who is the complainant in Case No. 3, now comes up and files this petition that his case might now be taken up and dealt with according to law. His prayer seems reasonable. I accordingly summon the accused under Ss. 430 and 147, I. P. C. Also summon prosecution witnesses for that date.

Now the learned Assistant Government Advocate has pointed out that it was not open to the Sub-divisional Officer to take any such action as he did in re-opening a warrant case which was already on his file on an application of a private party. It seems very clear that what the Sub-divisional Officer did (although his order is not particularly lucid) was that he really started a case de novo; but this he could not do because Case No. 3 was still really on his file. There seems no doubt that he thought that his predecessor's order with regard to Case No. 3 was a valid one and that it was not was never brought to his notice. It is quite clear that he could not act as he did in re-opening the case supposing that what he did could be regarded as his having done so upon the application of a private party. The learned Assistant Government Advocate points out that the Sub-divisional Officer could of course re-open the case either upon application by the Crown or suo motu, but in this case he did neither. Whilst the police case was already on his file he could not start a fresh case upon a complaint. There is no authority of any kind given to us to controvert the views which have been placed before us by the learned Assistant

Government Advocate. We, therefore, consider: (a) that the order of the Sub-divisional Officer of the 27th March under S. 249 of the Code of Criminal Procedure was altogether an invalid order. It is hereby set aside. The result is that the Warrant Case No. 3. is still on the file of the Sub-divisional Officer. (b) the order of the Sub-divisional Officer of the 26th June is also invalid ; it too must be set aside. The result will be as before that the Warrant Case No. 3 is still on the Sub-divisional Officer's file as it stood on the 27th of March last at the time of the invalid order purporting to be made under S. 249 with regard thereto. (c) The reference of the District Magistrate of 25th July 1925 is therefore accepted. (d) The Sub-divisional Officer either of his own motion or of course upon the application of the Crown may, if he so thinks fit, proceed with the Warrant Case No. 3.

Adami, J.—I agree.

Reference answered.

A. I. R. 1926 Patna 295

DAS AND ROSS, JJ.

Ram Lal Singh—Plaintiff—Appellant.

v.

Mt. Septi—Defendant—Respondent.

Appeal No. 1357 of 1922, Decided on 9th June 1925, from the appellate decree of the Sub-J., Patna, D/- 25th July 1922.

Evidence Act, S. 58—Admission of execution of a document—Attestation need not be proved—Executant a pardanashin lady—Consideration must be proved—Pardhanashin lady.

Admission of execution of a document dispenses with the necessity of proof of proper attestation : 6 *Pat. L. J.* 465 *Appl.*

Where the defendant mortgagor was an illiterate pardanashin lady:

Held ; that the mere admission of her execution of the document is not sufficient to dispense with the necessity of proving the passing of consideration. [P 295 C 2]

A. K. Ray—for Appellant.

S. M. Niamatullah—for Respondent.

Ross, J.—This is an appeal by the plaintiff in a suit on mortgage. The trial Court passed a decree for money holding that the mortgage bond had not been proved as a mortgage. The learned Subordinate Judge held that the plaintiff was not entitled to a decree and decided the cross-appeal in favour of the defendant holding that no consideration passed.

With regard to the question of proof of the mortgage bond it was contended on behalf of the appellant that the learned Subordinate Judge had erred in law. There was a clear admission of execution in the written statement. All the attesting witnesses were summoned, but only one appeared and his statement was that the executant did not sign the deed in his presence. The plaintiff was therefore entitled to prove the execution by other evidence. The learned Subordinate Judge referred to the decision of this Court in *Hira Bibi* v. *Ramdhan Lal* (1) as laying down the proposition that where evidence is adduced which shows that the deed was not properly attested, an admission of the execution will not have the effect of establishing the document. It is true that there are remarks to that effect in the course of the judgment, but the decision followed the decision of the Calcutta High Court which laid down that admission of execution dispenses with the necessity of proof. Consequently in view of the clear admission of execution in the written statement it must be taken that this document was sufficiently proved.

But the question still remains whether any consideration passed and, on this point, there is a finding of fact against the appellant. It is contended that the burden of proof was wrongly thrown upon the plaintiff in view of the fact that there was an earlier admission by the defendant that she had borrowed this money from the plaintiff to pay off a rent decree. But that admission was made in the plaint in a contribution suit in which the present plaintiff was, according to the finding of the Court below, acting as agent on behalf of the defendant. Consequently the admission cannot have its natural effect inasmuch as it is practically the statement of the agent, *i. e.*, the plaintiff. The defendant is an illiterate pardanashin lady and the mere admission of her execution of the document is not sufficient to dispense with the necessity of proving the passing of consideration. In my opinion the learned Subordinate Judge was right in his treatment of the alleged admission in the plaint in the contribution suit, and there was no error of law in this part of his judgment. Consequently this appeal is concluded by the

(1) [1921] 6 P. L. J. 465=62 I. C. 540=2 P.L.T. 752.

finding of fact and must be dismissed with costs. As there is a deficit Court-fee due on the cross-appeal in the Court below, the defendant will not be allowed to execute the decree for costs until the deficit is made good.

Das, J.—I agree.

Appeal dismissed.

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* * A. I. R. 1926 Patna 296

ROSS AND KULWANT SAHAY, JJ.

Subda Santal and *another* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 20 of 192
Decided on 16th February 1926.

* * (*a*) *Criminal P. C., S. 340—No authority in writing is necessary for an advocate or vakil in criminal cases.*

No appointment in writing is necessary in order to entitle an advocate or a vakil to act for an accused person in criminal cases. [P 298 C 1]

(*b*) *Patna High Court Rules, Ch. 17, R. 5A—Rule does not prescribe a written authority for an advocate in criminal cases.*

It has been the invariable practice in Patna High Court to allow advocates to appear and act for accused persons in criminal cases without any authority in writing. The new R. 5A of Chapter 17 of the High Court Rules makes it obligatory for an advocate of the Patna High Court to file an appointment in writing in civil cases; but it does not in any way interfere with the practice in criminal cases. [298 C 1]

(*c*) *Court Fees Act, Sch. 2, Art. 10—Article prescribes fees only and does not create necessity for an authority.*

The Article merely means that when an authority is filed, such authority must be stamped. It does not make it necessary that a vakalatnama or mukhtarnama must be filed in criminal cases. [P 297 C 1]

S. M Gupta—for Petitioners.

Government Advocate—for the Crown.

Kulwant Sahay, J.—Mr. S. M. Gupta, an advocate of this Court, presented an application for revision on behalf of Subda Santal and another, under the provisions of Ss. 435 and 439 of the Criminal Procedure Code. The application was admitted and notice was ordered to issue. Mr. Gupta was thereupon asked by the office to supply an authority on behalf of the petitioners duly stamped. He objected on the ground that in criminal cases no authority in writing was necessary. The Registrar has preferred the matter to us: and the question for decision is whether a duly stamped appointment in writing is necessary to be filed by an advocate or a vakil of this Court appearing on behalf of accused persons in criminal cases.

As the matter was of importance we thought it necessary to issue notice to the Government Advocate; and we have heard the Government Advocate as well as Mr. Gupta. Mr. Gupta contends that no authority in writing is necessary for an advocate or a vakil in criminal cases, and the Government Advocate supports him.

The office has drawn our attention to the rules of this Court. R. 24 of Chapter XII of the High Court Rules provides that

a criminal appeal which is to be presented to the Court shall in the first instance be given to the trial clerk, who shall note on it whether it is properly stamped, is within time and is admissible, and shall return it at once.

Rule 1 of Chapter XII prescribes that the rules in Chapter III shall apply as far as pssible to applications made under Chapter XII which deals with the procedure in criminal cases. R. 4 (iv) of Chapter III provides that every petition shall be

presented either by the petitioner or his declarant or his recognized agent or his pleader or some person appointed in writing in each case by such pleader to present the same

and the note attached to this rule says that "pleader" means advocate, vakil or attorney. These rules do not prescribe that in criminal cases an authority in writing has to be filed by an advocate or vakil when presenting a criminal appeal or application.

Rule 5A of Chapter XVII of the High Court Rules prescribes that

notwithstanding anything contained in O. 3, R. 4 (3) of the First Schedule of the Code of Civil Procedure, 1908, no advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognized agent or by some other agent duly authorized by power of attorney to act in this behalf; or unless he is instructed by an attorney or pleader duly authorized to act on behalf of such person.

This rule refers to civil cases governed by the Code of Civil Procedure and has no reference to criminal cases. There is, therefore, nothing in the High Court Rules requiring an advocate or a vakil to file an appointment in writing when presenting a criminal apeal or application.

Section 340 of the Criminal Procedure Code 1898 provides that

any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code in any such Court may of right be defended by a pleader.

The word "pleader" is defined in S. 4 (r) of the Code, when used with reference to any proceeding in any Court, to mean

a pleader or a mukhtear authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized; and (2) any mukhtear or other person appointed with the permission of the Court to act in such proceeding.

S. 419 of the Code prescribes that

every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader.

The Criminal Procedure Code, unlike the Civil Procedure Code, nowhere prescribes the mode of appointment of pleaders; and I find no authority for the proposition that in criminal cases a pleader must file an authority from his client in order to enable him to present an application or appeal on behalf of his client, and to act for him in criminal cases.

Article 10 of Schedule II to the Indian Court Fees Act prescribes a fee for mukhtarnamas and vakalatnamas when presented for the conduct of any case to any civil or criminal Court including a High Court. This merely means that when an authority is filed, such authority must be stamped. It does not make it necessary that a vakalatnama or mukhtarnama must be filed in criminal cases.

When we examine the older enactments relating to procedure in criminal cases, we find it provided that persons accused of criminal offences are entitled as of right to be defended by pleaders. Act XXXVIII of 1850, which was known as the Moffussil Prisoners' Counsel Act, provided that in all Courts and before all Magistrates, every person on trial for commission of any offence shall be admitted to defend himself either personally or by his authorized agent and it provided that

in those Courts in which any person now has by law the right of employing whomsoever he can employ as counsel or pleader nothing in this Act shall be deemed to restrict that right; in all other cases those persons only shall be deemed authorized agents within the meaning of this Act who are either Advocates of one of the Supreme Courts of justice established by Royal Charter, or authorized pleaders of the civil Courts of the East India Company, or, by leave of the Court, Magistrate or other person before whom the prisoner is on trial, any other person who is employed by the prosecutor or prisoner as his agent.

This Act does not prescribe the mode of appointment of authorized agents, and it enacted that advocates of the Supreme Court and authorized pleaders of civil Courts were deemed to be authorized agents of an accused person.

In the Code of Criminal Procedure (Act XXV of 1861) no provision was made as to the mode of appointment of pleaders, although S. 432 of the Act provided that

Every person charged before any criminal Court with an offence may of right be defended by counsel or authorized agent.

Act XXXVIII of 1850 was repealed by Act XVII of 1862 in places where the Criminal Procedure Code was brought in force, but it did not in any way affect the right of an accused person to employ a pleader, and no provision was made for the mode of appointment of such a pleader.

Act VIII of 1869, which was the Code of Criminal Procedure Amendment Act, gave the same right to persons charged with an offence before any criminal Court to be defended by any barrister or attorney of a High Court, or by any pleader duly qualified under the provisions of Act XX of 1865, or any other law in force for the time being relating to pleaders. Section 11 of Act XX of 1865 authorized pleaders to practise in criminal Courts. Here also the mode of appointment was not prescribed.

Act X of 1872, which was an act for regulating the procedure of the Courts of Criminal Judicature provided in S. 186 that

Every person accused in any criminal Court of an offence may of right be defended by any barrister or attorney of a High Court, or by any pleader duly qualified under the provisions of Act XX of 1865, or any other law in force for the time being relating to pleaders.

The question was raised in the Madras High Court, as to whether an advocate or attorney of the High Court or an authorized pleader appearing in defence of an accused person under S. 186 of the Act of 1872 was required to file a vakalatnama, and the High Court ruled that no vakalatnama was in such a case required: vide VII, Madras High Court Reports, Appendix XL.

We have referred to the provisions of the present Code of Criminal Procedure relating to the right of an accused person to be defended by a pleader ; and we find that from the earliest times the Legislature has refrained from making any provision prescribing the mode of appointment of a pleader to act for a person accused of an offence in criminal Courts. The Legislature did think it fit to make such provisions for appointment of pleaders in civil cases, but refrained from making any such provision as regards criminal cases.

I, therefore, find no provision either in the Criminal Procedure Code or in the rules of the High Court requiring an advocate or vakil of this Court to file a duly stamped appointment in writing in criminal cases. It has been the invariable practice in this Court to allow advocates to appear and act for accused persons in criminal cases without any authority in writing. The new rule 5-A of Ch. XVII of the High Court Rules makes it obligatory for an advocate of this Court to file an appointment in writing in civil cases ; but it did not in any way interfere with the practice in criminal cases. It may be observed that in some criminal cases, such as capital sentence cases, the Crown appoints a pleader to represent a person accused of an offence, and in those cases clearly no appointment in writing from the accused person is required. I am of opinion that it will unduly restrict the right of an accused person to be defended by a pleader in a criminal case if he is required to file a stamped authority enabling the pleader to defend him.

I, therefore, am of opinion that no appointment in writing is necessary in order to entitle an advocate or a vakil to act for an accused person in criminal cases ; and that no appointment in writing was necessary to be filed in the present case.

Ross, J.—I agree.

This is an application in revision against an order passed under S. 145 of the Code of Criminal Procedure. Section 340 of the Code provides that any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code in such Court, may of right be defended by a pleader ; and it makes no difference to the present question whether the petitioner is a person accused of an offence or a person against whom proceedings have been taken under S. 145 of the Code of Criminal Procedure. There is nothing in that Code which requires any written authority to defend an accused person ; and it differs in this respect from the Code of Civil Procedure. Whereas the former Code entitles an accused person to be defended of right by a pleader, without more, O. 3, R. 1 of the latter Code enacts that any appearance, application, or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent (defined in R. 2) or by a pleader duly appointed to act on his behalf. While, therefore, an accused person can either defend himself or be defended by a pleader, a party to a civil suit can appear either in person or by a recognized agent or by a pleader duly appointed to act on his behalf. The present question has arisen out of R. 5 (a) which has been recently added to Ch. XVII of the Rules of the High Court. Now, while it may be argued that although that rule refers to O. 3, R. 4 Cl. (3) of the Civil P. C., yet that reference does not limit its application to civil proceedings and the rule, in terms is of general application, still, I think that when the language of the rule is considered, it must be held to have been framed with reference to O. 3 of the Code of Civil Procedure. The language closely follows that of O. 3, R. 1, and the object of the rule apparently was to abolish the special privilege conferred on advocates by R. 4 of that order. I therefore do not think that the rule should be construed in a general sense or as intended to affect or alter the criminal practice in this Court.

A. I. R. 1926 Patna 299

ROSS AND KULWANT SAHAY, JJ.

Chandra Prasad and *another*—Accused—Appellants.

v.

King-Emperor—Opposite Party.

Criminal Appeals Nos. 216 and 223 of 1925, Decided on 3rd March 1926, from a decision of the S.-J., Darbhanga, D/- 9th December 1925.

Penal Code, S. 409—Post office clerk delivering V. P. P. to party and receiving money—Entry not made in register nor money credited—Offence is committed.

A post office clerk delivered some value payable parcels on 30th May 1925, 27th May 1925 and 23rd May 1925 and kept money s which were entrusted to him as a public servant up to 9th June 1925 in violation of the rules by which he was bound, and give a false explanation that the money had not been received until the 9th of June. He also made entries in his register showing that the articles were still undelivered in the post office long after they had been delivered and the money for them had been received.

Held: this amounts to a denial of the receipt of the money and is conclusive evidence of criminal breach of trust. *R. v Jackson* (1 *C. & K.* 384) *Appl*; 26 *I. C.* 307 : 40 *I. C.* 303; and 10 *Bom.* 256, *Dist.*

Held: further that the negligence of the post-master in charge whose duty was to check the delivery register, in not properly checking the register, cannot take the place or proof that the money received on account of these articles was entrusted to his care, and he cannot therefore be charged of a criminal breach of trust.

[P. 301, C. 2]

Deoki Prasad Sinha, B. P. Varma and *Raghosaran Lal, S. P. Varma, B. N. Mirta, Bhagwan Prasad* and *Kamada Nath Moitra*—for Appellants.

Asst. Govt. Advocate—for the Crown.

Judgment.—These are two appeals, one by Chandra Prasad who was Sub-Post master of Roserah sub post Office, and the other by Debendra Nath Ganguly who was a clerk in the same office, against their conviction under S. 409 of the Indian Penal Code. The appellants were charged with criminal breach of trust in their capacities of public servants in respect of three sums of money, namely Rs. 307-15-0 which was paid for V. P. letter No. 641 on the 30th of May 1925, Rs. 119-7-0 which was paid for V. P. letter No. 3 on the 27th of May 1925 and Rs. 303 which was paid on account of insured V. P. parcel No. 738 on the 23rd of May 1925, these sums not being accounted for until the 9th of June 1925.

The defence of the sub-post master was that the V. P. articles referrred to in the charges were all along in the exclusive custody of Debendranath Ganguly and that the money realized for them was never made over to him and he did not know that it was realized before the 9th of June. The defence of Debendranath Ganguly was that the letters and parcel were not delivered to the addressees on the 23rd, 27th and 30th of May, but on the 9th of June.

This latter defence was found to be untrue at the trial where it was conclusively shown that the sums of money referred to in the charges had been paid to the post office on the dates specified therein; and in the appeal, this defence was abandoned. The facts, as found by the learned Sessions Judge are no longer disputed. These facts are that V. P. letter No. 641 was sent by Messrs. H. D. Nandi and Co. of Taltola to a firm in Roserah called Friends and Co. of which the sole proprietor is Lachminarain Purvey. The letter contained the railway receipt for a bicycle consigned to sender. The letter was despatched on the 25th and arrived at Roserah on the 27th. It was received by Debendranath Ganguly in the usual course and entered by him in the Register of V. P. articles received. He also issued a receipt form on the 27th of May. The money was paid to Debendranath Ganguly by Lachminarain Purvey on the 30th of May 1925, but the V. P. letter appears in the register in an entry made by Debendranath Ganguly as still undelivered on the 4th of June, and the money order in respect of this receipt was not issued until the 9th of June.

V. P. letter No. 3 was sent by Jhallu Sahu Bijadhar Ram of Benares to Bhailal Gobind Lal of Roserah on the 19th of May. It contained the railway receipt for a bag of German silver lotas. The letter was received on the 21st of May and was registered by Debendranath Ganguly, who also issued the usual receipt form. On the 27th of May Badrilal, the proprietor of the firm, paid Rs. 119-7-0 to Debendranath Ganguly and got delivery of the letter. In this case also the money was not remitted to the sender by Debendranath Ganguly until the 9th of June.

The insured parcel No. 738 which was said to contain gold-leaf was despatched

by S. C. Singh from Strand Road, Calcutta, to Bhailal Gobind Lal at Roserah on the 22nd of May and was received at Roserah on the 23rd and entered as an ordinary value-payable article in the register by Debendranath Ganguly on that date. He also issued the usual receipt form. The money, Rs. 303/-was paid by Badrilal on the date of receipt, namely, the 23rd of May, to Debendranath Ganguly and the parcel was delivered to him. The parcel was still shown as undelivered on the 1st of June and on the 4th of June, by Debendranath Ganguly in his register and the money was not remitted to the sender until the 9th of June.

The contention on behalf of the sub-post master, Chandra Prasad, is that as the money was never entrusted to him, he cannot be held guilty of criminal breach of trust. The learned Assistant Government Advocate contended that both the appellants are post office servants and both are bound by the terms of their appointment to dispose of the property entrusted to them in accordance with the contract which is implied under the rules. If they are bound by the rules to send money received on account of value-payable articles to the sender on the date of receipt, or, at the latest, on the next day, as the rules provide, they violate the contract if they dishonestly retain the money. The duties of the parcels clerk are to receive parcels and deliver them and make over the money received for them to the post master. The duty of the post master is, as soon as he receives the money, to send it to the cash office at Samastipur. It is admitted by the learned Assistant Government Advocate that the prosecution has not proved that the money was received by the post master, but it is contended that the post master wilfully suffered the parcels clerk to dispose of the money in a manner contrary to his legal obligations. He knew of the receipt of the money in the post office, and if he dishonestly omitted to send off the money, he is guilty of criminal breach of trust. It is argued that once the money comes into the post office to the knowledge of the post master, it is entrusted to him. He has made some of the entries in the register of value-payable articles received and has also initialled the balance of articles undisposed of. Now it seems to me that on the facts found no charge is proved against the post master. He may have been negligent in supervision; and from the fact that the parcels clerk, who was in receipt of a salary of Rs 74 a month, must have been of almost the same standing in the service as himself, his pay being Rs. 78 a month, it is not unlikely that he exercised insufficient control. But from the mere fact that he made some of the entries in the Register and initialled the daily balance of articles undisposed of, it cannot be inferred that he knew that these moneys hand been paid. If he had checked the Register with the articles actually in had, the fraud must have been discovered but his failure to do this cannot take the place of proof that the money received on account of these articles was entrusted to his care. In the case of the insured article) Article 393 of the Post Office Manual requires that in sub— post offices where the pay of the sub-post master is less than Rs. 100 a month, the duty of examining the insured parcels must be performed by the sub-post master and the undelivered insured parcels must be kept under lock and key in his personal custody. But this rule is not available to the prosecution for two reasons; first, the insured article was entered in the Register as an ordinary V. P. article, and secondly, it was delivered to the addressee on the date of receipt.

There is, in my opinion, no case against Chandra Prased, and his appeal must be allowed.

The case of Debendranath Ganguly stands on a different footing. Learned Counsel argued on his behalf that accepting the findings, the facts do not amount to an offence under S. 409. They prove that certain sums of money were received on the 23rd, 27th and 30th May and were not transmitted until the 9th of June. But this only amounts to detention of the money and the prosecution must prove that within the period of detention the money was converted to the appellant's own use, but there is no such finding and there is no evidence to show that the money ever left the Post Office; and the period of detention was so short that it was not safe to presume that the appellant intended to cause wrongful loss or gain. The following decisions were referred to: *Rex* v.

Jones (1) where it was held that the sum of money received was insufficient to support an indictment for embezzlement, although it was observed that had the prisoner denied the receipt of the money, the case might have been different Archbold in his Criminal Pleading and Practice 26th Edition, p. 618, refers to this decision and says that it must be taken to be overruled by the contrary decision in *R.* v. *Jackson* (2) where it was held by Coleridge, J., that where it is the servant's duty to account for and pay over the monies received by him at stated times, his not doing so wilfully is an embezzlement, although he does not actually deny the receipt of them. The next case was in *Re Kuppili Prakasarow* (3). The head-note to that case says that where the only evidence against the accused with misappropriating a telegraphic money-order is that the postal account contained entries of delivery on dates different from those on which the actual deliveries were made, that merely creates a suspicion and is not a sufficient proof of misappropriation. The finding was that there was no evidence to show that the sum was mis-appropriated by the accused and not by the post-man. The decision therefore, went on the facts which are entirely different from the facts of the present case. The next case was *Mathura Prasad* v *Emperor* (4) where it was held that the detention of money by a servant or clerk for fifteen months after its receipt raises a very serious doubt of bona fides against him, but the detention is not conclusive proof of criminal misappropriation or criminal breach of trust. The decision in that case, however proceeded on the absence of any rules regarding the paying in of money realized, as well as on facts showing that the accused had attempted on various occasions to pay the money, but it had been refused by the Treasurer. Knox, J. observed

> In the present case the estate is a private estate. No attempt has been made on the part of the prosecution to prove that any rule of the estate, or any contract, express or implied, lay between the estate and Mathura Prasad regarding the time and the manner in which all such moneys were to be deposited. It is easy to say that they should be deposited without delay, but that must be a matter of proof as much as any other matter of fact in the case.

This observation clearly differentiates that case from the present where the rules of the Post Office are definite that the money must be remitted on the day of receipt or the latest on the following day. Reference was also made to *Rambyas Rai* v. *Emperor* (5) but that decision proceeded entirely on the facts which negatived any dishonesty on the part of the accused in retaining certain documents. The last case was *Queen Empress* v. *Ganpat Tapidas* (6). There money received on account of the Government had been detained for some time by a revenue patel. He had however, taken formal receipts for the money from the payees and it was found that the reason for his not immediately paying the money to them was that they were willing to trust him with the money. That decision had therefore no application to the present case. The accused Debendranath Ganguly kept these moneys which were entrusted to him as a public servant for periods of seventeen, thirteen and ten days in violation of the rules by which he was bound. This in itself raises a case which he has to answer. He gave a false explanation that the moneys had not been received until the 9th of June. He also made entries in his register showing that the articles were still undelivered in the post office long after they had been delivered and the money for them had been received. This amounts to a denial of the receipt of the money and is conclusive evidence of criminal breach of trust. In my opinion, therefore Debendranath Ganguly was properly found guilty of the charges framed against him.

The result is that the appeal of Chandra Prasad is allowed and his conviction and sentence are set aside and he is ordered to be acquitted and released from bail. His fine, if paid, will be refunded. The appeal of Debendranath Ganguly is dismissed and he will surrender to his bail to undergo the rest of his sentence.

Appeal of Chandra Prasad allowed : *Appeal of Debendra Nath dismissed.*

(1) [1887] 7 C. & P. 833.
(2) [1844] 1 C. and K. 384.
(3) [1915] 26 I. C. 307.
(4) [1917] 40 I. C. 308.
(5) [1918] 47 I. C. 667.
(6) 1886] 10 Bom. 256.

* A. I. R. 1926 Patna 302

ROSS AND KULWANT SHAY, JJ.

Mohammad Yasin — Accused — Petitioner.

v.

King-Emperor — Opposite Party.

Criminal Revision No. 520 of 1925, Decided on 5th February 1925, against an order of the Mag. 1st Cl., Muzaffarpur, D/- 21st October 1925.

* (a) *Criminal P. C., S. 403—Scope is wide—Jurisdiction does not refer merely to character or status of Court but refers also to want of jurisdiction on other grounds such as want of sanction under S. 195.*

The wording of S. 403 is very wide and the jurisdiction of the Court does not merely refer to the character and status of the Court to try the offence, but also refers to want of jurisdiction on other grounds as shown by illustrations (f) and (g) to the section. It also covers cases where the trial is held to be without jurisdiction for want of a sanction under S. 195. Where there was no trial of the accused on the merits as the conviction was set aside on the ground of want of jurisdiction in the Court to try the accused, S. 403 (1) does not operate as a bar to his second trial. 36 *Mad.* 308, *Dist. from*; 39 *All.* 293; 46 *I. C.* 716; *Rex* v. *Marsham* (1912), 2 *K. B.* 362; *Peter* v. *John* (18 *L. J. M. C.* 189); and 2 *U. B.* 10 *Cr. Foll.* [P 304, C 1, 2]

(b) Criminal trial—It is for the Crown and not for the High Court to consider whether proceedings should be dropped on the ground of harassment to accused.

It is for the Crown to consider whether the case is a fit one in which the proceedings should be allowed to go on, or whether it is proper to drop the proceedings. It is not competent for the High Court to quash the proceedings on the ground that the original complaint was made by the accused long ago and the accused is harassed thereby. [P 304, C 2]

S. P. Varma, *S. Fazle Ali* and *Syed Ali Khan*—for Petitioner.

H. L. Nandkeolyar—for the Crown.

Kulwant Sahay, J.—On the 25th October 1923, the petitioner, Sheikh Mohammad Yasin, lodged an information before the police charging Abdul Wahid and others with offences under Ss. 148 and 302 I. P. C., his case being that the said accused persons had committed rioting armed with deadly weapons, causing the death of Mohammad Jan, the father of the petitioner.

The police held an investigation, but before they had submitted their report on the 5th of November 1923, the petitioner filed a petition before the Magistrate complaining against the police investigation and praying that the case should be enquired into, and the persons accused by him should be summoned. Thereafter the police submitted their final report to the effect that the case was intentionally false, and they applied for the prosecution of the petitioner under S. 211, I. P. C. Notice was issued upon the petitioner to show cause why he should not be prosecuted for instituting a false case. The petitioner filed a petition showing cause in which he asserted that the case was a true one.

The Magistrate, however, ordered that the petitioner Yasin should be summoned under S. 211 on the basis of the complaint put in by the Sub-Inspector of Police, and he directed that further proceedings in the case which was started on the information of Yasin before the police should be terminated, and that the order to show cause to be served upon Yasin should be cancelled.

Yasin thereupon moved the Sessions Judge who made a reference to this Court (Cr. Reference No. 27 of 1924) which was heard by Adami, J., on the 14th May 1924. Adami, J., held that the petition of Yasin showing cause impugned the enquiry by the police and amounted to a complaint. The Magistrate should have examined Yasin on oath as a complainant, and either called upon him to prove his case or should have dismissed his complaint under S. 203, Criminal P. C. He did neither of these. Mr. Justice Adami held that, although it would have been proper to dispose of the complaint of Yasin in the first instance, and then entertain the complaint against him under S. 211, yet as the complaint had been made, he directed the proceedings upon the complaint of the Inspector under S. 211 to proceed. Yasin was accordingly committed to the Sessions on a charge under S. 211 and convicted by the Assistant Sessions Judge of Muzaffarpur and sentenced to five years' rigorous imprisonment. Against this conviction, Yasin preferred an appeal to this Court which was heard by Bucknill and Ross, JJ., and their Lordships' judgment is reported in *Mohammad Yasin* v. *Emperor* (1). Their Lordships in that case held that the petition of Yasin filed on the 5th of November 1923, must be treated as a complaint before the Magistrate, and that the offence, if any, committed by the petitioner was

(1) A. I. R. 1925 Patna 183.

an offence which was committed in or in relation to a proceeding in Court and, consequently, a complaint in writing by the Court or by some other Court to which it was subordinate was a condition precedent to cognizance being taken of the offence under S. 211. They held that by making the complaint to Court, the informant, viz., the present petitioner, had withdrawn the information from the category of mere police proceedings and had raised it to the category of a proceedings in Court. This necessitated a complaint by the Court if the informant was to be proceeded against. Their Lordships were of opinion, therefore, that the proceedings in which the petitioner had been convicted were wholly without jurisdiction because the bar imposed by S. 195 of the Criminal P. C.,had not been removed, and they directed that the conviction be set aside.

This decision of the High Court is dated the 19th December 1924, thereafter, on the 24th of January 1925, the Police Inspector made an application before the Sadr Sub-divisional Magistrate of Muzaffarpur praying that the petitioner might be re-tried under S. 211 I. P. C., in relation to the same offence, after a complaint under S. 476, Criminal P. C. Notice was issued on the petitioner to show cause why proceedings should not be taken against him under S. 211 I. P. C., and on the 26th February 1925, the petitioner filed a petition of objection before the Magistrate in which he contended inter alia that the petitioner could not be tried again upon the same facts upon which he had been tried before. The Magistrate, however, examined the petitioner on oath in connexion with his original petition of the 5th of November 1923. The petitioner examined witnesses in support of his allegation; but on the 21st of April 1925, the Magistrate found his original complaint to be intentionally false, and eventually on 14th August 1925, he made a formal complaint against the petitioner under S. 476, Criminal P. C. The said complaint was made over to another Magistrate of the 1st class who committed the petitioner to the Court of Sessions for an offence under S. 211 by his order dated the 21st October 1925.

The petitioner has come up in revision to this Court against this order; and the main ground taken by the learned counsel on his behalf is that the petitioner, having once been tried and acquitted by a Court of competent jurisdiction, is not liable to be tried again for the same offence. Reliance has been placed on sub-S. 1 of S. 403 of the Criminal P. C. It has also been contended that the present proceedings were started against the petitioner before his original complaint had been disposed of and he was called upon to show cause in the present proceedings before the truth or otherwise of his complaint made on the 5th of November 1923, was enquired into.

The first question depends on the construction of the judgment of this Court in the appeal preferred by the petitioner against his conviction by the Assistant Sessions Judge reported in *Mahomed Yasin* v. *Emperor* (1). As I have already observed, the conviction was set aside by this Court on the ground that the proceedings were ab initio void and without jurisdiction on account of the bar imposed by S. 195 of the Criminal P. C. not having been removed. S. 403 (1) of the Criminal P. C., provides that

> a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, be not liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237.

The question is whether the judgment of this Court in the appeal from the previous trial was an acquittal of the petitioner after his trial by a Court of competent jurisdiction as is contended for by the learned counsel for the petitioner. In my opinion, the first trial of the petitioner cannot be said to be a trial by a Court of competent jurisdiction so as to bar a second trial. It has been contended that the Court which tried the petitioner on the first occasion was a Court of competent jurisdiction within the meaning of the section, and the conviction was set aside on a point of law which did not affect the jurisdiction of the Court which held the trial; and reliance was placed upon a decision of the Madras High Court in re. *K. Ganapathi Bhatta* v. *Emperor* (2). This decision to a certain extent lends support to the contention of the learned

(2) [1913] 36 Mad. 308=19 I. C. 310=24 M. L. J. 463.

counsel; but in my view the learned Judges put a too narrow construction upon the provisions of S. 403 (1) of the Code.

They observed that sub-S. (1) of S. 403 refers to the character and status of the tribunal when it refers to competency to try the offence. The reasoning adopted in that case was that a sanction under S. 195, Criminal P. C. was not a condition of the competency of the tribunal, but it was only a condition precedent for the institution of proceedings before the tribunal, and that the want of sanction under S. 195 did not in any way affect the jurisdiction of the Court to try the accused of the offence charged. In my view the wording of S. 403 is very wide and the jurisdiction of the Court does not merely refer to the character and status of the Court to try the offence, but also refers to want of jurisdiction on other grounds as shown by illustrations (f) and (g) to the section. I think it covers cases where the trial is held to be without jurisdiction for want of sanction under S. 195, of the Code. This view was taken by the Allahabad High Court in *Hussain Khan* v. *Emperor* (3). In that case the accused persons were tried for an offence under S. 82 of the Indian Registration Act without the permission required by S. 83 of the Act having been obtained. They were convicted by the Magistrate, but the conviction was set aside by the High Court on the ground of want of permission under S. 83 of the Act. A second trial was held after obtaining the permission under S. 83 and the accused persons were again convicted. It was held by Knox, J., that the second trial was not barred by S. 403 of the Criminal P. C., it being held that the Court which had tried the case in the first instance was not a Court of competent jurisdiction to hold the trial owing to the absence of the sanction under S. 83 of the Act. The same view was taken in *Nanakram* v. *Emperor* (4): a similar view was taken in *Rex* v. *Marsham* (5), in *Peter Bradshaw* v. *John Drury* (6) and by the Calcutta High Court in *Queen* v. *Muthoorapershad Panday* (7).

It is further to be observed that this Court did not make an order of acquittal upon the appeal in the previous conviction but merely directed that the conviction should be set aside. There was no trial of the accused on the merits by this Court, and the conviction was set aside on the ground of want of jurisdiction in the Court to try the petitioner. I am, therefore, of opinion that S. 403 (1) does not operate as a bar to the second trial of the petitioner in the present case.

The second ground taken was that the proceedings were initiated against the petitioner before the disposal of his original complaint of the 5th of November, 1923. In my opinion there is no substance in this objection either. This Court did not direct an enquiry into the complaint of the petitioner Yasin. As a matter of fact, the Magistrate did examine the petitioner and dismiss his complaint although after the initiation of the enquiry; but the dismissal was before the making of the complaint under S. 476. The commitment of the petitioner, therefore, to the Court of Sessions cannot be quashed.

It has been contended on behalf of the petitioner that the matter is too stale and that the petitioner has already been sufficiently harassed, and a fresh prosecution of the petitioner for the same offence should not be allowed to proceed. It is no doubt true that the complaint was made by the petitioner so long ago as November 1923, and he has been subjected to a good deal of harassment on account of the previous prosecution, and it is for the Crown to consider whether the case is a fit one in which the proceedings should be allowed to go on, or whether it is proper to drop the proceedings. It is not competent for us to quash the proceedings on the ground that the original complaint made by the petitioner was more than two years ago.

In the result this application must be dismissed.

Ross, J.—I agree.

Application dismissed.

(3) [1917] 39 All. 293=59 I. C. 690=15 A. L. J. 136.
(4) [1918] 46 I. C. 716.
(5) [1912] 2 K. B. 362=81 L. J. K. B. 957=107 L. T. 89=23 Cox. C. C. 77=76 J. P. 284=28 T. L. R. 391.
(6) 18 L. J. M. C. 189.
(7) [1865] 2 W. R. Cr. 10.

* A. I. R. 1926 Patna 305

DAWSON-MILLER, C.J., JWALA PRASAD AND BUCKNILL, JJ.

Krishnaballabh Sahay—Petitioner.

v.

Governor of Bihar and *Orissa*—Opposite Party.

Misc. Judicial Case No. 55 of 1926, Decided on 27th April 1926.

* (a) *Government of India Act* (1919 *amended* 1925), *S. 72, Cls.* (3) *and* (4).

In Cl. (3) to S. 72D, as amended in 1925, the words "payments or emoluments payable to or on account of a person in respect of his office" include the tour expenses and the travelling allowances of the Governor and the Members of his Council and the Inspector-General of Police, and therefore these expenses are non-votable items.

Even assuming for the sake of argument that the "tour expenses" and "the travelling allowances" were not exempted from being submitted to the vote of the Council, the question cannot be raised before the High Court by reason of Clause (4). [P 310 C 1]

(b) *Jurisdiction—Act of State—Court cannot question.*

No Municipal Court has any jurisdiction to question, control or interfere with the appropriation of the revenue of India by the Local Government provided it is for the purpose of the government of India. The appropriation will be an act of State which essentially concerns the exercise of Sovereign power: *Salaman* v. *The Secretary of State for India* (1906), 1 *K. B.* 613, *Ref.* [P 311 C 1]

(c) *Specific Relief Act, S.* 45—*Power to issue writ of mandamus.*

Writ of mandamus can be issued only by the High Courts at Calcutta, Bombay, Madras and Rangoon, in their original jurisdiction but not by the other High Courts i. e., Allahabad, Patna and Lahore. [P 312 C 1]

(d) *Practice—Relief.*

It is meaningless to have a power and to pass an order without having the power to enforce it. [P 312 C 2]

D. P. Sinha, *A. Prosad*, *R. Saran*, *L. M. J. Mukharji*, *D. L. Nandkeolyar* and *B. P. Sinha*—for Petitioner.

J. A. Samuel—for Opposite Party.

Dawson-Miller, J.—In this case the Court is moved on behalf of Mr. Krishnaballabh Sahay, a member of the Bihar and Orissa Legislative Council, to issue a writ of mandamus to His Excellency the Governor of Bihar and Orissa requiring him under S. 72 D of the Government of India Act, 1919, to submit to the vote of the Legislative Council of Bihar and Orissa in the form of demands for grants, proposals for the appropriation of certain items of the provincial revenues forming part of the civil budget estimate for the current year. The items in question are three in number, namely, (a) a sum of Rs. 65,000, the estimated tour expenses of the Governor and his staff; (b) a sum of Rs. 10,000, the estimated travelling allowance of the Members of the Governor's Executive Council, and, (c) a sum of Rs. 10,000, the estimated travelling allowance of the Inspector-General of Police. We are further asked to issue a writ of mandamus to the Governor of Bihar and Orissa, the two Members of his Executive Council and the Inspector-General of police, directing them "to secure such legal sanctions and authority for the proposed appropriation as may under the law be deemed necessary." We are further moved to issue a writ of injunction restraining the same parties from using any portion of the revenues of the province for the purposes aforesaid "until proper legal sanction and authority deemed necessary under the law have been obtained therefor."

It appears from the petition of the applicant that in submitting the budget estimate for the current year the Local Government has treated the items in question as "non-voted," that is to say, items the appropriation of which is not subject to the control or sanction of the Legislative Council. The case made on behalf of the petitioner is twofold. First, he contends that the items of expenditure mentioned are of the class commonly described as "voted" items, that is to say, items the expenditure of which can only be sanctioned by the vote of the Legislative Council of the province, and not "non-voted" as they are described in the budget estimate. By reason of these items being withheld from the vote of the Legislative Council the petitioner complains that his right as a Member of the Council to exercise control over the proposed appropriation of this part of the revenue has been infringed. In the second place he contends that even if the Local Government is right in treating the items in question as "non-voted," neither the Governor nor the other parties named have obtained the necessary sanction which should authorize them to appropriate the sums in question to the purposes proposed. We are not told what the necessary legal sanction is and as I understand the argument it follows that if the items in question have in fact been properly treated as "non-voted," still

neither the Governor nor anybody else has obtained any authority under the Government of India Act to appropriate and spend the same.

A preliminary objection was taken by the Government Advocate, who appears for the opposite party, that this Court has no power to issue a writ of mandamus; and although I am by no means satisfied that we have such power, it is not necessary definitely to determine the question for assuming, without deciding, that we can issue in proper cases a writ of mandamus I think the application fails on the merits.

Under the Government of India Act the province of Bihar and Orissa, as in the case of other presidencies and provinces, is governed, in relation to reserved subjects, by the Governor in Council and in relation to transferred subjects, save as otherwise provided, by the Governor acting with Ministers appointed under the Act, and all orders and other proceedings of a Governor's province shall be expressed to be made by the Governor of the province, and shall be authenticated as the Governor may, by rule, direct; and orders and proceedings so authenticated shall not be called in question in any legal proceedings on the ground that they were not duly made by the Government of the province. This will appear from a perusal of Ss. 46 and 49 of the Act.

Under S. 72 D of the Act proposals for the appropriation of the revenues of the province can only be made on the recommendation of the Governor communicated to the Legislative Council. That section contains provisions which shall have effect with respect to business and procedure in Governors' Legislative Councils. Sub-S. (2) provides as follows:

(2) The estimated annual expenditure and revenue of the province shall be laid in the form of a statement before the Council in each year, and the proposals of the Local Government for the appropriation of provincial revenues and other moneys in any year shall be submitted to the vote of the Council in the form of demands for grants. The Council may assent, or refuse its assent, to a demand, or may reduce the amount therein referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant is composed.

Then follow certain provisos which are not material to the present case except the last which provides, as already stated, that no proposal for the appropriation of revenue shall be made except on the recommendation of the Governor. Sub-section (3) sets out certain heads of expenditure which are exceptions to the general provisions of sub-Section (2) and need not be submitted to the Council. This sub-section, as it existed before the amending Act of 1925, 15 and 26 Geo. V., c. 83, provided as follows:

(3) Nothing in the foregoing sub-section shall require proposals to be submitted to the Council relating to the following heads of expenditure:

(i) Contributions payable by the Local Government to the Governor-General in Council; and

(ii) interest and sinking fund charges on loans; and

(iii) expenditure of which the amount is prescribed by or under any law; and

(iv) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council; and

(v) salaries of Judges of the High Court of the province and of the Advocate General.

The only clause of the above sub-section which is material to the present discussion is Clause (iv).

Sub-section (4) is also of importance; it provides as follows:

(4) If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the Governor shall be final.

In addition to the salaries and pensions mentioned in sub-Section (3) (iv) allowances are given to the Governor and other Government officers to cover the actual travelling expenses incurred by them in travelling in the interests of the public service. These are provided for under the Civil Service Regulations and the Fundamental Rules which have statutory sanction. In so far as they are payable out of the provincial budget such allowances have always hitherto been submitted to the vote of the Legislative Council of the province since the reforms came into existence in 1919, for they are not included in the term "salaries" or any other of the exempted heads of expenditure mentioned in sub-Section (3) of Section 72 D. By the amending Act of 1925, however, sub-Section (3) of Section 72 D of the principal Act has been amended. Section 1 (3) of the amending Act of 1925 enacts that the following provision shall be added at the end of sub-S. (3) of S. 72 D of the Act of 1919.

For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund, and any

other payments or emoluments payable to or on account of a person in respect of his office.

In consequence of this amendment the tour and travelling allowances of the Government officers named have been treated by the Local Government in the budget of the current year as heads of expenditure which need not be submitted to the Legislative Council.

The first question then is whether the Governor's tour allowance and the travelling allowances of the other officers named come within the amendment. In my opinion they are clearly covered by the words of the amending Act and the Local Government was justified in withdrawing them from the vote of the Legislative Council and treating them as "non-voted" items. It was argued that the tour allowance of the Governor and the travelling allowances of the other officers were not payments to or on account of a person in respect of his office, but I am unable to accede to this argument. The allowances are payable to Government officers only to cover the actual travelling expenses incurred by them when travelling in the interests of the public service; in other words, in performing a part of the duties incumbent upon them by reason of their office. But in any case, if any question arises whether any proposed appropriation of moneys does or does not relate to the heads of exependiture mentioned in sub-S. (3) the Governor's decision on the matter is final as provided under sub-S. (4) and cannot be called in question. Even if we thought, which is by no means the case, that the Governor's decision on the matter was erroneous I consider that it cannot be questioned in a Court of Law. It was argued that his decision was only to be considered final for the purposes of the business and procedure in the Legislative Council and that it was not final for all purposes, but the business and procedure of the Legislative Council is the only question with which we are concerned in this matter and if the items in question were, by the decision of the Governor, withdrawn from the vote of the Legislative Council the Council can have no right to require them to be submitted and there has been no infringement of the right claimed by the petitioner. The first point raised by the applicant, therefore, fails.

The second point raises a question whether the local government has legal sanction to appropriate these items of revenue for the purposes of tour and travelling expenses. To determine this question it is necessary to consider certains sections of the Act in some detail. The scheme of the Government of India Act appears to be that, except as otherwise provided in the Act and the rules made thereunder, the control of the revenues of India shall rest with the Secretary of State or the Secretary of State in Council who have the right to delegate, in certain cases, to various officers or bodies the powers so conferred.

Section 2 (1) vests in the Secretary of State, subject to the provisions of the Act, all the powers and duties relating to the Government of India and the revenues of India formerly exercised or performed by the East India Company or the Court of Directors or Court of Proprietors before 1858 and sub-S. (2) provides as follows: —

(2) In particular, the Secretary of State may subject to the provisions of this Act or rules made thereunder, superintend, direct and control all acts, operations and concerns which relate to the government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India.

This control may be relaxed by rules properly framed for the purpose and a grant or appropriation of revenue may be made in accordance with the provisions and restrictions prescribed by the Secretary of State in council. Sections 19 A and 21 are in this connexion important and the material portions may be quoted. They are as follows: —

19 A. The Secretary of State in Council may, notwithstanding anything in this Act by rule regulate and restrict the exercise of the powers of superintendence, direction and control, vested in the Secretary of State and the Secretary of State in Council by this Act, or otherwise, in such manner as may appear necessary or expedient in order to give effect to the purposes of the Government of India Act, 1919.

The rest of the section provides for obtaining the sanction of both Houses of Parliament to proposed rules relating to to subjects other than transferred subjects and for giving either House of Parliament an opportunity of annulling rules when made relating to transferred subjects.

Section 21 reads as follows; —

21. Subject to the provisions of this Act, and rules made thereunder, the expenditure of the revenues of India, both in British India and

elsewhere, shall be subject to the control of the Secretary of State in Council and no grant or appropriation of any part of those revenues or of any other property coming into the possession of the Secretary of State in Council by virtue of the Government of India Act, 1858, or this Act, shall be made without the concurrence of a majority of votes at a meeting of the Council of India.

Provided that a grant or appropriation made in accordance with provisions or restrictions prescribed by the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council shall be deemed to be made with the concurrence of a majority of such votes.

From these sections it seems clear that, subject to the provisions of the Act which in certain cases require the vote of the provincial Legislative Council in provincial subjects before an appropriation of revenue can legally be made, the Secretary of State in Council may by a majority of votes prescribe the manner in which the grants and appropriations may be made by local governments and when made they shall be deemed to be made with the sanction of the Secretary of State in Council. The object of these provisions was no doubt to facilitate the expenditure of the revenue by avoiding the cumbersome procedure of applying for sanction for appropriation of the revenues in ordinary matters of routine in carrying on the government of the different presidencies and provinces of India.

Various resolutions have from time to time been passed and various rules have been formulated by the Secretary of State in Council under these and other sections of the Act with a view to facilitating the routine work of the appropriation of the revenue, and careful restrictions in all important matters have been imposed upon the powers delegated to the Governor in Council. The only resolution on the subject which I need refer to is No. 1449-E. A., dated the 29th September 1922, published in the Gazette of India of the 7th October 1922. The first clause of the resolution runs as follows:

His Majesty's Secretary of State for India in Council has been pleased to make the rules appended to this resolution, defining the classes of expenditure on reserved provincial subjects which a Governor in Council may not sanction without the previous consent of the Secretary of State in Council. These rules supersede all previous rules of a similar nature and, subject to their observance, orders regarding specific cases of expenditure passed by the Secretary of State in Council or the Governor General in Council under regulations previously in force will no longer be binding.

It should be pointed out that the subjects now under discussion are reserved provincial subjects. The second and third clauses of the resolution are not material. Clause 4 is as follows:

Subject to the observance of these rules and to the provisions of S. 72 D of the Government of India Act, the Governor in Council has full power to sanction expenditure upon reserved provincial subjects and, with the previous consent of his Finance Department, to delegate such power upon such conditions as he may think fit to any officer subordinate to him. Any sanction given under this rule will remain valid for the specified period for which it is given, subject, in the case of voted expenditure, to the voting of supply in each year.

Then follow certain rules enumerating the cases in which a Governor in Council must obtain the previous sanction of the Secretary of State in Council before incurring expenditure on reserved provincial subjects out of the revenues of India. These rules need not be referred to in detail. It is sufficient to say that they in no way limit the powers of the Governor in Council to sanction the expenditure which is now called in question. It is clear, in my opinion, upon a perusal of the statute and the resolution and rules referred to that the action of the opposite party which is called in question in the present proceedings is regular and constitutional, and no cause has been shown why the Court should exercise its powers of mandamus, assuming such powers are within its competence.

Moreover, I am of opinion that even if this Court possesses the power which it is asked to exercise, S. 110 of the Government of India Act is a complete bar to the exercise of such power in the present instance. The section provides that, amongst other persons, each Governor and each of the Members of the Executive Council of a Governor shall not

(a) be subject to the original jurisdiction of any high Court by reason of anything counselled, ordered or done by any of them in his public capacity only; nor

(b) be liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction; nor.

(c) be subject to the original criminal jurisdiction of any High Court in respect of any offence not being treason or felony.

It was argued that although S. 110 might take away the jurisdiction of the Court with regard to acts already done it did not deprive the Court of the right to restrain acts in contemplation, namely, the future expenditure of the

items of revenue in question. The future expenditure, however, is a matter already counselled or ordered by the Governor and it would be contrary to the spirit and intention of the enactment to hold that the Court had power to prevent the doing of an act which, when done, it would have no power to call in question.

In my opinion this application should be dismissed with costs. We fix the hearing fee at 25 gold mohurs.

Jwala Prasad, J.—(His Lordship stated facts of the case as set out in the judgment of the Chief Justice and proceeded as follows.) The Government of India Act has made provisions for the classification of subjects, in relation to the functions of Government as "central" and "provincial" subjects, and for the transfer from among the "provincial" subjects of subjects to the administration of the Governors of the Provinces acting with Ministers appointed under the Act, and the subjects not so transferred are called "reserved subjects." The three presidencies and the several provinces including the provinces of Bihar and Orissa are to be governed in relation to "reserved subjects" by a Governor in Council and in relation to "transferred subjects" by the Governor acting with Ministers appointed under the Act (S. 46). Provision has also been made under the Act for the allocation of revenues or other moneys to the Provincial Governments; S. 45 (a) (b). Under S. 72 (D) (2) the estimated annual expenditure and revenue of the province "shall be laid" in the form of a statement before the Council in each year, and the proposals of the Local Government for the appropriation of provincial revenues and other moneys in any year "shall be submitted to the vote of the Council" in the form of demands for grants." The Council "may assent, or refuse its assent" to a demand, or may reduce the amount therein referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant is composed. Under the first part of this clause the entire estimate of the annual expenditure of revenue called the Civil Budget Estimate is to be laid before the Council. But all the items of expenditure are not subject to the assent of the Council and are, therefore, not liable to be submitted to its vote. Such items are called "non-votable" items. They are governed by the rules laid down by the Secretary of State in Council in whom vests the superintendence, direction and control of all acts, operations and concerns which relate to the government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India (S. 2, Cl. 2). The revenues of India are received for and in the name of His Majesty and are to be applied for the purpose of the Government of India (S. 20). The Secretary of State has and performs all the powers and duties relating to the Government or revenues of India as used to be exercised or performed by the East India Company, the Court of Directors, etc, mentioned in S. 2. In order to facilitate the Government of India, the powers of the Secretary of State have by rules of devolution, been delegated to the Governor-General in India and to the several Governors in Council of the presidencies and the provinces, and these Local Governments have also control over the revenues and other moneys allocated to them. Cl (3) of S. 72 (D) exempts certain proposals for the appropriation of provincial revenues from having to be submitted to the vote of the Council. That clause runs as follows:

> Nothing in the foregoing sub-section shall require proposals to be submitted to the Council relating to the following heads of expenditure.

Among those heads are "salaries and pensions" of persons appointed by and with the approval of His Majesty in Council or by the Secretary of State in Council." This is what was originally contained in the Government of India Act, 1919. The tour expenses and the travelling allowances of the Governor of the Province and other officers were not included in the items which were not to be submitted to the Legislative Council and hence such items used to be included in the proposals of the Local Government and used to be submitted to the vote of the Council in the form of demands for grants.

Clause (3) has, however, been amended now by the Government of India (Civil Services) Act, 1925, (15 and 16 Geo. 5, Ch. 83), and to Sub-S. 3 the following proviso has been added:

For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund, and any other payments or emoluments payable to or on account of a person in respect of his office.

The words " payments or emoluments payable to or on account of a person in respect of his office " would certainly include the tour expenses and the travelling allowances of the Governor and the Members of his Council and the Inspector-General of Police.

The original S. 3 has undergone a further important amendment and that is, that not only salaries and pensions of officers (mentioned in Cls. 4 and 5 of the original sub-S. (3) but also " salaries and pensions " payable to the dependants of these officers will not be required to be submitted to the Council.

It was, however, urged that the items in question would increase the amount which they are entitled to get under S. 85 of the Act read with the 2nd schedule and consequently these items are not " lawful expenditures " and they are not entitled to appropriate the same from the provincial revenues. No doubt, under S. 85 these officers are only entitled to be paid out of the revenues of India such salaries, not exceeding in any case the maximum, as are specified in that behalf in Schedule II of the Act. Sub-S. 3 of that section says :

The remuneration payable to a person under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein.

The proviso to the section makes sub-S. 3 inapplicable to the allowances or other forms of profit and advantage which may have been sanctioned for such persons by the Secretary of State in Council. In other words, the travelling allowance and other advantages would be over and above the salary fixed by S. 85 read with Schedule II of the Act.

There is, therefore, no force in this contention.

Assuming for the sake of argument that the " tour expenses " and " the travelling allowances, " the items in dispute in the present case, were not exempted from being submitted to the vote of the Council, even then the question cannot be raised before us. It appertains exclusively to the jurisdiction of the Governor. Cl. (4) of S. 72 (D) runs as follows :

If any question arises whether any proposed appropriation of money does or does not relate to the above heads of expenditure, the decision of the Governor shall be final.

The question with respect to the disputed items was before the Governor on two occasions : first, when the Civil Budget Estimate was prepared and laid before the Council and these items were not included in the proposals for the appropriation of public revenues to be submitted to the vote of the Council, and, secondly, when the petitioner sent notice of motion for a nominal reduction in the amount of the provision for the tour expenses of the Governor. The Governor then disallowed the motion upon the ground that it related to non-voted items of expenditure. Thus, the petitioner directly raised the dispute as to whether the disputed items would be exempted from the vote of the Council under Cl. 3 of S. 72 (D). This dispute became the subject-matter of the decision of the Governor and under Cl. 4 of this section his decision has become final and it cannot now be re-opened.

The petitioner further submits that the decision was final only " with respect to business and procedure in Governors' Legislative Councils " as stated in Cl. (1) of S. 72 (D) and its finality is gone when the matter has come to this Court. But his prayer is to set aside that decision with a view that the disputed items be submitted to the vote of the Council. Hence the question raised relates to the business and procedure in the Council. This Court, therefore, has no jurisdiction to destroy the finality of the decision of the Governor.

Again, the act of the Governor in the matter in question is not subject to the jurisdiction of the High Court under S. 110 (A) of the Act. This provision in S. 110 dates back to the time of the Supreme Court of Judicature at Fort William in Bengal (Ss. 1 and 2 of the East India Company, 1780, 21Geo. 3, Ch 70) under which the Governor-General in Council of Bengal was not subject, jointly or severally, to the jurisdiction of

Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity and acting as Governor General in Council.

This provision remained unaffected under the subsequent statutes and was extended to apply to the acts and orders of Governors and Lieutenant-Governors and Members of their Councils. It has been re-affirmed in the present Government of India Act, 1919.

The first prayer asking for a writ of mandamus upon the Governor for submitting the proposals for the appropriation of the items in question to the Council must, therefore, be disallowed.

The second relief seeking for a writ of mandamus on the opposite party to secure a legal sanction and authority for the proposed appropriation seems to be equally barred by the provisions under the Government of India Act. The tour expenses and the travelling allowances of the opposite party relating to the reserved subjects and being excluded from the jurisdiction of the Legislative Council must be controlled by the Secretary of State in India and governed by the rules framed by him. It has not been at all shown that the appropriation of these items has, in any way, infringed the rules laid down by the Secretary of State in Council or is beyond the authority of the Local Government under the powers vested in them by the rules of devolution ; for aught we know the appropriation in question is within the power of the Local Government under the rules framed by the Secretary of State for India in Council, and it is not within our province to examine these items and to say whether or not they are within the authority vested in the Local Government. It may be mentioned that no Municipal Court has any jurisdiction to question, control or interfere with the appropriation of the revenue of India by the Local Government provided it is for the purpose of the Government of India. The appropriation will be an act of State which essentially concerns the exercise of Sovereign power : *Salaman* v. *The Secretary of State for India* (1).

The last prayer is to issue a writ of injunction restraining the opposite party from using any portion of the revenue of the province for the aforesaid purposes until legal sanction and authority are obtained. But no injunction can be granted independently of any suit having been brought. Therefore, this prayer is also not within the jurisdiction of the Court to grant.

The application, therefore, must fail with respect to all the reliefs sought. Hence it is not necessary to decide as to whether this Court has power to issue a writ of mandamus.

It may, however, be mentioned that mandamus or a command is a high prerogative writ of a most extensive remedial nature. In form it is a command issued in the King's name from the King's Bench Division of the High Court only, and addressed to any person, corporation or inferior Court of Judicature requiring them to do something therein specified which appertains to their office and which the Court holds to be consonant to right and justice. It is used principally for public purposes and to enforce the performance of public rights or duties. It enforces, however, some private rights when they are withheld by public officers. The issuing of this writ being part of the original jurisdiction of the Court of the King's Bench is a matter within the exclusive cognizance of and is assigned to the King's Bench Division of the High Court (Jud. Act. 1873, S. 34). It is a general rule that this writ is only to be issued where a party has no other specific remedy. The jurisdiction is altogether in the discretion of the Court.

Section 40 of the East India Company Act, 1772 (13 Geo. 3, Ch. 63) empowered His Majesty's Court of King's Bench to " award a writ or writs of mandamus, requiring the Chief Justice and Judges of the Supreme Court of Judicature at the time being, or the Judges of the Mayor's Court at Madras, Bombay or Bencoolen, as the case may require and are hereby respectively authorized and required accordingly, to hold a Court with all convenient speed for the examination of witnesses and receiving such proofs concerning the matters charged in such indictments or informations respectively laid or exhibited in the said Court of King's Bench for misdemeanour or offences committed in India.

Similarly, S. 44 empowered His Majesty's Courts at Westminster to award writs of mandamus to Supreme Court of Judicature for the time being or the Judges of the Mayor's Court at Madras, Bombay or Bencoolen for the examina-

(1) [1906] 1 K. B. 613 = 75 L. J. K. B. 418 = 94 L. T. 858.

tion of witnesses in respect of civil suits filed in the said Mayor's Courts at Westminster: vide also S. 3, 42 Geo. 3. C. 85 to the same effect.

This Indian High Courts Act of 1861 empowered the Crown to establish, by Letters Patent, High Courts at Calcutta, Madras and Bombay in which the Supreme Courts as well as the Sadar Diwani Adalat and the Sadar Nizamat Adalat were all merged, the jurisdiction and powers of the abolished Courts being transferred to the new High Courts. Later, other High Courts were established, such as, Allahabad, Patna and Lahore. These High Courts have appellate jurisdiction over the subordinate Courts and extraordinary original jurisdiction in certain matters; but they have not got the ordinary original jurisdiction of the Supreme Courts, which was inherited by the High Courts of Calcutta, Madras and Bombay. The right to issue or award writ of mandamus, which might have existed in the Supreme Courts, was therefore not inherited by the High Courts, other than Calcutta, Madras and Bombay, in as much as that right appertains exclusively to the original side of the King's Bench. This is the reason why S. 45 of the Specific Relief Act gives power only to the High Courts of Calcutta, Bombay and Madras (and Rangoon has since been added) in their original jurisdiction, to issue writs of mandamus upon public officers and corporations with respect to their public duties when there is no specific remedy available to the injured person. S. 50 expressly lays down that the High Court shall not have power to issue a writ of mandamus. Therefore, there is nothing to show that the power to award a writ of mandamus as the prerogative right of the Crown, which was conferred upon the King's Bench, was in its entirety conferred upon the Indian High Courts except in the form and to the extent provided for in S. 45 of the Specific Relief Act. There is no case showing that a writ of mandamus was ever awarded by any High Court, except as provided for in S. 45 which does not apply to the Patna High Court established in 1916 or the Allahabad High Court established in 1866. It is noticeable that the latter Court had come into existence long before the Specific Relief Act was enacted; still it is not included in S. 45 of the Act as having the power to issue writ of mandamus. These later High Courts have not inherited all the powers of the Supreme Courts on their original side: vide their respective Letters Patent. The point, however, need not be pursued further for, as already observed, no definite decision on this point is necessary in this case.

Another reason why the application must fail is that even if this Court were to issue any writ of mandamus or injunction, there is no power in the Court to enforce it, and it seems to me that it is meaningless to have a power and to pass an order without having the power to enforce it. As against opposite party Nos. 1 to 3 there is the statutory bar to the High Court having jurisdiction over them with respect to acts done by them in their official capacity. This bar is in existence from the earliest time.

For these reasons I agree with the order proposed by the learned Chief Justice.

Bucknill, J.—(After setting out facts and reliefs as claimed his Lordship proceeded.) Since the institution of the Reforms under the Government of India Act, 1919 and up till the Budget of this year, items of expenditure such as the three to which specific reference has been made above were, we are informed, as a matter of fact included in the votable portion of the budget which was submitted to the vote of the Provincial Legislative Council. This year, however, these and other items of similar character were placed in the non-votable portion of the budget and this was done because, as the result of recommendations of what is known as the Lee Commission, the law relative to what parts of the revenues were votable or non-votable was altered.

By S. 72-D of the Government of India Act, 1919, it was provided that in Governors' Legislative Councils the estimated annual expenditure and revenue of the province should be laid in the form of a statement before the Council in each year and that the proposals of the Local Government for the appropriation of provincial revenues and other moneys in any year should be submitted to the vote of the Council in the form of demands for grants. The Council might assent or refuse its assent to a demand or might reduce the amount therein

referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant was composed. Under the Scheme of the Government of India Act, 1919, certain subjects of administration were handed over to the control of the Governors and Ministers; these were called "Transferred" subjects. Other subjects rested under the control of the Governor and Executive Councillors. These were called "Reserved" subjects. If assent of a demand relating to a "Reserved" subject was refused by the Legislative Council, the Governor could certify that the expenditure was essential for the discharge of his responsibilities in connexion with the subject. No proposal for the appropriation of any revenue could in any case be made except on the recommendation of the Governor. Presumably with regard to refusal of a demand for a grant in connexion with a "Transferred" subject the decision of the Council was (subject to certain emergency powers of the Governor) substantially final. But, in addition to the distinction which was drawn between the effective powers of the Legislative Council relative to "Transferred" and "Reserved" subjects, there were also, by sub-section (3) of section 72D of the Government of India Act, 1919, certain heads of expenditure in connexion with which no proposals need be submitted at all to the Council; that is to say that upon these heads of expenditure the Council has no power to vote; these items were consequently termed non-voted. In the Government of India Act, 1919, they consisted of several heads, namely:

(i) Contributions payable by the local Government to the Governor-General in Council;

(ii) interest and sinking fund charges on loans;

(iii) expenditure of which the amount is prescribed by or under any law;

(iv) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council; and

(v) salaries of Judges of the High Court in the province and of the Advocate-General. Now this sub-section was materially altered by the provisions of section (1) of the Government of India (Civil Service) Act, 1925. Sub-clauses (iv) and (v) were deleted and in their place was substituted a sub-clause (iv) reading thus:

Salaries and pensions payable to or to the dependants of

(a) persons appointed by or with the approval of His Majesty or by the Secretary of State in Council.

(b) Judges of the High Court of the Province.

(c) The Advocate General.

(d) Persons appointed before the first day of April, 1924, by the Governor-General in Council or by a Local Government to services or posts classified by rules under this Act as superior services or posts.

(e) Sums payable to any person who is or has been in the Civil Service of the Crown in India under any order of the Secretary of State in Council or the Governor General in Council or of a Governor, made upon an appeal made to him in pursuance of rules made under this Act.

This sub-section (3) then had added to it the following provision of definition:

For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund, and any other payments or emoluments payable to or on account of a persons in respect of his office.

It is by virtue of this provision of definition that the items of tour and travelling allowances have been placed in this year's budget in the non-votable list. In the Government of India Act, 1919 (and not in any way altered by the amendment of 1925) sub-S. (4) of S. 72D reads thus:

If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the Governor shall be final.

Now the learned vakil who has appeared for the applicant has suggested that these tour and travelling allowances do not fall within this provision of definition. It is difficult to understand how it can seriously be suggested that these items of tour and travelling allowances to these respondents are not payments payable to them or on their account in respect of their offices. In any case, even if that was not so, by sub-S. (4) of S. 72D (just quoted above) the decision of the Governor on this question must be regarded as final; and again, apart even

from the provisions of sub-S. (4) of S. 72D, the provisions of Cl. (a) of S. 110, sub-S. (1) of the Government of India Act 1919, would appear effectually to prevent the High Court from making any order against the Governor in respect of his having thought fit to place these tour and travelling allowances in the non-votable portion of the budget. The material parts of sub-S. (1) of S. 110 of the Government of India Act, 1919, read thus :

The Governor-General, each Governor, Lieutenant-Governor and Chief Commissioner and each of the members of the Executive Council of the Governor-General or of a Governor or Lieutenant Governor and a Minister appointed under this act shall not (a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only.

There is no doubt that it was in his public capacity as Governor that the 1st respondent ordered these tour and travelling expenses to be placed in the non-votable portion of the budget and it would not appear to me that he is in any way amenable to this Court in respect of such action.

Now it is quite true that this application is declared to be made to this Court in its extraordinary civil jurisdiction, but it is admitted by the learned vakil who has appeared for the applicant that the issue of a writ of mandamus or an order prohibiting anyone from doing anything, if such could be effected at all, is done by this Court in its ordinary original civil jurisdiction.

The learned vakil, however, further contends that, even assuming that this Court is of the opinion that these tour and travelling allowances rightly fall within the provision of definition added to S. 72D by the Act of 1925 or that, whether right or wrong, the Governor has power to take such a step without this Court being able to exercise any control over such action, still, he (the Governor) has no power to order the disbursement of any such sums as the law at present stands. It is not made very clear to me by the learned vakil who appeared for the applicant, in what way he proposes that the Governor should obtain this authority to disburse these sums ; but he suggests that a vote of the Legislature would be effective to enable him to do so or that possibly a further Act of the Imperial Parliament might be necessary. The learned vakil has put forward two reasons why he contends that the Governor has no authority to make any disbursements of these tour and travelling allowances. In the first place with regard to the Rs. 65,000 appropriated to the tour and travelling allowances of the Governor himself, the learned vakil points to S. 85 of the Government of India Act, 1919. He contends that under that section there is fixed as payable to, amongst other persons, the Governor of this Province a salary not exceeding the maximum specified which in this case amounts to Rs. 1,00,000 (per annum) and that, if the tour and travelling expenses are to be included in the expression " salaries and pensions " in the provision of definition added to S. 72D of the Act of 1919 by the Act of 1925, then the maximum salary payable under S. 85 of the Act is exceeded by Rs. 65,000; or in other words the Rs 65,000 must be paid out of the salary of Rs. 1,00,000, the maximum payable by way of salary to the Governor under S. 85 of the Act. There are two fallacies in this argument : in the first place the word " include " in the provision of definition added by the Act of 1925 does not mean (as I read it) more than to indicate what for the purposes of the section (that is to say whether the sums can be included in the non-votable portion of the budget) is comprised in the meaning of the words " Salaries and pensions." It does not exclude the operation of the other portions of the Act upon the incidents connected with " salaries or pensions". It is necessary to look at sub-S. (3) of S. 85 with its proviso. This sub-section reads:

The remuneration payable to a person under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein ; provided that nothing in this sub-section shall apply to the allowances or other forms of profit and advantage which may have been sanctioned for such persons by the Secretary of State in Council.

In my view travelling allowances clearly fall within this proviso. The argument therefore that S. 85 operates in such a manner that travelling allowances of a Governor must come out of his salary as fixed by S. 85 falls to the ground ; if it did not the position would indeed be an absurdity.

The second reason which the learned vakil puts forward for his contention that the Governor cannot order disbursement of any of these tour and travelling allowances appropriated for himself is that no such tour and travelling allowances have been sanctioned by the Secretary of State in Council. I think that it may be convenient here to state that the Court is informed at the Bar that the procedure adopted with regard to the fixation of the quantum of travelling allowance is somewhat as follows. The Governors' staff and the heads of different departments put forward, when preparing their annual estimates of what they contemplate will be the expenses of administering their departments an approximate estimate of what would be required for their travelling expenses. These are considered by the Governer in Council and if passed, entered in the budget. Then when an official travels he submits to the Accountant-General through the head of his department a bill for his travelling expenses and if passed by the Accountant-General an order is given to him to receive the sum from the Treasury. It is clear that under the various provisions of the sections of the Act quoted by my Lord the Chief Justice that it is within the power of the Secretary of State in Council to prescribe payment of expenses of the nature under discussion by rule or regulation or in other expedient manner.

Now in Notification No. 1449 E. A., dated Simla, the 29th September 1922 (Vide Gazette of India October 7th, 1922, page 1216) it is stated that His Majesty's Secretary of State for India in Council had been pleased to make certain resolutions and rules with regard to expenditure by a Governor in Council on Reserved provincial subjects. The rules set out numerous instances in which a previous sanction of the Secretary of State in Council has to be obtained by a Governor before he can authorize expenditure upon various subjects. The 4th section of the resolution states that subject to the observance of these rules and of the provisions of Section 72 D of the Government of India Act, the Governor in Council has full power to sanction expenditure upon Reserved provincial subjects with the previous consent of his Finance Dapartment and to delegate such power upon such conditions that he may think fit to any officer subordinate to him. Now, if, as has already been expressed in my view to be the case, these tour and travelling expenses can properly be placed in the category of the non-votable portion of the budget, this resolution (which was ordered to be published and which was published in the Gazette of India) obviously gives the Governor in Council power to sanction the disbursement, as occasion may arise, of these sums which are appropriated for these tour and travelling necessities. In practice, of course, to each head of department is delegated the putting forward for sanction by the Accountant General of the travelling expenses of the officers of the department as occasion arises and as and when travel actually takes place.

The whole application would, therefore, appear to have been dealt with and concluded by the above observations.

It is true, that, upon the assumption that this Court might have agreed with the contentions put forward by the applicant an interesting but now purely academic discussion was initiated as to whether this Court has any power to issue a mandamus. I do not think that it would be profitable or desirable now to express any final view upon this question. I am not sure that prior to the Indian Specific Relief Act (Act 1 of 1877) the High Court of Calcutta had itself power to issue a mandamus but at any rate by Chapter 8 of that Act the position with regard thereto appears, to have been very materially altered. S. 50 of the Act declares that neither the High Court nor any Judge thereof is hereafter to issue any writ of mandamus and by Ss. 45 and 55 procedure which may be in lieu of mandamus and by way of prohibition or injunction is provided. As a matter of fact S. 45 of the Act only refers to the High Courts of Judicature at Calcutta, Madras and Bombay (and by a later addition Rangoon) all of which Courts possessed considerable original jurisdiction. As is, of course well known the Letters Patent constituting the High Court of Judicature at Patna were only issued on the 9th of February 1916.

It was suggested by the learned vakil for the applicant that this High Court had inherited from the Calcutta High Court much of its inherent jurisdiction

including a right to issue a mandamus. In the circumstances of the present application I am content to leave the matter there. When the occasion arises the question can perhaps be further discussed with advantage, but it is noticeable to observe that even by S. 45 of the Specific Relief Act none of the High Courts therein mentioned can make any order binding on a Governor. It would be rather curious if the High Court of Patna was in law endowed with greater powers than the High Court of Calcutta from which it was in 1916 territorially separated.

Summarizing, therefore, my conclusions, I am of the opinion: (a) that the tour and travelling allowances mentioned in the applicant's petition are rightly capable of inclusion in the non-votable portion of the budget; (b) that the Governor's decision on such a question is final; (c) that the High Court has no jurisdiction over the Governor in connexion with such a matter or any original jurisdiction over the Governor or the Executive Councillors in connexion with anything counselled, ordered or done by any of them in their public capacity; (d) that the maximum salary fixed by S. 85 of the Government of India Act for the Governor of the Province does not include tour and travelling allowances; (e) that the Secretary of State in Council has sanctioned the disbursement by the Governor (and by officers to whom he has delegated his authority) tour and travelling allowances subject, of course, to the consent of his Finance Department. I recognize, however, that the withdrawal from the control or vote of the Legislative Council of such large sums as in the aggregate these tour, travelling and other allowances make up is a matter upon which members of the Council and the members of the tax-paying community also may feel that they have a grievance, but that is not a question with which this Court is in any way concerned. The law with regard to the matter is in my view perfectly clear and the only duty of this Court is to interpret it.

I agree therefore that this application should be rejected.

Application dismissed.

A. I. R. 1926 Patna 316

ROSS AND KULWANT SAHAY, JJ.

Parmeshwar Dayal—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 55 of 1926, Decided on 18th February 1926, from an order of the S. J., Bhagalpur, D/- 4th January 1926.

(a) *Penal Code, Ss. 411 and 414—Accused found seated around the stolen property disputing as to its distribution, can be convicted.*

The evidence that the accused were all in the house wherefrom the stolen property was recovered disputing as to what was to be done with the booty, is sufficient for their conviction. [P 317 C 1]

(b) *Evidence Act, S. 154—Witnesses, being neighbours or supporting defence or not supporting prosecution is no ground for discrediting them as hostile—There must be something in their depositions contradictory.*

The grounds that witnesses do not support the prosecution story, but they are neighbours of the accused and they have been won over by them, that one of them is a tout and the other is a man of straw and quite unreliable, are no reasons for declaring the witnesses hostile; and unless there is something in their depositions which is conflicting with earlier statements made by them, which would afford ground for thinking that they have been gained over by the defence, the prosecution is not entitled to declare them hostile. The fact that the witnesses are neighbours of the accused is not sufficient ground for treating them as hostile in order to discredit the statements that they made favourable to the defence. [P 317 C 2, P 318 C 1]

Yunus, S. P. Varma and *Bhagwat Prasad*—for Petitioner.

H. L. Nandkeolyar—for the Crown.

Ross, J.—The petitioner is one of eight persons who have been convicted under Ss. 411 and 414 of the Indian Penal Code in connexion with the theft of three large bales of cloth and one box containing packages of medicine bottles from the railway station at Bhagalpur. The stolen property was recovered in a house rented by one of the accused, Singheswar Lal, situated near the railway station.

The first contention on behalf of the petitioner is that there is no evidence or finding that the petitioner was in possession of any of the stolen goods; and as regards S. 414, there is no evidence of any overt act done by the accused towards disposing of or making away with the property. Now the findings of the appellate Court are that

The evidence to implicate the appellants is that they were all in this house on the 9th of March 1925 disputing as to what was to be done with the booty.

And, again, that

About a dozen people were seen discussing as to how the cloth was to be divided,

The findings of the trial Court are more detailed and are that the witnesses have proved that the packages were found cut through and the cloth in the bales was lying open in the house of Singheswar Lal and all the first nine accused were sitting inside the house and quarrelling over the division of the property, and were claiming a share in the same. There is a further finding that there is also sufficient evidence to show that the accused had cut open the packages of cloths and assisted in concealing or disposing of the stolen property.

The learned counsel for the petitioner referred to the case of *Reg.* v. *Wiley* (1). In that case the jury convicted the accused but the case was reserved for the opinion of the Court of appeal. There was a division of opinion and the majority of the Court held that the conviction was wrong. The facts are thus stated by Baron Martin:

Two men stole some fowls which they put into a sack, and carried to the house of Wiley's father, for the purpose of selling them to Wiley. All three went together from the house to an outhouse; the bag was carried on the back of one of the thieves; and when the policemen went in, the sack was found lying on the floor unopened, and the three men around it as if they were bargaining, but no words were heard. Now I am of opinion that Wiley, under those circumstances, never did receive those fowls.

Lord Campbell, whose opinion was that of the minority, said that

The material question is, whether there has been a possession malo animo: and all the Judges, I believe, are of opinion that there may be a sufficient possession, though there is not a manual possession.

In that case there was no possession by the accused Wiley. But here possession is the basis of the finding; and the only question in debate between the accused was as to the actual division of the property. *Wiley's* case (1), therefore, is no authority on the present question; and, in view of the findings, I am of opinion that so far as that question is concerned the conviction under Ss. 411 and 414 is sustainable.

The main question, however, relates to the case of this particular accused. His defence was that he was falsely implicated and had been brought by the police, from outside, to the house where the stolen property was found. The learned Sessions Judge has referred to the evidence of thirteen witnesses, nine of whom are police officers, two are search witnesses, and two are private persons who were declared hostile. Four of the police officers speak to the presence of the petitioner in the group of men in the house. But whereas Ramrachya Singh (P. W. No. 22) says that he assisted Ramrup Singh, who is prosecution witness No. 13, in arresting Parmeshwar Dayal, Ramrup Singh himself says nothing on this point. Prosecution witness No. 20, who identified the petitioner in the house, called him Bhubaneshwari. There is therefore some uncertainty about the case of this man on the prosecution evidence alone.

Now the two witnesses who were declared hostile, Abdul Wahid (P. W. No. 19) and Madan Barhi (P. W. No. 26), in their cross-examination made statements consistent with the defence raised by the petitioner. They say that Parmeshwar Dayal was brought subsequently by the police from outside, from the direction of his own house. The contention on behalf of the petitioner with regard to this evidence is that there was no justification for declaring these witnesses hostile. The learned Sessions Judge has said nothing on this point and the reasons given by the trial Court are, in my opinion, no reasons at all. What the trial Court said was that these witnesses do not support the prosecution story, but they are admittedly neighbours of the accused and they have been won over by them. Witness No. 19 is a tout and Witness No. 22 is a man of straw and quite unreliable. These are no reasons for declaring the witnesses hostile; and unless there is something in their depositions which conflicted with earlier statements made by them, which would afford ground for thinking that they had been gained over by the defence, the prosecution is not entitled to declare them hostile.

Now Abdul Wahid was only examined to prove that he had let his house to Singheswar and he did make that statement. He was then cross-examined by the defence; and, apparently because of

(1) [1850] 2 Den. C. C. 37=T. and M. 367=20 L. J. M. C. 4=15 Jur. 184=4 Cox. C. C. 414.

statements made in that cross-examination, he was allowed to be cross-examined by the prosecution. Madan Barhi was not examined in chief, but only tendered for cross-examination; and it was after his cross-examination by the defence that he was allowed to be cross-examined by the prosecution. This procedure was, in my opinion, erroneous; and the fact that these witnesses are neighbours of the accused is not sufficient ground for treating them as hostile in order to discredit the statements that they made favourable to the defence. Apart from this, a large body of evidence was given on behalf of Parmeshwar Dayal to show the circumstances in which he was arrested. It is true that some of the witnesses are persons of little consideration and others are his own relatives: but one of the witnesses is a Sub-Registrar whose evidence was prima facie entitled to considerable weight.

The learned Sessions Judge has not discussed the evidence of this or any other defence witness with a view to showing why it should not be relied upon; he has merely said that he prefers the prosecution evidence, and has considered certain probabilities. The trial Court disbelieved the Sub Registrar on the ground that he is a caste-fellow of the petitioner. This reason is in my opinion insufficient; and the evidence of this witness ought to have received fuller consideration.

In view of the doubt that is thrown on the prosecution case by the defects of the prosecution evidence itself, which I have referred to above, it seems to me that there is a distinct element of doubt as regards the complicity of the petitioner. I would therefore allow this application and set aside the conviction and sentence of Parmeshwar Dayal and direct that he be acquitted and released from bail.

Kulwant Sahay, J.—I agree.

Application allowed.

A. I. R. 1926 Patna 318

MULLICK AND ROSS, JJ.

Sheodhar Prasad Singh—Defendant—Appellant.

v.

Ramsaroop Singh—Plaintiff—Respondent.

Misc Appeal No. 23 of 1925, and Civil Rev. No. 53 of 1925, Decided on 7th April 1925, against orders of the 1st Sub-J., Chapra, D/- 19th January 1925 and 2nd February 1925.

(a) *Civil P. C., O. 39, R. 1—Court should be satisfied before granting temporary injunction as to there being a serious question and as to the probability of plaintiff's success.*

In order to entitle the plaintiffs to an interlocutory injunction, though the Court is not called upon to decide finally upon the right of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and on the facts before it there is a probability that the plaintiff is entitled to relief. *Preston* v. *Luck* (1884) 27 *Ch. D*, 49 *Foll.* [P. 319, C 1

(b) *Bengal Ferries Act* (1 *B. C. of* 1885), *S.* 9—*Scope.*

The approval of the Commissioner is limited to the term of the lease and not to the whole lease. [P. 319, C 2]

(c) *Civil P. C., O. 39, R. 1—Suit for declaration only—No permanent injunction claimed—Whether interlocutory injunction should be granted, (Quaere)*

Whether it is competent to the Court to grant an interlocutory injunction in a suit which is a suit for a declaration only, and where nopermenent injunction is claimed. [P. 320 C 1]

Khurshid Hussain and *Dinesh Chandra Varma*—for Appellant.

K. B. Dutt, Nirsu Narain Singh, B. P. Sinha, S. S. Prasad Singh and *B. N. Singh*—for Respondent.

Ross, J.—The Local Government acting under the powers conferred upon it by S. 35 of the Bengal Ferries Act 1885 have transferred the management of a ferry called Rewa Ghat Ferry in the district of Saran to the District Board. The lease of the tolls of the ferry being about to expire on the 30th November, 1924, notice was given that the tolls would be leased by public auction on the 30th October, 1924. The auction was held on that date and continued on the 3rd November when the respondent was the highest bidder with a bid of Rs. 5,700. After consideration by the Vice Chairman and the Chairman, an order was passed on the 9th November, settling the ferry

with the respondent for a term of three years from the 1st December, 1924, and requiring him to take charge of the ferry and make the necessary payments.

Thereafter on the 1st December, the respondent took possession of the ferry and the settlement was referred to the Commissioner of the Division for approval under S. 9 of the Act. But the Commissioner disapproved of the settlement with the respondent and directed that the ferry should be settled with the appellant for a term of one year. An order was then issued by the Chairman of the District Board informing the respondent that the settlement with him had been disapproved by the Commissioner and requiring him to give up possession to the appellant. Thereafter the respondent instituted a suit for a declaration that the settlement of the ferry was lawfully made with him and that the settlement with appellant was inoperative and ineffective against him. With his plaint he made an application for an interlocutory injunction restraining the defendant from interfering with his possession. The defendant replied to the application for an injunction maintaining that the settlement made with him by the Commissioner was a good settlement and that he had been put in possession by the Chairman of the District Board, and that no injunction could issue.

The learned Subordinate Judge, however, made an order in favour of the plaintiff holding that the plaintiff had taken possession of the ferry in due course and that it was the duty of the Court to preserve the existing state of things pending the suit. Against that order the present appeal has been brought.

In order to entitle the plaintiffs to an interlocutory injunction, though the Court is not called upon to decide finally upon the right of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and on the facts before it there is a probability that the plaintiff is entitled to relief, (per Cotton L. J. in *Preston* v. *Luck* (1).

That is the general principle on which the Court acts in these matters. On the question of title, so far as it falls to be considered at this stage, it is only necessary to refer to the order of the Commissioner and to the relevant section of the Ferries Act. The Commissioner after reciting the facts said:

I do not approve the settlement with Ram Swarup Singh but under S. 9 of the Ferries Act I approve the lease of the tolls to Sheodhar Prasad Singh for a period of one year as asked for by him at the highest amount bid. viz Rs. 5,700."

Now S. 9 of the Bengal Ferries Act runs as follows:—

The tolls of any public ferry may, from time to time be leased by public auction for such term as the Magistrate of the District in which such ferry is situated, may, with the approval of the Commissioner, direct.

It would appear from the terms of this section that in the district of Saran, where the District Board has been substituted for the Magistrate of the District in this matter, the tolls of a public ferry are to be leased by public auction and that the approval of the Commissioner is limited to the term of the lease. The order of the Commissioner therefore seems to assume a power which is not conferred by law, in that he disapproved not of the term of the lease but of the whole lease, and made a settlement with one who had not been the highest bidder at the auction. At this stage it is unnecessary to say more on the question of title; but it is clear that the plaintiff has a substantial question to raise and that so far as can be seen at present there is a probability that he is entitled to relief.

On the question of possession there is the parwana to the plaintiff issued on the 29th November, 1924, by the District Board reciting the settlement with him and ordering him to take charge of the ferry from the old contractor and manage the ferry. There is a further order by the Chairman dated the 8th January, 1925, to the plaintiff informing him that the Commissioner had disapproved of the settlement of the ghats with him and had sanctioned a settlement with the old lessee Babu Sheodhar Prasad Singh for a year. The plaintiff was therefore directed to give up possession and make over charge to Babu Sheodhar Prasad Singh.

On the same day a parwana was issued to the peon of the District Board who reported on the 9th that he went to deliver possession of the ferry to Babu Sheodhar Prasad Singh and put his servants in possession and they began to ply a boat; but two hours after the plaintiff's party with a large number of people came prepared to commit a riot and with

1) [1 84] 27 Ch. D. 497.

great difficulty he persuaded them to desist. On the 12th of January, a notice was issued against the respondent by the Magistrate under S. 144 of the Code of Criminal Procedure but the order was discharged on the 3rd of February.

The suit was instituted on the 19th January, and the injunction was granted on the 22nd. It therefore appears that the plaintiff had been put in possession of the Ghat and had been in effective possession from the 1st December till the 9th of January, and that his possession was only temporarily and not apparently effectually disturbed when the settlement was subsequently made with the defendant. In these circumstances it seems to me that it was the duty of the Court to maintain the possession of the respondent by granting this injunction.

The only question that remains is whether it is competent to the Court to grant an interlocutory injunction in a suit which is a suit for a declaration only where no permanent injunction is claimed. The learned vakil for the respondent, in order to escape from the difficulty which this question raises, has undertaken to amend the plaint, praying for a permanent injunction, and to pay the necessary Court-fee. If this is done, there is no legal obstacle to the injunction being continued.

The proper order therefore to make in this appeal is that if the plaint is amended in this manner and the necessary Court-fee is paid by the 15th of April, 1926, the appeal will stand dismissed: but in default of this amendment and payment of Court-fee being made by that date, the injunction will stand dissolved.

The application in revision is dismissed. There will be no order as to costs.

Mullick, J.—I agree.

Revision dismissed.

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* A. I. R. 1926 Patna 320

DAS AND ROSS, JJ.

(*Malik*) *Fazlur Rahman Ahmad* and *others*—Appellants.

v.

Mt. Kokila and *another*—Respondents.

Appeals Nos. 192 and 301 to 328 of 1925, Decided on 8th April 1926, from the Appellate Order of the Dist. J., Gaya, D/- 19th May 1925.

* *Civil P. C., O. 21, R. 16—Decree-holder of a decree-holder is not 'transferee' within R. 16.*

A person by being a decree-holder of the decree-holder does not become a 'transferee' of the decree holder 'by operation of law' within R. 16.

[P 320 C 2]

S. Dayal for *Kailash pati*, *Janak Kishore* and *Sarju Prasad*—for Appellants.

Hasan Jan and *Sultanuddin Hussain*—for Respondents.

Das, J.—The question involved in these analogous appeals turns on the construction of O. 21, R. 16 of the Code of Civil Procedure. The facts are these. One Fazlur Rahman instituted certain proceedings under the provisions of S. 69 of the Bengal Tenancy Act and obtained decrees as against the tenants. It appears that the land in respect of which these decrees had been obtained passed into the possession of Musammat Kokila, who appears to have got a decree against Fazlur Rahman in the civil Court. Musammat Kokila now claims to execute the decrees obtained by Fazlur Rahman and she contends that her right to execute the decrees is conceded to her by O. 21, R. 16 of the Code which runs as follows: (R. 16 quoted). There is a proviso which it is unnecessary for me to consider.

The learned Advocate appearing on behalf of the respondent concedes that there is no transfer or assignment in writing in this case; but he contends that there is a transfer by operation of law. I am wholly unable to accept this contention. Mt. Kokila is in no sense the representative in interest of Fazlur Rahman. She claimed as against Fazlur Rahman and obtained a decree as against Fazlur Rahman. It is difficult to understand how it can be said that because she has obtained a decree in respect of the disputed land against Fazlur Rahman, therefore it must be held that there is a transfer by operation of law of the decrees under S. 69 which had been obtained by Fazlur Rahman as against the tenants.

The decision of the lower appellate Court is, in my opinion, erroneous. I would allow these appeals, set aside the orders passed by the Courts below and dismiss the application of Mt. Kokila. The respondents must pay the costs of these proceedings in all the Courts. There will be a consolidated hearing fee of six gold mohurs.

Orders set aside.

** A. I. R. 1926 Patna 321

DAS AND ROSS, JJ.

Khursaidi Begum—Plaintiff.

v.

Secretary of State for India—Defendant.

Title Suit No. 1 of 1923, Decided on 9th February 1926.

* (a) *Limitation Act, S. 10—Duty of receiving property and holding it for another can only be discharged by handing it over to the person entitled and not by appealing to the lapse of time.*

Where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themseves by handing over that property to somebody entitled to it. Nor can it make any difference whether the duty arises from contract or is connected with some previous request, or whether it is self-imposed and undertaken without any authority whatever. If it be established that the duty has in fact been undertaken and that property has been received by a person assuming to act in a fiduciary character, the same consequences must in every case follow: *Burdick* v. *Garrick*, (1870) 5 *Ch.* 343 and *Lyell* v. *Kennedy*, (1889) 14 *A. C.* 437, *Foll.* [P. 324, C. 1]

(b) *Civil P. C., O. 1, R. 8—Community of interest is the essence of representative suit.*

Given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all, whom the plaintiff proposes to represent. Community of interest is the essence of a representative action, and an order appointing a person to represent a class does not affect one of the class who has a distinct and independent right in another capacity: *Duke of Bedford* v. *Ellis*, (1901) *A. C.* 1, *Foll.* [P. 324, C. 2]

(c) *Mahomedan Law—Shias—Suit for declaration of trust in favour of poor—All Shias are interested—No distinction as to actual poor and others can be made.*

In a suit for a declaration of trust in favour of poor Shias the interests of all Shias are identical. It may be that if there is a trust it is the poor Shias who are the beneficiaries, but the entire Shia community is interested to have the trust declared even if it be a trust in favour of the Shia poor, and it is impossible to distinguish, or to infer a conflicting interest, between those who are actually poor and those who are only potentially so. [P. 324, C. 2]

** (d) *Mahomedan Law—Escheat—Property of heirless Shia taken by acts of sovereignty—Suit does not lie to recover it—But if taken under legal title Courts have jurisdiction—Property taken under a decree is not taken by act of sovereignty.*

If the Secretary of State takes property of a heirless Shia by an act of sovereignty, then no suit will lie to recover it but if on the other hand, he takes it under the colour of a legal title, then his act will be within the jurisdiction of the Municipal Courts. Where the property comes to the Secretary of State by a decree of the Court it is not taken by an act of sovereignty, but under the colour of a legal title. [P. 325, C. 2]

* (e) *Civil P. C., S. 92—Suit to establish existence of trust itself is not within S. 92.*

Section 92 regulates suits where there is a breach of an express or constructive trust created for public purpose of a charitable and religious nature; but a suit to establish the existence of the trust itself, where the whole question involved is whether such a trust exists or not, is not within the purview of S. 92. [P. 326, C. 1]

** (f) *Escheat—In the discretion of Government alone escheated property can be granted back.*

Property which escheates to the Crown may in certain cases be granted to the family of or to persons adopted as part of the family of the person whose estates the same have been, but that is a matter which rests in the discretion of the Government alone. [P. 330, C. 1]

(g) *Trusts Act, S. 6—According to Shiah Law property of heirless Shia is to be devoted to poor—The dedication is, however, vague and no trust is thus created.*

Although it is clearly the intention of the Shia Law that the property of a heirless Shia should be devoted to the poor and indigent, there is some vagueness as to the persons who are intended to be benefited. This vagueness relates to whether the beneficiaries are to be Sayyids, especially poor Sayyids, or whether they are to be the poor and indigent, whether Sayyids or not, whether they are to be the poor of the native town of the deceased or the poor of the place where he resided or the poor of the place where he died, or of all these places, or whether they were to be poor Shias generally.

[P. 327, C. 2, P. 328, C. 2]

(h) *Trusts Act, S. 10—Secretary of State can be trustee.*

The Secretary of State is capable of being a trustee. [P. 330, C. 1]

Ali Imam, Khurshaid Hussain, S. N. Bose, Siveshwar Dayal, Syed Ali Khan, Syed Nooruddin, Ahmed Reza and *A. H. Fakhruddin*—for Plaintiff.

P. C. Manuk, L. N. Singh, Noorul Hussain, C. M. Agarwala and *A. T. Sen*—for Defendant.

Ross, J.—The first plaintiff was the President of the Anjuman Imamia of the town of Gaya. After his death his widow has been snbstituted for him. The second plaintiff is the moofti of the said Anjuman. The plaintiffs sue on their own behalf and on behalf of the Shia community. The defendant is the Secretary of State for India in Council.

The case of the plaintiffs is that one Raja Mode Narain Singh of Tikari in the District of Gaya had a Muhammadan mistress named Barati Begum to whom he granted large moveable and immovable properties. Barati Begum had four children, Mirza Himmat Bahadur, Mirza

Ekbal Bahadur, Bismilla Begum and Sharfunnissa Begum. She died on the 16th of February 1860, leaving her surviving the first three of the aforesaid children who belonged to the Shia sect of Muhammadans and succeeded to her property. In respect of one mahal called Taluka Belkhara she had executed a deed of taksimnama in favour of her children. Mirza Ekbal Bahadur was in possession of properties yielding an income of more than a lakh of rupees. He married Sahebzadi Begum, a lady of Benares, and died childless in 1867, his properties passing to his widow. He had brought up as his own son the son of his sister named Mirza Jalaluddin Bakht Bahadur, and Sahebzadi Begum executed a deed of gift of all her properties in his favour in 1872. She died in Karbala in 1875.

In 1878 a suit was instituted by the Secretary of State for India in Council against Mirza Jalaluddin Bakht Bahadur in the Court of the Subordinate Judge of Gaya for the recovery of the entire estate of Mirza Ekbal Bahadur and of Sahebzadi Begum on the ground that Mirza Ekbal Bahadur being the son of a Hindu Raja could not succeed under the Shia Law to the estate of his mother Barati Begum ; and that as he died childless, under the Shia Law his widow could not succeed to his estate : and, therefore, the deed of gift in favour of Mirza Jalaluddin Bakht Bahadur was invalid. On the 7th of May 1879 the suit was decreed for possession of the immovable properties and dismissed as regards the moveables. The plaintiff in that suit obtained possession of the immovable properties. The judgment in that suit is made part of the plaint and it is pleaded that no regard has been paid to the finding recited in the plaint. Immediately after the decision of the case the Secretary of State got possession over all the immovable properties. The plaintiffs contend that while they have no objection to the right of the Government to hold possession of the estate, the escheated estate is a trust property for the benefit of the Shia community and that the Government is bound to apply the income to pious and religious purposes as enjoined by the Shia Law.

It is alleged that under the Muhammadan Law of the Shia sect no Shia dies heirless, for the last Imam named Hazrat Iamam Mehdi is the heir when there is no natural heir, and that this position was admitted by the Secretary of State for India in the aforesaid litigation. It is further alleged that the Anjuman Imamia of Gaya exists from 1892 and represents the whole Shia community in the District and the Anjuman and the plaintiffs are beneficiaries under that trust. It is also stated that a memorial was submitted to the Governor of Behar and Orissa in Council for a grant for religious purposes out of the income of the trust estate and that the memorial was rejected and that at a meeting of the Anjuman Imamia held on the 10th of December 1922 the plaintiffs have been authorized to institute this suit. The cause of action is the disregard of the defendant to spend the income of the trust estate according to the Shia Law and it is a recurring cause of action. The date of the refusal of the Government to entertain the memorial of the Anjuman, namely, the 12th of August 1922, is stated as the date of the cause of action.

The bulk of the trust estate, namely, the mahal Belkhara, is situated in the District of Gaya. The plaintiffs pray for a declaration that the escheated estate described in the schedules to the plaint is a trust property for the benefit of the Shias in general and of the Shia community of Gaya in particular ; for an injunction restraining the defendant and his Government from using the income of the trust estate for any purpose other than that enjoined by the Shia law ; for costs and for general relief.

The defence is that the plaint is insufficiently stamped ; that the suit is barred by limitation ; that the defendant has been in possession of the properties in suit as full owner for upwards of forty years ; and that no Shia ever put forth any claim on any ground to the same. It is denied that the estate is a trust estate and that the plaintiffs or other Shias have any interest of any sort in the properties in suit or have any cause of action against the defendant. It is alleged that the defendant is not a trustee and is incapable of being a trustee ; that he did not get the properties in suit under the Shia Law, but under the law of escheat and that he has been in possession of the escheated estate as absolute owner and not as trustee ; that Barati Begum, Sharfunnissa Begum and Mirza Ekbal Bahadur died heirless and their properties escheated to the Crown ; that

the properties were claimed in 1878 in suits against Jalaluddin Bakht Bahadur and Bismilla Begum and Mirza Himmat Bahadur not on the strength of the Shia Law but on the law of escheat and that the title of the Crown under the law of escheat was declared and possession was decreed and that the Court rejected the plea that the Imam Mehdi was the heir and that the Mujtahids were entitled to possession.

It is pleaded that the plaintiffs' interpretation of the judgment is not correct. It is further pleaded that the religious and moral injunctions and directions of the Shia Law are not binding on and enforceable against the defendant: that the income of the properties cannot be spent according to the Shia Law; and that the Anjuman and the plaintiffs and other Shias are not beneficiaries and are not interested in the properties in suit. In a supplementary written statement it is pleaded that the suit is not maintainable without compliance with the provisions of S. 92 of the Code of Civil Procedure and that it is barred as res judicata. In a further supplementary written statement it is pleaded that five properties specified therein had been transferred to other persons who were necessary parties and that the defendant has no interest in them and the suit is barred in respect thereof by general and special limitation.

The following issues were framed: —

(1) Has the claim been undervalued? Is the Court-fee insufficient? (2) Is the cause of action recurrent? If so, to what extent? Is the suit barred by limitation? (3) Is the suit barred by the principle of res judicata? (4) Are the plaintiffs entitled to maintain the suit? (5) Does the suit lie against the Secretary of State for India in Council as agent of the sovereign? (6) Does the suit infringe the provisions of S. 92 of the Civil Procedure Code? (7) Is the Imam Mehdi the legal heir, under the Shia Law, of a Shia dying without natural heirs? Was this not found in the judgment of the 7th May 1879 annexed to the plaint? Was this not admitted by the plaintiff in the suit? (8) If so, does the defendant hold the property in suit to the use of the Shia community until the Imam Mehdi appears? (9) Has the defendant obtained the said property under the general law of escheat, free from the restrictions of the Shia Law, by the aforesaid judgment of otherwise? (10) Is the defendant capable of being a trustee? If not, is the suit maintainable against him? (11) To what relief are the plaintiffs entitled?

Before discussing the issues it may be mentioned here that an order, dated the 16th of January 1924, an application under O. 1, R. 8 for permission to sue on behalf of the Shias generally who are interested in the subject-matter of the suit and also for notice of the institution of the suit being given to all the persons interested was granted and notice was duly given in the usual way.

Issue No. 1.—This issue has been decided in favour of the plaintiffs by order, dated the 6th February 1924, which is to be read as part of this judgment.

Issue No. 2.—From the plaint in the present suit it would appear that Taluka Belkhara was the subject of a deed of taksimnama executed by Barati Begum. This is stated in para. 4. In para. 18 of the written statement, while certain of the allegations of para. 4 of the plaint were traversed, there was no denial of this taksimnama: and for the purposes of this suit the allegation in the plaint must be accepted, although no document has been produced and, so far as I can discover, in the litigation of 1878, there was no reference to any such instrument. Barati Begum died in 1860. As no trust was set up, time began to run from that date; and, as regards the estate other than Taluka Belkhara, which was the subject of the taksimnama, the title of the Shia community, if any, became barred long before the suits of 1878 gave the property to the Secretary of State. As regards Taluka Belkhara time began to run as to the share of Ekbal Bahadur from the 15th of August 1867 when he died. The property became vested in the Secretary of State on the 7th of the May 1879.

It was stated in the argument by the learned vakil for the defendant that possession was not taken until the year 1881, but this does not appear to be correct. On the contrary the plaintiffs said in their present plaint that immediately after the decision of the case the decree was executed and the Secretary of State for India in Council got possession over all the immovable properties claimed by him. The original record has been sent for from the record room of the Calcutta High Court and it appears from the petitions of compromise filed in the appeal from the decree of the Subordinate Judge, dated the 8th of June 1880, that the Secretary of State had already executed the decree and obtained possession. There is therefore no material for holding that possession was not obtained until more than twelve years had

expired from the date of the death of Ekbal Bahadur and as regards the interests of Himmat Bahadur and Bismilla Begum in the taksimnama properties it is clear that, as they were alive when the suits of 1878 were decided, time had not begun to run in respect of their interests when the Secretary of State entered into possession.

With regard to the taksimnama properties, therefore, the question of limitation must be decided with reference to S. 10 of the Limitation Act. The argument of the plaintiffs is that as to this part of the property they are protected by S. 10 of the Limitation Act: (S. 23 was also referred to, but that has obviously no application.) Now by pleading limitation the defendant admits that the Shias once had title, but it has been lost by lapse of time. The plea therefore is in this form that the property was trust property but not property held in trust for a specific purpose. In *Burdick* v. *Garrick* (1), Giffar, L. J., said :

> I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it.

In *Lyell* v. *Kennedy* (2), Lord Macnaghten in adopting that dictum said :

> Nor do I think, it can make any difference whether the duty arises from contract or is connected with some previous request or whether it is self-imposed and undertaken without any authority whatever. If it be established that the duty has in fact been undertaken and that property has been received by a person assuming to act in a fiduciary character, the same consequences must, I think, in every case follow.

The determination of this question will, therefore, depend upon : (1) whether the Shia Law impressed a definite trust upon this property : and (2) whether under the judgment of 1879 the Secretary of State took the property with notice of that trust. The result therefore is that with regard to the property in suit except Taluka Belkhara the suit is barred by limitation ; and, whether as regards Taluka Belkhara it is also barred, will depend upon the decision of the issues on the merits.

Issue No. 3.—The suit is not barred by the principle of res judicata as it is not between the same parties as the suits of 1878.

Issue No. 4.—The plaintiffs sue on be half of the entire Shia community. In order to conduct the action the plaintiffs must represent the class. They have been permitted to sue as representing the class. They must also give an opportunity to the class to say whether the class wants to be represented by them. This has been done by the notice under O. 1, R. 8. But learned counsel for the defendant contends that as representing the entire Shia community the plaintiffs cannot be said to represent the Shia poor in particular (who are the true cestuis que trustent) and that the Shia poor have a hostile right to the general Shia community. It is contended that a claim on behalf of the Shias in general cannot be joined with a claim on behalf of the Shia poor because their interests are necessarily conflicting. The principle governing representative actions is thus stated by Lord Macnaghten in *Duke of Bedford* v. *Ellis* (3) :

> Given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent.

Now while it is true that community of interest is the essence of a representative action, and an order appointing a person to represent a class does not affect one of the class who has a distinct and independent right in another capacity, [*In re Lart* (4) and Daniel's Chancery Practice, Eighth Edition, p. 869], yet it seems to me that so far as the present suit is concerned it is a suit for a declaration of trust and in this matter the interests of all Shias are identical. It may be that if there is a trust it is the poor Shias who are the beneficiaries, but the entire Shia community is interested to have the trust declared even if it be a trust in favour of the Shia poor, and in this matter it seems to me impossible to distinguish, or to infer a conflicting interest, between those who are actually poor and those who are only potentially so. I would, therefore, decide this issue in favour of the plaintiffs.

Issue No. 5.—The statutory provisions relevant to this issue are S. 79 of the Code of Civil Procedure and S. 32 of the Government of India Act. S. 32 provides that every person shall have the

(1) [1870] 5 C. H. 243.
(2) [1889] 14 A. C. 437.
(3) [1901] A. C. 1=83 L. T. 686=70 L. J. Ch. 102=17 T. L. R. 139.
(4) [1896] 2 Ch. 788=65 L. J. Ch. 846=75 L. T. 175=45 W. R. 27.

same remedies against the Secretary of State for India in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed, and that the property for the time being vested in His Majesty for the purposes of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company if the Government of India Act, 1858, and this Act had not been passed. The question of the liability of the Secretary of State for India in Council to an action in the Municipal Courts was discussed in *The Peninsular and Oriental Steam Navigation Company* v. *Secretary of State for India* (5) where Barnes Peacock, C. J., said :

In determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to sovereigns and States and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force. We concur entirely in the opinion expressed by Chief Justice Grey in the case of *Bank of Bengal* v. *East India Company* (6) which was cited in the argument, that the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them sovereigns. We are further of opinion that the East India Company were not sovereigns, and, therefore, could not claim all the exemptions of a sovereign, and that they were not public servants of Government, and, therefore, did not fall under the principle of the cases with regard to the liabilities of such persons, but they were a Company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of the Government and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them : *Moodaley* v. *East India Company* and the same v. *Morton* (7). But the Master of the Rolls, afterwards Lord Kenyon, said : I admit that no suit will lie in this Court against a sovereign power for anything done in that capacity but I do not think the East India Company is within the rule. They have rights as a sovereign power, they have also duties as individuals. But where the act is done or a contract is entered into in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by sovereign or private individuals delegated by a sovereign to exercise them, no action will lie.

The same principle was laid down in the Raja of Tanjore's case [*Secretary of State* v. *Kamachee Boye Sahaba*] (8), where the question was put thus :

The next question is : What is the real character of the act done in this case ? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring state, an act not affecting to justify itself on grounds of Municipal law ? Or, was it in whole or in part a possession taken by the Crown under colour of legal title of the property of the late Raja of Tanjore in trust for those who, by law, might be entitled to it on the death of the last possessor :

Similarly in *Forest* v. *Secretary of State for India* (9), it was held that the resumption was not an act of State. It was the

resumption of land previously held from the Government under a particular tenure upon the alleged determination of the tenure. The possession was taken under the colour of a legal title, that being the undoubted right of the sovereign power to resume, and retain or assess to the public revenue all lands within its territories upon the determination of the tenure, under which they may have been exceptionally held rent free. If by means of the continuance of the tenure or for other cause a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would prima facie be cognizable by the Municipal Courts in India.

Sirdar Bhagwan Singh v. *Secretary of State for India* (10) was a case where the act of Government was done in accordance with the notions of the Government of what was just and reasonable and not according to any rules of law to be enforced against them by their own Courts.

These decisions make it clear that if the Secretary of State took the property in suit in this case by an act of sovereignty, then no suit will lie ; but if, on the other hand, he took it under the colour of a legal title, then his acts will be within the jurisdiction of the Courts. As the property came to the Secretary of State by a decree of the Court it would seem that it was not taken by an act of sovereignty, but under the colour of a legal title. It was said, however, that the property came by escheat, that is, by the prerogative of the Crown and, therefore, by an act of sovereignty. This argument, however, involves the question

(5) [1861] 5 B.H.C.A. 1 Bourk A.O.C. 166.
(6) Bignell Rep. 120.
(7) [1785] 1 Bro. C. C. 469=28 E. R. 1245.
(8) [1859] 7 M. I. A. 476.
(9) [1872] L. A. Sup. Vol. 10 = 18 W. R. 349 = 12 B. L. R. 120 = 1 P. R. 1872 = 3 Sar. 1 (P. C.).
(10) [1874] 2 I. A. 38.

which arises on the merits as to the nature of the estate taken by the Secretary of State under the judgment of 1879. It was further contended on behalf of the defendant that no suit could have been brought against the East India Company in respect of property taken by escheat and reference was made to Regulation 19 of 1910 which deals with the custody and disposal of escheats. By that Regulation a right of suit is reserved in respect of lands and buildings of the nature described therein and it is said that no right of suit is reserved with regard to escheats. But this merely repeats the former argument and the answer to this contention depends upon the merits of the case. Reference was also made on behalf of the defence to S. 20 of the Government of India Act, which provides that the revenues of India shall be received for and in the name of His Majesty and shall be applied for the purposes of the Government of India alone, and the expression "revenues of India" is defined as including all moveable and immovable properties of British India escheating or lapsing for want of an heir or successor and of property in British India devolving as bona vacantia for want of a rightful owner. This argument does not advance the matter further as its validity also involves the question of the nature of the estate taken by the Secretary of State in the property in suit. The answer to this issue, therefore, depends upon the decision on the merits of the case.

Issue No. 6.—In my opinion S. 92 of the Civil Procedure Code is not applicable to the present suit. S. 92 regulates suits where there is a breach of an express or constructive trust created for public purposes of a charitable and religious nature ; but here the suit is to establish the existence of the trust itself and the whole question involved is whether such a trust exists or not. In my opinion, a suit of this nature is not within the purview of S. 92 of the Code. This issue is decided in favour of the plaintiffs.

Issue Nos. 7, 8 *and* 9.—In dealing with these issues it will be convenient in the first place to ascertain what the law of the Shias is with regard to the heirship of the Imam. The principal modern authorities are as follows :

In Bailie's Digest of Muhammadan Law Imameea, at page 261, the scheme of inheritance under the Shia law is set forth : 'Inheritance is founded on nusub or consanguinity and on subub or special connexion.' One of the forms of subub is wula or dominion and the last form of wula is the wula of Imamut or headship of the Musalman community. At page 301 the rule is laid down that where there is no surety for offences (that is, the second form of wula) the Imam is the heir of a person who has no other heirs, and this is the third kind of wula. If then the Imam be present, the property belongs to him to do with it as he pleases. Aly, on whom the peace, was accustomed in such cases to give the property to the poor and indigent of the deceased's city and the weak and infirm among his neighbours gratuitously. And if the Imam is absent, the property is to be divided among the poor and indigent, and not be given up or surrendered to any other but a righteous Sultan or ruler, except under fear or actual compulsion.

It may be explained here that by all the followers of the twelve Imam's, Imam Mehdi, their twelfth and last spiritual as well as temporal leader, is believed to be still living, but to have retired from human observations since his last appearance on earth (page 272, foot-note.) The wula of the Imam or doctrine of escheats to the public treasury is more fully explained at pages 362 and 363, where the authorities are cited which prescribe the partition of the property among the poor and indigent of the Shia sect in the same manner as they enjoy the fifth of the spoils taken in battle. Mr. Shama Churun Sircar in his Tagore Law Lectures, 1874, at page 264, discusses the wula of Imamat and lays down, quoting the authorities, that if the Imam be present the property goes to him to do with it as he pleases and that the most approved opinion is that the property thus vested in the Imam should, while he is absent, be distributed among the Sayyids who are his descendants, preference nevertheless being given to such of them as are poor and indigent.

Several authorities are quoted, including the Sharayaul-Islam, to show that the property should be distributed among the poor and indigent. Mr. Ameer Ali in Vol. II of his Muhammadan Law, Fourth Edition, at pages 132 to 134 discusses the Walaul Imam. In his view the right of the Imam is not in the nature of an escheat to the sovereign, but the property goes to him as the spiritual head of the Shia Commonwealth to be distributed among the poor and indigent of the locality where the intestate lived, or

where he was born and in the absence of the Imam the property goes to his representative, the Mujtahid, the chief expounder of the law, to be distributed by him equitably and properly among the poor and indigent of the place where the intestate lived or for such charitable and religious purposes as may seem consonant to his last wishes. The right of the Imam is not qua-sovereign, but qua-spiritual leader, and is, therefore, subject to the ordinary bar of the statute of limitation. The learned author, after quoting a Fatwa pronounced by a leading Mujtahid of Iran, goes on to say :

In Shia countries not subject to foreign control the Mujtahid, who is the chief expounder of the law, is also frequently vested with the power of the Kazi. When this is the case no difficulty occurs in the application of the principle of Shia law. But in India, where the Shias are subject to a non-Moslem power, the question may arise, under whose direction the distribution contemplated by the Shia law should take place ? These questions, it seems to me, are answered by the dictum quoted from the Jama-ush-Shittat. The Civil Court, representing the Hakim mentioned in the Fatwa, would assume the charge of the property and make it over to the Mujtahid, if there be any, to be distributed among the poor and indigent of the deceased's village, or native city under the Court's own control and supervision so as to leave no room for doubt as to its proper application. If there be no Mujtahid, some Shia officer should be appointed for the purpose of distribution. It must also be remembered that the law does not necessarily contemplate application of the proceeds in the shape of alms. If the object of the law which has in view the benefit of the poor and the indigent, who are always in need of help, can be attained by establishing an institution by which regular assistance can be rendered to them it would be valid.

Sir Roland Wilson in his Anglo-Muhammadan Law (1st Edition, page 378) deals with the difference in the Shia law of inheritance, from the Hanifi Law by which the property of a Muhammadan dying without heirs devolves upon the Government and says that

the surplus does not return to the wife even where there are no other heirs but passes by escheat, in Shia theory, to the Imam, and according to Anglo-Muhammadan law, to the British Government.

It is noteworthy, however, that in the last edition (that is, the fifth edition) of this work, which has been revised by Mr. Yusuf Ali, this qualification is omitted. It is simply stated at page 451 that

there is no final escheat to a Baitul Mal. Where a deceased person leaves no possible heir, his property is liquidated by the Mujtahid as representing the Imam, the proceeds to be distributed among the poor of the city in which the deceased was born (or presumably, where that is impracticable, where he died.)

The learned Subordinate Judge of Gaya in his judgment in the suits of 1878 cited numerous original authorities, Shurra-al-Islam, Mustanid-ul-Sheea, Mansubood, Mussalik-ul-efham and Zainul-ul-ehakam and on a review of these authorities he came to the conclusion that the majority of the traditions concur and agree that the property of a Shia should be received by Sayyids, the poor and the indigent especially of Shia sect.

Learned counsel for the plaintiff cited also the following passages from texts of authority : (1) Mustanadash Shia on Jurisprudence by Ahmad b. Muhammad b. Mahdi b. Abi Darr, Vol. II, Juzv. 26, the Book of Inheritance, Chap. IV, edited in Tehran Rajab A. H. 1273 ; (2) Sharai-ul-Islam, p. 267, by Abul Qasim Najmud Din Jafar b. Muhammad b. Yahya b. Saidal Hilli, also known as Al Muhaqqiq (the scholar), who died in A.H. 676, A. D. 1275 ; (3) Jawahirul Kalamfi Sharh-i-Sharai-ul-Islam by Muhammad Hasan b. Baquir-an-Najafi. Book of Inheritance, Vol. VI ; (4) Najatul Ibad, page 404, on the heirship of the Imam and (i) Copy of an Istifa (precept) in connexion with the property of one who has no heir, taken from the book entitled Jami's Shattah by Abdul Qasim Alib Abdul Hamid-al-Quami, (ii) Jawahirul Kalam, Vol. VI, the Book of Inheritance (iii) Najatul Ibad, by the author of Jawahirul Kalam, Edition of A. H. 1318, page 404. (iv) Ar-Rahdatul-Bahiyah by Zainud Din B. Ali Amili, who died A. H. 966, A. D. 1558, and (5) Mustanadash-Shia, Vol. II, on the mode of dealing with property left without heirs.

These authorities make it clear that the last heir of a Shia leaving no other heirs is the Imam ; and that the Imam being infallible could dispose of the property as he pleased. But the practice of the Imams had established a rule which was binding upon the Mujtahids who took the property during the absence of the Imam Mehdi on his behalf ; and under that practice the property was to be distributed among the poor and indigent. There is some difference of opinion as to whether the beneficiaries were to be Sayyids, especially poor Sayyids, or whether they were to be the poor and indigent, whether Sayyids or not, and whether they were to be the poor of the

native town of the deceased or the poor of the place where he resided or the poor of the place where he died or of all these places, or whether they were to be poor Shias generally. While therefore it is clearly the intention of the Shia law that the property should be devoted to the poor and indigent, there is some vagueness as to the persons who are intended to be benefited; and in some of the authorities the matter is left to the discretion of the vicegerent of the Imam.

I now turn to consider the judgment of the Subordinate Judge of Gaya in the suits of 1878; and, in order to ascertain the effect of his decision on Issue No. 2 in these suits, it will be convenient first to deal with the decision of the Judicial Committee in *Collector of Masulipatam* v. *Covely Vencata Narainappa* (11). That was a case dealing with the estate of a Brahmin dying without heirs and the matter which called for consideration was the effect of the prohibition in the Hindu law.

If there be no heir of a Brahmin's wealth, on his demise, it must be given to a Brahmin, otherwise the King is tainted with sin.

The Judicial Committee first of all discussed the question as one to be determined merely by Hindu law; and it was held that according to Hindu Law the title of the King by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against any claimant who could not show a better title, and that the only question that arose upon the authorities was whether Brahmanical property, so taken, was, in the hands of the King, subject to a trust in favour of Brahmins. Their Lordships then proceeded to say that they were not satisfied that the Sudder Court was not in error when it treated the appellant's claim as wholly or merely determinable by Hindu Law. They conceived that the title which he set up might rest upon grounds of general or universal law. They pointed out that any question touching inheritance is determinable in a manner personal to the last owner; but when it is made out clearly that by the law applicable to the last owner there is a total failure of heirs, then the claim to the land ceases, they apprehend, to be subject to any such personal law. And as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails and is adopted generally in all the Courts of the country alike. Private ownership not existing, the estate must be owner as ultimate lord.

Their Lordships further held that the Sudder Court was in error in applying the actual or supposed Hindu law (which negatives the King's right to Brahmanical property) in derogation of the general right of the British sovereignty, and they came to the conclusion in favour of the general right to the Crown to take by escheat the land of a Hindu subject, though a Brahmin, dying without heirs and they thought that the claim of the appellant to the zamindari in question (subject or not subject to a trust) ought to prevail.

There are, therefore, three grounds for the decision: in the first place, supposing the case to be governed by Hindu law, then the King must take as, at least, intermediate holder of the property; in the second place, where there is no heir under the personal law, the personal law ceases to govern the case and the King takes by the general law of escheat; and, in the third place, the personal law cannot be applied in derogation of the general right of the British sovereignty.

Now it seems to me that the learned Subordinate Judge has followed closely the line of reasoning in that case. He first of all sets forth the Shia law on the heirship of the Imam. During the absence of the Imam the property is to be held by his deputy, the Mujtahid. There is no Mujtahid in British India with the powers required.

"On the contrary, as regards this estate, in the absence of the Imam the most influential, honest and faithful person is the sovereign for the time being, that is, the Queen-Empress. It is most likely that she on receipt of possession of this estate shall use it for good purposes in the way that she thinks best."

This line of reasoning seems to correspond with the first part of the decision of the Privy Council. Then he goes on to say that this line of reasoning is inapplicable because the defendants in these suits were not entitled to raise objections for or on behalf of the Imam or Mujtahid and they, at all events, had no title. He then holds that apart from this, in this matter the plaintiff, that is,

(1) [1867] 8 M. I. A. 500=2 W. R. 61=1 Suther 476=1 Sar. 820 (P. C.).

the Secretary of State, is not bound by the religious books of the Shia sect. When the defendants had no right, there was no heir to the estate. That being so, the sovereign for the time being is under the general law of escheat entitled to take possession. He then points out the analogy between this case and the case of a Brahmin dying without heirs, and as the principle of the Hindu Law could not prevent the Government for the time being from taking the estate under the general law of escheat, in like manner the doctrine of the Muhammadan Law could not bar the plaintiff's claim.

"In this age the Government should, in my opinion, be held as the last heir just in the same way as the Imam has been declared the last heir in the Shurra. That this is the scheme of the judgment is apparent also from the form of the issue framed. According to the general law and the law of the Shias (Kanunan O Sharah) who is entitled to take the estate of a Musalman of the Shia sect who has no issue nor relation entitled to the estate?"

The argument of the learned counsel for the plaintiff is that the Subordinate Judge found title to be in the Imam. He then looked for some one to hold the property and that must mean some one to hold it with the obligation of a Mujtahid. The Crown was selected, because it was honest and the Crown must therefore take the property with the conditions of the Shia law attached and has freedom only within the ambit of Shia purposes. The estate had vested in a heir who could not take possession; he was not present to perform his obligations; the deficiency was to be made up by the sovereign. The Subordinate Judge did not hold that title went to the Secretary of State, but he got the estate in accordance with the principles of the Shia law. The Secretary of State in the plaint had based his claim to the property explicitly on the Shia law, and that in two respects:

By the Imamia Code of Muhammadan law an illegitimate child has no nusub or parentage and is not an heir of his mother. By this law therefore neither Himmat Bahadur, Ekbal Bahadur or Bismilla Begum were the heirs of Barati and as Barati Begum left no other heirs her surviving the properties possessed by her at the time of her death passed in default of other heirs by escheat to the Crown (para. 8). Under the Imamia Code of Muhammadan Law by which the family of Ekbal Bahadur was governed, Sahebzadi Begum being a childless widow was not entitled to inherit any portion of the immovable property of her late husband and as Ekbal Bahadur was himself an illegitimate child and had no issue of his body the whole of his immovable property and 12 annas of his moveable property escheated on his death to the Crown: (para. 12).

It is clear that whatever claim the Secretary of State may have had on principles of general or universal law to the property other than the Taksimnama property, he had no such claim to the Taksimnama property and his claim to that property so far as Ekbal Bahadur's share was concerned was based wholly on the peculiar provision of the Shia law that a childless widow is not an heir. There is therefore great force in the argument of the plaintiffs that inasmuch as the Secretary of State took the property, or at least the Taksimnama property, under the peculiar provisions of the Shia law, he should hold it under that law. But the argument is not conclusive. By the personal law governing the parties the estate was strictly heirless (apart from the claim of the Imam), the persons holding it had no title to it. The Crown was therefore entitled to come in under the general law and to hold the estate. As regards the heirship of the Imam, there was, in the words of the Privy Council, no "person in the nature of an heir capable of succeeding," and on this ground also the Crown was entitled to come in. It is clear that no trust was imposed upon the Secretary of State by the judgment of the Subordinate Judge. The question of the heirship of the Imam was discussed only as a theoretical question, because it was definitely held that the defendants in these suits were not entitled to raise it. No trust therefore could have been imposed by the judgment because there was no one to set up any trust.

It was also argued that the second ground of decision in *The Collector of Masulipatam* v. *Cavely Vencata Narainappa* (11) cannot apply to the present case because in fact there is an heir and consequently there can be no escheat under the general law. But the question is whether there was anyone in the nature of an heir capable of holding the property; and the answer to the question must be in the negative. And the analogy with 8 Moore is complete because in the case of a Brahmin dying without heirs the Mitakshara repeatedly describes the other Brahmins as his "heirs." Consequently a Brahmin dying without natural heirs is no more heirless than a Shia.

Then apart from the judgment, does the Secretary of State hold this property impressed with a trust? This raises the question: Who is the trustee? And who is the cestui que trust? If there is substance in the plaintiffs' contention, then the Secretary of State occupies the position of the Mujtahid. But the Mujtahid is not a trustee for the poor and indigent; he is agent of the Imam. If it be assumed that the Imam could give directions, and by law has given directions to his deputy to distribute the estate which is in the nature of spoils, this would not establish the relation of trustee and cestui que trust between the deputy and the poor. The law binding upon the deputy would not create a trust enforceable by the Court for the benefit of the poor: see *Kinloch* v. *Secretary of State for India* (12). There was no means of enforcing the law against the Mujtahid and there is in my opinion no ground in the Shia law for holding that the present claim can be enforced against the Secretary of State. On these grounds therefore I think that these issues must be decided against the plaintiffs: (1) the trust set up is, on the texts, vague and not enforceable; (2) no trust was imposed by the judgment and decree of the Subordinate Judge awarding possession of the property to the Secretary of State; and (3) no relation of trustee and cestui que trust exists between the parties.

Reference was made in the argument to the practice of the Crown in England in the matter of re-granting escheated lands.

Property which has escheated to the Crown may in certain cases be granted to the family of, or to persons adopted as part of the family of, the person whose estates the same have been. (Halsbury, Laws of England, Vol. II page 27).

This is a matter, however, which rests in the discretion of the Government alone.

Issue No. 10.—That the Secretary of State is capable of being a trustee is indisputable. In *Secretary of State for India* v. *Guru Prasad Dhur* (13), Piggot, J., said:

It need not be discussed whether or not the East India Company could be a trustee. It is certain it could be and often was.

See also *Secretary of State for India* v. *Radhika Prosad Bapuli* (14). This issue is decided in favour of the plaintiffs.

(12) [1889] 7 A.C. 619=15 Ch.D. 1.
(13) [1893] 20 Cal. 51 (F.B.).
(14) A.I.R. 1923 Mad. 667.

Issue No. 11.—No injunction could in any view be granted as the effect would merely be to hold up the property without imposing any duty. On the findings on the above Issues Nos. 7 to 9 the plaintiffs are not entitled to any declaration and therefore to no relief.

The suit must, therefore, be dismissed; but, in view of the importance of the question that has been raised and of the fact that the plaintiffs did not raise it for their own benefit, I think that the costs of both parties should come out of the estate. Hearing-fee, Rs. 1,000 per diem, for seven days.

Das, J.—I agree.

Suit dismissed.

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* A. I. R. 1926 Patna 330

JWALA PRASAD AND BUCKNILL, JJ.

F. H. Manisty and *others*—Plaintiffs—Appellants.

v.

J. V. Jameson and *another*—Defendants—Respondents.

Appeal No. 138 of 1922, Decided on 9th December 1925, from the Original Decree of the Sub-J., Muzafferpore, D/- 16th January 1922.

* *Contract Act, Ss.* 59, 60 *and* 61—*In the absence of any direction from debtor, creditor may appropriate payment in chronological order of debts—This right of creditor continues until he has communicated the appropriation to the debtor.*

The right to adopt the manner of appropriation rests directly with the debtor. In the absence of any direction of the debtor it is open to his creditor to appropriate the payment towards any of his debts, and if there is no intimation by the debtor at the time of payment with regard to appropriation by the creditor, then it is open to the creditor to insist upon appropriation being made in the chronological order in which the debts stand. The right of the creditor to appropriate the payment towards any of the debts due to him continues up to the time that he intimates the appropriation to the debtor, and the creditor has a right to cancel his own appropriation towards a particular debt and to appropriate subsequently towards another debt provided he does so before he had communicated the previous appropriation to the debtor. [P, 333, C. 1]

B. N. Mitter—for Appellants.

S. N. Palit—for Respondents.

Jwala Prasad, J.—The plaintiffs are appellants. They are; (1) Francis Henry Manisty; (2) James Byod Simson Hill; and (3) Henry Walter Dunlop Hill. The defendants are; (1) Julian Veitch Jameson

and (2) Mrs. Georgina Gertrude Munro Jameson. Defendant No. 2 is the wife of Defendant 1.

The plaintiffs brought an action to enforce a simple mortgage set forth in an indenture (Ex. 1) dated the 15th January 1920, and confirmed by an agreement (Ex. 2) dated 12th March 1920. The indentures were executed by both the defendants in respect of a debt of Rs. 21,000 due from Mr. J. V. Jameson alone to the plaintiffs ; and as security for repayment of the debt Mr. Jameson mortgaged the whole of the Jalaha Indigo concern which belonged to him, and Mrs. Jameson mortgaged her undivided two-sixteenths share in the indigo concern called the Karnowl indigo concern. The loan was to be repaid in four instalments, namely :

(1) Rs. 3,000, on the day of handing over the indenture ;

(2) Rs. 6,000, on the 30th June 1920.

(3) R. 6,000 on the 31st December 1920 ;

(4) Rs. 6000 on the 30th June 1921; and with a stipulation that in case any of the instalments remained unpaid on the due date the mortgagees will have a right to take action on the indenture to recover the whole of the balance due after giving the said Mr. Jameson one month's notice in writing of their intention to do so. The mortgagor, however, had a right to pay any instalment or any part thereof before the date mentioned as that on which it falls due. As Mrs. Jameson was not the principal debtor it was stipulated for her benefit that as soon as the total amount due under the mortgage became less than Rs. 12,000 and the rents due to the Bettiah estate on account of the leasehold properties, whether mukurrari or otherwise, shall have been paid, the liability of Mrs. Jameson under the indenture shall cease and determine and thereafter the remaining amount unpaid shall continue to be the first charge on Mr. Jameson's Jalaha Indigo Concern alone.

The first instalment of Rs. 3,000 was paid on the day the mortgage indenture was executed, i. e., on 15th January 1920; the second instalment of the 30th of June 1920 was not paid on the due date. On the 27th September 1920 Rs. 3,000 was sent by Mr. Palmer on behalf of Mr. Jameson to Mr. J. B. S. Hill through one Mr. Kasturi Lal and received by Mr. Hill on the 28th September 1920 (receipt Exhibit 3). Mr. Palmer did not direct as to whether the said sum of Rs. 3,500 was to be credited towards the mortgage loan or the personal loan which admittedly Mr. Jameson owed at that time to Mr. J. B. S. Hill. On the 8th November Mr. Palmer sent another sum of Rs. 3,000 stating in his letter (Ex. 9) of that date that it was paid on account of the mortgage on behalf of Mr. Jameson. On the 18th November M. J. B. S. Hill intimated to Mr. Jameson by his letter of that date (Ex. 4) that he had appropriated Rs. 2,083 due to him on account of the personal loan from Mr. Jameson out of Rs. 3,500, and the balance together with Rs. 3,000 was credited towards the mortgaged loan, thus leaving a balance of Rs. 2,524-4 0 due in respect of the June kist under the mortgage. He asked him to send this sum so as to clear off the June kist. On the 25th November 1920 Mr. Palmer as Manager of the Jalaha Indigo Concern wrote a letter (Ex. 12) to Mr. J. B. S. Hill on behalf of Mr. Jameson sending Rs. 1,515-12-6 along with two statements of account up to 27th November 1920, (1) for the personal loan ; and (2) for the mortgage (Exhibits 12 and 12-B respectively) he credited the entire sum of Rs. 6,000 aforesaid towards the mortgage loan, and out of Rs. 1,515-13-6 he credited Rs. 541 towards the mortgage and the balance of Rs. 974-12-6 towards the personal loan thus reducing the loan account to Rs. 1,200 and the mortgage to Rs. 11,900. As the mortgage loan was brought down under R. 12,000 claimed in his letter the release of Mrs. Jameson's undivided two-sixteenths share in the Karnowl Indigo Concern in accordance with the stipulation in the mortgage bond, the kist due to the Bettiah estate having been paid in full on the 30th September 1920 on account of the leasehold properties and mukarrari. Mr. Hill acknowledged the letter and the sum of Rs. 1,515-12-6 on the very day he received them per letter (Exhibit 1) and said that as he was going that night to the mela he would send his reply later which he did on the 9th December (Ex. 10). In this letter he credited the aforesaid Rs. 1,515-12-6 towards the unpaid amount of June kist referred to in his letter of the 18th November (Ex. 4), reducing it to Rs. 1,008-7-6 (i. e., Rs. 2,524-4-0 minus Rs. 1,515-12-6). He insisted upon the

appropriation made by him in his earlier letter of the 18th November on the ground that Mr. Jameson had promised payment of his personal loan in June. He also pointed out certain small inaccuracies in the accounts given by Mr. Palmer.

The December kist of Rs. 6,000 fell due on the 21st December and was not paid. Mr. Hill accordingly, on the 9th January 1921 wrote a letter (Exhibit 6) to Jameson stating that as the balance of June kist according to his letter of the 9th December and also the December instalment were not paid he would give due notice that if the full amount was not paid within a month he would take action to realize the whole amount of the mortgage under the terms of the deed. He sent the notice that very day (Ex. 13) which was received by Mr. Jameson on the 14th January per acknowledgment (Ex. 15). On the 13th February 1921 Mr. Jameson wrote to Mr. Hill refusing to accept Mr. Hill's mode of appropriation of the payments made by him and asking him to appropriate the same in the manner stated by Mr. Palmer in his letter of the 25th November. He also asked him to release the Karnowl Indigo Concern of his wife from the mortgage. Mr. Hill wrote back to him (Ex. 11) on the 19th February refusing to accede to his request and insisting upon his right to appropriate Rs. 3,500 paid in September 1920 towards his personal loan inasmuch as it was not suggested to him that it was to be credited to the mortgage account.

Mr. Hill brought his suit to enforce the mortgage against both the defendants Mr. and Mrs. Jameson, inasmuch as according to him Rs. 1,008-7-6 was due to him in respect of the June kist of 1920 and Rs. 12,000 for the December kist of 1920 and June kist of 1921 making a total of Rs. 13,008-7-6 which with interest on the date of the suit. amounted to Rs. 13,265-12-5.

The defendants filed separate written statements. The principal contention however, on their behalf has been that the plaintiffs ought to have credited the entire sum of Rs. 3,500 paid on the 27th September 1920 to the mortgage account instead of crediting only a portion of it namely Rs. 1,418, after paying off the personal loan of Mr. J. B. S. Hill amounting to Rs. 2,083, and that the plaintiffs' claim should thus be reduced which would bring down their claim to less than Rs. 12,000 on the 8th of November 1920, the date on which another sum of Rs. 3,000 was paid. Accordingly on behalf of the Defendant No. 2 it was contended that her liability under the mortgage ceased and determined and that the plaintiffs were not entitled to a decree against her own share in the Karnowl Indigo concern. The other pleas of the defendants were of minor importance as the issues framed would show, and the Court below decided those issues against them. They do not arise in this appeal.

The principal contentions of the defendants referred to above gave rise to the following issues: Whether the plaintiffs were entitled to credit Rs. 3,500 towards the loan account as alleged by them.—(Issue No. 3).

Did the Defendant No. 1 promise to pay up the loan account in June? If so does it entitle the plaintiffs to credit Rs. 3,500 to the loan account?—(Issue No. 4).

The Court below decided the two issues together and held that the Defendant No. 1 had promised to pay the personal loan to the Plaintiff No. 2 along with the June instalment of 1920 but that the plaintiffs were not entitled to credit any amount out of the sum of Rs. 3,500 against the loan account and ought to have credited the same towards the mortgage account. Accordingly the Court below reduced the claim of the plaintiffs to Rs. 11,900 on the 8th November 1920 as contended for by the defendants and as this sum was under Rs. 12,000 and the arrears of rent due to the Bettia estate were paid up the Court below released Mrs. Jameson and her Karnowl Indigo Concern from the mortgage.

The plaintiffs have appealed against this decision. Mr. Jameson has not appeared in this Court, and the appeal is resisted only by Mrs. Jameson.

The only question before us is whether Mr. J. B. S. Hill, one of the plaintiffs, was entitled to appropriate Rs. 2,083 out of Rs. 3,500 paid on the 27th September 1920. towards his personal loan and then due from Mr. Jameson. (His Lordship then while discussing the circumstances and probabilities in respect of the appropriation of the amount continued.)

In the case of *Simson* v. *Ingham* (1) it was laid down that the right of the creditor to appropriate the payment towards any of the debts due to him continues up to the time that he intimates the appropriation to the debtor. The decision goes further and holds that the creditor has a right to cancel his own appropriation towards a particular debt and to appropriate subsequently towards another debt provided he does so before he had communicated the previous appropriation to the debtor. Referring to the aforesaid case Sir Henry Cunningham and Sir Horatio Shepherd, in their commentary on the Indian Contract Act under S. 60, observe :

> This is contrary to the rule of civil law according to which an appropriation, whether by debtor or creditor is necessarily made at the time of payment.

(The judgment further discussing the evidence found that the finding of the learned Subordinate Judge as regards the appropriation was erroneous and then proceeded.) Suppose for a moment that Mr. Jameson intended that the sum of Rs. 3,500 should be appropriated towards the June kist of the mortgage, but his intention will not be of any avail until it was communicated to the creditor. The principle of appropriation of payments made by a debtor who owes several debts, to a creditor has been enunciated in the case of *Cory Bros. & Co. Ltd.* v. *Owners of the Turkish Steamship "Mecca"* (2), where it has been laid down that the right to adopt the manner of appropriation rests directly with the debtor. In the absence of any direction of the debtor it is open to his creditor to appropriate the payment towards any of his debts, and lastly, if there is no intimation by the debtor at the time of payment with regard to appropriation by the creditor, then it is open to the creditor to insist upon appropriation being made in the chronological order in which the debts stand. These principles have been so firmly established that it is needless to refer to any further authority. Suffice it to say that the principles have been crystallized in the Indian Contract Act in Ss. 59 to 61. The present case lies in a nutshell. Mr. Jameson, as proprietor of the Jalaha Indigo Concern owed two debts to J. B. S. Hill (1) on account of his loan advanced to the Jalaha factory at a time when he, along with the other plaintiffs and Mr. Jameson, was the proprietor and which subsequently became the sole property of Mr. Jameson ; and (2) the mortgage debt due to Mr. J. B. S. Hill and the other two plaintiffs in the case, Mr. Hill acting on their behalf and representing them throughout the transaction. Mr. Jameson had promised to pay off the personal loan along with the June kist under the mortgage. In September 1920 long after the June kist had become due, Mr. Jameson paid Rs. 3,500 on the 27th September 1920 to Mr. Hill without telling him towards which of the two debts payment was to be appropriated. In the absence of any such direction Mr. Hill appropriated the same towards the full satisfaction of his personal loan and the balance towards mortgage debt, and he indicated the same to Mr. Jameson on the 18th of November 1920. Mr. Jameson subsequently asked him to credit the entire sum of Rs. 3,500 towards the mortgage loan, and not towards his personal loan. Mr. Hill refused to do so. Thereafter Mr. Jameson, on the 13th January 1921, objected to the appropriation and asked Mr. Hill to appropriate the entire sum of Rs. 3,500, towards the June kist which Mr. Hill refused in the following words :

> With reference to your letter dated 13th instant, I have to write to you that I am sorry, I cannot accept the suggestions made in your said letter.
>
> At the time of the payment of Rs. 3,500 in September 1920 it was not suggested to me that the payment should be first credited to the mortgage account B or that any specified amount should be credited to the mortgage account B. I had the right to credit to whichever account I liked and as I considered it proper to credit it first to the loan account I did so and you are duly informed about it. You are wrong in thinking now that you have a right to ask me to credit any portion of the sum credited to the loan account to the mortgage account.

The position taken by Mr. Hill in this letter is fully in consonance with the law on the subject as stated above. Therefore, Rs. 3,500 was properly credited towards to personal loan account of Mr. J. B. S. Hill. The result of this appropriation is that the mortgage debt due at the date of the suit, or when the cause of action arose, was not under Rs. 12,000, but it was as claimed in the plaint, and,

(1) 2 B. and C. 65=3 D. and R. 549=1 L. J. (O S.) K. B. 234=26 R. R. 273.
(2) [1899] A. C. 286=68 L. J. P. C. 86=76 L. T. 579=45 W. R. 667 =8 Asp. M. C. 266.

therefore Mr. Jameson or Mrs. Jameson or her two-sixteenth share in the Karnowl Indigo Concern could not be exempted from the mortgage. The view taken by the learned Subordinate Judge is wrong, and, differing from him, I set aside the decree made by him and decree the appeal with costs.

Accordingly we decree the plaintiffs' suit in terms of the reliefs sought for by them against both the defendants and the properties mortgaged in the mortgaged indenture (Exhibit 1), dated the 15th January 1920. The plaintiffs will get an ordinary mortgage decree with six months' grace allowed to the defendants to pay up the principal sum claimed with interest at the stipulated rate, failing which the plaintiffs will be entitled to sell the properties mortgaged. After the expiry of the period of grace interest will run at the rate of 6 per cent. per annum. The plaintiffs will also get a decree under O. 34, R. 4, of the Code of Civil Procedure.

Bucknill, J.—I should like to add only a few words to the judgment of my learned brother. I think that the law in this subject is clear. In the House of Lords in the case of *Cory Brothers and Company Ltd.* v. *The Owners of the Turkish Steamship "Mecca"* (2), His Lordship Lord Macnaghten there states in clear language that when a debtor is making a payment to his creditor he may appropriate the money as he pleased and that the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of appropriation devolves upon the creditor. In the old and former case of *Devaynes* v. *Noble* (3) (usually known as Glayton's case) which was decided in 1816, it was held that the creditor was bound to make his election at once or within a reasonable time. But Lord Macnaghten observes that it had long been held, and is now quite settled law, that the creditor has the right of election up to the very last moment. It was also stated in the same case decided in the House of Lords, to which I have already referred, that the appropriation of the money is governed, not by any rigid rule of law, but by the intention of the creditor, expressed, implied or presumed and that the same principle is no doubt applicable to appropriation by the debtor. Now in this appeal now before the Court it is common ground that there certainly was no express information given by the debtor to the creditor as to the appropriation of the sum, nor, so far as I could see, was there any ground for suggesting that with regard to this sum (the appropriation of which is now in dispute) there had taken place anything from which the creditor could or should have extracted any implied intention on the part of the debtor as to the methods of its appropriation. Still less was there in my view any presumption which could be fastened upon the creditor that the debtor's intention was that the money should be appropriated to the later of the two specific debts, i. e., to the mortgage debt. Under these circumstances it appears to me that in this case, as the law stands, it is hopeless to argue and cannot seriously be maintained that Mr. Hill could not have had the right of appropriating the sum in whatever manner he might have thought fit.

Appeal allowed.

(3) [1816] 1 Mer. 585=35 E.R. 767.

✻ A. I. R. 1926 Patna 334

ADAMI, J.

Janki Sahay and *others*—Defendants—Petitioners.

v.

Lalbehari Lal and *others*—Plaintiffs—Opposite Party.

Civil Revision No. 331 of 1925, Decided on 18th February 1926, from an order of the Dist. J., Gaya, D/- 6th June 1925.

✻ *Civil P. C., S. 115—Valuation of suit under S. 7 (4) (c), Court-Fees Act, found to be reasonable by lower appellate Court—High Court will not interfere—Court Fees Act, S. 7 (4) (c).*

Where plaintiff valued his suit for injunction at Rs. 150, the value of the property involved being Rs. 300, and lower appellate Court held that under S. 7, sub-S. (4), cl. (c) of the Court Fees Act the valuation was reasonable :

Held : that the lower appellate Court had jurisdiction to decide the matter and High Court will not interfere. [P 335 C 1]

L. N. Singh and *Surjoo Prasad* — for Petitioners.

S. Dayal and *Adit Narain Lal*—for Opposite Party.

Judgment.—It appears that partition proceedings between the parties were taken before a revenue Court, and, on the

5th December 1923, the Revenue Officer determined the share of the parties and directed the Batwara to proceed. The value of the entire property, it seems, is about Rs. 12,000.

The opposite party was dissatisfied with the decision of the revenue Court as to the shares to which he was entitled in the shamilat lands in the various tauzis, and he instituted a suit in the Court of the Munsif of Aurangabad, praying for a declaration that the shares in the shamilat in the various tauzis were equal between the various parties, and that the order of the Partition Deputy Collector was erroneous. He prayed that an injunction might issue restraining the defendants to that suit from proceeding with the partition. He valued the suit for purposes of Court-fee at Rs. 150. Before the Munsif exception was taken by the present petitioners to the valuation stated in the plaint. The learned Munsif, after looking into the value of the tauzis involved in the suit, came to the conclusion that their value was more than Rs. 3,000 and therefore he held that he had no jurisdiction to try the suit and returned the plaint to be presented to the Subordinate Judge. The opposite party then appealed to the District Judge who held that under S. 7, sub-S. (4), Cl. (c) of the Court Fees Act the suit was within the jurisdiction of the Munsif ; for it was open to the plaintiff to value the injunction at such value as he pleased. He held that the valuation of Rs. 150 was a reasonable valuation.

Before me it is contended that, considering the value of the properties, the valuation of Rs. 150 was too small and was an altogether arbitrary valuation, and that on this ground it is open to this Court to interfere.

The question that arises is whether this Court can interfere in the present case. The District Judge had jurisdiction to decide the matter and he has found that the valuation placed on the suit by the plaintiff was a reasonable valuation. If I found that the valuation was altogether arbitrary and unreasonable, I might interfere, but on the finding of the learned District Judge that the valuation was not unreasonable, he having considered the matter, I cannot see that I can interfere in the case at all. The application must be rejected. Hearing-fee two gold mohurs.

Application rejected.

A. I. R. 1926 Patna 335

ADAMI, J.

Jhaldhari Singh—Auction-purchaser—Petitioner.

v.

Pershad Bharti and *others*—Judgment-debtors and decree-holder — Opposite Party.

Civil Revision No. 224 of 1925, Decided on 9th November 1925, from an order of the 1st Munsif, Gaya, D/- 23rd April 1925.

Civil P. C., S. 65—Decree-holder allowed to bid but on conditions—His failure to fulfil the conditions does not affect the sale in favour of highest bidder.

At an auction sale the purchaser bidding the highest amount for the properties is entitled to have the properties knocked down to him at his highest bid. The fact that the decree-holder did not observe the conditions on which he was allowed to bid at the sale could not do more than take away the validity of the decree-holder's own bid, but cannot affect the validity of the bids by the purchaser who is an independent bidder at the sale. [P. 336, C. 1]

Brij Kishore Prasad—for Petitioner.

K. P. Sukul—for Opposite Party.

Judgment.—It appears that, during proceedings for the execution of a decree, the five properties of the judgment-debtors were proclaimed for sale and valuations were fixed for each property, the amounts being Rs. 1,050, Rs. 454, Rs. 588, Rs. 1,805 and Rs. 650. The proclamation was duly served and the sale was fixed for the 21st April 1925. The decree-holder was given leave to bid at the sale, but the condition on which he was allowed to bid was that he was to bid up to the sums fixed by the Court. That order is dated the 22nd April 1925. Bidding commenced and the decree-holder bid Rs. 175 for the first property put up for sale.

The present petitioner was present at the sale and bid against the decree-holder. His bid was Rs. 200 and was the highest. Similarly in the case of the four other properties the decree-holder bid Rs. 75, Rs. 90, Rs. 150 and Rs. 135 respectively for the properties, whereas the present petitioner bid against him Rs. 85, Rs. 100, Rs. 175 and Rs. 150 and his bid in each case was the highest. The result was that when the bid-sheet was put up to the Munsif, he, finding that the decree-holder had not obeyed the order that he was to bid up to the amounts fixed by Court,

declared that there had been a default and dismissed the execution case.

Against this order of dismissal the petitioner contends that as there was an auction sale and he bid the highest amount for each of the properties he was entitled to have these properties knocked down to him at his highest bid. The fact that the decree-holder did not observe the condition on which he was allowed to bid at the sale could not, to my mind, do more than take away the validity of the decree-holder's own bid, but I cannot see how it can affect the validity of the bids by the petitioner who was an independent bidder at the sale. It is doubtful whether the Munsif had any power to compel the decree-holder to bid the full amounts shown under the valuation in the sale proclamation. In the case of *Badri Sahu* v. *Pandit Peare Lal Misra* (1), Mullick, J., held that there was no provision of law compelling a decree-holder to bid up to any sum which may be fixed by the Court.

"The valuation in the sale proclamation is intended primarily for the protection of the judgment-holder and for giving information to the bidders at the auction sale."

The learned Judge held that

if in a sale properly published and conducted the highest bid, whether of the decree-holder or any other person, is some figure below the figure given in the sale proclamation it is not competent to the Court to compel the decree-holder to bid higher than that highest bid.

In the present case we are concerned with the bid of an outside bidder. The sale was properly conducted and the petitioner was entitled to have the property knocked down to him as he made the highest bid. The fact that the decree-holder did not fulfil the condition imposed upon him did not invalidate the sale so far as the present petitioner is concerned. The order of the lower Court must be set aside and the application must be allowed. The petitioner's bid for each of the properties must be accepted. Hearing fee : 2 gold mohurs.

Order set aside.

(1) A. I. R. 1926 Patna 140.

✻ A. I. R. 1926 Patna 336

DAS AND ROSS, JJ.

East Indian Railway Company Ltd.—Appellant.

v.

Kishun Chand Kasarwani — Respondent.

Appeal No. 638 of 1923, Decided on 27th October 1925, from a decision of the Sub-J., Ranchi, D/- 9th April 1923.

✻ *Railways Act* (9 *of* 1890), *S.* 72 (2) (*a*)—*Person sending and person delivering goods to railway need not be same.*

The person sending and the person delivering the goods to the Railway Administration need not be necessarily the same, and so execution of risk-note by the person delivering the goods is sufficient to bind the sender by the contract.

[P 337 C 1]

N. C. Sinha—for Appellant.

Baikuntha Nath Mitter—for Respondent.

Ross, J.—This is an appeal by the East India Railway : Company against a decision of the Subordinate Judge of Ranchi affirming a decision of the Munsif in a suit brought by the plaintiff-respondent for damages for the loss of one bale of cotton piece-goods. It appears that two bales of cloth were despatched from Bombay to Daltonganj on the East Indian Railway and only one bale was delivered. The goods were despatched under risk note in Form B.

The learned Subordinate Judge held that as the risk note was executed by one Narsing, who was not the sender of the goods nor an authorized agent of the sender, the risk note was not an effective contract.

He was further of opinion that as the Railway Company defendant had not pleaded loss, it was not necessary for the plaintiff to show that the non-delivery was due to wilful negligence on the part of the Company's servants.

In my opinion the decision of the learned Subordinate Judge is wrong on both points. It was found as a fact by the Munsif that the goods were delivered to the Railway Administration by Narsing, who signed the risk note. This finding has not been reversed by the Subordinate Judge, and it must be taken that the risk note was executed by the person delivering the goods to the Railway Administration. This comes within the language of S 72, Cl. (2) (a)

and, in my opinion, the learned Subordinate Judge was wrong in construing that section as meaning that the person sending and the person delivering the goods are necessarily the same. If Narsing delivered the goods on behalf of the sender to the Railway Administration then he was the agent for executing the risk note under which the goods were despatched. In this view of the case it is unnecessary to deal with the further argument advanced on behalf of the appellant that the plaintiff had ratified the act of Narsing by taking delivery of one bale of goods under this risk note.

With regard to the second point, it is clear that this is a case of loss. The plaintiff in his plaint alleged that only one bale was delivered and that there was shortage. The Railway Company in their defence pleaded that there was no wilful negligence by reason of which the Company was liable for any loss sustained by the plaintiff. The case was clearly a case of loss on the pleadings and in view of the terms of risk note in Form B it was for the plaintiff to prove that the loss of one complete package was due to negligence on the part of the Company's servants. No such proof was offered and the plaintiff's claim must therefore fail.

The appeal is allowed and the suit of the plaintiff is dismissed with costs in both the Courts below, but in the circumstances of the case there will be no costs of the appeal in this Court.

Das, J.—I agree.

Appeal allowed.

✻ A. I. R. 1926 Patna 337

MULLICK AND KULWANT SAHAY, JJ.

Ramjhari Koer—Plaintiff—Appellant.

v.

Kashi Nath Sahai and *others*—Defendants—Respondents.

Appeal No. 398 of 1923, Decided on 11th March 1926, from the appellate decree of the Sub-J., Saran, D/- 18th January 1923.

✻(a) *Civil P. C., O. 34, R. 1—Suit by prior mortgagee without joining puisne mortgagee—Puisne mortgagee is not bound either by decree in such suit or sale in execution—Purchaser being in possession for more than 20 years does not affect rights of puisne mortgagee.*

A second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgage and is not bound either by the decree in the suit by the prior mortgagee or by the sale held in execution thereof. The fact that the purchaser in execution of the decree of the prior mortgage has been in possession for more than 20 years does not affect the rights of the second mortgagee to redeem the first mortgage. [P, 338, C. 2]

✻(b) *Limitation Act, Arts. 132 and 148—Suit for redemption of prior mortgage by second mortgagee is not governed by Art. 132 but by Art. 148.*

Tha second mortgagee's right of redemption cannot be considered to be a right to enforce payment of money charged upon immovable property. The second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgage and so Art. 132 does not apply, but under Art. 148 he has 60 years period. 14 *C. W. N.* 439; *A. I. R.* 1925 *Mad.* 150; *A. I. R.* 1925 *Mad.* 76, *not Foll*: 2 *L. L. J.* 419; *A. I. R.* 1923 *All.* 271; and 32 *Cal.* 891, *Foll.* [P. 339, C. 1]

Jayaswal, B. N. Mitter and *Sunder Lal*—for Appellant.

P. Dayal for *Jadubans Sahay*—for Respondents.

Kulwant Sahay, J.—This appeal arises out of a suit for redemption of a mortgage which has been dismissed by the learned Subordinate Judge on the ground of limitation.

In Mouza Sarai Srikant Touzi No. 10752 a five annas four pies share belonged to Lala Fatah Bahadur and Lala Lal Bahadur. On the 11th December 1886 they executed a zarpeshgi in respect of a four annas share to the plaintiff's mother and the Defendants Nos. 11 to 13. On the 28th March 1892 they mortgaged a six pies share to the Defendant No. 5 and it seems to have been the case of both parties that this six pies was out of the four annas given in the zarpeshgi. On the 16th February 1893 they executed a second mortgage to the plaintiff's mother and the Defendants Nos. 11 to 13 in respect of the four annas share which had already been given in zarpeshgi in the year 1886 and which included the six pies already mortgaged to Defendant No. 5. It appears that the remaining one anna four pies out of five annas four pies has passed to Defendants Nos. 8 to 10. Defendant No. 5 instituted a suit to enforce his mortgage which was Suit No. 50 of 1894.

In this suit the subsequent mortgagees were not made parties. A decree was obtained and the mortgaged property

viz., six pies share was sold on the 26th October 1895 and purchased by the Defendants Nos. 1 to 3 in the farzi uame of the Defendant No. 4. Subsequently the second mortgagees, namely, the plaintiff's mother and the Defendants Nos. 11 to 13. instituted a suit to enforce their mortgage of the 16th February 1893. In this suit neither the first mortgagee nor the purchasers in execution of his decree were made parties. A decree was obtained on the 26th February 1896 and in execution of the decree the four annas share was sold on the 8th January 1897 and purchased by the decree-holders themselves. The plaintiff's mother being dead, the plaintiff now claims the four annas share as her heiress on the allegation that by a private partition she has been allotted the entire four annas share and the Defendants Nos. 11 to 13 have no interest therein.

The present suit for redemption was instituted on the 17th January 1919. The contesting defendants, namely, Defendants Nos. 1 to 3 pleaded inter alia that the suit was barred by limitation, they having been in possession for more than 20 years and the claim of the plaintiff to enforce her second mortgage having been barred by lapse of time. The learned Munsif held that the suit was governed by Art. 148 of the Schedule to the Indian Limitation Act; and that the plaintiff had, therefore, 60 years to bring the suit from the date when the right to redeem accrued to her. He further held that as the plaintiff's predecessors-in-interest were not made parties in the suit of the first mortgagee, the plaintiff had still the right to redeem. He accordingly made a decree for redemption in favour of the plaintiff.

On appeal the learned Subordinate Judge set aside the decree of the Munsif on the ground that although the plaintiff had got the right of redemption as her predecessors-in-interest were not made parties to the suit of the prior mortgagee, but her right was barred by limitation as, in his opinion, the article applicable to the present suit was not Act. 148, but Art. 132 of the Indian Limitation Act, and he relied upon the decision of the Calcutta High Court in the case of *Nidhiram Bandopadhya* v. *Sarbessar Biswas* (1). He accordingly dismissed the suit on the ground of limitation.

Against this decision of the Subordinate Judge the plaintiff has come up in second appeal to this Court, and the only question for consideration in this second appeal is as to what is the period of limitation for the present suit.

It is clear that a second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgage and is not bound either by the decree in the suit of the prior mortgagee or by the sale held in execution thereof. It has been contended on behalf of the respondents that after the sale in execution of the decree of the prior mortgagee, the mortgage was extinguished and the purchasers remained in possession not as representatives of the prior mortgagee but as representatives of the mortgagor; and that, therefore, Art. 148 has no application inasmuch as it provides for a suit against a mortgagee to redeem or to recover possession of the mortgaged property.

In my opinion this contention is not sound. So far as the second mortgagee is concerned, he is not bound by the decree or the sale in enforcement of the prior mortgage. His position as a second mortgagee reamains unaffected by the decree and the sale. He was a necessary party in the suit brought by the prior mortgagee and a decree obtained in his absence on the basis of the prior mortgage did not affect his right to redeem the prior mortgage. The fact that the purchaser in execution of the decree of the prior mortgage has been in possession for more that 20 years does not, in my opinion, affect the rights of the second mortgagee to redeem the first mortgage.

The question, however, remains as to whether Art. 132 or Art. 148 of the Indian Limitation Act applies to the present case. In my opinion Art. 132 has no application to the present suit. In the case of *Nidhiram Bandhopadhya* v. *Sarbessar Biswas* (1) mentioned above the reasoning adopted was that the second mortgagee by his purchase at the sale in satisfaction of his mortgage-debt cannot acquire any right of redemption which he had not as mortgagee, With very great respect to the learned Judges, I am unable to follow this reasoning. The right to redeem the prior mortgage was vested in the second

(1) [1910] 14 C. W. N. 439= 5 I, C. 877.

mortgagee by virtue of his being a second mortgagee. This right was not acquired by him by his purchase at the sale in satisfaction of his mortgage-debt. The learned Judges observed that

> the omission of the prior mortgagee to include the second mortgagee in his suit has been held by this Court not to deprive the second mortgagee of his right to redeem the prior mortgage, but it cannot be held that this interpretation of the law, which is intended merely to save his right as second mortgagee gives him any additional right, or extends the period during which, under the law, he can sue to enforce his rights. The right to redeem was held not to be lost. It was not held, and, in our opinion, it was not intended to be held, that a fresh period to enforce his right to redeem under his mortgage was given to him from the date of the purchase. We hold that Arts. 134 and 148 of Sch. II of the Indian Limitation Act have no application in this case. The Article that applies is Art. 132 of that Schedule under which limitation begins to run from the date when the mortgage-debt became due.

I regret I am unable to agree with this reasoning. Once it is conceded that the second mortgagee had still the right to redeem and was not affected by the sale in execution of the prior mortgage, it must necessarily follow that whatever right the second mortgagee had before the sale in execution of the decree on the prior mortgage remained intact. Under Art. 148 the second mortgagee had 60 years to redeem the first mortgage and this right was consequently not affected by the sale in execution of the decree upon the prior mortgage. Ariticle 132 provides for enforcement of payment of money charged upon immovable property. The second mortgagee's right of redemption cannot, in my opinion be considered to be a right to enforce payment of money charged upon immoveable property. The second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgage. This Article has, therefore, no apt plication to a suit for redemption brought by the second mortgagee.

I am, therefore, unable to accept the view taken in the case of *Nidhiram Bandhopadya* v. *Sarbessar Biswas* (1). This case was followed in two cases in the Madras High Court in *Appayya* v. *Venkataramanayya* (2) and *Lakshmanan Chettiar* v. *Sella Muthu Naicker* (3) and the reasoning adopted in these cases is similar to the reasoning adopted by the learned Judges in *Nidhi Ram's* case (1). The Lahore High Court has, however, differed from the view taken in *Nidhi Ram's* case (1) in *Basanta* v. *Indur Singh* (4). That Art. 148 of the Schedule to the Limitation Act applies to the present case is supported by the view taken by the Allahabad High Court in *Priya Lal* v. *Bhora Champa Ram* (5) and by the Calcutta Hight Court in *Har Persad Lal* v. *Dalmardan Singh* (6).

I would, therefore' hold that the present suit was not barred by limitation and that the plaintiff was entitled to a decree for redemption.

The question remains what should be the form of the decree. The learned Munsif has ordered that the plaintiff will be entitled to redeem on payment of Rs. 50 together with interest thereon at the rate of 12 per cent. per annum from the date of sale that is, 26th October, 1895 to the Defendants Nos. 1-3. This sum of Rs. 50 represents the price of the property fetched at the sale in execution of the decree upon the first mortgage. This is not a principle upon which redemption should be allowed. The puisne mortgagee is held to be entitled to redeem the prior mortgage on the hypothesis that so far as he is concerned the mortgage has not been extinguished and is still in existence. He must, therefore, pay to the prior mortgagee the entire amount due upon the prior mortgage on an account being taken less the sum of Rs. 50 being the purchase money at the first sale already paid to him. Upon such payment being made the plaintiff will acquire the right of the prior mortgagee because what he redeems is not the premises but the prior encumbrance and he is entitled not to a conveyance of the premises, but to an assignment of the security.

This would necessitate a remand for the taking of the account and also directions declaring the rights of the parties to redeem each other and relating to other matters which would create complications. The parties have, however, come to terms and desire that a decree be made in the following terms that the plaintiff's right to redeem be declared, that it be declared that she will be entitled to redeem on payment to

(2) A. I. R. 1925 Mad. 150.
(3) A. I. R. 1925 Mad. 76.
(4) [1916] 2 P. L. J. 419.
(5) A. I. R. 1923 All. 271.
(6) [1905] 32 Cal. 891=1 C. L. J. 371= 9C W. N. 728.

the Defendants Nos. 1-3 of a sum of Rs. 100 only within three months from this date, that on her failure to do so, the suit will stand dismissed with costs. Each party is to bear its own costs throughout in the event of payment being made by plaintiff within the three months. It is represented that the plaintiff has deposited in the trial Court a sum of money in accordance with the decree of that Court. If so, and if there be no other objection to her doing so she will be entitled to take the sum back, from the Court.

The appeal be decreed by consent on the above terms. The decrees of the Courts will be set aside and the suit decreed as directed above.

Mullick, J.—I agree,

Decree set aside.

A. I. R. 1926 Patna 340

ROSS AND KULWANT SAHAY, JJ.

Midnapore Zamindari Co. Ltd.—Appellants.

v.

Muktakeshi Patrani—Respondent.

Appeal No. 209 of 1923, Decided on 30th April 1926, from the appellate decree of the Dist. J., Manbhum, D/- 4th November 1922.

(a) *Deed — Construction —Intention may be elucidated by conduct.*

The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued : *Chapman* v. *Black* (1838) 4 *Bing. N. C.* 187, *Foll.* [P. 343, C. 1]

(b) *Practice — Inconsistent pleas —Plaintiff resisting a rafanama (settlement) in a previous suit, but failing can claim under the rafanama in a subsequent suit.*

Where the plaintiff, who in the earlier litigation had been resisting a rafanama (settlement) as defendant, pleaded that a certain village was a ghatwali village and there had been disputes and the Government had intervened and a rafanama had been drawn up to settle the disputes, and claimed such rights as the rafanama gave not because it represented his real rights, but because he could not get anything more.

Held : that there was nothing contrary to natural justice in plaintiff's accepting this course : 10 *W. R.* 1 (*P. C.*): 27 *C. L. J.* 535; 1 *Lah.* 464, *Dist.* [P. 343, C. 2. P. 344, C. 1]

(c) *Limitation Act, Art,* 132 *Expl.—Malikana.*

A suit to recover malikana, though coupled with an ancillary relief of declaration of right to receive malikana, is governed by Art. 132. [P. 344, C. 1]

(d) *Limitation Act, Art.* 132 *Expl.—Malikana.*

The explanation to Art. 132 does not merely refer to malikana as contemplated by the Bengal Regulations, but it also covers malikana claimable by a sardar ghatwal under a settlement between the Ghatwals and zamindars.

A share of bastu rent payable to taraf sardar is malikana where the land is not settled with the taraf sardar but direct with the village sardar. [P. 344, C. 2]

P. C. Manuk and *S. N. Palit*—for Appellants.

A. B. Mukherjee and *B. B. Mukherjee* —for Respondent.

Ross, J.—The plaintiff brought this suit to recover Rs. 613-12-5 gands on account of malikana from 1317 to 1327 for village Bhalubasa by sale of the village. The Subordinate Judge decreed the suit with certain deductions from the claim, and the District Judge modified the decree in favour of the plaintiff, with the result that the entire claim has been allowed except the claim for interest. The defendant company appeals.

The plaintiff is the widow of the sardar ghatwal of Taraf Tinsaya in Barabhum, one of the constituent villages of which is mauza Bhalubasa. Between 1881 and 1883 a survey of the ghatwalis of Barabhum was made in which Bhalubasa and other villages were entered as ghatwali villages. The entries were disputed by the zamindar of Barabhum and his ijaradar, Messrs Watson and Co., the predecessors of the defendant company, who instituted Suit No. 174 of 1884 for a declaration that Bhalubasa was a *mal* and not a ghatwali village. The sardar ghatwal and the village ghatwal, whose name was Gopal Singh, were defendants. The suit was decreed ex-parte on the 15th of January 1885 ; but, subsequently, on the application of the manager of the encumbered estates under whose management the estate of the sardar ghatwal of Taraf Tinsaya was, the ex-parte decree was set aside as against the sardar ghatwal ; and, when the case came on for re-hearing, the plaintiff did not prosecute it further, but undertook to abide by the settlement which had in the meantime been made in 1884. It may be mentioned, however, that as the decree against the village sardar had not been set aside, Messrs Watson and Company took possession of the village.

The settlement just referred to is known as the ghatwali rafanama and is a general compromise of the whole question of " the lands recently surveyed as ghatwali of Barabhum, " and was embodied in an instrument executed on the 6th of March 1884 by the Government, the sardar ghatwals and the village ghatwals of the one part and the zamindar of Barabhum and Messrs. Watson and Company of the other part. It is on the construction of this agreement that the decision of ;the present appeal principally turns.

In order to understand the effect of the clauses which are the subject of particular controversy in this case it is necessary to look at the scheme of the rafanama as a whole. It is expressed to be executed with a view to settle the disputes that had arisen in respect of title to and area of *mal* and ghatwali lands during the thakbast and survey of ghatwali lands in pargana Barabhum. It was agreed in the first place that the document known as the Isimnavisi of 1833 should be assumed to be accurate and that the ghatwali lands should be demarcated in accordance with the columns showing the quantity of ghatwali lands in each village. This was subject to the proviso that, where the ghatwali lands were not entire villages but had been demarcated more or less according to the isimnavisi, the demarcation should hold good in respect of cultivated land but not in respect of jungle or waste. A rule for calculating the areas is then laid down in order that effect may be given to the isimnavisi. The rafanama then proceeds to require Messrs. Watson and Company to measure at once the entire area demarcated as ghatwali in the recent survey except entire villages entered in the isimnavisi. When measurement of a village or group of villages is completed, the Superintendent of Surveys is to select the ghatwali area. This must evidently refer to the isimnavisi ghatwali lands which were not entire villages. The next matter dealt with is jungle ; and it is provided that no absolute right over the jungles or waste land shall be annexed to the possession of ghatwali lands (this expression appears to be used loosely and not in the restricted sense of isimnavisi ghatwali lands) but the ghatwal is given certain rights of pasturage and fuel etc. subject to certain rules to be framed. Jungles on the lands not included in the isimnavisi are to be managed by Messrs. Watson and Company and one half of the net profits are to be divided among the sardar ghatwals, sadials and village sardars in the manner and in the proportions therein laid down. Clause (12) deals with the abadi lands in excess of what is shown in the aforesaid isimnavisi of which the ghatwals are in possession at present. It is provided that this cultivated area is to be settled with the ghatwals on certain terms. These terms are that the excess area shall be measured by Messrs. Watson and Company and the rents payable by the actual cultivators shall be fixed on the scale therein laid down. The sardar ghatwals are to be admitted to take settlement of each village at a rent not exceeding 50 per cent. of the total rent payable by the cultivating raiyats, this proportion being fixed in perpetuity. But it is stipulated that if the rate of rent or the total rent payable is raised or reduced, the rent payable by the ghatwal would vary accordingly. There were certain restrictions on alienation. Each village was to be treated as a separate taluk, and separate pattas and kabuliyats embodying these terms were to be exchanged for each village. In villages where there was no sadial, the village sardar was entitled to settlement from the sardar ghatwal of all *mal* lands in the village at a certain rate, and, where there was a sadial as well as a village sardar, the sadial was first to get the settlement at a particular rate and then he was to settle with the village sardar at a particular rate. The sardar ghatwals were to be designated as bhumijani talukdars, the sadials as sadiali talukdars, and the sardars as bhumijanidar talukdars. Clause (13) provides that the isimnavisi lands should be wholly separate from the *mal* lands dealt with in clause (12). The title to the latter will not be affected by the dismissal of a ghatwal from his office. Clause (14) provides for hastbud to be made of the bastu rent according to the local custom in the course of the settlement, of which 50 per cent. is to go to the ghatwals to be divided among them in a specfied proportion. Clause (17) provides that

the village sardar or sadial might take settlement direct from the zamindar or Messrs. Watson and Company, and, in that case, a malikana of 12½ per cent. would be paid to the sardar ghatwal or the sadial. Finally it was agreed that the jama fixed under the settlement should remain unchanged for ten years.

The contention on behalf of the appellant company is that as Bhalubasa was admittedly jungle in 1884, the only right under this agreement which the taraf sardar got over Bhalubasa was a right to a share in the net profit of the jungle under Clause (10), but no claim under Cl. (10) has been made in the present case. The present claim is made under Cls. (14) and (17) for five annas out of every rupee of the bastu rent and 12½ per cent. of the agricultural rent as malikana ; but these clauses have no application. Cl. (12) and, consequently, Cl. (17), which must be read along with it, apply to the cultivated area then held by the ghatwals in excess of the area shown in the isimnavisi ; while as to Cl. (14) there was no bastu and consequently no bastu rent for Bhalubasa was in contemplation of the parties in 1884. The village has been reclaimed since 1892 ; and the fact that it is now a cultivated area with homesteads will not entitle the plaintiff to the homestead rent and the malikana which the rafanama provides for in the case of land then under cultivation.

The contention on behalf of the respondent on the other hand is that the rafanama in Cl. 12 makes provision not only for the settlement of rent of the land then under cultivation, but for the settlement of the entire mal villages with the ghatwal at a rate fixed in perpetuity and that the clause is not to be read as if it were confined only to the land under cultivation in 1884. Learned counsel for the appellant, however, lays stress on the words "at present" in Cl. (12). Now it is clear that the meaning of Cl. (12) is at least this : that where there was cultivated land in a mal village then held by a ghatwal, the ghatwal was declared to be entitled to a settlement of the village on payment of 50 per cent. of the rent payable by the raiyats. The area in cultivation, therefore, was immaterial. It might be the whole village or it might be part of the village. But where there was cultivated land in a mal village held by the ghatwal, the ghatwal was entitled to settlement of the village as a bhumijani talukdar. The rent would naturally expand as more and more lands were brought under cultivation. Is it then proper to consture this agreement as if it meant that where a village was jungle in 1884, the ghatwal in possession was not to be entitled to settlement when the village became cultivated, but was simply to lose even his jungle rights with the disappearance of the jungle itself ? This seems a very forced construction. It appears to me that the real meaning of the agreement is to provide (a) for jungle, and (b) for cultivated land. When a jungle village is reclaimed, it ceases to be jungle and would therefore come under the provisions relating to cultivated land. The only difficulty in the way of this construction is the words "at present" in Cl. (12). But in my view these words do not relate to the word "cultivated," but to the words "held by the ghatwals." The jungle village was also held by the ghatwals then ; and, to say that, because it was not cultivated in 1884, therefore the provisions of the rafanama for cultivated lands held by the ghatwals are not to apply to jungle land which has been reclaimed seems to me inconsistent with the tenor of the whole document. It admittedly would leave a great gap in the completeness of the settlement ; and it is unnecessary to suppose that any such gap was intended to be left or was even left by oversight. The instrument lays down the rights in the jungle and in cultivated land ; and the fact that Bhalubasa has passed from the one category to the other is no reason for excluding it from the terms of the rafanama.

The Courts below in their judgments on this part of the case relied on the actings of the parties. Learned counsel contended on the authority of The *North Eastern Railway Company* v. *Lord Hastings* (1) that the words of an instrument must be construed according to their natural meaning ; and, as the present instrument is plain, no evidence of the actings of the parties is admissible. The controversy that had arisen over the interpretation of the document is sufficient to show that it is not plain or

(1) [1900] A. C. 260=69 L. J. Ch. 516=82 L. T. 429=16 T. L. R. 325.

unambiguous in its terms. And this seems to me to be very plainly a case in which the words of Park, J., in *Chapman* v. *Bluck* (2) are applicable :

The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued.

quoted *in Watcham* v. *The East Africa Protectorate* (3). I think therefore that evidence of the actings of the parties was admissible in this case. This consists of Exhibit 6 and Exhibit 3. Exhibit 6 was a kabuliyat executed on the 13th of July 1886 by Messrs. Watson and Co. in respect of Taraf Tinsaya in favour of the manager of the encumbered estates. The kabuliyat contains the following, among other, terms :

During the term of the lease we shall have the right to make fresh settlement, measurement and assessment of rate of rent with all kinds of raivats and tenants of the lands included in this ijara, in respect of the lands in their possession as well as to make nayabadi settlement in respect of patit lands. . . . . Besides the fixed rent out of the amount of bastukar which is realized from the household lands according to the long-standing practice of the pargana, we shall pay separately the five annas share which is due to the sardar ghatwal of Taraf Tinsaya according to para. 14 of the rafanama dated the 6th of March 1884, regarding mal ghatwali of pargana Barabhum . . . . . As regards the jungles in the lands included in the ijara, we shall proceed to act according to para 10 of the said rafanama.

This kabuliyat covers 28 villages including Bhalubasa and all its terms apparently apply indiscriminately to all. There is nothing to suggest the construction of the rafanama now contended for by the appellant. Exhibit 3 is a petition dated 21st April 1898 for execution of a decree against the present plaintiff by which Messrs. Watson and Company, the decree-holders, prayed for the sale of fifteen villages including Bhalubasa with this note :

According to the rafanama dated the 6th of March 1884 the rent for the judgment-debtors' bhumijani taluqdari right in these mauzas has not as yet been assessed. It will be assessed without delay.

This was in 1898, after the reclamation had begun. Learned counsel contends that if the right was not there, the use of these words will not confer it. But the question for decision is whether the right is there or not, and the use of these words is certainly an indication that in the contemplation of the parties it was. I therefore think that both on the construction of the instrument and on the evidence of the actings of the parties, the Courts below were right in holding that the plaintiff was entitled to malikana and to a share of the bastu rent of Bhalubasa.

It was next contended on behalf of the appellant that the plaintiff was estopped from bringing this suit on the basis of the rafanama because in two previous suits—in Suit No. 539 of 1891, she herself is defendant, and, in Suit No. 484 of 1899—she, through her tenant Bahadur Singh as defendant, had repudiated the rafanama as having been obtained by coercion and undue influence. The plea was accepted and it is contended that unless the plaintiff restores to the defendant the villages Jagudih and Erka, which were the subject-matter of these suits, she is not entitled to sue on the rafanma which she then successfully repudiated. Reference was made to the decisions in *Sreemuthoo Raghunadha Perya Oodya Taver* v. *Kattama Nauchear* (4), *Giris Chandro Bit* v. *Bepin Behary* (5), and *Bhola Singh* v. *Babu* (6). But the facts of these cases were different from the facts of the present case. In the first case referred to, the plaintiff had in an earlier litigation disclaimed title under a certain instrument as a Will and in a later suit the same plaintiff set up the instrument as a valid Will and Testament. The Judicial Committee held that this could not be done. In the second case the defendants set up a lease in an earlier litigation as a bar to the plaintiffs' claim for possession and succeeded ; and in a second suit by the same plaintiffs they contended that the lease had terminated before the first suit was instituted. It was held that this plea was not open. In the third case it was held that the plaintiffs could not rely upon a Will when they had in a previous litigation obtained a declaration of its invalidity against the same defendants. In the present case the plaintiff, who in the earlier litigation had been resisting the rafanama as defendant, now pleads that this village is a ghatwali village and

(2) [1838] 4 Bing. N. C. 187=5 Scott. 513=1 Arn. 15=7 L. J. C. P. 100=2 Jur. 206.
(3) [1919] A. C. 533=120 L. T. 258=87 L. J. P. C. 150=34 T. L. R. 481.
(4) [1866] 11 M. I. A. 50=10 W. R. 1=2 Sar 212 (P. C.).
(5) [1918] 27 C. L. J. 535=44 I. C. 159.
(6) [1920] 1 Lah. 464=59 I. C. 503=2 L. L. J. 431.

there had been disputes and the Government had intervened and a rafanama had been drawn up to settle the disputes and she therefore claims such rights as the rafanama gives her, not because it represents her real rights, but because she cannot get anything more. I can see no prejudice to the defendant in her adopting this position and nothing contrary to natural justice. Moreover, as the learned District Judge has pointed out by two judgments (Ex. 11 in Suit No. 83 of 1903 and Exhibit 12 in Suit No. 49 of 1901) the rafanama had been affirmed. If there is an estoppel (and I do not think there is) there is also an estoppel against the estoppel and the matter is set at large. In my opinion, this argument fails.

It was then contended that the claim is barred by limitation. The Courts below have held that the case is governed by Article 132 of the Limitation Act. Learned counsel referred to certain decisions, viz. *Chhagan Lal* v. *Bapubhai* (7), *Raoji* v. *Bala* (8), and *Bhimabai* v. *Swamirao* (9), in support of his argument that as the plaintiff could no longer claim a declaration of her right to receive malikana, her right to recover the malikana itself was barred. Now, although she has in the present suit, in her amended plaint claimed a declaration, this is merely ancillary to her claim for malikana and the plain terms of Article 132 entitle her to enforce payment for 12 years from the date when the money sued for became due; and in this view, she is within time as was held in *Hurmani Begum* v. *Hirday Narain* (10). The learned counsel also cited *Gopinath Chobey* v. *Bhugwat Pershad* (11) to show that if the suit was for the purpose of establishing a periodically recurring right, Article 131 would apply and the period must be reckoned from the time when the plaintiff was first refused the enjoyment of the right; and argued that the suit of 1901 was notice to her of an adverse title. The finding of fact of the Court below, however, is that there was no instance of the malikana having been claimed and refused in the past, and I fail to see how the suit, No. 158 of 1901, which was brought against the defendant), by Gopal Singh for a declaration that he held a jamai right under the present plaintiff (who was a pro forma defendant) can affect the plaintiff with notice that the defendant would refuse to give her malikana under the rafanama.

It was next contended that the malikana referred to in the explanation to Article 132 is malikana as contemplated by the Bengal Regulations and that the malikana in this suit does not fall within the explanation. Reference was made to an observation in *Mullick Abdool Guffoor* v. *Mulaka* (12), where Garth, C. J., said that a malikana right is the right to receive from the Government a sum of money, etc. But his Lordship was there dealing with the malikana which was in question in that case. That happened to be malikana under the Bengal Regulations; but I can see no reason for restricting the application of the word as used in the explanation to Article 132 in this way. The allowance claimed in the present case is malikana and it falls within the language of the article.

Then it was argued that even if the 12½ per cent of the agricultural rent is malikana, the 5 annas in the rupee of bastu rent is not malikana, and is not so described in the instrument. But in my opinion, both claims stand on the same footing. The land is not settled with the taraf sardar, but direct with the village sardar or, in this case, with the defendant company which stands in the shoes of the village sardar by reason of their having taken possession of his interest in execution of the decree of 1884 after the rafanama had been entered into. The taraf sardar is given this share of the bastu rent in lieu of the profits arising from the homestead land and it stands on precisely the same footing as the 12½ per cent. of the agricultural rent.

The last point taken was that the learned District Judge has erred in not deducting from the rental 6 annas in the rupee deducted by the Subordinate Judge as a deduction made by the defendant company in favour of its lessee Sham Dhal who got the land reclaimed. Tenants on reclaiming land are given 6 annas out of 16 annas of the land free from rent; and this is the deduction to which

(7) [1880] 5 Bom. 68 (69).
(8) [1891] 15 Bom. 135.
(9) [1921] 45 Bom. 638=60 I. C. 892=23 Bom. L. R. 100.
(10) [1880] 5 Cal. 921=6 C. L. R. 183.
(11) [1884] 10 Cal. 697.
(12) [1884] 10 Cal. 1112.

the Subordinate Judge refers. But to deduct another 6 annas from the rent of the remaining 10 annas is to make the deduction twice over; and the learned District Judge was right in disallowing this double deduction.

The appeal must be dismissed with costs.

Kulwant Sahay, J.—I agree. I only wish to say a few words as regards the interpretation of the rafanama of 1884. The circumstances under which the rafanama was executed have to be borne in mind. In the Ghatwali Survey af Barabhum held in 1881-83 certain areas were shown as included within the Ghatwali which the zemindar claimed to be Mal lands. A suit was instituted by the ijaradar of the zamindar for declaration that Bhalubasa, the village in dispute in the present case, was a mal and not a ghatwali village. The rafanama was executed during the pendency of this suit. It dealt with not only the village Bhalubasa, but with the entire dispute between the parties in relation to all lands claimed by the zamindar as mal and by the ghatwal as ghatwali. It was agreed to by the parties concerned that the ghatwali title of the ghatwal will be limited to the area shown as such in the issumnavisi of 1833 and the rest of the area in the possession of the ghatwal was declared to be the mal land of the zamindar. On reading the rafanama as a whole it seems to me that the intention of the parties was that although the title of the zamindar to the excess area was declared yet the possession of the ghatwal was retained and limitations to the rights of the parties were prescribed. Cl. 10 dealt with jungles and Cl. 12 with cultivated land. These are the two important clauses upon the true construction whereof this appeal depends. It seems to me that in Cl. 10 a distinction was drawn between the jungle or waste land and the jungle on the land. The clause opens with the words that :

> no absolute rights over jungle or waste land shall be annexed to the possession of ghatwali land.

This seem to imply that some limited rights were conferred upon the Ghatwal over such lands. Provision is then made as regards the management of the jungle on the excess area, and the profits arising therefrom were to be divided between the zamindar and the ghatwal in certain proportions. Cl. 12 then prescribed the rights of the parties over the lands of the excess area which were not waste or covered with jungle but were then in the possession of the ghatwal. This clause to my mind referred not only to the area which was then actually under cultivation as contended for by the learned counsel for appellant, but referred to all lands which were then cultivated or might be brought under cultivation thereafter. This construction finds support from the opening words of Cl. 10. The ghatwal was not to have an absolute right, but a limited right, as set out in Cl. 12 and some of the subsequent clauses. The words "now held by the Ghatwals" in Cl. 12 to my mind are not restricted to the area which was then under actual cultivation, but they refer to the lands then held in possession by the ghatwals. This clause dealt with all lands in the excess area which were cultivable or might become cultivable. Cl. 10 dealt with jungle and waste lands and Cl. 12 with arable lands and these two clauses covered the entire area in excess of the real ghatwali land then in possession of the ghatwal. The real intention of the parties seems to be that the entire excess area declared to be mal, was to continue in possession of the ghatwals on payment of rent to the zamindar and their status was recognized as tenure-holders, their rights over jungle and waste lands and cultivable lands being separately defined, the object being that whereas before the rafanama the zamindar used to get nothing for the excess area, by the rafanama he got a proportion of the income by way of rent and certain rights over the jungles. The construction placed on the rafanama by the Courts below seems to be correct.

Appeal dismissed.

A. I. R. 1926 Patna 346

MACPHERSON, J.

Fagu Tanti—Petitioner.

v.

Chotelal Tanti and *others*— Opposite parties.

Criminal Revision No. 317 of 1925, Decided on 24th August 1925, against the order of the S. J., Monghyr, D/- 27th April 1925.

Penal Code, S. 494—Remarriage during lifetime of first husband—Custom as to, must be proved—Hindu Law—Marriage.

Sagai in the form of remarriage of widows is the normal condition in all except the five or six highest castes of Hindus in Bihar But a custom of *sagai*, while the first husband is still alive is, even assuming the custom to be a valid defence under S. 494, something which would require strict proof in respect of the particular caste in the particular area, and in respect of the conditions in which the custom operates. 19 *Cal.* 627, *Dist.* [P. 346, C. 2]

Mihir Kumar Mukharji for *Fazale Ali*—for Petitioner.

Neyamatullah—for Opposite parties.

Macpherson, J.— The petitioner in this case asks that a further inquiry should be ordered into a complaint under Ss. 494 and 498 of the Indian Penal Code against his wife Badia, Chotelal, a man to whom she has admittedly been given in *sagai*, and others, which he made on the 16th March before the Sub-Divisional Magistrate, Monghyr, and which was dismissed by the Magistrate, an application for further inquiry into the complaint being also dismissed by the Sessions Judge.

It is admitted that Badia was married to the petitioner some six years ago. In the middle of February 1925 the petitioner applied to the District Magistrate under S. 552 of the Code of Criminal Procedure for the restoration of his wife to him from the custody of Chotelal. The police inquired into the matter and reported that " her father made *sagai* of Badia with Chotelal " because petitioner had not taken care of her for six years. The police also reported that her father had stated that there is a custom in the Tanti caste, to which they belong, that if a husband does not take care of his wife, she is given in *sagai* to another person.

The Magistrate, on receiving the petitioner's complaint, sent for that police report, and on a consideration of it dismissed the complaint. The Sessions Judge declined to interfere on the ground that he was not prepared to hold that the Sub-divisional Magistrate had exercised his discretion wrongly.

In my opinion a further inquiry must be ordered. In the first place it is clear that there is nothing except the statement of the father of Badia to show that there is in the Tanti caste a custom of *sagai* of the nature alleged. It is of course well known that *sagai* in the form of remarriage of widows is the normal condition in all except the five or six highest castes of Hindus in Bihar which, as the Census figures show, have the highest proportion of widows, and a few aspiring sub-castes. But a custom of *sagai*, while the first husband is still alive, is, even assuming the custom to be a valid defence under S. 494, something which would require strict proof in respect of the particular caste in the particular area, and in respect of the conditions in which the custom operates. No doubt in the case of *Junki* v. *Queen-Empress* (1) the High Court upheld such a custom as an answer to a charge under S. 494 : but it is clear that in that case it was proved that the first husband had relinquished the accused and that the custom of the caste sanctioned the marriage during the lifetime of the husband of the relinquished wife. The actions of the petitioner would go to show that he had not, at least willingly, relinquished his wife. Again it is remarkable that in the police report, or even in Mr. Neyamatullah's argument for the opposite party, there is no mention of a caste panchayat sanctioning the marriage of Badia and Chotelal : ordinarily the operation of such a custom would be contingent on the sanction of a caste panchayat.

Accordingly it is clear that it cannot be said on the present materials that no offence has been committed under S. 494 or S. 498. It is therefore directed that further enquiry be made into this case by the Sub-Divisional Magistrate or any other Magistrate of the First Class to whom he may make it over for disposal.

Revision allowed.

(1) [1892] 19 Cal. 627.

A. I. R. 1926 Patna 347

BUCKNILL, J.

Farzand Ali—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 233 of 1926, Decided on 6th May 1926, against the decision of the S. J., Purnea, D/- 25th February 1926.

Criminal P. C., S. 537—Cheating—Omission to give exact date—Month given—Irregularity is curable.

Where a charge of cheating gives the month in which the offence was committed, but the exact date is not given, the irregularity is curable. [P 347 C 2]

(b) *Criminal P. C. (amended 1923), S. 234—Cheating two persons within one month—Joint trial is not illegal.*

Where the accused was tried jointly at one trial for cheating two persons within the space of one month :

Held : that one trial for the two offences was not illegal; 40 *Cal.* 846, *Considered as no longer good law.* [P 348 C 2]

S. M. Gupta for *Manohar Lal*—for Petitioner.

H. L. Nand Keolyar—for the Crown.

Judgment.—This was an application in criminal revisional jurisdiction. The applicant was charged with offences punishable under the provisions of S. 409, (criminal breach of trust by a public servant) and S. 420 (cheating and dishonestly inducing delivery of property) of the Indian Penal Code. He was tried before a First Class Magistrate of Kishunganj. He was convicted under both the sections. He was sentenced under S. 409 to two months' rigorous imprisonment and a fine of Rs. 25 and, in default of payment thereof, to 15 days' further rigorous imprisonment. Under S. 420 he was sentenced to one month's rigorous imprisonment and a fine of Rs. 25, and similarly, in default of payment thereof, to 15 days' further rigorous imprisonment. The applicant appealed to the Sessions Judge of Purnea who set aside the conviction and sentence under S. 409, but upheld the conviction and sentence under S. 420. The applicant has now come up in revision to this Court.

The only point which the learned counsel has put forward is with regard to the form of charge. The charge reads—

That you in the month of September deceitfully induced Mejaj Ali and Mehtar Ali to pay to you Re. 1 each and Bhattri Das to pay to you 4 annas in excess of the legitimate chaukidari tax due for 1332 Fs., and thereby committed an offence punishable under S. 420 of the Indian Penal Code.

The charge is certainly not a model one ; in the first place it would have been more proper to have put the exact dates upon which the offences were alleged to have been committed. But I do not think that it is possible for me to set aside the conviction on the ground that no closer date than the month of September is given in the charge, unless it was clearly shown that the omission to give the exact date has materially prejudiced the applicant at his trial. No such proof is forthcoming and no allegation even is made to that effect.

The next point which is put forward is that three distinct offences have been included in this one charge and that they all ought to be tried separately and that these three offences should have formed the subject of separate trials which should have been tried separately. I have commented upon the somewhat slipshod manner in which the charge was drawn up ; but in view of S. 234 of the Criminal P. C., I cannot see how it can seriously be suggested that the inclusion of these three offences in one charge can be regarded as illegal. Under S. 232 of the Criminal P. C. it is true that for every distinct offence of which any person is accused there shall be a separate charge, and that every such charge shall be tried separately ; but the section goes on to make certain exceptions, the first of which is the exception mentioned in S. 234. Now, S. 234, sub-S. (1) reads—(*S.* 234 (1) *quoted.*)

In the present charge it is obvious that here we have three offences of the same kind alleged to have been committed not only within one year but within one month. The learned counsel has referred to a case, *Asgar Ali Biswas* v. *Emperor* (1), in which a Bench of the Calcutta High Court held that where a charge, under S. 409 of the Indian Penal Code, of criminal breach of trust, alleged two separate offences—one in respect of a sum of 4 annas 6 pies collected from *A* between certain dates in one year and a sum of 6 annas collected

(1) [1913] 40 Cal. 846=20 I.C. 609=17 C.W.N. 827.

from *B* between other dates in the same year—such a charge was bad for misjoinder, and a trial held on such a double charge was illegal. It appears from the report that no one appeared on behalf of the Crown at the hearing of the application. It seems to have been argued on behalf of the applicant that the two acts of misappropriation were distinct, that there were two distinct offences, and that under S. 233 of the Code they could not be included in one charge.

The case of *Subrahmania Ayyar* v. *King-Emperor* (2) was referred to as an authority for that proposition. But in that case the appellant was tried on an indictment in which he was charged with no less than 41 acts extending over a period of three years. The charge was patently illegal and was so held to be by their Lordships of the Privy Council. I may mention that in the first count of that indictment there were no less than four persons in respect of whom Subrahmania Ayyar was alleged to have committed criminal breach of trust and that in that count, also, no less than eight specific acts extending over a period from 1896 to 1898 were mentioned. I think it is obvious that such a count was hopelessly illegal ; but I cannot see anywhere in that case any ground for thinking that it was an authority which affected the case which was tried in the Calcutta High Court to which I have already referred. In the Calcutta High Court no reference seems to have been made to S. 234, of the Criminal P. C., and Harrington and Coxe, JJ., seem to have thought that joinder of these two offences against different persons in one charge was an illegality. The law on that particular point was altered by an amendment an 1923 by the insertion of the words. '

whether in respect of the same person or not.

It does not seem to have been suggested to their Lordships that the offences were of the same kind. I am inclined to think, with great deference, that, at any rate, the alteration of the law renders the decision in *Asgar Ali Biswas* v. *Emperor* (1) one which would not be followed by this Court. And, even, judging from the report, it seems that the law upon the position was not fully placed before their Lordships and no appearance was entered in the application on behalf of the Crown.

I, therefore, am of opinion that in this case the charge as framed (although open to some objection) is not illegal. Had it been shown to me that the form of the charge had embarrassed or adversely affected the applicant in connexion with his trial, I should have had no hesitation in setting the conviction aside ; but no such proof has been brought before me and I can see no ground for thinking that the charge is intrinsically illegal..

Then, as to the question of sentence: it is suggested that the sentence is too severe. With the Sessions Judge, however, I am inclined to agree that, taking the circumstances into consideration, applicant has been somewhat leniently dealt with. He succeeded in his appeal in avoiding the longer sentence of two months to which by the trial Court he had been sentenced ; but I do not think that, in view of the fact that he was a public servant and that he was extorting money in his position as such, it can be said that the sentence which has been passed upon him is in any way too severe.

The application is therefore rejected.

Application rejected.

(2) [1902] 25 Mad. 61=28 I. A. 257=11 M. L. J. 233=8 Sar. 160 (P. C.).

✻ A. I. R. 1926 Patna 348

BUCKNILL, J.

P. D. Hamir & Co.—Petitioners.

v.

Suresh Chandra Sarkar—Opposite Party.

Criminal Revision No. 205 of 1926, Decided on 3rd May 1926, from an order of the Addl. Dist. Mag., Dhanbad, D/- 23rd Feburary 1926.

✻ (a) *Crtmtnal P. C., S. 147—Right of personal easement as well as public right of way can be claimed together.*

If one could prove that a road was a public road either by, showing that it had been dedicated to the public or that from time immemorial it had been freely used by the public, no question of easement in favour of a private individual would arise. But, on the other hand, although it might seem not to be possible to put forward such proofs as would show that the road was really a public road, it might still be possible to prove that a private individual had acquired an easement and, therefore, there is nothing to prevent a claim of this double nature being made. [P 350, C 2.]

(b) *Criminal P. C., S. 147—Reasonable grounds that bona fide claim of right exists are sufficient to pass an order under the section.*

The provisions of S. 147 are of an emergency nature and are conducted more or less summarily. If the Magistrate, as the result of hearing the evidence, thinks that reasonable grounds have been shown to him that a bona fide claim of right exists, then he is justified in passing such order as he may think fit. It is not expected that he should usurp the functions of the civil Court or that the enquiry under S. 147 should be a formal trial of the matter in issue. The actual rights of the parties must await determination in a civil suit.

The words " such right exists " must be understood to mean " such right as is claimed."

[P. 351, C. 1]

(c) *Criminal P. C., S. 147—Specific instances of user within 3 months is not necessary—General user is sufficient.*

No specific instance of user need be proved within three months. Continuous general user up to the date of obstruction is sufficient.

[P. 351, C. 1]

Hasan Imam and *S. C. Mazumdar*—for Petitioners.

P. K. Sen, *B. N. Mittra* and *K. N. Moitra*—for Opposite Party.

Judgment.—This was an application in criminal revisional jurisdiction. It was made in connexion with an order passed by the Deputy Magistrate of Dhanbad on the 22nd of January last under the provisions of S. 147 of the Criminal P. C. By this order the Magistrate directed that the applicants here should not take exclusive possession of a certain road until they have obtained an order of a competent Court adjudging them to be entitled to such exclusive possession.

An application was made by the petitioners to the Additional District Magistrate of Dhanbad asking for a reference to this Court and a recommendation that the Deputy Magistrate's order should be set aside ; but the Additional District Magistrate on the 23rd of February last rejected this petition. The matter has now come before me in revision.

The area in which the dispute about the right of way arose is one in which there seem to be situated collieries and brick-kilns. The petitioners, who are three in number, constitute a firm called P. D. Hamir and Co., and the opposite party is the Manager of the Pandebera Colliery. The petitioners are said to be the owners of the Colliery known as the Durgapur Colliery which lies north of the Pandebara Colliery managed by the respondent. On the eastern side of the applicant's property there is a road or track leading up to a District Board road which runs along the northern portion of the applicant's land. From the south-eastern angle of the applicant's property the cart-track turns to the west and runs towards a brick-kiln where bricks are either made or stored by the applicants. It is said that there is a continuation of the road on the applicant's property from the south-eastern angle on to the land of the Pandebera Colliery.

Put shortly, the dispute was, as between the applicants and respondent ; that the applicants claimed that they had an exclusive right on this road which lay on their property in Durgapur Mouza whilst the respondent claims that his colliery had rights of way over the road. According to the respondent's story it had, for a very long time, been the practice of his colliery to send carts with goods to and from Pandebera leaving or joining the applicant's road at the south-east corner of the applicants' property ; but that recently they have been stopped.

The proceedings were started by an application made on 5th of March 1925 to the Magistrate by the respondent asking for proceedings to be taken under the provisions of Ss. 107, 144, and 147 of the Criminal P. C. This petition averred that the road used for coming and going from and to Jharia and Pandebera passed through Durgapur and that P. D. Hamir and Co., were, without any right whatsoever, forcibly preventing any cart going along the road and were blocking the passage of the public. That when the petitioner went to forbid them blocking the road the opposite party was ready to make a breach of the peace. The petitioner complained that if the roads are obstructed the work of the Pandebera Colliery as well as the communication of the public and other people of the mouza by cart or otherwise would be stopped. The petitioner also alleged that the road has thus been in use for a long time. Apparently the senior Deputy Magistrate held a local enquiry and finding that there was no chance of an amicable settlement commenced proceedings under S. 147.

Written statemente of course were filed. The respondent here in his written statement put forward what might be read as a kind of double claim ; the first

being based on a statement that his Colliery had been using the road over 20 years without any dispute or objection. By this the respondent, I imagine, contemplated a claim in the nature of an easement. But the respondent also alleged that from time immemorial the road had been a public road. I need hardly point out that these two claims are really of somewhat different character and are capable of proof in different ways. If a personal easement in favour of the respondent was proved, the property in the road, subject to this easement, might still remain exclusively vested in the applicants. If on the other hand it was proved that the road was a public road, then the applicants would have no exclusive right over it at all.

The applicants' written statement denied that there was any likelihood of any breach of the peace and maintained that they had exclusive rights over the road and that neither the respondent nor anyone else had any right to drive carts over the track. They denied that the respondent had obtained any right of easement or that it was a public road; and, further, that either the respondent or any member of the public had used the road within 3 months prior to the institution of the proceedings.

The Magistrate heard a considerable amount of evidence on both sides. He found that the track had been for a long time in existence and had constantly been used by many persons. He was impressed by the fact that there was in existence a clear beaten track extending from the end of the road at the south-eastern corner of the applicant's property down southwards towards the Pandebera Colliery. Although he does not think that any part of the road is a pucca road, he came to the conclusion that the respondent had made out a sufficient case to justify him in passing an order under S. 147.

There is a good deal of dispute as to whether there was any other method of getting from the Pandebera Colliery to the District Board road in the north than by the way mentioned; the Magistrate does not think that there was another road; even if there was, it is quite obvious that the track which the respondent says has been in use is a very short-cut and saves a circuitous and long detour. The Magistrate accordingly passed the order to which I have referred above.

Now the first point which the counsel for the applicants has made is that S. 147 is not appropriate for dealing with obstruction on a public road. He suggests that action under S. 133 of the Criminal P. C., is the appropriate remedy. It is quite true that in the petition the respondent has referred to the road being obstructed and in the map which has been used it seems that at the extreme northern corner of the road some brick cooly huts are being made. The claim, however, was not for the removal of any physical obstruction (if it actually existed) but to prevent the applicants from stopping the carts of the respondent by turning them back. I think that, although the language in which the complaint was couched might not have been very lucid, the real nature of the complaint was as I have indicated.

The next point which was put forward was that the respondent could not claim both a personal easement as well as a public right of way as the two claims are inconsistent. I think it is possible that they might be inconsistent, but at the same time either one or the other might be capable of proof. If one could prove that the road was a public road either by, for example, showing that it had been dedicated to the public or that from time immemorial it had been freely used by the public, no doubt, no question of easement in favour of the respondent would arise. But, on the other hand, although it might seem not to be possible to put forward such proofs as would show that the road was really a public road, it might still be possible to prove that the respondent had acquired an easement, I do not think, therefore, that there is anything to prevent a claim of this double nature being made.

Third point which was argued on behalf of the applicants was that no right of easement has been proved and no proof had been adduced that the road was a public one. The argument is based upon the wording of sub-S. (2) of S. 147 which reads: "If it appears to such Magistrate that such right exists he may make an order prohibiting any interference with the exercise of such right." It is contended that in proceedings under S. 147 full proof must be given that a right exists; and in this case, for instance that it ought either to have been proved that the respondent had a right of easementor

that it was a public road. I do not think that that is necessary. The actual rights of the parties must await determination in a civil suit. The provisions of S. 147 are of an emergency nature and are conducted more or less summarily. If the Magistrate, as the result of hearing the evidence, thinks that reasonable grounds have been shown to him that a bona fide claim of right exists, then I think he is justified in passing such order as he may think fit. It is not expected that he should usurp the functions of the civil Court or that the enquiry under S. 147 should be a formal trial of the matter in issue. I have looked through the evidence and I am satisfied that there is sufficient evidence to justify an order being made under the provisions of this section. In the case of *Peary Mohan* v. *Hari Chandra* (1), it was laid down by a Bench of the Calcutta High Court that the words "such right exists" must be understood to mean "such right as is claimed." I think this construction is also one of commonsense.

The fourth point put before me on behalf of the applicants was that there was no evidence to show that there was any user of the road within three months prior to the date of the proceedings. It may be that there was no specific instance of user proved within that period; but, as pointed out by the learned advocate who appeared for the respondent, there was a great deal of evidence of continuous general user up to the date when tha respondents' carts were stopped.

I do not, therefore, think that there is any cogency in the last argument. Under these circumstances, in my opinion, there is no ground for interference with the order which has been made by the Magistrate and I must reject this application.

Application rejected.

(1) [1919] 23 C. W. N. 956=49 I. C. 923.

* A. I. R. 1926 Patna 351

JWALA PRASAD AND BUCKNILL, JJ.

Mahanth Rukmin Das — Plaintiff—Appellant.

v.

Deva Singh and *others*—Defendants—Respondents.

Appeal No. 666 of 1923, Decided on 31st March 1926, from the appellate decree of the Addl. Dist. J., Patna, D/-9th April 1923.

* *Suits Valuation Act* (5 *of* 1887), *S.* 11—*If proper valuation would have brought the appeal to High Court directly as first appeal and undervaluation brought it to High Court on second appeal, such undervaluation affects the merits of the appeal.*

Where, if the appeal were properly valued, the lower appellate Court would have no jurisdiction to entertain the appeal or dispose of it on its merits and the appeal then would have come directly to the High Court where it could have been heard and disposed of by a Bench consisting of two Judges, as a first appeal, the undervaluation must be deemed to have affected the disposal of the appeal on its merits. *A. I. R.* 1926 *Mad.* 6 (*F. B.*), *Diss. from*; *A. I. R.* 1923 *Patna* 581 *Dist.*: 5 *P. L. J.* 397 *Appr.* [P 353 C 1]

P. C. Manuk, *S. Dayal* and *N. C. Sinha*—for Appellant.

Ali Imam and *S. N. Bose*—for Respondents.

Judgment.—Mr. Manuk on behalf of the appellant, contends that the decree made by the Court below must be set aside upon the sole ground that the appeal filed by the defendants in that Court was wholly incompetent. The ground for this contention urged is that the value of the subject-matter of the suit was over Rs. 5,000 hence the appeal from the Subordinate Judge who tried the case lay directly to the High Court and not to the District Judge.

The plaintiff, who is the appellant before us valued the suit for the purpose of jurisdiction at Rs. 2,550. The defendants in their written statement stated that the properties in the suit were under-valued and the Court-fee paid was insufficient. Upon this plea the Subordinate Judge raised an issue as to the sufficiency of valuation and the Court-fee paid by the plaintiff, that is, issue No. 1. At the hearing this issue was not pressed, and the Court held "the Court-fee paid according to law is all right." The suit was decreed.

The defendants appealed to the District Judge and valued their memo-

randum of appeal according to the valuation thereof mentioned by the plaintiff in his plaint, and they paid the same amount of Court-fee as was paid by the plaintiff on his plaint. The plaintiff who was respondent before the learned District Judge, did not object to the valuation of the appeal or the jurisdfction of the District Judge to entertain the appeal. The District Judge set aside the decree of the Subordinate Judge and dismissed the plaintiff's suit. The plaintiff has come to this Court.

In this Court the Stamp Reporter discovered that the subject-matter of the litigation was under-valued and, according to him, the proper valuation should have been over Rs. 8,000. The plaintiff made up the deficiency in the Court fee paid by him on the plaint and on the memorandum of appeal in this Court. Yesterday, defendants-respondents objected to the valuation of the Stamp Reporter and the question came before us under Ss. 10 to 12 of the Court-fees Act and we by our order passed yesterday upheld the valuation fixed by the Stamp Reporter and directed the defendants respondents to make up the deficiency, or else the matter would be dealt with under Ss. 10 to 12 of the Court-fees Act.

It is now contended on behalf of the appellant that the value of the subject-matter of the litigation having been now finally settled to be over Rs. 5,000, the Court below had no jurisdiction to entertain the appeal filed by the defendants. In support of this contention two rulings of this Court have been cited: *Mohini Mohun Missir* v. *Gour Chandra Rai* (1) and an unreported decision in the case of *Sah Radha Krishna* v. *Babu Mahadeo Lall Geonka* (2). The defendants, on the other hand, rely upon the decision of this Court in *Kesho Prasad Singh* v. *Lakhu Rai* (3) and two decisions one a full Bench decision of the Madras High Court in *Kelu Achan* v. *Cheriya Parvathi Nethiar* and *others* (4) and the other in *Vattekatte Veetil Chorotto Amma's daughter Ammalu Ammal* v. K *A. Krishna Nair* (5).

(1) [1920] 5 Pat. L. J. 397=56 I. C. 762=1 Pat. L. T. 390.
(2) Second Appeal No. 1204 of 1922 decided 22nd June 1925.
(3) A. I. R. 1923 Pat. 581
(4) A. I. R. 1924 Mad. 6. (F. B.).
(5) [1921] 62 I. C. 715.

The Suits Valnation Act (Act VII of 1887) has laid down the rules as to how a case of this kind should be dealt with. S. 11, Cl. 1 says.—

An objectio n that by reason of the over-valuation or under-valuation of a suit or appeal, a Court of first instance or lower appellate Court which had no 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 that Court or

(b) the appellate Court is satisfied for reasons to be recorded by it in writing, that this 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.

Clause (2) says :

If the objection was taken in the manner mentioned in Clause (a) of sub-Section (1), but the appellate Court is not satisfied as to both the matters mentioned in Clause (b) of that sub-Section, and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of the first instance or lower appellate Court.

In this case an objection was taken as to the valuation by the defendants themselves in their written statement in the Court of first instance. Therefore, Cl. (a) of sub-S. (1) applies to this case. It is now concluded by the decision of this Court that the suit as well as the appeal in the Court below were under-valued and that the proper value was such as took the matter out of the jurisdiction of the lower appellate Court. Therefore, the first part of Clause (b) is also satisfied. In accordance with this section it is not enough to set aside the decree of the Court below unless under the second part of Clause (b) the under-valuation prejudicially affected the disposal of the suit or the appeal on its merits. There is no question as to the valuation not having affected the disposal of the suit by the Court of first instance on account of its valuation where the suit was tried by the Subordinate Judge of Patna, who had local jurisdiction over the subject-matter in suit and his pecuniary jurisdiction was unlimited. Therefore, it did not matter whether the value of the suit was mentioned in the plaint to be Rs. 2,550 or over Rs. 5,000 or Rs. 10,000. The Subordinate Judge in question would in any case have tried the suit. Therefore, the under-valuation

did not affect the disposal of the suit on its merits in the trial Court.

The matter is, however, different so far as the lower appellate Court is concerned. If the appeal were properly valued, then the lower appellate Court would have no jurisdiction to entertain the appeal or dispose of it on its merits. The appeal then would have come directly to the High Court where it could have been heard and disposed of by a Bench consisting of two Judges. No doubt, it has ultimately come to a Bench of this Court consisting of two Judges, but it has come as a second appeal; and the power of the Court is limited to points of law only. In other words, the Court cannot enter into the merits of the case, whereas, if it had come as a first appeal, it would have entered into the merits of the case. Therefore, literally speaking, the disposal of the appeal on its merits has been affected on account of the under-valuation. The view taken by the Madras High Court does not commend itself to us, and with great respect to the decision of that Court which is a decision of a Full Bench, we do not find ourselves in agreement with the view of that Court. We think that the decision is not in accordance with the true interpretation of S. 11 of the Suits Valuation Act. It does not seem to have taken into consideration the import and effect of the words in that section: "the disposal of the suit or appeal on its merits." The decision of this Court in *Maharaja Bahadur Kesho Prasad Singh* v. *Lakhu Rai* (3) is fully in accordance with the provisions in the section; but it is a decision with respect to the circumstances and facts which were before the Court in that case. The Court, however, ultimately found it equitable to enter into the merits of the case and to treat the second appeal as a first appeal. The other two cases of this Court, particularly the unreported case, are on all fours with the present case.

We think the order which will meet with the requirements of the section and the ends of justice should be to treat this second appeal as a first appeal, ignoring the judgment of the Court below and allowing the parties to go into the merits of the case, that is, into the evidence, etc., just as in a first appeal. The appellant has consented to supply typed copies of the evidence for the use of the Court and also for the use of the respondents.

According to the order which has just been passed it would seem that the appellant here becomes the respondent and the respondents become the appellants. The memorandum of appeal, which was filed in the Court below by the defendants, will be treated as the grounds of appeal to this Court. It will be open to the appellants to add to the grounds already mentioned in the memorandum of appeal in the Court below. The question of cost of the paper-book will depend upon the result of the final hearing of the case. Mr. N. C. Sinha, on behalf of the appellant, says that he would print paper-books of the oral and documentary evidence; for he considers that it would be less costly and convenient than to get the paper-books typed. He must do so in consultation with the Deputy Registrar of the Court.

Order accordingly.

A. I. R. 1926 Patna 353

DAS AND ADAMI, JJ.

Baijnath Prasad Singh and *another*—Plaintiffs—Appellants.

v.

The Firm of Nand Ram Das and *another*—Defendants—Respondents.

Appeal No. 30 of 1923, Decided on 10th April 1926, from the original decree of the Sub-J., Saran, D/- 28th November 1922.

(a) *Contract Act, S. 78—Payment of purchase money does not determine passing of title—Court will construe contract according to intention of parties as to when property is to pass.*

If the parties express in terms their intention as to when property is to pass, the Court will construe the contract according to such intention. The payment of the purchase money is not the criterion or deciding the question whether title in the property sold passes. [P. 354, C. 2]

(b) *Contract Act, S. 78—He who enables third person to occasion loss must suffer it—Principles explained—Equity.*

Wherever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it: *Commonwealth Trust Ltd.* v. *Akotey* (1925) *App. Cas.* 72, *Foll.*

To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so

frequently affirmed ; *Lickbarrow* v. *Mason* (1787) 2 *Term Rep.* 63, *Foll.* [P 355 C 1, 2]

(c) *Contract Act, S.* 103—*Steam launch—Certificate of survey is not a document of title.*

A certificate of survey of a steam launch is not a document of title and is not for the protection of intending purchasers but for the protection of the passengers and crew. [P 355 C 2]

N. C. Sinha, N. C. Ghosh and *Bhuvaneshwar Prasad*—for Appellants.

B. N. Mitter—for Respondents.

Das, J.—On the 11th September 1919, the plaintiffs sold a steam launch which belonged to them to Nripendra Nath Mazumdar for Rs. 13,250. Rs. 2,000 was paid in cash and Nripendra Nath agreed to pay the balance in three instalments, that is to say, Rs. 3,000 on the 1st October 1919, Rs. 4,000 on the 2nd November 1919, and Rs. 4,250 on the 3rd December 1919. From the very beginning there was default on the part of Nripendra Nath and it appears that Rs. 5,550 has in all been paid by him towards the instalments. On the 22nd June 1920, Nripendra Nath sold the steam launch to the firm of Nand Ram Das Mathura Das and the suit out of which the appeal arises was instituted by the plaintiffs as against Nripendra and the firm of Nand Ram Das Mathura Das to recover the sum of Rs. 6,589-8-0, from them or from either of them, or in the alternative for an order that the steam launch be made over to the plaintiffs.

The learned Subordinate Judge has given the plaintiffs a decree as against Nripendra, but has dismissed the suit as against the firm of Nand Ram Das Mathura Das. The plaintiffs being aggrieved by the decision of the learned Subordinate Judge have appealed to this Court. It was contended on behalf of the appellants that by virtue of this special contract between the parties, the property in the steam launch remained in the plaintiffs, and that accordingly the plaintiffs are entitled to proceed as against the steam launch since they have not received the price of the steam launch from Nripendra.

The learned Subordinate Judge thought that the property in the steam launch passed to Nripendra and that Nripendra was entitled to sell the steam launch to the firm of Nand Ram Das Mathura Das. I am unable to agree with the decision of the learned Subordinate Judge on this point. It is sufficient to refer to the letter which embodies the contract, between the plaintiffs and Nripendra. That letter written by Nripendra to the plaintiffs runs as follows :

To Baijnath Prasad Singh, Zamindar, Sonepur.
Dear Sir,

The steamer 'Midnapur' belonging to you, I undertake to purchase for the sum of Rs. 13,250 (thirteen thousand two hundred and fifty); this is the price settled, and I take delivery of the said steamer on the 11th September 1919. Out of the said consideration money I pay Rs. 2,000 (two thousand) at once and the balance I agree to pay by following instalments : Rs. 3,000 (three thousand) to be paid in October 1919. Rs. 4,000 (four thousand) in November 1919, and Rs. 4,250 (four thousand two hundred and fifty) in December 1919. In case I fail to carry out the terms above referred to, you will be entitled to recover the whole amount with interest to be calculated at nine per cent. per annum. That I agree to hold myself responsible to you for the sole custody of the said steamer. Until the entire consideration money is paid I shall be responsible for any loss or damage done to the said steamer. That unless and until the whole amount of the price settled for the purchase of the steamer is paid, the ownership of the said steamer will rest in you and you will be entitled to get back the steamer itself or the money from me as desired by you.

I am entirely responsible for taking the steamer safely to Calcutta, and expenses in so doing is entirely mine.

Now it is quite true that the payment of the purchase money is not the criterion for deciding the question whether title in the property passes, and I entirely agree that if we did not find a clear intention expressed in the letter to the effect that the property in the steamer would not pass to Nripendra until the payment of the full consideration money, I would be inclined to agree with the learned Subordinate Judge that the property in the steamer had as a matter of fact passed to Nripendra. But it is well settled that if the parties express in terms their intention as to when property is to pass, the Court will construe the contract according to such intention, and in this case, there is no doubt at all as to what the parties intended. They agreed that the ownership of the steamer would remain in the plaintiffs until the payment of the full consideration money by Nripendra to the plaintiffs. I hold therefore that the property in the steamer remained in the plaintiffs.

But my conclusion on this point does not decide the case. Nripendra has, as a matter of fact, sold the steam launch to the firm of Nand Ram Das Mathura Das, and the question is, whether the plaintiffs are entitled to a decree as against Nand

Ram Das Mathura Das. There is some evidence that Gokul Das of the firm of Nand Ram Das Mathura Das was told that the steam launch was the property of the plaintiffs, but I am not disposed to place any reliance on that evidence. The facts are that, after the sale of the steam launch to Nripendra, Nripendra was allowed to carry the steam launch to Calcutta. There is conclusive evidence in the record that the plaintiffs engaged a man in Calcutta to look after their interest and that man duly informed the plaintiffs that Nripendra was about to dispose of the steam launch to Gokul Das of the firm of Nand Ram Das Mathura Das. Haji Ahmad Ali, who was engaged by the plaintiffs to look after their interests in Calcutta in the matter of the steam launch, admits that he wrote a letter to Baijnath Babu informing him that one Gokul Das had come to purchase the steamer. Apart from that, there is a letter from Nripendra himself to the plaintiffs in which he definitely asserts that he was trying to dispose of the steam launch.

I have no doubt whatever, upon the evidence, that the plaintiffs acquiesced in the position which was taken up by Nripendra, namely, that he would sell the steam launch and pay the plaintiffs the balance of the money due to them out of the sale proceeds. That this was the definite position taken up by Nirpendra is perfectly clear from the letter dated the 4th December 1919, and this was acquiesced in by the plaintiffs.

Now upon the facts the case clearly comes within the well-known statement of Ashhurst, J., in *Lickbarrow* v. *Mason* (1

> That, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

This principle is founded on the rule of estoppel and, as was pointed out by the House of Lords in *Commonwealth Trust Limited* v. *Akotey* (2),

> to permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow* v. *Mason* (1).

It was contended by Mr. Naresh Chandra Sinha that the purchase by the firm of Nand Ram Das Mathura Das was not in good faith, and reliance is placed upon the fact that the certificate of survey exhibited in the steam launch showed that the owners of the steam launch were the plaintiffs and not Nripendra. It is quite true that a certificate of survey has to be affixed and kept affixed, so long as it remains in force, on the steam vessel in use in some conspicuous part of the steam vessel where it may easily be read by all persons on board the same.

But the evidence is conclusive that the steam launch was not in use: see the evidence of Idu Mian examined on behalf of the plaintiffs. He says: "Defendant No. 1 did not ply this steamer for fares," and he adds in cross-examination, "the steamer never plied in Calcutta so long as I was there." That being the position, there is no reason to take the view that the certificate of survey must have been affixed on some conspicuous part of the steam vessel. Apart from that, the certificate of survey is not a document of title. A certificate of survey is not for the protection of intending purchasers but for the protection of the passengers and crew, and I do not think that it can be fairly argued that because there was a certificate of survey in the steam launch showing that the plaintiffs were the owners of the launch, there was an obligation on Gokul Das to require the production of that certificate and to act upon that certificate.

In my opinion, the firm of Nand Ram Das Mathura Das were bona fide purchasers for value and the plaintiffs cannot proceed as against them.

The appeal fails and must be dismissed with costs.

Adami, J.—I agree.

Appeal dismissed.

(1) [1787] 2 T. R. 63=1 H. Bl. 357=6 East 21=1 R. R. 425.
(2) [1925] A. C. 72.

A. I. R. 1926 Patna 356

DAS AND FOSTER, JJ.

Kamla Prasad and *another*—Appellants.

v.

Murli Manohar—Respondent.

Appeals Nos. 251 and 264 of 1924, Decided on 3rd March 1926, from the original decrees of the Dist. J., Muzafferpur, D/- 10th September 1924.

(a) *Succession Act* (1925), *S.* 124—*Rule in S.* 124 *is rule of law and not construction—Devise to A and in case A dies B to become heir—A surviving the testator—B cannot take under the Will.*

The rule enunciated in S. 124 is a rule of law and not a rule of construction.

The right of administration follows the right to the property.

By his will the testator devised his estate to his widow and his two daughters-in-law and then provided as follows: "In case the said three Musammats die, *M* son of *R* my brother's son shall be the heir and possessor of the properties." All the three ladies survived the testator.

Held: that S. 124 would operate so as to bar the right of *M* to take under the Will. [P. 356, C. 2]

(b) *Probate and Administration Act* (5 *of* 1881) *S.* 17—*Applicant challenging validity of the will—Administration cannot be granted.*

Where the position taken up by the applicant was that the Will was a forgery and that the ladies through whom he claimed were in possession not by virtue of the Will but adversely to the whole estate, and had acquired a title to the estate by adverse possession,

Held; that the applicant was incapable to act in the discharge of his duties as administrator. [P, 357 C. 1]

(c) *Probate and Administration Act* (5 *of* 1881), *S.* 21—*Will—Court's duty—Will must be established although administration is complete.*

The delay in the application should put the Court on an enquiry as to whether there is anything to be administered, but that applies to a case where the application is for Letters of Administration, not for Letters of Administration with the Will annexed. It is of paramount necessity that the Will should be established and the establishment of the Will is one of the functions of the Probate Court, and the Probate Court cannot decline to exercise that function because the administration is complete. [P. 357, C. 2]

(d) *Probate and Administration Act* (5 *of* 1881), *S.* 86—*Appeal—High Court will not interfere with the discretion of the lower Court.*

High Court will not interfere with the discretion exercised by the lower Court unless it is satisfied that that discretion was unreasonably exercised. [P. 357, C. 2]

(e) *Probate and Administration Act, S.* 14—*Grant of administration—Scope.*

A grant of administration does not decide any question of title. It merely decides the right to administer. [P. 358, C. 1]

N. C. Sinha T. N. Sahai, Navadwipa Chandra Ghosh, C. C. Das and *C.S. Banerji*—for Appellants.

Kurshaid Hussain and *Bhagwan Prasad*—for Respondent.

Das, J.—The question as to the genuineness of the Will was in controversy in the Court below, but is no longer in debate before us. The only question is whether Murli Manohar is entitled to a grant of Letters of Administration with the Will annexed. It is well-settled that the right of administration follows the right to the property. Murli Manohar claims that in the events which have happened he is now solely entitled to the estate of the deceased. By his Will the testator devised his estate to his widow and his two daughters-in-law and then provided as follows:

In case the said three Musammats die, Murli Manohar, son of Rara Charan Lal, my brother's son, shall be the heir and possessor of the properties.

It is contended on behalf of the appellants that S. 124 of the Indian Succession Act is directly applicable and that the bequest in favour of Murli Manohar cannot take effect as the uncertain event specified in the Will did not happen before the period when the "fund" bequeathed was payable or distributable. Now, the "fund" in this case, the estate of the testator, was distributable on his death and it is not disputed that all the three ladies survived him. The rule enunciated in S. 124 or the Succession Act is a rule of law and not a rule of construction and although it is not necessary for us to decide the point, it would appear that S. 124 operates so as to bar the right of Murli Manohar to take under the Will.

But my opinion on this point does not decide this case. The estate has never been administered in due course of law and it is necessary that the validity of the Will should be established and the estate administered. Murli Manohar is not a stranger. He is the nephew of the testator and in the words of S. 21 of the Probate and Administration Act

would be entitled to the administration of the estate of the deceased if he had died intestate.

The ladies are dead and there is no other applicant for Letters of Administration. In these circumstances S. 21 of the Probate and Administration Act would seem to apply. That section provides as follows :

When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the Will, and Letters of Administration may be granted to him or them accordingly.

It is contended by Mr. Naresh Chandra Sinha that his client Kamla Prasad is at least the sister's son of the last surviving widow and is in the position of the representative of the residuary legatee and so S. 21 will not operate in favour of Murli Manohar. There are two answers to this argument: first the ladies were not residuary legatees but universal legatees, and the representative of a universal legatee is not entitled to a grant of Letters of Administration; and, secondly, Kamla Prasad is not only not an applicant for a grant of letters of Administration, but has put it out of his power to make such an application. The position taken up by Kamla Prasad in his petition of objection is that the Will is a forgery and that the ladies were in possession not by virtue of the Will but adversely to the whole estate and had acquired a title to the estate by adverse possession. That being so, we must assume that he is incapable to act in the discharge of his duties as administrator even if the term "residuary legatee" in S. 21 includes universal legatee. In my opinion S. 21 of the Probote and Administration Act is clearly applicable and Murli Manohar is entitled to the grant.

It was then contended that Murli Manohar did not base his claim on the terms of S. 21 of the Probate and Administration Act. It is quite true that Murli Manohar claimed under the Will and so far as I can see his claim under the Will cannot be sustained. But the Will has to be established and the estate has to be administered, and we should not deprive Murli Manohar of his right to administer the estate if he is otherwise entitled to the grant under S. 21 of the Probate and Administration Act.

Two other points were argued before us. First, that there is nothing whatever to administer and that the Court below should on this ground have refused the application of Murli Manohar; and, secondly, that the grant of Letters of Administration was in the discretion of the learned Judge and that he should not have exercised his discretion in favour of Murli Manohar. The first point raises a question which was not raised in the petition of objection or in the arguments in the Court below. Cases have been cited to us to show that the delay in the application should put the Court on an enquiry as to whether there is anything to be administered and the decision of the Calcutta High Court in *Lalit Chandra Chowdhury* v. *Baikuntha Nath Chowdhury* (1) was referred to. That was a case where the application was for Letters of Administration, not for letters of administration, with the Will annexed. The distinction is important and should not be overlooked. It is of paramount necessity that the Will should be established, and the establishment of the Will is one of the functions of the Probate Court, and the Probate Court cannot decline to exercise that function because the administration is complete. In this case the widows were in possession for many years without applying for letters of admistration. It is the case of Kamla Prasad that the Will is a forgery; that the widows acquired a title by adverse possession and that he, as the heir of the last surviving widow, is entitled to the whole estate. If we refuse to entertain the application, then the Will is put out of the way and there is nothing in the world to prevent Kamla Prasad from claiming a title to the property adversely to the estate of the testator In my opinion the argument is an impossible one and should not find favour in this Court.

The last contention is that the learned Judge in the Court below should not have exercised his discretion in favour of the applicant for Letters of Administration. This is a matter not for us but for the Court below and this Court will not interfere with the discretion exercised by the learned Judge unless it is satisfied that that discretion was unreasonably exercised. I am not prepared to say that that discretion was unreasonably exercised. On the contrary, having regard to the facts and circumstances of the case I am clearly of opinion that the discretion was properly exercised. The

(1) [1910] 14 C.W.N. 463=5 I.C. 895.

appeal fails and must be dismissed with costs.

The appellant in F. A. No. 264 of 1924 is the brother of Murli Manohar and he is anxious that nothing should be decided in these proceedings to affect his title to the estate. A grant of administration does not decide any question of title. It merely decides the right to administer. There is no substance in this appeal which must be dismissed with costs. Hearing-fee, five gold mohurs in each case.

Foster, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 358

MACPHERSON, J.

Raja Madhu Sudan Dev and *others*—Accused—Petitioners.

v

Panu Parhi—Complainant—Opposite Party.

Criminal Case No. 61 of 1925, Decided on 10th September 1925.

Criminal P. C., S. 192 (1)—Sub-divisional Magistrate transferring a case before issue of summons—Transferee Magistrate can issue summons and perform all requisites to decide the case. If transfer is by High Court's direction it makes no difference.

If the Sub-divisional Magistrate, acting under S. 192 (1), transfers a case of which he has taken cognizance before issue of summons, the Magistrate who receives the case on transfer has power to do all that is requisite to try and decide the case, including power to issue summons on the accused. He has the same power where the High Court directs transfer of the case from the file of the Sub-divisional Magistrate and the case is transferred to his file in accordance with that direction. [P. 359, C 2]

Manohar Lall—for Petitioner.

G. P. Das—for Opposite Party.

Macpherson, J.—This rule was originally granted to consider whether the case pending against the petitioners in the Court of Mr. M. N. Bose, Deputy Magistrate of Cuttack, should be not transferred to another Court for trial substantially on the ground that the Magistrate had on 21st May altered, to the prejudice of the petitioners, charges which he had framed against them on the proceding day. When the rule was being heard by Bucknill, J., Sir Ali Imam for the petitioners took a fresh ground that the trying Magistrate had no jurisdiction to try the case and the learned Judge referred the case to a Division Bench, by which the rule was extended to cover both grounds. Mr. Manohar Lal, on behalf of the petitioners, has pressed both grounds.

The first ground cannot prevail. From the report of the Magistrate on the matter the reason for the alteration is manifest. When the charges as originally framed were read over to the accused on the 20th May, the pleader for the prosecution pointed to illustration (d) to S. 383 of the Indian Penal Code and submitted that it would be more appropriate to charge Petitioner No. 1 with the substantive offence punishable under S. 384 and Petitioner No. 2 with abetment of that offence. Just then the Magistrate was called away to other duties and he accordingly adjourned the case to the following day, at the same time informing the pleader for the prosecution that his contention would be considered then. On taking up the case on the following day the Magistrate having considered the law and the evidence on the record, acceded to the contention of the pleader for the prosecution. Any submissions against the alteration in the charge which the defence cared to make would have had patient hearing and consideration but none were forthcoming. It is clear that the Magistrate acted correctly and that the accused have no grievance whatever.

The plea that the Magistrate has no jurisdiction to try the case is supported in the following manner. The Sub-Divisional Magistrate in whose Court the complaint against the petitioners was preferred, after making an inquiry under S. 202, dismissed the complaint under S. 203 of the Code of Criminal Procedure. Upon application made to him the Sessions Judge directed "a further inquiry into the complaint which has been dismissed." The complainant then moved the Circuit Court for a transfer of the case from the file of the Sub-divisional Magistrate and Ross, J., passed the following order :

In my opinion there ought to be a transfer of this case. The Magistrate held a local inquiry and disbelieved the complaint and further enquiry was ordered by the learned Sessions Judge, but he did not direct the transfer of the case to another Magistrate. This application has

now been made. I think it is expedient for the ends of justice that, as the Magistrate has held an inquiry and expressed a decided opinion on the merits of the case, the case should be transferred to some other Magistrate.

I therefore direct that the further enquiry be held by a competent Magistrate other than Mr. Misra to whom the learned District Magistrate may make over the case.

The District Magistrate thereupon made over the case to Babu M. N. Bose for disposal. That Magistrate examined the witnesses of the complainant whom the Sub-Divisional Magistrate had failed to examine and, finding that a prima facie case had been made out, issued summons upon the petitioners under various sections of the Penal Code, heard the evidence adduced by the prosecution and thereupon, as has been said, framed charges on the 20th May and amended them on the next day.

The contention is not very clear but is substantially as follows. Babu M. N. Bose had no power to issue summons against the accused or to try them. The case was indeed made over to him by the District Magistrate for disposal but the order of the District Magistrate was, it is urged, illegal, since all that Ross, J. directed to be transferred was the inquiry under S. 202, so that until the report of that inquiry had been made to the District Magistrate, and the latter had passed orders upon it, the accused could not be placed on their trial at all; still less by Babu M.N. Bose who could not in any case issue summons under S. 204, as he has not been empowered under S. 190 (2) to take cognizance of an offence upon receiving a complaint of facts constituting such offence.

In my opinion the submission is unfounded. Admittedly cognizance was taken of the complaint by the Subdivisional Magistrate and he examined the complainant. It was no doubt open to him under S. 202 (1) to direct an inquiry by a Subordinate Magistrate but he did not so. The transfer of the case under orders of the High Court does not amount to a direction under S. 202 (1). On the contrary it contemplates a transfer to an officer competent to try the whole case as it stood before the Subdivisional Officer dismissed the complaint with the order for further inquiry made by the Sessions Judge superadded. No doubt it is implied that the Magistrate to whom the case is transferred will hold an inquiry under S. 202 (1) but he will do so as the Magistrate seised of the case and not in a subordinate capacity with the obligation to report to another Magistrate. In fact the order contemplates complete determination of the case by the Magistrate to whom it is transferred, either by dismissal, if in his judgment there is, after further inquiry, no sufficient ground for proceeding, or by issue of summons, if in his opinion there is sufficient ground for pr oceeding.

The District Magistrate is brought in merely so that he may exercise his discretion in the distribution of the work of his district by nominating the particular Magistrate. The case is not transferred to his file nor is he placed in the same position as the Sub-Divisional Magistrate would, it is suggested, have occupied if the latter had under S. 202 (1) directed an inquiry by a Magistrate subordinate to him. If the Sub-divisional Magistrate acting under S. 192 (1) transfers a case of which he has taken cognizance before issue of summons (the provisos to S. 200 show that he may do so) the Magistrate who receives the case on transfer has power to do all that is requisite to try and decide the case, including power to issue summons on the accused. He has the same power where the High Court directs transfer of the case from the file of the Subdivisional Magistrate and the case is transferred to his file in accordance with that direction.

Upon this view this application is without merit and the rule must be discharged. The case has already been pending more than seventeen months and it should be disposed of with all reasonable expedition.

Rule discharged.

A. I. R. 1926 Patna 359

DAS AND FOSTER, JJ.

Basudeo Bhagat and *others*—Plaintiffs—Appellants.

v.

Sheikh Kadir and *others*—Defendants—Respondents.

Appeal No. 165 of 1922, Decided on 21st January 1926, from the original decree of the Sub-J., Dumka, D/- 17th December 1921.

(a) *Santhal Parganas Regulation (3 of 1872 amended in 1908), S. 6—Regulation does not restrict Court's power under S. 34, Civil P. C.*

The Santhal Parganas Regulation applies only to the interest to be decreed under the bond and does not limit the powers of a Court under S. 34, Civil P. C., to award interest on the decretal amount until realization: *A. I. R. 1922 Patna 450, Foll.* [P 361 C 2]

(b) *Santhal Parganas Regulation (3 of 1872), S. 6—Whether contracts of novation are nullified is undecided.*

The question is undecided whether by S. 6 so large an inroad on the law of contract has been made in the Santhal Parganas as to nullify bona fide contracts of novation, where the claim or debt at the time of the novation is an adjusted amount comprising principal and interest.

[P 362 C 1]

S. M. Das and *Sant Prasad* — for Appellants.

Khurshaid Husnain, Gholam Muhammad and *S. N. Roy*—for Respondents.

Das, J.—The suit out of which this appeal has arisen was instituted by the appellants for recovery of Rs. 5,364-3-9 on the foot of a mortgage bond executed by the respondents. The learned Subordinate Judge has given a decree for Rs. 1,530 as against some of the respondents and the plaintiffs appeal to this Court.

It is not disputed that transactions have been going on between the parties since 1289. On the 3rd Sawan 1310, accounts were adjusted between the parties, and it is the plaintiffs' case that Rs. 2,755 was found due to them on the taking of the accounts. On that day two mortgage bonds were executed by Sheikh Nagu, Sheikh Kadir (Defendant 1) and Sheikh Magru (Defendant 2) in favour of the plaintiffs, one for Rs. 2,755, the other for Rs. 995. Sheikh Nagu is now dead, and is represented in this suit by Sheikh Abdul (Defendant 3), Mussammat Jumagan, (Defendant 4) and Mussammat Ankhar (Defendant 5). The plaintiffs' case is that the bond for Rs. 2,755 was executed to secure the sum of money found due to the plaintiffs on the taking of the accounts and that the bond for Rs. 995 was executed to secure an advance made on that day to the executants. Thereafter transactions went on between the parties. Another adjustment of account took place on the 27th Assar, 1314, and on that adjustment Rs. 3,582 was found due to the plaintiffs. Defendants 1, 2 and 3 executed a mortgage bond on that day in favour of the plaintiffs to secure the sum of money found due by them to the plaintiffs, and it is this last mentioned mortgage bond which is the subject-matter of the present suit. I may mention that the plaintiffs' case in regard to the bond for Rs. 995 is that it has been satisfied by payments from time to time made by the defendants.

The parties live in the Santhal Parganas and are governed by the special law in force in that pargana as contained in Regulation 3 of 1872, Regulation 5 of 1893 and Regulation 3 of 1908. S. 6 of Regulation 3 of 1872 as amended by the later Regulations is as follows :—

All Courts having jurisdiction in the Santhal Parganas shall observe the following relating to usury, namely—

(a) interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two per cent. per mensem, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed.

(b) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

Explanation.—The expression 'intermediate adjustment of account' in Clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal.

As may be anticipated, the defendants rest their defence on the terms of the Regulation and they claim that the accounts should be re-opened with a view to disallow the plaintiffs compound interest arising from any intermediate adjustment of accounts and they contend that the total interest to be decreed to the plaintiffs should not exceed the principal sum actually advanced to them. They admit that Rs. 2,755 was found due to the plaintiffs on the 3rd Sawan, 1310, but they allege that the sum included interest on which the plaintiffs are not entitled to claim further interest, notwithstanding the terms of the bond. In regard to the bond for Rs. 995, their case is that that sum represented, not a cash advance made on the 3rd Sawan, 1310, but irrecoverable interest, that is to say, interest found due to the plaintiffs on the 3rd Sawan, 1310, in excess of the principal of the original debt or loan. They say that towards the debt due by them, they have paid to the plaintiffs the sum of Rs. 1,285, and they profess their willingness to pay the plaintiffs what is found due to them on the examination of the accounts and in con-

formity with the special law of the Santhal Parganas.

The problem in this suit is to ascertain the actual cash advances made by the plaintiffs to the defendants. By the terms of the Regulation we are bound to ignore all intermediate adjustment of accounts, and we have to be on our guard to see that the plaintiffs do not get compound interest by having recourse to the simple device of procuring mortgage bonds from the defendants. The simple issue, therefore is: What were the actual advances made by the plaintiffs to the defendants? I may say that the plaintiffs accept the case of the defendants that they paid Rs. 1,288 to them. They maintain, however, that they appropriated this sum (which was paid by instalments and on different dates) towards the mortgage bond for Rs. 995 executed by the defendants on 3rd Sawan, 1310. It will be remembered that, according to the plaintiff's case, there was a cash advance in respect of this bond; whereas, according to the defendants' case Rs. 995 mentioned in the bond as having been advanced to the defendants, represented irrecoverable interest.

Having regard to the questions involved in the case, the learned Subordinate Judge appointed a commissioner to examine the accounts and to make a report to the Court. The Commissioner made a careful investigation and reported as follows:

First, on the 3rd Sawan 1310, the sum of Rs. 2,755 was due to the plaintiffs as principal and that sum (to secure which the mortgage bond of 3rd Sawan 1310, was executed) did not include interest or compound interest.

Second, Rs. 995 which is the subject-matter of the other bond executed on 3rd Sawan 1310, represented an actual advance made by the plaintiffs to the defendants and that the bond was satisfied by the payment of Rs. 1,285 by the defendants between 3rd Kartic 1314 and 27th Asin 1314.

Third, Rs. 5,036 was due to the plaintiffs for principal and simple interest on the date of the institution of the suit.

When the case came before the learned Subordinate Judge, neither party called the Commissioner to show that his report was in any way incorrect. The learned Subordinate Judge however speculated to an extent which is not permissible in a judicial officer and came to the conclusion that the sum of Rs. 1,530 only was due to the plaintiffs. (His Lordship here criticised the method followed by the learned Subordinate Judge and concluded). In my opinion, the plaintiffs are entitled to a mortgage decree for Rs. 4,976.

The next question is whether we should allow the plaintiffs interest on the decree under S. 34 of the Code of Civil Procedure. In *Hari Prasad Sinha* v. *Sourendra Mohan Sinha* (1) the learned Chief Justice of this Court thought that there was much to be said for the argument that the Santal Parganas Regulation applies only to the interest to be decreed under the bond and does not limit the powers of a Court under S. 34 of the Code of Civil Procedure to award interest on the decretal amount until realization; but he felt bound to follow an earlier decision of this Court which had decided that interest under the Code should not be awarded upon the decretal amount in so far as it includes interest on the principal debt or loan, but only upon the amount of the principal debt itself. The case of *Hari Prasad Sinha* v. *Sourendra Mohan Sinha* (1) went up to the Privy Council, and it is clear from the decision of their Lordships [*Sourendra Mohan Sinha* v. *Hari Prasad Sinha* (2)] that the question rests on the discretion of the Court, and not (as I read the judgment) on the Santhal Parganas Regulations. In my opinion, the plaintiffs are entitled to interest at 6 per cent. on the decretal amonnt from the date thereof until realization.

The last question is whether the plaintiffs are entitled to a decree as against Defendants 4 and 5. They are not parties to the bond of 27th Assar, 1314; but Sheikh Nagu (whom they, along with Defendant 3, represent) was a party to the bond of 3rd Sawan 1310. The solution of the question depends on whether the liability under the bond of the 3rd Sawan 1310, was extinguished by the execution of the bond of the 27th Assar 1314. There is no indication in the latter bond that liability under the former bond came to an end. That being so, the plaintiffs are clearly entitled to a decree as against Defendants 4 and 5, but it is clear that their liability must be limited to the assets of Sheik Nagu in their hands.

I would allow the appeal, set aside the judgment and decree passed by the Court below and give the plaintiffs the usual mortgage decree for Rs. 4,976 as against

(1) A. I. R. 1922 Patna 450.
(2) A. I. R. 1925 P. C. 280.

all the defendants (the decree against Defendants 4 and 5 being limited to the assets of Sheikh Nagu in their hands) with costs throughout and interest at 6 per cent. on the decree from the date hereof until realization. Period of redemption six months.

Foster, J.—I agree in the order to be passed, but I wish to make a remark or two on one point. It is not the plaintiffs' case, nor is it our finding, that the first mortgage bond of 1903 was rescinded by the second mortgage bond of 1907. After studying the terms of S. 6 of Regulation III of 1872 I think it quite possible that the question may arise whether by that provision of law so large an inroad on the law of contract has been made in the Santal Parganas as to nullify bona fide contracts of novation, where the claim or debt at the time of the novation is an adjusted amount comprising principal and interest: and some fresh consideration, for instance, the rescision of the previous bond or forbearance to sue, has passed from the mortgagee to his debtor. So far as I am aware the matter has not been decided in any case ; and I wish to reserve an open mind on the subject.

Appeal allowed.

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* * A. I. R. 1926 Patna 362

ROSS AND FOSTER, JJ.

Iltaf Khan—Accused—Appellant.

v.

Emperor—Opposite Party.

Death Reference No. 22 of 1925, Criminal Appeal No. 198 of 1925, Decided on 21st December 1925, from a decision of the Judl. Comr., Chota Nagpur, D/- 18th November 1925.

* * *Criminal P. C., S. 162 — Important statement made at trial was not made at the investigation—Contradiction can be proved.*

To construe S. 162 as meaning that while any part of the statement of a witness to the police may be used to contradict him, yet if the contradiction consists in this that a statement made at the trial was not made in any part of the statement to the police, such a contradiction cannot be proved, seems to be an artificial construction and cannot be adopted. *A. I. R. 1926 Patna 20 Dissented.* [P 363 C 1]

Athar Hussain—for Appellant.

L. N. Sinha—for the Crown.

Ross, J.—Iltaf Khan and Shamsuddin Khan have been sentenced to death by the Judicial Commissioner of Chota Nagpur on conviction of a charge of murdering Ram Sawarath Dubey on the 2nd of May 1925 at Chandarpura. The sentence hae been submitted to this Court for confirmation and the prisoners have appealed against their conviction.

The Judicial Commissioner was assisted at the trial by four assessors all of whom held that the accused were guilty. Besides the two appellants, a third person, Ali Karim was also put on his trial, and two of the assessors were of the opinion that he was guilty also, but he has been acquitted. (His Lordship here gave the prosecution story and after discussing the evidence proceeded). There remain four witnesses, Jogeswar Dusadh, Mahabir Dhobi, Munshi and Bhajan, and their evidence is directed to prove the fact that the accused were seen running away shortly after the murder, Jogeswar is the brother-in-law of Munshi and Mahabir is a neighbour. They are both residents of Kamat and their evidence in Court is that on the evening of the day of occurrence, about 2 gharis before sunset they saw the two accused passing through the village and thereafter they did not see them at their home. The weak point about their evidence is that they did not make any such statement to the Police. Before the Sub-Inspector all that was said was that the accused had been found absent from the village after the occurrence. Jogeswar Dusadh admitted that he did not mention to the Sub-Inspector his having seen the accused in the lane, but Mahabir Dubey maintained that he did make that statement. The Sub-Inspector says that he examined these witnesses on the 9th and that they stated only that the accused were absent from the village from the day of occurrence and they did not, so far as he remembered, say that they had seen the accused fleeing on the date of the murder.

On this evidence a question of law arises in the view of the learned Judicial Commissioner. Plainly there is a very important discrepancy between the evidence of these witnesses in Court and their statements to the Police, and if their statements to the Police were in the form deposed to by the Sub-Inspector, the statements made subsequently at the trial cannot safely be acted upon. The learned Judge, however, considering himself bound by the decision of this Court in *Badri Choudhury* v.

Emperor (1) held that such use of the notes of the witnesses" statements in Police diaries was not warranted by law and apparently rejected the Police statement, and, in consequence, believed the evidence at the trial. Now so far as Jogeswar is concerned, no question arises. He admitted that he did not make the statement to the Police that he had seen the accused that evening. Mahabir Dubey maintained that he did and the Sub-Inspector contradicted him. Why should this not be evidence? Apparently the learned Judicial Commissioner is referring to the observation by one of the learned Judges who decided that case (an observation which on the facts found must be regarded as obiter, because on the facts no question of the construction of S. 162 of the Criminal P. C. arose) that only a part of the recorded statement can be used and that

it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the Investigating Officer.

To construe S. 162 of the Criminal P. C. as meaning that while any part of the statement of a witness to the Police may be used to contradict him, yet if the contradiction consists in this that a statement made at the trial was not made in any part of the statement to the Police, such a contradiction cannot be proved, seems to be an artificial construction. I am unable to adopt it, and with respect, I must dissent from that view. I can find nothing in the language of S. 162 which would lead to such a conclusion. I would, therefore, hold that the evidence of the Sub-Inspector with regard to these witnesses is relevant and on the strength of that evidence I would discard their evidence in Court.

There remains, therefore, only the evidence of Munshi and Bhajan. (His Lordship then criticised the evidence of these two witnesses and held that they were unreliable). I fail, therefore, to find the evidence which can be safely acted upon to show even that these two persons were seen in the neighbourhood of the place of occurrence shortly after the murder. (His Lordship then discussed the question whether there was motive and found that there was none).

(1) A. I. R. 1926 Patna. 20=90 I. C. 874=6 P. L. T. 620.

On the whole, therefore, I feel convinced that in this case the evidence falls far short of proof to justify the conviction of the appellants. I would, therefore, allow the appeal and set aside the conviction and sentence and direct that the appellants be acquitted and set at liberty.

Foster, J.—I agree,

Conviction set aside.

A. I. R. 1926 Patna 363

DAS AND ADAMI, JJ.

Dhuplal Sahu—Defendant—Appellant.

v.

Bhekha Mahto—Plaintiff—Respondent.

Appeal No. 669 of 1923, Decided on 14th May 1926, from the appellate decree of Sub-J., Palamau, D/- 17th May 1923.

Chota Nagpur Tenancy Act (Amended 1920), S. 139 A—Suit for declaration as occupancy tenant and for possession is barred.

A suit based on the allegation that the plaintiff had an occupancy right in the land but had been dispossessed by the defendant, whom the landlord set up as a tenant in order to get rid of the plaintiff, is clearly barred by the provisions of S. 139 A, and the case is not excluded from the operation of S. 139 A by the mere fact that a declaration as to his occupancy status was asked for in the suit. [P. 364, C. 1]

D. P. Sinha—for Appellant.

Jadubans Sahay—for Respondent.

Adami, J.—In the suit giving rise to this second appeal the plaintiff sought to recover possession of a certain holding on the ground that he has been dispossessed by the defendant who had been put in possession of the holding by the landlord. He also asked for a declaration that he had right of occupancy in the holding. In the trial Court the question was considered whether under the provisions of S. 139 A the suit could lie in a civil Court. The Munsif decided that it could, because it was not merely a suit under S. 139, sub-S. 5, but was a suit for a declaration of the plaintiff's title as an occupancy raiyat. Therefore the Munsif held that the suit would lie in the civil Court, it not being a suit exclusively of the nature mentioned in sub-S. 5 of S. 139 and therefore S. 139 A would not apply. In the appellate Court this question does not seem to have been raised. Before us the question was raised again and it was contended that no suit would lie in the civil Court.

Section 139 A was added to the Chota Nagpur Tenancy Act in 1920 and was extended to the District of Palamau in which the land in dispute lies, in 1920. Therefore it was in force at the time the present suit was instituted. Under that section the civil Courts are precluded from entertaining any suit

concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under S. 139.

Under S. 139, sub-S. 5, as it stood at the time of the institution of the suit, it was provided that all applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord would only be brought before the Court of the Deputy Commissioner. Therefore it would seem that the present suit which was based on the allegation that the plaintiff had an occupancy right in the land but had been dispossessed by the defendant, whom the landlord set up as a tenant in order to get rid of the plaintiff, would seem to be clearly barred by the provisions of S. 139 A.

It is argued, however, that, since in the plaint a declaration was asked of the plaintiff's title as an occupancy raiyat, the suit was not merely a suit of the nature mentioned in S. 139, sub-S. 5, but involved a question of title, so the provisions of S. 139 A would not apply. As a matter of fact the point whether the plaintiff had an occupancy right or not in this land was merely a point in the evidence. It was not necessary really to ask for that relief; for in order to recover possession the plaintiff would have to show that he was an occupancy raiyat. In my opinion the case is not excluded from the operation of S. 139 A by the mere fact that the declaration was asked for.

I would hold that this suit was in fact barred under the provisions of S. 139 A, and S. 139, sub-S. 5, of the Chota Nagpur Tenancy Act and that the plaint should have been filed in the Court of the Deputy Commissioner. I would therefore allow the appeal with costs, and dismiss the plaintiff's suit with costs in all the Courts.

Das, J.—I agree.

Appeal allowed.

* A. I. R. 1926 Patna 364

DAWSON-MILLER, C. J., AND FOSTER, J.

Dangal Ram—Defendant—Appellant.

v.

Jaimangal Saran and *another*—Plaintiffs—Respondents.

Appeal No. 1212 of 1923, Decided on 6th May 1926, from the appellate decree of Addl. Sub-J., Shahabad, D/- 11-9-1923.

* (*a*) *Hindu Law—Family settlement—Property not partitionable without inconvenience—One party should take compensation from the other for his share—Legal necessity need not be proved.*

Where the transaction was really one in the nature of a family arrangement and both the brothers were entitled to a half share in the house and for that purpose to have it partitioned by metes and bounds, but the house could not be partitioned in equal shares without a great inconvenience:

Held, that the only other course to adopt was that one party should take compensation for his share from the other and that it is not necessary, in order to support a transaction of that sort, to show that there was any actual legal necessity for such a course, but that it must be made out by the party challenging the transaction that the course adopted was so detrimental to the interests of those who are interested as minors that it would be inequitable to allow the transactions to stand. [P. 366, C. 1]

(*b*) *Hindu Law—Family settlement is method of enjoying ancestral property by parties—Binding nature—Doctrine of legal benefit applies* (*Per Foster, J.*).

A family settlement is inter alia an arrangement by which the method of enjoying the ancestral property comes to be settled between the parties and to family arrangments great importance is attached by the Courts. In the absence of proof of mistake, inequality of position, undue influence, coercion, or like ground, a partition or family arrangement made in settlement of the disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from; and this principle is applicable where some of the members of the family are minors, or where the settlement has been effected by a qualified owner whose acts in this respect will bind the reversioner: 34 *C. L. J.* 323 and 23 *C. W. N.* 118, *Foll.*

The doctrine of legal benefit is applicable, though at the same time the Court should not be disposed to scan with too much nicety the quantum of consideration in case of family settlement The legal justification of the transaction should be tested on much wider grounds in the cases where there is a family arrangement in existence. [P. 367, C. 1, 2]

D. N. Verma—for Appellant.

B. N. Mitter—for Respondents.

Dawson-Miller, C. J.—This is an appeal on behalf of the Defendant No. 5 from a decree of the Additional Subordinate Judge of Shahabad reversing a decision of the Munsif of Arrah. The suit was instituted on behalf of two brothers, the sons of Kishun Chand, who

are minors, in order to recover back from the defendant Haricharan, their father's brother, and from the present appellant, their share in a house situated in Arrah town. It appears that Haricharan, the Defendant No. 1, and Kishun Chand, his brother, the Defendant No. 2, were at one time joint in estate, but the only joint property which they held was the house in question in Arrah town which had previously belonged to their father. The evidence shows, and it is not disputed, that these two brothers were by no means on friendly terms. They had separated in estate, but the house had not been divided by metes and bounds. The younger brother Kishun Chand and four sons who were also living with him in the same house. Kishun Chand and his brother being upon the terms which I have described, difficulties arose both as to the payment of rent and as to the payment of the municipal taxes and as to the carrying out of repairs to the house, the result being that the property was likely to depreciate in value owing to dilapidation without any repairs being carried out, and there was a further source of danger that in the strained relationship which existed between these two brothers no rent at all might be paid and the house might be sold up under arent decree.

In these circumstances it was obviously necessary that some sort of arrangement should be made so that each brother should have a separate portion of the house divided by metes and bounds for which he alone would be responsible. When I say each brother, I include with Kishun Chand his sons, because Haricharan was entitled to one-half and Kishun Chand and his sons were entitled to the other. Now it so happened that the house, which apparently was not a very large one, was practically incapable of division into two equal parts and the question which then arose was what sort of arrangement should be come to. There can be no doubt that if it were a question of partition by metes and bounds, and if it was found that the property was of such a nature that it could not be conveniently partitioned into equal shares, then the proper course would be that one party or the other should in lieu of his half share receive compensation from the other co-sharer. Now that is in effect what actually happened in this case.

The younger brother, Kishun Chand, in lieu of his moiety of the house, took from Haricharan a sum of Rs. 1,000 in satisfaction of his share and gave up the entire house to Haricharan. It is not contended that the sum of Rs. 1,000 was not adequate for the half interest in the house. There is no dispute about that. When Haricharan got possession, he, according to his case, although there is no direct finding upon this matter, effected some improvements in the house thereby increasing its value. He also sold to the Defendant No. 5, the present appellant, certain rooms in the house and so matters continued for some time until the present suit was instituted on the 29th February 1922 by Jaimangal and Ajodhya Prasad, the two minor sons of Kishun Chand, claiming to recover back their one-fifth share in the house on the ground that the transfer by their father to Haricharan was not for their benefit and was not justified by any legal necessity and was not in fact binding upon them.

The learned Munsif before whom the case came for trial considered that the arrangement which is now in question in the suit had been brought about with the help of the punches and might be looked upon as a partition between the two brothers. He also found that it was not practicable to partition the house as there was not room for two exit doors, one for each party. It was also stated in the evidence, according to the Munsif, that the transaction was one which arose out of a desire for partition. The actual transfer by Kishun Chand to Haricharan was made by a sale-deed, but the learned Munsif considered that this was in fact tantamount to a partition. He found also that the transaction was for the benefit of both parties concerned including the plaintiffs and he dismissed the plaintiffs' suit.

On appeal the learned Subordinate Judge, although he does not question the facts found by the Munsif in so far as they were pure findings of fact and not inferences, dealt with the question purely from one point of view, namely, whether in fact Kishun Chand, the father of the plaintiffs, acting on their behalf in the transaction which I have mentioned, had done something which was really for the benefit of the plain-

tiffs, then minors, and the conclusions he came to was that Kishun Chand had not done the best he could have done in the circumstances and, therefore, he thought that he had not acted like a prudent guardian in selling away this house, which was the only ancestral property remaining in the family, merely in order to avoid family quarrels.

Now, perhaps, I ought to point out that the learned Subordinate Judge appears to accept the view presented by certain of the witnesses that without disposing of the property there did not appear to be any way of escape from the daily quarrels that took place between the brothers, and in order to put an end to what was an intolerable state of affairs involving almost certain deterioration to the property, it was agreed that the elder brother should purchase the house paying adequate remuneration to the others for their share. With great respect to the learned Subordinate Judge it appears to me that he entirely failed to take into consideration the fact, which to my mind was the essential element in this case, namely, that this is not an ordinary case of transfer of property by the karta of the family involving the interest of the minors who, not being of age, were unable to give their consent. Had that been so and had the transferee failed to show that there was either any justifying necessity of the sale or any benefit to the estate then no doubt the minors might have had the sale set aside but that was not really the transaction in this case. The transaction was really one in the nature of a family arrangement, and further it was one certainly in the nature of a partition. Both these brothers were entitled to a half share in the house and for that purpose to have it partitioned by metes and bounds ; but it having been found that, in the circumstances, the house could not be partitioned in equalshares without a great deal of inconvenience, the only other course to adopt was that one party should take compensation for his share from the other. In such circumstances it seems to me that it is not necessary, in order to support a transaction of that sort, to show that there was any actual legal necessity for such a course. On the other hand, it seems to me that it must be made out that the course adopted was so detrimental to the interests of those who are interested as minors that it would be inequitable to allow the transactions to stand. Undoubtedly to my mind a partition in the circumstances was the proper thing. If that partition could not be effected in the ordinary way by dividing up the house by metes and bounds then the only other course to adopt was that which was in fact taken on the advise of the punches. For these reasons, although the learned Subordinate Judge has arrived at a conclusion that it is not sufficiently proved that the course adopted was the best in the interests of the minors, still I think that the transaction in the particular circumstances of the case, is unassailable and the decision must be set aside and the decree of the Munsif restored. The appellants are entitled to their costs here and in the lower appellate Court.

Foster, J.—I agree. It appears to me also that the legal justification of the sale made by the plaintiffs-respondents' father Kishun Chand has been measured by too narrow a standard. The actual conclusion of the learned Subordinate Judge in the Court of appeal has been that the transaction was not for the benefit of the minors, nor was it a prudent measure. Judged by itself, this would at first sight appear to be a final finding of fact although, even so, the judgment would be open to the criticism that after quoting the case of *Hanooman Persaud Pandey* v. *Baboo Moonraj Koonweree* (1) it would have been a more satisfactory discussion of the case if the Court had contemplated the question where there were damages to be averted by the sale.

However, as I have said, it appears to me that the case can and should be discussed on a much wider legal ground. We can take it that the sale of the moiety of the house, made by the Defendants Nos. 2 and 3, Kishun Chand and his elder son Nathuni Lal, was for a fair price. There is no doubt of this and it has not been disputed. We know that the price was settled by the punches appointed to settle the dispute between the parties in this matter. We also know that there were constant quarrels, and that those quarrels were such as would necessarily arise between two people who were not disposed to take the same view as to their

(1) [1856] 6 M. I. A. 393=18 W. R. 81=2 Suther 29=1 Sar. 552 (P. C.).

enjoyment of a common property. The two brothers were certainly beset with difficulties as to the mode of enjoyment of their patrimony. They had already separated, but the house was still undivided. They each had a right to partition arising out of their legal status. Had they gone to Court, what would have happened? There is no doubt that their right of partition would have been declared; but it appears to me extremely likely that the provisions of Act IV of 1893 would have been invoked. In S. 2 powers are given to a Court to order sale instead of division in partition suits where the nature of the property to which the suit relates makes the division unreasonable or inconvenient; and in S. 3 facilities are given to a share-holder in the property to acquire the property at a valuation by way of sale. The order so made will have under S. 8 the force of a decree.

It may be noted that this method of dealing with the property is treated as a substitute for partition "whenever a decree for partition might have been made, it appears to the Court . . ." So perhaps the procedure may not amount precisely to a partition. In view of the facts proved in this particular case, the transaction may be regarded as a family settlement. A family settlement is (inter alia) an arrangement by which the method of enjoying the ancestral property comes to be settled between the parties. We know that to family arrangements great importance is attached by the Courts.

Now reverting to the findings of fact, I have already mentioned that the price was a fair one; and I also mentioned that though in the plaint there is a suggestion of a fraudulent and collusive transaction, yet in the judgments showing upon what lines the contest between the parties proceeded there is no suggestion of fraud or coercion or misrepresentation or undue influence or mutual mistake. If, therefore, the transaction was a partition or a family arrangement (whichever we may choose to call it), then it would seem that the case of *Kusum Kumari Dasi* v. *Dasarathi Sinha* (2) will be applicable. The rule there is very clearly stated, that in the absence of proof of mistake, inequality of position, undue influence, coercion, or like ground, a partition or family arrangement made in settlement of the disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from; and this principle is applicable where some of the members of the family are minors, or where the settlement has been effected by a qualified owner whose acts in this respect will bind the reversioner.

(2) [1921] 34 C. L. J. 323=67 I. C. 210.

The question might arise whether the equities of parties in case of a family settlement are identical with the equities in a question of legal necessity, having regard to the elaborate discussion of the legal weight of a family settlement in the judgment of *Kermatulla Meah* v. *Keamatulla Meah* (3). In that judgment it is suggested that the doctrine of legal benefit is applicable, though it is at the same time stated that the Court should not be disposed to scan with too much nicety the quantum of consideration. What appears to me, however, to be quite clear is the point with which I began, namely, that what my Lord has called the legal justification of the transaction should be tested on much wider grounds in the cases where there is a family arrangement in existence. If the learned Subordinate Judge had taken into his view the fact that there was a partition and a family arrangement, there can be little doubt that his judgment would have been more complete and more correct.

There is only one point to add. It appears to me that as this family arrangement has been acted upon by the defendant Haricharan's act in improving the house, and by the sale to the present appellant Dangal Ram, the Court should be inclined not to upset the existing arrangement, especially as there is really no case made out sufficient to raise the apprehension that the respondents have been unfairly treated.

Appeal allowed.

(3) [1918] 23 C. W. N. 118=49 I. C. 886.

A. I. R. 1926 Patna 367

ROSS AND KULWANT SAHAY, JJ.

Makhru Dusadh — Accused — Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 21 of 1926, Decided on 8th March 1926, from a decision of the Asst. S. J., Purnea, D/- 23rd March 1925.

Penal Code, Ss. 380 and 457 — Separate sentences under both are bad—Penal Code, S. 71.

Separate sentences cannot be passed under S. 457 and S. 380 of the Indian Penal Code for housebreaking followed immediately by theft : 2 *W. R. (Cr.)* 63 ; 8 *W. R. (Cr.)* 31 ; 6 *W. R. (Cr.)* 49 ; 6 *W. R. (Cr.)* 92 and 5 *W. R. (Cr.)* 49 ; *Foll.* [P. 368, C. 1]

W. H. Akbari—for the Crown.

Ross, J.—The appellant broke into a house at night and stole a box and was caught in the act. He has been convicted under Ss. 457 and 380 of the Indian Penal Code and has been sentenced to consecutive term of three years' rigorous imprisonment under each of these sections. It has been repeatedly held that separate sentences cannot be passed under S. 457 and S. 380 of the Indian Penal Code : see *Queen* v. *Tonaokoch* (1), *Queen* v. *Sahrae* (2), *Jogeen* v. *Nobo* (3), *Mussahur Dusadh In re* (4) and *Queen* v. *Chytun Boura* (5), where their Lordships observed :

The point has been frequently ruled. A prisoner convicted of house-breaking followed immediately by theft would be punished under S. 457 of the Indian Penal Code only.

The result is that the sentence of three years' rigorous imprisonment passed under S. 380 must be set aside. The sentence under S. 457, Penal Code, will stand.

Kulwant Sahay, J.—I agree.

Appeal allowed.

(1) [1865] 2 W. R. Cr. 63.
(2) [1867] 8 W. R. Cr. 31.
(3) [1866] 6 W. R. Cr. 49.
(4) [1866] 6 W. R. Cr. 92.
(5) [1866] 5 W. R. Cr. 49.

A. I. R. 1926 Patna 368

ROSS AND KULWANT SAHAY, JJ.

Ambika Singh—Accused—Applicant.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 526 of 1925, Decided on 27th January 1926, from an order of the 1st Mag., Patna, D/- 29th October 1925.

Criminal P. C., S. 195—Magistrate dismissing a false complaint cannot proceed against complainant under S. 211, Penal Code.

Where a false complaint is lodged and dismissed, the Magistrate dismissing the complaint is not competent to proceed against the complainant under S. 211, Penal Code. He should make a complaint under S. 195, Criminal P. C.. [P. 368, C. 2]

S. M. Naim—for Petitioner.

H. L. Nandkeolyar—for the Crown.

Kulwant Sahay, J.—The petitioner lodged a first information before the police at Ghosi on the 12th of July 1925, charging certain persons with an offence under S. 302 of the Indian Penal Code. Before the police submitted a report, the petitioner filed a petition before the Sub-divisional Magistrate of Jehanabad on the 17th of July 1925, praying for a local enquiry into the case by the Sub-divisional Officer. The Sub-divisional Magistrate treated this application as a complaint and proceeded to examine the petitioner on oath. In the meantime the police submitted a final report stating that the case was a false one and prayed for the prosecution of the petitioner under S. 211 of the Indian Penal Code. On the 13th of August 1925, the Sub-divisional Magistrate, on receipt of the police report, summoned the petitioner under S. 182 of the Indian Penal Code and treated the complaint of the petitioner as a counter-case which he proposed to take up after the disposal of the case under S. 182. On the 24th of August, 1925, the petitioner prayed that he should be given an opportunity of proving his case before he was tried for an offence under S. 182 ; but the learned Sub divisional Magistrate rejected the application, and also dismissed the petition of complaint under S. 203 of the Code of Criminal Procedure. On the 21st of September, 1925, the learned Sub-divisional Magistrate converted the trial of the petitioner under S. 182 into an enquiry before commitment for an offence under S. 211 read with S. 302 of the Indian Penal Code, and he has committed the petitioner to the Sessions Court for trial.

It is clear that the proceedings in this case have been without jurisdiction. The Sub-divisional Magistrate could not himself enquire into the case under S. 211 read with S. 302, Indian Penal Code. The proper procedure to adopt was to make a complaint under S. 195 of the Code of Criminal Procedure. The provisions of S. 195 not having been complied with, the order of commitment is clearly without jurisdiction and must be set aside and the commitment quashed.

Ross, J.—I agree.

Order set aside.

A. I. R. 1926 Patna 369

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

Kamakhya Narain Singh—Plaintiff—Appellant.

v.

Jawahir Khan and *others*—Defendants—Respondents.

First Appeal No. 163 of 1922, Decided on 11th March 1926, from the decision of the Addl. Sub.-J., Hazaribagh, D/- 18th April 1922.

(a) *Chota Nagpur Tenancy Act, Ss.* 258 *and* 84 (3)—*Record of Rights recording a tenure to be non-resumable—Suit to declare that tenure is resumable is not barred.*

Section 258 does not bar a suit for declaring that a particular tenure recorded to be non-resumable in the Record of Rights is resumable; S. 84 (3) creates a statutory presumption in favour of the correctness of the finally published record, but implies the right to bring a suit averring the contrary. [P 374 C 2]

(b) *Chota Nagpur Tenancy Act* (6 *of* 1908) *S.* 83 —*Scope.*

Any order passed under S. 83 relates to the draft record only. [P 374 C 2]

(c) *Land tenure—Jagir—Ramgarh Raj—Maintenance grants and jagirs are resumable on failure of lineal male descendants—Jagodih tenure is such jagir tenure under Ramgarh and is likewise resumable.*

Maintenance grants in Ramgarh and Chota Nagpur, like jagirs, are resumable on failure of the lineal male descendants of the grantee.

The holders of the Jagodih tenure have the status of dependent talukdars holding under the Ramgarh Raj and are to be considered as leaseholders only within S. 7 of Regulation 8 of 1793. The tenure is a jagir tenure held under the Ramgarh Estate and is resumable on failure of the lineal male descendants of the grantee and it is not a shamilat or shikmi tenure in the sense in which those terms are used by the Revenue Officer in the Record of Rights published in 1914.

[P 372 C 2, P 373 C 1, P 374 C 2]

(d) *Evidence Act, S.* 102—*Zamindar and tenant—Record of Rights recording tenants as owners of non-resumable tenure—Burden is on zamindar to prove that the tenure is resumable.*

Where the defendants, the tenure holders, are recorded in the Record of Rights as holding land within the ambit of the zamindari of the plaintiff and that he was paying revenue for the same, the onus of showing the nature of their title is upon the tenure holders and upon a failure to show that they had had a tenancy therein the plaintiff is entitled to resume. But if it is recorded that the defendants were owners of a non-resumable tenure the onus is shifted upon the plaintiff to rebut the presumption created by the Record of Rights. [P 375 C 2, P 376 C 1]

L. P. Pugh, S. S. Ahmad and *S. M. Mullick*—for Appellant.

S. H. Imam, C. S. Bannerji and *S. N. Palit*—for Respondents.

Dawson-Miller, C. J.—The plaintiff, a minor, is the proprietor of the Ramgarh Raj suing through the manager of his estate which is under the management of the Court of Wards. He instituted the suit out of which this appeal arises claiming a declaration that the tenure ordinarily called Jagodih Lat consisting at present of 41 villages is an ordinary jagir within his zamindari and is resumable on failure of the direct male line of the grantee and that the entries in the Record of Rights, finally published in 1914, describing it as a shamilat or shikmi taluk and non-resumable are incorrect. The defendants are the present holders of the tenure and others claiming through them.

The villages comprised in Jagodih Lat form part of Pargana Chai, and this, together with many other Parganas, was settled with the plaintiff's ancestor, Raja Maninath Singh of Ramgarh, by the Permanent Settlement, and it can no longer be disputed that Jagodih is comprised within the plaintiff's zamindari.

It is the plaintiff's case that under the Moghul Emperors and for some centuries before the British acquired the Diwani of Bengal, Bihar and Orissa in 1765, the Rajas of Ramgarh were the paramount chiefs of a large tract of hilly country north of Hazaribagh including Ramgarh, Chai and Champa and many other parganas a number of which were held under them by petty chiefs under service tenures, or jagirs, granted originally for life, but which subsequently, by custom became descendible in the direct male line of the grantee, being defeasible on failure of his lineal male descendants and that Jagodih was a tenure of this nature. He further relies upon the Permanent Settlement made by the East India Company with his ancestor, Raja Maninath Singh, and the effect of the Settlement Regulations. In addition he contends that the question now agitated was decided in a suit between the ancestors of the parties in 1793 and cannot again be re-opened.

The defendants, on the other hand, contend that the Jagodih Chiefs were independent talukdars paying not rent to the Ramgarh Raja as their overlord, but revenue through him to the Moghul Emperor, and that had they been so minded, they could have obtained a Settlement direct from the East India Com-

pany under the provisions of the Settlement Regulations and in particular Regulation VIII of 1793, but that, notwithstanding this omission, and the fact that Jagodih was comprised in the Settlement with the plaintiff's ancestor as part of the Ramgarh Raj, they ought not to be treated as lease-holders holding under the Raja of Ramgarh, but as talukdars still paying their revenue through him, and that their estate is not resumable by the Ramgarh Raja in any event. They further contend that the villages, in question were their ancestral nankar villages, that is revenue free, in which they hold absolute proprietary rights.

During the recent Survey and Settlement operations in the Hazaribagh District, the Settlement Officer directed the Jagodih tenure to be recorded in the khewats as a shamilat taluk held under the Ramgarh Raj and as non-resumable, and it was so recorded in the Record of Rights finally published in 1914. The plaintiff accordingly instituted the present suit in 1920, before the Additional Subordinate Judge of Hazaribagh claiming the declaration already mentioned. The learned Judge dismissed the suit and the plaintiff has preferred this appeal.

Two main questions arise for consideration. The first concerns the relationship existing between the Ramgarh Raja and the holder of Jagodih before the Permanent Settlement; and the second is what effect, if any, the Permanent Settlement had upon the relationship previously existing between the parties. The plaintiff's case is that for many years before the Permanent Settlement, the Ramgarh Rajas were in possession of Jagodih and the other parganas of Chai and Champa, but from time to time granted jagirs of these parganas, or of certain villages therein, to the Chai Chiefs whom they had reduced to subjection, and certain documents purporting to show such grants have been tendered in evidence. These documents are challenged by the defendants either as spurious or inadmissible.

It is hardly surprising that after a lapse of about a century and a half direct and conclusive documentary evidence of the grants under which the defendants' ancestors held should be difficult to obtain, and it has been necessary to investigate a number of official reports and records of contemporary transactions in order to ascertain the relationship existing between the Ramgarh Rajas and those who held interests under them in their zamindari. (The judgment then set out the history of Ramgarh, Jagohih and other Chai Parganas from 1585 and continued). From 1764 onwards the Settlement of Jagodih and the other Chai Parganas was always made with the Rajas of Ramgarh although the Chai Chiefs made efforts to have their independence recognized. The first document produced in support of this part of the case is Ex. 23 a Settlement of Jagodih and other Paraganas with Raja Mukund Singh for the year 1878 F. (1771 A. D.) at a jama of Rs. 9,001 after deducting nankar inam. The next (Ex. 24) is a Settlement with Raja Mukund Singh for three years, 1179 to 1181 F. (1772-1774 A. D.) at a jama of Rs. 21,000. The next Settlement was for five years 1181 to 1185 F. with Raja Tej Singh at a consolidated jama of Rs. 30,000; and finally we have the Decennial Settlement with Raja Maninath for the years 1197 to 1206 F. at an annual jama of Rs. 40,001 reduced by deduction of sayer and expenses to a net annual jama of Rs. 28,100. This was further reduced by an order of the Board of Revenue in 1792 by certain allowances for excise, markets, etc., to Rupees 26,587. This Settlement includes, inter alia, Pargana Chai which embraces Jagodih, Rampur, Paroria, Danarh and Itkhori. The settlement which was afterwards made permanent provides: "You shall not without the order of the Hazur resume Devotar, Brammhotar Mahotar Aimas, Madatmash of pirs and faqirs, orchard land, lakhraj, tanks and istamrari villages without obtaining order from the Hazur, nor are you to make fresh Settlement of the same unless you get a sanad from the Hazur to do so. You shall raise in time usual earthwork within your boundary limits. In case of negligence on your part you shall be liable for the loss accruing therefrom; you shall guard and watch over the highways within your boundaries carefully so as to enable travellers and passers-by to journey over them peacefully and safely. You will not harbour thieves and robbers within your jurisdiction. If peradventure anybody's property be stolen or robbed, you will conformably with criminal regulations

search for and produce the thieves and robbers with the property.

From this it will be seen that the grantee became responsible to Government for keeping the peace within the zamindari, a task previously carried out with the assistance of the jagirdars holding under the Raj whose sanads generally provide that they should maintain a certain number of armed men.

It appears from the documentary evidence in the case and from Mr. Sifton's Settlement Report (pages 86 and 87) that the question of resuming the jagirs was raised at the time of the Decennial Settlement. Mr. Leslie, the Collector, complained to the Board that the value of the Ramgarh Estate was greatly reduced by the alienation of most of the lands in jagir and recommended resumption on the death of the existing incumbent on the ground that the services for which the jagirs were assigned were no longer required. At the same time he pointed out that the custom of the devolution of the jagirs from father to son had become so established that he feared any sudden innovation would be attended with bad consequences. I have already referred to this letter of July 1788 in which he included Lal Khan of Jagodih as one of jagirdars of Ramgarh. In the later correspondence in 1792, after referring to the kamil jama, Mr. Leslie states that it had been thought expedient to require the jagirdars to pay a certain annual revenue in lieu of maintaining the people specified in their sanad, a measure which caused considerable discontent at first and the proportion of the kamil jama which they should pay was not finally determined until the time of Mr. Dallas who fixed it at 6 annas in the rupee on the kamil jama.

This measure, however, had not proved satisfactory as this rate of payment although easy in some cases was intolerable in others and the zamindar had been obliged to grant reductions in his Mufassil Settlement to several people whose revenue was excessive. He further states that the jagirdars had in many cases fallen into arrears, as their lands had not been cultivated, and they had taken up the position that they were independent of the zamindar and could not be dispossessed. He makes certain suggestions for alleviating the situation, and, in the event of the Board not approving his proposals, he asks for a determination on the point whether the zamindar has the right to resume the jagir in case the jagirdar falls into arrears and secondly, whether on the death of the jagirdar his heirs have the right to get possession on the same terms, or whether the zamindar may resume the land and increase the rent or levy a fine for renewal. The Board replied that they conceived it optional with the zamindar to resume such of these tenures as they might think proper either upon the death of the present incumbent or upon their being unable to discharge the revenue assessed on their lands and, after resumption fix such assessment as they might think proper under the general regulations. From that time onwards the jagirs in Ramgarh have come to be regarded as resumable, but by the custom in the family established and supported by legal decision the zamindar cannot resume except upon failure of the lineal male line of the grantee.

I may now turn to the documents relied on by the plaintiff as showing that the Jagodih Rajas held their lands under a jagir tenure from Ramgarh. The plaintiffs' case is that the Ramgarh Rajas were the paramount chiefs of that part of the country for centuries before the advent of British rule. He further contends that although Ramgarh may have lost its dominion over Jagodih from time to time during the disturbed period in the first half of the eighteenth century, nevertheless from 1763 onwards they were always masters of the country, and in fact from about that time they retained possession, and by way of maintenance, and in return for certain services, the nature of which is not very clear but probably included the maintenance of certain armed men, they made grants of a few villages in their Parganas to the Chai Chiefs including Jagodih. (The judgment then discussed the several documents relevant to the case and while dealing with the suit of 1793 continued). It was contended on behalf of the respondents that the suit of 1793 did not include a claim for the proprietary interest in the villages of which the plaintiffs in that suit were already in possession, but I think it must be taken on a perusal of the record of the suit that the Jagodih Rajas were claiming proprietary rights over the whole of their Parganas of which accord-

ing to their case they had been deprived. They state in their plaint : "Raja Maninath Singh of Ramgarh is in possession of the milkiat and malguzari Rs. 6,501 besides the zirats which is our own jama of five mahals." They were claiming apparently the whole of that which was lost which was their milkiat right ; and had they proved that they were entitled as proprietors, even to the villages which they still held and not as jagirdars I think that they would have been entitled to a declaration as to that part of the property. Evidence was called on both sides as to the terms on which they held these villages. It was their case that the rent was collected during the time of Mr. Dallas under some sort of parwana granted by him and that they were paying as proprietors, but a body of evidence was called on behalf of the Raja of Ramgarh including that of Daryao Singh the sazawal sent by Mr. Dallas to collect the rent, to show that he collected the rent from them as jagirdars in the same way as he collected it from the other jagirdars and credited it to the revenue payable by Ramgarh. There seems to have been no object in calling this evidence unless it were to prove that the Jagodih Rajas were holding those villages as jagirdars and not as proprietors. The Court seems to have accepted the evidence for the defendant on this question and dismissed the whole claim on the ground that the plaintiffs had been out of possession of the proprietary right from before 1765. I consider, therefore, that the present respondents are precluded by that decision from re-opening the question of their proprietary interest.

I hold further that on the evidence before us it is amply proved that the Raja of Jagodih held the villages at that time in his possession under a baiswan or jagir grant from Ramgarh. These villages, then numbering 21 reduced to 15 after the rent suit of 1786, are the nucleus of the present 41 villages of the tenure. The bond of 1784 the genuineness of which is corroborated by the compromise in the rent suit of 1786 admits that they were jagir villages and the amalnama issued by Raja Maninath Singh in 1784 (Ex. 14) is further corroboration of the jagir grant. The Court in the suit in 1793 seems to have taken the same view. Moreover, it is significant that as late as 1848 Raja Shibraj Khan, the descendant of Lal Khan and ancestor of the present respondents, in his petition to Government giving the history of taluka Jagodih states :

> The said Raja Makund Singh through his high handedness brought the zamindari in his possession and occupation, but left out several villages out of the aforesaid mahal for the maintenance of the dependants of the ancestors of your petitioner the Raja.

Maintenance grants in Ramgarh and Chota Nagpur like jagirs are resumable on failure of the lineal male descendants of the grantee. In fact it would appear that at all events up to recent times no grants were ever made in Ramgarh of a larger interest than a tenure descendible in the male line. Woodroffe, J., in *Ram Narain Singh* v. *Chota Nagpur Banking Association* (1), when discussing the nature of mokarrari istamrari leases which were first granted in Ramgarh in about the year 1864 states :

> Before that date there had been no absolute transfers in Ramgarh, the nearest approach to such transfers being jagirs descendible in the male line.

If my decision on the above points is accepted it is unnecessary to consider the effect, if any, of the Settlement Regulations upon the status of the Jagodih Rajas, but in case the present suit may go to a higher tribunal I propose to state my conclusions upon this question.

The entry in the Record of Rights to the effect that the tenure is not resumable by the Raja of Ramgarh in any event can only be justified on the assumption that the tenure holders have an absolute proprietary interest in the land and are not lease holders. It is the respondents' case that at the time of the Permanent Settlement they were in the position of independent talukdars and, although they have lost their rights with regard to the other villages in the taluk, they at all events retain the right of independent talukdars with regard to the villages which they still possessed at the time of the Settlement. This argument is based upon the assumption that the suit of 1793 did not include those villages. Under the provisions of Regulation VIII of 1793, as already stated, it is provided by Cl. (4) that the Settlement, under certain restrictions and exceptions therein specified, shall be concluded with the actual proprietors of the soil of whatever denomination whe-

(1) [1916] 43 Cal. 332=36 I. C. 321.

ther zamindars, talukdars or chaudharies. The talukdars to be considered the actual proprietors of the land composing their taluks are set out in S. 5 and are to be regarded as independent talukdars entitled to a separate settlement with Government. The distinguishing feature of this class is, as I read the section, that they have either acquired their land from the zamindar or other actual proprietor by sale or gift making over to them the proprietary rights, or have received from Government grants of a similar nature directing them to pay their revenue through some other zamindar and not direct to Government. The respondents rely upon the third clause of S. 5 and say that they are talukdars whose taluks were formed before the zamindar or other actual proprietor of land to whom they now pay their revenue or his ancestors succeeded to the zamindari and they further point to S. 6 which provides that proprietors of taluks, who now pay the public revenue assessed upon their lands through a zemindar or other actual proprietor of land, and whose title-deeds contain a clause stipulating that their revenue is to be paid through him, shall continue to pay their revenue through such zamindar or other actual proprietor of land as heretofore. Assuming that for certain short periods under the Mughal Emperors and before the acquisition of the Diwani they had Settlement of their taluks and were paying revenue direct to the treasury or through some renter such as Kamdar Khan or some other zamindar they lost all rights in their zamindari before 1765 when Raja Makund Singh finally drove them out; and the Settlement made by the British Government took notice only of those rights which still subsisted on the 12th August 1765. From that date onwards they cannot be said to come under the provisions of Cl. (6) as they can produce no title-deeds containing a clause stipulating that their revenue is to be paid through Ramgarh or any other proprietor after that date. Had they wished to assert such a right after the property was settled with Ramgarh, they should have brought a suit to establish such right under the provisions of Cl. (12) of Regulation VIII. I am assuming, of course, that the villages comprised in their tenures were not included in the suit of 1793. Questions having arisen as to the time within which such a suit could be brought, it was provided by Regulation I of 1801, S. 14, (after reciting the necessity of fixing a period for the institution of such suits) as follows:

It is hereby required all that talukdars who, as the proprietors of the lands composing their taluks, may consider themselves entitled under S. 5, Regulation VIII, 1793, or any other part of that regulation to be separated from the zamindars to which their taluks are attached, shall prefer a written application to the Collector of the zillah in which their taluks may be situated, for the separation thereof, within one year from the date of this Regulation, under penalty of forfeiting all title to separation under Regulation VIII, 1793, if they shall omit to apply as directed within the prescribed period, at the expiration of which the portion of the section above mentioned shall be considered extinct with regard to all taluks for which no claim to separation may have been then preferred; and such taluks shall thereafter be considered as dependent taluks, not entitled to be separated from the zamindaris to which they may be attached, though in other respects the rights of the talukdars are not meant to be in any degree affected by the Regulation.

The effect of this section appears to me to be that the holders of the Jagodih tenure are reduced to the status of dependent talukdars holding under the Ramgarh Raj and are to be considered as lease-holders only, within the meaning of S. 7 of Regulation VIII of 1793. It is true that their rights in other respects are not affected, but they cannot be both dependent and independent. If dependent they are mere lease holders under the Ramgarh Raja and cannot have a greater interest than that of other lease holders holding under that Raj at the time of the Permanent Settlement. The highest form of tenure known in Ramgarh at that time was a jagir resumable on the death of the male heirs of the body of the grantee. The grantee in this case was Lal Khan.

With respect to the Settlement Officer, Mr. Sifton, who decided this question for the purposes of the Record of Rights, I think his conclusion was based upon very inadequate materials. He says:

After reading the evidence produced I am satisfied that these tenures are not of the same origin as the jagirs founded by the Padma Raja and his predecessors. They have hitherto been regarded and treated as shikmi or shamilat taluks and they probably existed as independent properties before the Ramgarh Raj was established, and I can find nothing in their recent history to change the status of the holders of these taluks. As they were not originated by the Ramgarh Raj I find them to be not resumable by the zamindar. They will be noted in the khewat as not liable to resumption.

In his Settlement Report, at page 26, he says :

> Jagodih, Rampur, Paroria, Itkhori and Barsote are shamilat-taluks, the owners of which have always claimed that they are not tenure-holders of the Ramgarh Raj and that a separate revenue ought to have been assessed on their estates. I have not been able to find out any definite history of the taluks, but the fact of their appearing with separately assessed revenue at the time when even the Chota Nagpur Raj was paying its revenue through the Ramgarh Raj suggests the possibility of these shikmi talukdars having been also in reality independent as they claim.

If by this he means that they were separately assessed by Government as independent taluks after 1765 there is no evidence to support him. If he means that they were independent at some period or other before that date, then this ignores the fact that in 1765, when the British took over the administration of the country, their independence had vanished and the Ramgarh Raj was by conquest the proprietor. Moreover it would appear that Mr. Sifton had not the advantage we now possess of having before him the old documents showing baiswan grants or the other documentary evidence adduced in this suit which is confirmatory of those grants.

A further point was raised on behalf of the respondents that the present suit was barred by the provisions of S. 258 of the Chota Nagpur Tenancy Act which applies to land settlements in Ramgarh. The section provides that, save as expressly provided in the Act, no suit shall be entertained in any Court to vary, modify or set aside, either directly, or indirectly any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceedings under (inter alia) S. 89 except on the ground of fraud or want of jurisdiction. It is contended that the order passed by the Revenue Officer, which resulted in the final publication of the Record of Rights, was an order passed under S. 89 and cannot now be questioned. The latter section gives the Revenue Officer power on application, or of his own motion, within 12 months from the making of any order or decision under Ss. 83, 85 or 86 to revise the same, whether made by himself or by any other Revenue Officer. It is contended that the order passed by Mr. Sifton was an order revising the previous order made by his subordinate under S. 83 which prescribes the procedure for considering objections to the entries made in the draft record. An objection to the entries in the draft record with regard to Jagodih was heard and decided in favour of the present respondents, and Mr. Sifton whose intention appears to have been to reserve this question for himself afterwards decided it in the same manner. When applied to subsequently, he stated that the order made by him was not and did not purport to be taken under S. 89, and added that his order would not be any bar to any subsequent civil suit to determine the status of the tenure. However that may be, it seems clear that any order passed under S. 83 relates to the draft record only. The draft has now served its purpose and final publication has taken place, and the present suit is not one seeking in any way to interfere with the draft record which is merely a preliminary publication. With regard to the Record of Rights finally published, S. 84, Cl. (3) provides :

> every entry in a Record of Rights so published shall be evidence of the matter referred to in any such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect.

This provision is similar to that in S. 103-B (3) of the Bengal Tenancy Act which creates a statutory presumption in favour of the correctness of the finally published record but implies the right to bring a suit averring the contrary. In my opinion the present suit is not barred by S. 258 of the Chota Nagpur Tenancy Act.

What the exact significance of the terms shamilat and shikmi may be it is not necessary to enquire—authorities differ as to their meaning but, in my opinion, the appellant is entitled to a declaration that Jagodih Lat consisting of the villages named in Schedule E of the plaint is a jagir tenure held under the Ramgarh Estate and is resumable on failure of the lineal male descendants of Raja Lal Khan, and that it is not a shamilat or shikmi tenure in the sense in which those terms are used by the Revenue Officer in the Record of Rights published in 1914.

A point was raised by Mr. Bannerji who appeared on behalf of the Respondent No. 24, Maharaj Bahadur Singh, who has acquired some interest by purchase in Mouza Petula one of the villages named in Schedule E of the plaint as appertain-

ing to Jagodih Lat. He contends that Mouza Petula appertains to taluk Rampur and not to Jagodih and that he has been unnecessarily made a party to the suit. There was no evidence one way or the other to show whether the village claimed by this respondent is the same Petula as that mentioned in the documents in this case or whether it has subsequently been transferred to Rampur. This question cannot be determined in the present suit and must be left open.

The decree of the Additional Subordinate Judge is set aside with costs against the defendants who appeared at the trial, and in lieu thereof a decree will be passed granting the declaration above mentioned. The appeal is allowed with costs against the respondents who have appeared other than the Respondent No. 24 who will bear his own costs.

Mullick, J.—(After setting out facts as stated in the judgment of the Chief Justice his lordship continued.) In para. 21 of his plaint the plaintiff states that the cause of action arose in 1914 when the Record of Rights was finally published, and in para. 22 he prays for the following reliefs :

(1) It may be declared that the tenure ordinarily called 'Jagodih Lat' consisting of villages in Schedule 'E' hereto annexed is not 'shamilat' for 'shikmi' taluk of the Ramgarh Estate, nor is it "non-resumable" as recorded in the khewats.

(2) It may be further declared that it is an ordinary jagir under the Raj and is resumable by it on failure of the direct male line of the grantee and under certain other circumstances, and the entries in the khewats are incorrect.

A joint written statement was filed by Defendant No. 3 Rai Debend·a Chandra Ghose Bahadur, and by No. 5 Lokendra Nath Mukherji, No. 6 Odhindra Nath Mukherji, No. 7 Harindra Nath Mukherji, No. 8 Digendra Nath Mukherji and No. 9 Parendra Nath Mukherji jointly. They contended that taluk Jagodih was a shikmi taluk at the time of Decennial Settlement paying revenue through the Maharaja of Ramgarh, that it was not, and never had been, a tenure appertaining to the Ramgarh Estate and that the Settlement Entry was correct.

Defendants Nos. 11 and 13 Jhagru Sahu and Bhagwan Das took the same grounds as the above defendants but further pleaded that the Mouzas Debo and Petula were originally included in taluk Jagodih and that by arrangement with the proprietor of taluk Rampur they were exchanged for Mouzas Pado, Ingania and Phuledaria of that taluk. They also claimed that they had purchased proprietary rights in villages Padaria, Kakraula and Machola and have purchased. the jagir, khorposh and khairat rights in several villages in the Jagodih Estate and also a mokarrari interest in Mouza Bhagar.

Defendant No. 24 Maharaj Bahadur Singh claimed to have purchased Mouza Petula and other mouzas in execution of a decree obtained by Damri Sowdagar against Kuar Deo Narain Sahi. He contended that this mouza was in taluk Rampur and that he had been unnecessarily impleaded in the present suit.

Defendant No. 22 Ramkumar Lal Bhagat stated that in 1878 his brother purchased Mouza Debo in execution of a decree obtained against Kuar Deo Narain Sahi, and that the mouza was included in Mouza Rampur and that he had been unnecessarily made a party in the suit.

Defendant No. 3 having died during the pendency of the suit his son, the Defendant No. 3 (a) now represents his interest. It appears that by purchase he has acquired the interest of some of the Mukherji defendants. This defendant and Defendant No. 24 are the only contesting defendants appearing in the present appeal.

The following facts are either admitted or established beyond doubt :

(1) That the 41 mouzas in suit are situated upon the site of Pargana Chai, Champa and Barsote as existing at the time of the Decennial Settlement.

(2) That the site was settled at the time of the Decennial Settlement as part of the zemindari of Ramgarh.

(3) That they were recorded in 1914 by the Settlement Officer as laying within that zemindari.

(4) That the zemindari bears No. 28 on the revenue roll of the District of Hazaribagh which was constituted in or about 1831.

(5) That the defendants do not claim that the lands were ever revenue free. On the contrary their case is that they were assessed to revenue which was paid for convenience through the Maharaja of Ramgarh.

Now as it was admitted before the Settlement Officer that the defendants were holding land within the ambit of the zemindari of the plaintiff and that

he was paying revenue for the same, the onus of showing the nature of their title was upon the defendants and upon a failure to show that they had had a tenancy therein, the plaintiff was entitled to resume. But the Settlement Officer having held that the defendants were owners of a non-resumable tenure the onus is shifted upon the plaintiff, and the question is whether he has given sufficient evidence to rebut the presumption created by the Record of Rights. It is necessary to bear this in mind in examining the evidence adduced by the plaintiff.

On the 11th September 1792 Raja Shiva Nath Sahi of Rampur, Raja Bed Khan of Jagodih and Raja Bahadur Sahi of Itkhori in Pargana Chai, Balaghat, laid a suit before the Diwani Adalat at Chata in Zilla Ramgarh against Raja Maninath Singh, zemindar of Zilla Ramgarh, valued at Rs. 6,501 alleging that he had misappropriated the income of their villages in Pargana Chai. The prayer was made in the following words:

> The usual practice as regards one-fourth of our villages has been contravened, we are, however, ready to pay the rent. Raja Maninath Singh of Ramgarh is in possession of the milkiat and malguzari Rs. 6,501 besides the zairats, which is our old jama of 5 mahals. It is, therefore, prayed that the said person may be summoned and justice done so that our milkiat and malguzari right may be restored to us.

The plea of the defendants was that the plaintiffs were jagirdars and that the jagirdars have been paying rent year by year.

The number of mouzas in suit was 40½ and the valuation represented one year's rental.

It was decided by Mr. Hunter, the District Judge, in a judgment delivered on the 17th December 1793 that inasmuch as the cause of action had arisen previous to the 19th August 1765 the suit was barred under the provisions of the Code of 1793, and also that inasmuch as the cause of action had accrued 12 years prior to the institution of the suit it was also barred under the same Regulations.

There was an appeal to the Provincial Court of Appeal at Azimabad (Patna) which was dismissed on the 29th August 1794. There was then a second appeal by the plaintiffs to the Sadar Diwani Adalat which also was dismissed on the 18th November 1795. The material portion of the judgment of the Court run as follows:

> The appellants admit that they were dispossessed of the zemindari claimed by them previously to the Company's accession to the Diwani, and that it is established in evidence of the witnesses that they have never been restored to the possession of it since that period, that it does not appear that they subsequently preferred any claims to the property in any Court of competent jurisdiction within the period limited by the Regulations nor have appellants assigned any satisfactory reasons for having neglected to prefer their claims. The Court, therefore, considering the admission of appellants' claims precluded in the first instance by S. 14 of the Regulation of 1793 which is extended to the Sadar Diwani Adalat by S. 7 of Regulation VIII of 1793 they resolve and decree that the decree passed in this case on the 29th August 1794 by the Provincial Court of appeal for the Division of Patna affirmed and that the appeal be accordinly dismissed.

In this suit a large number of the documents were filed by both parties and witnesses were also examined. The contents of the documents were embodied in the judgment of the Court in full and are, therefore, admissible in evidence without the production of the originals. (His Lordship here examined the several documents filed in this suit.) Judgment was given by the trial Court on the 17th December 1793, by the Provincial Court of appeal on the 29th August 1794 and by the Sadar Diwani Adalat on the 8th November 1795. It appears that in 1800 a further attempt was made by Raja Petambar Sahi, Rampur Balaghat, for recovery of proprietary right to 4 mahals withiu the Pargana Chai. That suit was dismissed by Lieut. Col. Freyer on the 18th June 1800 who found in his jungment that as Mr. Hunter had dismissed the plaintiff's claim to 5 of the mahals in the earlier suit on the ground that the plaintiff had been out of possession since 1764, this suit also was liable to dismissal on the same ground.

For the next 40 years we do not hear anything more about the Chiefs of the Pargana Chai, but on the 22nd November 1839 Mr. Ouselay, the Agent to the Governor General, wrote to Lieut. Thomas Simpson, the Personal Assistant to the Governor-General's Agent, asking him to submit a statement of estates, jagirs and their malguzars and he enclosed in his letter a form Ex. 11 (a) to be filled up. In reply a mulki form was filed by Bed Khan on the 17th August 1842 containing a statement of "goshwara villages" in his possession appertaining to mahal

Jagodih, the " remarks " column of which contains a history of the Jagodih Chiefs. It is there stated that only 21 mauzas were left as nankar to Bed Khan, ancestor of Raja Lal Khan and 39-1/2 mauzas to Raja Shib Nath Sahi grandfather of Raja Gauhar Sahai after Makund Singh nad treacherously captured their country: that after Mr. Camab invaded Ramgarh, Lal Khan and Shib Nath Singh helped tc win over Tej Singh to Mr. Camac's side and Tej Singh was recognised as the proprietor of Ramgarh and that Tej Singh acted perfidiously in not causing Lal Khan's nankar villages to be separated from Ramgarh ; that after the death of Tej Singh Mr. Camac's intention to recognise the Jagodih Chief's right to separation was not carried out owing to the opposition of Raja Preshnath Singh. Bed Khan further asserted that no rent was realised for his nankar villages from the time of Nawab Kasim Ali but that Maharaja Maninath Singh upon his accession claimed a one-fourth share, and as he threatened a suit an ekrarnama was executed by him on the 17th November 1795 under which he accepted 6 mouzas of Jagodih as security for rent of the nankar villages leaving the remaining 15 mouzas in the possession of Bed Khan. On the 27th August 1842 Sidhnath Singh, the son of Maninath Singh, filed an objection against Bed Khan's mulki form asserting that Bed Khan was his jagirdar and had no proprietary interest in mouza Jagodih. He also objected that he could not file his own form till Bed Khan had filed a revised form. The order of the Collector upon this objection was that the Maharaja of Ramgarh was at liberty to state in his mulki form the right which he considered the Chiefs of Jagodih and Rampur to possess and to make such entries in his own form as he thought proper.

On the 21st January 1848 'Raja Sheoraj Khan filed a statement in the office of the Agent to the Governor-General in answer to a request for information as to particulars of the title under which he held and stated that he was holding taluk Jagodih Pargana Chai as zemindar and proprietor by virtue of a maintenance grant given by Raja Makund Singh and that he was holding 15 of the 21 villages covered by the grant in accordance with the terms of an ekrarnama executed hy the Raja Maninath Singh.

In 1859 a Survey was undertaken of the Ramgarh District and in consequence of an order made by the Suprintendent of of Survey the proprietor Maharaja of Ramgarh filed a statement containing certain particulars of the villages held by him. In this statement he declares that 16 mouzas in taluk Jagodih were held as jagirs for good will and service by Raja Sheoraj Khan and Raja Bed Khan.

Seventeen years later the local authorities did not accept this view and on the 3rd April 1876 a report was submitted by Mr. Robinson, the Commissioner of the Chota Nagpcr Division, to the Assistant Secretary to the Government of Bengnl on the land tenures of Hazaribagh in which the following account aqpears :

Shamilat or shikmi taluka. In para. 5 I have mentioned that Pargana Chai was composed of five petty Rajas. These Rajas were semi-independent only paying tribute to Raja Lal Khan and when merged into Ramgarh continuing to pay tribute to the Ramgarh Raja. When the country was taken by the English and its Settlement was being made these Rajas endeavoured to get Settlements made with them direct but their efforts failed and though they were maintained each in his Raj they were directed to pry tbeir tribute which was then covered into a fixed rental to the Raja of Ramgarh. The Rajas of Rampur, Jegodih, Paroria and Itkhori accepted these terms and have been made shikmi talukdars. The Raja Pittij, who was risident of Gaya, refused to agree and made over his taluk to the Raja of Kandi, into whose estate this taluk has merged and the title has been lost. Similarly the Raja of Parsote succeeded in saving his estate from being merged into that of Ramgarh and the estate was made shamilat taluk as also was Pargana Kodarma but the circumstances relating to this last and its severance from the Ramgarh Estate, etc., are related in a separate Chapter. There is a legend that there were two more such shikmi taluks, viz., Tiliyaa and Gola bnt they have long been extinct and have merged into the Ramgarh Estate.

It is contended by the appellant that this report was the basis of the statement made by Mr. Hunter (afterwaeds Sir William Hunter) in his Statiscal Account of Hazaribagh and Mr. Lister in his Gazetteer for the Hazaribagh District and Mr. Sifton in his Settlement Report of the District regarding the status of the Chai Chiefs and that Mr. Robinson was completely in error in regarding the Chief of Jagodih as a proprietor, his proper status being that of the tenure-holder governed by the ordinary rule as to resumption applicable to jagirs in the Ramgarh Estate.

In addition to these documents there is a set of awarzas prepared in the office of the Raja of Ramgarh ranging from 1774 to 1900 (Ex. 15 series to Ez. 21). The earliest Ex, 15 (r) which is dated 1782 shows that Raja Lal Khan held a jagirdari tenure of 21 mouzahs. The income from each mouza purports to be shown against it the total being Rs. 2,480. The rok hakmi or the landlord's demand is shown at 6-annas in the rupee, that is, Rs. 930 and a collection of Rs. 517 is shown as having been made through Daryao Singh. This document is obviously intended to relate to the period when Mr. Dallas gave orders that the jagirdars should pay 6 annas in the rupee on their kamil jama. A similar document of 1785 shows the landlord's rent at Rs. 649-4-0 and obviously relates to the period after the jagirdars had executed the kabuliyat or bond of 1784 by the pen of Sumer Singh on the 7th Kartik Sudi Sambat 1841. In the awarza (Ex. 15) (t) for the year 1786 the rent is calculated at 4 annas in the rupee and is shown as Rs. 656-8-0. It relates to the period after the compromise when six of the mouzas were assigned to the landlord as security for rent. The landlord's rent, after making allowance for the depreciation in the currency, is entered as Rs. 640 and accords with the figure shown in the compromise petition filed by Maninath Singh in the Collector's Court printed at p. 75 of the paper-book. Owing to exchange of villages the gross income of 21 villages is shown as Rs. 2,602 in 1786, but after the compromise the income of the 15 villages remaining in the jagirdar's possession is shown in the awarza of 1788 (Ex. 15 (g) as Rs. 1,982 and it remains at this figure till 1863. In the awarza for 1774 (Ex. 15 (a)) the income is shown as Rs. 1,899 and so also in 1776, 1777 and 1778. In the awarzas for 1774, 1776 and 1777 five villages of Pargana Champa appear, but these go out in the awarza for 1780 which relates to Dalla's time and the number of villages increases from 16 to 21, and the total income to Rs, 2,622.

The learned Subordinate Judge has declined to place any reliance upon these papers on the ground that they are ex parte and prepared in the zemindar's sherista, and, that the defendants cannot be bound by them. That is perfectly true. It is also true that many of the entries in these documents are not now intelligible. Nevertheless so far as they go, I think they are good corroborative evidence of the title set up by the plaintiff. They show that since 1774 the plaintiff has always asserted that the Chief of Jagodih was his jagirdar. Papers which are nearly 150 years old ought not to be regarded in a hypercritical spirit and it is our duty, unless there is clear evidence of forgery, to see whether they cannot be reconciled with the other old documents in the case. In my opinion they cannot support the case of the plaintiff.

The same observations apply generally to the other documents produced by the plaintiff except where there is clear evidence that they are not genuine. I do not think we are justified in rejecting them on the ground that copies were admitted in the suit of 1792 without sufficient proof of the loss of the originals or that the persons executing or writing them on behalf of the respective parties have not been shown to have possessed the authority to do so. The kabuliyat or bond of 1784 was executed by Somer Singh on behalf of the jagirdars of Jagodih, but if he signed in the jagirdar's presence and the signature was what is known in the vernacular as "bakalam" i. e., by the hand of some one else, the question of authority arises.

The evidence of the plaintiff, therefore, leads to the following conclusions.

The country of the Chief of Jagodih lying within Pargana Chai was brought under the dominion of Hemant Singh, tha Raja of Ramgarh in 1640. It is possible, as has been found by the Subordinate Judge, that the Jagodih family is older than the Ramgarh family and that the Chief of Jagodih was the most powerful of the minor local Chiefs in that part of the country, who all owned allegiance to Ramgarh. Hemut Singn made an assessment of the annual produce of the villages lying within the Jagodih Chief's territory and prepared the kamil jama upon which the permanent Settlement was eventually made. The authority of Ramgarh was frequently disputed; but in 1764 Madan Singh finally reduced it. From that time the Chief of Jagodih lost all his vil-

lages except 21 which were situated in the neighbourhood of his home and were granted to him by the Chief of Ramgarh on condition of service.

It is now urged on behalf of the appellants that these 21 villages were ancient nankar villages; i. e., villages given in lieu of the allowance given by the Moghuls to zemindars for collecting the revenue. But in support of this there is no evidence beyond the assertions made by the Chiefs of Jagodih from time to time. There is evidence that in 1728, 1731, 1732 and 1733 the Chief of Jagodih executed kabuliyats in favour of some representative of the Moghul Emperor. I doubt the genuineness of these kabuliyats but even if it be admitted that at that time the Chief of Jagodih was paying revenue direct to the Moghuls, it seems clear that by 1764 his State had been completely conquered and absorbed by Ramgarh.

This evidence shows that for sometime the Jagodih Chiefs held the 21 mouzas as tenure-holders entitled to hold the lands free of rent for the services required of them. It is presumed that as their territory lay on both sides of the Grand Trunk Road those services consisted of policing the road and of otherwise assisting the proprietor when necessary. In 1772 and 1773 rent appears to have been realized from them, because after the advent of the East India Company it was no longer necessary for the zemindar of Ramgarh, as was observed by Mr. Leslie, to keep a rabble army of retainers. In 1776 the rent was definitely commuted to Rs. 656-12-0 and six villages were assigned as security for the same. In my opinion this evidence is sufficient to rebut the entry that the villages in suit are held under a shikmi taluki. A judicial finding though not res judicata was entered to this effect in 1905 in a suit in which the proprietor of Ramgarh sued Hiram Khan, the Chief of Jagodih, for the rent of the years 1958 to 1961 Sambat describing him as mashruti (conditional) jagirdar and obtained a decree against him.

I propose next to consider the evidence upon which the respondent claims that the Settlement Officers's entry that Jagodih was a shikmi taluk is correct. Hiram Khan in his mortgage in favour of Rai D. C. Ghose described the mortgaged property as revenue free nankar dehat. In his written statement in this suit the claim to a lakheraj right is withdrawn and it is pleaded that the mortgagor is a talukdar within the meaning of S. 6 of Regulation 8 of 1793; In argument before the learned Subordinate Judge that case was changed, and it was suggested that the mortgagor should have been held to be an actual proprietor under S. 5 of the Regulation. It is now urged that Tej Singh's letter of 1772 to Capt. Camac at Patna shows that the Chief of Jagodih was paying revenue to the East India Company through the Maharajah of Ramgarh. The letter certainly does contain a promise to take revenue from Jagodih but the promise was never carried out.

Next it is said that in 1777 Pareshnath acknowledged the existence of some nankar villages and, therefore, he had a proprietary right when he issued a parwana on Patlu-peon not to realise rent from the nankar villages granted to Raja Lal Khan. I have shown that the letter does not contain any such admission. On the contrary it was Pareshnath who objected to Tej Singh's promise being carried out and insisted that Lal Khan was a jagirdar. The Awarazas of 1774, 1776, 1777, 1778, 1780 and 1782 refer to the 21 villages held by Lal Khan as jagir and are inconsistent with any admission that he was holding nankar land as a shikmi or independent talukdar.

It is said that in the ekrarnama delivered by Maninath in 1784 Maninath declares that the said Rajas have set apart one-fourth their villages on account of Government revenue. The word "malguzari" may mean both rent and revenue and before the Permanent Settlement rent in the English sense was unknown. It was not inaccurate to say that a tenure-holder was paying revenue to his landlord. That Lal Khan was a jagirdar in Maninath's opinion is clear from his written statement at p. 50 of the paper-book which was filed in the suit of 1792. Mr. Camac in 1780 no doubt wished a separate engagement to be taken from Lal Khan and so did Mr. Chapman but that wish was never carried out. The payments made in 1782 to Daryao Singh do not show that they were made in his capacity as an

independent taluqdar or other actual proprietor.

It is next pointed out that in his appeal petition to the Sadar Diwani Adalat (p. 87 of the paper-book) Bed Khan asserted that the suit of 1792 was for 406-1/2 villages besides nankar villages the jama of which in rupees was 6,501. In 1848 Shiv Raj Khan in the declaration of heirship (p. 120 of the paper-book) asserted that he held 15 villages revenue free. In the mulki forms filed in 1842 assertions of the same kind were made. These assertions do not carry the case very far.

With regard to the Acts of Government, we find that Ramgarh was settled for one year in 1771, for three years, from 1772 to 1774 and for 5 years from 1775 to 1780. The first of these documents makes an allowance of Rs. 500 on account of inam nankar. The other two do not. These documents do not in any way show that there were any nankar villages in the possession of Lal Khan. It is possible that in the time of the Moghuls before the accession of the East India Company to the Diwani some nankar allowance used to be granted to the Chief of Jagodih, but there is no evidence that after 1765 they were allowed any nankar or to retain any lands in lieu thereof on the footing of any proprietary right. The evidence on the contrary shows that after 1764 Makund Singh deprived them of all their lands of the 21 mouzas which he assigned to them for their maintenance.

It is contended that though the Chai Chiefs lost their proprietary right to 406-1/2 mouzas they retained it in that small fragment comprised in the 60-1/2 mouzas which were the subject of the suit of 1792 and that they were at the time of the Permanent-Settlement actual proprietors in respect of that fragment. Apart from the effect of the Permanent Settlement on the status of actual proprietors who did not make a separate engagement with the Government, to which subject I will presently refer, it seems to me clear that at no time after 1764 was the Chief of Jagodih holding any land in proprietary right.

The entry, therefore, that he was a shikmi talukdar in the sense of a dependent talukdar paying revenue through another seems to me be supported by no evidence at all.

It is clear that the Settlement Officer was using the term "shikmi" or "shamilat" talukdar as meaning a dependent proprietor who was entitled to separation as an actual proprietor and who was paying revenue through another. The term has been used to indicate any tenure-holder who dates back to the Permanent Settlement by Mr. Field in his Introduction to the Bengal Regulations and by the High Court in Calcutta and by their Lordships of the Privy Council in various decisions "shikam"; is the Persian for belly and shikmi taluk means literally a taluk within the belly of another or dependent upon another, and "shamilat" means joint or co-ordinate; and the ordinary meaning of the term "shikmi" talukdar is a talukdar who may or may not be an actual proprietor. At the time of the Permanent Settlement the East India Company found in this Province many classes of persons who all claimed to be the owners of the soil. Some were ancient Chiefs and Rajas, others belonged to great land-holding families which had come into existence during the Muhammadan Government; others were officers in the employ of the Moghuls; others again were farmers who had in course of time begun to claim a prescriptive right to the office. Some were called zemindars and others were called talukdars or Chaudhurys.

The talukdars were divided again into two classes, namely, independent or Huzuri talukdars who paid their revenue direct to Goverument, or shikmi or mazkuri or dependent talukdars. These again were divided into two classes, namely, those who were actual proprietors of the soil and paid their revenue through another proprietor and those who were not actual proprietors. S. 5 of Regulation 8 of 1793 empowered the East India Company to treat as actual proprietors the shikmi and dependent talukdars enumerated in the section. A talukdar in whose taluk the proprietor, through whom he was paying revenue had no proprietary interest, was entitled to separate himself unless he was under S. 6 debarred from so doing by his title deeds. The need of the East India Company for money was great and as there was no time to make a detailed

inquiry, they decided to treat as the actual owner of the soil the person with engagement for the revenue.

The result was that all those talukdars who were actual proprietors, but who failed to separate themselves ceased to be proprietors and became tenure-holders or tenants in the English sense. They fell into the category provided by S. 7 which runs as follows :

> Talukdars whose taluks are held under writings or sanads from zemindars, or other actual proprietors of lands, which do not expressly transfer the property in the soil, but only entitle the talukdar to possession so long as he continues to discharge the rent, or perform the conditions stipulated therein, are considered as lease-holders only.

In S. 8 special provision is made for jungleburi taluks which although to all intents and purposes proprietary estates, are classed as lease-holders. The Regulation makes a sharp distinction between revenue and rent although the contrary has been sometimes said. In the opinion of the framers of the Code revenue was that which was payable to Government by the zemindar, independent talukdar or other actual proprietor who took Settlement for the zemindari. All others persons holding mal lands in the estate were subordinate in status and were liable to pay rent unless exempted by the terms of the engagement or by special contract with the zemindar. It was the duty of the zemindar or independent talukdar engaging with Government to take in his turn the necessary engagements from the talukdars dependent upon him. The Muhammadan Government had recognized no rights of property in the soil in any one except Government and every person holding any interest therein had been liable to pay revenue to the Crown, and although there is some evidence that rent in the English sense of payment for the use and occupation of a land to a private proprietor other than the King had been known in Hindu times, the Muhammadan Government declined to subscribe to any such economic theory. The result was that the Collector of the revenue was at most entitled to a fee in addition to the revenue demandable from the raiyat. But the East India Company bringing with them a wholly different conception of the ownership of land decided to establish a middle class in whom would be vested a right in the soil, and they carried out this intention by enacting that the zemindar was entitled to contract for rent from his tenants without any reference to the revenue payable by him to Government. The rents, for some years were regulated by custom but though an attempt was made to protect the raiyat against competition rents by the Legislature the growth of population which followed upon a period of settled Government created such a sudden and urgent demand for land that the attempt met with signal failure.

Next in order to put a stop to the entertainment of applications for separation long after Regulation VIII was enacted and to protect the rights of purchasers of estates sold for default of revenue, Regulation I of 1801 directed that a dependent talukdar entitled to separation who failed to make his application within one year, was to be debarred from making any application to separate but that in other respects his rights would not be affected by the Regulation. This proviso, in my opinion, merely saves such rights as a dependent talukdar may claim as a tenant. It is a contradiction in terms to say that a dependent talukdar who had lost the right to separate himself could continue to remain an actual proprietor co-ordinate in status with the zemindar who had engaged for the revenue. The rights that were reserved to him were rights in regard to succession, transfer and the like. It may be conceded that if a dependent talukdar had been an actual proprietor he would become a tenant liable to be resumed for escheat but on no other ground ; but if he was not formerly an actual proprietor his status would be governed by contract or custom.

A reference to the resumption Regulations in respect of lakheraj lands which were passed in the same year leads to the same conclusion also.

The effect of Regulation XIX of 1793 and Regulation II of 1819 was that resumed lands less than 100 bighas in area were annexed to the tenure of the dependent talukdar if any in whose taluk they were situated. In other words the relationship of landlord and tenant was established by law between the talukdar and the holder of the lands. There is, therefore, nothing startling in the view

that all dependent talukdars became after 1801 the tenants of the proprietor of the estate.

In the lower Court a case seems to have been made that the talukdar of Jagodih was in effect a lakherajdar at the time of the Decennial Settlement; but that case has been abandoned before us and now upon the facts it is not arguable. The case now argued is that he was in possession of nankar lands as a part of his ancient zemindari and that at the time of the Permanent Settlement they were assessed to revenue in conformity with the Regulations and that by arrangement the revenue was computed at the income of 6 mouzas which were assigned as security to the proprietor who undertook the duty of paying it to Government. Such a case is intelligible; but, in my opinion the answer to it is that it is not supported by the facts. It is difficult to see why the proprietor of Ramgarh should have undertaken the position of a mere post office for the transmission of the revenue and what remedy he had against the talukdar in case of default. Under the Regulations his estate was liable to be sold for the talukdar's default unless he chose to pay the arrear himself. In my opinion the consideration for the grant of the 21 villages was that the Chief of Jagodih accepted the status of a tenure-holder and he was confirmed in that position by the Permanent Settlement and he has continued to occupy it ever since.

The next question is whether the Settlement Officer's entry that the tenure is not resumable is correct.

On this part of the case the plaintiff puts his argument as follows: He says that although it was open to the proprietor of the Ramgarh Estate to create a tenure that would pass an absolute estate of inheritance he has in fact never done so at any time and that even an istimrari mokarrari tenure which for a long period was considered to be such an estate has now been held to be an estate resumable on failure of male heirs in the direct line of the grantee and that a jagir is the highest form of tenure known in the estate and that it has been held in repeated judicial decisions and though originally a tenure for life it has by custom become an estate in tail male: *Ram Narain Singh* v. *Chota Nagpur Banking Association* (1), *Pratap Udainath Sahi Deo* v. *Ganesh Narain Sahi* (2), *Srinath Roy* v. *Pratap Udai Nath Sahai Deo* (3) and Sifton's Settlement Report, page 89. A jagir which was originally a life-grant, has by custom acquired immunity from resumption except on failure of male heirs in the direct line of the grantee and as there is no tenure within the estate with privileges higher than this, the plaintiff is willing that the taluk in suit should be recorded as resumable like other jagirs. In about 1777 Mr. Heatley reported that the income of Ramgarh Estate was Rs. 1,53,000; but it was found that the proprietor was seldom able to pay a revenue of Rs. 30,000 because he had alienated large tracts of country as jagirs. In 1788 Mr. Leslie reported that these jagirs should be resumed by the proprietor on the death of the holder at the time but no orders were passed by the Board of Revenue and the evidence is that by custom the jagirs have in fact become hereditary and that sometimes a succession fee is exacted. It is true that since 1764 there is no evidence that any services have been actually performed by the talukdars; but in my opinion, the evidence shows that the condition of the grant was service. The situation of the taluk in the neighbourhood of the Grand Trunk Road and the unsettled condition of the times which compelled the Ramgarh Chief to retain armed forces and the admission of the talukdar himself in 1784 show that the grant must have been conditional upon service and that it was a jagir in the true sense.

As there is no question of the land being lakheraj and as the land is included within the ambit of the plaintiff's estate, the burden of proving the incidents of the tenure before the Settlement Officer rested upon the talukdar. The sole ground upon which the Settlement Officer appears to have arrived at his conclusion was that Jagodih was entitled to be separated from the Ramgarh Estate in 1793 as an independent taluk and that the Chief had continued to pay Government revenue since the Permanent Settlement through the proprietors of Ramgarh. In my opinion there was no reliable evidence for such a conclusion. There is no evidence that Jagodih ever paid any revenue through Ramgarh

(2) [1921] P. H. C. C. 369=70 I. C. 232.
(3) A. I. R. 1923 P. C. 217.

before 1793 or that he was entitled at that time to be classed as an actual proprietor. In my opinion, therefore, the entry that the taluk is not resumable is incorrect and the plaintiff is entitled to have it declared that the taluk is resumable upon failure of male heirs in the male line. The question may be asked "whose heirs?" The answer, I think, is that the taluk is resumable upon the failure of male heirs in the direct line of the original grantee Lal Khan.

It remains next to consider whether the contention of the respondents that S. 258 of the Chota Nagpur Tenancy Act is a bar to the suit.

Now S. 83 of the Chota Nagpur Tenancy Act, 1908 (Bengal Act VI of 1908) enacts as follows :

(1) When a draft Record of Rights has been prepared under this Chapter, the Revenue Officer shall publish the draft in the prescribed manner and for the prescribed period, and shall receive and consider any objections which may be made to any entry therein, or to any omission therefrom, during the period of publication. (2) When such objections have been considered and disposed of in the prescribed manner, the Revenue Officer shall finally frame the record, and shall cause it to be finally published in the prescribed manner, and the publication shall be conclusive evidence that the record has been duly made under this Chapter.

When the draft record of Mouzas Paro and Jagodih was prepared and published, an objection was made by the Maharaja of Ramgarh on the 10th February 1913 that it might be recorded that the shikmi taluk was held in jagirdari right in lieu of service and that the word "resumable" might be entered in Col. 5 of khewat No. 2. On the 13th August 1913 Mr N. N. Ghosh recorded an order declaring that the entry was correct and declining to make any alteration. The matter then appears to have been taken by the proprietor of Ramgarh to the Settlement Officer Mr. Sifton, who on the 1st February 1914 recorded the following order :

Order in case under S. 89 of the Chota Nagpur Tenancy Act.

I have heard pleaders and counsel upon the question of the nature of the terms of Rampur, Jagodih, Itkhori and Paroria and Barsote. I reserve my orders until I should have had an opportunity of studying the paper-books of two proceedings in the High Court on the relevancy and meaning of which the parties were at variance. It is not necessary for me at this stage to write a detailed judgment as the parties will have an opportunity after final publication of proceeding in a formal suit. After reading the evidence produced, I am satisfied that these tenures are not of the same origin as the jagirs founded by the Padma Raja and his predecessor. They have hitherto been regarded and treated as shikmi or shamilat taluks and they probably existed as independent properties before the Ramgarh Raj was established, and I can find nothing in their recent history to change the status of the holders of these taluks. As they were not originated by the Ramgarh Raj I find them to be not resumable by the zamindar. They will be noted in the khewat as not liable to resumption.

On the 24th March 1914 the Settlement Officer made the following supplementary order :

A petition has been filed by the Manager of the Court of Wards on behalf of the Ramgarh Raj enquiring under what section my order of 1st February 1914 was passed and whether it was a revisional order under S. 89, Chota Nagpur Tenancy Act in regard to the tenures Jagodih, Rampur, Itkhori, Paroria, and Barsote. The order was not an order of revision. There had been no objection under S. 83 in reference to any of the tenures except Jagodih, and the order of the Assistant Settlement Officer who tried the case of the resumability of Jagodih held it to be non-resumable. The question of the nature of these tenures had been reserved by me for a full hearing when notices for orders were sent by the attestation officers. My proceedings were not and did not purport to be taken under S. 89, Chota Nagpur Tenancy Act, and hence my order will not be any bar to a subsequent civil suit to determine the status of these tenures.

It is, however, contended by the respondents that although the Settlement Officer did not think that his order was an order under S. 89 it was in fact such an order, and that under S. 258 no suit can lie so as to affect that order. S. 258 of the Chota Nagpur Tenancy Act runs as follows :

Save as expressly provided in this Act, no suit shall be entertained in any Court to vary, modify or set aside, either directly or indirectly, any decision, order or decree of any Deputy Commissioner or Revenue Officer in any suit, application or proceeding under S. 29, S. 32, S. 35, S. 42, S. 46, sub-S. (4), S. 49, S. 50, S. 54, S. 61, S. 63, S. 65, S. 73, S. 74A, S. 75, S. 85, S. 86, S. 87, S. 89, S. 90, or S. 91 (proviso) or under Chs. XIII, XIV, XV, XVI, or XVIII, except on the ground of fraud or want of jurisdiction and every such decision, order or decree shall have the force and effect of a decree of a civil Court, in a suit between the parties and, subject to the provisions of this Act relating to appeal shall be final.

Now, was the Settlement Officer acting under S. 89 of the Act on the 1st February 1914 ? In my opinion he was not. In the first place, he did not revise any decision made under S. 83 ; but even if it were held that he did revise the entry in the draft record and that he passed an order within the meaning of S. 89, then the plaintiff's reply is that he is not

seeking to vary, modify or set aside, either directly or indirectly, that decision. He is not concerned any longer with any entry in the draft record. The final record, having been published, he is bringing the present suit for a declaration that the final record is incorrect and this he is entitled to do under the general law. He might have proceeded under S. 87 of the Act for the correction of the entry, but he has chosen not to do so. He has an alternative remedy and S. 258 of the Act is no bar to the suit.

It was also argued that the learned Subordinate Judge was right in finding the issue of limitation against the plaintiff.

It is contended that as the talukdar first made his claim to proprietary rights in 1792 and repeated it in 1842 and 1843 the present suit is barred by the rule of 6 years' limitation under Art. 120 of the Limitation Act. The answer to this is that it was not necessary for the plaintiff to take notice of every challenge, and that a new cause of action arose when an authoritative record of the title of the talukdar was made in the survey and settlement proceedings.

The learned Subordinate Judge also finds that on the death of the original grantee the possession of his successor became adverse if the tenure was a life jagir. In my opinion there is no evidence of any adverse possession. The tenancy was continued by the consent of both parties, and as the evidence shows that the jagirdar was let into possession by the proprietor it is not open to him to plead adverse possession during the continuance of the tenancy. In my opinion the learned Subordinate Judge's findings on the issue on limitation cannot be sustained.

There is one other question which requires consideration and that is the effect of the decision of the Sadar Diwani Adalat in 1795 in the appeal against Mr. Hunter's judgment of the 17th December 1793.

In my opinion that decision operates as res judicata. Although the case of the plaintiffs in that suit was that they were in possession of their nankar villages, and although they did not pray for the recovery of those villages the point directly and substantially in issue was whether the plaintiffs had a zamindari or milkiat right in the 406½ villages in Pargana Chai. If they had succeeded in proving their milkiat right to those villages, their title to the alleged nankar villages which were in their possession would have also been established without a further suit. Indeed it was contended by the plaintiffs in their appeal that the fact that they were in possession of the nankar lands was proof of their ancient proprietary title. In my opinion the rule of constructive res judicata applies here and it must be assumed that the question of the title of the plaintiffs to the nankar lands was also decided against them. If that view is correct, then the Jagodih Chiefs lost the right to claim in any subsequent proceeding proprietary rights to any of the 21 mouzas claimed by them as nankar. It follows then that they cannot now be heard to urge that proprietary right to the 41 villages now in suit.

The decision of this appeal does not depend on oral evidence. It depends upon the construction of and weight to be attached to documentary evidence and on matters of record in respect of which we are in as good a position to pronounce a decision as the learned Subordinate Judge.

In my opinion, after giving due weight to the learned Judge's appreciation of the evidence in the case, his decision cannot be supported and the appeal must the decreed with costs.

As First Appeals Nos. 163, 169 and 230 of 1922 were heard together, the judgment in each appeal will be governed by the material portions the judgments in the other two.

Appeal decreed.

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* A. I. R. 1926 Patna 384

ROSS AND KULWANT SAHAY, JJ.

Bengal and North-Western Railway Company—Defendants—Appellants.

v.

Tupan Das—Plaintiff—Respondent.

Appeal No. 1299 of 1922, Decided on 10th March 1926, from the appellate decree of the Dist. J., Purnea, D/- 17th July 1922.

(a) *Railways Act, S. 76—'Deterioration' must be taken in ordinary sense—Abstraction of goods from parcel is deterioration.*

"Deterioration" is not a word of art and it must be taken in its ordinary sense. Where

parcel is impaired in value by the abstraction of the articles contained in it, there is deterioration of the parcel. [P 385 C 1]

* (b) *Railways Act, S. 75—No Indian authority exists for the proposition that if goods are abstracted by company's servants S. 75 does not apply—English rulings are inapplicable.*

There is no Indian authority for the proposition that S. 75 does not protect the Company where the articles are abstracted by the servants of the Company, and English authorities are not applicable as there is no such provision in the Indian Act as there is in the English Act. [P 385 C 2]

Hasan Jan—for Appellants.

L. K. Jha—for Respondents.

Ross, J. — This appeal must be allowed. The plaintiff-respondent sent a parcel for transmission from Hyderabad Sindh to Katihar on the railway of the defendant company. The parcel arrived at Katihar ; but when it was opened it was found that some of the contents had been abstracted. These were articles of silk and other things falling within the second schedule to the Indian Railways Act. The present action was brought for the recovery of the value of these articles. The defence was that the company was protected by S. 75 of the Indian Railways Act inasmuch as the parcel sent by the plaintiff contained articles mentioned in the second schedule but no declaration of their value was made. The finding of the Munsif was that the articles in question were abstracted while the parcel was in the custody of the defendant company's servants. A decree has been passed in favour of the plaintiff by both the Courts below and the defendant company has appealed.

The learned advocate for the respondent contends that the case does not fall within the terms of S. 75, because there has been neither loss, destruction nor deterioration of the parcel ; and secondly that inasmuch as the goods were lost by theft of the company's servants they are not entitled to the protection of this section. Now " deterioration " is not a word of art and it must be taken in its ordinary sense. In the Oxford Dictionary one of the meanings given to the word " deteriorate " is " to become lower or impaired in quality or value." The parcel was impaired in value by the abstraction of these articles and consequently there was deterioration of the parcel. I think, therefore, that the case falls within the language of S. 75. As to the argument that S. 75 does not protect the company because the articles were abstracted by the servants of the company, the learned advocate was compelled to admit that he had no Indian authority for this proposition. He relied upon certain decisions of the English Courts, but these proceeded on the express provision of S. 8 of 11 Geo. IV and 1 Will. IV, Chap 68 (Carrier's Act 1830) where a proviso is enacted exempting from the liability for loss of or injury to the articles therein referred to imposed by the first section of that Act. The proviso is that

nothing is this Act shall be deemed to protect any mail contractor, stage coach proprietor or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from felonious acts of any coachman, guard, book keeper, porter, or other servant in his or their employ etc.

There is no such proviso in the Indian Act and, therefore, the English decisions have no application. It was also pointed out by the learned advocate for the appellant company that there is no evidence that the theft was committed by any of the company's servants and this argument was not met by the learned advocate for the respondent.

In my opinion, therefore, this case is covered by S. 75 of the Indian Railways Act and the appeal must be decreed with costs and the suit dismissed with costs throughout. The cross-objection is dismissed.

Kulwant Sahay, J.—I agree.

Appeal allowed.

A. I. R. 1926 Patna 385

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

Keshbji Pitamber—Plaintiff — Appellant.

v.

Shashi Bhusan Banerji and *another*—Defendants—Respondents.

First Appeal No. 150 of 1922, Decided on 15th March 1926, from a decree of the Addl. Sub-J., Dhanbad, D/- 13th February 1922.

(a) *Evidence Act, S. 36—Thakbast map and Revenue survey map—The latter is more accurate and should be relied upon to determine boundaries.*

Although the Thakbast map is a part of the thak survey, it is not meant to be and is not in

fact a scientifically prepared plan, but merely a rough sketch, or at most, an unscientifically prepared plan showing the number and approximate position of the thak marks or dhuis for the guidance of the revenue surveyor who followed after, and who, having picked up and verified the thak marks indicated roughly in the Thakbast map prepared the revenue map by accurate observations made by expert surveyors with scientific instruments. Where it appears that he had the Thakbast map before him when he made his survey and prepared the revenue map then the revenue map must be accepted as shewing the result of the thak survey even more accurately than the Thakbast which was not intended to be scientifically accurate.

The signature of the Revenue Surveyor on a thak map means merely that he has satisfied himself that the boundary accepted and intended by the demarcation staff had been correctly picked up on the ground and correctly surveyed on the revenue survey map.

[P. 388, C. 1, 2, P. 389, C 2]

Per Mullick, J.—The words "as per thak" mean as per thak pillars. *A.I.R.* 1924 *Patna.* 402 *Rel. on.* [P. 392, C. 1]

(*b*) *Adverse Possession—Trespasser can acquire right only in land encroached upon.*

A trespasser cannot acquire by prescription title to anything more than the precise area encroached upon. [P. 391, C. 1]

S Hassan Imam, S. Mahdi Imam, N. N. Sen, S. M. Mullick and *S. C. Mazumdar*—for Appellant.

S. Sultan Ahmad, B. C. De and *A. K. Roy*—for Respondents.

Dawson-Miller, C. J.—The dispute in this case is between the holders of the mineral rights in two adjacent villages in the Jharia coal fields each of the parties holding under grants derived from the Raja of Jharia who is the proprietor of both villages.

The plaintiff, Keshabji Pitamber, has a lease of the mining rights in mouza Kujaman whilst the principal defendant, who may be referred to as the defendant has a lease of the mining rights in mouza Ghanuadi. The northern boundary of Ghanuadi is the southern boundary of Kujaman and the main question for decision in this appeal is whether the boundary between these two villages must be determined for the purpose of this suit as that shown in the revenue survey map or as that shown by the thakbast survey which immediately preceded it, assuming that there is a difference between the two. A further question arises whether the defendant, assuming him to be wrong on the first point has acquired by adverse possession a prescriptive right to the minerals in a portion of the land comprised within Kujaman, and which is enclosed within a yellow line upon map No. 3 prepared by a Commissioner in this case.

The learned Additional Subordinate Judge Dhanbad before whom the case came for trial found that the plaintiff had failed to prove that the disputed land was included in the boundaries of his grant, and further that the plaintiff, or his predecessors, were never in possession of the disputed land and that the defendant had acquired title by adverse possession for a period of over 12 years. From this decision the plaintiff has appealed.

The first question depends partly upon the interpretation of the documents of title of the respective parties and partly upon whether the boundaries therein described correspond with the boundaries shown in the revenue survey map.

It appears that at some time before 1893 Shyama Charan Halder and others held a mukarrari patta of Mouza Ghanuadi from the Raja of Jharia. The document has not been produced. In 1893 the Halders transferred by a dar-mukarrari patta the whole of their interest in the surface and under-ground rights of Mouza Ghanuadi, excepting only the surface rights in certain paddy lands, to Mr. Aratoon Misrop Thaddeus. The southern boundary of the land demised by this dar-mukarrari deed is stated to be the border of the highway (Saran) of Mouza Durgapur as per thak. Durgapur lies immediataly to the westward of Kujaman and its northern boundary is a part of the southern boundary of Ghanuadi. In 1896 the Raja of Jharia sued the Halders and Mr. Thaddeus for a declaration that they had no right to the minerals in mouza Ghanuadi, and further that they had no right to the surface land in that mouza. The southern boundary of the land comprised in that suit is described in the plaint as the border of the limits of Mouza Durgapur, Kujaman and Tisra as in the thak. In 1898 Mr. Thaddeus who had received from the other defendants in that suit their rights in Mouza Ghanuadi, whatever they might be, and who was therefore the only defendant materially interested in the suit, arrived at a compromise with the Raja of Jharia and accepted from him a fresh lease under a permanent mukarrari patta, of the mineral rights in that Mouza, agreeing to pay him an annual rental of Rs. 1,200 and a

premium of Rs. 2,000, and in the event of the railway freights being reduced by the East Indian Railway Company, or a new railway being made in the Jharia pergana by the Bengal Nagpur Railway Company, then in lieu of the rent of Rs. 1,200 the lessee was to pay royalty of 2 annas per ton on the coal despatched with a minimum of Rs. 1,200 per annum. In that lease the southern border of the land demised is stated to be the border of the limits of Mouza Durgapur, Kujaman and Tisra as per Thak. This deed was executed on the 22nd January 1898 and on the 24th of the same month the suit instituted in 1896 was withdrawn with permission to bring a fresh suit against the defendants other than Thaddeus. It will be seen from these transactions that Thaddeus recognized the rights of the Raja of Jharia in 1898 to grant a lease of the mineral rights in Mouza Ghanuadi, and the withdrawal of the suit two days later was merely a part of the same transaction. On the 25th April 1904 Thaddeus sold his interest in mouza Ghanuadi to the defendant and Tara Prasanna Mukerjee for a sum of Rs. 5000. The land, the subject of that sale, is said to be bounded on the south by the border of the limits of Mouza Tisra, Kujaman, Durgapur and Fatepur, and on the 16th December 1917 T. P. Mukerji transferred his share to the defendant who thereby acquired the whole of the interest conveyed to Thaddeus by the Raja of Jharia in 1898. The southern boundary of the land in the deed of 1917 is given as the border of the limits of mouzas Tisra, Kujaman, Durgapur and Fatepur as per thak.

The plaintiff's title to the Kujaman begins with two deeds executed on the 15th June and the 2nd July 1900 respectively by the Raja of Jharia in favour of Jugal Kishore Lal Singh Deo the zamindar of Kashipur. It appears that shortly before that date 592 bighas of land in the northern part of Kujaman had come into the direct possession of the Raja by surrender from the previous tenants By the deed of the 15th June 1900, 400 bighas of this were granted to the zamindar of Kashipur, under a permanent mukarrari patta. This, however, did not extend as far as the borders of Ghanuadi. By the instrument of the 2nd July 1900 the remaining 192 bighas, the northern border of which was the border between Kujaman and Ghanuadi were also leased to the zamindar of Kashipur. The settlement was of the under-ground rights in 192 bighas, more or less, lying within the boundaries as per map mentioned in schedule Kha. In schedule Kha the northern boundary is given as the border of the limits of Mouza Ghanuadi as per thak and a map was annexed to the deed. On the 5th September 1914 the plaintiff acquired from the zamindar of Kashipur the mineral rights in 92 bighas of this land for a term of 30 years. The land demised is delineated in the plan annexed to the lease and is said to be bounded on the north by Mouza Ghanuadi.

It will be seen from the various documents of title to which I have referred that the defendant's title originates with a lease granted by the Raja of Jharia to Thaddeus in 1898 and the sothern boundary of his land was the limit of, inter alia, Kujaman as per thak. The plaintiff's title originates with the grant of the 2nd July 1900 made by the Raja of Jharia to the zamindar of Kashipur in which the northern boundary is the limit of Mouza Ghanuadi as per thak. It must be taken, therefore, the boundary between these two estates is the boundary shown by the thak survey.

In 1918 disputes arose between the plaintiff and the defendant as to possession of a portion of the land near the junction of their two estates. The defendant claimed as being within Ghanuadi the greater part of the land, both surface and subsoil, which the plaintiff claimed to have been leased to him. Proceedings under S. 145 of the Criminal Procedure Code were instituted by the defendant and the Magistrate decided, after a remand by the High Court, that the plaintiff was in possession of the underground rights in the land enclosed within the green line shown on the commissioner's map except the portion therein enclosed in yellow and this he attached under S. 146 of the Code. The present suit relates only to the yellow portion.

The plaintiff's case is that the revenue survey correctly shows the boundary between Ghanuadi and Kujaman according to the thak survey and therefore it is unnecessary to have the thakbast map relaid on the spot to ascertain the boundary between the two mouzas. He ac-

cordingly asked that the commissioner should ascertain the common boundary between the mouzas as shown in the revenue survey map, and show thereon the land claimed by the plaintiff including the disputed land. This he has done and from this it appears that the land in dispute, that is the yellow portion falls within mouza Kujaman according to the revenue survey map. It follows therefore that if the revenue survey map correctly represents the thak survey the disputed land falls within the leasehold land of the plaintiff and outside that of the defendant.

The defendant, however contends that as his title was of earlier date than that of the plaintiff, the plaintiff could not acquire anything already demised to the defendant or his predecessor, and therefore the boundary must be taken as the boundary shown in the defendant's title deeds, that is the dividing line between Ghanuadi and Kunjaman as shown by the thak survey. The first grant of the mineral rights which the defendant can rely upon must be the mukarrari patta of 1898 granted by the Raja of Jharia to Thaddeus, for Thaddeus acquired no mineral rights from the Haldars, who, although they held a Mukarrari are not shown to have acquired any mineral rights therein but surface rights only. The lease of 1898 was a grant of mouza Ghanuadi including minerals. It contains no map or plan but the southern boundary therein given, as already mentioned, is the limit of mouza Durgapur, Kujaman and Tisra as per thak. It is necessary therefore to ascertain what this means. The defendant contends that in order to ascertain the demarcation made by the thak survey between these two mouzas the thakbast map alone should be regarded but as the thakbast map has not been relaid the plaintiff has failed to establish his case.

The plaintiff replies to this that although the thakbas map was a part of the thak survey it was not meant to be, and was not in fact, a scientifically prepared plan, but merely a rough sketch, or, at most, an unscientifically prepared plan showing the number and approximate position of the thak marks or dhuis for the guidance of the revenue surveyor who followed after, and who, having picked up and verified the thak marks indicated roughly in the thakbast map, prepared the revenue survey map by accurate observations made by expert surveyors with scientific instruments, and if it appears that he had the thakbast map before him when he made his survey and prepared the revenue map, then the revenue map must be accepted as shewing the result of the thak survey even more accurately than the thakbast map which was not intended to be scientifically accurate.

On referring to Captain Hirst's "Notes on the old Revenue Surveys of Bengal, Bihar, Orissa and Assam" published in 1912 we find ample support of the plaintiff's contention. Captain B. C. Hirst was Director of Surveys in Bengal and Assam. He gives a graphic account of how the thak survey was conducted by the settlement officer and his staff, generally about a year before the scientific work of the revenue survey was about to commence. The Settlement Officer's duty was first to settle all boundary disputes on the spot, and then to demarcate on the ground the actual boundaries of villages and estates. This was done by placing thak marks or dhuis (generally large mud pillars about five feet high, although they might assume other forms) at the principal bends in the village and at all trijunction points. These marks were shewn in the thak map. That map was prepared by an amin, but as Captain Hirst points out the thak map was seldom really accurate and frequently it was not even intended to be so. On this subject he says (page 10) there are three main kinds of thak maps to be considered.

(*a*) Eye sketches, in which no actual measurements were made.

(*b*) Maps in which rough magnetic bearings were used and rough linear measurements made.

(*c*) Maps made from careful magnetic bearings and careful linear measurement.

He points out that in the earlier maps and in some of the late maps, no angular measurements were used, and that when regular measurements were made they were generally made with prismatic compasses or ordinary compasses, and adds that where magnetic compasses were used it was intended that the bearings should be observed and recorded in the field book or some other part of the records which the thak surveyor would hand over to the revenue surveyor. In

some cases the bearings were recorded to guide the revenue surveyor, whilst the map to him was little more than a guide to the actual number of thak survey marks put down on the ground and later be says.

We may pass over the question of accuracy of maps of both classss (a) and (b) with the remark that they were not intended to be more than a rough guide to the revenue surveyor and that, as such, they served their purpose usually, but not always.

In fact the field books and other records prepared by the thak surveyor were generally a more accurate indication of the thak survey than the maps themselves. The third class of maps were more accurate and more reliable and were of a somewhat later date. It was the duty of the revenue snrveyor to map accurately the village boundaries demarcated on the ground, and to find these boundaries by using the thak maps and other information collected by the demarcation officer. If the thak maps are found to have been initialled by the revenue surveyor, this is, according to Captain Hirst, evidence that their boundaries agree with those picked up by the revenue survey. "It may be" he says

that this signing of thak maps has led to much of the misunderstanding that exists as to the accuracy of these maps, and it will be well therefore to record here exactly what the revenue surveyor's signature implies: it does not mean that if the thak map is reduced to the same scale as the revenue survey map then the two boundaries will necessarily agree, but rather that the revenue surveyor has satisfied himself that the boundary accepted and intended by the demarcation staff has been correctly picked up on the ground and correctly surveyed on the revenue map,

He then refers to Thuillier's Manual of Surveying published in 1875 and quotes the following passage.

The Assistant surveyor can compare his exterior boundary and rectifiy any errors that he may chance to perceive between the marks on the ground and the thakbast sketch map,

and deduces from this that it is clear that the comparison was one of the boundaries as demarcated rather than of boundaries as shown in the thakbast maps.

The remarks of Captain Hirst were considered and approved of by a Division Bench of this Court in the case of *Shashi Bhusan Banerji* v. *Ramjas Agarwalla* (1). In that case the present defendant, was the plaintiff and it was held that the words as per thak meant "as per thak demarcation" and not "as per thak map" and that the signature of the revenue surveyor on a thak map means merely that he has satisfied himself that the boundary accepted and intended by the demarcation staff had been correctly picked up on the ground and correctly surveyed on the revenue survey map. I see no reason to differ from the conclusion arrived at in that case. In the present case the thakbast survey map of mouza Kujaman showing the thak demarcation between the Kujaman and Ghanuadi was put in evidence by the defendant and it appears from that document that it was initialled by the revenue surveyor. It may be assumed therefore that the revenue survey accurately represents the demarcation of the boundary between these two mouzas arrived at by the thak survey.

It was contended that as the map attached to the lease of the 2nd July 1900 had not been put in evidence by the plaintiff it is impossible to say what the northern limit of the land settled with him was. This map was tendered somewhat late in the case and the learned Judge rejected it. It appeared to us on appeal that it ought to be admitted and sufficient reason had been shown for its late production. We accordingly admitted it. The northern limit shown on that map is obviously meant to show the demarcation line between the two villages appearing on the revenue survey map. Whether as a scientific map it is in all particulars accurate is, to my mind a matter of no importance. The northern boundary is stated in the body of the lease as the border of the limit of Mouza Ghanuadi as in the thak and the pictorial representation of that limit in the plan was clearly meant to represent the revenue survey. I consider therefore that the northern limit of the land demised to the plaintiff, which is also the southern limit of the land demised to the defendant, is the boundary between the two mouzas as shown in the revenue survey map, and as demarcated on the commissioner's plan, and the disputed land falls within the limits of the plaintiff's case.

The next question is whether the defendant has acquired by adverse possession the mineral rights in the disputed lands. I have already stated that

(1) A. I. R. 1924 Pat. 402.

Thaddeus the predecessor of the defendant acquired no mineral rights from the Haldars under his dar-mukarrari grant of 1893. Whatever rights he may have been asserting in pursuance of that lease he gave up in 1898 when he accepted from the Raja of Jharia a fresh lease of mouza Ghanuadi. The question therefore is whether since 1898 an adverse title has been acquired by the defendant over the minerals in the disputed land. In 1900 the Raja of Jharia transferred to Jugal Kishore the predecessor of the plaintiff the under-ground rights in the northern portion of the mouza Kujaman. Up to that time there could have been no ouster of the Raja of Jharia as the lease to Thaddeus was only two years earlier. In 1904 Thaddeus parted with his whole interest to the defendant and Tara Prasanna Mukerji and gave up whatever possession he may have had over the disputed land. Up to that time he had acquired no title by adverse possession and what he transferred to the defendant and Tara Prasanna Mukerji was Mouza Ghanuadi only.

It seems to me therefore unnecessary to consider the evidence as to any acts of ownership over the the minerals in mouza Kujaman on the part of Thaddeus between 1898 and 1904 for his successors cannot tack on to their own possession the adverse possession of their predecessor who had withdrawn from the field. He had nothing to convey in Mouza Kujaman and in fact conveyed nothing. There is some evidence to the effect that the defendant has exercised some acts of ownership over the surface of the disputed land but the defendant himself in his evidence says that he has not done any colliery work in the plot shown in the commissioner's map as belonging to the plaintiff. There is therefore no evidence upon which we can hold that the defendant has acquired by adverse possession against the plaintiff or his predecessors any right to the minerals in Mouza Kujaman. In my opinion the appeal should be allowed with costs here and in the Court below as against the Defendant No. 1 who alone contested the suit. The decree of the Subordinate Judge will be set aside and in lieu thereof it will be decreed and declared that the mineral rights in the land in suit appertain to the leasehold property of the plaintiff and that he is entitled to hold and possess the same and that the said defendant has no right to the minerals or any portion thereof within the said land and that he be restrained by injunction from disturbing the plaintiff's possession.

Mullick, J.—(After stating facts the judgment proceeded). The first point to be considered is whether the defendant has acquired any interest to the surface or the under-ground of the land in suit by adverse possession. This question only arises on the assumption that the land in suit falls outside the boundary of Ghanuadi.

The case of adverse possession is put thus. Thaddeus was in possession of the land in suit till 1904 when he transferred his rights to the Defendant No. 1 and Tara Prasanna Mukerji. Now, was Thaddeus in possession of the land? First let us consider the surface. As to this the result of the Jharia Raja's suit in 1896 was to establish the mukararri right of the Haldars and in the absence of an express transfer of the minerals the mukarrari right must be held to extend only to the surface. Thaddeus was a dar-mukarraridar and the most he could have acquired by prescription against the proprietor was a dar-mukarrari right to the surface of the land in suit. But he sold the land in 1904 and unless the Defendant No. 1 can tack his own possession, if any, to that of Thaddeus he cannot claim a dar-mukarrari right by prescription. Now Thaddeus sold to the defendant and his predecessor Mouza Ghanuadi. It follows that he sold the area demarcated at the revenue survey as comprising Ghanuadi. It is clear from the definition of the term "mouza" in the Land Registration Act that the legislature does not recognize any other meaning than "an area surveyed as a mouza in a Revenue survey." That being so, the Defendant No. 1 acquired neither title nor possession to the land in suit from Thaddeus and he cannot add his possession to his own. It is not suggested that he has acquired title by possession since 1904 independently of Thaddeus and otherwise than as his representative.

But there are other difficulties in defendant's way. What is the evidence of adverse possession he had adduced? Thaddeus has been examined. He says he took possession according to his lease

from the Haldars. That lease describes the southern boundary of Ghanuadi as a road, which the defendant has endeavoured to identify as the present District Board road but in my opinion the evidence of such identification is inconclusive.

Thaddeus does not say what portions of the surface in question he occupied and the omission is sought to be supplemented by the witnesses Ram Bauri, Chamroo Beldar and Defendant No. 1 himself. Chamroo Beldar says Thaddeus was in possession of the paddy land north of the road but this cannot be true because the paddy lands were not leased to Thaddeus at all. He also says that Thaddeus and after him the Defendant No. 1 took fish from the big tank on the land. No particulars are given and I think it would be most unsafe, in my opinion, to deprive a landlord of his title on evidence of this kind. Sharma Charan Haldar, who has been called by the defendant, contradicts both Chamroo Beldar and Defendant No. 1 as to the paddy lands and the fish and says that he and not Thaddeus was in possession and that he sold these to Defendant No. 1, presumably, after the Defendant No. 1 and Mukherji had purchased Ghanuadi from Thaddeus. The Defendant No. 1 also deposes to Thaddeus's possession of the paddy lands to the north and east of the tank, but these have not been identified as falling within the property in suit.

The result, therefore, is that it has not been shown that Thadddues was in possession of the surface of the land in suit before 1904.

As regards the subsoil, the evidence of Ram Bauri is that Thaddeus cut an incline on the site of the present District Board road which was constructed in or about 1913. Chamroo Beldar says that Thaddeus sank 7 or 8 pits or inclines and dug a quarry 40 or 50 feet deep and that he extracted about 100 tons of coal. The exact spots where these works were carried out is not made clear and the evidence is useless for the purpose of founding a case of title to the underground by adverse possession. A trespasser cannot acquire by prescription title to anything more than the precise area encroached upon. The defendant No. 1 supports Chamroo and adds that Thaddeus extracted stone from lands to the west of the tank and that he also has done so. He also states that Thaddeus made some experimental shafts and inclines but he does not identify the sites of these works. His evidence as to the stone quarries and Ram Bauri's evidence as to the incline on the site of the District Board road does show some possession within the disputed area but it is wholly insufficient in continuity, extent and publicity to justify a claim to the minerals.

With regard to the subsoil rights also, the objection arises that the defendant is not the representative of Thaddeus. The transfer of 1904 conveyed the under-ground rights to mouza Ghanuadi but not to the lands in suit which do not lie within that Mouza.

A point was next taken by the learned counsel for the respondents that O. 2 R. 2 of the Code of Civil Procedure is a bar to the suit. It was contended that in 1896 the proprietor of Jharia should have sued to eject Thaddeus from the surface and subsoil of not only Ghanuadi but also the land now in suit as Thaddeus was then in possession of it. As I have found that he was not in possession of the land in suit the contention must fail. The plaint in that suit is not before us and we do not know what was the cause of action pleaded and it has not been shown that the claim to the land now in suit was covered by the cause of action in that suit.

We now come to the main point in the case, namely, whether the plaintiff is entitled to a decree on his title deed, I think the answer must be in the affirmative. It is true that the plan attached to the plaintiff's lease has not been relaid on the ground and that without a remand it will not be possible to lay down the northern boundary of the place upon the commissioner's map; but there are materials which are sufficient to indicate that the land in suit cannot lie within the defendant's mouza Ghanuadi but that they must lie within the plaintiff's mouza Kujaman. The plaintiff's title deed describes the northern boundary of his land as mouza Ghanuadi and unless a prior title was created in the defendant the plaintiff is entitled to the common boundary between Kujaman and Ghanuadi according to Revenue Survey

map which has been plotted on the commissioner's map. But the title deed of the plaintiff's lessor (Ex. 5 (a) Jugal Kishore Deo, gives a slightly different northern boundary, namely, " Border of the limit of Mouza Ghanuadi as per thak " and the plaintiff is limited to this boundary line, Fortunately the defendant's title deeds (Exs. C. and B) and Thaddeus's title deed (Ex. E) all agree with the plaintiff's lessor's title deed and show that the northern boundary of plaintiff's lessor's land is the boundary of Mouza Ghanuadi as per thak and that it is identical with the northern boundary of the defendant's land which is mouza Kujaman as per thak. It remains therefore, to ascertain what the words " as per thak " mean. Now on this point I agree with the decision of a Division Bench of this Court in *Shashi Bhushan Banerji* v. *Ramjas Agarwal* (1) where the words " as per thak " have been held to mean as per thak pillars.

It is contended on behalf of the respondent that " as per thak " means as per thakbast map. But some difference must be made between the words " as per thak " and as per thakbast map " and it has not been shown that the reasoning of the learned Judges of the Division Bench is wrong. That being so, we have to ascertain where the thak pillars are. One way of doing so would be by relaying the thakbast map of Kujaman which in this case appears to contain sufficient details to enable the boundary to be laid down ; but the thakbast map has not been plotted and the question is whether the revenue survey line may be taken as accurately showing the position of the thak pillars. In the present case the revenue survey map shows that it was compared by the revenue surveyor with the thakbast map but it is certain that the revenue survey line correctly represents the line of the thak pillars. In these circumstances, the omission to plot the thakbast map is of no consequence, for we have a demarcation according to the more scientific map prepared in the revenue survey and I am satisfied that a remand is not necessary. The northern boundary of Kujaman and the southern boundary of Ghanuadi as " per thak " are represented by the revenue survey line so that the land in suit must fall within the plaintiff's title deed.

The appeal, therefore, will succeed, the suit will be decreed and the plaintiff will get his costs in both this Court and the lower Court.

Appeal allowed.

A. I. R. 1926 Patna 392

ADAMI AND DAS, JJ.

Mt. Anmole Kuer—Plaintiff—Appellant.

v.

Kamla Dutt Misir and *another*—Defendants—Respondents.

Appeal No. 65 of 1923, Decided on 13th May 1926, from the Original decree of Sub-J., Gaya, D/- 22nd March 1923.

Hindu Law—Succession—Daughters amongst themselves take by survivorship—Agreement to relinquish survivorship right is valid.

Agreement between two daughters, under which each gave up the right to succeed, to the properties held by the other, by survivorship, is valid and cannot be ignored at least by parties to it. 11 *M. I. A.* 487 (*P. C.*). and 2 *I. A.* 113, (*P. C.*) *Ref.* [P. 392, C. 2]

T. N. Sahai, *R. Dayal* and *Aditya Narain Sinha*—for Appellant.

S. M. Mullick—for Respondents.

Das, J.—One Ambikadeo Missir who died in 1905 left a widow and two daughters, Anmole Kuer and Puna Kuer. Anmole Kuer is the plaintiff. The defendants are the sons of Puna Kuer who died some time in 1921. The widow of Ambikadeo died in 1911 and upon her death Anmole Kuer and Puna Kuer succeeded to the properties left by Ambikadeo. On the 7th July 1912 they entered into a transaction wnich is the subject matter of the dispute before us. They appear to have partitioned the entire property left by Ambikadeo between them and each relinquished in favour of the other the right to claim the properties by survivorship from the other. Under the Hindu Law on the death of one of the daughters the other daughter would be entitled to take the properties by survivorship to the exclusion of the sons of the deceased daughter. By the agreement between the parties each gave up the right to succeed to the properties held by the other by survivorship. This arrangement was effected on the 7th July 1912. Puna Kuer died in 1921 and upon her death the plaintiff claimed to take the properties which were allotted to Puna Kuer by survivorship to the exclusion of her sons who have been cited as defen-

dants in this action. The defendants rely upon the deed of relinquishment executed by Anmole Kuer and contend that the plaintiff by virtue of that deed has lost her right to take the properties belonging to Puna Kuer by survivorship. The learned Subordinate Judge has given effect to the defence and has dismissed the plaintiff's suit.

In my opinion the decision of the learned Subordinate Judge is right and must be affirmed. The decision in no way touches the interest of the sons of the plaintiff. It may be open to them to contend that they are not bound by the deed of relinquishment executed by their mother in favour of Puna Kuer on the 7th July 1912; but the plaintiff as a party to the transaction is clearly bound by the terms thereof. If it could be established that Anmole Kuer and Puna Kuer took definite shares in the properties left by their father, it might be contended that the plaintiff could not alienate the chance of succeeding to the properties which Puna Kuer inherited from her father; but it is too late to contend that Hindu daughters succeeding to their father take estates in severalty. It has been held by the Judicial Committee that the estate of two widows who take their husband's property by inheritance is one estate and it was pointed out that "the right of survivorship is so strong that the survivor takes the whole property, to the exclusion even of daughters of the deceased widow". *Bhugwandeen Doobey* v. *Myna Baee* (1). The case of daughters taking by inheritance stands on the same footing. This was established in the case of *Aumirtolal Bose* v. *Rajoneekant Mitter* (2). The case not being one of inheritance the question as to the relinquishment of the chance of succesession does not arise. Anmole Kuer and Puna Kuer took a joint estate as between them and it was competent to Anmole Kuer to give up her right to survivorship to the properties on the death of Puna Kuer. This proposition has been established in cases far too numerous to mention.

I must dismiss this appeal with costs.

Adami, J.—I agree.

Appeal dismissed.

(1) [1886-67] 11 M. I. A. 487=9 W. R. 23=2 Suther. 124=2 Sar. 327 (P. C.).

(2) [1874] 2 I. A. 113=23 W. R. 214=15 B.L.R. 10=3 Suther 94=3 Sar. 430 (P. C.)

A. I. R. 1926 Patna 393

MACPHERSON, J.

Balgobind Thakur and *others*—Accused—Petitioners.

v.

King Emperor—Opposite Party.

Criminal Revision No. 208 of 1926, Decided on 13th April 1926, from an order of the S.J., Darbhanga, D/- 15th March 1926.

(a) *Criminal P. C., Ss. 530 and 439—Magistrate convicting accused for lesser offence within his jurisdiction—Facts also constituting grave offence not within his jurisdiction—Proceedings are not void—High Court will not interfere unless prejudice is caused.*

When a Magistrate convicts the accused of an offence triable by him though the facts disclosed also constitute a graver offence, not triable by him, his proceedings are not void under the provisions of S. 530. (*A. I. R.* 1926 *Pat.* 36 *Foll.* 4 *Bom. L. R.* 267; 10 *C.* 85; 13 *B.* 502, 24 *M.* 675 *Appr.*) High Court will not interfere, when no objection was taken either before the Magistrate or in the Court of appeal to the jurisdiction of the trial Court and the accused are not prejudiced. [P 394 C 1]

(b) *Criminal P. C., S. 342—Technical failure to comply is not fatal unless prejudice is caused.*

Where the accused is not prejudiced, a technical failure to comply strictly with the provisions of S. 342 is not fatal. *A. I. R.* 1925 *Patna* 414, *Foll.* [P 394 C 2]

S. P. Verma and *L. K. Jha*—for Petitioners.

Fazle Ali—for Opposite Party.

Judgment.—This rule has been issued for the consideration of the conviction of the 14 petitioners, of whom 9 are residents of Pardri and the others of Sahir. All the petitioners have been convicted under S. 147, also under S. 379 Nos. 1 and 10 under S. 324, and No. 6 under S. 325. Those who have been convicted under S. 147 only have been sentenced to fine while the others have been sentenced to terms of imprisonment except Petitioner No. 6 convicted under Ss. 147, 325 and 379, who has been sentenced to imprisonment and fine. The trying Magistrate exercised second-class powers and the appeal from his decision was dismissed by the District Magistrate of Darbhanga.

The prosecution case which has been found to be true was as follows: Owing to a quarrel between the complainant and the second petitioner Banke Thakur the latter led a mob of 250 men including the other petitioners to loot the house of the complainant and to assault

him. In the course of that occurrence hurt was caused to the complainant by the 1st petitioner, Balgobind, by means of a ganrasa and to Gopi Sahu by Bachha Jha, petitioner No. 10, with a spear while Surjanarain Thakur broke the arm of the complainant with his lathi. The petitioners who have been convicted of theft carried away the property of the complainant.

In support of the rule Mr. S. P. Varma raises five points which I discuss seriatim. First, he claimed 'a remand,' inasmuch as the case for the prosecutiou showed offences under S. 148 and S. 395 of the Indian Penal Code which are not triable by a Magistrate of the second-class. Having regard to the common object set out in the charge of rioting which was to loot the house and property of the complainant and to assault him and to the fact that Balgobind and Bachha Jha carried and used weapons for cutting, I do not think that this assertion can be gainsaid and therefore the second class magistrate was in error in trying the case. But that fact is not sufficient to establish the claim for a re-trial. In the first place no objection was taken either before the Magistrate or in the Court of appeal to the jurisdiction of the trial Court and certainly the Magistrate himself was under the bona fide belief that he had jurisdiction. Again it is impossible to say that there has been prejudice to the petitioners. I do not consider that prejudice can be inferred by reason of illustration (f) to S. 403 of the Code of Criminal Procedure. It may indeed be open in law to the Crown to have the petitioners subsequently charged with and tried for graver offences on the same facts, but in the circumstance of the case such a course is highly improbable and in any event the sentences inflicted in the present case would be taken into consideration by the Court in awarding punishment in further proceedings. Finally it is now settled law that the proceedings of the Magistrate in a case like the present are not void under the provisions of S. 530 of the Code of Criminal Procedure. Reference may be made in this connexion to *King-Emperor* v. *Ragya Bhagwanta* (1); *Empress* v. *Paramananda* (2); *Queen Empress* v. *Gundara* (3) *King-Emperor* v. *Ayyan* (4); *Barhamdeo* v. *King-Emperor* (5) and there are numerous unreported cases to the same effect. This plea therefore cannot prevail.

It is next argued that there ought not to have been a conviction because there are inherent improbabilities in the prosecution story. All that is advanced in support of this plea is that three persons who are alleged to have taken a prominent part in the occurrence have been acquitted. But these persons who are alleged to be short-sighted, have apparently been acquitted from excess of caution and such an acquittal does not cast material doubt upon the conviction of the petitioners against whom there is abundant evidence which has been believed by the Courts.

Again it has been faintly urged that the conviction is bad under S. 342 because the Petitioner No. 5 was not examined until after the defence had adduced their evidence. It is clear that this petitioner has not been prejudiced and in view of the decision of this Court on the point in the case of *Mohiuddin* v. *King-Emperor* (6) the contention cannot prevail. Moreover in the prasent case there was the good reason for the failure to examine this accused that at the time when the examination of the accused took place he was not present in Court and was then represented by a mukhtar, his personal attendance having been dispensed with.

The fourth plea is that the trial was bad because two important witnesses were not examined by the prosecution. They were Harnarain and Subnarain, two sons of Kunji, the latter a boy of 14. The latter is supposed to have made, some days after the occurrence, a statement subversive of the prosecution case. But that statement (which moreover should not have been admitted in evidence) was made under very suspicious circumstances. Kunji is the step-brother of Bachha Jha, Petitioner No. 10, and it seems clear that the statement was made under the influence of the latter. In any case there was no paucity of evidence of persons who were present at the occurrence. Of the seven persons

(1) [1902] 4 Bom. L. R. 267.
(2) [1884] 10 Cal. 85=13 C. L. R. 375.
(3) [1889] 13 Bom. 502.
(4) [1901] 24 Mad. 675.
(5) A. I. R. 1926 Patna 36.
(6) A. I R. 1925 Patna 414.

who are alleged to have been injured, all except Harnarain, were put in the witness-box on behalf of the prosecution. Not only is the absence of these two witnesses reasonably explained but in the face of abundant testimony of eyewitnesses adduced by the prosecution any unfavourable inference, which might in law arise for failure to examine them, vanishes.

Finally, it is contended that the appellate Court has not adequately discussed the evidence against individual accused. In my opinion the contention has no force. Even the passage read out by learned counsel shows the District Magistrate directed his mind to the case of each individual accused and merely forbore to write down the grounds for his conclusions because they coincided with the reasons set out adequately by the trial Court.

In this view the application is without merits. It is accordinly rejected. The petitioners who are on bail must surrender forthwith to undergo the unexpired portions of their sentences.

Application rejected.

A. I. R. 1926 Patna 395

DAS AND ADAMI, JJ.

East Indian Railway Company and *another*—Defendants—Appellants.

v.

Chinmay Charan Sanyal—Plaintiff—Respondent.

Appeals Nos. 764 and 977 of 1923, Decided on 6th May 1926, from the appellate decrees of the Dist.-J., Darbhanga, D/- 4th November 1923.

Railways Act, S. 80—A Railway accepting goods and sending to B Railway—Invoice not sent by A to B for over six months—Goods not identified and hence not delivered—Both railways are responsible for deterioration.

Goods were booked on *A* Railway to be sent to a station on *B* Railway. Goods were despatched but the invoice relating thereto was not sent to *B* Railway for over six months. As the goods were lying, they deteriorated and the consignee sued for damages. *B* Railway too did not take care to ascertain whose goods they were.

Held: that both Railways are liable. [P 397 C 1]

N. C. Sinha, N. C. Ghose, B. B. Ghosh and *Sivanarain Bose*—for Appellants.

S. M. Mullick and *S. K. Mitra*—for Respondent.

Das, J.—This appeal arises out of a suit instituted by Chinmay Charan Sanyal for recovery of Rs. 826-6 as against the Bengal and North-Western Railway Company and the East Indian Railway Company. The material facts are these :

Messrs. A. Q. Ansari & Co. despatched one wagon of unslaked lime weighing 517 maunds 10 seers from Dehri-on-Sone to Samastipur, per the East Indian Railway Company. The consignment was to Messrs. Ansari & Co. as consignees. The plaintiff became the holder of the railway receipt in due course and claimed the consignment from the Bengal and North-Western Railway Company.

The findings of fact are that the consignment actually reached Samastipur about the end of July 1921, and that the Bengal and North-Western Railway Company offered to deliver the goods to the plaintiff on the 2nd February 1922. The plaintiff refused to take delivery of the goods on the ground that they had deteriorated in value and were perfectly useless to him. On these facts he claimed a decree as against both the Railway Companies.

The learned Munsif took the view that no responsibility attached to the East Indian Railway Company, but he thought that there was gross negligence on the part of the Bengal and North-Western Railway Company, and, on this ground, he gave a decree for the amount claimed as against the Bengal and North-Western Railway Company and dismissed the suit as against the East Indian Railway Company.

The Bengal and North-Western Railway Comnany appealed, and it appears that the plaintiff did not appeal against that portion of the judgment of the Court of first instance by which the suit was dismissed as against the East Indian Railway Company.

The learned District Judge heard the appeal of the Bengal and North-Western Railway Company, and while agreeing with the view of the Court of first instance, that that Company was liable to make good the loss sustained by the plaintiff, he thought that the East Indian Railway Company was equally liable to the plaintiff. In the result he has passed a decree as against both the Railway Companies, and we have two appeals

before us, one by the East Indian Railway Company and the other by the Bengal and North-Western Railway Company.

I will first consider the appeal of the East Indian Railway Company. There can be no doubt whatever that the decision of the learned District Judge is right and must be affirmed.

There was evidence before the Court upon which the Courts below came to the conclusion that there was an express contract that the goods were to be sent via Benares Cantonment, but the East Indian Railway Company did not send the invoice along with the goods to the railway authority at Samastipur. The result was that, although the goods arrived about the end of July 1921, the goods could not be identified as belonging to the plaintiff till the 2nd February 1922. The East Indian Railway Company relies on the contract contained in the risk note. The learned District Judge has pointed out that as the goods were diverted from the agreed route, the case was taken out of the special contract contained in the risk note. The learned District Judge also took the view that there was gross negligence on the part of the East Indian Railway Company in so far as they did not send the invoice to the Bengal and North-Western Railway Company. It is not necessary for me to express any final opinion on the first point decided by the learned District Judge, because I am clearly of opinion that the plaintiff has satisfactorily established that there was negligence on the part of the East Indian Railway Company.

It was then contended that the first Court having dismissed the suit as against the East Indian Railway Company, and the plaintiff not having appealed against that portion of the decree, it was not competent to the lower appellate Court to pass a decree against the East Indian Railway Company. But all the parties were before the Court, and it is obvious that complete justice could not be done between the parties except by adjudicating on the rights of all the parties that were before the Court.

It is pointed out before us that if the East Indian Railway Company is really guilty of negligence, then the Bengal and North-Western Railway Company would be entitled to contribution from the East Indian Railway Company and that that right should not be prejudiced by the fact that the plaintiff was satisfied with the decree as against the Bengal and North-Western Railway Company and did not think it worth his while to appeal against that part of the decree which dismissed the suit as against the East Indian Railway Company. There was complete jurisdiction in the lower appellate Court to pass the decree which it did against the East Indian Railway Company. The only question is whether the jurisdiction was properly exercised. I am of opinion that it was, and I must dismiss the appeal of the East Indian Railway Company with costs.

I will now deal with the appeal of the Bengal and North-Western Railway Company.

It is contended that the negligence was of the East Indian Railway Company and that the suit as against the Bengal and North-Western Railway Company must fail, because the cause of action in the plaint is not based on tort. It is quite true that there is no privity of contract between the plaintiff and the Bengal and North-Western Railway Company, but it is not disputed that an action in tort is maintainable against the Bengal and North-Western Railway Company, provided a case to that effect is made in the plaint.

Now all that is necessary for the plaintiff to allege in the plaint is that there was some duty upon the Bengal and North-Western Railway Company to deliver the goods to him and that there was a breach of duty on their part. Now all these allegations are to be found in the plaint. The plaint alleges that the goods were consigned to Samastipur and that, therefore, we must take it that there is an allegation that the Bengal and North-Western Railway Company in this matter were acting as the agent of the East Indian Railway Company. Then there is the fifth paragraph of the plaint which alleges as follows :

> That thereafter this plaintiff sent his men several times to the delivering station for taking delivery of the consignment of unslaked lime but no delivery was given to this plaintiff's men by the defendant Railway Companies.

There is a clear allegation of a breach of duty on the part of the Bengal and North-Western Railway Company entitl-

ing the plaintiff to damages if the allegations made by him were made good.

It was then contended that on the merits a decree should not have been passed against the Bengal and North-Western Railway Company. The argument is to the effect that it was impossible for them to identify the goods in the absence of the invoice; but, as the agent of the East Indian Railway Company, it was clearly its duty to make enquiries from the East Indian Railway Company to ascertain the real facts in connexion with this particular consignment. It is true that it gave some evidence to show that inquiries were made by it, but with reference to this the learned District Judge says as follows:

They should, therefore, have taken prompt steps to ascertain from the possible sources to which consignment the goods related. The evidence, however, shows that they took no steps till September. They must have known by this time that goods are such as were liable to deterioration during the monsoon period. Even then there is no evidence to show the nature of the enquiry, as the documents are not before the Court and the defendants did not make any case that they were entitled to give secondary evidence. The evidence of enquiry said to have been made also show that it was of the most perfunctory character.

In my opinion, the learned District Judge was right in passing decree as against both the Railway Companies and the appeal of the Bengal and North-Western Railway Company must be dismissed with costs: five gold mohurs in each case.

Adami, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 397

DAS AND ADAMI, JJ.

Bihari Lal Mitter—Appellant.

v.

Tanuk Lal Mander and *others*—Respondents.

Appeals Nos. 107 to 111 of 1925, Decided on 2nd November 1925, from the appellate order of the Sub-J., Bhagalpur, D/- 20th March 1925.

(a) *Civil P. C., S. 47—Order on question of notice under O. 21, R. 22, is one in execution.*

The orders upon the question whether notices under O. 21 R. 22, were or were not served must be regarded as orders under S. 47, and second appeal lies. [P 397, C 2]

(b) *Limitation Act, S. 18—Mere carelessness or negligence does not substantiate a finding of fraud.*

There is all the difference in the world between a failure to serve the notices and a deliberate contrivance on the part of a party to suppress the notices. The one is due to negligence, carelessness or various other circumstances; the other is the result of a deliberate contrivance on the part of a party for his own advantage. Mere negligence or carelessness on the part of the process-server or the identifier is insufficient as a basis for a finding of fraud. [P 398, C 1,2]

(c) *Limitation Act. Arts* 181 *and* 166—*Scope.*

Application to set aside execution sale on the ground of want of notice under O. 21, R. 22, is governed by three years' rule of limitation under Art. 181. [P 398, C 2]

S. C. Majumdar—for Appellant.

Navadwip Chandra Ghose—for Respondents.

Das, J.—These appeals are directed against the order of the learned Additional Subordinate Judge of Bhagulpur, dated the 20th March 1925 by which he confirmed the orders of the learned Munsif setting aside certain sales both under O. 21, R. 22, and under O. 21, R. 90 of the Code. So far as the applications can be read as applications under the provision of O. 21, R. 90, no appeal lies to this Court; but then the applications were made both under S. 47 and under O. 21, R. 90 of the Code. It was contended that notices under O. 21, R. 22, were not served in the cases and that accordingly the sales ought to be set aside under the provision of S. 47 of the Code. The orders upon the question whether notices under O. 21, R. 22 were or were not served must be regarded as orders under S. 47 of the Code and second appeal lies to this Court. I will therefore only consider the question whether the petitioners are right in saying that notices under O. 21, R. 22 were not served and whether their application was not barred by limitation. So far as the first question is concerned, it is the concurrent finding of both the Courts that notices under O. 21, R. 22, were not served and this is a finding of fact which is binding on us in second appeal. We must accordingly hold that notices under O. 21, R. 22 were not served in these cases.

But then a very important question arises. In one of these cases, Miscellaneous Case No. 146 of 1924 which is the subject-matter of Miscellaneous Appeal No. 108 of 1925, the property was sold so far back as the 18th of July 1918 and the application was made beyond three

years from the date of the sale. It may be mentioned that although the property was sold on the 18th July 1918, delivery of possession was not taken until the 30th July 1921 and it may be conceded that the application for setting aside the sale was made within 3 years from 30-7-21.

The main ground upon which the Court of first instance decided the issue of limitation in favour of the petitioners was that they were kept from the knowledge of the right to apply for setting aside the sale under the provision of O. 21, R. 22 by means of fraud. It is material therefore to consider whether the actual findings at which the learned Munsiff has arrived are findings from which an inference of fraud can be raised. I have scrutinized the judgment of the learned Munsif with great care and in my opinion there is no legal finding of fraud in his judgment. For instance, in dealing with the question whether the process was served the learned Munsif says as follows :

In none of these cases it appears from the reports that the process-server made a bona fide substantial effort or proper enquiries to find out when and where the judgment-debtor was likely to be found in order to justify their hanging up of the process to his door to constitute legal service.

And then he says :

That being so, and there being oral evidence of the petitioner and his Witnesses Nos. 2, 3, and 4 that to their knowledge never had any process-server served the notices on the judgment-debtor such as are contemplated by the provision of O. 21, R. 22 or R. 66 and the reports indicating clearly that the judgment-debtor was undoubtedly never met by them without any real or even perfunctory effort to find him out, the natural inference of suppression of the processes appears to be made out in favour of the applicant in all these cases including Case No. 149.

I am unable to agree with the learned Munsiff on the point. There is all the difference in the world between a failure to serve the notices and a deliberate contrivance on the part of a party to suppress the notices. The one is due to negligence, carelessness or various other circumstances ; the other is the result, as I have said of a deliberate contrivance on the part of a party for his own advantage. In dealing with these cases, I have noticed the case with which the Subordinate Courts arrive at findings of fraud without considering for a moment how serious these findings may be for the parties concerned.

All that the judgment of the learned Munsif establishes is that there was negligence or carelessness on the part of the process-server or the identifier. This in my opinion is insufficient as a basis for a finding of fraud. The learned Subordinate Judge on appeal has not gone beyond the findings of the learned Munsif. In my opinion, therefore, fraud has not been established in these cases. That being so, so far as Miscellaneous Case No. 146 of 1924 is concerned it is clearly barred by limitation. Mr. Naresh Chandra Sinha arguing on behalf of the respondents contends that the right to apply accrued not on the 18th July 1918 when the sale took place but on the 30th July 1921 when the delivery of possession was taken by the decree-holder. I am unable to agree with this contention. The application is in substance an application for setting aside the sale and it is the sale which is the subject-matter of the application and therefore the right to apply clearly accrued to the petitioners on the 18th July 1918. It may be that the petitioners have a grievance against the order for possession ; for as Mr. N. C. Sinha points out that the sale being a nullity it was not necessary for them to apply for setting aside that which has no substance in the eye of law. That may be so, and it may be that Mr. N. C. Sinha's client may still bring a suit for recovery of possession of the property within twelve years from the date of delivery of possession, but the application for setting aside the sale must be governed by the three years rule and it must fail as, in my opinion, fraud has not been established by the petitioners. I would accordingly allow M. A. 108 of 1925 and dismiss Miscellaneous Case No. 146 of 1924 with costs in all the Courts.

So far as the other appeals are concerned, it is not disputed that the application for setting aside the sale were made within three years from the date of the sales. That being so, clearly the point of limitation must be decided in favour of the respondents and as the findings of fact at which the lower appellate Court has arrived are findings which are binding on us in second appeal, on the question whether notice under O. 21, R. 22 were in fact served on the respondents, we must dismiss those appeals with costs in all the Courts.

Adami, J.—I agree.

Appeals dismissed.

A. I. R. 1926 Patna 399

FOSTER, J.

Jodhi Singh and *another*—Petitioners.

v.

Chhotu Mahto and *others*—Opposite Party.

Civil Revisions Nos. 454 and 460 of 1925, Decided on 5th March 1926, from an order of the Small Cause Court J., Bihar, D/- 20th August 1925.

Contract Act, S. 68—Debt by guardian for necessaries—Decree for, is executable against minor's property.

A decree for a re-payment of a loan taken by natural guardian of a minor during his minority, for purposes which can be considered to be necessary within the meaning of S. 68, can be enforced against his property : 2 *P. L. T.* 35, *Dist.* [P. 399, C. 2]

Sambhu Saran—for Petitioners.

B. P. Verma—for Opposite Party.

Judgment.—The first point taken by the petitioners is that they being minors cannot be made parties liable under a decree for re-payment of a loan taken by their natural guardian during their minority. The learned vakil calls attention to the case of *Kashi Prasad Singh* v. *Akleshwari Prasad Narain Singh* (1). That case can be at once distinguished. It was found to be not a suit for the price of necessaries. Now, here, according to the petition before me, the plaint alleges that the natural guardian was short of money to meet the household expenses of the family, and she borrowed Rs. 85 from the plaintiffs which is the subject-matter of Suit No. 19 of 1925, and she also borrowed Rs. 60 to defray the expenses in the roksati ceremony of her daughter which forms the subject-matter of Suit No. 18 of 1925; and the plaintiffs' case was that as both the loans were for family necessity, and as the Defendants Nos. 2 and 3 (the present petitioners) were benefit d thereby, they were liable for the debts. As a matter of fact the plaint did not fairly express the position of the minor defendants in the last sentence.

The minor defendants cannot be personally liable; they cannot be arrested and dealt with in any of the usual methods adopted when a debt is being exacted from ordinary debtors. The only exception to the general rule protecting minors from decrees for debts and execution thereof is to be found in Hindu Law and in the general law, that where the expenses have been incurred by the natural guardian on behalf of the minor, and where that expenditure is necessary in the sense that it is an expenditure which would have to be met by persons in the social position of these minors, the expenditure shall in such circumstances be considered to be for necessaries : provided of course, that the guardian was obliged by justifying circumstances to borrow money. The case of *Kashi Prasad Singh* (1) is quite different. There was no mention of any supply of necessaries. Here the claim is obviously based primarily on an advance of money for certain necessary purposes; and secondly, upon the hand-note, which is produced in support of the claim. Cases which are brought solely upon hand-notes, and not under the rules of Hindu law or the rules contained in such sections as 68 and 247 of the Contract Act, will exclude the special liability imposed by these provisions of Hindu Law and the Law of Contract. But here it has been found definitely in the judgment that the minors were supplied with money which was needed for purposes which can be considered to be necessary within the meaning of S. 68 of the Contract Act. The defendants cannot certainly be made judgment-debtors in the unrestricted sense, but their property will be liable under the special provisions which I have referred to.

There is another aspect of the matter. The guardian would certainly have to pay the dues under the hand-note and would certainly be entitled to be reimbursed out of the family property; so this form of decree saves a multiplicity of suits. The next point taken is that the application of the Usurious Loans Act to this case was inadequate and that the interest should have been reduced still more. That is obviously not a matter for a Court acting uuder S. 25 of the Provincial Small Cause Courts Act. I am, therefore, satisfied that there is nothing in this case which the applicants have shown to be not in accordance with law. The petitions are dismissed with costs, hearing fee one gold mohur.

Petitions dismissed.

(1) [1920] 2 P. L. T. 35=58 I. C. 22.

A. I. R. 1926 Patna 400

ROSS AND KULWANT SAHAY, JJ.

Bengali Gope—Accused—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 480 of 1925, Decided on 27th January 1926, from an order of the 1st Cl. Mag., Patna, Dl- 11th May 1925.

Criminal P. C., S. 190 and S. 37 and Sch. 4—Cognizance of offence beyond powers specified in Sch. 4 and S. 37 is without jurisdiction and conviction may not be invalid but complainant cannot be prosecuted for false complaint—Criminal P.C, S. 529 (e.)

A Magistrate of the 2nd Class cannot take cognizance of a complaint that certain persons were guilty of murder. Where therefore he does entertain such a complaint and finding it to be false takes action under S. 190, though defect in conviction could be cured by S. 529, complainant cannot be prosecuted for false complaint. The powers of a 2nd class Magistrate can be extended only to the extent specified in S. 37 and Sch. 4 which provisions are to be read with S. 190 in such cases. [P 400, C 2]

G. P. Das—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Ross, J.—The petitioner has been committed to the Court of Sessions for trial on a charge of having presented a false complaint before the Sub-Deputy Magistrate of Dinapur. The offence alleged in the complaint was the offence of murder.

The contention on behalf of the petitioner is that the Sub-Deputy Magistrate who exercised 2nd Class powers only, had no authority to take cognizance of the complaint; and that all the proceedings before him were without jurisdiction.

It appears that by an order of the District Magistrate of Patna the Sub-Deputy Magistrate of Dinapur is authorized to entertain complaints during the absence of the Sub-divisional Magistrate. The power to make such an order is conferred by S. 190, Cl. (2), and is exercisable with regard to cases which the Subordinate Magistrate is competent to try or commit for trial. S. 37 and the fourth schedule of the Code, which also deal with this matter, must be read with S. 190; and there is nothing in these provisions to extend the powers which the District Magistrate can confer. As the complaint made to the Sub-Deputy Magistrate was a complaint that certain persons were guilty of murder, he was not competent to take cognizance of it; and the proper procedure for him to adopt was that laid down in S. 201 which requires him to return the complaint for presentation to the proper Court with an endorsement to that effect. Instead of doing that he sent the complaint to the police for enquiry and, on their reporting the case to be false, he dismissed the complaint under S. 203 without ever having examined the complainant on oath, and then himself complained against him. The orders were throughout irregular and without jurisdiction. Nor are they protected by S. 529 (e). That section saves proceedings before a Magistrate taken on a complaint of which cognizance is taken without authority; but this will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the Magistrate's having taken cognizance of it, without power to do so.

In my opinion these proceedings were void ab initio; and there is no basis in law for the present prosecution. I would therefore quash the commitment under S. 213 of the Code and direct that the petitioner be discharged.

Kulwant Sahay, J.—I agree.

Commitment quashed.

A. I. R. 1926 Patna 401

DAWSON-MILLER, C. J., AND FOSTER, J.

Kumar Ramishwar Narain Singh—Defendant—Appellant.

v.

Mahabir Prasad and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 69 of 1925, Decided on 27th May 1926, from a decree of Kulwant Sahay, J., D/- 29th April 1925.

(a) *Limitation Act, Arts. 95 and 12—Suit to set aside sale under Chota Nagpur Tenancy Act on the ground of fraud is governed by Art. 95—S. 231, Chota Nagpur Tenancy Act, does not apply—Chota Nagpur Tenancy Act, S. 231.*

A suit for possession of land and the right to ask for a declaration that a sale under the Chota Nagpur Tenancy Act has been fraudulently confirmed is clearly not a suit under the Chota Nagpur Tenancy Act. It is governed by Limitation Act, Art 95. It is true that the Act in some cases takes away the right to sue for setting aside a sale, but it nowhere grants that right although to some extent it limits it. [P 403 C 1]

(b) *Civil P. C., S. 100 — Question of law depending on question of fact not raised in lower Court was not allowed.*

A point of law which depended to some extent upon question of fact which might have been raised in first appellate Court but was not raised, was not allowed to be raised in second appeal. [P 402 C 2]

(c) *Limitation Act, Sch. 2.*

The more general article must be governed by that which is more specific. [P 403 C 1]

B. C. De—for Appellant.

S. N. Roy and *S. Sahai*—for Respondents.

Dawson-Miller, C J.—In this case the plaintiffs were the khastkars of a holding in mauza Manjura consisting of 8·43 acres. They were in default in the payment of their rent, a rent suit was brought against them and a decree was passed in favour of the present defendant. The decretal amount was, in round figures, Rs. 52. Before the sale which took place under the provisions of the Chota Nagpur Tenancy Act the plaintiffs appear to have paid into Court at different times certain sums on account of the decretal amount and at the date of the sale of the property in execution of the decree, which was on the 3rd December 1917, there was still a balance of Rs. 11-5-0 due. On the 29th December 1917, that is, within a month of the date of the sale, the plaintiffs sent this sum to the defendant's mukhtar as payment of the balance due under the decree.

Under the provisions of S. 212 of the Chota Nagpur Tenancy Act the judgment-debtor in such cases or anyone who claims under a title acquired before the sale may within a period of 30 days from the date of the sale apply to have it set aside on depositing in Court 5 per cent. of the purchase price together with the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount which may from the date of the proclamation have been received by the decree-holder. The plaintiffs did not comply strictly with the provisions of that section because they did not deposit the money in Court. They did, however, pay the money to the decree-holder who was himself the purchaser of the property at the auction sale. Therefore the defendant was the only person interested in the sale apart from the plaintiffs themselves at that time. The plaintiffs in such circumstances might reasonably expect that they would get back their property for they had paid the small balance that was due within a month of the date of the sale. So far, however, from getting their property back the defendant who was their landlord and decree-holder in the rent suit actually applied for confirmation of the sale and the sale was accordingly confirmed

Whether the defendant remained in possession of the holding, or for how long, if at all, he remained in possession is not very clear from the facts disclosed in the case, but we are told that the landlord has since that date and some time apparently before the suit was brought settled the land with other tenants, but whether those other tenants have actually got possession or whether the plaintiffs are still in possession again we do not know. They asked in the present suit that it may be held that the defendant got the sale fraudulently confirmed and that the order confirming the sale should be set aside, and they further asked that if in the opinion of the Court the plaintiffs are considered out of the possession of the disputed land then khas possession may be awarded to them.

Two points arose for consideration in the trial Court, first, whether the circum-

stances which I have detailed amounted to a fraud on the part of the landlord against his tenants and if so, whether the sale should be set aside, that is to say, whether the title to the land should be restored to the plaintiffs ; and, secondly, whether even if the plaintiffs were in law or equity entitled to get back possession of the land, they were not barred by limitation having brought their action more than one year after the date of the sale.

The learned Munsif before whom the case came for trial arrived at the conclusion that there was undoubtedly fraud on the part of the defendant and he considered that the defendant was wrong and fraudulent in getting the sale confirmed in spite of the fact that full payment of the sums due to him had been made within one month of the sale. He considered, however, that the suit was barred by limitation although he does not specify under which article of the Limitation Act, or whether under any provision of the Chota Nagpur Tenancy Act, the suit was barred.

The matter went on appeal to the Subordinate Judge, the plaintiffs contending in that appeal that the suit was not barred by limitation. The finding of fact that the defendant had got the sale fraudulently confirmed was not disputed, that finding being apparently accepted by the defendant on appeal. In the result the learned Subordinate Judge came to the conclusion that neither S. 231 of the Chota Nagpur Tenancy Act nor Art. 12 of the Limitation Act applied to the case, but that Art. 95 of the Limitation Act was the article applicable. That Article provides for a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud, the period of limitation being three years from the date when the fraud becomes known to the party wronged. From that decision there was a second appeal to this Court which came for hearing before Mr. Justice Kulwant Sahay. He agreed with the finding of the lower appellate Court that the case was governed by Art. 95 of the Indian Limitation Act and not by Art. 12 or by S. 231, of the Chota Nagpur Tenancy Act.

A further point was urged before him, namely, that under the Chota Nagpur Tenancy Act no provision is actually made for having a sale confirmed and therefore the sale was complete on the 3rd December and required no confirmation, and that any fraud which may have been perpetrated by the defendant was not a fraud bringing about the sale and that the sale as such was free from fraud, the fraud alleged having occurred subsequently. This point, if it could be established, and if the defendant could satisfy the Court that the fraud perpetrated by him was something altogether apart from the sale, was a point which he could have taken in first appeal when the plaintiffs appealed from the decision of the Munsif on the ground of limitation, for it is obvious that although he might not have been able to support the Munsif's decision on the ground of limitation still he could have supported it upon this ground of fraud by urging before the Subordinate Judge that although the Munsif may have been wrong in the view he took still his decision was right because there was in fact no fraud connected with the sale. The point, however, was not taken and it appears quite cleary from the decision of the Subordinate Judge that the findings of fact in the Court below were not challenged by the defendant and the only question debated in the appeal was whether the suit as held by the trial Court was barred by limitation. Mr. Justice Kulwant Sahay accordingly refused to entertain the point in second appeal and, in my opinion, he was perfectly justified in doing so. The point is not one entirely in bar of the suit.

It is undoubtedly a point of law but it is a point that depends to some extent upon questions of fact and it is certainly a point which was open to the defendant in the first appellate Court. If he did not choose to raise such a point when he might have, I do not think it can be said that he is of right entitled to raise such a point in second appeal.

Moreover, looked at from an equitable point of view it seems to me quite clear in this case that the defendant having accepted the balance of the decretal amount due to him impliedly undertook to re-transfer the property to the plaintiffs or at all events not to go on with the sale and have it confirmed as in fact he did. That he practised a fraud I do not think can be disputed, and therefore I am certainly not prepared to interfere with the decision come to by the learned Judge of this Court.

With regard to the second point here again I think that the decision of Mr. Justice Kulwant Sahay should be affirmed. S. 231 of the Chota Nagpur Tenancy Act places a limitation period of one year upon all suits and applications instituted or made under this Act for which no period of limitation is provided elsewhere in the Act. It is, to my mind, quite clear that a suit of the present nature is not a suit under the Chota Nagpur Tenancy Act. The right to sue for the possession of land and the right to ask for a declaration that a sale has been fraudulently confirmed is clearly not a suit under the Chota Nagpur Tenancy Act. It is true that the Act in some cases takes away the right to sue for setting aside a sale but it nowhere grants that right although to some extent it limits it. Then with regard to the Limitation Act, Art. 12, under which one year's limitation is prescribed, is with regard to cases of a sale in execution of a decree of the civil Court, and if the matter stood there, there is no doubt that it might apply to the present case ; but Art. 95 seems to be a more specific article in so far as sales are concerned. That article applies to suits to set aside a decree obtained by fraud or for other relief on the ground of fraud. If the sale therefore which it is sought to have set aside is obtained on the ground of fraud then I think that the more specific Art. 95 ought to be applied and that the more general article must be governed by that which is more specific. It is upon this ground that Mr. Justice Kulwant Sahay dismissed that part of the appeal and, in my opinion, he was quite right.

This appeal will be dismissed with costs.

Foster, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 403

DAS AND ADAMI, JJ.

Madhab Poddar—Defendant—Appellant.

v.

Lall Singh Bhumij—Plaintiff—Respondent.

Appeal No. 426 of 1923, Decided on 2nd June 1926, from the appellate decree of the Dist., J., Manbhum, D/- 8th February 1923.

Chhota Nagpur Tenancy Act, S. 139A—Suit for ejectment of under-tenant by his immediate landlord is barred as application lies under S. 46 to Deputy Commissioner.

Under S. 46 an application for the ejectment of an under-tenant was cognizable by the Deputy Commissioner; and under Cl. (8) of S. 139, as it stood before the amendment of 1920, and as it still stands, an application under S. 46 is an application cognizable by the Deputy Commissioner. Thus it seems clear that under the terms of S. 139A no suit could be brought in the civil Court for the ejectment of an under-tenant by his immediate landlord: [P. 404 C. 1]

S. C. Mazumdar—for Appellant.

A. K. Ray and *Sashi S. Pd. Singh*—for Respondent.

Adami, J.—The plaintiff in this suit sought to eject the defendant from the lands asserting that he was an occupancy raiyat and the defendant was an under-raiyat under him. The defendant set up a claim of occupancy-right on the basis of two leases, each of a permanent nature, granted by the father of the plaintiff and the mother of the plaintiff, respectively, in the years 1301 and 1304.

The Munsif decreed the suit in part, but on appeal to the District Judge the appeal was dismissed.

A point was taken before the lower appellate Court that no suit was maintainable, having in view the provisions of S. 139, Cl. (4) of the Chhota Nagpur Tenancy Act. The learned District Judge found that Cl. (4) of S. 139 only bars suits which are under the Act and that there was no section in the Act providing for the ejectment of an under-tenant. The Courts have found that the defendant was merely an under-tenant.

Before us the only point taken is that the suit was in fact not maintainable by the civil Court ; it should have been instituted in the Court of the Deputy Commissioner. It is true that there is no specific section in the Chhota Nagpur Tenancy Act providing for the ejectment of an under-tenant, though there are provisions for the ejectment of occupancy raiyats and non-occupancy raiyats. There is, however, a provision, namely, S. 46, sub-S. (4), which allows a tenant to approach the Deputy Commissioner with an application to eject an under-tenant at any time within three years after the expiration of the period for which the raiyat has transferred his right in the holding or any portion thereof. The section allows the Deputy Commissioner, in his discretion, on the application of a

raiyat, to put the raiyat into possession of such holding or a portion thereof in the prescribed manner. It was open, therefore, to the plaintiff in this case to have applied to the Deputy Commissioner to take action under S. 46 sub-S. (4). At the time the suit was instituted S. 139 had not been amended by S. 38 of the Act of 1920. That S. 38 only came into force in 1924, and Cl. (4) of S. 139, at the time that the suit was brought, referred only to suits under the Act to eject a tenant from agricultural land; there was no mention in that clause of applications.

The Court below, however, has failed to notice S. 139A which was introduced into the Act by the Amending Act of 1920 and came into force before the suit was instituted. Under S. 139A no Court may entertain a suit concerning a matter in respect of which an application is cognizable by a Deputy Commissioner under S. 139. Now S. 46 gives the Deputy Commissioner jurisdiction to deal with an application for ejectment of an under-tenant. This has been held by Teunon, J., in the case of *Bholanath Mandal* v. *Chhota Gunaram Mighi* (1). At the time when that judgment was passed the Act of 1908 had not been amended by the Act of 1920, so that the provisions of S. 139A could not be taken into consideration by Teunon, J.; and those provisions altogether alter the position. It was however decided in that case that S. 46, sub-S. (4), covers the case of the ejectment of an under-tenant by a tenant.

Under S. 46, then, an application for the ejectment of an under-tenant was cognizable by the Deputy Commissioner; and under Cl. (8) of S. 139, as it stood before the amendment, and as it still stands, an application under S. 46 is an application cognizable by the Deputy Commissioner. Thus it seems clear that under the terms of S. 139A, no suit could be brought in the civil Court for the ejectment of an under-tenant by his immediate landlord. In this view, then, this appeal must succeed and the decree of the lower Courts must be set aside with costs in all the Courts.

Das J.—I agree.

Appeal allowed

(1) 23 I. C. 407.

✲ A. I. R. 1926 Patna 404

ROSS AND KULWANT SAHAY, JJ.

Muhammad Habibur Rahman and *another*—Petitioners—Appellants.

v.

Qasim Hussain and *others*—Opposite Party—Respondents.

Appeal No. 211 of 1925, Decided on 19th March 1926, from the original order of the Sub-J., Patna, D/- 23rd June 1925.

✲ (*a*) *Mahomedan Law—Dower—Transfer of Property Act, S.* 100.

Decree for dower debt does not create a charge on the husband's property in the hands of his heirs. [P. 406, C. 2]

✲ (*b*) *Transfer of Property Act, S.* 53—*Mahomedan Law—Dower.*

Suit by widow to set aside alienation by husband of his property made with a view to defeat plaintiff's claim for dower is a suit as contemplated by S. 53. [P. 407, C. 1]

Hasan Imam, Hasan Jan and *Ahmad Raza*—for Appellants.

K. Husnain, Janak Kishore, Raghunandan Prasad, Ali Khan and *S. M. Wasi*—for Respondents.

Kulwant Sahay, J.—This is an appeal against an order of the Subordinate Judge of Patna, dated the 23rd June 1925, rejecting the claim of the appellants under O. 21, R. 58, Civil P. C. and allowing an amendment of the application for execution of the decree. In order to understand the nature of the objection and the points raised in appeal it is necessary to set out the facts briefly; they are given in my judgment dated the 22nd January 1925, but in order to make this judgment self-contained, I state the facts again.

One Khajeh Azhar Hussain died on the 10th of June 1916 leaving a widow, Mt. Izatunnisa Begum and a sister Mt. Ahmadi Begum. According to the Mahomedan Law governing the parties, the sister, Mt. Ahmadi Begum, was the sole heir of Khajeh Azhar Husain. Before his death, Khajeh Azhar Husain executed two waqfnamas dated the 11th of June 1915 and 6th of December 1915, and a hiba-bil-ewaz dated the 27th of November 1915. By these three deeds the whole of the immovable properties owned by Khajeh Azhar Husain were alienated. On the 14th of June 1916 the widow Mt. Azatunnissa instituted

a suit for recovery of her dower debt amounting to Rs. 40,015. In that suit the parties impleaded as defendants were Mt. Ahmadi Begum, Mirza Mehdi Ali Khan, son of Ahmadi Begum, Mt. Asghari Khanam alias Nanhu who was described as the concubine of Khajeh Azhar Husain, and Mt. Ahmadi alias Bibi Begum, the daughter of Mt. Asghari Khanam alias Nanhu: they were the Defendants 1 to 4 respectively. Defendants 5 to 10 were the other creditors of Azhar Husain. It was alleged in the plaint that the two waqfnamas and the hiba-bil-ewaz executed by Azhar Husain before his death were illegal, void and inoperative in law as against the plaintiff, and the Defendants Nos. 5 to 10; that they could not be bound by such fraudulent deeds advisedly executed; that the said deeds had been brought into existence simply with a view to evade payment of the dower debt of the plaintiff and the debts due to the other creditors; and that the plaintiff was fully competent to get the said three fraudulent deeds declared void and inoperative by Court and to cause the dower debt due to her to be recovered by the sale of the immovable properties left by her husband and entered therein, that the said deeds had never been acted upon and enforced and that the Defendant No. 4 had never been and was not in possession and occupation on the basis of the said deeds, and that the said deeds were altogether inoperative and fit to be cancelled. The prayers in the plaint run thus:

(1) The Court may be pleased to pass a decree for the recovery of Rs. 40,000 and one gold mohur worth Rs 15 in all of the dower debt of Rs. 40,015 in favour of the plaintiff against the principal defendants.

(2) The properties detailed in Schedules Nos. 1 and 2 to the plaint which are in possession of the principal defendants may be declared to be the heritage of the late Khajeh Azhar Husain and the plaintiff be empowered to recover her decree therefrom.

(3) The costs in Court with interest thereon may be awarded to the plaintiff against the liable defendants.

(4) An order for attachment before judgment may be made till the disposal of this suit under O. 38, R. 5, Civil P. C., against the properties detailed below.

(5) Such other relfefs as the plaintiff be deemed entitled to in the opinion of the Court may be decreed.

This suit was decreed by the learned Subordinate Judge on the 31st of January 1918. On the 13th of April 1918, a mortgage was executed by Ahmadi Begum and by the widow Izatunnisa in favour of the appellant Habibur Rahman in respect of two properties out of the estate left by Khajeh Azhar Husain and of the decree dated 31st of January 1918. On the 1st of May 1918, another mortgage was executed by the said two ladies in favour of one Wajihunissa mortgaging the two properties and the decree which had already been mortgaged on the 13th of April 1918 and some other properties. On the 23rd of July 1922, Mt. Ahmadi Begum and Izatunnisa Begum again mortgaged the said two properties and the decree and some other properties to one Kuar Singh. On the 8th of July 1923, Mt. Ahmadi Begum sold two properties to Habibur Rahman and Mt. Khatoon Jannat for a sum of Rs. 38,000 out of which Rs. 17,281 was applied towards payment of three mortgages mentioned above.

Izatunnisa died on the 7th of September 1923. Before her death she had attempted to execute her dower decree, and on the 25th of July 1918 she took out execution of the decree in Execution Case No. 148 of 1918 and a sum of Rs. 1,000 was realized by sale of certain moveable properties. The second application for execution was made by a Izatunissa on the 31st of January 1921 in Execution Case No. 47 of 1921. A house belonging to her husband's estate was attached; but the execution case was dismissed for default on the 17th of March 1921. The third execution was taken out after the death of Izatunnisa by her heirs who are the Respondents Nos. 1 to 3 in the present case. The execution case was, however, struck off for default on the 18th December 1923 as the heirs failed to produce a succession certificate. On the 20th of January 1924 the heirs of Izatunnisa made an assignment of a portion of the decree to three persons, Dargo Singh, Bansi Pande, and Bhawani Mohan, and the present execution petition was filed on the 26th of January 1924 by the heirs of Izatunnisa and the assignees from the said heirs. In the application for execution, several properties were sought to be attached and sold, and the properties now in dispute which were purchased by Habibur Rahman and Khatoon Janat on the 8th of July 1923 were Lots Nos. 1 and 2 in the execution

petition. On the 26th of February 1924 the decree-holders, viz., the heirs and assignees filed a petition saying that Habibur Rahman and Khatoon Jannat were farzidars for Ahmadi Begum and that Ahmadi Begum was really in possession of the properties, and that the said properties were liable to attachment and sale. The properties purchased by Habibur Rahman and Khatoon Jannat were attached on the 16th of May 1924, and on the 28th of May 1924, Habibur Rahman and Khatoon Jannat preferred a claim as regards the two properties purchased by them under the provisions of O. 21, R. 58, Civil P. C.

The learned Subordinate Judge rejected the claim by his order dated the 18th of September 1924. He was of opinion that the decree in the dower suit created a charge upon the properties purchased by the claimants and that the claim case was not maintainable. Against the order of the Subordinate Judge the claimants came up to this Court in revision, and on the 22nd of January 1925 it was held by this Court that the decree-holders having taken out execution of the decree as a money decree, and having asked for attachment of the properties as in execution of a money decree, and there being nothing in the execution petition to show that the decree-holders claimed a charge upon the properties, the learned Subordinate Judge was wrong in going into that question and in rejecting the claim of the claimants without an investigation of their claim as required by law. The case was, therefore, remanded to him for an investigation of the claim. When the matter went before the learned Subordinate Judge, the decree-holders admitted that the claimants were really in possession in their own rights and not as benamidars for the judgment-debtor Ahmadi Begum ; but they said that the decree created a charge and that the claim case was not maintainable. They asked for amendment of their application for execution by stating that the decree was a decree creating a charge and they prayed for the addition of the names of the claimants Habibur Rahman and Khatoon Jannat as representatives of the judgment-debtor, and they applied that the prayer for attachment of the properties may be deleted. This amendment was opposed by the claimants, but the learned Subordinate Judge having relied upon his previous decision that the decree created a charge allowed the amendment, the effect whereof was that Habibur Rahman and Khatoon Jannat were added in the application for execution as representatives of the judgment debtor and the decree was sought to be executed as a decree creating a charge upon the properties sought to be sold. Against this order of the learned Subordinate Jugde the claimants have come up in appeal to this Court.

The principal point argued on behalf of the appellants was that the decree in the dower suit did not create a charge upon the properties as held by the learned Subordinate Judge. In my opinion this contention is sound and ought to prevail. It is conceded on behalf of the decree-holders that a dower debt does not under the Muhammadan Law create a charge upon the properties of the husband. Having regard to the authorities, this position could not be challenged. I need only refer to the decision of the Privy Council in *Mt. Hamira Bibi* v. *Mt. Zubaida Bibi* (1) where their Lordships observed that dower ranks as a debt and that the wife is entitled, along with other creditors to have it satisfied on the death of her husband out of his estate ; her right is, however no greater than that of any other unsecured creditor. *Ameer Ammal* v. *Sankaranarayanan* (2) is to the same effect. The learned Subordinate Judge also conceded that the dower debt did not by itself create a charge upon the properties of the husband : he was, however, of opinion that the decree in the dower suit had the effect of creating a charge. In order to see whether a charge was created by the decree, it is necessary to examine the nature of the suit in which that decree was passed. As I have said, the principal claim in suit of Izatunnissa was a claim for recovery of her dower amounting to Rs. 40,015 ; but having regard to the alienations said to have been made by her husband, she made a prayer in the plaint to the effect that it might be decided by the Court that the properties set out in the schedule attached to the plaint were really in possession of the principal defendants and that those properties formed the heritage of the late Kha-

(1) [1916] 38 All. 581=36 I. C. 87=43 I. A. 294 (P. C.).
(2) [1902] 25 Mad. 658.

jeh Azhar Husain, and that the plaintiff was entitled to recover her debt from those properties. The suit was really a suit as contemplated by S. 53 of the Transfer of Property Act. The allegations in the plaint were that the transfers alleged to have been made under the two waqfnamas and the Hiba-bil-ewaz were really transfers with intent to defeat or delay the creditors of the transferrer, and that such transfers were void and could not affect the creditors who were entitled to realize their debts by sale of those properties. The other creditors of Azhar Husain were also made parties and in paragraphs 21 and 22 of the plaint a clear allegation was made which would bring the case within the purview of S. 53 of the Transfer of Property Act. The real object of the suit was to have a declaration from Court that the properties covered by the waqfnama and the Hiba-bil-ewaz were still the properties forming the estate of the plaintiff's husband and that they were available to her for realization of her dower debt. The decree made in that suit had the effect of declaring that the transfers evidenced by the waqfnamas and the Hiba-bil-ewaz were fraudulent transfers made with intent to defeat the claims of creditors. No charge was created by the decree in favour of the plaintiff upon the properties set out in the schedules to the plaint in that suit. The learned Subordinate Judge has referred to Issue No. 3 raised in the dower suit which ran thus :—

Whether the dower debt, if any, can be realized from the properties mentioned in the plaint.

This issue was answered in the affirmative, and the learned Subordinate Judge says that this had the effect of creating a charge. In my opinion the learned Subordinate Juege has taken an erroneous view of the decision of the Issue No. 3 in the dower suit. Having regard to the pleadings of the parties, it is clear that all that was intended was to hold that the properties covered by the waqfnamas and the Hiba-bil-ewaz were still available to the plaintiff and the other creditors as forming part of the estate of Azhar Husain. I am, therefore, of opinion that no charge was created by the decree under execution.

Reliance has been placed on behalf of the decree-holders upon the decision of the Privy Council in *Mahomed Wajid* v. *Tayyuban* (3). This appeal was heard by the Judicial Committee along with another appeal : *Bazayet Hossein* v. *Dooli Chund* (3). In dealing with the case of *Bazayet Hossein* v. *Dooli Chund* (3) their Lordships held that a creditor of a deceased Mahammadan cannot follow his estate into the hands of a bona fide purchaser for value to whom it had been alienated by his heir-at-law. In dealing with the case of *Mahomed Wajid* v. *Tayyuban* (3) their Lordships observed that this case was similar to the case of *Bazayet Hossein* v. *Dooli Chund* (3) with one exception, viz., that the appellant Mohammed Wajid claimed under a sale in execution of a decree upon a mortgage bond executed by Najmuddin to Abdul Aziz on the 30th of October 1867 and the great distinction between this case and the case of *Bazayet Hossein* was that in this case the mortgage bond was executed pending the suit brought by the widows, whereas in the other case the mortgage bond was executed before the institution of the widow's suits ; and their Lordships agreed with the decision of the High Court which held that the purchaser from Najmudin was bound by the decree as he was affected by the doctrine of *lis pendens*.

It has been contended that in the present case Habibur Rahman made his purchase with knowledge of the decree in the dower suit and that, therefore, he must be held bound by the decree and that the properties purchased by him were available to the decree-holder as he was affected by the doctrine of lis pendens. In my opinion this contention is not sound. The principle applied by their Lordships in the case of *Mohammed* v. *Wajid* (3) was an equitable principle. Here in the present case we find that Mt. Izatunnisa the predecessor in interest of the present decree-holder executed three mortgages in respect of the properties purchased by the claimants. The decree under execution was also mortgaged and by the purchase of the 8th of July 1923 the claimants satisfied the previous mortgages executed by Mt. Izatunnisa along with Ahmadi Begum and the effect of it was to release the decree under execution and free it from the mortgages created by Izatunnisa and

(3) [1879] 4 Cal. 402=5 I. A. 211=3 Sar. 853 (P. C.).

Ahmadi Begum. Izatunnisa herself never treated the decree as a decree creating a charge. She took out executions in her own lifetime treating the decree as a money decree. Her heirs also took out execution of the decree treating it as a money decree. The purchasers Habibur Rahman and Mt. Khatoon Jannat are certainly bona fide purchasers for value and it will be opposed to all principles of equity to hold that the properties purchased by the present claimants are liable to be sold in execution of the dower decree. I am, therefore, clearly of opinion that the learned Subordinate Judge was wrong in holding that the decree created a charge and that it could be executed as such.

Having regard to this finding, it becomes unnecessary to consider whether the learned Subordinate Judge had jurisdiction to allow amendment of the application for execution at the stage at which he ordered the amendment. Various rulings have been cited on both sides, some of which are conflicting; but, as I have said, having regard to the fact that the decree under execution did not create a charge, it is not necessary to consider this question.

It is stated by the learned Subordinate Judge in his order under appeal that if the decree be held not to create a charge, then the claim of the claimants must be allowed. I would, therefore, set aside the order of the Subordinate Judge and allow the claim of the plaintiffs and direct that the properties purchased by them be released from attachment and sale. The appellants are entitled to their costs in this Court as well as in the Court below.

Ross, J.—I agree.

Order set aside.

A. I. R. 1926 Patna 408

ROSS, J.

Naresh Chandra Sinha—Petitioner.

v.

Charles Joseph Smith—Opposite Party.

Civil Revision No. 265 of 1925, Decided on 17th June 1925, from the order of the Sub. J., Patna, D/- 5th June 1925.

Court-Fees Act, S. 27—Patna—Stamps impressed with "for use in the High Court only" are not invalidated for use in subordinate Courts—Court Fees.

The words "for use in the High Court only" impressed on the back of Courtr-fee stamps do not limit their use to High Court only. The words may have some significance for administrative purposes, but they are not capable of invalidating the stamps themselves if filed in lower Courts. [P 408 C 2]

S. M. Mullick—for Petitioner.

Govt. Pleader—for Opposite Party.

Judgment.—The petitioner filed three Court-fee stamps of the aggregate value of Rs. 240 with his plaint in a suit before the Subordinate Judge of Patna. The stamps after being punched have been rejected by the learned Subordinate Judge on the ground that they bear on the back the words "for use in the High Court only." The learned Government Pleader has not been able to show that the Local Government has made any rule to the effect that the sale of any stamp may be limited to a particular purpose or Court. The words impressed on the back of the stamps may have some significance for administrative purposes, but they are, in my opinion, not capable of invalidating the stamps themselves. I can see no reason why the stamps should not be accepted by the Subordinate Judge. In my opinion the refusal to accept these stamps was not justified. The application must be allowed and the order of the learned Subordinate Judge must be set aside and he must be directed to accept these stamps. There will no order as to costs.

Application allowed.

* A. I. R. 1926 Patna 409

MULLICK AND KULWANT SAHAY, JJ.

(*Syed*) *Qazi Muhammad Afzal*—Plaintiff—Appellant.

v.

Lachman Singh—Defendant—Respondent.

Appeal No. 401 of 1925 and Civil Revision No. 510 of 1924, Decided on 4th November 1925, from a decision of the Addl. Dist. J., Patna, D/- 19th March 1925.

* *Civil P. C., O. 23, R. 1—Withdrawal of suit allowed on certain conditions—conditions not fulfilled—Suit is not automatically dismissed but is deemed as pending.*

Where a Court allows a suit to be withdrawn on certain conditions and those conditions are not fulfilled in the prescribed time, the suit cannot be deemed as dismissed. It continues to remain pending in the Court, and the plaintiff, if he chooses, may elect to go on with it and the Court must then dispose of it according to law : 19 *C. L. J.* 529, *Appr.*; 2 *C. L. J.* 480. and *A. I. R.* 1924 *Mad.* 877. *Disappr.*

[P. 410, C. 1,2]

Muhammad Hassan Jan and *Sashi Sekhar Prashad Singh*—for Appellant.

Shiveshwar Dayal and *Raghunandan Prasad*—for Respondent.

Mullick, J.—On the 15th August 1923, the Munsif of Barh made the following order in a suit :

I therefore permit the plaintiffs to withdraw this suit with permission to bring a fresh suit on a condition that they pay all costs to defendants besides pleader's fee Rs. 32 within two months from the date of the decree.

Subsequently the village in which the cause of action arose was transferred to the jurisdiction of the Munsif of Patna and, on the 12th September 1923, a second suit on the same cause of action was lodged before the latter Munsif. But the costs directed to be deposited under the order of 15th August 1923, were not deposited in the Court of the Munsif of Patna till the 1st February 1924, and at the trial it was contended that the money not having been paid within two months allowed by the order of the 15th August 1923, the suit was not maintainable. The Munsif accepted this objection and dismissed the suit.

In appeal the Additional District Judge of Patna agreed with this view and Second Appeal No. 401 of 1925 has now been preferred to this Court against the District Judge's order.

After the suit was dismissed by the Munsif of Patna an application was made to the Munsif of Barh for an extension of the time allowed for the payment of the costs decreed by him. The Munsif held, firstly that he had no jurisdiction to entertain the application ; and secondly, that on the merits no sufficient reason had been made out for allowing the plaintiff any extension of time and he declined to extend the period of two months allowed by his order of the 15th August 1923. It is this order of refusal that we are asked to revise under S. 115 of the Civil Procedure Code in Civil Revision Case No. 510 of 1924.

Now the argument addressed to us by the learned advocate for the plaintiff appellant is that time was not of the essence of the order of the 15th August 1923, and that it is competent to the second Munsif of Patna to proceed with the suit provided the costs are paid any time before the disposal of the suit, and reference is made to *Kuldip Singh* v. *Kuldip Choudhury* (1).

But in that case the Court did not fix any time within which the payment was to be made. The order in that suit was that the plaintiff might withdraw the suit and might bring a fresh suit if not otherwise barred, and that the payment of costs should be a condition precedent to the institution of a fresh suit. But in the present case a very different state of things exists. Here a definite time was fixed for the payment of the costs and it was not open to the Court in which the second suit was instituted to accept the costs.

The question, however, is, whether, the present case comes within the rule laid down by Sir Lawrence Jenkins, C. J., in *Shital Prashad Mandal* v. *Gaya Prasad Dingal* (2).

On behalf of the defendant-respondents reliance is placed upon *Hari Nath Dass* v. *Syed Hossainali* (3). There it was held that when a plaintiff fails to pay the costs within the time prescribed he cannot be permitted to bring a fresh suit upon the same cause of action because

(1) [1918] 3 Pat. L. J. 63=44 I. C. 79=4 Pat. L. W. 134.
(2) [1914] 19 C. L. J. 529=23 I. C. 210.
(3) [1905] 2 C. L. J. 490=10 C. W. N. 8.

the withdrawal in that case was a withdrawal without permission which, for prac ical purposes, was a dismissal of the suit. Reliance is also placed upou *Goolapudi Seshayya* v. *Nadendla Subbayya* (4). There Phillips, J., of the Madras High Court, put the argument in a somewhat different form. He held that the order allowing the withdrawal of a suit upon terms was separable into two parts, one allowing the withdrawal which ipso facto carried a dismissal of the suit and the other allowing the institution of a fresh suit upon complying with the conditions laid down by the Court, and that the withdrawal being complete the plaintiff could not, upon failure to comply with the conditions prescribed, elect to treat the suit as still pending. The learned Judge dissented from the view taken by Sir Lawrence Jenkins, C. J., in *Sital Prasad Mandal's* case (2). Now the reasoning of Sir Lawrence Jenkins appears to us to be conclusive, He observes that what the Court allows is not a withdrawal and an institution separately but a withdrawal and institution on certain conditions; the whole is one order and the one part cannot be severed from the other. It seems to us that this is the correct view of the order. It is open to a Court to say to a plaintiff: Your suit is defective and I give you leave to institute a fresh suit on conditions. If then the plaintiff complies with the condition the withdrawal is complete and the suit is at an end. If he does not he may, if he chooses, elect to go on and the Court must dispose of the suit according to law. If the Court directs that on failure to comply with the conditions by a certain date the suit shall stand dismissed and the plaintiff defaults the suit is at an end from the date prescribed. It follows, therefore, in the present case, that the Munsif before whom the second suit was instituted was not entitled to dismiss the suit outright but was bound, under S. 10 of the Civil P. C., to stay the trial of the second suit on the ground that the first suit was still pending.

The same view has been taken by the Calcutta High Court in *Deb Kumar Roy Choudhury* v. *Debnath Barna Bipra* (5). But in *Sabal Chandra* v. *Mosaraf Ali* (6), the learned Judges, while approving of Sir Lawrence Jenkins' judgment in *Sital Prasad Mandal's* case (2) appeared to have made an order which was not consistent with the view that the previous suit was still pending. They observed that the permission to withdraw with liberty to bring a fresh suit must be construed in accordance with the wording of the order in each particular case, and that where the order was that the payment of costs was a condition precedent to the institution of the second suit failure to pay the amount before the institution of such suit effected a dismissal of the first suit. Upon the reasoning in *Sital Prasad Mandal's* case (2) we prefer to hold that until the conditions are complied with the original suit still remains pending and the second suit, though maintainable, cannot be proceeded with by reason of S. 10 of the Civil Procedure Code.

In this view of the case the order of the District Judge in Second Appeal 401 of 1925 cannot be supported. The suit was maintainable, but as the first suit was still pending the proper direction was that it be stayed. The appeal therefore succeeds.

There remains the application under S. 115 of the Civil P. C. The Munsif of Barh, before whom the first suit must be still considered to be pending had jurisdiction under S. 148 to extend the time for depositing the costs. In our view the order of the 15th August 1923, merely meant:

> I give you time to pay within two months from this date and if you pay before that date you will be entitled to institute a fresh suit upon the same cause of action; but if you fail, then, from the expiry of the time so granted, this suit will stand dismissed.

This was an order he was entitled to make under the Civil P. C. and, therefore, he was entitled to give an extension of time under S. 148. The argument on the other side is that it was not an order to which S. 148 applies and the authority of *Suranjan Singh* v. *Rambahal Dal* (7), was invoked. But in that case it was held that where a preliminary decree in a pre-emption suit fixed the time for payment, it was not open to the Court to resort to S. 148, for the purpose of extending the time. It was observed that the extension of time

(4) A. I. R. 1924 Mad. 877.
(5) [1920] 64 I. C. 738.
(6) [1917] 38 I. C. 476.
(7) [1913] 35 All. 582=21 I. C. 585=11 A. L. J. 950.

effected a variation of the decree in the suit and that S. 148 could not be called in aid. That, however, is not the case before us, and we think that under the Civil P. C. time could have been extended by the Mnnsif if he had chosen to do so. Now although we are told that owing to the negligence of the karpardaz and the pleader's clerk the money could not be deposited within the time allowed, it does not appear that any evidence to that effect was given before the Munsif and we think that having, regard to the fact that the sum was only Rs. 32 and that no attempt to pay was made till the 1st February following, the Munsif was justified in holding that no proper reason had been shown for the delay and in refusing to extend time to authorize the institution of the suit.

Therefore the only thing that remains for the plaintiff to do is to prosecute the suit as framed in the Court where it was originally lodged or in such other Court as is competent to try it. It will be the Court's duty to continue the suit from the stage at which it was on the 15th August 1923, and to dispose of it according to law.

The order in Civil Revision No. 510 of 1924 is modified. The declaration that the suit stands dismissed is set aside, but the decision that no further time be allowed to the plaintiff to pay the costs incidental to the institution of a fresh suit is affirmed.

Each party will pay his costs both in the revision and in the second appeal. All orders as regards costs in the lower Courts will stand.

Kulwant Sahay, J.—I agree.

Appeal allowed.

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* A. I. R. 1926 Patna 411

MULLICK AND KULWANT SAHAY, JJ.

Bibi Hafsa—Decree-holder—Appellant.

v.

Kaniz Fatma and *others*—Judgment-debtors—Respondents.

Appeal No. 31 of 1925, Decided on 30th November 1925, from an order of the Sub.-J., Gaya, D/- 17th January 1925.

* *Decree — Execution — Decree for dower passed—Executing Court cannot direct in execution payment of decree proportionate to shares of different heirs.*

Although the proposition that the estate of a deceased Muhammadan devolves upon his heir or heirs from the moment of his death and that the proportionate interests of the heirs, if more than one, come into separate existence from that moment is correct, yet when a decree for dower is passed the Court executing the decree is not entitled to go behind the decree and to direct the release of a portion of the estate on payment of a proportionate share of the debt; *A, I. R.* 1924 *All.* 690, *Dissented from.* [P 412 C 1]

K. Husnain and *Ahmed Reza*—for Appellant.

Md. Hasan Jan—for Respondents.

Kulwant Sahay, J.—On the 1st April 1922 the appellant obtained an ex-parte decree for dower against the respondents. The decree directed that the decretal amount be recovered from the properties left by the husband of the appellant and that the decretal amount, viz., a sum of Rs. 6,000 and a further sum of Rs. 404-1-3 on account of costs of the suit with interest thereon at the rate of 6 per cent. per annum be paid by the defendants to the plaintiff. This decree was passed by the Subordinate Judge of Patna and execution was taken in the Patna Court and a portion of the decretal amount was realized by the sale of a house belonging to the estate of the husband of the appellant. Subsequently the appellant applied for transfer of the decree to the Gaya Court as the properties of the deceased were within the jurisdiction of that Court. The decree was accordingly transferred by an order of the Subordinate Judge of Patna, dated the 6th of August 1924, and on the 19th of August 1924 the appellant applied for execution of the decree in the Court of the Subordinate Judge at Gaya and prayed for attachment and sale of certain properties lying within the jurisdiction of that Court.

One of the judgment-debtors, Mt. Kaniz Fatma, filed an objection to the execution raising various points: but the only question which seems to have been pressed before the learned Subordinate Judge was as to whether the objector was entitled to have her three-fourths share in the property released from attachment and sale on payment of three-fourths of the decretal amount. The objection was raised on the ground that the appellant as widow of the

deceased was entitled to a four annas share of the estate of her husband by inheritance and that the remaining twelve annas share belonged to Bibi Kaniz Fatma, and, that, therefore, the latter was entitled to pay only three-fourths share of the debt, the remaining one-fourth being payable by the appellant herself. The learned Subordinate Judge has given effect to this objection and has directed that three-fourths share of the attached property be released from attachment and sale on the objector's depositing three-fourths of the decretal amount. Against this order the decree-holder has come up in appeal to this Court.

The learned Subordinate Judge has relied upon the principle that under the Mahomedan law devolution takes place immediately after death and is not contingent on the payment of the debts due from the deceased owner. A number of authorities have been cited before us in support of this proposition. There can be no doubt as regards the correctness of the proposition that the estate of a deceased Muhammadan devolves upon his heir or heirs from the moment of his death and that the proportionate interests of the heirs, if more than one, come into separate existence from that moment. The question, however, in this case is as to whether the Court executing the decree was entitled to go behind the decree and to direct the release of a portion of the estate on payment of a proportionate share of the debt. In my opinion it was not open to the Court executing the decree to make this apportionment of the debt The decree clearly directs that the decree was to be realized from the entire estate left by the deceased husband of the appellant and the defendants were directed to pay the decretal amount to the plaintiff. The question as regards the proportionate liability of the respondents and of the appellant for the payment of the debt due from the estate of the deceased ought to have been raised in the suit itself and before decree was passed, and it is not open to the respondents to raise this question before the Court executing the decree.

Reliance was placed on behalf of the respondents upon a decision of the Allahabad High Court in *Mohammad Ashiq Ali* v. *Mt. Hadra Bibi* (1) where the learned Judges held that the execution Court was bound to construe the decree in the light of the admitted fact that both parties were fighting over a dower decree and if the decree itself created any obstacle, justice could be done by amending it so that the shares of the various defendants may be specifically apportioned as between them; and the learned Judges proceeded to direct that the decree be amended by apportioning the shares amongst the several heirs. I am unable to agree with the view taken by the learned Judges in that case. I fail to understand how the Court executing the decree could direct an amendment of the decree. Reference was made to certain decisions which laid down that the share taken by a Muhammadan widow by inheritance is liable proportionately for the satisfaction of her dower debt in the same way as the shares taken by the other heirs, and that the liability of each heir is limited to the extent of the assets in his or her hands. There cannot be any doubt as regards the correctness of the proposition; but the question as regards the liability has to be raised in the suit itself, and the decree ought to direct in what proportion the dower debt is to be paid by each of the heirs.

I am therefore of opinion that the learned Subordinate Judge was not right in directing the release of the three-fourths share of the estate on payment by the respondents of the three-fourths of the decretal amount. It appears, however, that the respondents have deposited in Court three-fourths of the decretal amount. If the parties agree, the amount in deposit may be paid to the appellant in part satisfaction of the decree, and the execution may proceed for realization of the balance of the decree. In such an event the Court may direct the properties to be sold in two lots of four annas and 12 annas, the first lot being of the four annas share. If by sale of the first lot of four annas the balance of the decretal amount be realized the remaining twelve annas need not be sold; but if the sale-proceeds be insufficient to satisfy the decree then the remaining 12 annas might be sold. This can, however, be done only if the parties agree to it.

The result is that the order of the learned Subordinate Judge is set aside

(1) A. I. R. 1924 All. 690.

and the appeal decreed. The entire estate of the deceased attached and advertised for sale should be sold for realization of the entire decretal amount unless the parties agree to sell them in the way suggested above or in any other way. The appellant is entitled to her costs of this appeal.

Mullick, J.—I agree.

Order set aside.

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* A. I. R. 1926 Patna 413

ROSS AND KULWANT SAHAY, JJ.

East Indian Railway Company — Defendants—Appellants.

v.

Bhimraj Srilal—Plaintiff — Respondent.

Appeal No. 756 of 1923, Decided on 23rd April 1926, from a decision of the Dist. J., Gaya, D/- 2nd May 1923.

(a) *Railways Act, S. 77 — Six months run from date of delivery of goods for carriage.*

The notice required by S. 77 has to be given within six months from the date of delivery of the goods for carriage by railway and not from the date on which goods ought in the ordinary course to be delivered to the consignee. [P 413 C 1]

* (b) *Railways Act, Ss. 77 and 140—Notice addressed to Subordinate Officer and forwarded by him to Agent within six months is sufficient.*

Notice to a subordinate officer of a railway company is not a sufficient compliance with the provisions of the law; but if it can be shown by the plaintiff that a notice of claim for loss of goods, although addressed to a subordinate officer of the Railway Administration, did actually reach the Agent within the time prescribed by law it would be a sufficient compliance with the requirements of the law: *A. I. R.* 1921 *Pat.* 98 and *A. I. R.* 1924 *Mad.* 567, *Rel. on.*

[P 414 C 1; P 415 C 1]

(c) *Railways Act, S. 77—Delegation of power by Agent to receive notice may be inferred from rules and conduct of railway — Authorizing to settle claim is not delegating power to receive notice.*

A delegation of authority by Agent to receive notice under S. 77 will be presumed from rules framed by the Railway Company or from the course of conduct of the Railway Company which might lead the public to believe that notice given to a particular officer of the Company would be a valid notice under S. 77 of the Act. But the fact that a particular officer is appointed by the Agent to investigate into and settle claims for loss of goods does not show that the Agent delegated his powers to receive notice to such officer. [P 415 C 2]

N. C. Sinha, N. C. Ghosh and *B. B. Ghosh*—for Appellants.

S. M. Mullick and *B. C. Sinha*—for Respondent.

Kulwant Sahay, J. — This appeal arises out of a suit for compensation for non-delivery of a bale of cotton goods consigned to the defendant, the East Indian Railway Co., at Howrah, for carriage to Rafiganj, a station on the line of the said Company. Both the Courts below decreed the suit and the Railway Co., has come up in second appeal to this Court.

The only point for consideration is whether the suit is incompetent for want of notice as prescribed by S. 77 of the Indian Railways Act.

The facts found are that the bale was consigned on the 9th of July 1920; that several letters were sent by the plaintiff, who is the consignee, to the Divisional Traffic Manager making claim for compensation for non-delivery of the goods; all these letters were within six months from the date of consignment, and they were replied to by the Traffic Manager. On the 20th of January 1921 the plaintiff sent a registered notice to the Agent through his pleader claiming compensation for the loss of the goods. The suit was brought on the 21st of May 1921, and in the plaint the cause of action was alleged to have accrued on the 24th of July 1920, when the bale ought to have been delivered at Rafiganj.

The learned Munsif found that the notice to the Agent was within six months from the date when the cause of action accrued to the plaintiff, and that the cause of action arose when the goods were not delivered to the plaintiff. He further found that letters claiming compensation had been sent to the Divisional Traffic Manager, and he, apparently, was of opinion that such letters amounted to a notice as prescribed by law. The learned District Judge, on appeal, did not base his decision upon the first ground taken by the learned Munsif which was clearly wrong. The notice required by S. 77 of the Indian Railways Act has to be given within six months from the date of delivery of the goods for carriage by railway and not from the date on which goods ought in ordinary course to be delivered to the consignee. The learned District Judge, however, has held that the notice to the Traffic Manager was a good notice to the Agent within the meaning of Ss. 77 and 140 of the Indian Railways Act. He relied for this purpose upon a decision of this Court in the *East Indian Railway Co.* v. *Kali-*

charan Ram Prasad (1). He further referred to the fact that in the railway receipt (Ex. 7), granted by the Railway Company on receipt of the goods, there were certain conditions printed on the back, one of which was that notice was to be given to the Divisional Traffic Manager in case of loss ; otherwise the Railway will not hold itself responsible ; and the learned District Judge concludes from this that the railway will be responsible if notice was given to the Divisional Traffic Manager. He further referred to the fact that the replies sent by the Traffic Manager show that he had power to settle claims and he, therefore, considered that powers had been delegated to him by the Traffic Manager and held that the notice given to the Traffic Manager was a sufficient notice according to law.

It is clear on reference to Ss. 77 and 140 of the Indian Railways Act that a notice must be given to the Agent of the Company before a suit for compensation for loss can be entertained. It is settled law that notice to a subordinate officer of the Railway Company is not a sufficient compliance with the provisions of the law, and the learned District Judge does not base his decision on such ground, nor has it been argued before us on behalf of the plaintiff respondent that a notice to the Traffic Manager was a sufficient notice as required by law.

The question, however, is whether a notice to the Traffic Manager can be considered to be a notice to the Agent. The decisions of the various High Courts on this point are almost uniform. In the *Agent E. I. Ry. Co.* v. *Ajodhya Prasad* (2) a Division Bench of this Court held that a notice under S. 77 of the Indian Railways Act, to be valid notice, must be served upon the Agent or Manager of the Company and not upon a subordinate official of the Railway Co., and that any communication addressed to the District Traffic Manager is not a notice in accordance with the requirements of S. 77 read with S. 140 of the Indian Railways Act. In *Janki Das* v. *Bengal-Nagpur Railway Co.* (3). Sir Lawrence Jenkins held that a notice of claim for loss of goods despatched by rail given to the Goods Superintendent did not comply with the requirements of Ss. 77 and 140 of the Railways Act. In the *Assam-Bengal Railway Co. Ltd.* v. *Radhika Mohan Nath* (4) a Division Bench of the Calcutta High Court held that a service of notice on the Traffic Manager was not a sufficient compliance with the Act and the notice must be given to the Agent of the Company. The Bombay High Court has taken the same view in the *G. I. P. Ry. Co. Ltd.* v. *Chandulal Sheopratap* (5). The same view was taken by the Allahabad High Court ; see *Cawnpore Cotton Mills Co. Ltd.* v. *G. I. P. Ry. Co.* (6) and the cases cited therein, and by the Lahore High Court : see *Paras Das* v. *East Indian Railway* (6a) and *B B. & C. I. Ry. Co.* v. *Manohar Lal Parwin Chand* (7). In *Mahadeva Aiyar* v. *S. I. Ry. Co.* (8) a Full Bench of the Madras High Court considered the question of notice, and two of the learned Judges composing the Full Bench held that where the notice under S. 77 read with S. 140 of the Railways Act is sent to the District Traffic Superintendent and there is nothing to show that the power of the Agent to receive such notices had been delegated to that official, or that the Railway Company by its rules or course of conduct had held out to the public that the notices might be sent to that officer instead of the Agent and it is not proved that the Agent became aware of the notice within the prescribed time, a suit for damages for short delivery of goods against the Railway Company would not be maintainable. Kumaraswami Sastri, J., however, held that S. 140 was only an enabling provision and that its object was to see that the notice provided for by it somehow reaches the Agent, and that in cases where a subordinate railway official sends on the notice to the Agent or informs him of its contents within six months, there is a substantial compliance with the requirements of the Act, and that an Agent can depute a subordinate officer of the company to receive the notice. In the *S. I. Ry. Co.* v. *Narayana Aiyar* (9) similar view was expressed by the Madras High Court where

(1) A.I.R. 1922 Pat. 106.
(2) [1919] P.H.C.C. 150=49 I.C. 498.
(3) [1911] 16 C.W.N. 356=13 I.C. 509=15 C. L.J. 211.
(4) A.I.R. 1923 Cal. 397.
(5) A.I.R. 1926 Bom. 138.
(6) A.I.R. 1923 All. 301.
(6a) A.I.R. 1924 Lah. 504.
(7) A.I.R. 1923 Lah. 84.
(8) A.I.R. 1922 Mad. 862.
(9) A.I.R. 1924 Mad. 567.

it was held that if it is found that the notice required by S. 77 of the Act has not been given to the Agent of the Railway, but was sent to some subordinate officer of the Railway, the plaintiff, in order to succeed, must prove either that the power of the Agent to receive notice under S. 140 of the Act had been delegated to the subordinate officer who had actually received the notice or that the Company by its rules or course of business had held out to the public that notices ought to be given to such officer instead of to the Agent.

These Madras decisions, therefore, proceed on the principle that the notice has to be given to the Agent, and although the notice might be addressed to a subordinate officer of the Railway Company, yet if that notice actually reaches the agent within the prescribed time, it would amount to a sufficient compliance with the requirements of the law. A similar view appears to have been expressed by this Court in *Durga Prasad* v. *G. I. P. Railway* (10) where a claimant who had failed to comply with clause (c) to S. 140 of the Railways Act was held entitled to prove that the notice was in fact delivered to the Agent under clause (a) to the section. In that case the notice was addressed to the Agent, E. I. Railway, at Howrah, but the office of the Agent was not at Howrah but at Fairlie Place, Calcutta. The notice was received by the General Traffic Manager of the East Indian Railway at Howrah, who then sent the letter to the Divisional Traffic Manager who, after carrying on a correspondence with the plaintiff for sometime, finally wrote to him denying the liability of the Railway Company. It was held that although the notice was not served in accordance with clause (c) of S. 140, yet if, in fact, the notice reached the Agent, as contended for by the plaintiff in that suit, it was good service under Cl. (a) of S. 140. In my opinion this is a sound view of the law, and if it can be shown by the plaintiff that a notice of claim for loss of goods, although addressed to a subordinate officer of the Railway Administration, did actually reach the Agent within the time prescribed by law, it would be a sufficient compliance with the requirements of the law. All the High Courts, however, agree in holding that a notice must be actually given to the Agent. In the present case it has not been shown that the notice sent to the Divisional Traffic Manager reached the Agent. In fact the plaintiff himself did not consider the notice to the Divisional Traffic Manager to be a sufficient compliance with the law inasmuch as he himself sent a duly registered notice to the Agent on the 20th of January 1921. This was, however, beyond six months from the date of delivery of the goods to the Railway Company, and was not a compliance with the requirements of S. 77 of the Act.

As regards the observation of the learned District Judge that there was a delegation of power to the Traffic Manager and that therefore the notice to the Traffic Manager was a valid notice, I am of opinion that this contention is not sound. In the first place no such plea was taken by the plaintiff. No issue was raised on the question of fact as to whether there was a delegation of the powers of the Agent to the Traffic Manager. There is absolutely no evidence on the point except the printed conditions on the back of the receipt given by the Railway Company to the consignor when the goods were delivered to the Company. One of the conditions on the back of the receipt was that notice must be given to the Divisional Traffic Manager before a claim can be entertained. That did not in any way amount to a delegation of the powers of the Agent to receive notices prescribed by S. 77 of the Act to the Traffic Manager. It was simply a condition prescribed for speedy investigation into claims. No doubt, it had been held in the Madras High Court, and also in some of the other High Courts, that a delegation of authority will be presumed from rules framed by the Railway Company or from the course of conduct of the Railway Company which might lead the public to believe that notice given to a particular officer of the Company would be a valid notice under S. 77 of the Act. But in the present case there is no such allegation and no such proof. The fact that a particular officer is appointed by the Agent to investigate into and settle claims for loss of goods does not show that the Agent delegated his powers to receive notice to such officer. I am clearly of opinion that in the present case it has not been shown that the

(10) A.I.R. 1924 Pat. 98.

Divisional Traffic Manager had any delegated powers to receive the notice, and that the notice given to the Traffic Manager was not a sufficient compliance with the requirements of law.

Under the circumstances it is clear that the present suit cannot be maintained for want of notice to the Agent within six months of the date of delivery of the goods and the claim of the plaintiff must therefore be dismissed. This appeal is decreed and the plaintiff's suit dismissed. The ground of dismissal, however, is a technical ground and the plaintiff has actually suffered loss on account of the non-delivery of the goods to him. I am, therefore, of opinion that although the suit is dismissed he is not liable to pay costs. Therefore, although the appeal is decreed, no costs are allowed to the appellant in any Court.

Ross, J.—I agree.

Appeal allowed.

A. I. R. 1926 Patna 416

ROSS AND KULWANT SAHAY, JJ.

Chandra Mouleshwar Prasad Singh—Plaintiff—Respondent.

v.

Hemnalini Debi and *others*—Defendants—Respondents.

Appeals Nos. 150 to 153 and 288 to 297 of 1924, Decided on 4th May 1926, from the appellate decrees of the Dist. J., Monghyr, D/- 17th July 1923.

(a) *Bengal Revenue Sales Act* (11 *of* 1859), *S.* 37 —*Purchaser at sale for arrears suing for recovery of land—Defendant claiming land as lakhiraj—Onus is on the plaintiff to show that at Permanent Settlement the land was entered as* mal *and was included in the estate as such.*

A purchaser of an entire estate sold for arrears of revenue suing to recover land claimed by the defendant as lakhiraj must make out a prima facie case that at the time of the Permanent Settlement the land in dispute was *mal* land and was included in the estate as such, and that the revenue assessed upon the estate was fixed on consideration of the assets of the land in dispute; in other words, that the assets of the land were taken into account in settling the revenue at the time of the Permanent Settlement. The fact that the lands are within the ambit of the estate is not sufficient to meet this burden: 14 *M. I. A.* 152 (*P. C.*); 20 *C. W. N.* 1028; and 27 *C. L. J.* 133, *Foll.* [R. 314, C. 2]

(b) *Bengal Revenue Sales Act, S.* 37, *Excep.* 4 —*Exception does not mean that lease must be one for excavating a tank thereon.*

In order to bring a case within Exception 4 it is not necessary that the lease must be a lease for the purpose of excavating a tank thereon. [P. 419, C. 2]

(c) *Bengal Revenue Sales Act* (1859), *S.* 37— *Encumbrance—Revenue sale does not ipso facto annul an encumbrance—Steps have to be taken by purchaser to annul it—Denial of purchaser's title by tenants before encumbrance is annulled does not create forfeiture.*

An encumbrance is not annulled ipso facto by the revenue sale the purchaser at the revenue sale has to take steps to annul the tenure alleged to be an encumbrance, and if before the rent suits are instituted the purchaser has taken no steps to annul the encumbrance, the denial of the purchaser's title by the tenants on the land creates no forfeiture. [P. 420, C. 2]

Sultan Ahmad, Jagannath Prosad and *S. K. Mitter*—for Appellant.

S. K. Mullick, S. N. Bose and *P. K. Mukerjee*—for Respondents.

Kulwant Sahay, J.—These 14 appeals arise out of suits brought by the plaintiff for declaration of title to and recovery of possession of certain lands and houses. The plaintiff is the purchaser of the entire estate bearing Touzi No. 6104 of the Monghyr Collectorate at a sale for arrears of revenue held on the 25th of March 1913. She obtained delivery of possession on the 16th of September 1913 and her name has been registered as proprietor of the 16 annas of the estate. The present suits are for declaration that the lands and houses in dispute are included in this Touzi No. 6104 and, therefore, by virtue of the purchase at the revenue sale she had acquired a title thereto and is entitled to possession. There was an alternative relief prayed for for fixing a fair and equitable rent.

It has been necessary to deal with these appeals separately as the subject-matters of the suits are different and the points raised are not exactly the same in each case.

Appeal Nos. 150 *and* 288 *of* 1924.

These appeals arise out of Suit No. 454 of 1920 which was Appeal No. 78 of 1922 before the District Judge. Appeal No. 150 is by the defendant and Appeal No. 288 by the plaintiff. In this suit the plaintiff claimed a tank known as Laloopokhar which was in the exclusive possession of the defendant, the Maharaja of Girdhaur. The plaintiff claims a 4 annas share in this tank as lying within her Touzi and alleges that she is

entitled to possession thereof on dispossessing the Maharaja. The defence of the Maharaja was that he had a lakhiraj title to this tank as it was included within an area of 30 bighas of lakhiraj land purchased by him in 1882 and it was not included in the *mal* land of the Touzi. The Munsif dismissed the suit holding that the tank was ijmal and that the Maharaja had a lakhiraj title thereto. The learned District Judge has found that a 2 annas share of the tank was allotted by batwara to Touzi No. 6104 and that the Maharaja had failed to prove that the 30 bighas of land purchased by him, within which this tank was situated, was lakhiraj land at the time of the Permanent Settlement. He however, held that the plaintiff was not entitled to oust the Maharaja from possession as the tank came within the 4th Exception to S. 37 of Act 11 of 1859 but was entitled to recover rent for a 2 annas share of the tank. He, however, held that the rent could not be assessed in the present suit as the remaining 14 annas' proprietors were not before the Court and he accordingly dismissed the suit.

The Maharaja appeals against this decree, in so far as it is against him in Second Appeal No. 150 of 1924 and the plaintiff appeals against the decree dismissing the suit in Second Appeal No. 288 of 1924.

The mahal out of which Touzi No. 6104 was carved out was partitioned twice, once in 1868 and again in 1880. The touzi number of the original mahal was 424. In the partition of 1868 half of the tank was allotted to the estate which retained the old Touzi No. 424. In the partition of 1880, which was a partition of the estate which retained the old Touzi No. 424, the tank was not divided, but the income derived from the tank was divided. One-fourth of the income of this tank was by this partition allotted to the putti of Darwesh Muhammad and others, which was given Touzi No. 6104. Now this one fourth was of the one-half of the tank which was allotted to Touzi No. 424 by the partition of 1863. Therefore, what was allotted to the putti of Darwesh Muhammad and others bearing Touzi No. 6104 was one-fourth of one-half, i. e. one-eighth of the tank. The learned District Judge therefore found that a 2 annas share of the tank was allotted to Touzi No, 6104. This finding is supported by the batwara khasra of 1868 (Ex. Z 7) and the 16 column register of 1880 (Ex. 12a). It is also supported by the other batwara papers referred to by the learned District Judge. The finding of the learned Judge, therefore, that a 2 annas share of the tank was included in Touzi No. 6104 is based on the evidence in the case and must be accepted as correct.

The question is whether the plaintiff is entitled to oust the Maharaja on a declaration that the latter had no lakhiraj interest therein. As stated above the Maharaja claims title to this tank as included in 30 bighas of lakhiraj land purchased by him from Sardharilal under a deed of sale, Ex. A, dated the 10th of August 1882. These 30 bighas of land were purchased by Girdharilal, the father of Sardharilal, at a Court sale on the 2nd of October 1852. Ex. X (a) is the sale certificate of Girdharilal. It appears, however, that a suit had to be brought by Sardharilal for khas possession of these 30 bighas of land, and he obtained a decree on the 9th of May 1863 and obtained delivery of possession in execution of the decree on the 2nd of August 1866. The patwarana dakhaldehani, under which Sardharilal obtained possession is Ex. W. and is dated the 17th of March 1866. In the sale certificate, Ex. X (a) the property is described 30 bighas situate in Laloopokhar in Mouza Salempur Dhamdaha, pergana Monghyr. There is no mention therein that the land was lakhiraj. In the parwana dakhaldehani (Ex. W) the description of the property is similar to that in the sale certificate Ex. X (a), but there is a further description that the land was lakhiraj. The learned Munsif held that the land must have been held to be lakhiraj in the civil suit brought by Sardharilal and that the description of lakhiraj in the sale certificate might have been omitted by mistake. The learned District Judge, however, observed that there is no reason to suppose that there was a mistake in the description of the property in the sale certificate ; he infers that the lakhiraj title might have been created between 1852 and 1866. He, however, found that the Maharaja was actually in possession and no rent was paid by him for these 30

bighas of land, but he was of opinion that this does not establish that the land was lakhiraj since the time of the Permanent Settlement as required by S. 37 of Act XI of 1859.

The point taken by the learned counsel for the Maharaja, appellant, is that the learned District Judge has misplaced the onus of proof upon the Maharaja to show that the land was lakhiraj from the time of the Permanent Settlement. He contends that it was for the plaintiff to prove that the land was included in the Permanent Settlement in *mal* land of the estate, and that the onus was upon the plaintiff to prove that the land was *mal* land at the time of the Permanent Settlement. In my opinion this contention is sound and ought to prevail.

Section 37 of Act XI of 1859 provides that a purchaser of an entire estate shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of the Permanent Settlement, and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants with certain exceptions. In *Hurryhur Mookhopadya* v. *Madub Chunder Baboo* (1) it was held by the Privy Council that a plaintiff in a suit for resumption of land as part of his *mal* zamindari, for assessment is bound in the first instance to prove a prima facie case of payment of rent since 1790 or that the land formed part of the *mal* assets of the estate at the Decennial Settlement. When such a prima facie case is made out the onus probandi is shifted on to the defendant, who, to exempt himself from assessment must show that his tenure existed rent-free before the 1st of December 1790. Their Lordships observed :

> If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a prima facie case. His case is that his *mal* land has, since 1790, been converted into lakhiraj. He is surely bound to give some evidence that his land was once *mal*.

Their Lordships further observed that:

> He (plaintiff) may do it by proving payment of rent at some time since 1790, or by documentary or other proof, that the land in question formed part of the *mal* assets of the estate at the Decennial settlement. His prima facie case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December 1790.

The principle enunciated by the Privy Council in this case is applicable to the present case. The plaintiff has to prove in the present case that at the time of the Permanent Settlement the land was included within the estate permanently settled as *mal* land. This principle has been followed in the Courts in India in a large number of cases. In *Krishna Kalyani Dasi* v. *R. Braunfield* (2) it was held by a Division Bench of the Calcutta High Court that a purchaser of an entire estate sold for arrears of revenue suing to recover land claimed by the defendant as lakhiraj must prove a prima facie case that his *mal* land has, since 1790, been converted into lakhiraj. The fact that the lands are within the ambit of the estate is not sufficient to meet this burden. In *Abdul Rahman Kazi* v. *Baikunth Nath Roy Choudhury* (3) the same view was taken by another Division Bench of the Calcutta High Court. As was observed by Mookerjee, J., in the last case, the rule is that the purchaser of an entire estate at a sale for arrears of revenue takes the estate as created at the time of the Permanent Settlement, and the question is reduced to this: Has the plaintiff established that these lands were included in the estate at the time of the Permanent Settlement; in other words, was the revenue assessed on the basis of the assets of these lands? It is clear, therefore, that in order to succeed, the plaintiff in the present case must make out a prima facie case that at the time of the Permanent Settlement the land in dispute was *mal* land and was included in the estate as such, and that the revenue assessed upon the estate was fixed on consideration of the assets of the land in dispute; in other words, that the assets of the land were taken into account in settling the revenue at the time of the Permanent Settlement. It appears from the decisions of the Courts below that there is a total absence of such evidence on the part of the plaintiff. Learned counsel for the plaintiff is unable to point to a single piece of evidence showing that the land in dispute was treated as *mal* land at the time of the Permanent Settlement. The Defendant Maha-

(1) [1871] 14 M. I. 152=8 B. L. R. 566=20 W. R. 459=2 Suther. 484=2 Sar. 713 (P.C.)

(2) [1916] 20 C. W. N. 1028=36 I. C. 184.

(3) [1918] 27 C. L. J. 133=41 I. C. 757.

raja has proved that at least since the year 1866 no rent has been paid for the 30 bighas of land within which the tank in dispute is situate. The learned District Judge has relied on the absence of the description of the land as lakhiraj in the sale certificate Ex. (a): This, in my opinion, is not sufficient in law to show that the land was *mal* at the time of the Permanent Settlement.

Under the circumstances, I am of opinion that the decision of the learned District Judge that the land was not lakhiraj land, and that the plaintiff was entitled to possession of the land but for Exception (4) to S. 37 of the Act, is not sound. The plaintiff having failed to prove that the land was *mal* at the time of the Permanent Settlement her suit for declaration of title and possession in respect of this tank must fail. In this view of the case it becomes immaterial to consider the appeal of the plaintiff, namely, Second Appeal No. 288 of 1924. Her contention in this appeal is that the learned District Judge was wrong in holding that the case came within Exception (4) to S. 37 of the Act, and that she was entitled to oust the Maharaja from possession, or in any event, she was entitled to have a rent assessed in respect of the two annas share of the tank which the District Judge had found to appertain to her estate Touzi No. 6104 and that the proprietors of the remaining 14 annas were not necessary parties to the suit.

As regards Exception (4) to S. 37 of the Act it is contended that there is no plea in the written statement that the tank came within the exception. It is also contended that the leases referred to in the Exception 4 must be leases of lands for the purpose of excavating tanks thereon. In my opinion neither of these contentions can prevail. The defence of the defendant in the present case was that the entire area of 30 bighas within which the tank in dispute was situate was lakhiraj land, and the mere omission of the defendant to take the plea of Exception (4) to S. 37 in the written statement will not entitle the plaintiff to a decree for possession.

As regards the second contention, the language of Exception 4 does not warrant the construction sought to be placed upon it by the learned counsel. It does not say that in order to bring the case within this exception the lease must be a lease for the purpose of excavating a tank thereon. Reliance was placed upon the decision of the Calcutta High Court in *Asmat Ali* v. *Hasmat Khan* (4) where it was held that a lease of a tank without any portion of the surrounding land is not protected under Cl. (4), S. 37 of Act XI of 1859, as it was not within the meaning of that clause a lease of land whereon a tank has been excavated. This case has clearly no application to the facts of the present case. In the present case the lease is of 30 bighas of land upon which stands the tank in dispute.

As regards the contention that rent ought to have been assessed for two annas share of the tank even in the absence of the proprietors of the remaining 14 annas share reliance has been placed upon *Kamal Kumari Chowdhurani* v. *Kiran Chandra Roy* (5). That was not a case for assessment of rent and in that case the plaintiffs did not ask for direct or actual possession of the land, but indirect or constructive possession by a receipt of rent to the extent of their share from the cultivating tenants upon a declaration that the intermediate tenure was cancelled by the sale for arrears of revenue. That case is clearly distinguishable from the facts of the present case.

The result is that Suit No. 454 of 1920 must be dismissed with costs. Appeal No. 150 of 1924 of the Defendant Maharaja is decreed, and Appeal No. 288 of 1924 of the plaintiff-appellant is dismissed. The Defendant Maharaja will be entitled to his costs in all the Courts. There will however be only one hearing-fee in the two second appeals in this Court.

Second Appeals Nos. 151, 152, 153, 291, 296 *and* 295 *of* 1924.

These six appeals arise out of three suits Nos. 453, 456 and 483; the corresponding appeals before the District Judge being Nos. 90, 79 and 82. Appeals Nos. 151, 152 and 153 are by the Maharaja of Gidhaur and Appeals Nos. 291, 296 and 295 are by the plaintiff; Suits Nos. 453 and 456 relate to certain raiyati lands and Suit No. 483 relates to a house which forms part of the 30 bi-

(4) [1897] 2 C. W. N. 412.
(5) [1897] 2 C. W. N. 229.

bighas of lakhiraj land referred to in Suit No. 454. In these suits the raiyati lands and the house are held by tenants who took settlement thereof from the Maharaja defendant and these tenants are also parties to the suits.

The learned Munsif found the land to be lakhiraj of the Maharaja and he held that the tenant defendants could not be ousted. The learned District Judge has held that the lands lie in the plaintiff's Touzi No. 6104 and they are situated within the 30 bighas purchased by the Maharaja and that the tenants have been paying rent to the Maharaja. He, however, found that the 30 bighas of land was not lakhiraj since the time of the Permanent Settlement and that, therefore, the Maharaja defendant was liable to ejectment under S. 37 of Act XI of 1859. In Suits Nos. 453 and 456 the plaintiff wanted to oust the tenant defendants because in a previous suit for rent instituted by her, these defendants had denied her title as landlord and had set up the Maharaja's title, and the plaintiff seeks to dispossess the tenants on the ground of forfeiture by denial of her title. The learned District Judge has held that the denial of the title by the tenants was a bona fide assertion on their part inasmuch as they took settlement of the lands from the Maharaja and had been paying rent to him. As regards Suit No. 483 which was for the house in possession of the defendant Latif Mian, there was no denial of title of the plaintiff by the tenant, but the learned District Judge found that this case came within Exception (4) to S. 37 Act XI of 1859 inasmuch as the house was a permanent building erected upon the land. The result was that the learned District Judge gave a decree to the plaintiff for possession as landlord by ousting the Maharaja defendant, and made a declaration that the plaintiff was entitled to recover rent from the tenant defendants at rates paid by them to the Maharaja.

The points raised in the appeals of the Maharaja are the same as in Appeal No. 150 arising out of Suit No. 454 dealt with above. The lands and the house form part of the 30 bighas of the lakhiraj land purchased by the Maharaja and which has continued to be lakhiraj at least since the year 1866. The onus being on the plaintiff to show that the land was included in the *mal* lands of the estate at the time of the Permanent Settlement, and there being absolutely no evidence on that point, the plaintiff is not entitled to a declaration of her title as landlord and she is not entitled to oust the Maharaja defendant. That being so, it follows that the tenant defendants cannot be ousted either. Moreever, the denial of title of the plaintiff was at a time when the plaintiff really was not the landlord, but the Maharaja was the landlord. Even, assuming that the lakhiraj set up by the Maharaja was an encumbrance which could be annulled under S. 37 of the Act, such annulment had not taken place at the time the plaintiff had brought her rent suits. The encumbrance is not annulled ipso facto by the revenue sale ; the purchaser at the revenue sale has to take steps to annul the encumbrance, and at the time the rent suits had been instituted the plaintiff had taken no steps to annul the encumbrance and the Maharaja was really the landlord of the tenants and their denial of the title of the plaintiff was correct.

As regards Suit No. 483, the house is no doubt not a masonry house, but the finding is that it is a permanent house, and even if the Maharaja was liable to ejectment, the tenant defendant in Suit No. 483 was not liable to ejectment.

The result is that these three suits, Nos. 453, 456 and 483 will be dismissed with costs. Appeals Nos. 151, 152 and 153 will be decreed with costs ; Appeals Nos. 291, 296 and 295 will be dismissed but without costs. (His Lordship then dealt with the other appeals and agreeing with them finding of the District Judge dismissed them.)

Ross, J.—I agree.

A. I. R. 1926 Patna 421

ADAMI AND BUCKNILL, JJ.

Ajodhya Prasad and *others*—Defendants—Appellants.

v.

Ramkhelawan Singh and *others*—Plaintiffs—Respondents.

Appeal No. 1323 of 1923, Decided on 9th June 1926, from the appellate decree of the Addl. Dist. J., Patna, D/- 30th July 1923.

(a) *Bengal Estates Partition Act* (1897). *S.* 119—*Objection, as to certain plots not belonging to the estate under partition, raised—No adjudication given on the question, but the plots allotted in the final partition award—Civil suit by objector is not barred.*

"If there has been any adjudication upon the question, whether certain plots belonged to the estate which was being partitioned, raised by a party during the course of the batwara proceedings, S. 119 would undoubtedly affect adversely his position. But where there has been no adjudication upon such a claim, the mere fact that there has been in the final partition award an allocation of the land which the objection had contended was not properly capable of inclusion in the estate which was being partitioned, cannot operate to prevent the claimant from bringing a suit for a declaration of his title and, if necessary recovery of possession : 37 *Cal.* 662, *Rel. on.* [P. 423, C. 2]

(b) *Limitation Act, Art.* 14—*Partition under Estates Partition Act* (1897)—*Land not belonging to the estate under partition allocated—Claimant of the land can bring a suit for its recovery within* 12 *years—Art.* 14 *does not apply—Limitation Act, Art.* 144.

If property which did not fall in any way within the estate which was being partitioned was allocated to one of the persons, who was a party to the partition proceedings, it seems incredible to suggest that the person to whom that property so allocated rightly belonged could not within 12 years from the date when his right of action accrued, bring a suit for a declaration of his title and if necessary for recovery of possession of that land in question. Further it matters not whether such claimant was an outsider; that is to say, a person who was not a party to the partition proceedings, or a person who was a party to the partition proceedings. In such a case there is no act or order of an officer of Government in the official capacity which could be regarded as bringing the period of limitation within the purview of Art. 14. [P. 422, C. 1, 2]

S. N. Rai—for Appellants.

S. Dayal—for Respondents.

Bucknill, J.—This was a second appeal from a decision of the Additional District Judge of Patna, dated the 30th July 1923, by which he confirmed a judgment of the Munsif of Barh, dated the 29th June 1922.

The facts of the case, so far as they are before this Court, appear to have been very simple. The plaintiffs brought a suit on the 20th October 1921, against three sets of defendants; the second party and third party defendants need not be considered as of importance for the purposes of this appeal. The allegation put forward by the plaintiffs was that they had been dispossessed of two pieces of land known as Plots Nos. 2242 and 2735 which properly appertained to Mauza Marachi Bhagat Ekhtiyarpur; that this dispossession had come about owing to the fact that in a partition of an adjoining mauza known as Marachi Bariar, the first party defendants had been wrongly allotted these two plots of land which in fact did not belong to Mauza Marachi Bariar at all. It may be convenient here to say that the tauzi number of the village Marachi Bhagat Ekhtiyarpur was 86 and that of Marachi Bariar 641. The plaintiffs claimed the following principal reliefs :

(1) That on adjudication of their title the Court might be pleased to declare that the two plots in question lay in Mauza Marachi Bhagat Ekhtiyarpur : that they were the plaintiffs' bakasht lands in that mauza and that the defendants had no right or title in connexion therewith ; and

(2) that the Court should be pleased to award the plaintiffs direct possession of the two plots on ouster of the first party defendants.

Now for a number of years a slow partition—a Collectorate Batwara—had been taking place in the Mauza Marachi Bariar ; it would appear that these partition proceedings had commenced so long ago as 1906 ; they did not end until 1915. It will be seen that, as a result of this partition proceeding, Plots Nos. 2242 and 2735 were in some way or other allotted as if they appertained to Mauza Marachi Bariar to the defendants first party ; delivery of possession appears to have taken place on the 31st May and 11th June 1915, respectively. During the period occupied by this partition proceeding it would appear that a cadastral survey took place some time in or about 1910 or 1911 and there seems no doubt that in the cadastral survey the two seem to have been entered as part of Tauzi No. 641 ; but it is contended by the plaintiffs that that entry was wrong

and wrongly obtained. On the 17th July 1912, the plaintiffs filed a petition in the batwara proceedings asking that Plot No. 2242 should be included in their takhta, because they (the plaintiffs) were in possession thereof; however, somewhat later, that is to say, on the 8th September 1913, another petition was filed by the plaintiffs pointing out that their previous petition had been discovered to be completely in error and that as a matter of fact both Plots Nos. 2242 and 2735 did not belong to Tauzi No. 641 at all, but should be excluded therefrom. It is not clear that any notice of any sort was taken of this petition. At a later stage of this judgment I will refer in some detail to the manner in which the learned Additional District Judge has dealt with what is supposed to have taken place at the Batwara proceedings with regard to these two plots of land. It is snfficient to state that, as I have already mentioned, these two plots were allocated to the first party defendants as if they did appertain to Tauzi No. 641, Mauza Marachi Bariar. The suit was then brought by the plaintiffs some years afterwards for the relief which I have already named.

The Munsif of Barh found in favour of the plaintiffs and his decision was affirmed by the Additional District Judge of Patna. Now there are only two points raised by the learned advocate, who appeared for the appellants, here. The first of these points is that the period of limitation which applies to a suit of this kind is governed by Art. 14 of the Schedule to the Limitation Act, 1908; that is to say, that under that article a suit such as this must be brought within one year of the date of the act or order of an officer of Government in his official capacity not otherwise expressly provided for by other articles of the schedule or by the act itself. In this case, however, there was no act or order in my opinion which could be regarded as bringing the period of limitation within the purview of this Art. 14.

The second point which was put forward by the learned advocate who appeared for the appellants was that under S. 119 of the Estates Partition Act it was not possible for the plaintiffs to bring a suit to set aside anything which had taken place under the partition unless they did so under the proviso to that section which proviso, however, could not be brought into effect under the circumstances of the present case. The material provisions of this section read thus:

> Section 119: No order (a) refusing to admit an application for partition or to carry out a partition on any of the grounds mentioned in S. 11, or (b) made under S. 20, S. 30, Ch. V, Ch. VII, Ch. VIII, Ch. IX (except S. 81), Ch. X, S. 107 or S. 117, shall be liable to be contested or set aside by suit in any Court, or by any means other than those expressly provided in this Act: Provided that (1) any person claiming a greater interest in lands which were held in common tenancy between two or more estates than has been allotted to him by an order under S. 84 or S. 83; or (2) any person, who is aggrieved by an order made under S. 88 may bring a suit in a Court of competent jurisdiction to modify or set aside such order.

The learned advocate contends that there has been no order under S. 88 of the Act which is the only possible section would could apply to what took place in this case; and that by the very allocation by the Collectorate of these two plots of land to the defendant first party, the plaintiffs have no recourse to or remedy in any civil Court. I must admit that I think that this is a fallacious argument. If, as is contended here, property which did not fall in any way within the estate which was being partitioned was allocated to one of the persons, who was a party to the partition proceedings, it seems to me incredible to suggest that the person to whom that property so allocated rightly belonged could not within 12 years from the date when his right of action accrued bring a suit for a declaration of his title and if necessary for recovery of possssion of that land in question; and, indeed, I would go a step further and say that it matters not whether such claimant was an outsider; that is to say, a person who was not a party to the partition proceedings, or a person who was a party to the partition proceedings.

In the case of *Janaki Nath Chowdhry* v. *Kali Narain* (1) this proposition is clearly laid down by Mookerjee and Teunon, JJ. Their Lordships there observed that if in the course of a partition proceeding any question arose as to the extent or otherwise of the tenure, the tenure-holder not being a party to

(1) [1910] 37 Cal. 662=7 I. C. 881=15 C. W. N. 45.

the proceeding he was not affected in any manner by the decision which might be arrived at by the revenue authorities for the purpose of partition between the proprietors and that it would be unreasonable to hold that a party who appeared before the revenue authorities in his character as a proprietor should be finally concluded by a decision upon a question of title, which would not have been binding upon him, if he had been a stranger to the proceeding.

Now the learned advocate who has appeared for the appellants here has quoted to us a considerable number of cases of which the general trend has been to insist upon the importance of the bar presented by S. 119 of the Estates Partition Act. The case which perhaps most strongly supports this proposition is perhaps that of *Gurubuksh Prasad Tewari* v. *Kali Prasad Narain Singh* (2). In that case, where a party to a partition proceeding objected during the proceedings only to the mode in which the partition was being made, but never took any objection that land outside the limits of the property which was being partitioned was being included wrongly in the estate, and where the final order for partition was made without such objection, that party was precluded, under the provisions of S. 119 of the Estates Partition Act, from bringing a suit for a declaration of title in his favour and for recovery of possession of land which in the suit for the first time he declared belonged to him and did not appertain to the estate which alone should have rightly been partitioned. In the other cases, which were quoted by the learned advocate we find that the party seeking to bring a suit which would affect the final partition award is generally found to have brought forward his objections during the course of the batwara proceedings and in effect to have had a substantive adjudication thereupon.

Now it is, therefore, I think, at this stage important to ascertain, so far as is possible, whether there really was any adjudication upon this question of the plaintiffs' claim with regard to these two plots of land. (His Lordship then agreed with the finding of the lower Court that no orders under S. 88 had been passed.) It is quite clear, I think, that the authorities indicate that if there had been any adjudication upon this question raised by the plaintiffs during the course of the batwara proceedings (i. e., that Plots Nos. 2242 and 2735 did not at all lie within the estate which was in the course of being partitioned) the relative provisions of the Estates Partition Act would undoubtedly have affected adversely their position. But it must also be admitted that where there has been no adjudication upon such a claim, the mere fact that there has been in the final partition award an allocation of the land which the objectors have contended was not properly capable of inclusion in the estate which was being partitioned cannot operate to prevent the claimants from bringing a suit for a declaration of their title and, if necessary, recovery of possession. If we look at what took place here it certainly appears, as it has appeared to both the lower Courts, that there was no sort of enquiry or adjudication upon the claimants' claim. That being so, it does not appear to me that there was any bar to the right of the plaintiffs to bring the suit in the manner and in the time at which they have so done.

In my view therefore both the lower Courts were correct in their decision and this appeal must be dismissed with costs.

Adami, J.—I agree.

Appeal dismissed.

(2) [1915] 19 C. W. N. 1322=32 I. C. 167.

A. I. R. 1926 Patna 423

DAS AND ROSS, JJ.

Lachman Sahay and *others*—Defendants—Appellants.

v.

Gauri Charan Mahton and *others*—Plaintiffs—Respondents.

Second Appeal No. 124 of 1923, Decided on 24th June 1925, from a decree of the Sub. J., Patna, D/- 16th September 1923.

Landlord and Tenant—Non-transferable occupancy holding — Landlord may sue for rent against the original tenant even after the transfer.

The landiords may if they choose ignore the sale of non-transferable occupancy holding and proceed to bring a rent suit as against their tenants. They may, if they choose, bring a suit for ejectment as against the purchaser.[P 424 C 2]

Shiveshwar Dayal—for Appellants.

Bimla Charan Sinha—for Respondents.

Das, J.—There is a deficit Court-fee of Rs. 80-4-0 due from the plaintiffs-respondents on their plaint and on their memorandum of appeal in the Court below. They are given seven days' time to make good the deficiency; if they fail to do so their suit in the Court of first instance will stand dismissed and the appeal in this Court will stand decreed with costs in all the Courts.

I now proceed to deal with the case on the understanding that the deficiency will be made good. The plaintiffs, who are respondents before us, sued the appellants, the defendants first party, for a declaration that the decree passed on the 30th of March, 1920 in Rent Suit No. 1964 of 1919 and the auction sale held on the 15th of November 1920 in execution case No. 861 of 1920 are irregular, against the provisions of law and fraudulent and are fit to be set aside and rendered null and void.

The facts are these. The defendants second party had a holding of 5 bighas of kasht land under the defendants first party. They transferred the entire holding to the plaintiffs. Thereafter the landlords brought a rent suit as against the defendants second party, obtained a decree against them, proceeded to execute the decree, and in due course purchased the holding at a sale held in execution of their decree.

The plaintiffs contend that there is a custom of transferability of occupancy holdings in the village and that the decree obtained by the landlords against the defendants second party is fraudulent and not binding upon them. The Court of first instance found that there was no custom of transferability of occupancy holdings in the village. The learned Judge in the Court below has not gone into that question, but he has come to the conclusion that, assuming that the decision of the Court of first instance on this point is right, the plaintiffs are still entitled to succeed on the ground that the decree obtained by the landlords as against the defendants second party was fraudulent. In my opinion the decision of the learned Subordinate Judge cannot be supported. If there is no custom of transferability of occupancy holdings in the village, the plaintiffs have no cause of action and their suit should be dismissed on that ground. The learned Subordinate Judge was under the impression that the landlords had to bring a suit for ejectment as against the purchaser. In my opinion this is not right. The landlords may, if they choose ignore the sale and proceed to bring a rent suit as against their tenants. This is the course which they adopted; and they are undoubtedly entitled to succeed unless it be established that there is a custom of transferability of occupancy holdings in the village.

I must set aside the judgment and the decree passed by the Court below and remand the case to that Court for disposal of the question as to the custom of transferability of occupancy holdings in the village. This judgment will not be signed by us until the 30th of this month. Costs will abide the result and will be disposed of by the lower appellate Court.

Ross, J.—I agree.

Case remanded.

A. I. R. 1926 Patna 424

ROSS AND KULWANT SAHAY, JJ.

Kishun Mandar—Accused—Applicant.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 156 of 1926, Decided on 29th March 1926, from an order of the S. J., Bhagalpur, D/- 20th January 1926.

* *Crtminal P. C., Ss. 56 and 54—Command certificate issued under S. 56—Constable effecting arrest not notifying contents to person arrested—Arrest is not illegal if facts entitle the constable to arrest under S. 54.*

Where a command certificate has been given to a constable under S. 56 for effecting the arrest of a person, but the constable arrests that person without notifying to him the substance thereof the arrest does not become illegal if facts of the case are such that the constable can arrest the person under S. 54 without a warrant, irrespective of a command certificate under S. 56.

[P 425 C 1]

S. P. Varma—for Applicant.

Sultan Ahmed—for the Crown.

Ross, J.—The first petitioner has been sentenced to six months' rigorous imprisonment under S. 147 of the Indian Penal Code and to four months' rigorous imprisonment under S. 332. Petitioners Nos. 2, 3 and 4 have been sentenced to six months' rigorous imprisonment under S. 147 and petitioner No. 5 has been dealt with under S. 562 of the Code of

Criminal Procedure on conviction under S. 147 of the Penal Code.

It appears that three persons, Dipu, Kishun and Bawan had been charged before the police with the theft of a bullock. On the 3rd of June 1925, the Sub-inspector deputed a constable Harihar Singh to arrest them. Harihar Singh, accompanied by the complainant in that case, went to the house of Dipu in the early morning and found him asleep and arrested him and took him away. He had gone some distance when he was attacked by the petitioners and Dipu was rescued, injuries being inflicted upon the constable. The ground upon which the conviction is attacked is that the constable did not comply with the provisions of S. 56 of the Code of Criminal Procedure in making the arrest inasmuch as he did not, before making the arrest, notify to the person to be arrested the substance of the order. This provision has been added to S. 56 by the recent amendment of the Code of Criminal Procedure; and it is contended that the effect of that amendment is to bring in the decisions on S. 80 of the Code to the effect that if the police officer executing a warrant of arrest does not notify the substance thereof to the person to be arrested, he is not acting in the discharge of his public functions in the manner authorized by law.

The learned Government Advocate who appeared in support of the conviction did not contend that the provisions of S. 56 had been complied with; but he argued that independently of S. 56 the constable was entitled to arrest Dipu without a warrant under S. 54. The terms of S. 54 are very wide and authorize any police officer without an order from a Magistrate and without a warrant to arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. Now there can be no doubt in the present case that Dipu was such a person. The fact that he was eventually acquitted is of no consequence. A complaint had been made which the police believed to be true and his arrest had been ordered. The fact that a command certificate had been given to the constable under S. 56 is immaterial, as the constable, independently of any such command certificate was entitled to make the arrest.

It was contended on behalf of the petitioners that S. 56 lays down the procedure to be followed in the cases to which it applies and that that procedure had not been followed in the present case; and that the section applies to constables equally with chaukidars. But the fact that S. 56 applies to constables does not deprive them of their statutory powers conferred independently of that section. In my opinion, therefore, this arrest was perfectly legal and the petitioners were rightly convicted. The application must be dismissed and the petitioners will surrender to their bail to undergo the rest of their sentences.

Kulwant Sahay, J.—I agree.

Rule discharged.

★ A. I. R. 1926 Patna 425

MACPHERSON, J.

Karu Singh and *others* — Accused—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 408 of 1926, Decided on 6th July 1926, from an order of the Sub-Divl. Officer, Jahanabad, D/- 27th April 1926.

★ *Penal Code, S. 499—Defamatory statement in a plaint is not absolutely privileged.*

The rules of the English Common Law apply to questions of civil liability for defamation in India, but criminal liability is determined exclusively by the Penal Code. A defamatory statement whether on oath or otherwise, e. g., one contained in a plaint, falls within S. 499 and is not absolutely privileged: 48 *Cal.* 388 and 40 *Cal.* 433, *Foll.* [P. 426, C. 2]

S. N. Rai—for Petitioners.

Judgment.—This rule has been issued to consider the conviction of the three petitioners under S. 500 of the Indian Penal Code and the sentence of fine of Rs. 25 imposed upon each of them.

The petitioners, of whom Karu and Mainath (otherwise Bhainath) are brothers, along with others, filed a suit in the Court of the Munsif of Gaya against Jhangi Mahton, his brother Anhach Mahton, Mt. Budhni and Mukhram Singh for a mortgage decree on a deed of 1919 said to be executed by the first two defendants in favour of the plaintiffs. In

the heading of the plaint they described Defendant No. 3 Mt. Budhni as "zan dasta" or "kept woman" of Defendant No. 1, and in para. 5 of the plaint they set out that as the Defendant No. 3 is the kept woman of Defendant No. 1, and Defendants 1 and 2 have with a dishonest motive, as a precautionary measure and in order to derive undue advantage, executed a farzi deed of sale without consideration in respect of the mortgaged property, in the name and in favour of Defendant No. 3, the kept woman of Defendant No. 1, and of Defendant No. 4, a friend and creature of the latter, therefore they too are brought into the category of defendants.

Musammat Budhni who is 40 or 45 years of age and a widow for a quarter of a century, instituted criminal proceedings under S. 500 of the Indian Penal Code against the petitioners and alleged that the imputation in the plaint that she was kept woman of Jhangi Mahton was maliciously false and very harmful to her reputation and that in fact she had no interest whatever in the mortgaged property and had been made a defendant unnecessarily with ulterior motives, because she had purchased lands from the first defendant other than the mortgaged property.

The petitioners pleaded in defence that the complainant was in fact the concubine of Jhangi aud that Jhangi in order to evade payment of the amount due to them had with that object sold some of his land to her, that under legal advice they had made Budhni defendant and that they stated a fact which they were entitled to state.

The petitioners attempted to prove their allegation that Budhni is the concubine of Jhangi, but the Sub-divisional Magistrate held that the attempt had failed completely and that she is of good character. He further found that the allegation that Budhni was the kept woman of Jhangi Mahton was not made in good faith nor for the benefit of anybody. The petitioners, he held, had in fact made it because of resentment at transfer of some land by Jhangi to Budhni, which they considered was intended to defraud them, and their object clearly was to injure the reputation of the complainant.

Finding all the ingredients in the charge under S. 500 of defaming the complainant by describing her as the concubine of Jhangi Mahton to be established, he convicted and sentenced the petitioners already stated.

In support of the rule Mr. S. N. Roy does not challenge the findings on the facts. He contends, however, that the occasion was privileged and refers to several decisions of the Calcutta High Court in support of his contention. These decisions are all antecedent to the Full Bench decision in *Satish Chandra* v. *Ramdayal* (1) in which they were considered. The only decision of this Court on the question of privilege is *Jagat Mohon Nath* v. *Kalipada Ghosh* (2) in which it was held in considering the case of a legal practitioner that the rules of the English common law apply to questions of civil liability for defamation in India. As to liability on the criminal side, there has, it is well known, been diversity of opinion among the High Courts in India. It will serve no good purpose to consider them in detail. In my judgment criminal liability is determined exclusively by the provisions of the Indian Penal Code. The law is to my mind correctly set out in *Kari Singh* v. *Emperor* (3) and in *Satish Chandra* v. *Ramdayal* (1) already referred to which was cited with approval in the decision of this Court which I have mentioned. A defamatory statement, whether on oath or otherwise, falls within S. 499 of the Indian Penal Code, and is not absolutely privileged.

The question of importance is therefore that of good faith. In the present case it has been found and there is not the slightest doubt that the statement that the complainant was the kept woman of Jhangi is without foundation and that it was made maliciously because Budhni had, as the petitioners considered to their detriment, purchased some of the lands of Jhangi.

Following the decisions cited I hold that the petitioners were not absolutely privileged and that on the facts found the conviction is correct.

The application being without merits, this rule is discharged.

Rule discharged.

(1) [1921] 48 Cal. 888=32 C. L. J. 94=59 I. C. 143=24 C. W. N. 982 (S. B.).
(2) A. I. R. 1922 Pat. 104=1 Pat. 371.
(3) [1918] 40 Cal. 433=18 I. C. 660=17 C. W. N. 297.

★ A. I. R. 1926 Patna 427

DAWSON-MILLER, C. J., AND FOSTER, J.

Achutanand Jha and *others*—Plaintiffs—Appellants.

v.

Surjanarain Jha and *others*—Defendants—Respondents.

Second Appeals Nos. 1056 of 1923 and 41 of 1924, Decided on 11th May 1926, from a decree of the Dist. J., Darbhanga, D/- 30th June 1923.

(a) Civil P.C., O. 6, R. 17—Amendment prayed for after evidence—Question of fact to be raised by amendment already raised and evidence adduced—Amendment should be allowed.

A died leaving two sons B and C. B alienated family properties. C instituted a suit against B and his vendors for the recovery of his shares on the ground that after the death of his father and before the sale he had separated from B and that B had no right to sell anything beyond his share. It was also alleged that the sale deed was not genuine and for consideration and that it was executed without legal necessity. An issue was framed as to whether there was legal necessity and was discussed in the trial Court as well as the first appellate Court. After the evidence was closed the plaintiffs filed a petition praying that he might be allowed to amend his plaint upon payment of the neceseary additional Court-fee by adding to the relief claimed therein the prayer that if in the opinion of the Court the separation as alleged by the plaintiffs be not proved then a decree for reovery of possession of the entire property be pssed in favour of C or jointly in favour of C and B. [P. 428, C. 1, 2]

Held: that the question of legal necessity having been raised in the plaint and an issue been framed on the point the amendment should be allowed for the purpose of determining the real questions in issue between the parties.

(b) Hindu Law—Joint family—Alienation by manager—If sale for consideration is not much over the legal necessity and the transaction is not an improper one, sale should not be set aside.

In cases where the part of the consideration not justified on the grounds of legal necessity is small, sale should not be set aside, and where it is insignificant the sale should even be upheld: 48 *All.* 183, *Rel. on.*

Where it is necessary to sell property in order to discharge a binding legal obligation, the purchase price must occasionally exceed the actual cash requirements, and unless it appears that the transaction itself was an improper one or that some more advantageous arrangement could have been made, the Courts should be slow to set aside a sale to a bona fide purchaser merely because the consideration paid is somewhat greater than the actual requirements of the joint family. [P 429, C 2; P 430, C 1]

★ *(c) Hindu Law—Debts—Pious obligation of son does not extend to time-barred debts of father.*

The pious obligation of the son does not extend to the payment of his father's time-barred debts. [P. 430, C. 1]

Murari Prasad and *R. K. Jha*—for Appellants.

S. K. Mitter—for Respondents.

Dawson-Miller, C. J.—These two appeals numbered 1056 of 1923 and 41 of 1924 are brought from a decision of the District Judge of Darbhanga, modifying the decree of the Munsif.

The appellants in Appeal No. 1056, who are the plaintiffs in the suit, are the younger son and the widow of Deokishun Jha who died in 1913 leaving, in addition to the plaintiffs, an elder son, Subhanand Jha (son of a deceased wife) who became the karta of the family on Deokishun's death.

By a kobala dated the 17th March 1917, (Ex. E) Subhanand Jha, during the minority of his half-brother, sold to the defendants first party a portion of the family property consisting of between 6 and 7 bighas of kasht and brahmottar land in mauza Ranti for a sum of Rs. 750. By a second kobala dated the 20th May 1918 (Ex. I) he sold two other plots of land and a dwelling house to the defendant second party for a sum of Rs. 128.

In 1922 the male plaintiff, who by that time had attained majority together with his mother instituted the present suit against the respective purchasers and Subhanand Jha, their vendor, claiming to recover a two-thirds share in the property sold on the ground that the plaintiffs had separated from the elder brother after the death of Deokishun and before the sales took place, and they were entitled to a third share each in the property which the elder brother had no power to sell beyond the extent of his own share. The plaint also alleged that the sale deeds were not genuine or for consideration, and that they were executed by Subhanand Jha without any legal necessity and that the plaintiffs were not benefited by the transaction. They claimed a declaration that the sale deeds were illegal and inoperative as against the plaintiffs and asked for recovery of their two-thirds share with mesne profits.

It will be seen from what I have stated that the claim was based upon the

allegation that at the date of the transfers the family property had already been partitioned, the mother and each of the sons being separately entitled to a third share in the whole. The question of legal necessity was therefore only material in case there had been no separation, but such a case was not specifically pleaded. Nevertheless issues were framed before the hearing dealing with this point. The fourth and fifth issues were as follows :

(4) Are the kobalas sought to be impugned genuine and for consideration and for the benefit of the plaintiffs ?

(5) Were the kobalas in question for legal necessities and are they binding upon the plaintiffs ?

Considerable evidence was adduced at the trial upon these issues and the question of legal necessity was discussed in great detail in the judgment of both the Munsif, who originally tried the case and the District Judge before whom it went on appeal.

On the 20th February 1922, after the evidence was closed, the plaintiffs filed a petition before the Munsif praying that they might be allowed to amend their plaint upon payment of the necessary additional Court-fee by adding to the relief claimed therein the following prayer.

That if in the opinion of the Court the separation, as alleged by the plaintiffs, be not proved then a decree for recovery of possession of the entire property with mesne profits covered by the kobalas, dated 27th March 1917 and 20th May 1918, may be passed in favour of your petitioners or jointly in favour of your petitioners and Defendant No. 6 (Subhanand Jha).

The learned Munsif rejected the application on the ground that it was unfair to ask the defendants to meet a different case at the stage. Had the question of legal necessity not been raised in the plaint, and had no issue been framed on the point, I consider that the learned Munsif's decision would have been unassailable and that it would have been improper to allow the amendment at that stage as it would involve the taking of evidence on a question of fact not raised in the pleadings or the issues. But having regard to the course which the case took it cannot be said that the defendants would be in any way prejudiced by allowing the amendment asked for. The question of legal necessity was one of the issues for trial and both parties had every opportunity to produce evidence, and did produce evidence, on the point, and as the materials were before the Court to enable to decide the point and both Courts in fact decided it. I consider that in the particular circumstances of the case, and in the interests of justice, the Court should have allowed the amendment under O. 6, R. 17 of the Code of Civil Procedure for the purpose of determining the real questions in issue between the parties. We accordingly ruled that the plaint should be treated as amended in the manner prayed as above set out.

The trial Court found that there had been no separation and that the plaintiffs and the Defendant No. 6, Subhanand Jha, were joint in estate. This finding was, in the absence of any amendment of the plaint, sufficient to dispose of the suit, but the learned Munsif, after stating that his decision might not find favour with a higher tribuual, proceeded to determine Issues 4 and 5. He found that the sales were genuine and for legal necessity and binding on the plaintiffs and dismissed the suit.

From this decision the plaintiffs appealed to the District Judge. The learned District Judge found that there had been no separation in the family of the plaintiffs and the Defendant No. 6 and that the property in suit was joint family property. With regard to the kobala of 1917 he found that out of the consideration of Rs. 750 a sum of Rs. 550 was required for family necessity, but that no legal necessity had been proved in respect of the balance of Rs. 200. He considered that this was only a small portion of the consideration and held that the kobala should not be set aside, but directed that the plaintiffs should recover from the transferees, the defendants first party, the male plaintiff's half-share of this amount, viz., Rs. 100.

With regard to the second kobala the sale was made to the defendant second party in order to raise money to pay off a sum of Rs. 128 due under a mortgage dated the 1st March 1904, executed by Deokishun Jha, the father of the first plaintiff, and the Defendant No. 6 whereby certain family property had been mortgaged. The personal debt incurred by Deokishun Jha under the mortgage of 1904, was time barred in 1918, when the kobala was executed, and therefore, it could not be justified on the ground of the antecedent debt of the

father. The property which was the subject of the mortgage had also passed out of the possession of the family, as it formed part of the property sold to the first party defendants under the kobala of 1917. The District Judge accordingly found that there was no necessity to pay the debt and the family property could not validly be sold for that purpose. In the result the appeal was allowed in part and the decree of the trial Court was varied by awarding the plaintiffs the sum of Rs. 100 in respect of the first sale and by declaring that the second sale was not binding on the plaintiffs and had no effect in so far as the half share of the male plaintiff was concerned. The learned District Judge, although he does not in terms say so, in fact dealt with the suit as if the plaint had been amended.

From this decision the plaintiffs have preferred a second appeal, 1056 of 1923, to this Court and contend that as the lower appellate Court has found that legal necessity was not established in respect of the whole of the consideration for the first kobala it should have set aside the sale upon payment by the plaintiffs of the amount found justified by legal necessity, viz., Rs. 550.

The defendants 1st party, the purchasers under the first kobala, have also entered a cross-objection and contend that on the pleading the question of legal necessity did not arise, the plaint not having been amended and that the lower appellate Court was wrong in awarding the plaintiffs the sum of Rs. 100.

The defendant second party the purchaser under the second kobala has also preferred a second appeal numbered 41 of 1924, to this Court. He contends (1), that the lower appellate Court was not justified, in the absence of any amendment of the plaint, in considering the question of legal necessity and allowing the plaintiff's claim on the ground of the absence of legal necessity, (2) that the Defendant No. 6 as karta of the family was under a pious obligation to discharge his father's debt under the mortgage of 1904 even though the personal debt was time-barred and (3) that the mortgage debt still subsisted after the transfer of the mortgaged property under the first kobala and the liability of the joint family to discharge the debt remained with them.

As to the plaintiff's contention in Appeal No. 1056 of 1923, certain authorities have been relied on to support the argument that where a portion of the consideration for a sale of family property is not justified by legal necessity the sale should be set aside on payment to the transferee of that part of the consideration which is so justified. No doubt this rule has been followed where a substantial portion of the consideration is not proved to have been necessary for the needs of the family. In the *Deputy Commissioner of Kheri* v. *Khanjan Singh* (1), their Lordships of the Judicial Committee set aside a sale where out of a total consideration of Rs. 19,998 necessity was found to have existed for Rs. 7,080 only. In *Samukh Pande* v. *Jagarnath Pande* (2), Rs. 200 out of Rs. 1,000 was found not to have been supported by legal necessity or antecedent debts. The learned Judges of the Allahabad High Court (Sulaiman and Mukherji, JJ.) in setting aside the sale in that case said :

> It is impossible to lay down any hard and fast rule which could apply equally to every case ; for every transaction has to be considered on its own merits and the Court has to come to a finding on the merits of every case.

Other cases were cited where in similar circumstances the sale was set aside, but in all of them the portion of the consideration not justified by family necessity or antecedent debt was substantial. The rule, however, is not of universal application and in cases where the part of the consideration not justified on the ground of legal necessity is small, the Courts have frequently refused to set aside the sale, and where it is insignificant the Courts have even gone the length of upholding the sale, without ordering the defendant to restore to the plaintiff that part of the consideration not proved to have been justified by necessity. One of the latest cases on the subject is the Full Bench decision of the Allahabad High Court in *Lal Bahadur Lal* v. *Kamleshar Nath* (3), where the authorities are reviewed and where the Court refused to set aside the sale, or even to order a refund, where the sum of Rs. 259, out of a consideration of Rs.5,995 was found to be unsupported by legal necessity. Other cases where the Court exercised its discretion in favour of the

(1) [1907] 29 All. 331=34 I. A. 72=4 A. L. J. 232=11 C. W. N. 474 (P. C.).
(2) A. I. R. 1924 All. 708=46 All. 531.
(3) A. I. R. 1925 All. 624=48 All. 188 (F.B.

purchaser are *Felaram Roy* v. *Bagalanand Banerjee* (4); *Chattar* v. *Chote* (5); *L. A. Nilakanta Sarma* v. *Ganesha Iyer* (6); and *Medai Dalavoi Thirumalaiyappa Mudaliar* v. *Nainar Tevan* (7). In the last case cited their Lordships of the Judicial Committee held that where Rs. 711 out of a consideration of Rs. 5,300 was not proved to have been justified by legal necessity the sale was not invalid. It seems obvious that where it is necessary to sell property in order to discharge a binding legal obligation, the purchase price must occasionally exceed the actual cash requirements, and unless it appears that the transaction itself was an improper one or that some more advantageous arrangement could have been made, which is not the case here, I consider that the Courts should be slow to set aside a sale to a bona fide purchaser merely because the consideration paid is somewhat greater than the actual requirements of the joint family. Moreover in the present case the transfer has remained unchallenged for a period approaching five years and on a consideration of all the circumstances I am not prepared to hold that the District Judge acted illegally, or exercised a wrong discretion in allowing the sale to stand on condition that the purchasers pay to the plaintiffs the sum of Rs. 100. Appeal No. 1056 of 1923 is accordingly dismissed with costs. The cross-objection of the defendants first party in this appeal is also dismissed with costs, as we consider that the plaint should be amended as prayed.

With regard to Appeal No. 41 of 1924, in which the defendant second party, the purchaser under the second kobala is appellant, his first point fails as we have allowed the amendment. His second point is based upon the contention that the pious obligation of a son to pay his father's debts extends even to a time-barred debt. Whatever may be the duty or the powers of a Hindu widow succeeding to her husband's estate with regard to the payment of her husband's debts, when barred by limitation, the pious obligation of the son does not extend to the payment of his father's time-barred debts. If the debt could not have been enforced against the father, were he alive, the son is not bound. This, however, does not conclude the case for it appears that the kobala of 1918, was executed in order to pay off the sum due under a previous mortgage (Ex. C) executed by Deokishan Jha, father of Subhanand and the male plaintiff, in 1904, and it is conceded that the mortgage (Ex. C) created a valid charge upon the family property. The learned District Judge held that, as the property charged by Ex. C had already been transferred to the first party defendants under the previous kobala of 1917, the liability to discharge the mortgage no longer rested with the plaintiffs' family. If this property had been sold subject to the encumbrance the learned Judge's decision might be justified on the ground that the liability to discharge the encumbrance had passed away from the family. But under the terms of the kobala of 1917 (Ex. E), it appears that the lands comprised in that sale were sold free of all encumbrances, the vendor undertaking to discharge any encumbrance, still subsisting and to indemnify the purchasers from any loss they might suffer by reason of the existence of such encumbrance. This was not creating a new liability, but retaining a liability already created and binding on the family in respect of the vended property. I must hold, therefore, that the transaction of 1918 (Ex. 1) was binding upon the plaintiffs and cannot be set aside. Appeal No. 41 of 1924, is accordingly allowed. The judgment and decree of the District Judge are set aside and the decree of the Munsif is restored in so far as it dismissed that part of the claim which relates to the kobala of the 20th May 1918. The plaintiffs will pay the defendant second party his costs incurred in this appeal and in both the lower Courts.

Appeal No. 41 *of* 1924 *allowed.*

(4) [1909] 14 C. W. N. 895=6 I. C. 207.
(5) [1917] 40 I. C. 269.
(6) A. I. R. 1925 Mad. 469.
(7) A. I. R. 1922 P. C. 207.

A. I. R. 1926 Patna 430

DAS AND ADAMI, JJ.

Kusunda Nayadi Collieries—Defendant No. 1—Appellant.

v.

Bholanath Sarkar and *others*—Plaintiffs—Respondents.

Appeal No. 1005 of 1923, Decided on 8th July 1926, from the appellate decree of the Dist. J., Manbhum, Sambalpur D/- 5th June 1923.

Bengal Cess (Act 9 of 1880), S. 6—Lessee of mining rights need not pay cess to lessor.

A case of rent or royalty payable under a mining lease does not come within Chap. 2 which relates to assessment of cess on the annual value of lands and not to assessment on the annual net profits from mines, etc. A holder of mining rights in a mouza is liable to pay cess to the Government under Chap. 5 of the Act but not to the lessor. [P. 431, C. 2]

S. M. Mullick and *S. N. Bose*—for Appellant.

S. C. Mazumdar, N. N. Sen and *N. C. Sinha*—for Respondents.

Das, J.—This appeal arises out of a suit instituted by Bholanath Sarkar, the respondent in this Court, for recovery of cess. The facts are these: Bholanath gave a mukarari lease of 100 bighas of land with under-ground rights to Haricharan Bose at a rent of Rs. 2,500 a year. Haricharan transferred his interest to the patnaiks who are Defendants Nos. 2—5 in this suit. The patnaiks gave a mining lease to Kusunda Nayadi Coal Co., Ltd. and it was provided in the lease that out of the royalties and commissions payable by the Company to the patnaiks Rs. 2,500 should be paid direct to Bholanath Sarkar. Kusunda Coal Co. was Defendant No. 1 in the suit and is the appellant in this Court.

In 1918 a suit was instituted by the patnaiks against Bholanath and the Company in substance for a declaration that Bholanath had no right to the mouza and for recovery of the royalties paid by them to him through the Company. A compromise was entered into by the parties. It was agreed that out of Rs. 2,500 payable by the defendant Company to Bholanath under the previous arrangement on account of the annual rent of Rs. 100 bighas of land Bholanath would get an annual rent of Rs. 800 only and the patnaiks, who were the plaintiffs in that suit, would get the balance. It was also agreed that Bholanath would have no other right in the surface or under-ground of the mouza except the right to receive Rs. 800 per year from the defendant Company. The plaintiff contends that he is entitled to recover cess from the defendants on the annual rent of Rs. 800 which is being paid by the defendant Company to the plaintiff. The learned Judge in the Court below has allowed the claim of the plaintiff and the defendant Company appeal this Court.

The learned Judge has taken the view that on the compromise between the parties the defendant Company must be regarded as the tenants of Bholanath and that as such they are bound to pay his cess recoverable under Chap. 2. Now it is to be observed that the defendant Company is in possession of certain mining rights in the mouza. What is being paid to the plaintiff by the defendant Company is rent or royalty in respect of such mining rights and the question arises whether Chap. 2 of the Cess Act is at all applicable to a case of this nature. S. 6 of the Cess Act provides that the road-cess and the public works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways and other immovable property ascertained respectively as in this Act prescribed. Annual value of land is defined in the Act to mean

the total rent which is payable, or if no rent is actually payable, would, on a reasonable assessment, be payable during the year by all the cultivating raiyats of such land, estate or tenure, or by other persons in the actual use and occupation thereof.

It is obvious to my mind that a case of rent or royalty payable under a mining lease does not come within Chap. 2 which relates to assessment of cess on the annual value of lands and not to assessment on the annual net profits from mines, etc. If this be so, it is clear that the plaintiff cannot recover any cess from the defendant under Chap. 2 of the Act. The Defendant Company is no doubt liable to pay cess to the Government under Chap. 5 of the Act and as a matter of fact it is paying cess to the Government under Chap. 5. The plaintiff is obviously not entitled to ask the defendant Company to contribute towards the cess payable by him to the Government on his profits.

I would allow the appeal, set aside the judgment and the decree passed by the Court below and dismiss the plaintiff's suits with costs throughout.

Adami, J.—I agree.

Appeal allowed.

A. I. R. 1926 Patna 432

BUCKNILL, J.

Chota Lal Sahu—Plaintiff—Petitioner.

v.

Gumani Chaudhury—Defendant—Opposite Party.

Civil Revision No. 151 of 1925, Decided on 24th June 1925, against the judgment of the Munsif, Darbhanga, D/- 25th February 1925.

Pro-note—Loan transaction and pro-note contemporaneous—Suit based on pro-note which cannot be proved fails.

Where the loan transaction and the promissory note constitute one and the same transaction and were actually contemporaneous, and the suit was based upon the promissory note alone and there was no suggestion that it was maintainable without the promissory note or that it was a case founded upon a claim merely for money lent: *Held*: that if the pro-note cannot be proved, the suit fails: 9 *M. L. T.* 281, *Foll.* [P 432 C 2]

S. S. Bose for *Murari Prasad*—for Petitioner.

S. K. Mitter—for Opposite Party.

Judgment.—This is an application in civil revisional jurisdiction. The application is made under the following circumstances: The appellant was a plaintiff in a suit, which he brought on a promissory note to recover from the defendant a small sum of money. The suit came before the Munsif of Darbhanga sitting as a Small Cause Court Judge; and when the plaintiff endeavoured to prove his case by the production of this promissory note, it was found that the promissory note was not stamped and could not be received in evidence. No other argument or matter appears to have been addressed to the Munsif (so far as we can ascertain from the record) and the Munsif held on the 25th February 1925 that as the plaintiff had failed to prove his promissory note upon which he had brought his suit the plaintiff's suit must fail and must accordingly be dismissed with costs.

Now, the matter has come before me in revision and the suggestion is that the suit might have been maintainable as for one simple money lent. It is perfectly clear from the plaint in the suit and from the plaintiff's own petition to this Court that the loan transaction and the promissory note constituted one and the same transaction and were actually contemporaneous. It is also perfectly clear that the suit was based upon the promissory note alone and upon no suggestion that it was maintainable without the promissory note or that it was a case founded upon a claim merely for money lent. If the suit is founded on a instrument and that instrument cannot be proved it appears to me that it is clear that the suit fails. The learned counsel who has appeared for the respondent here has drawn my attention to a case which appears to be strongly in point: *Chinnappa Pillai* v. *M. R. Muthuraman Chettiar* (1).

In that case, which was decided by Benson and Sundara Aiyar, JJ., it was clearly laid down there that where a loan and the execution of a promissory note are contemporaneous and constitute one transaction, a suit based on the original consideration, if the promissory note is inadmissible for insufficiency of stamp, is not maintainable. This would tend to show that in the present case if the execution of the promissory note and the loan transaction were, as indeed is admitted, contemporaneous and as appears to be clearly the case one transaction, it would have been impossible for the plaintiff to have attempted to submerge his promissory note and to bring a claim solely upon the consideration of money lent. For this reason I am satisfied that, as the plaintiff founded and brought his suit on his promissory note, and as he failed to prove it, his case was rightly declared to fail and in consequence that the Munsif was right in dismissing his case.

I do not, therefore, see that it is possible for me to interfere in this matter in revision, and the application is dismissed with costs.

Application dismissed.

(1) [1911] 9 M.L.T. 281=10 I. C. 669.

* A I. R. 1926 Patna 433

ROSS AND KULWANT SAHAY, JJ.

Farman Khan—Accused—Appellant.

v.

King-Emperor—Respondent.

Criminal Appeal No. 25 of 1926, Decided on 23rd March 1926, from a decision of the S. J., Purnea, D/-1st February 1926.

(a) *Penal Code, S. 97—Right of private defence of property—Onus is on accused to prove their ownership of property.*

Where a plea of private defence of property is raised, the burden of proving that the property belonged to them, is on the accused. [P 434, C 1]

* (b) *Penal Code, S. 100—Right of private defence arises only when there is no recourse for safety—Accused must not be the creator of necessity for self-defence — No right of self-defence exists when both parties are determined to vindicate their rights by show of criminal force.*

Before a person can avail himself of the defence, that he used a weapon in defence of his life, he must satisfy the Court that that defence was necessary, that he did all he could to avoid it and that it was necessary to protect his own life or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger. A man cannot, in any case, justify killing another by pretence of necessity unless he were wholly without fault in bringing that necessity upon himself. When a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men who on the other hand are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. [P 436, C 1,2]

Manuk, Md. Yunus, S. P. Varma and *Bhagwat Prasad*—for Appellants.

H. L. Nandkeolyar—for the Crown.

Ross, J.—This case had an unfortunate course, largely the result of an order passed by the District Magistrate of Purnea directing the Public Prosecutor to appear on behalf of the Government before the committing Magistrate and that his fees should be paid by the parties and he should receive instructions from the Court Inspector. This order is to be deprecated. It has resulted in a trial in which forty-seven witnesses were examined for the prosecution and which lasted for thirty-six days. Day after day the prosecution presented to the Court evidence which was false, evidence which has been rejected by the assessors and the Sessions Judge, and which the learned Assistant Government Advocate has not attempted to support here. The case which the trial Court found to be proved and which rests on a first information given by Lodhi chaukidar, is supported by the evidence of a dafadar and three chaukidars only. It differs from the official case of the prosecution in every respect and there can be no question that this trial has involved a great waste of public time and money.

The three appellants have been sentenced to three years' rigorous imprisonment under S. 304 read with S. 149 of the Indian Penal Code and to concurrent terms of one year under each of the sections 148 and 324. I do not propose to discuss the case upon which the prosecution relied and which has been found to be false. I shall confine myself to the case upon which the appellants have been convicted. The occurrence took place at 7. 30 A. M. on the 22nd of May 1925. Information was given at the police station, six miles distant, at 9. 30 A.M. on the same day by Lodhi chaukidar to the effect that in the morning at about 6 A. M. two or three Muhammadans whom Gour Babu zamindar's men had brought from Bengal for cutting lac and forty or forty-two peons on behalf of Gour Babu were getting lac gathered. At about 7 A. M. twenty or twenty-five peons on behalf of Muhammad Bakhsh Chowdhry, zamindar, came from the direction of Manshahi Kothi armed with lathis, spears and axes. The peons of Gour Babu were similarly armed. Durga Singh, the jamadar of Chowdhry, said to Mahadeo Singh, the jamadar of Gour Babu: "Why do you cut lac." On this Mahadeo Singh said: "The banker belongs to my master Gour Babu, I will cut the lac". When this talk was going on, Durga Singh was trying to appease them saying that there is no need of quarrelling, give up gathering lac, the landlords will settle among themselves. In the meantime three peons of Gour Babu began to shout "Beat beat" and came forward jumping and the peons of both sides closed and began to use lathis, axes and spears. The dafadar and three chaukidars tried to stop the fight, but without success. When a peon of Gour Babu fell, the mob dispersed and a man was found to be dead. This was Misri Gope, and later it was found that Mahadeo Singh had also been killed. There was some discussion about the

side to which Misri Gope belonged. The question is immaterial, but, in my opinion, the evidence that he was a peon of Gour Babu ought to be believed. The only reason for doubting it is that no one was able to identify the man; but as the peons were collected from the outlying villages, there was nothing necessarily suspicious in this.

The accused were charged under S. 302 read with S. 149, the common object of the unlawful assembly being to beat the men of Gour Babu. There was also a charge under S. 148 and minor charges against the individual accused under S. 324. The defence was that the lac of mauza Narainpur had been settled on behalf of Chowdhry Sahib with Sheikh Kalu; and on the day of the occurrence peons of Gour Babu were getting this lac cut without any right or possession and that a riot occurred in which Gour Babu's men were the aggressors. It thus appears that the appellants raised a plea of private defence both of property and of person, and that is the defence that has been urged in this Court. There was also a general argument on behalf of the appellants that the common object of assaulting the peons of Gour Babu alleged by the prosecution arose out of a dispute over the cutting of trees, that this was the case which the prosecution put forward as true and which the accused were called upon to meet, and that when that case broke down, the prosecution were not entitled to substitute what was really a different intention, though included within the same words, of assaulting the peons of Gour Babu over a dispute about lac. In my opinion there is no substance in this argument. The whole case was presented against the accused—both the allegation about the tree cutting and its sequel and the allegation about the lac cutting and its sequel. There was no embarrassment or prejudice to the accused as is shown by their written defence; and the fact that they were able to destroy the case for the prosecution about the tree cutting is no reason for acquitting them of rioting in connexion with the lac cutting.

On the plea of private defence of property, the burden of proof is on the accused. If they assert that they injured the deceased in the defence of their property, they must show that it was their property. Learned counsel relied on the finding of the Sessions Judge that it was not proved that either side had peaceful possession; but this is a finding which is fatal to the defence. It was also argued that the defence on the question of possession of the lac had been prejudiced by the fact that the prosecution had set up as their substantive case an occurrence arising out of tree cutting, and that the cutting of lac was only a subsidiary element. But the evidence was there and there was no question of prejudice. The accused had ample notice (as their written statement shows) and if they had any proof of possession of the lac they ought to have given it. Learned counsel admitted that the proof of possession on behalf of the defence was meagre, and on the evidence it must be held that the possession of the party of the accused has not been proved. (His Lordship then discussed the evidence on the point of possession and proceeded). All that can be concluded from the evidence is that rival claims were being made by Gour Chandra Roy and the tenants, who were in league with him, on one side, through their lessee Haro, and by Chowdhry Muhammad Bux, the proprietor of the village, on the other side, through his lessee Kalu. But it is not proved that Kalu was in possession or that the accused were defending his property. The plea of private defence of property therefore fails.

I now turn to the plea of defence of person. It was strongly contended on behalf of the appellants that the prosecution evidence, from the first information onwards, proves that the accused had the right of private defence of person and that this is clear when the sequence of events is closely examined. The learned Assistant Government Advocate contended that the evidence of the dafadar and the chaukidars is partial to the accused because these witnesses are tenants of Chowdhry. I have considered the evidence of these witnesses at the different stages at which it was given, and, in my opinion, it is fairly consistent throughout and makes the sequence of events sufficiently plain. I have already given the substance of the first information, and from that document it would appear that the sequence of events was this lac cutting was going on from about 6 A.M. At 7 A.M. Chowdhry's men

came armed from the direction of the factory. Some of the men of Gour Babu went near the door of Phuhi Khan and some hid themselves in the jungle. Then there was a conversation between the leaders, Durga Singh, the jamadar of Chowdhry, and Mahadeo Singh, the jamadar of Gour Babu, in which Durga Singh took up a pacific attitude, but the persons of Gour Babu shouted "Beat, beat" and then a conflict ensued. In his statement before the committing Magistrate Lodhi made a few additions to his statement. He then said that he asked Chowdhry's men not to riot. He also said that Chowdhry's men rushed towards Gour Babu's men. That apparently was before the conversation between the leaders. With regard to the conversation he then stated that he did not hear what was said. Then he added that Rupan Singh, peon of Gour Babu, was beaten and thereafter there was intervention by the chaukidars and dafadar after which both sides dispersed. Then Debi Singh taunted Gour Babu's men and the riot ensued. Some parts of this statement are apparently untrue in points that bear against the defence, especially, that Chowdhry's men rushed towards Gour Babu's men at an early stage and that Rupan Singh was beaten. In the Sessions Court he returned to his original statement, giving slightly fuller details. Thus after the talk between the leaders he says that half an hour elapsed before the dafadar came. He changes his statement with regard to Rupan Singh and says that he with others shouted "Maro." He speaks of the intervention of the chaukidars and dafadar and the incitement by Debi Singh. Behari is a more common place witness. He agrees with Lodhi about the arrival of the two parties and then he was sent to fetch the dafadar. On his return he says that the men of Gour Babu abused the men of Chowdhry Sahib and began to fight them. This was before the committing Magistrate. He amplifies this statement in the Court of Sessions and says that Gour Babu's men raised the alarm "Mar, mar" and the chaukidars and dafadar entreated Gour Babu's men not to commit rioting, but they did not listen. He also adds that Debi Singh instigated and that Mahadeo Singh struck the first blow. The evidence of Jalil dafadar is to the same effect and his statement has not varied. He also speaks about the intervention of the chaukidars and himself and the withdrawal of both sides thereafter and the instigation by Debi Singh.

The argument on behalf of the appellants based on this evidence is that the appellants did not fight until they were compelled to, that they adopted a pacific attitude, that Gour Babu's men were the first to attack, and that they acted in self-defence. The learned Assistant Government Advocate on the other hand in his very able argument contended, and I think rightly, that this is not a case of the private defence of person at all. Both parties went out armed on account of the dispute about the right to cut lac. Apparently the peons of Gour Babu had been collecting for some days though they may not have arrived on the scene till the morning of the 22nd, the chaukidar says that they had not arrived the previous evening, and the twenty or thirty men who were on the side of Chowdhry were not collected in a moment either. There was therefore ample time to have recourse to the authorities, the police station being only six miles distant and it was the clear duty of Muhammad Bukhsh Chowdhry when he heard that armed peons were being collected on behalf of Gour Chandra Roy, to inform the authorities instead of raising an armed force on his own account.

Homicide upon chance medley (or chaude mellee) borders very nearly upon manslaughter and in fact and experience, the boundaries in some instances are scarcely perceivable, though in consideration of law they have been fixed..... In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated or with malice; and from the doctrine which has been above laid down, it appears that the law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely could to avoid the violence of the assault before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity but from a real tenderness of shedding his brother's blood...The party assaulted must therefore flee, as far as he conveniently can, either until prevented by reason of some wall, ditch or other impediment or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm, and then, in his defence he may kill his assailant instantly. Before a person can avail himself of the defence, that he used a weapon in defence of his life, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it and that it was

necessary to protect his own life or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he would be justified : (Russel on Crimes, Eight Edition, pages 769-770).

And it may be further observed that a man cannot, in any case, justify killing another by pretence of necessity unless he were wholly without fault in bringing that necessity upon himself, ibid, page 777.

This statement of the law is based upon authority [1 Hale, 440, 441, 481, 486, *R.* v. *Smith* (1)] which is as valid in India as in England. Now the accused in this case had no notion of retreating. They actually advanced to meet the attack. There can be no doubt that this was a free fight for which both sides had come prepared. In *Queen* v. *Jeolal* (2) it was said :

In such a case there could be no private defence either to one side or the other. Both sides were evidently aware of what was likely to happen, for they both turned out in force and were armed with deadly weapons.

In *Kalee* v. *Baparee* (3), where the appellants had been concerned in an affray in which a man was killed, their Lordships observed as follows :

There is good reason to believe that on both sides there was irritation and also determination to resort to force to support the rights and wishes of the parties ; and the Judge expressly says that it appears from the evidence (and it must be taken therefore that he believes it in that respect) that there had been preparation on both sides for an armed encounter.

It was held that under these circumstances it made no difference who was the attacking party where both parties were armed and prepared for battle. The leading case is *Kabiruddin* v. *Emperor* (4) where it was laid down that according to the Penal Code no right of private defence arises in circumstances such as those of that case when both parties armed themselves for a fight to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle. And in *Queen-Empress* v. *Prag Dat* (5) the opinion of Sir John Edge was quoted with approval :

That when a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men who on the other hand are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself but each side is trying to get the better of the other.

There can be no doubt in the present case that if Chowdhry's men had wanted to get away from the fight, they could have done so. The evidence of the chaukidar makes it clear that after the leaders had had their discussion both parties continued to stand their ground for a considerable time and it was in these circumstances that the fight took place. No right of private defence, therefore, arose, and, in my opinion, the appellants were rightly convicted. The appeal must be dismissed and the appellants will surrender to their bail to undergo their sentences.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

(1) [1837] 8 C. & P. 160.
(2) [1867] 7 W. R. Cr. 34.
(3) [1878] 1 C. L. R. 521.
(4) [1908] 35 Cal. 368 = 12 C. W. N. 384 = 7 C. L. J. 359.
(5) [1898] 20 All. 459=(1898) A. W. N. 117.

A. I. R. 1926 Patna 436

ADAMI J.

Hargobind Singh — Plaintiff —Appellant.

v.

Kishundeyal Gope — Defendant—Respondent.

Appeal No. 118 of 1923, Decided on 16th April 1926, from the appellate decree of the Offg. Sub-J., Patna, D/- 9th December 1922.

(a) *Bengal Tenancy Act, S. 71—Suit for rent—Bhault rent—Tenants removing crops before appraisement—Landlord is entitled to claim rent on the basis of best crops in the neighbourhood on similar lands.*

It is true that, where a plaintiff claims a certain amount of rent in cash and the defendant admits a lesser amount, unless the plaintiff can give good proof of the larger amount being payable, the suit will be decreed on the defendant's admission. But a different situation arises in the case of a claim for Bhauli rent. If tenants cut and take away crop before it can be appraised or do not attend at the appraisement, under S. 71 (4), Bengal Tenancy Act, presumption arises against them and the landlord is entitled to the full measure of the crop as of the best crop in the neighbourhood of a similar character to that harvest : 52 *I. C.* 267, *Rel. on.* [P 437, C 2]

(b) *Evidence Act, Ss. 74 and 35—Crop cutting report of Deputy Collector under S. 40, Bengal Tenancy Act, is public document and admissible to prove quantity of crops cut—Bengal Tenancy Act, S. 40.*

The crop cutting report of the Deputy Collector made under S. 40, Bengal Tenancy Act, should

be considered a public document and is evidence of the amount of crops produced by the land. 4 *Cal.* 79, *Rel. on.* [P 488 C 1]

Sarju Prasad and *S. N. Roy*—for Appellant.

N. N. Sinha—for Respondent,

Judgment.—The plaintiff in the suit is appellent here. He sued for recovery of arrears of produce rent for the years 1325 to 1328 he being the landlord of the 16 annas share. He claimed a half share of the paddy crop for the years in suit, 1325 to 1328, at the rate of 18 to 22 maunds per bigha and in respect of khesari at the rate of 8 to 12 maunds per bigha. The defendant pleaded payment and asserted that the produce of the paddy lands was only 2½ to 4 maunds per bigha and that there was no khesari grown on the lands. The plea of payment was disbelieved by both the Courts to prove the produce. The plaintiff produced some appraisement khesras said to have been drawn up by his own man, also the report of a crop-cutting experiment made by a Deputy Collector, who made the crop-cutting experiment in the course of a case under S. 40 of the Bengal Tenancy Act respecting this same land. He held that a copy of the report was a copy of a public document and was admissible in evidence. The Munsif also found that both paddy and khesari were grown on the land, and he gave reasons for finding that khesari was grown. The defendant admitted that where the lands are irrigated by a canal, rabi crops are grown, and he found that the lands in suit are irrigated by a canal. The learned Munsif refused to place any reliance on the appraisement khesras produced by the plaintiff as he doubted their genuineness. He gave the plaintiff a decree for two-thirds of the amount claimed for the paddy and khesari.

On appeal the learned Subordinate Judge, while agreeing that the payment by the defendant was not proved, held that there was no good evidence to support the plaintiff's claim as to the amount of paddy grown. He held that the crop-cutting report was not admissible in evidence not being a copy of a public document, and he found that the witness brought to prove the plaintiff's appraisement khesras was altogether unreliable. He held, therefore, that the plaintiff having failed to produce any satisfactory evidence to prove the amount of his claim, the suit would have to be decreed at the amount of paddy per bigha admitted by the defendant. He disallowed the plaintiff's claim for khesari altogether on the ground. I suppose, that the plaintiff had no sufficient evidence and the defendant denied that khesari was grown. It is true that, where a plaintiff claims a certain amount of rent in cash and the defendant admits a lesser amount, unless the plaintiff can give good proof of the larger amount being payable, the suit will be decreed on the defendant's admission. But a different situation arises in the case of a claim for bhauli rent. If tenants out and take away crop before it can be appraised or do not attend at the appraisement, it is impossible for the landlord to give any certainty of the amount of crop produced on the land, and even if he sends his own man to make an appraisement, the khesra drawn up by his own man is given little credence by the Court because it is a document drawn up by the plaintiff himself.

In the case of *Balak Mahton* v. *Mathura Ram Dubey* (1), sub-S. 4 of S. 71 of the Bengal Tenancy Act was referred to. That sub-section runs as follows:

> If the tenant removes any portion of the produce at such a time or in such a manner as to prevent the due appraisement or division thereof at the proper time, that produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land for that harvest.

And the learned Judges in the case I have mentioned remarked that this sub-section seems to contemplate that where tenants do remove a crop without having the same properly appraised the presumption arises against them and the landlord is entitled to the full measure of the crop as of the best crop in the neighbourhood of a similar character to that harvest.

In the present case the tenant defendant had taken away the crop and gave no opportunity for an appraisement and I do not think that he can be allowed to derive profit from the fact that the landlord had no opportunity of finding out what the produce really was. The landlord did produce a crop-cutting report of lands close to the lands in suit and that report was drawn by a Deputy Collector acting in his official duty under S. 40 of the Bengal Tenancy Act. A question has been raised in the case whether that

(1) [1919] 52 I. C. 267.

report is a public document which would be admissible in this case. According to the case of *Taru Patur* v. *Abinash Chunder Dutt* (2), the report would seem to be a public document. In that case it was held that a Jamabandi prepared by a Deputy Collector while engaged in the settlement of land under Regulation VII of 1822, is a public document within the meaning of S. 74 of the Evidence Act. That case has been considered in several cases since, but where the finding has been differed from, it has been differed from on the ground that in the cases where it was differed from, the document had been prepared by a Government official performing the duties for Government as landlord.

In my mind the report of the Deputy Collector made in the case under S. 40 should be considered a public document and the evidence of the amount produced by the land should be admitted, and the decision of the suit with regard to the paddy produce should be based on that crop-cutting report as it was by the learned Munsif.

As to khesari. the learned Subordinate Judge gives no reason why he disallows the claim. The learned Munsif found definitely that khesari was produced and if the Subordinate Judge wished to reverse that finding he was bound to give reasons. The reasons given by the learned Munsif are good and cogent reasons, and in this point too, the learned Subordinate Judge was mistaken.

I set aside the decree of the lower appellate Court and restore the decree passed by the Munsif.

The appellant will get his costs in both Courts.

Appeal allowed.

(2) [1879] 4 Cal. 79.

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* A. I. R. 1926 Patna 438

ROSS AND KULWANT SAHAY, JJ.

Chairman, District Board, Monghyr—Appellant.

v.

Sheodutt Singh—Respondent.

Appeal No. 184 of 1925, Decided on 19th April 1926, from the Original Order of the Dist. J., Saran, D. 16th March 1925.

* *Provincial Insolvency Act* (1920), *S.* 2 (1) (*d*) *—Hindu joint family—Father adjudged insolvent—Sons' shares are liable to be sold by Official Receiver to pay off debts not incurred for immoral purpose—Hindu Law—Joint family.*

Where in the case of a Hindu joint family the father is adjudged an insolvent, even the sons' shares vest in the Official Receiver and he can dispose of the same to pay the debts of the father unless they are incurred for immoral purpose; and the pious obligation of the sons will prevent them from contending that their shares are not liable to be sold: *A. I. R.* 1925 *Patna* 127; *A. I. R.* 1924, *P. C.* 50 (*P.C.*); *A. I. R.* 1923 *Lah.* 1 (*F. B.*) *Foll.* [P. 439, C. 1, 2]

Harnarayan Prasad—for Appellant.

Sambhu Saran and *Bankey Behari Sahay*—for Respondent.

Ross, J.—In 1918 Sheodutt Singh filed a petition in insolvency, and on the 7th January 1919, a receiver was appointed to take charge of his property. On the 7th September 1921, the wife of the insolvent, on behalf of her minor children, filed a petition claiming that three-fourths of the properties should be exempted from liability. The District Judge referred the matter to the receiver; and accepting his report, exonerated the share of the minor children from sale.

The matter came before the High Court, and the case was remanded in order that the District Judge should deal with the question himself. The District Judge has now given his decision; and, overruling the objection of one of the creditors, the Chairman of the District Board of Monghyr, he has accepted the evidence on behalf of the minors that Sheodutt Singh was a man of immoral habits and has held that there is nothing to show that there was any enquiry regarding the necessity for the loan; and that it had not been established that the loan was raised for the benefit of the minors. He has consequently directed that three-fourths share of the property, being the share of the three minor sons of the insolvent, should be exempted from sale. The Chairman of the District Board of Monghyr has appealed against this decision; and it is contended on his behalf that as it is the pious duty of the sons to pay their father's debt the whole of the estate is assets in the hands of the receiver. It is further contended there is no evidence of the immorality of the debt in question in this case; that a general charge of immorality is not sufficient; and that there must be some-

thing to connect the immorality of the debtor with the debt.

The debt is a decree for money obtained by the District Board against Sheodutt Singh. There is nothing to show what the nature of the debt was.

The learned advocate for the respondents relies upon the definition of "property" contained in S. 2 (1) (d) of the Provincial Insolvency Act:

"Property" includes any property over which or the profits of which any person has the disposing power which he may exercise for his own benefit;

and he contends that although a Mitakshara father can dispose of the property of the family for necessity or for antecedent debt, his powers extend no further; and as there is nothing to show in the present case that the debt had been contracted for family necessity or to pay off an antecedent debt, the family property is not liable. It is pointed out that the decision in *Amolak Chand* v. *Mansukh Rai Mangal Lal* (1) upon which the appellant relied, was a decision in a case of antecedent debt. Now there is no doubt that the District Board could have executed their decree against the family property: *Brij Narain* v. *Mangal Prasad* (2), where it was laid down by the Judicial Committee that if the managing coparcener is the father and the reversioners are his sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt. The principle underlying this rule is thus stated in that decision:

Then there comes in the further doctrine that the debt has been contracted by the father, and the pious obligation incumbent on the son to see his father's debts paid prevents him from asserting that the family estate, so far as his interest is concerned, is not liable to purge that debt. It my become liable by being taken in execution on the back of a decree obtained against the father, or it may become liable by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought.

If their pious duty prevents the sons from asserting that the family estate is not liable to be taken in execution, I do not see in principle how the sons can dispute the right of the receiver in insolvency to sell the property in order to liquidate the father's debt. If the debt was recoverable by execution before insolvency it is not easy to see why the creditor should be deprived of his relief merely because the estate has vested in the receiver. And it has been so held by the Full Bench of the Lahore High Court in *Bihari Lal Jamna Das* v. *Sat Narain* (3), where the learned Chief Justice said:

It has, however, been repeatedly held ..... that joint family property can be attached and sold in execution of a decree for money passed against the father, and that the sale affects the interest of the son as well as that of the father, and in principle I see no real difference between an individual creditor realizing his debt from the coparcenary property and an official assignee who represents the general body of the creditors, seizing it for the satisfaction of their debts.

It has not been proved that this debt was incurred for immoral purposes; and there is in my opinion no obstacle to the sale of the family property by the receiver in order that the debt may be discharged.

It was further contended on behalf of the respondents that the case was remanded by the High Court [*Sant Prasad Singh* v. *Sheodutt Singh* (4)] for a decision on the allegations in the petition filed on behalf of the minors and that the District Judge has come to a decision on these allegations and has found that the debt was not contracted for the benefit of the family; and that consequently the position taken up by the minors has been established; and it must be taken, under the decision of the High Court, that nothing has vested in the receiver. But the legal consequences of the findings of the District Judge cannot be taken to have been determined before these findings had been arrived at; and, moreover, the view of the law expressed in *Sant Prasad Singh* v. *Sheodutt Singh* (4), which rested on the decision in *Sahu Ram Chandra's* case (5) has been held to require reconsideration in view of the later decision of the Judicial Committee which has been referred to above: vide *Amolak Chand* v. *Masukh Rai* (1). It follows that this appeal must be allowed and the order of the District Judge exempting three-fourths of the property from sale must be set aside. There will be no orders as to costs.

Kulwant Sahay, J.—I agree.

Appeal allowed.

(1) A. I. R. 1925 Patna 127=3 Pat. 867.
(2) A. I. R. 1924 P. C. 50=46 All. 95.
(3) A. I. R. 1928 Lah. 1=8 Lah. 329 (F. B.).
(4) A. I. R. 1924 Patna 259=2 Pat. 724.
(5) [1917] 39 All. 437=39 I.C. 280=44 I.A. 126 (P. C.).

* A. I. R. 1926 Patna 440

ROSS AND KULWANT SAHAY, JJ.

Bigna Kumhar and *others*—Accused—Appellants.

v.

King-Emperor—Opposite Party—Respondent.

Criminal Appeal No. 199 of 1925, Decided on 24th February 1926, from an order of the Judl. Commr., Chota Nagpur, D/- 27th October 1925.

(a) *Criminal P. C., S. 288—"Subject to the provisions of the Evidence Act" means so far as the previous evidence is evidence under the Evidence Act and not so far as it is admissible under that Act—Weight to be given to the previous evidence depends on facts of each case, but it cannot be utilized to support conviction unless there is other evidence to corroborate it.*

Section 288 makes the previous evidence of a witness taken before a committing Magistrate, evidence admissible at the trial and the limitation imposed to such admission by the introduction of the words "subject to the provisions of the Indian Evidence Act" merely means that such evidence can be used at the trial for all purposes as long as the evidence is evidence within the meaning of the Evidence Act. In other words, that the deposition recorded by the committing Magistrate can be utilized at the trial if the matter contained therein is according to the rules of evidence laid down in the Evidence Act, of evidential value. To limit the admissibility of such evidence at the trial only to cases where the evidence is admissible under the Evidence Act would be to frustrate the object in enacting S. 288 of the Criminal P. C.: *A. I. R.* 1925 *Pat.* 51, *Rel. on.* [P 442, C 2]

It is difficult to lay down any precise rule as regards the weight to be placed on a piece of evidence admitted at the trial. Each case will depend upon its own peculiar facts and the nature of the other evidence adduced in the case. It can, however, be said that if a witness makes two contradictory statements, his evidence cannot be implicitly relied upon and must be taken with a good deal of caution. [P 443, C 1]

Unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilized in support of a conviction. *A. I. R.* 1925 *Pat.* 51, *Foll.*; *A. I. R.* 1924 *Mad.* 379, *Ref.* [P 443, C 1]

(b) *Evidence Act, S. 30—Confession to be used against co-accused must be confession of guilt of maker.*

Confessions of an accused can be used against other accused persons who are tried jointly with the accused making the confession when such confession affects the person making it. A confession must be a confession of guilt. [P 443, C 2]

Anand Prosad and *Sudhansu Ranjan Sen Gupta*—for Appellants.

Asst. Govt. Advocate—for Respondent.

Judgment.—The six appellants with three others were charged with offences under Ss. 302 and 147 of the Indian Penal Code. They were charged with committing murder by intentionally causing the death of Mt. Ghasin and with being members of an unlawful assembly with the common object to kill and cause hurt to Mt. Ghasin in prosecution of which common object the said Ghasin was beaten by the members of the assembly causing her death. The trial was held with the aid of four assessors. Three of the assessors were of opinion that it was doubtful if Mt. Ghasin was dead or alive and missing, and that the evidence was not sufficient to convict the accused. One assessor was of opinion that Mt. Ghasin has been killed but that the charge under S. 302 had not been proved. He considered that the charge under S. 147 had been proved. The learned Judicial Commissioner agreed with the assessors that the charge under S. 302, I. P. C. had not been established against any individual accused. He, however, came to the conclusion that a riot had been committed and that those who took part in the riot were guilty under S. 147, I. P. C. He was of opinion that the six appellants were guilty under S. 147 and convicted them under the said section and sentenced them to undergo rigorous imprisonment for two years. He acquitted three of the accused, being of opinion that the evidence against them was not sufficient.

This Court, in admitting the appeal also directed notice to issue on the appellants to shew cause why they shall not be convicted of an offence under S. 302, I. P. C. We have therefore to consider not only the question as to whether the conviction under S. 147, I. P. C. should stand, but also as to whether the evidence on the record leads to the conclusion that the appellants were guilty under S. 302, I. P. C.

The appeal has been very ably and fully argued by Mr. Anand Prasad on behalf of the appellants and the learned Assistant Government Advocate, with his usual fairness, has conceded that the evidence is not sufficient to convict the appellants of an offence under S. 302 I. P. C. I propose, however, to discuss the evidence as regards both the offences.

Mt. Ghasin was a widow living with her only son Lohra Kumhar, a child ten

years old. The appellant, Bigna Kumhar, is her husband's brother and her house was situated in the same angan as that of Bigna. The other appellants are all related with each other, and with Bigna.

The prosecution case is that the deceased Mt. Ghasin was supposed to be a witch or possessed by some evil spirit and that she was the cause of illness of several persons in the village. The appellant, Bucha Kumhar, had a son named Bandhan and he died on the 1st of May 1925. The prosecution case is that the appellants believed that the death of Bandhan had been caused by the witchcraft of Ghasin. The appellants and one Tipru Sawasi, who is a bhandari of the landlord of the village, went to bury the body of Bandhan and there was some talk about the death of the boy having been caused by Mt. Ghasin and there was a proposal that Mt. Ghasin should be got rid of. After the burial a meeting is said to have taken place in the house of Bucha after sunset, to which Tipru was also called, where it was resolved to kill Mt. Ghasin. Tipru says that he warned them not to do so, and that he went straight from the meeting to Mt. Ghasin and told her to run away as there was a proposal to kill her. It is said that at about midnight the deceased Mt. Ghasin and her son Lohra were sleeping on a khatia in a room facing the verandah of her house when the appellants went and Bigna called Ghasin and asked her to come out. She did come out and according to one version, Bigna caught her by the throat and threw her down, and according to another version, Harakh caught and threw her down. They are said to have throttled her and to have trampled upon her and killed her and to have carried her either dead or alive.

Now this is said to have taken place on the night of the 1st May 1925. Nothing happened until the 17th of May. The boy, Lohra, used to live with his uncle, the appellant Bigna. On the 17th of May, Lohra's sister's husband Kandna and his father, Mahesh, who live at Mouza Tingaria went to Mt. Ghasin's house and enquired of Lohra as to where she was, and then Lohra is said to have told them at once that she had been killed by the appellants and others and that her body had been thrown away. They apparently did not believe him, and they took him to the house of Dukhan and Ladhu, who are the brothers of the deceased woman and lived at Mouzah Timra; and there they enquired as to whether Mt. Ghasin was there. On being informed that she was not there, Lohra told them about her death and they all resolved to go to the thana and lodge the first information. It appears that Kandna and Mahesh before going to Timra, had gone to the chaukidar Sohrai and informed him; but that Sohrai told them that he would first go to the village and enquire into the matter and then go to the thana the next day. The first information was lodged at the thana at Karra on the 18th of May 1925 at about 2 p. m. by the boy Lohra. He was accompanied by the chaukidar Sohrai, by Mahesh and Kandna and by his maternal uncles Dukhan and Ladhu. He stated that Bigna Kumhar came to the house at about midnight and asked his mother to open the door and that his mother opened the door and that the other appellants then came up and they all accused her of being a witch and of bringing about the death of Bucha Kumhar's son. Bigna is said, in this first information report, to have seized his mother by the throat and knocked her down and the other appellants to have kicked and fisted her and killed her by trampling. Lohra stated in this first information that he was awakened when Bigna first came to the house and that he had seen all that had happened. He further stated that Bigna had warned him not to speak about the affair to anyone and that he was threatened that they would kill him if he told anybody about it. He stated that on the previous day, when his sister's husband Kandna and the latter's father Mahesh came to his house and enquired about his mother, he told them that she had been killed.

Now the evidence of this boy Lohra is the most important evidence in the case. He is the only eyewitness of the occurrence and if his evidence is believed, the whole of the occurrence, as stated by him is proved. The other important evidence is that of Tipru Sawasi, the bhandari of the village. The cause of the murder is said to be the general belief that the deceased woman was a witch. It is said that the appellants and others believed that she was the cause of the illness of the people in the

village and that the death of Bucha's son was the immediate cause of the murder. There is no doubt upon the evidence that there was some sort of belief in the minds of the accused and others that the illness in the village was caused by Ghasin. But it seems that the belief was not that she was really a witch but that she was herself possessed by some evil spirit. In Chait or Baisakh preceding the occurrence there appears to have been a panchait, which Tipru and others attended, and there a proposal was made to take steps to drive away the evil spirit from her and that one of the members of the panchait undertook to do so if he was given expenses for making certain sacrifices. This appears to have been a friendly proposal to relieve Mt. Ghasin of the evil spirit which possessed her. The evidence is that during the illness of Budhan and others, Mt. Ghasin used to go and see the sick men and there was no objection to her doing so. She used to go and visit the appellants and others and to dine with them and no objection appears to have been taken to this. There does not appear to be any strong feeling in the mind of the accused and others to get rid of Mt. Ghasin herself on account of her being a witch. Therefore, although there appears to be some sort of belief in the mind of the accused of Mt. Ghasin being either a witch or possessed by some evil spirit, and although it has been established by the evidence that Bucha's son died on the 1st of May, the evidence falls short to prove that the appellants resolved to kill Mt. Ghasin on account of such a belief and on account of the death of Bucha's son.

The meeting of the villagers at the funeral and the resolution to dispose of Mt. Ghasin is deposed to by Tipru alone. As regards his evidence it is clear that one cannot place great reliance upon it. He made conflicting statements before the committing Magistrate and in the Sessions Court. The learned Judicial Commissioner has relied upon his evidence before the committing Magistrate which was admitted under S. 288 of the Criminal Procedure Code. It was contended by the learned vakil for the appellants that the evidence before the committing Magistrate was not admissible at the trial. Reliance was placed upon the words "subject to the provisions of the Indian Evidence Act, 1872" introduced into the section by the Amending Act of 1923. By this Amending Act, the evidence of a witness taken before a committing Magistrate may be treated as evidence in the case, if such witness is produced and examined at the trial" for all purposes "subject to the provisions of the Indian Evidence Act." These words have introduced a certain amount of ambiguity in the section. One cannot be certain as to what is exactly meant by these words. Under the provisions of the Indian Evidence Act the evidence of a witness examined before a committing Magistrate would not be admissible in evidence except under S. 145 or under S. 155 of the Evidence Act for the purposes of the witness being examined as to his previous statement and relevant matters in question or with the intention to contradict him with the statement made by him in previous depositions or generally in order to impeach the credibility of the witness ; or under S. 157 for the purpose of corroborating the testimony of the witness given at the trial. To my mind S. 288 makes the previous evidence of a witness taken before a committing Magistrate, evidence admissible at the trial and the limitation imposed to such admission by the introduction of the words "subject to the provisions of the Indian Evidence Act" merely means, as laid down by this Court in *Emperor* v. *Jehal Teli* (1) that such evidence can be used at the trial for all purposes as long as the evidence is evidence within the meaning of the Evidence Act. In other words, that the deposition recorded by the committing Magistrate can be utilized at the trial if the matter contained therein is according to the rules of evidence laid down in the Evidence Act of evidential value. To limit the admissibility of such evidence at the trial only to cases where the evidence is admissible under the Evidence Act would be to frustrate the object in enacting S. 288 of the Criminal Procedure Code. In my opinion the previous deposition of Tipru taken before the committing Magistrate was rightly admitted at the trial.

The question, however, is as to what is the weight of such evidence. This point has been discussed in a number of cases some of which have been noticed

(1) A.I.R. 1925 Patna. 51=3 Pat. 781.

by the learned Judges in the case of *King-Emperor* v. *Jehal Teli* (1). In addition to this, reference may be made to the case of *Bachula Peda Somadu* v. *King-Emperor* (2). It is difficult to lay down any precise rule as regards the weight to be placed on a piece of evidence admitted at the trial. Each case will depend upon its own peculiar facts and the nature of the other evidence adduced in the case. It can, however, be said that if a witness makes two contradictory statements, his evidence cannot be implicitly relied upon and must be taken with a good deal of caution. In *Jehal Teli's case* (1) after consideration of the cases bearing on the point, the learned Judges observed as follows :

I think, therefore, that the principle is quite clearly settled by this line of cases that unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilized in support of a conviction.

I entirely agree with this expression of opinion and unless Tipru's statement before the committing Magistrate is materially corroborated by other evidence or is shown by facts clearly established by other evidence that the statement made by him before the Magistrate was a true statement, the conviction ought not to be sustained upon such evidence. (The judgment then discussed the evidence and proceeded.) I now come to the confession of Bigna. It appears that on the 27th of May 1925, he made a statement before the Sub-divisional Officer in which he stated that on a Saturday or Sunday at the end of Baisakh, Harakh, Hati, Sibu Kumhar, Dhirju Nana, Ramjia Fagu and Bora Kumhar killed Mt. Ghasin and threw away her corpse. The Sub-divisional Officer then asked him as to what had happened and he stated that when Bucha's son died, Phagu called him (Bigna) and said" See the child is dead. Why have you killed him, have you eaten him what have you done, say or else I will kill you and throw you away. If you go by what your sister-in-law says we shall kill you, if you go by what we say nothing will happen to you. That there was a meeting about sunset in the angan of Rangia and Bucha ; that it was decided to kill his sister-in-law. He gave the names of all the appellants and of others as being present. He says that he was also present as Bora and Phagu had gone to call him. He then says that they came during the first part of the night when Harakh called his sister-in-law saying that he wanted to speak something to her and asked her to come out for a drink of haria. His sister-in-law said that she would not go at night and that Harakh said that he had got something to tell her and thereupon his sister-in-law came out of the room and sat in the varandah. Harakh asked her if she had haria, to which she replied that she had not got haria. Harakh then seized her by the throat, Phagu seized her legs and some of the others trampled and some kicked her ; Sibu thrust cloth in her mouth and Harakh throttled her to death. On being asked as to where did he see the occurrence from, he said that Harakh woke him and took him to the spot and told him that if he would lodge information they would kill him. That is why he did not give information. On being asked where did they throw the corpse of his sister-in-law, he said that after they had killed her they immediately carried her corpse and buried her in the sands in Karo river on the boundary between villages Bilsiring and Kedli.

Now the question is whether this is a confession at all and whether it could be used as evidence not only against Bigna but also against the other accused. S. 30 of the Evidence Act is quite clear. Confessions of an accused can be used against other accused persons who are tried jointly with the accused making the confession when such confession affects the person making it. A confession must be a confession of guilt The statement made by Bigna could in no sense, be considered to be a confession of guilt. He does not inculpate himself in any way. He states that he himself was accused by Phagu as being instrumental in killing the son of Bucha and he was himself threatened with being killed. He accounts for his presence there as he was called there by Phagu and Boro. His statement does not make it out that he was a member of the assembly with the common object of killing or causing hurt to Mt. Ghasin. I am, therefore, clearly of opinion that this statement is not a confession at all which

(2) A.I.R. 1924 Mad. 379=47 Mad. 282.

can be used in evidence either as against Bigha or against the other accused. This confession was retracted subsequently and it was stated that he had made the statement at the instance of Tipru.

It is then contended that his statement to the police which led to the discovery of the bones and the ornaments could be used as evidence. It is clear that the bones were not discovered on account of the statement made by Bigna. His statement was that the body was buried at a certain place. The Sub-Inspector went there and did not find the body there. He next stated that it was removed to another place and there also no trace of the body was found. The bones were discovered at a third place and as I have said above the bones have not been proved to be the bones of Mt. Ghasin.

In the circumstances the charge under S. 302 cannot stand.

The charge under S. 147 also cannot stand as it is based entirely upon the evidence of Tipru and Lohra, whose evidence is not sufficient to prove that the appellants were members of an unlawful assembly. The learned Judicial Commissioner has found that the present accused persons were members of the unlawful assembly on account of the discovery of the stains of human blood on the cloths of the accused. A motia chadar was found on the person of Ronghia; a dhoti was found on the person of Boro; a chadar was found in the house of Boro; a dhoti was found on the person of Phagu; a chadar was found on the person of Bucha and another chadar on the person of Bigna, on all of which were stains of human blood. The cloths were discovered about three weeks after the occurrence and it is hard to believe that if the stains of blood were the stains caused by the murder of Mt. Ghasin the accused persons would not have taken the ordinary precaution of washing the stains from the cloths. In my opinion the finding of the stains of blood on the cloths is not a circumstance which would prove the complicity of the accused in crime.

After a careful consideration of the entire evidence in the case, I am of opinion that the charge under S. 302 has not been established and that the charge under S. 147, Indian P. C., has also not been sufficiently proved as against the accused. I would, therefore, set aside the conviction and sentence passed upon the appellants and direct that they be set at liberty.

Conviction and sentence set aside.

A. I. R. 1926 Patna 444

ADAMI AND KULWANT SAHAY, JJ.

Sarda Devi—Judgment-debtor—Appellant.

v.

Ram Louchan Bhagat and *others*—Decree-holders—Respondents.

Appeal No. 263 of 1925, Decided on 8th April 1926, from the appellate order of the Dist. J., Santhal Pargannas, D/- 7th September 1925.

(a) *Grant — Brahmottar interest created by Ghatwal is not burdened with service—It is liable to be sold in execution of a decree.*

A Brahmottar interest created by a Ghatwal is not burdened with any services as a Ghatwali estate is, and although the interest created by the Brahmottar grant is liable to resumption under certain circumstances, such interest can be sold in execution of a decree. The Brahmottar interest cannot be held to be inalienable because the Ghatwal who created the Brahmottar right had no power to alienate his own estate. So long as the interest created under the Brahmottar grant is in existence such interest is liable to be attached and sold in execution of a decree against the Brahmottadar. [P. 445, C. 1, 2]

(b) *Bengal Regulation* (8 *of* 1872), *S.* 27—*Landlord's interest in raiyati holding can be sold in execution of a decree.*

S. 27, prohibits the transfer by a raiyat of his right in his holding or any portion thereof by sale, gift, mortgage or otherwise; it does not prohibit the landlord from transferring his or her interest in a raiyati holding if the landlord by some means or other comes into possession of such holding. No doubt the possession of the landlord is the possession of the land as raiyati land and not as zerait or proprietor's private land, but so long as the proprietor remains in possession of this raiyati land, the interest which he has in such raiyati land to remain in possession is liable to transfer and sale. [P. 445, C 2]

N. C. Sinha and *B. P. Sinha*—for Appellant.

S. M. Mullick and *Pashupati De*—for Respondents.

Kulwant Sahay, J.—This is an appeal by the judgment-debtor. The respondents in execution of a money decree obtained by them against the appellant, sought to attach and sell the four annas brahmottar interest of appellant in Mauzah Sadhuadih. It appears that 6

bighas of land comprised within the four annas brahmottar interest is under the direct cultivation of the brahmottardar and the decree-holder wanted to attach and sell her right, title and interest in this 62 bighas of land also. The judgment-debtor objected to the attachment and sale of her brahmottar interest and of her interest in the 62 bighas of land on the ground that the brahmottar interest was not saleable, nor was her interest in the 62 bighas which was raiyati interest. The learned Subordinate Judge allowed the objection and held that the interest of the judgment-debtor in the properties sought to be attached and sold was not saleable. On appeal the learned District Judge disallowed the objection and has held that the interest of the judgment-debtor is saleable. The judgment-debtor has come up in second appeal against the decision of the District Judge.

As regards the four annas brahmottar interest the objection of the judgment-debtor arises under the following circumstances :

The village Sadhuadih is compromised within the Handwe estate which is a ghatwali estate and is inalienable. The brahmottar interest in the 16 annas of village Sadhuadih was granted by the proprietors of the Handwe estate, and the objection of the judgment-debtor is that the Handwe estate being inalienable on account of its being a ghatwali estate, the brahmottar interest created by the ghatwal in village Sadhuadih was likewise inalienable. The learned District Judge has pointed out that the interest created by the ghatwal by the brahmottar grant is a resumable interest but it is an interest which is not protected from sale or alienation like a ghatwali estate. A brahmottar interest is not burdened with any services as a ghatwali estate is, and although the interest created by the brahmottar grant was liable to resumption under certain circumstances, such interest could be sold in execution of the decree.

In my opinion the decision of the learned District Judge on this point is correct. The brohmottar interest cannot be held to be inalienable because the ghatwal who created the brahmottar right had no power to alienate his own estate. So long as the interest created under the brahmottar grant is in existence such interest is liable to be attached and sold in execution of a decree against the brahmottardar.

Mr. Naresh Chandra Sinha, appearing on behalf of the judgment-debtor appellant, does not press the point as regards the brahmottar interest with any seriousness. He, however, seriously objects to the attachment and sale of the 62 bighas of land included in the four annas brahmottar interest of the judgment-debtor He contends that this 62 bighas is a raiyati interest and under the Santhal Reg 3 of 1872, a raiyati interest is not saleable and therefore the 62 bighas of land comprised within the four annas brahmottardar as also under the direct cultivation of the brahmottardar, is also not saleable.

The learned District Judge has come to the conclusion that the interest of the judgment-debtor in the 62 bighas is not the interest of a raiyati but she is in possession of the 62 bighas in her capacity as brahmottardar or tenure-holder.

In my opinion, the view taken by the learned District Judge appears to be sound. The record-of-rights which is conclusive under Reg. 3 of 1872 shows that the 62 bighas is in possession of the judgment-debtor as brahmottardar ; the entry in the record-of-rights is " bakasht brahmottardar." This evidently means that although the land might have been raiyati land at one time, by some means or other it has come into the possession of the brahmottardar and that the brahmottardar is in direct cultivation of 62 bighas in the capacity of a brahmottardar and not as a raiyat. S. 27 of Reg. 3 of 1872 prohibits the transfer by a raiyat of his right in his holding or any portion thereof by sale, gift, mortgage or otherwise ; it does not prohibit the landlord from transferring his or her interest in a raiyati holding if the landlord by some means or other comes into possession of such holding. No doubt the possession of the landlord is the possession of the land as raiyati land and not as zerait or proprietor's private land, but so long as the proprietor remains in possession of this raiyati land, the interest which he has in such raiyati land to remain in possession is liable to transfer and sale. The learned District Judge was careful to point out that what will be sold was the right, title and interest of the judgment-debtor in the four annas brahmottar interest

and in the 62 bighas of land held by her in the capacity of a brahmottardar.

The view taken by the learned District Judge appears to be correct and must be affirmed. This appeal is dismissed with costs.

Adami, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 446

BUCKNILL, J.

Aklu and *another*-Accused—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 287 of 1926, Decided on 7th June 1926, from an order of the S. J., Purnea, D/- 8th March 1926.

(a) *Motor Vehicles Act, Ss. 8 and 16—Right to demand driver's license for inspection is not restricted to a public place only.*

Section 8 does not contemplate that police officer cannot ask a driver of a motor vehicle for his license in the private grounds of a private person and that he can only do so when a car is actually being driven by the person, whose license is demanded, whilst on the public road. [P. 447, C. 1]

(b) *Motor Vehicles Act* (1914), *S.* 16—*(Patna) Motor Vehicles Rules—R.* 12—*Person responsible for fixing board is the owner and not the user of the car.*

The person responsible for having a board fixed upon the vehicle under R. 12 is owner and not the person who, from time to time, may have the use of the car.

Where a car is purchased by an estate for the use of its manager the manager cannot be said to be the owner under R. 12. [P. 448, C. 1]

(c) *Motor Vehicles Act* (1914), *S.* 16—*(Patna) Motor Vehicles Rules, R.* 13—*Time at which car was found driven without proper lights must be accurately proved.*

It is of the utmost importance that when a prosecution for driving the car without proper lights is being undertaken, there should be independent and direct evidence (preferably of two persons with separate and accurate timepieces) indicating exactly the time at which the car has been observed being driven on the public road with defective lights. [P. 448, C. 1]

Hasan Imam and *D. L. Nandkeolyar*—for Petitioners.

Bucknill, J.—This was an application made to this Court in criminal revisional jurisdiction by two persons named Aklu and Shyamnarain Rai. The first of the applicants is a chauffeur in the employment of a wealthy gentleman named Mr. P. C. Lal, the proprietor of a large property known as the Dharamganj Estate. This chauffeur was convicted by a Deputy Magistrate of Purnea on the 12th of January last of an offence against the provisions of S. 8 of the Motor Vehicles Act (VIII of 1914) which is punishable under the provisions of S. 16 of the same Act. The offence contemplated by S. 8 is the non-production by the driver of a motor vehicle of his license upon demand by any police officer. This applicant was fined Rs. 5.

The second applicant is an Assistant Manager of the Dharamganj Estate; he is also in the employment of Mr. Lal and is in a responsible position. He was convicted by the Deputy Magistrate of Purnea on the 12th of January last of two offences against rules made under the provisions of the Motor Vehicles Act of 1914. The first of these convictions was in respect of an offence committed against the provisions of R. 12. This rule relates to the necessity for having marked and numbered plates on a motor vehicle. The second conviction was relative to R. 13 of the rules made under the Motor Vehicles Act of 1914. This R. 13 relates to the necessity for the appearance of certain lamps on motor vehicles driven on public roads at certain times of the night. Apparently, as a sort of compound penalty for the breaches of Rr. 12 and 13, the Deputy Magistrate sentenced Mr. Shyamnarain Rai to pay a fine of Rs. 25; the penalties for contravention of rules made under the Act are regulated mainly by S. 16 of the Act itself. From these convictions and sentences the two applicants applied to the Sessions Judge of Purnea, asking that he should refer the matter to this Court; the Sessions Judge, however, on the 8th of March last, refused to do so and hence the matter has come up here in revision.

The whole matter is really a very petty one; but it seems to have aroused a considerble amount of feeling in the neighbourhood. I do not propose, however, to refer to any question of that kind, but merely to examine the matter from a legal point of view. In the first place, with regard to the first applicant, the chauffeur, there is no doubt that he had been driving a car; he had driven the car to the house of a Deputy Magistrate, Babu Rameshwar Singh, at Kishanganj and when at that gentleman's house was asked by a Deputy Superintendent of Police (Mr. Sanyal) to produce

his license; he had not got it with him, but had it at his house. S. 6 of the Act prescribes so far as is here material, as follows:

No person shall drive a motor vehicle in a public place unless he is licensed in the prescribed manner, and no owner or person in charge of a motor vehicle shall allow any person who is not licensed to drive it.

Section 8 reads:

The driver of a motor vehicle shall produce his license upon demand by any police officer.

The learned counsel, who has appeared for the applicants here, suggests that a police officer cannot ask a driver of a motor vehicle for his license in the private grounds of a private person; but can only do so when a car is actually being driven by the person, whose license is demanded, whilst on the public road. I do not think that there can properly be read into the Act any such exact restrictions of the time or place at which a police officer can demand a driver's license. The administration of this law should, however, be carried on with sympathy and firmness. In this case, it seems that the Deputy Superintendent of Police, one evening, saw the car in question being driven into the premises of the Deputy Magistrate; it seems to have had no name plate and the lights are said to have been defective; the Deputy Superintendent therefore followed the car and eventually reached the Deputy Magistrate's compound and there it was that he asked the chauffeur for his license. Now, as a matter of fact, it is common ground that the chauffeur was a properly licensed driver and had at his house near by his license. I must admit that it does seem to me (although it may be said that the chauffeur was guilty of a technical offence) that it is rather a harsh way of administering the law to institute a prosecution against a chauffeur simply because he may have not got his license on his person. In any case, although I think that he has committed a technical offence I do not think that he should, under the circumstances, have been prosecuted; and I therefore order that his fine shall be reduced from Rs. 5 to one anna as I do not think that prosecution under the circumstances should have taken place.

I next come to the question of the absence of the name-plate. There seems no doubt whatever that there was no proper name-plate on the car that evening. The explanation is that the car had just come that day from a workshop where it had been repaired and that the plate was at the Dharamganj katcheri; it would no doubt have been fixed the next day; there was plate which had always been used and properly used on the car. Now R. 12 of the rules made under the Motor Vehicles Act of 1914 throws upon the owner of the car the burden of seeing that the plates containing the distinctive letters and number of the car are fixed in the proper place upon motor vehicles. The material part reads thus:

Every owner shall within three days of the registration cause the mark assigned to the motor vehicle under R. 9 to be shown in white on two black rectangular plates etc. etc.

Now the facts with regard to this particular car are somewhat confused; one thing, however, is quite certain and that is that Mr. Shayamnarain Rai was not the owner. It would seem from the evidence of a Mr. J. J. Mackay that he was at one time the Sub-Manager at Dharamganj katcheri at Kishanganj; that during the period when he occupied that position Mr. Lal purchased a car for the use of the officer who was Sub-Manager of the Dharamganj katcheri at Kishenganj. It was a Ford car and, although it was purchased by Mr. Lal and was an estate car, it appears that Mr. Mackay (probably through ignorance of the law) registered the car in his (Mr. Mackay's) own name. So far as I am aware, this registration has never been altered; but, some time after Mr. Mackay vacated his position, he seems, under the provisions of R. 10 of the rules made under the Motor Vehicles Act of 1914, to have given written information to the police that he no longer "was in charge of the car." No doubt the "charge of the car" (whatever that may exactly mean) conveys in popular language the general idea that Mr. Mackay was in control of the car itself whilst he was Sub-Manager of the estate at Kishanganj. No doubt, too, Mr. Shayamnarain Rai succeeded Mr. Mackay in office and also in being "in charge of the car"; but although Mr. Mackay seems to have wrongly been registered as owner of the car, there is nothing to indicate that Mr. Shyamnarain Rai was ever registered even wrongly as the owner; and it is quite

clear that he is not the owner within the meaning of R. 12 of the rules. Under these circumstances it seems impossible to uphold this conviction under this rule. The person responsible for having a board fixed upon the vehicle appears to be the owner and not the person who, from time to time, may have the use of the car.

Lastly, I come to the question of the conviction under R. 13 of the Motor Vehicles Act of 1914. R. 13 reads :

No motor vehicle shall be driven on a public road during the period between half an hour after sunset and half an hour before sunrise unless every lamp prescribed by R. 8 (i) is lit and unless its light is visible within a reasonable distance.

Now it may well be asked as to who is responsible with regard to the lights being in proper order and duly lit. This opens up a considerable field for speculation ; one may think that the real person who is in charge of the car and who is looking after and should look after the lamps must primarily be the driver ; but then one may well say that there might occur cases in which the person not actually in charge of the car might be responsible ; as, possibly, for example, in the case of a person who was the owner of the car and who refused to provide his driver with the necessary batteries for the purposes of illumination or with the necessary lamps or bulbs. However, this question does not really arise, I think, here ; because I am not satisfied that it was clearly shown that the car was being driven on a public road at a prohibited time. (While examining the evidence regarding the time when the car was found driven with defective lights his Lordship proceeded.) We do not find any distinct statement as to the exact time at which the Deputy Superintendent of Police saw the car being used wrongfully without proper lights ; and I may say that it is of the utmost importance that when a prosecution of this character is being undertaken, there should be independent and direct evidence (preferably of two persons with separate and accurate timepieces) indicating exactly the time at which the car has been observed being driven on the public road with defective lights. It is little practical use for a police officer to come into Court and say that "some time after dusk" or "about 7 p. m." or words to that effect, if it is hoped that such a prosecution is to be successfully conducted. In questions of contravening regulations as to the time of lighting lamps on, what I suppose one must consider, a dangerous vehicle, time is practically the most material point and the point of time must be proved meticulously and accurately. I do not think that this is the case here. The Deputy Superintendent of Police, in the course of a very long cross-examination, indeed, says that he cannot swear that the car was not at the Deputy Magistrate's place from 6 to 6-15 p. m. on that day. One may understand that this officer means that he cannot say whether between those two times the car was not at the Deputy Magistrate's compound. I do not gather that he thinks that his statement with regard to the hour or approximate hour at which he had seen the car being driven on the road was wrong : but I may point out that according to the evidence of the Deputy Magistrate and the Sub-Deputy Magistrate there was only one occasion upon which the car came into the Deputy Magistrate's compound that evening ; and that was at the time when they were all together and when the Deputy Superintendent of Police followed the car in some 15 or 20 minutes after it arrived. I do not think, therefore, that the case of conviction with regard to the improper lighting of the car in contravention of R. 13 of the Motor Vehicles Act of 1914 can be upheld and must be set aside.

The result is that the conviction of the first applicant will be upheld but, under the circumstances, his sentence of Rs. 5 fine will be reduced to a fine of one anna. The surplus fine of the chauffeur, if paid, must be refunded. With regard to the convictions of the second applicant, Mr. Shyamnarain Rai, for contravention of R. 12, it must be set aside on the ground that he was not the owner of the car. His conviction for contravention of R. 13 under the Motor Vehicles Act of 1914 must also be set aside on the ground that the time at which the alleged offence was committed has not been satisfactorily proved, the joint sentence of fine passed against him for the double offence which he is alleged to have committed in contravention of the two Rules Nos. 12 and 13 under the Act must be set aside and the fine, if paid, refunded.

Order accordingly

* A. I. R. 1926 Patna 449

JWALA PRASAD AND MACPHERSON, JJ.

Anwar Ali—Petitioner.

v.

Chairman, Deoghar Municipality—Opposite Party.

Criminal Revision No. 355 of 1926, Decided on 15th June 1926, from an order of the Commr., Bhagalpur, D/- 23rd April 1926.

* *Criminal P. C., S. 4 (j)—"High Court" for purposes of revision against acquittal from proceedings from Sonthal parganas is Commissioner of Bhagalpur—Sonthal Parganas Regulation (5 of 1893), S. 4 (1) (ii).*

Under Cl. 1 (ii) (a) of S. 4 the High Court of Patna has only jurisdiction to deal with appeals under S. 417 against an order of acquittal. It has no power to deal with an application under S. 439 for setting aside acquittal for which the proper forum is the Commissioner of Bhagalpur. [P 450 C 2]

M. Yunus—for Petitioner.

Sultan Ahmed—for Opposite Party.

Jwala Prasad, J.—The Petitioner Anwar Ali was prosecuted by the Chairman of the Deoghar Municipality under Ss. 186 (1) and 192 of the Bihar and Orissa Municipal Act of 1922. He was tried by a Magistrate of the second class of Deoghar, who by his judgment, dated the 19th February 1926, acquitted the petitioner.

The Chairman of the Municipality moved the Commissioner of the Bhagalpur Division against the order of acquittal and the Commissioner by his order, dated the 23rd April 1926, set aside the acquittal and directed re-trial of the petitioner.

Aggrieved by this order of the Commissioner the petitioner moved this Court under S. 439 of the Code of Criminal Procedure and obtained a rule by this Court on the 27th May 1926, which runs as follows :

The application will be heard by the Criminal Bench. Issue the usual notices, Let further proceedings be stayed pending the disposal of this application.

Accordingly a letter of this Court, Memo No. 1477, Cr. A., dated the 27th May 1926, forwarding a copy, was addressed by the Assistant Registrar to the Commissioner of Bhagalpur enclosing copy of letter No. 1477, Cr. A., of the same date to the Deputy Commissioner of the Santal Parganas, calling upon the latter to submit the original record and to stay further proceedings, and requesting the Commissioner to forward the original record and proceedings in his own Court. In reply to this letter the Commissioner in his letter No. 98 J/V, dated the 1st June 1926, pointed out that he had dealt with the case under S. 439 of the Code of Criminal Procedure in the exercise of his power as the High Court of the Santal Parganas under S. 4 (I) (ii) (b) of the Santal Parganas Justice Reg. V of 1893, and consequently the requisitions issued by the High Court were issued by inadvertence. He also intimated that pending further orders of the Court, the record of the case has been withheld and the Deputy Commissioner has been asked not to take any action upon the order of this Court, dated the 27th May 1926.

Considering the importance of the question raised by the Commissioner of Bhagalpur, the Goverment Advocate was asked to appear. The case was argued at great length on both sides. The complainant Chairman of Deoghar Municipality has also appeared in this case.

The first question is whether this Court had any power to pass the order of the 27th May 1926. In the application of the petitioner on the basis of which the aforesaid order was passed the petitioner, prayed that the order of the Commissioner setting aside his acquittal and directing his re-trial be set aside was also prayed that the proceedings re.the trial of the petitioner started upon the basis of the order of the Commissioner be set aside. The Commissioner says that he passed the order in question as the High Court of the Santal Parganas under S. 40 (I) (ii) (b) of the Santal Parganas Justice Reg. V of 1893. S. 4 of that Regulation says that the Code of Criminal Procedure of 1898 shall have effect in the Santal Parganas, subject to the modifications indicated in that section. The most important modification is the constitution of the Commissioner of Bhagalpur as the High Court for certain criminal cases in the Santal Parganas within the meaning of the term as defined in S. 4 of the Code of Criminal Procedure. The "High Court" in this section, leaving out the words with which we are not concerned, means the highest

Court of Criminal appeal or revision for any local area; or where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in this behalf.

The High Court within the province of Bihar and Orissa known as the Patna High Court established in 1916 under the Letters Patent of that year is the highest Court of appeal in the civil and criminal matters and exercises revisional jurisdiction under S. 439 of the Code of Criminal Procedure. The jurisdiction of this Court is modified by the Santal Parganas Justice Reg. V of 1893 referred to by virtue of the definition of High Court with respect to the area called the Santal Parganas in that section. Cl. I of that section defines the "High Court" (i) in reference to proceedings against European British subjects, or persons jointly charged with European British subjects, the High Court of Judicature at Fort William in Bengal (now in the province of Bihar and Orissa the High Court of Patna); and (ii) in reference to proceedings against other person, (a) in cases tried by the Court of Sessions and in appeals under S. 417 from original or appellate orders of acquittal the High Court of Judicature at Fort William in Bengal; and (b) in other cases the Commissioner. Sub-Cl. (i) of Cl. I applies only to cases against European British subjects and we are not concerned with that case. We are concerned with sub-Cl. (ii) of Cl. I. In cases coming under that sub-clause the High Court of Patna has jurisdiction in the area called the Santal Parganas. In cases not coming under that clause, in other words, in other kinds of cases, the High Court of the Santal Parganas is the Commissioner of Bhagalpur.

The question then is whether the present case comes under Cl. (a) or Cl. (b) of sub-Cl. (ii). The present is a case of an accused person tried by the Sub-Deputy Magistrate of Deoghar for offences under the Bihar and Orissa Municipal Act which is in force in the Santal Parganas. The accused (petitioner) was acquitted by the Sub-Deputy Magistrate. The order of acquittal was appealable and was also revisable by the High Court under S. 439 of the Criminal P. C. An appeal against an acquittal is allowed only to Local Government and it lies only to a High Court. Any private person just like the complainant might invoke the revisional powers of the High Court to set aside an order of acquittal under S. 439 or the High Court may of its own motion set aside such an order. There was no appeal in the present case by the Local Government under S. 417. If there was an appeal it would have lain only to the High Court of Patna under Cl. I (ii) (a) of S. 4. The Chairman of the Deoghar Municipality who was the complainant in the case applied to the Commissioner of Bhagalpur to set aside the order of acquittal in his capacity as the High Court of the Santal Parganas.

The learned Government Advocate contends that the matter dealt with by the Commissioner under S. 439 came under Cl. I (ii) (b) of S. 4. His contention is that the High Court of Patna has only jurisdiction to deal with appeals under S. 417 against an order of acquittal and that it has no power to deal with such an order under S. 439 of the Criminal P. C. and that the Commissioner of Bhagalpur is the High Court in such matters. Mr. Yunus on behalf of the petitioner resists this contention of the learned Government Advocate and says that all matters connected with an order of acquittal, be it an appeal from that order or an application in revision, is excluded from the jurisdiction of the Commissioner of Bhagalpur and that the High Court of Judicature at Patna is the only authority competent to deal with such matters. He says that although the words used in Cl. I (ii) of S. 4 refer especially to appeals under S. 417, it includes also applications in revision under S. 439 of the Criminal P. C. In support of his contention he relies upon S. 439 of the Code which says that the High Court dealing with matters in revision under that section may exercise any of the powers conferred on a Court of appeal by Ss. 423, 426, 427 and 428 or on a Court by S. 338, and he says that an order of acquittal can only be set aside by the High Court acting under S. 439 in the manner prescribed by S. 423 of the Criminal P. C. which deals with appeals.

Reference has also been made to the provision in S. 423 (1) which says that in dealing with an appeal under S. 417 from an order of acquittal the Court

may reverse such order or direct that a further enquiry may be made, or that the accused may be re-tried or committed for trial as the case may be and find him guilty and pass sentence according to law. The contention is that reading Ss. 424 and 439 together the order of acquittal can only be set aside by the High Court exercising its revisional powers under S. 439 by a reference to the provisions in S. 417 relating to an appeal from an acquittal. Therefore, the power given to the High Court at Patna to deal with appeals under S. 417 against an order of acquittal implies that the power of revising such an order under S. 439 is also vested in the said High Court and is taken away from the Commissioner of Bhagalpur.

The contention does not seem to be sound. The powers of revision are different from powers exercisable in appeal. The right of appeal can only be conferred by express provision in the Criminal P. C., whereas the power of revision conferred under S. 439 is larger in scope and it deals with matters in which there may or may not be an appeal. It gives a wide power to the High Court to look into the record of any cause and satisfy itself as to the correctness and propriety of the finding or sentence recorded or order passed and as to the irregularity of proceedings of an inferior Court. This power of revision is exercisable at the instance of a party or by the High Court of its own motion. Even in cases where there is an appeal the power of revision may be exercised where no appeal has actually been brought: vide Cl. (5) of S. 439. Under that clause a private party has a right to apply to the High Court to set aside an order of acquittal although it has no right of appeal. S. 439 indicates the manner in which certain cases coming to this Court might be disposed of. It refers to the powers of the appellate Court defined in S. 423 as indicating the mode in which appealable orders may be dealt with by the High Court. It does not mean that an application in revision is converted into an appeal simply because under S. 439 a High Court is empowered to exercise the powers defined under S. 423 with respect to appeals.

It is obvious that an application by private party against an order of acquittal under S. 439 cannot be regarded as an appeal under S. 417, for a private party has no right of appeal under that section. Reference to S. 417 in S. 423 and to S. 423 in S. 439 simply means that under the revisional powers of the High Court an order of acquittal may also be reversed and further enquiry of re-trial of the accused be directed as is indicated under Cl. (1) (a), S. 423 The application of the Chairman of the Municipality in the present case cannot be treated as an appeal under S. 417 by the Local Government, and hence it cannot come under Cl. I (ii) (a) of S. 4 which applies only to appeals under S. 417 from orders of acquittal. We have to read into that clause the words "and applications under S. 439" or words to that effect in order to amplify the scope of the provision and thus to give jurisdiction to the High Court at Patna to deal with applications in revision against orders of acquittal. This we are not permitted to do. It may seem to be an anomaly that an appeal from an order of acquittal under S. 417 should lie to the High Court at Patna, whereas an application in revision against the same order under S. 439 would lie to the Commissioner under S. 4 (1) of the Santal Parganas Justice Regulation V of 1893. It may be that this is a case of omission ; but that is a matter which has to be dealt with by competent authority.

The application to this Court against the order of the Commissioner of Bhagalpur passed under S. 439 of the Criminal P. C. setting aside the order of acquittal in the present case did not lie to this Court and it is obvious that it was entertained under a misapprehension. The order of the Commissioner exercising his powers as the High Court of the Santal Parganas under S. 4 cannot be dealt with by this Court, and, therefore, the petitioner had no right to come to this Court against the order of the Commissioner.

The result is that the rule issued on the 27th May 1926 calling for the record of the case and staying further proceedings is discharged.

Macpherson, J.—I also entertain no doubt that this application must be rejected.

It has been made under S. 439 of the Code of Criminal procedure on behalf of

a person other than a European British subject and other than a person jointly charged with a European British subject, with the prayers that this Court will (1) set aside an order of the Commissioner of Bhagalpur purporting to act as High Court of the Santal Parganas in which he set aside the acquittal of the petitioner in the Court of the Sub-Deputy Magistrate of Deoghar and directed his re-trial; and (2) quash the proceedings now pending against the petitioner in that Court.

The first prayer fails because this High Court has, as Mr. Yunus admits, no jurisdiction under S. 439 or otherwise to set aside the order of the Commissioner. In point of fact the rule was granted to consider the second prayer. The second prayer fails because this Court possesses no jurisdiction under S. 439 over the proceedings against the petitioner in the Court of a Magistrate of the Santal Parganas. Furthermore, the order for re-trial of the petitioner was in fact within the jurisdiction of the Commissioner. Under Chap. II of the Santal Parganas Civil Justice Reg. V of 1893 the jurisdiction of this Court under the Code of Criminal Procedure with reference to proceedings against the petitioner does not extend beyond cases tried by the Court of Sessions and appeals under S. 417 from Original and Appellate orders of acquittal [S. 4 (*I*) (*ii*) (*a*)], the Commissioner being the High Court with reference to all other proceedings against him. The proceedings now pending against him are manifestly not included within such cases or appeals.

In fact Mr. Yunus for the petitioner admits that he is out of Court at once if S. (*I*) (*ii*) (*a*) be strictly construed. His position is that a wide interpretation should be accorded to "appeals under S. 417" so as to make the expression cover also applications under S. 439 to set aside orders of acquittal. His ground is that anomalies may result if an appeal under S. 417 is made to one High Court and an application to set aside the same acquittal is made under S. 439 to the other High Court. The discussion before us has' however, clearly demonstrated that the possibility of divergent order on the subject of an acquittal being passed by the two High Courts is so remote as to be in practice entirely negligible. It is certainly not such as would lead one to construe "appeals under S. 417" (which are presumably excluded from the jurisdiction of the Commissioner as High Court because they are preferred by the executive Government, and the Commissioner is, except for his special judicial functions in the Santal Perganas, an executive officer) as including applications under S. 439 in respect of acquittals which can only be preferded by the private prosecutor and with which the executive Government is not concerned.

Mr: Yunus next argues, if I understand him aright, that as this Court is: the only Court that can set aside an acquittal by a Court in the Santal Parganas, the Court of the Sub-Deputy Magistrate is an inferior criminal Court situated within the local limits of the jurisdiction of this Court, at least so far as acquittals are concerned, and accordingly this Court is empowered to revise the proceedings of such Magistrate in a case such as the present where he is about to try the petitioner whom he has already acquitted.

But there is no reason to hold that this is the only High Court that can set aside an acquittal by the Magistrate in the Santal Parganas. No doubt this Court alone can set aside an acquittal on appeal. The learned Commissioner in his judgment does indeed describe the proceedings before him as an appeal against an acquittal, and he has also set out that the private prosecutor "has a right of appeal under S. 439." But that proceeding was in fact not an appeal, still less an appeal by the Local Government under S. 417, and the intention manifestly was to hold that it was open to him as the High Court to revise an order of acquittal. In fact his order concludes: "I accordingly direct that re-trial shall take place (under S. 439, Criminal P. C.)." That an acquittal may be set aside by the High Court under S. 439 at the instance of a private prosecutor is settled law. It had also been so held in several High Courts prior to the date when the Regulation of 1893 was made, and the authority which made the regulation is to be presumed to have been aware of that fact and to have intended that as High Court for the Santal Parganas the Commissioner of Bhagalpur should possess the ordinary power under S. 439 to revise orders of acquittal

in such circumstances. Mr. Yunus then points out that the powers exercisable under S. 439 are "the powers conferred on a Court of appeal under S. 423" and that the only powers conferred under S. 423 to set aside an acquittal on appeal relate to appeals under S. 417 which are removed from the jurisdiction of the Commissioner, and contends that in the face of these provisions the presumption should not be made. But the argument involves the importation of words into S. 439 so as to make the provision quoted run "the powers conferred on(it as) a Court of appeal under S. 423." The indications are that in S. 4 (*I*) (*ii*) (*a*) of Reg. V of 1893 the enacting authority specifically set out all the powers which it intended should not rest with the Commissioner as High Court in proceedings against persons of the status of the petitioner, and I can see no justification for importing any words into S. 439 which would restrict his jurisdiction by implication. Accordingly this Court is not the only High Court which has jurisdiction to set aside an acquittal by a Magistrate of the Santal Parganas.

Jurisdiction in respect of setting aside acquittals is in fact distributed between the two High Courts : this Court possessing it on appeal by Government and the Commissioner on application by a private party in revision. In Ss. 435 to 439 : as in other provisions of the Code, "High Court" means the Commissioner except where S. 4 (*I*) (*ii*) (*a*) of the Regulation operates. It has no operation in the proceeding pending against the petitioner in the Court of the Sub-Deputy Magistrate of Deoghar which for this purpose at least is not an inferior Court to this Court. Accordingly this Court has no jurisdiction to quash that proceeding. The same would have been the case if the Magistrate had without the intervention of the Commissioner, started suo motu and illegally to re-try the petitioner ; the petitioner's remedy would have lain in an application for revision in the Court of the Commissioner.

Mr. Yunus, it may be remarked, adopted in so many words the argument of Mr. Hill in *In the matter of Wilson* (1) which is summarized at the top of p. 249 in support of his claim that this Court has jurisdiction over all the criminal Courts of the Santal Parganas under its revisional powers under the Code of Criminal Procedure, but a perusal of the Acts, Regulations and cases there cited has failed to satisfy me that the claim is well founded.

Rule discharged.

(1) [1891] 18 Cal. 247.

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* A. I. R. 1926 Patna 453

JWALA PRASAD AND BUCKNILL, JJ.

Khiri Chand Mahton—Defendant No. 2—Appellant.

v,

Mt. Meghni—Plaintiff—Respondent.

In the matter of Court-fee in Second Appeal No. 1388 of 1925, Decided on 24th March 1926,

* *Court-fees Act. S. 7 (iv).(c)—Two reliefs not co-extensive and both necessary—S. 7 (iv) (c) will apply.*

The plaintiff prayed for two reliefs. The first relief related to a declaration as to the general title of the plaintiff to all the properties inherited by her from her husband. The second relief related to the particular deed of transfer executed by Defendant No. 1 in favour of Defendant No. 2 with respect to a particular property as part of the estate inherited by her from her husband.

Held : that the two reliefs prayed for were not co-extensive, nor was one of them a surplusage. Hence the suit was one for a declaration and a consequential relief and an ad valorem Court-fee under S. 7 (iv) (c) was payable : 29 *Bom.* 207 ; 22 *C. L. J.* 415 and 63 *I. C.* 38, *Dist.* [P 456 C 2]

Sant Prasad—for Appellant.

Shadi Shaikher Prasad Singh and *Lachmi Narain Sinha*—for Respondents.

Judgment.—The question is : What Court-fee is payable upon the plaint in the present case filed in the Court of the Munsif of Bihar and upon the memorandum of appeal filed uy the defendant in the Court of the District Judge of Patna ? In the plaint the reliefs sought are as follows :

(1) It may be held by the Court that the disputed properties form portion of the properties left by the husband of the plaintiff ; that Defendant No. 1 has no title thereto and that she has no right to transfer the same,

(2) On determination of relief No. 1 it may be held that Defendant No. 1 had no right to execute the sale-deed, dated the 3rd August 1920, and that neither it has affected the title of the plaintiff nor has Defendant No. 2 acquired any right thereby.

(3) If during the pendency of this suit the plaintiff be dispossessed of the disputed properties, then on Court-fee being taken she may be

awarded a decree for recovery of possession of the disputed properties.

(4) The costs in Court with interest up to the date of realization may be awarded to the plaintiff against the defendants.

(5) Such other reliefs as deemed equitable by the Court may be decreed in favour of the plaintiff.

The plaintiff's case as laid in the plaint is based upon the following facts. It is said that one Tarni Mahton had two sons Puran Mahton and Budhan Mahton. He died while joint with his sons, and after his death the two sons continued to be members of a joint Mitakshara family. Defendant No. 1, Mt. Jogia, is the wife of Puran Mahton. The plaintiff is the wife of Budhan Mahton. Puran is dead. It is said that when he died he was joint with Budhan Mahton and consequently the latter succeeded to the properties by right of survivorship as the sole surviving male member. Budhan died in 1909. The plaintiff's case is that she has succeeded to the property as his widow under the Hindu Law and that the Defendant No. 1 Mt. Jogia, wife of Puran, is entitled only to maintenance. Continuing, the plaint states that the plaintiff obtained possession of the property and has been enjoying it; and that the Defendant No. 1 has not acquired any right to it nor any right to transfer or encumber the family property . . . In the record-of-rights, however, Mt. Jogia, Defendant No. 1, got her name recorded as in possession and occupation of the family property along with the plaintiff, and the names of both the plaintiff and Defendant No. 1 were recorded in the khatian with respect to the raiyati kasht lands of the family.

Defendant No. 1 though she had no right of any sort in the property nor had she possession thereof executed a sale-deed on the 3rd of August 1920 in respect of half of the properties left by the husband of the plaintiff, in the farzi name of Defendant No. 2. It is also stated in the plaint that the Defendant No. 3 for self and on behalf of other properties got a kabuliyat and kishtbandi bond executed by the plaintiff in respect of the area and made Defendant No. 2 also join in the execution of the said deed on the ground that her name was already entered in the survey khatian.

The aforesaid transactions, namely, the entry in the record-of-rights and the kabuliyat are attacked by the plaintiff. She says that:

> although the sale-deed in question has not affected her title, yet the existence thereof is apprehended to cause dispute hereafter and a cloud is thereby cast over the title of the plaintiff in respect of the disputed properties; hence the suit.

The cause of action is said to have arisen on the 3rd of August 1920, the date of the execution of the aforesaid sale-deed. The plaint was stamped with a Court-fee of Rs. 15 under Art. 17 of the Court-fees Act. The defendant in his written statement took a distinct plea as to insufficiency of the Court-fee, and upon that plea Issue No. 3 was raised in the trial Court:

> Is the Court-fee paid sufficient?

But at the actual hearing of the case this issue was not pressed. The suit therefore, was determined by the Munsif upon the aforesaid Court-fee. The Defendant No. 2, the transferee, appealed to the District Judge and paid a Court-fee of Rs. 15 upon the memorandum of appeal; and upon an objection raised by the District Judge an additional Court-fee of Rs. 15 was paid upon the ground that reliefs (1) and (2) constituted two separate declarations. The appeal was dismissed in the Court below, and hence the defendant has filed a second appeal in this Court.

Under the orders of the Taxing Officer of this Court, dated the 9th November 1925, the appellant has paid the additional Court-fee, as according to the Taxing Officer, an ad valorem Court-fee, was chargeable under S. 7, Cl. (4) (c) of the Court-fees Act. If this view of the Taxing Officer is correct, the Court-fees paid upon the plaint and the memorandum of appeal in the Court below were insufficient, and the plaintiff and the defendant both have to make good their respective deficiencies. The question as to the sufficiency or otherwise of the Court-fee payable in the Court below does not lie within the province of the Taxing Officer; but it has to be determined by the Court under S. 12 of the Court-fees Act. Accordingly, this being the preliminary question before the appeal can be allowed to proceed, it has been placed before this Bench for a decision as to whether ad valorem Court-fee should be charged upon the plaint and the memorandum of appeal in the Court

below under S. 7, Cl. (4) (c) of the Court-fees Act.

The Taxing Officer in his order directing ad valorem Court-fee to be paid upon the memorandum of appeal has relied upon a decision of mine as Taxing Judge in the case of *Ram Ekbal Singh* v. *Sarjug Prasad Misser* (1). The second relief in that case quoted by me in my judgment was similar to the second relief in this case. It sought to have an adjudication by way of a declaration that certain sales and transfers made by the defendants in that case were without any valid necessity and without any consideration and were not binding upon the plaintiff after the death of the limited owner who was a Hindu lady. I held that that relief clearly came under S. 42 of the Specific Relief Act and was chargeable with a fixed Court-fee of Rs. 10 which under the then provisions of the Court-fees Act was chargeable. The first relief sought in that case was as follows:

> That it may be held by the Court that the plaintiff is a near gotia and reversionary heir of Mangal Prasad Singh.

That relief related to the title of the plaintiff in that case to the property in dispute and his locus standi to question the validity of the transfer made by the widow of the late holder of the property. The plaintiff in the present case is the widow of Budhan Mahton and claims to have succeeded to the properties on account of Budhan's brother, husband of Defendant No. 1, having died in a state of jointness. This is the title claimed by her to the property and upon that title her right to question the validity of the transfer made by Defendant No. 1 in favour of the Defendant No. 2 rests. If that title was not at all disputed nor was there any reason for any apprehension on the part of the plaintiff of the title being seriously denied by the defendant, then the mere asking for a declaration by the Court to declare her title in order to enable her to seek the principal and the second relief would not make the relief essential, and would not require any additional Court-fee to be paid. In that case relief No. 1 would have been deemed simply a surplusage or as an ornamental relief. This is the view taken by me in the miscelleneous judicial case referred to above. I do not think that the other reliefs in the present case demand any serious consideration for they do not seem to affect the real character of the suit. The third relief was only a contingent one depending upon the finding of the Court that the plaintiff was not in possession of the property and in that event she offered to pay Court-fee for getting the relief for recovery of possession. That contingency has not arisen and the Courts below have held that the plaintiff has been all along in possession of the property. Therefore that relief has become unnecessary and the occasion for calling for additional Court-fee has not arisen.

The fourth relief obviously is immaterial relating to costs. Depending upon the adjudication in her favour of the other reliefs, the fifth relief is what is often said to be an omnibus relief which does not in itself ask for a specific relief so as to make the plaintiff liable to pay Court-fee upon it. A number of authorities have been cited to us at the Bar, one of which is of our own Court *Mt. Noowooagor Ojain* v. *Shidhar Jha* (2), in which Roe, J., held that a suit for avoidance of a registered deed of gift was chargeable with ad valorem Court-fee upon the ground that the Court was bound, upon deciding the suit in the plaintiff's favour, to send a copy of the decree to the office in whose book the deed was registered. The report of the case does not show the details of the reliefs sought in the case. The decision was entirely based upon certain previous authorities cited therein. One of these cases is *Parvatibai* v. *Vishvanath Ganesh* (3). In that case, however, there was a specific relief sought for sending a copy of the decision noted in the book containing a copy of the document with a view to have the cancellation of the deed noted in the register of documents kept in the Sub-Registrar's office. In this case there is no prayer for sending a copy of the decision to the Sub-Registrar and we cannot import a relief into the plaint in order to make the relief consequential and thus to charge Court-fee thereon. If the Court is bound to send a copy of the decree to the office of the Registrar it is no business of the party to ask for it, but

(1) M. J. C. 49 of 1921.

(2) [1918] 3 Pat. L. J. 194=45 I. C. 233.

(3) [1905] 29 Bom. 207=6 Bom. L. R. 1125.

it is the duty of the Court to send it of its own accord.

The next case relied upon is *Jhumak Kamti* v. *Debu Lal Singh* (4). In that case it was held that a relief for a declaration coupled with a relief for confirmation of possession makes the suit one for a declaration and consequential relief. In that case also there was a specific prayer made by the plaintiff for confirmation of possession. No such prayer has been made in the present case, and upon the principle already stated we cannot add that prayer to the reliefs sought by the plaintiff and make the relief a consequential one.

The decision of this Court in *Sheikh Rafiq-uddin* v. *Haji Shaikh Asgar Ali* (5) (Das and Adami, JJ.) has been cited to show that two declarations do not necessarily make a suit for a declaration and a consequential relief. Similarly, the case of *Mahabir Prasad* v. *Shyam Bihari Singh* (6), has been cited to show that a relief which is unnecessary and follows as a matter of course from the decision in favour of the plaintiff on the other reliefs, is not a consequential relief. In that case the principal relief asked for a declaration that a certain transfer made by a judgment-debtor of the plaintiff was with a view to defeat the decree of the plaintiff and an additional relief was asked that the plaintiff be declared entitled to realize the decree from the estate of the defendant judgment-debtor. It was held that the last relief was a surplusage, for the plaintiff would be entitled to execute the decree and attach the property without any declaration by the Court upon the decision obtained on other reliefs in his favour. In the case of *Shaikh Rafiq-ud-din* v. *Haji Shaikh Asgar Ali* (5), the two reliefs asked for, as a matter of fact constituted one relief, and the declaration of the first relief rendered unnecessary the declaration with respect to the second relief.

Upon the principles of the aforesaid decisions the question is whether the two principal reliefs claimed by the plaintiffs in the present case are separate and necessary, or the decision of one of them renders the decision of the other relief unnecessary, or the other is obtainable without any further declaration by the Court and merely upon the strength of the decision of one of the reliefs. The first relief in the present case relates to a declaration as to the general title of the plaintiff to all the properties inherited by her from her husband. The second relief relates to the particular deed of transfer executed by Defendant No. 1 in favour of Defendant No. 2 with respect to a particular property as part of the estate inherited by her from her husband. The second relief is admittedly essential; the first relief will be essential only when upon the plaint it would appear that it is necessary for the plaintiff to have any doubt or cloud cast upon the estate inherited by her removed. The two astounding facts stated in the plaint: the entry of the name of Defendant No. 1 in the record-of-rights and in the kabuliyat in favour of the proprietor, would go to show that the plaintiff is apprehensive of the claim of Defendant No. 1 not only to the property in suit but to a moiety of the entire estate in question and that the deed in question was only a first move in the matter with a view to have it established that the husband of Defendant No. 1 died while separate from that of Defendant No. 2. The plaintiff, on the other hand, claims the entire property on the ground that the husband of Defendant No. 1 predeceased her husband and died while joint with him, the whole estate having passed by survivorship to the husband of the plaintiff.

Therefore, in the present case we are not prepared to hold that the two reliefs are co-extensive or that one of them is surplusage. We are prepared to give the plaintiff an option to state which of the aforesaid reliefs she would wish to be deleted as being superfluous and not required by her. If she does not intimate her intention within three days it will be presumed that both the aforesaid reliefs are essential, which will render plaintiff liable to pay ad valorem Court-fee on her plaint as estimated by the Stamp-Reporter.

(4) [1915] 22 C. L. J. 415=16 I. C. 898.
(5) [1921] 63 I. C. 38.
(6) A. I. R. 1925 Pat. 14=3 Pat. 795.

* A. I. R. 1926 Patna 457

ADAMI AND KULWANT SAHAY, JJ.

Permanand Kumar and *others*—Plaintiffs—Appellants.

v.

Bhon Lohar and *others*—Defendants—Respondents.

Second Appeals Nos. 1302 to 1309 of 1925, Decided on 8th July 1926; from a decree of the Sub-J., Muzaffarpur, D/- 13th August 1925.

* *Civil P. C., S. 151—Remand order is appealable only if it amounts to decree—Order reversing trial Court's decree is not a decree unless order itself decides any point for determination—Civil P. C., O. 41, R. 23.*

An order of remand under S. 151 is appealable only when it amounts to a decree. Where the order of remand merely sets aside the decree of the trial Court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to any of the matters in controversy in the suit, it cannot amount to a decree and must be treated as an order; and no appeal would lie against it as a decree. The mere fact that the order reverses the decree of the trial Court and deprives the plaintiffs of the valuable right they had acquired thereunder would not make an order of remand a "decree," unless that order itself determines any of the points arising for determination in regard to the matters in controversy in the suit: 44 *Cal.* 929 (*F. B.*), *Dist.*; 3 *P. L. J.* 99 and 58 *I. C.* 909, *Ref.* [P. 459, C. 2]

L. K. Jha—for Appellants.

Ray, T. N. Sahay and *Aditya Narain Lal*—for Respondents.

Kulwant Sahay, J.—These are appeals by the plaintiffs filed against the decision of the Subordinate Judge of Muzaffarpur whereby he remanded the suits to the trial Court for fresh trial laying down certain issues for consideration.

A preliminary objection is taken on behalf of the respondents that no second appeal lies in these cases. The objection is based on the ground that the remand was made not under the provisions of O. 41, R. 23 of the Civil P. C., against which an appeal would lie under O. 43, R. 1, Cl. (u), but that the remand was under the inherent power of the Court, and that, therefore, no appeal would lie to this Court as an appeal from an order; and that the order making the remand was not a 'decree' within the meaning of the Code of Civil Procedure and, therefore, the present appeals as appeals against the appellate decrees of the Subordinate Judge were not maintainable. On behalf of the appellants it is contended that the orders of the learned Subordinate Judge were decrees and, therefore, second appeal would lie to this Court as an appeal against a decree. The question for determination, therefore, is whether there was any decree made by the Court of appeal below against which an appeal would lie to this Court.

Learned vakil for the appellants relies on four decisions, three of which are decisions of this Court and one is a decision of the Calcutta High Court. The decisions of this Court relied upon are *Ram Chandra Rao* v. *Naraiyan Lal* (1); *Achuta Singh* v. *Hit Narain Singh*, Second Appeal No. 1382 of 1922, which has not been reported as yet; and *Raghunath Das* v. *Jhari Singh* (2). The decision of the Calcutta High Court relied upon is *Bhairab Chandra Dutt* v. *Kali Kumar Dutt* (3). It is necessary to consider these decisions in detail. The case of *Ram Chandra Rao* v. *Narain Lal* (1) was decided by Mr. Justice Jwala Prasad sitting alone. It appears that this appeal was originally filed as an appeal from an order and it was directed against an order of remand which did not come under O. 41, R. 23. The Registrar was of opinion that the appeal was incompetent and he referred the case to the Bench for orders. The matter came up before the Hon'ble the Chief Justice and Adami, J., and their Lordships made the following order on the 13th June 1919:

The learned vakil for the appellant consenting, let this appeal be admitted as an appeal from the decree of the lower appellate Court reversing the decree of the Munsif. Send for the record and issue the usual notices. This order is subject to a further report from the Stamp Reporter as to the sufficiency of the stamp on a memorandum of appeal on the above basis. The memorandum must be amended accordingly.

The appeal was accordingly admitted as an appeal against the decree and it ultimately came on for hearing before Mr. Justice Jwala Prasad sitting alone, when an objection was taken on behalf of the respondents that the appeal did not lie. Jwala Prasad, J., overruled this objection. His Lordship observed that the remand in that case was not

(1) [1920] 58 I. C. 309.
(2) [1918] 3 Pat. L. J. 99=45 I. C. 100.
(3) A. I. R. 1923 Cal. 606.

under O. 41, R. 23 and, therefore, no appeal lay under O. 43, R. 1, Cl. (u), but an appeal lay against the decree made by the lower appellate Court setting aside the decree of the trial Court. His Lordship relied upon a decision of this Court in *Brijmohan Pathak* v. *Deobhajan Pathak* (4), and upon the order of the learned Chief Justice and Adami, J., dated the 13th June 1919 referred to above. His Lordship also referred to the decision in *Bhadai Sahu* v. *Sheikh Manewar Ali* (5). No reasons are given by his Lordship for holding that the order setting aside the decree of the trial Court was itself a decree. In *Brijmohan Pathak* v. *Deobhajan Pathak* (4) relied upon by the learned Judge, it was merely held that a remand which was not made under R. 23 of O. 41 of the Civil P. C. was not appealable. There was no decision in this case that the order could be appealed against as a decree. In the order of the learned Chief Justice and Adami, J., dated the 13th June 1919, directing the appeal to be admitted as an appeal against the decree of the lower appellate Court no reasons are given as to how the order appealed against could be treated as a decree. In *Bhadai Sahu* v. *Sheikh Manowar Ali* (5) the question as to whether an appeal could be filed against an order of remand treating it as a decree was not raised or discussed.

The question raised there was whether the order appealed against came under R. 23 or R. 25 of O. 41. Their Lordships observed that there was no reason why there could not be at one and the same time an order both under R. 23 and under R. 25 of O. 41. In such a case the orders, although made upon one piece of paper, would in effect be quite separate, and the party affected would be competent to pursue the remedy by an appeal provided by the Code in respect of each; that, with regard to the order under R. 23 he could appeal against the decree or against the remand order itself under O. 43, R. 1, Cl. (u); and, that the order under R. 25 could be attacked in a second appeal against the final decree in the suit. Now, when their Lordships observed that with regard to the order under R. 23 the party affected could appeal against the decree, I apprehend that what was intended was that an appeal would lie against the final decree made in the case and in that appeal the order of remand under R. 23 could be challenged. It was not laid down that the order of remand itself under R. 23 could be appealed against as an appeal against a decree. The language used by their Lordships is:

> With regard to the order under R. 23 it is open to him either to appeal against the whole decree or to appeal against the order of remand only under O. 43.

Their Lordships merely pointed out that it was open to the party to appeal against that portion of the order which was under R. 23 or he could wait and appeal against the final decree and in that appeal object to the order under R. 23. I am, therefore, of opinion that the cases relied upon by Jwala Prasad, J. in *Ram Chandra Rao* v. *Narain Lal* (1) do not support the contention that an appeal would lie against the decree of the lower appellate Court remanding a case to the trial Court, the remand being under the inherent power of the Court and not under O. 41, R. 23 of the Code. The decision of Bucknill, J. in S. A. No. 1382 of 1922 merely follows the decision of Jwala Prasad, J., in the case referred to, and to the order of the learned Chief Justice and Adami, J. made on the 13th June 1919, referred to above. His Lordship gives no reason whatsoever for holding that the order appealed against could be treated as a decree and an appeal could lie against it as an appeal from decree. It is remarkable that the judgment of Bucknill, J., in S. A. No. 1382 of 1922 was appealed against in Letters Patent Appeal No. 76 of 1925: but the question of maintainability of the second appeal as an appeal against a decree was not raised or decided in the Letters Patent appeal.

In *Raghunath Das* v. *Jhari Singh* (2) the appeal was originally filed as an appeal from an order of remand under O. 43, R. 1, clause (u). An objection was taken by the respondent that the appeal was really not an appeal from the order of remand but from an appellate decree. The trial Court had dismissed the suit on various grounds. On appeal by the plaintiff the District Judge had held that the plaintiff was entitled to the land

(4) [1919] 1 Pat. L. T. 509=55 I. C. 484.
(5) [1919] 4 Pat. L. J. 645=52 I. C. 125=(1920) P. H. C. C. 91.

which he claimed and that the suit was within limitation and therefore, the plaintiff was entitled to a decree for possession and the remand was made by the District Judge for determining the question as to whether the plaintiff was entitled to mesne-profits and if so what; and whether the plaintiff had any cause of action against Defendant No. 6. The learned District Judge directed that after determining these issues the lower Court will pass a decree accordingly. It was held by this Court that the District Judge did really reverse the decree of the first Court on merits and that he should have passed a decree for possession in favour of the plaintiff and sent the case to the Court below for inquiry as to mesne profits. Their Lordships, therefore, treated the order of the District Judge as a decree for possession and held that the defendant's appeal against the decision of the District Judge must be considered as an appeal against an appellate decree. The decision of this Court in that case proceeded on the assumption that the District Judge on appeal had conclusively determined the rights of the parties with regard to some of the matters in controversy in the suit and that such a decision was a decree within the definition of the term as given in the Code of Civil Procedure.

In this view of the case it was clear that the decision of the District Judge in that case could be treated as a decree and appealed against as such. This case, therefore does, not help the appellants in the present appeals.

It now remains to consider the decision of the Calcutta High Court in *Bhairab Chandra Dutt* v. *Kali Kumar Dutt* (3). This decision no doubt is in favour of the appellant in the present case. There also the appeal was against an order which did not purport to have been made under O. 41, R. 23 of the Civil P. C., but it had been made in the exercise of the inherent power of the Court as explained by the Full Bench in *Ghuznavi* v. *Allahabad Bank, Ld.* (6). The learned Judges, however, remarked as follows:—

> The order so made (i. e., in exercise of the inherent power of the Court) is a decree which reverses the decree of the Court of first instance and deprives the plaintiffs of the valuable right they had acquired thereunder. The appeal is consequently competent not as an appeal from order under O. 43, R. 1, sub-rule (u), but as an appeal from a decree under S. 96 of the Code read with S. 100.

With very great respect to the learned Judges, I am unable to agree with the view taken by them. I fail to understand how an order of remand under the inherent power of the Court can be treated as a decree unless the order can be brought within the definition of "decree" as given in the Code of Civil Procedure; in other words, unless the Court of appeal making the remand conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit so far as that Court is concerned. Where the order of remand merely sets aside the decree of the trial Court and does not itself decide any of the points raised for determination and does not determine the right of the parties with regard to any of the matters in controversy in the suit, I am of opinion that it cannot amount to a "decree" and must be treated as an order and no appeal would lie against it as a decree. The mere fact that the order reverses the decree of the trial Court and deprives the plaintiffs of the valuable right they had acquired thereunder would not make an order of remand a "decree," unless that order itself determines any of the points arising for determintion in regard to the matters in controversy in the suit. Das and Foster JJ., in admitting the present appeals now before us under O. 41, R. 11, of the Civil P. C. expressed grave doubt whether an appeal would lie in the present case. It was conceded before their Lordships that no appeal lay against the order as an order, but it was contended that the order appealed against amounted to a decree and that, as such it was appealable. Their Lordships observed:—

> But a decree has been defined in the Civil P. C. as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. In this case there is no expression of an adjudication conclusively or otherwise or at all determining the rights of the parties. All that the Court says is that it is unable to determine the rights of the parties unless certain other matters are decided by the Court of first instance.

Their Lordships, however admitted this appeal in view of the ruling of this Court in *Ram Chandra Rao* v. *Narain Lal* (1) referred to above. I fully agree

(6) [1917] 44 Cal. 929=26 C. L. J. 49=41 I. C 598=21 C. W. N. 877 (F. B.).

with the view expressed by Das and Foster, JJ., in the above order. I, therefore, hold that no Second appeal lies in this case.

It has then been contended by the learned vakil for the appellants that the present appeals might be treated as applications in revision and that we ought to set aside the order of remand in exercise of our power of revision under S. 115 of the Code. In my opinion there is no question of jurisdiction involved in the case. It is contended that having regard to the findings of the trial Court, the Court of appeal below had no jurisdiction to make the remand and its proper duty was to dispose of the appeal itself. But it appears from the order of remand that the learned Subordinate Judge thought it necessary that certain issues framed by him should be decided before the suit could be finally disposed of. I am, therefore, of opinion that there is no reason to set aside the order of the learned Subordinate Judge in exercise of our revisional powers These appeals must be dismissed with costs.

Adami, J.—I agree.

Appeals dismissed.

A. I. R. 1926 Patna 460

DAS AND ADAMI, JJ.

Nazir Hussain and *another*—Defendants—Appellants.

v.

Aulad Haider and *others*—Plaintiffs—Respondents.

Appeal No. 9 of 1926. Decided on 8th July 1926, from the appellate decree of the Addl. Sub-J., Saran, D/- 26th November 1925.

Easement—Right of way—Servient owner pleading permissive user must allege and prove it.

In order to establish a right of way it must be proved that the claimant has enjoyed it for the full period of twenty years and that he has done so as of right ; but if it should be the case of the opposite party that the enjoyment was by violence or by stealth or by leave asked from time to time, it is for him to allege and establish that case But where no such case is made by him the Court ought not to allow him to argue such a case : 8 *C. W. N.* 359, *Diss. from.*

[P 460 C 2 P 461 C 1]

Khursaid Hussain and *Syed Ali Khan*—for Appellants.

Hasan Jan—for Respondents.

Das, J.—In my opinion the decision of the learned Judge in the Court below ought to be upheld. The learned advocate for the appellants has assailed the judgment of the lower Appellate Court on two grounds : first, on the ground that it is not correct to say that an open user without interruption for a long time, and not shown to be attributable to permission or sufferance on the owner's part, is prima facie evidence of enjoyment as of right ; and, secondly, on the ground that the learned Judge in the Court below should have dismissed the suit as barred by limitation.

In regard to the first point it is to be observed that the defendants did not set up a case of permissive user. On the other hand they denied the user upon which the plaintiffs relied. On this question the learned Judge in the Court below has found in favour of the plaintiffs that they have as a matter of fact used the lane for the statutory period. The only question is whether that user should be regarded as a right. In *Sheikh Khoda Buksh* v. *Shaikh Tajuddin* (1) Banerji, J., said as follows :

> Then in the second place, having regard to the habits of the people of this country, I do not think that it would be right to draw the same inference from mere user that would be proper and ligitimate in a case arising in England. The question is always a question of fact and the propriety of the rule that the presumption from user should be that it is as of right, must depend upon the circumstances not only of each particular case but also of each particular country, regard being had to the habits of the people of that country.

I entirely agree with this view ; but that learned and distinguished Judge proceded to say that although no case of permissive user may be set up by the defendant, still it is for the plaintiff to establish that the user has been of right. The question is really one of fact and in my opinion it is not possible to the extent to which Banerji, J., did go in that case. The rule is well established in England that a party enjoying an easement acted under a claim of right until the contrary is shown : see Gale on Easements, 10th Ed., p. 227. Now the rule under what circumstances an easement can be acquired is the same in England as here. In order to establish a right of way in England it must be proved that the claimant has enjoyed it for the full period of twenty years and

(1) [1903] 8 C. W. N. 359.

that he has done so as of right; but if it should be the case of the defendant that the enjoyment was by violence or by stealth or by leave asked from time to time, it is for the defendant to allege that case and establish that case.

On what ground are we then to say that the English rule does not apply to this country? I am quite aware that circumstances are different in this country and that in the villages there is often express or tacit permission to use the private lanes, but such a case must be alleged by the defendant and when so alleged the Court may consider the whole matter with a strong leaning in favour of the defendant. But where no such case is made by the defendant, the Court, in my opinion, ought not to allow him to argue such a case. In my opinion, the point has been correctly decided by the learned Judge in the Court below.

The question of limitation must also be decided against the defendants. The plaintiffs gave evidence which was accepted by the learned Judge in the Court below that their house fell down in 1923. The suit was filed in 1923.

I must dismiss this appeal with costs.

Adami, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 461

ROSS AND KULWANT SAHAY, JJ.

Kuldip Saran Singh—Plaintiff—Appellant.

v.

Raghunandan Singh and *others*—Defendants—Respondents.

Appeals Nos. 267 to 271 of 1925, Decided on 16th June 1926, from the appellate decrees of the Sub-J., Patna, D/- 31st January 1925.

Bengal Tenancy Act, Ss. 188 and 105—Application under S. 105—Sole plaintiff karta of the family and the sole recorded proprietor—His sons need not be joined as plaintiffs.

Where the sole plaintiff is not only the karta but he is the sole recorded landlord of the touzi, he can apply alone under S. 105 without joining his sons as plaintiffs: 16 *C. L. J.* 427 and 25 *C. W. N.* 38, *Dist*; *A. I. R.* 1924 *Pat.* 104, *Foll.*

[P. 461, C. 2, P. 462, C. 1]

B. C. Sinha—for Appellant.

Ross, J.—This is an appeal by the plaintiff in a suit for enhancement of rent. The Munsif decreed the suit for enhancement at the rate of 5 annas 3 pies in the rupee. Before the Subordinate Judge in appeal that rate was questioned, but this point was decided in favour of the plaintiff. The suit was, however, dismissed on the ground that it was brought by the plaintiff alone, although admittedly he had an infant son, and under S. 188 of the Bengal Tenancy Act the suit had to be brought by all the landlords and was, therefore, not maintainable by the plaintiff only.

The learned Subordinate Judge relied on the decision in *Satiprosad Garga* v. *Radhanath Maity* (1) and in *Raja Satiprosad Garga Bahadur* v. *Sonaton Jhara* (2). In both of these cases the same point was decided and on the same grounds; and in fact in the second the first decision was quoted. Now all that was decided in that case was that a suit for assessment of rent for excess land instituted by some of the members of a joint Mitakshara family, cannot be considered as instituted by them as agents for other members, authorized to act on behalf of all the landlords within the meaning of S. 188 of the Bengal Tenancy Act. It was pointed out that the Legislature has expressly provided for the performance of such an act, not only by the entire body of the joint landlords but also by their representative. In that suit it could not have been argued that the plaintiffs were acting in a representative capacity because more than one member of the joint family had brought the suit without including the other members. The present suit is entirely different. The sole plaintiff is not only the karta, but he is the sole recorded landlord of this touzi. The principle applicable in such a case has been laid down by this Court in *Hazari Lal Sahu* v. *Ambica Gir* (3) where at p. 594 it was said in dealing with the question of applicability of S. 188 in the circumstances of that case which dealt with an application under S. 105 of the Bengal Tenancy Act:

All the recorded proprietors of the touzi are named as applicants in the application and in the absence of the name of Sukhram Singh even if he be the managing member will not make the application illegal if the persons who are recorded as proprietors are all

(1) [1912] 16 C. L. J. 427=18 I. C. 197.
(2) [1921] 25 C. W. N. 38=61 I. C. 549.
(3) A. I. R. 1924 Patna, 104=3 Pat. 67.

joined in the application. I am, therefore, of opinion that the learned Special Judge was wrong in holding that the application under S. 105 could not be maintained by reason of the provisions of s. 188 of the Bengal Tenancy Act.

It is true that in that case the decisions upon which the learned Subordinate Judge relied were not cited, but the principle is laid down and there is nothing in these decisions to conflict with that principle. In my opinion the suit was properly constituted and the plaintiff is entitled to a decree for enhancement at 5 annas 3 pies in the rupee.

The appeal must, therefore, be decreed and the decision of the Subordinate Judge set aside and that of the Munsif restored. As the respondents do not appear there will be no costs in the appeal but the plaintiff is entitled to the costs in the lower appellate Court.

This judgment will govern Second Appeals Nos. 268 to 271 also.

Kulwant Sahay, J.—I agree.

Appeal allowed.

A. I. R. 1926 Patna 462 (1)

MACPHERSON, J.

Rambilakh Singh and *another*—Petitioners.

v.

Chairman of Dinajpure Nizamat Municipality—Opposite Party.

Civil Revision No. 111 of 1926, Decided on 3rd May 1926.

Bihar and Orissa Municipal Act, S. 377 (1) and (2)—Scope.

Section 377 (1) and (2) do not cover cases of contract: 65 *I. C.* 105, *Rel. on.* [P 462 C 2]

B. C. Sinha—for Petitioners.

Sashi Shekhar Prasad Singh—for Opposite Party.

Judgment.—This is an application under S. 25 of the Small Cause Courts Act.

The petitioners contend that the dismissal of their suit against the Dinapur Nizamat Municipality is not in accordance with law.

The petitioners had a contract to repair one of the municipal roads and submitted their bill for Rs. 181-1-0 which was reduced by the Municipality which considered that they were entitled only to Rs. 110-4-0, and offered that sum. Not satisfied, the plaintiffs brought a Small Cause Court suit on the 22nd August 1925 for Rs. 209-8-0 including Rs. 28-7-0 as interest.

The Judge held, first, that the petitioners were not entitled to more than Rs. 110-4-0, and secondly, that under S. 377 (1) of the Bihar and Orissa Municipal Act the suit failed because they had not given the requisite notice of one month to the Municipality and that it also failed under S. 377 (2) because they had not commenced their action within three months next after the accrual of the cause of action on the 24th December 1924.

On behalf of the petitioners the decision as to the amount due is but feebly assailed and in my opinion there is no ground for interfering with the decision of the Court below.

As to the second point, however, it is difficult to see how the decision can be maintained. The suit was in contract and not in tort and it has been held that S. 363 of the Bengal Municipal Act, 1884, which does not differ from S. 377 of the Bihar and Orissa Municipal Act, 1922, does not cover cases of contract. I would refer to the judgment of Richardson, J., in *Panchanan Chattarji* v. *Sontosh Kumar Bose* (1) in which the position was precisely the same as it is in the present case. In my opinion S. 377 does not apply in either sub-S. (1) or sub-S. (2) and the suit ought not to have been dismissed in toto by reason of any of its provisions.

There must, therefore, be a decree for the plaintiffs for Rs. 110-4-0 with future interest at 6 per cent. per annum. But as this amount was offered to him prior to the suit by the Municipality and he refused to accept it, it is clear that he ought to pay the costs of the defendant opposite party throughout. Pleader's fee in this Court one gold mohur.

Appeal dismissed.

(1) [1921] 65 I. C. 105.

✻ A. I. R. 1926 Patna 462 (2)

DAWSON MILLER, C.J., AND FOSTER, J.

Sone Kuar and *others*—Appellants.

v.

Baidyanath Sahay—Respondent.

Second Appeal No. 1330 of 1923, Decided on 17th May 1926.

✻ *Civil P. C., O. 26, R. 10—Report of Commissioner is not binding.*

A Commissioner's report is only evidence in a case but it is in no way binding on the Court. If such report is not satisfactory, it is in Courts

discretion to order another Commissioner to be appointed: 23 *C. L. J.* 600, *Dist.* [P. 463, C 2]

K. P. Jayaswal and *B. C. Sinha*—for Appellants.

K. Husnain and *R. T. N. Sahai*—for Respondent.

Dawson-Miller, C. J.—This case arises out of a boundary dispute between the proprietors of neighbouring estates. The plaintiffs succeeded as to part of their claim in the trial Court and on appeal to the District Judge the whole of their claim was decreed.

Before the trial Court the defendant applied for the appointment of a Commissioner to inspect the locality and prepare a map and report the result of his inspection. This he did, but the report of his inspection although in some respects in favour of the defendants was adversely criticized by the learned District Judge. The Record of Rights was in favour of the plaintiffs, and the defendants placed no documents before the Commissioner to rebut the presumption arising from the record. They relied merely on certain physical features of the ground which they contended supported their case. The Commissioner could not come to any definite findings on such materials. He, however, prepared two rough maps which supported the defendants. At the same time although he was asked to locate the plots in dispute and to ascertain whether they formed part of the plaintiffs' mouza according to the survey map, he said he could not do so on account of insufficient materials.

The learned District Judge on appeal described the report as perfunctory and came to the conclusion that it was based on surmise and was not supported by the evidence. He accepted the Record of Rights and the Survey map which were supported by the oral and documentary evidence of the plaintiffs, and he gave valid reasons for preferring the survey authorities' map to those prepared by the Commissioner.

The defendants have appealed to this Court and the only point urged in appeal is that the Commissioner's report having been found to be unsatisfactory, the District Judge should have appointed another Commissioner to make a fresh report. It does not appear that he was asked to do so, nor is this in the present instance, in my opinion, a good ground of appeal. The Commissioner's report was merely evidence in the case. Although generally accepted, when the Commissioner performs his duties satisfactorily it is not binding upon the Court. The Court has full power to arrive at its own conclusions even if they are at variance with the report, and I am not prepared to hold that the mere fact that the report is based upon inconclusive material or upon an inspection indifferently performed imposes an imperative duty upon the Court to order a fresh inspection. In such cases the Court must exercise its discretion and may or may not require a fresh inspection. If the Court considered the evidence sufficient to enable it to decide the case, it has, in my opinion, full discretion in the matter, and unless a higher tribunal finds that that discretion was improperly exercised, its judgment cannot be called in question merely because it refrained from ordering a fresh inspection In the present instance, after reading the careful judgment of the learned District Judge, I consider that he exercised his discretion wisely. He was satisfied that the other evidence on the record was to be preferred to the Commissioner's report based as it was on unsubstantial foundations. There was every reason to suppose that had the report been based upon a more careful inspection it would not have supported the defendants' case.

Our attention has been drawn to the case of *Tirthabasi Singh Roy* v. *Bepin Krishna Roy* (1). In my opinion that decision lays down no general principle that in all cases where the Commissioner's report is not accepted there must be a second enquiry. Each case must be considered upon its own particular facts and I am certainly not prepared to say that the mere fact that the learned District Judge has not accepted the Commissioner's report, nor the fact that the inspection has not been very satisfactorily carried out is in itself, a ground upon which the Court must be compelled to order a fresh inspection.

In my opinion this appeal should be dismissed with costs.

Foster, J.—I agree.

Appeal dismissed.

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(1) [1916] 23 C. L. J. 600=34 I. C. 80.

* A. I. R. 1926 Patna 464

BUCKNILL, J.

Dwarika Singh and *others*—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 28 of 1926, Decided on 6th May 1926.

* *Criminal P. C., S. 526 — Crown case conducted by Court Inspector—Complainant appointing a pleader, who is a near relation of Magistrate, to watch the case is no ground for transfer.*

Where a Crown case is being conducted by the Court Inspector, the mere fact that the complainant has engaged, to watch the case, a pleader who is a near relation of the Magistrate trying the case is no ground for transfer of the case so long as the pleader is only watching the case : *A. I. R. 1925 Oudh 348, Diss from.*

Dhyan Chandra—for Petitioners.

Assistant Govt. Advocate—for the Crown.

Judgment—This is an application in criminal miscellaneous jurisdiction. The application is made under the provisions of S. 526 Cr.P.C. and S. 107, Govt. of India Act, 1915 and asks that a criminal case which is being tried before Mr. Syed Ahmed Nawab, Magistrate First Class of Gaya, should be transferred from that Magistrate to another Magistrate of competent jurisdiction. Apparently the applicants (10 in number) have been charged with various offences punishable under the provisions of Ss. 147 (rioting) 148 (rioting with deadly weapons) 323 (simple hurt) and 324 (causing hurt with cutting weapons) of the Indian Penal Code. It is said that the complainant is the barahil of the 7 annas Tikari Raj. The case is a Crown case and the prosecution is being conducted by the Court Inspector ; but it is alleged that the complainant has engaged to watch the case Mr. Waris Nawab, a Barrister who is the brother of the Magistrate ; that the applicants say that they are afraid that the presence of Mr. Waris Nawab watching the case in the Court may influence in some way the course of the proceedings. The District Magistrate was applied for a transfer, but he did not think that the circumstances were sufficient to justify any apprehension.

There are, of course, obvious disadvantages in relatives of Judicial Officers practising in front of them and had Mr. Waris Nawab been prosecuting in the case I should probably have felt inclined to consider that a transfer was desirable. The general view upon matters of this kind, which of course are very often largely matters of professional etiquette and delicacy, has been mentioned in the case of *Nityaranjan Mandal* v. *Emperor* (1), where Newbould and Ghose, JJ., in the Calcutta High Court stated that it was undesirable that a member of the legal profession should practise in a Court presided over by a near relation. In their Lordships' judgment their Lordships observed :

> The only serious ground on which this application for transfer is based, is that the muktear who is appearing for the complainant is, as is admitted by the learned Magistrate, a near relation of his. It is undesirable that a member of the legal profession should practise in a Court presided over by a near relation. The complainant in this case is a pleader and we are surprised that a member of that branch of the profession should have engaged a mukhtear whom he knew to be related to the Magistrate who would try the case. The mukhtearnama was not filed until the day on which the case was transferred to this Honorary Magistrate.

In the case of *In Re the Petition of Basapa* (2) a Bench of the Bombay High Court held that where the trying Magistrate was the master of the complainant his magisterial jurisdiction was not affected thereby though it was probably expedient that the complaint should be dealt with by another Magistrate.

There is, however, a recent case from Oudh (reported in *Pearay Lal* v. *Puttan* (3) where Pullan, A. J. C., held that the mere fact that the Magistrate's son was a pleader and was engaged in a criminal case before that Magistrate, was no ground for granting a transfer to another Magistrate. I do not think that I can subscribe to the proposition laid down in this last decision. I do feel that it is not very seemly or suitable that a practising lawyer should pursue his practice in the Court of a near relative ; it gives rise to ideas in the mind of the public which should not have the opportunity of being thus engendered. It might be a gesture well in keeping with the traditions of our profession if Mr. Waris Nawab retired from the case ; but as long as he confines his attention to watching the case on behalf of the complainant, I do not think that I have the least ground for ordering or that it would be right to order any transfer. The matter might be different if Mr. Waris Nawab took any active part in the conduct of the prosecution. This application will therefore be rejected.

Application rejected.

(1) A.I.R. 1925 Cal. 806.
(2) [1885] 9 Bom. 172.
(3) A.I.R. 1925 Oudh 348.

A. I. R. 1926 Patna 465

JWALA PRASAD AND BUCKNILL, JJ.

Shaikh Abdul Gaffar and *others*—Plaintiffs—Appellants.

F. B. Downing and *others*—Defendants—Respondents.

Appeal No. 135 of 1922, Decided on 18th December 1925, from the original decree of the Sub-J., Purnea, D/- 7th February 1922.

(a) *Landlord and Tenant—Relationship is not established by marfatdari receipts.*

Marfatdari receipts, i. e., receipts granted in the name of payer on behalf of another, do not constitute any relationship of landlord and tenant between the payer and the payee, nor any recognition of the payee's right as tenant. [P 467, C. 2]

(b) *Bengal Patni Regulation* (8 *of* 1819), *S.* 5 *—Transfer of tenure—Fees not paid—Landlord can ignore transfer and proceed against transferror for rent—Sale for arrears of rent cannot be challenged by unregistered transferee.*

The transfer of a patni tenure is subject to the payment of fees and security to the landlord as required by S. 5, and until these conditions are fulfilled, the landlord has a right to refuse to register and otherwise to give effect to such alienations by discharging the party transferring his interest from personal responsibility and by accepting engagements of the transferee. Until the registration of transferror's name has taken place, the transfer does not affect the zamindar's right and it does not create any relationship of landlord and tenant. In spite of the transfer the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rents and other obligations imposed upon the tenure; and if the tenure is sold by the landlord for the arrears of rent due therefor in a proceeding against the recorded tenant, the purchaser acquires the tenure free from any incumbrance created upon it by act of the defaulting proprietor, his representatives or assignees, the zamindar having an indefeasible right to hold the tenure answerable for the rent which is his reserved property in the tenure. The whole tenure at such a sale passes, and not only the right, title and interest of the recorded tenant, so that the interest of an unrecorded transferee ceases and he has no right to impugn the sale upon the ground that he was not made a party to the proceedings taken by the landlord in selling up the tenure for the realization of his rent. [P. 468, C. 2]

(c) *Bengal Patni Regulation* (8 *of* 1819), *Ss.* 5 *and* 6*—Unregistered assignee of lease can have sale set aside on the ground of fraud but not on ground that he was not party to rent realisation proceedings.*

An unregistered assignee, though he cannot claim to be a tenant of the landlord and to release his assignor, yet has an interest independently of the regulation and can impugn a sale held under the Patni Regulations as being no sale at all and as being void against everybody else. He can have the sale set aside on the ground of its being illegal or irregular, or tainted with fraud. And if he succeeds in getting the sale set aside on the above grounds, he will be restored to the position which he had before the sale. But he has no right to have the sale set aside upon the ground that he was not a party to the proceedings taken by the landlord to realize his rent by sale of the holding: 26 *Cal.* 677; 17 *Cal.* 162; 32 *Cal.* 1031; 20 *W. R.* 380; 20 *Cal.* 247; 19 *Cal.* 703; 3 *C. W. N.* 38; 29 *C. L. J.* 481; *A. I. R.* 1923 *Cal.* 527 and 9 *C. W. N.* 224, *Rel. on.* [P. 469, C. 1]

(d) *Bengal Patni Regulation, S.* 11*—Landlord can realise rent after one year under ordinary law, i. e., Bengal Tenancy Act.*

Even if a landlord allows his rent to fall into arrear for a perlod exceeding one year, he is not debarred from realizing it under ordinary law. The Patni Regulation gives to the zamindar the right to realize the rent by a summary procedure and that summary procedure is restricted only to periodical rents. But the zamindar is not bound to realize his rent every six months. He can wait for a longer period, and if he does wait for a longer period he can proceed under the general law for the realization of his rent. [P. 471, C. 1, 2]

(e) *Bengal Tenancy Act, S.* 195 (e)*—Tenancy Act applies where Patni law is silent—Bengal Patni Regulation, S.* 11.

Section 195 (e) of the Bengal Tenancy Act says that the Bengal Tenancy Act would not apply to enactments relating to patni tenures in so far as it relates to those tenures. Where the patni law is silent, the provisions of the general rent law would apply. The Patni Regulation does not take away the right of the zamindar to proceed in the ordinary way under the general law to recover arrears of rent; it only gives him an additional right to recover rent by a summary process of sale which is restricted to the recovery of rent for only one year: 22 *C. W. N.* 181 and 19 *Cal.* 504, *Foll.* [P. 471, C. 2]

(f) *Bihar and Orissa Public Demand Recovery Act* (*B and O.* 4 *of* 1914), *S.* 46*—Recorded patnidar holding benami for another or transferring by private arrangement—Beneficiary or transferee cannot sue to set aside rent decree on grounds other than fraud.*

Where the recorded patnidar is a benamidar for another, or where the recorded patnidar has transferred his interest to another by private arrangement, that other is a representative of the recorded tenant and is bound by a rent decree obtained under the Act against the recorded tenant and by the sale held thereunder. His suit therefore for setting aside the sale on grounds other than that of fraud is barred by S. 46. P 472, C. 1]

Khursaid Husnain and *S. M. Naimatullah*—for Appellants.

Sultan Ahmed and *Sambhu Saran*—for Respondents.

Jwala Prasad, J.—The plaintiffs, who are the appellants before us, claim to recover possession of an eight annas share of a Patni Taluq Mahals Khora-

gach, Bormasea, Dipnagar, Kantari and Sedabad in Pergana Fatehpur-Sedia, District Purnea, upon a declaration of their title thereto and upon a declaration that the sale of the putni on 4th November 1920, in execution of a certificate debt for arrears of rent under Bihar and Orissa Public Demands Recovery Act (IV of 1914), is fraudulent, illegal, null and void and not binding upon them.

The 16 annas disputed putni taluq was originally owned by the Defendants Nos. 2 and 3, Janardan Prasad Thakur and Tirpurari Prasad Thakur, who, for convenience' sake, will hereafter be referred to as the Thakur defendants.

Previous to the present sale in question, the putni was sold in execution of a certificate debt for arrears of rent and was purchased by Defendant No. 4, Haji Shaikh Majidur Rahman. By a compromise, the auction-purchaser, Defendant No. 4, retained the eight annas share and the other eight annas share went to the Thakur defendants. Thus Defendants Nos. 2—4 became owners of the putni taluq in 1909 and their names were recorded in the register of the zamindar, Defendant No. 1.

Defendant No. 5 is the purchaser of the putni taluq at the auction-sale now sought to be set aside.

Defendant No. 4 is a step-brother of the plaintiffs and in 1907 was appointed guardian, under the Guardians and Wards Act (VIII of 1890), by the District Judge of Purnea, of the two plaintiffs and his other brothers, Abdul Wahab, Abdul Halim, Abdul Samad, Abdul Sattar and Muhammad Siddique who were all minors at that time. Plaintiff No. 1, Abdul Gaffar, and his two brothers, Abdul Sattar and Abdul Siddique, attained majority in the year 1916 and the guardianship of Haji Shaikh Majidur Rahman ceased. By a compromise petition, Ex. 3, filed before the District Judge on the 26th February 1915, Haji Shaikh Majidur Rahman's guardianship was withdrawn from the person and properties of the remaining brothers also, namely, Abdul Jabbar, Abdul Halim, Abdul Wahab and Abdul Samad and in his place their mother Mt. Nasiban was appointed guardian : vide Ex. 5, extract from order sheet in Miscellaneous Case No. 21 of 1907.

The plaintiff's case is that Defendant No. 4 purchased the putni taluq at the first certificate sale in the year 1909 for himself as well as for the plaintiffs and his other minor brothers ; and that after the eight annas of the putni was returned to the Thakur defendants, the plaintiffs and their other brothers remained in joint possession of the remaining eight annas share in the taluq through Defendant No. 4, Haji Shaikh Majidur Rahman, who alone was the recorded tenant in respect of their moiety share. They further say that by a private family arrangement, their step-brother Defendant No. 4, ceased to have any share in the putni taluq and the whole moiety share in the putni was allotted to the plaintiffs and their full brothers, Abdul Wahab, Abdul Samad and others. The plaintiffs say that they and their brothers and not Defendant No. 4 have been in exclusive possession of the said eight annas share in the said putni taluq and have been paying rent in respect thereof. Consequently the plaintiffs say that the certificate should have been issued in their names and notice thereof should have been served upon them and not upon Shaikh Majidur Rahman, who had ceased to have any concern with the putni taluq, and they impugn the certificate proceedings and the sale held in execution thereof as having been brought on account of fraud and collusion of Defendants Nos. 2—5, who are inimically disposed towards them in order to deprive the plaintiffs of their share in the putni. They also say that on account of collusion, the processes were not served in accordance with law and the service returns were fraudulently obtained in collusion with the Court peon, and the plaintiffs were kept out of knowledge thereof with the result that the property in dispute was sold for a very inadequate value.

Defendant 1st party, No. 1, Manager, Court of Wards, filed one written statement and Defendant No. 5, of the third party, filed another written statement. They deny that there was any fraud or collusion in the preparation or issue of the certificate, the service of processes or in the sale in execution of that certificate. They also deny that the plaintiffs have any interest in the putni or that they ever paid any rent in respect of it or that there was any private partition between the plaintiffs and their co-sharers. They deny any knowledge of

the plaintiffs' possession as putnidars or that there was any collusion between them and the other defendants in bringing the property to sale. They assert that the property was sold at an adequate price and that the notice and other processes were duly served in accordance with law and that the plaintiffs not having been recorded in the office of the zamindar as holders of the putni had no right to the certificate being issued in their names or any process being served upon them and that they have no status to bring the suit.

The Subordinate Judge dismissed the plaintiffs' suit holding that the certificate was properly drawn up and issued and that the processes, including the sale proclamation, were duly served and were not fraudulently suppressed as alleged by the plaintiffs inasmuch as their servant, Yusuf, bade at the sale up to Rs. 6,000 and that the price fetched at the sale, Rs. 7,000 was not, in any way, inadequate. Inasmuch as the plaintiffs did not get their names recorded, the learned Subordinate Judge held that they were not entitled to be made party to the certificate proceeding or any notice served upon them even if they had any interest in the tenure and the purchaser at the auction-sale acquired good title.

The principal contention in this appeal of the learned advocate on behalf of the appellants is that the plaintiffs' title to an eight annas share in the putni taluk has been conclusively established and that their title and interest therein is not affected by the sale of the putni inasmuch as they were not parties to the certificate proceedings. The plaintiffs base their title upon the auction-purchase of the putni in 1909 in the name of their step-brother, Defendant No. 4, in execution of a certificate sale for arrears of rent. They say that Defendant No. 4 at that time was guardian appointed by the District Judge, under the Guardians and Wards Act (VIII of 1890) of the person and property of the plaintiffs and their other minor brothers, and that subsequently, on the 25th February 1915, by a private partition, the eight annas share in the putni taluq was allotted to the share of the plaintiffs and their other brothers. For this they rely upon an inventory or takhtabandi filed with the petitition, Ex. 3, dated the 25th February 1915, in Misc. Case No. 21 of 1907. In that inventory this property has been described as having been allotted to the plaintiffs and their other brothers. Defendant No. 4 was a party to the petition and signed it. In paragraph 3 of the petition, referring to the takhtabandi, it is stated as follows :

> The parties shall execute within three months a taksimnama or partition deed of the properties in accordance with the terms of the parties.

Abdul Gaffar, Plaintiff No. 1, in his evidence admits that a deed of partition was drawn up but was not registered. As to actual possession over the property he says that he has never had the occasion to go to the Mahals and his servants looked after it, and names one Narayan Chaudhry as his tahsildar. He also says that the papers showing collections are kept, but neither any collection papers have been filed nor has any tahsildar been examined.

The plaintiffs then rely upon the petition, dated the 13th January 1920, Ex. 2, filed by Defendant No. 4 in the certificate proceedings stating that the plaintiffs, along with their brothers and their mother are in possession of the property and that it belongs to them and that he himself had no concern with it. This petition of 'disclaimer by Defendant No. 4 cannot confer any right upon the plaintiffs. They must prove their title and possession by better evidence. The Plaintiff No. 1 became major in the year 1915 and both the plaintiffs were released from the guardianship of their step-brother, Defendant No. 4. If they had been in possession of the property they would have been in a position to give better evidence. The only evidence is the oral statement of the Plaintiff No. 1 and in my opinion this is not sufficient to establish the plaintiffs' possession over the property in dispute. No doubt the rent receipts and chalans, Exs. A and 1 to 1(e), show that rents used to be paid by the plaintiffs : but in all these receipts they have been mentioned as marfatdars meaning that the rents were paid through them. The payments were made by them not as tenants of the holding but on behalf of the recorded tenant, Majidur Rahman, whose name is mentioned in the receipts as tenants. Such marfatdari receipts have been held as not constituting any relationship between the payer and the payee, nor any recognition of the payee's right as tenant

These receipts therefore cannot prove any tenancy right of the plaintiffs nor any recognition of such a right by the zemindar. D. W. No. 5, Asgar Ali, the Head Clerk of the Court of Wards says that the plaintiff never asked him to substitute his name. Plaintiff No. 1 himself admits that he did not file any application for mutation of his name and that he was aware that a fee of Rs. 5 on the jama is paid to the zamindar for effecting mutation. He was certainly conversant with the rules and practice on the subject as is stated by D.W. No. 1 Gowhar Ali, the certificate clerk, that the Plaintiff No. 1, Abdul Gaffar, often used to come to the Collectorate. Therefore the plaintiffs for some reason or other knowingly and deliberately did not get their names registered in respect of the share they claim in the putni. The plaintiffs are not clear about the extent of the interest they had in the putni. Plaintiff No. 1 says that the other two brothers are also interested in it and that the plaintiff's share is only four annas. The petition, Ex. 2, also shows that not only the plaintiffs but their brothers and stepmother were all interested in the putni.

The plaintiffs have failed to prove satisfactorily the interest claimed by them in the tenure in question and their possession thereof. Even if they acquired any interest by the auction purchase of Defendant No. 4 in 1909 and subsequently by allotment in the partition of family properties, they did not get their names recorded in the zemindar's sarishta and allowed Defendant No. 4 to continue as recorded holder of the tenure along with the Thakur defendants Nos. 2 and 3. Can they contend that their interest is not affected by the sale of the tenure for arrears of rent held in certificate proceedings under the Bihar and Orissa Public Demands Recovery Act (IV of 1914) against the tenants whose names were recorded in the zemindar's sarishta ?

The tenure in question is admittedly a patni tenure and designated as "patni mahals" in paragraph 1 of the plaint. It is unquestionably governed by the Patni Regulation VIII of 1819 *Brindaban Chunder Sircar Chowdhry* v. *Brindaban Chunder Dey Choudhry* (1). This is not disputed by the learned advocate on behalf of the appellants.

By S. 3 of the Regulation the tenure is "capable of being transferred by sale, gift or otherwise at the discretion of the holder as well as answerable for his personal debts and subject to the process of the Court of Judicature in the same manner as other real property." The transfer, however, is subject to the payment of fees and security to the landlord as required by S. 5 and until those conditions are fulfilled, the landlord has a right to refuse to register and otherwise to give effect to such alienations by discharging the party transferring his interest from personal responsibility and by accepting engagements of the transferee" : vide S. 5. The transferee can seek his remedy in the civil Court to compel the zemindar to give effect to the transfer if the security tendered is not accepted by the landlord : vide S. 6. But until the registration of his name has taken place, the transfer does not affect the zemindar's right and it does not create any relationship of landlord and tenant. In spite of the transfer the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rents and other obligations imposed upon the tenure : and if the tenure is sold by the landlord for the arrears of rent due, therefor, in a proceeding against the recorded tenant, the purchaser acquires the tenure free from any incumbrance created upon it by act of the defaulting proprietor, his representatives or assignees. the zemindar an indefeasible right to hold the tenure answerable for the rent which is his reserved property in the tenure. The whole tenure at such a sale passes, and not only the right, title and interest of the recorded tenant, so that the interest of an unrecorded transferee ceases and he has no right to impugn the sale upon the ground that he was not made a party to the proceedings taken by the landlord in selling up the tenure for the realization of his rent.

The obligations of having his name recorded in the landlord's sarishta are the same in the case of a purchaser in execution of a decree other than a decree for arrears of rent due from the tenure. In the latter case the purchrser is not required to pay any fee, though he is

(1) [1873] 1 I A. 178=13 B. L. R. 408=21 W. R. 324=8 Sar. 365 (P. C.).

liable to be called on to give security under the conditions of the tenure purchased : vide the last portion of S. 5.

The zemindar can refuse to accept a tender or any amount of rent from unregistered transferee of a patni and he is not bound to recognize deposits of rent made by such a transferee in his own name ; vide the case of *Saibesh Chandra Sarkar* v. *Kumar Bonowari* (2).

The above is the effect of the various provisions in the Regulation and it was put in a nutshell by Sir Comer Petheram, C. J., in the case of *Joykrishna Mukhopadhya* v. *Sarfannessa* (3). His Lordship observed as follows :

> the effect of the provision of those sections (S. 5 and 6) amounts to this, that upon an alienation or transfer by the putnidar the zemindar may exact a fee, which represents his profits being the portion of his interest in the property whenever a transfer of the tenure is made, the amount of which is regulated by the Regulation itself and further than that, until that fee has been paid, the zemindar shall not be bound to register the transfer and further than that, until transfer has been registered, he shall not be bound to recognize the transfer in any way, that is to say, until his demand has been satisfied and registration has been effected, the old tenant remains his tenant, and the relation of landlord and tenant has not been created between him and the assignee of the putnidar, whatever the arrangement may be between the putnidar and his assignee.

No doubt, as held in that case, an unregistered assignee, though he cannot claim to be a tenant of the landlord and so release his assignor, yet has an interest independently of the Regulation and can impugn a sale held under the Patni Regulations as being no sale at all and as being void against everybody else. He can have the sale set aside on the ground of its being illegal or irregular, or tainted with fraud. And if he succeeds in getting the sale set aside on the above grounds, he will be restored to the position which he had before the sale. But he has no right to have the sale set aside upon the ground that he was not a party to the proceedings taken by the landlord to realise his rent by by sale of the holding. This view is supported by a string of cases quoted at the Bar, which for the sake of reference are given hereunder : *Nitayi Behari Saha Paramanick* v. *Hari Govinda Saha* (4) ; *Gyanada Kantho Roy Bahadur* v. *Bromomoyi Dassi* (5) ; *Surendra Narain Singh* v. *Gopi Sundari Dai* (6) ; *Lackhi Narain* v. *Khettro Pal* (7) ; *Surendranath Pal Choudhry* v. *Tinchowri Dasi* (8) ; *Rajnarain Mitra* v. *Ananta Lal Mondul* (9) ; *Rajah Sir Sourindra Mohan Tagore* v. *Moharani Surnomoyee* (10) ; *Golam Sattar* v. *Maharaja Sir Prodyat Kumar Tagore Bahadur* (11) ; *Behari Lal Biswas* v. *Nasimannessa Bibi* (12) and *Sourendra Narayan Singh* v. *Gopi Sundari Dasi* (13).

The learned advocate on behalf of the appellants has equally cited a number of authorities, namely, *Kali Kumar Ghose* v. *Bidhu Bhusan Banarji* (14) ; *Ishan Chandra Sarkar* v. *Beni Madhab Sarkar* (15) ; *Raja Jagadish Chandra Deo* v. *Dhabel Deb* (16) ; *Probhash Chandra Chattarji* v. *Jahar-ud-din Mondal* (17), *Kali Kumar Ghose* v. *Bidhu Bhushan Banerji* (14), and *Gobinda Sunder Sinha Chowdhury* v. *Srikrishna Chakravarty* (18).

On the strength of these authorities it is contended that a transferee of a tenure is not bound by the sale in execution of a decree to which he was not a party. The authorities relied upon are either cases where tha sale was brought about on account of fraud and collusion with a view to deprive the purchaser of his right, or are cases under the Bengal Tenancy Act the provisions whereof relating to the sale or transfer of a permanent tenure and recognition thereof by the landlord are different from those contained in the Patni Regulations. On the other hand, where a transferee, without any sufficient cause omits to get his name registered, he is bound by the sale held in execution of a decree against the recorded tenant even in a case governed by the Bengal Tenancy Act. For instance,

(2) [1909] 10 C. L. J. 453=4 I. C. 371.
(3) [1888] 15 Cal. 345.
(4) [1899] 26 Cal. 677.
(5) [1890] 17 Cal. 162.
(6) [1905] 32 Cal. 1031=9 C. W. N. 824.
(7) 20 W. R. 380=13 B. L. R. 146=24 W. R. 407 Note=3 Sar. 273 (P. C.).
(8) [1893] 20 Cal. 247.
(9) [1892] 19 Cal. 703.
(10) [1898] 26 Cal. 103=3 C. W. N. 38.
(11) [1919] 29 C. L. J. 481=51 I. C. 933.
(12) A. I. R. 1923 Cal. 527.
(13) [1905] 32 Cal. 174=9 C. W. N. 224.
(14) [1911] 16 C. L. J. 89=10 I. C. 382.
(15) [1897] 24 Cal. 62=1 C. W. N. 36 (F. B.).
(16) [1918] 44 I. C. 26.
(17) [1920] 32 C. L. J. 77=59 I. C. 49.
(18) [1909] 10 C. L. J. 538=3 I. C. 346=6 M. L. T. 255.

vide *Sham Chand* v. *Brojonath* (19); *Profulla Kumar Sen* v. *Nawab Sir Slimulla Bahadur* (20); *Raja Jagadish Chandra Deo* v. *Dhabel Deb* (16); *Probash Chandra Chattarji* v. *Jahar-ud-din Mandal* (17) and *Maharaja Sir Rameshar Singh Bahadur* v. *Rajo Choudhrain* (21). In the present case the title set up by the plaintiff is further affected by the fact that they claim to have obtained only eight annas share in the patni taluq in question. S. 6 says that the rules of that section and of S. 5 do not apply to transfers of any fractional share of a patni taluq nor to any alienations other than transfers of the entire interest unless made under the zamindar's special sanction. The plaintiffs say that by a private partition in the year 1915, Shaikh Majidur Rahman transferred his interest in favour of the plaintiffs. But he had only a fractional share in the taluq and the transfer was not valid so far as the landlord was concerned without his special sanction. No sanction of the landlord is pleaded in this case. Therefore, he is not bound to recognize the transfer or to register it. Even the receipt of money or rent from the transferee of a portion of a patni taluq will not have the effect of recognition of the transfer or splitting up of the tenure. Therefore, the plaintiffs have no right to question the validity of the sale or to urge that their interest in the tenure, if any, is not affected by the sale in execution of the certificate obtained by the zemindar for realization of his rent.

The learned Subordinate Judge has held that the plaintiffs failed to establish any fraud either in the preparation or issue of the certificate or the process required by law. There is absolutely no evidence on the record of any enmity between the plaintiffs and any of the defendants. The finding of the learned Subordinate Judge as to fraud has not been seriously challenged in the present case. It is not disputed that the rents for which certificate was issued were due. A certificate, No. 318 of 1919-20 (Ex. J), was prepared and filed on the 27th November 1918 in the office of the Certificate Officer under the Bihar and Orissa Public Demands Recovery Act (IV of 1914). The notice of the certificate (Ex. C) was served upon the certificate-judgment-debtors, Defendants Nos. 2 to 4 under S. 7 of the Act and a notice through post (Ex. D) was served upon and acknowledged by Defendant No. 4, Shaikh Majidur Rahman. On the 13th January 1920, Shaikh Majidur Rahman, one of the certificate-debtors, filed a petition (Ex. 2) stating that he had no connexion or concern with the patni taluq nor was it in his possession and that the patni taluq belonged to and was in possession of Abdul Gaffar, Abdul Jabbar, Abdul Wahab, Abdul Sammad and Mt. Nasiban and the Thakur defendants. In that petition he prayed that the certificate may be issued in the names of the above persons and that the certificate issued upon him may be cancelled, or that the said mahal be attached and put to sale. The Manager Court of Wards, filed a petition consenting to the mahal being sold and did not insist upon proceeding against the person or other property of the judgment-debtors. The certificate officer ordered the sale of the mahal and directed a sale proclamation to issue : (vide order sheet Ex. 1). After some adjournments, at the instance of the Thakur defendants who made part payments from time to time as noted in the order sheet, ultimately 4th November 1920 was fixed for the sale and a sale proclamation was directed to be issued afresh for the balance of the amount due. The sale proclamation was duly served (vide Exs. B to B-4), and on the date fixed the sale was held and the property was knocked down in favour of the highest bidder, Sheobhanjan Lal, Defendant No. 5, for Rs. 7,000 (vide bid sheet Ex. E). No objection was made within the time allowed by law and the sale was confirmed on the 4th January 1921. The purchaser obtained a sale certificate (Ex. L) on the 22nd January 1921 and delivery of possession of the property on the 21st February 1921 (Ex. K). The processes have been conclusively proved to have been duly served and effected. The Plaintiff No. 1 says that Yusuf is his law-agent and the witnesses on behalf of the defendant say that Yusuf was taking keen interest in the sale and the plaintiff used to go to Court in connexion with the sale. Therefore, the sale far from

(19) 21 W. R. 94=12 B. L. R. 484 (F. B.).
(20) [1920] 28 C. W. N. 590=52 I. C. 304.
(21) A. I. R. 1926 Patna 210.

being fraudulent was held with the knowledge of the plaintiffs and they tried their best to purchase the property. The reason is not far to seek. They wanted to acquire the entire 16 annas interest in the property, but they failed. They did not appear in the certificate proceedings nor did they pay the rent due from the tenure, but soon after the sale on the 3rd January lodged their plaint.

It has been strenuously contended on behalf of the plaintiffs that the petition of Defendant No. 4, dated the 22nd January 1921, was not legally disposed of. In the petition the Defendant No. 4, the certificate-debtor, stated that he had no concern with the property and that the certificate be issued in the names of the persons who possessed the property and that the certificate issued in his name be cancelled. He further said that the mahal might be attached and put to sale. The Manager, Court of Wards, also consented to the mahal being sold. The certificate under S. 12 of the Bihar and Orissa Public Demands Recovery Act (Act IV of 1914) could be executed against both the person and property of the judgment-debtors. The objection of Defendant No. 4 was allowed in so far as exemption of his personal liability was asked for and the Court directed the property to be sold. Thus the petition was validly disposed of.

The learned advocate has also contended that the certificate covered rents for the period exceeding one year. Consequently the certificate demand cannot create a charge upon the property. It is difficult to appreciate this contention. His contention, if I have understood it aright, is that the rent due to the zamindar is the first charge upon the property under S. 11 of the regulation only when the periodical steps for realization of rent under the regulation are taken by the landlord. He says that the landlord has a right to realize his rent by the summary procedure prescribed in the regulation every six months and therefore if he allows his rent to fall into arrear for a period exceeding one year, he loses the benefit of S. 11 which makes the rent the first charge on the property. Thus, upon this contention, it is urged that the right, title and interest only of the certificate-debtors passed by the sale held in execution of the certificate under the Public Demands Recovery Act and hence the plaintiffs' right in the property is not affected. There does not seem to be any force in this contention. The Patni Regulation gives to the zemindar the right to realize the rent by a summary procedure and that summary procedure is restricted only to periodical rents. But the zemindar is not bound to realize his rent every six months. He can wait for a longer period, and if he does wait for a longer period he can proceed under the general law for the realization of his rent. S. 195 (e) of the Bengal Tenancy Act says that the Bengal Tenancy Act would not apply to enactments relating to Patni tenure in so far as it relates to those tenures. Where the Patni law is silent, the provisions of the General Rent Law would apply. This has been settled ay authorities. The Patni law is silent as to the realization of rent beyond one year and, therefore, the zamindar is entitled to bring his suit under the ordinary rent law.

It is noticeable that the decree for the rent due from the Patni taluq in the case of *Brindaban Chunder Sircar Chowdhry* v. *Brindaban Chunder Dey Chowdhry* (21), was obtained under the Rent Law (VIII of 1859) and the sale in execution of that decree took place under that law and not under the Patni Regulations. It was held there that the provisions of the Patni Regulations did apply and that the effect of the sale was to destroy all encumbrances including the darpatni created by the patnidar. In the case of *Kumar Satya Sankar Ghosal Bahadur* v. *Mon Mohan Guha Roy* (22), Chatterji, J., held that the Patni Regulation does not take away the right of the zemindar to proceed in the ordinary way under the general law to recover arrears of rent; it only gives him an additional right to recover rent by a summary process of sale which is restricted to the recovery of rent for only one year. Similar was the view taken in an earlier case of *Durga Prosad Bondopadhya* v. *Brindaban Roy* (23). Therefore this contention is overruled.

It would seem further that the plaintiffs' suit is barred by the provisions of S. 46 of the Public Demands Recovery Act. The plaintiffs based their title upon the purchase of the tenure in 1909

(22) [1918] 22 C. W. N. 131=43 I. C. 996.
(23) [1892] 19 Cal. 504.

at a sale held in execution of a rent decree by their step brother Defendant No. 4 who subsequently gave away eight annas share of it to the old holders thereof, Defendants Nos. 2 to 4, and retained the eight annas in his own name. Defendant No. 4 acquired the property for himself as well as for the plaintiffs. Therefore Defendant No. 4 was a benamidar of the tenure to the extent of the interest of the plaintiffs therein. In 1915 the plaintiffs say that Defendant No. 4 abandoned his interest and gave the entire eight annas share to the plaintiffs; in other words, by a private arrangement or exchange in the partition of family properties, the plaintiffs acquired the interest of Defendant No. 4. They were thus the representatives of Defendant No. 4 and as such their suit is barred under S. 46 unless upon the ground of fraud which is not established in the present case; and as representatives they are bound by the decree made against Defendant No. 4: vide the case of *Ishan Chandra Sarkar* v. *Beni Madhab Sarkar* (15). The case in *Kali Sundari Debi* v. *Dharani Kanta Lahiri* (24) is exactly on all fours with the present case. In that case the purchaser had a money decree, but he did not get his name registered in the landlord's serishta and he was held to be a representative of the judgment-debtors within the meaning of S. 244 of the Code of Civil Procedure and was held to be bound by the subsequent decree for arrears of rent against the registered patnidar and the sale held in execution of such a decree. Again, in the aforesaid Privy Council case of *Brindaban Chunder Sircar Chowdhry* v. *Brindaban Chunder Dey Chowdhry* (21), at one stage of the litigation it was held by the Principal Sadr Ameen that the zamindars were entitled to sue the patnidar whose name was registered ignoring the right of a person claiming to have beneficial right in the property and the patnidar being only a benamidar. The sale in that case took place in execution of the decree against the recorded tenant and such a sale was held to be valid and proper under the regulations irrespective of whether the recorded patnidar was the benamidar or not. The point, however, did not directly arise in that case, but there is no doubt that the plaintiffs are bound by the sale in execution of the decree against Defendant No. 4 who was the recorded tenant, and who represented them so far as the zemindar is concerned even if he was a benamidar for them. Therefore whether Defendant No. 4 is a benamidar of the plaintiffs or he transferred his interest to them by means of private arrangement the plaintiffs are bound by the sale and their interest, if any, passed by it. In this case the sale having been held properly under the Public Demands Recovery Act, the tenure passed to the purchaser and not the right, title or interest of the judgment debtors (vide Cl. 3 of S. 26 of the Act). Thus, even if the plaintiffs had any interest in the estate it passed by the sale held under the Public Demands Recovery Act.

The result is that the appeal is dismissed with costs to the defendants who have entered appearance in this Court and contested the appeal. The defendants who did not appear in this Court will not get any costs.

The cross-objection has not been pressed at the time of the arguments and is, therefore, dismissed.

Appeal dismissed.

(24) [1906] 33 Cal. 279=10 C. W. N. 272.

✻ A. I. R. 1926 Patna 472

BUCKNILL, J.

Dindayal Rai—Plaintiff—Petitioner.

v.

Indrasan Rai and *others*—Defendants—Opposite Party.

Civil Revision No. 44 of 1926, Decided on 23rd March 1926, from an order of the Sub-J., Arrah, D/- 21st November 1925.

✻ *Civil P. C., O. 23, R. 1—Permission to withdraw given, on condition of paying defendant's costs, not mentioning that suit will stand dismissed if costs not paid, within prescribed time—Fresh suit is not barred for non-payment of costs—Remedy is, not to proceed with the fresh suit till costs are paid.*

Where a plaintiff is allowed to withdraw a suit with liberty to bring a fresh suit on his depositing the costs of the defendant within a specified time, but where the order contains no direction to the effect that on failure to pay within that time the suit will stand dismissed, the non-payment of such costs within the time specified does not bar the fresh suit until the costs are

paid and when they are paid to proceed with the trial of the fresh suit: 64 *I. C.* 738, *Foll.*
[P. 473, C. 2]

Siveshwar Dayal—for Petitioner.

L. N. Singh and *S. P. Asthana*—for Opposite Party.

Judgment.—This was an application in civil revisional jurisdiction. It is a very simple matter and arises in the following way: The applicant here desired to bring a suit in forma pauperis and applied to the First Subordinate Judge of Arrah, claiming a declaration of his title to and recovery of possession of certain property and other reliefs. The plaintiff's allegation that he was a pauper appears to have been substantiated. The suit was admitted and it seems to have progressed to some extent; but after the action had proceeded for some months, the plaintiff, (that is the applicant here) found it necessary to apply to amend his claim in respect of the description of the property to which he claimed possession. The Subordinate Judge, however, thought that the amendment which the plaintiff asked for was of such a far-reaching character as to alter materially the form and nature of his claim; and, in consequence, on the 16th of August 1924, he passed an order refusing to allow the plaintiff to make the amendment which he asked to make but allowing the plaintiff to withdraw from the suit with permission for fresh suit

But the Subordinate Judge adds

Plaintiff must pay defendants' costs incurred up to date as a condition precedent for instituting a fresh suit.

Now on the 24th of October 1925, the plaintiff made a fresh application to the First Subordinate Judge of Arrah asking that he might be allowed to bring his fresh suit again in forma pauperis. It was undeniable that the plaintiff was a pauper, but the defendants' pleader, when the matter came up before the Subordinate Judge on the 24th October last, drew the attention of the Court to the fact that the plaintiff had not yet paid the costs which he had been ordered to pay to the defendants in the previous suit which he had been allowed to withdraw. The learned Subordinate Judge, remarking that it had been directed that the payment of these costs was imposed upon the plaintiff as a condition precedent to his liberty to commence a fresh suit, thought that the fresh suit could not be entertained at all until these costs were paid.

It is true that the pleader for the plaintiff asked for some time so that he could find money to pay these costs; but the Subordinate Judge, for no particular reason, at least for no good reason, stated that no time would be allowed. In consequence, the Subordinate Judge refused to entertain the application of the plaintiff at all and dismissed the application made by the plaintiff to be regarded as a pauper and consequently his application to bring this second suit stood also dismissed.

Now, I think it is quite clear that this order was one which could not and should not have been made. The case of *Kuldip Singh* v. *Kuldip Choudhury* (1) decided by Chamier, C., J. and Sharfuddin, J., and the case of *Deb Kumar Roy Choudhury* v. *Deb Nath Barna Bipra* (2) show quite clearly that the order which the Subordinate Judge made on the 24th October last was one which cannot be supported. In the last of the two cases quoted, it was held that where a plaintiff is allowed to withdraw a suit with liberty to bring a fresh suit on his depositing the costs of the defendant within a specified time, but where the order contains no direction to the effect that on failure to pay within that time the suit will stand dismissed, the non-payment of such costs within the time specified does not bar the fresh suit. The only course to be adopted by the Court in such a case is to stay the hearing of the fresh suit until the costs are paid and and when they are paid to proceed with the trial of the fresh suit. It will be seen that that case which I have just quoted is an even stronger case than the one which is the subject-matter of the present application now before me. The question as to the applicant being a pauper or not is, for the moment, quite beside the mark. Now, it is clear, therefore, that what the Subordinate Judge should have done was to have considered the question as to whether the plaintiff was or was not a pauper; and, if, as undoubtedly, it would appear would have been the case, he had come to the conclusion that the plaintiff was a pauper,

(1) [1918] 3 Pat. L. J. 63=44 I. C. 79=4 Pat. L. W. 134.
(2) [1921] 64 I. C. 738.

then he should have admitted his suit but stayed its progress until the costs, which had been ordered to be paid in the previous suit by the plaintiff to the defendants, had, in fact, been so paid. But, instead of this, he refused to take any steps to inquire whether the plaintiff was a pauper and in consequence he rejected the application for the institution of the fresh suit as a corollary.

Now, by the 21st of November, that is to say, less than a month after the order made by the Subordinate Judge on the 24th of October last, the plaintiff had, in fact, deposited the costs of which he had been mulcted in the first suit brought by him; and on that date he made an application to the Court for permission to sue afresh. But the Subordinate Judge thinking that he was bound by his former decision of the 24th October came to the conclusion that he must reject both the application to sue in forma pauperis and the application to bring a fresh suit. I suppose he thought that in view of his earlier order he was debarred from reopening the matter. This may or may not be so, but I have no hesitation in coming to the conclusion that as the order of the 21st of November 1925 was rightly or wrongly based upon the order of the 24th of October 1925, which was patently a bad order, the latter order as well as the penultimate order must both be set aside. The order of the 21st November 1925 of the Subordinate Judge as well as the order of the Subordinate Judge of the 24th October 1925 will, therefore, both be set aside. The Subordinate Judge must now hear the application made on the 21st November 1925 de novo; he must first consider whether the plaintiff is a pauper and if he decides that he has made out satisfactorily that he is a pauper he should, subject to any other provisions of the law relative thereto, permit the plaintiff to commence and continue his fresh suit.

As I have said before, the costs which the plaintiff was ordered to pay when he was allowed to withdraw his previous suit as a condition precedent to his being allowed to bring a fresh suit have now been paid or deposited and there should, therefore, be no further obstacle in the way of his prosecuting his claim.

Application allowed.

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* A. I. R. 1926 Patna 474

BUCKNILL AND FOSTER, JJ.

Achuta Ram and *others*—Plaintiffs—Appellants.

v.

Jainandan Tewary and *others*—Defendants—Respondents.

Appeal No. 668 of 1923, Decided on 19th April 1926, from the appellate decree of the Dist. J., Shahabad, D/- 7th March 1923.

* *Mortgagor—Mortgagor selling equity of redemption—Purchaser promising to pay the mortgage money—Mortgagee not a party to the agreement—Purchaser is not personally liable to mortgagee for mortgage money—Contract.*

Where the mortgagor sells his equity of redemption, and the purchaser agrees to pay off the mortgage money to the mortgagee, the mortgagee being no party to the agreement, cannot enforce the agreement against the purchaser and get a personal decree for the mortgage money: 34 *All.* 63 (*P.C.*) and *A. I. R.* 1923 *P. C.* 54, *Foll.* [P. 477, C. 1]

L. N. Sinha, *R. B. Saran* and *N. C. Sinha*—for Appellants.

P. Dayal and *Jai Gobind Prasad*—for Respondents.

Bucknill, J.—This was a second appeal from a decision of the District Judge of Shahabad, dated the 7th March 1923 modifying a judgment of the Subordinate Judge of the same place, dated the 18th February 1922. The facts in this case were somewhat complicated; but it is unnecessary to refer to them in any great detail as there has been argued before us but one point at the hearing of this appeal. It is sufficient to state that the plaintiffs (who are here the appellants) were the mortgagees of certain property from Defendants Nos. 1 and 4. These mortgages were effected by five deeds. In addition to these five mortgages there were also three other mortgages of which the plaintiffs were not the direct mortgagees but assignees from those who were the original mortgagees. It is only with the five transactions in which the plaintiffs were the direct mortgagees that we are in this appeal at all concerned. The plaintiffs brought their suit to enforce the mortgages and in addition to joining the mortgagors they also joined certain persons, who were Defendants Nos. 8 to 13 who had bought from the mortgagors the equities of redemption of the properties hypothecated by virtue of the five mortgage-deeds referred to above. Int. he

trial Court the plaintiffs succeeded in obtaining a personal decree not only against the mortgagors, but also against the purchasers of the equities of redemption. But on appeal the learned District Judge came to the conclusion that the decree, so far as it related to relief against these purchasers of the equities of redemption, could not be in law upheld. He, therefore, set aside that portion of the judgment of the Subordinate Judge and it is from that part of the decision of the District Judge that this appeal has now been brought before us.

The simple point, therefore, for consideration is whether the plaintiffs could obtain a money-decree against the purchasers of the equities of redemption. It must first be pointed out that in the instruments under which the purchasers of the equities of redemption so purchased, they (the purchasers), stipulated that they would pay off the debts due under the mortgages. It is common ground that they did not do so. It is also common ground that the plaintiffs had no notice of what had taken place between the mortgagors and the purchasers of the equities of redemption and were not privy to the contract. It is important to observe that some support was lent to the argument which was put forward before us by the learned advocate who has appeared for the plaintiffs by the rulings in the case of *Dwarka Nath Ash* v. *Priya Nath Malki* (1). In that case the facts were certainly very similar to those which obtain in this appeal now before us. The defendants had borrowed a sum of money from the plaintiff for which they had given a promissory note, they subsequently transferred their property to another party who executed an agreement in their favour expressly undertaking to pay to the lender of the money under the promissory note his dues thereunder. The lender of the money under the promissory note was no party to this contract and had no notice thereof; but, having ascertained the circumstances, he proceeded to sue the borrowers as well as the individual who had purchased the borrowers' property. He claimed that, in view of the agreement entered into between the borrowers' property, he (the lender) was entitled to take advantage of that agreement.

(1) [1916] 22 C. W. N. 279=36 I. C. 792=27 C. L. J. 483.

Mookerjee and Cuming, JJ., of the Calcutta High Court held that the plaintiff was entitled to enforce his claim against the purchaser of the borrowers' property.

Had the matter rested there, one might have thought that this case would constitute an authority in favour of the proposition argued in the present instance. There are also other cases which have been quoted by the learned advocate for the appellant which certainly at first sight appear to support to some extent the learned advocate's argument. In the case of *Khwaja Muhammad Khan* v. *Husaini Begam* (2) their Lordships of the Privy Council held that under certain circumstances (to which I shall refer presently) it was possible for a person who was no party to an agreement to take advantage of the provisions of such an agreement which were in fact beneficial to herself. Their Lordships' decision (which was given by the Right Hon'ble Mr. Ameer Ali) relates the facts at some length. Put very shortly, they were as follows A minor Muhammadan lady, prior to and in consideration of her marriage with the son of the defendant in the suit, was promised by the defendant under an agreement executed between the defendant and the lady's father to be paid by the defendant the sum of Rs. 500 per mensem from the date of her reception in marriage, the defendant also charged certain specified properties for the purpose of producing the requisite funds. The lady, as I have stated, was a minor; but, eventually, after the marriage, lived with her husband for sometime, owing, however, to disagreement she, at the end of some 12 or 13 years, ceased so to do. The defendant then refused to continue to pay the allowance and the lady accordingly brought the suit against him basing her claim upon the document of agreement which had been entered into between the defendant and her (the plaintiff's) father. It was maintained on behalf of the defence on the line of reasoning adopted in the well-known English case *Tweddle* v. *Atkinson* (3), that as the plaintiff was in no way an actual party to the agreement, made

(2) [1910] 32 All. 410=7 I C. 237=37 I. A. 152 (P. C.).

(3) [1861] 1 B. & S. 393=30 L. J. Q. B. 265=4 L. T. 468=8 Jur. (N. S.) 332=9 W. R. 781.

between her father and the defendant, she had no locus standi and was unable to sue thereunder. Mr. Ameer Ali, however, pointed out that the case of *Tweddle* v. *Atkinson* (3), was one decided under the Common Law of England and was not in their Lordships' opinion applicable to the facts which were disclosed in the case before their Lordships. Their Lordships were of opinion that although no party to the agreement (and it must be remembered that the lady was then a minor and the document was executed by her father) she was clearly in equity entitled to enforce her claim against the defendant. The case, however, appears to me to be distinguishable from the present case in view of the fact that the benefit which was to accrue to the plaintiff was one for which the consideration was the marriage to take place between herself and the defendant's son. Then there is another case which was cited on behalf of the plaintiffs: *Deb Narain Dutt* v. *Chuni Lal Ghose* (4). In that case Jenkins, C. J., and Mookerjee, J., held that where the transferee of a debtor's liability acknowledged in the provisions of the registered instrument which conveyed to him all the original debtor's properties, his obligation to the creditor for the debt to be paid by him, and where the acknowledgment was communicated to the creditor and accepted by him, the creditor could sue the transferee on the registered instrument. Here again their Lordships based their decision upon the equitable principle which had operated upon the minds of their Lordships of the Privy Council in the case which I have just quoted. Here in this case of *Deb Narayan Dutt* v. *Chuni Lal Ghose* (4) it may indeed be said that the facts disclosed that the creditor was actually privy to and concerned in the transaction which took place between the transferee and the debtor. In fact in the judgment of Jenkins, C. J., it is expressly stated that there was an arrangement between the plaintiff and Defendant No. 5 by which the liability of Defendant No. 5 under the transfer was acknowledged and accepted, and it may also be observed that (although under the mistaken idea of their true legal effect) certain title-deeds were actually handed over at that time by the purchaser to the plaintiff. Although, therefore, the last two cases quoted seem to be based upon considerations somewhat different from those which have to be regarded in the present appeal, there is no doubt, as I have said before, that the case reported as *Dwarka Nath Ash* v. *Priya Nath Malki* (1) does constitute some authority to support the argument which has been addressed to us by the learned advocate who has appeared for the appellants. There are, however, on the other hand two cases which appear to be conclusive authority upon the point which has been argued in this appeal. The first of these is *Jamna Das* v. *Ram Autar Pande* (5). It is a decision of their Lordships of the Privy Council, and although the facts are not set out at any great length in the report they can be found fully reported as *Jamna Das* v. *Ram Autar Pande* (6). It will be seen, from a perusal of the facts as given in that report, that the circumstances were almost the same as those which obtain in the present appeal. The judgment of their Lordships of the Privy Council delivered by Lord Macnaghten is very short and very much in point here. His Lordship observes:

> This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor.

I may pause here to observe that the undertaking referred to was to the effect that the purchaser would pay off the debt due to the mortgagee by the person from whom the purchaser had purchased the property. His Lordship continues:

> The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay his mortgage debt.

There is still a later case in which the same proposition has been similarly set forth in another decision of their Lordships of the Privy Council. In that case, *Nanku Prasad Singh* v. *Kamta Prasad Singh* (7) the facts again are in that report, but very shortly set out. We have had the advantage, however, of seeing what the facts were from the record of this Court, the case having been tried on appeal on the 7th June 1918 before Roe and Coutts, JJ. The facts were substantially identical with those which exist

(4) [1913] 41 Cal. 137=18 C. W. N. 1143=20 I. C. 630=18 C. L. J. 603.

(5) [1912] 34 All. 63=13 I. C. 304=39 I. A. 7.

(6) [1909] 31 All. 352=2 I. C. 460=6 A. L. J. 427.

(7) A. I. R. 1923 P. C. 54.

in the present appeal. A mortgagor having executed a mortgage in favour of the plaintiff sold the property to a third party who, in the recitals of his sale-deed, agreed to pay off the mortgage with a portion of the purchase-money which was for that purpose left in his hands. The mortgagee sued upon his mortgage, not only the mortgagor but also the purchaser ; but this Court refused to grant any personal decree against the purchaser, holding that he (the mortgagee) could not avail himself of the stipulation made in the contract between the purchaser and the mortgagor. Their Lordships of the Privy Council upheld the decision of this Court, Lord Atkinson, in a very short judgment stating :

Their Lordships have considered this case, and they think it is clear that no personal liability was incurred by the purchasers of the equity of redemption. Their Lordships, therefore, think that the decree of the High Court was right and that the point made by the appellant fails.

It may be observed that in the judgment given by this Court on the 7th June 1918, the cases to which I have referred above were mentioned and quoted.

It seems, therefore, that we are clearly bound by the authority of these two decisions of the Privy Council which are so directly in point.

The appeal, therefore, must be dismissed with costs. I should mention that there was a cross-objection which, however, is not pressed and has not been argued and that cross-objection also must be dismissed with costs.

It is said by the learned advocate who has appeared for the appellants (and it may be mentioned that the question is referred to in ground No. 7 of the appellants' grounds of appeal to this Court) that there has been some arithmetical or other mistake with regard to the amount of costs which have been awarded to the Defendants Nos. 8 to 13. It was suggested that, as this question had been made a ground of appeal it might be dealt with in this Court. We have, however, no materials whatever before us which would enable us to discuss or consider this point. If there has been any mistake in regard to the quantum of costs, that matter should be referred to and dealt with by the lower appellate Court.

Foster, J.—I agree. The difference between the case quoted in *Deb Narain Dutt* v. *Chuni Lal Ghose* (4) and the last cases quoted by my learned brother from 34 *All.* 63 and 3 *Pat. L. T.* 637 appears to me to be very important in connexion with the facts of the present case. It is to be borne in mind that in the present case there was no notice to the plaintiff at the time of the contract. In the judgment of 41 *Calcutta*, we see that the promisee, that is to say, the plaintiff, had a proposal made to him by the promisor, that is to say, Defendant No. 5, and he accepted it. So in that case the promisee was in the position indicated in S. 2 of the Indian Contract Act. He held the benefit of a contract for consideration. In the present case the plaintiff, who claims to be the promisee, has never had a proposal made to him by the defendants against whom he is seeking a money-decree and he certainly never accepted any such proposal. Therefore, S. 2 does not bring him into the position of a person who can sue a promisor upon a contract or for consideration. That is the distinction between the two classes of cases, and I think the present case falls within the class indicated in the Privy Council cases which have been quoted. There may be a third class of cases in the judgments which we have been studying, namely, the class in which minors or other third parties sue under family or marriage settlements. In such cases as those, the plaintiff can hardly be regarded as a promisee who has accepted any proposal or promise, and such cases are probably decided on the traditional principles governing the English Courts of Equity rather than by any application of the terms of S. 2 of the Indian Contract Act. If I am correct, this third class would, I think, be exemplified by the case of *Khwaja Muhammad Khan* v. *Husaini Begum* (2).

Appeal dismissed.

✻ A. I. R. 1926 Patna 478

DAS AND FOSTER, JJ.

Maharaj Bahadur Singh and *another* — Decree-holder—Appellants.

v,

A. H. Forbes—Judgment-debtor—Respondent.

Appeal No. 167 of 1924. Decided on 29th March 1926, from the original order of the Dist. J., Purnea, D/- 16th April 1924.

✻ (a) *Civil P. C., S. 11—Execution purchaser, whether the decree be a money decree or mortgage decree, represents judgment-debtor for purposes of the section—Evidence Act, S. 115.*

An execution purchaser is the representative of the judgment-debtor so as to bring him within the rule of estoppel and the principle of res judicata : *A. I. R.* 1922 *Patna* 63 *Foll.* There is no difference in principle between a purchaser in execution of a money decree and a purchaser in execution of a mortgage decree. 10 *C. L. J.* 150. *Rel. on.* [P 479, C. 2]

(b) *Mortgage—Mortgagee purchasing mortgaged property at execution sale can use mortgage as shield against subsequent incumbrancers*

A mortgagee, when he purchases the mortgaged properties at a sale held in execution of a decree obtained by him, is at liberty to hold the mortgage as a shield against any attack that might be made against him by subsequent encumbrancers. The purchaser of mortgaged property acquires the equity of redemption of the mortgagor as at the time of the mortgage together with a lien of the mortgagee which he may use if necessary for his protection. [P, 480, C. 1]

✻ (c) *Civil P. C., S. 11—Co-defendants—Conflict of interest between co-defendants and necessity to adjudicate on that dispute to give relief to plaintiff are necessary to make the decision res judicata between them.*

The general rule is that there is no estoppel by res judicata between co-defendant, but there are exceptions to this rule. Where an adjudication between the defendants, is necessary to give appropriate relief to the plaintiffs, there must be such an adjudication, and in such a case the adjudication will be res judicata between the defendants as well as the plaintiffs and defendants. 11 *Bom.* 216, *Foll.* To produce the bar of res judicata between two defendants there must be a conflict of interest between those defendants, and a judgment defining the actual rights and obligations of those defendants inter se.

[P, 480, C. 2, P. 481, C. 1]

P. K. Sen, C. C. Das, C. S. Banerji and *G. N. Mukerji*—for Appellants.

Ali Imam and *Lal Mohan Ganguli*—for Respondents.

Das, J.—The facts are stated with clearness and precision in the judgment of the learned District Judge and it is not necessary to recapitulate them. The following facts are, however, material to understand the position :

One Dhanpat, who is respresented in these proceedings by the appellants, obtained a decree for rent against his patnidar Chatarapat Singh so far back as the 10th July 1896 for the period prior to the sale of the interest of Dhanpat to one Mt. Bhagwanbatia Chaudhurain. The proceedings which have given rise to this appeal were taken by the decree-holders, the appellants, to execute the decree against Mr. Forbes, the respondent. Mr. Forbes was the darputnidar under Chatraput Singh and it appears that Chatrapat Singh having again defaulted, the new landlord Mt. Bhagwanbatia Chaudhurain took proceedings against him under the Putni Regulation and put up the putni taluq to sale. Mr. Forbes deposited the rent in order to protect his darputni interest and was put in possession of the taluq on the 29th May 1900, as a mortgagee under the provisions of S. 13, Cl. (4) of the Putni Reg. (8 of 1819). Subsequently, one Surendra Narain Singh who had a money decree against Chatrapat put up the property for sale and purchased it himself on the 1st September 1902. The position then was this, the appellants were the holders of a decree against Chatrapat whose interest in the taluq had passed to Surendra Narain Singh, and Mr. Forbes was actually in possession of the taluq as a mortgagee under S. 13 para. 4 of the regulation and entitled to claim redemption first from Chatrapat and also Surendra Narain Singh

Although I am anticipating events, I may point out here that a suit for account was subsequently filed by Surendra Narrin Singh against Forbes and that suit was substantially converted into a mortgage suit and a decree was passed on the 22nd April 1914 giving Surendra Narain the right to redeem the property and providing that on failure to redeem the property should be sold in due course of law to answer the claim of Forbes against Chatrapat. This decision was upheld by the Calcutta High Court on the 30th July 1915 and a final decree was passed in favour of Mr. Forbes as against Surendra Narain on the 8th January 1917 for Rs. 61,000. On the 2nd July 1917 Mr. Forbes put the decree in execution as against Surendra Narain in the taluq for Rs. 2,000. It is conceded that the balance is still due to him. It may be taken then that Mr. Forbes at present

represents both the interests of the mortgagor and the mortgagee.

Meanwhile execution proceedings were taken by the appellants and the question was at once raised whether the decree obtained by Dhanpat Singh as against Chatrapat was a rent decree or a money decree. It is not necessary to go through all the proceedings ; it is sufficient to say that claim cases were filed both by Surendra Narain and by Mr. Forbes and that those cases having been decided against them, two suits were instituted, one by Mr. Forbes and the other by Surendra Narain for the purpose of trying the question whether the decree obtained by Dhanpat as agairst Chatrapat was a rent decree or a money decree. It is obvious that if they could induce the Court to hold that the decree was a money decree, their interest in the property could not be sold ; on the other hand, if they failed in their contention, their interest was liable to be sold in execution of the rent decree of the appellants. The suit of Mr. Forbes succeeded in the Court of first instance, whereas the suit of Surendra Narain failed. Appeals were taken to the Calcutta High Court and on the 8th April 1908 the Calcutta High Court held that the decree was a rent decree and was enforcible as against the taluq. Both Surendra Narain and Forbes appealed to the Privy Council ; Surendra Narain's appeal was dismissed on the 14th May 1912 for non-prosecution : Mr. Forbes's appeal succeeded on the 9th March 1914, the Privy Council holding that the decree obtained by Dhanpat as against Chatrapat was a money decree and not a rent decree. That decision is *Forbes* v. *Maharaj Bahadur Singh* (1).

It is conceded that the effect of the decision of the Privy Council is to release Mr. Forbes from all liability to the appellants. But the appellants now contend that Mr. Forbes, as the representative in interest of Surendra Narain, is bound by the decree which the appellants have obtained as against Surendra Narain and that accordingly the appellants are entitled to enforce the decree as a rent decree as against Surendra Narain as represented by Mr. Forbes. The questions which fall to be considered are, first, whether Mr. Forbes may be said to be the representative in interest of Surendra Narain ; secondly, whether the appellants are entitled to rely upon the decree obtained by them in the Calcutta High Court as against Surendra Narain ; and thirdly, whether the present application is barred by limitation. The learned District Judge has held that the application is barred by limitation and has also held that Mr. Forbes cannot be considered to be the representative in interest of Surendra Narain. In this view he dismissed the application for execution. Hence the appeal to this Court,

In my opinion there is no doubt whatever that Mr. Forbes must be regarded as the reperesentative in interest of Surendra Narain. The learned District Judge has referred to various cases on the point which cannot now be considered as good law. The position is explained with great clearness in Mr. Woodroffe's well-known work, the Indian Evidence Act, at pp. 247 and 248, Eighth Ed. ; and, so far as this Court is concerned, the matter is concluded by the decision of the learned Chief Justice of this Court in *Kali Dayal* v. *Umesh Prosad* (2). The learned Chief Justice in that case held that an execution purchaser is the representative of the judgment-debtor so as to bring him within the rule of estoppel and the principle of res judicata. As has been pointed out there is no difference in principle between a purchaser in execution of a money decree and a purchaser in execution of a mortgage decree. It is not necessary for me to pursue the point, for it rests on principle and is covered by authority. I need only refer to the decision of Mr. Justice Mookerjee in *Debendra Nath Sen* v. *Mirza Abdul Samed Seraji* (3).

But the decision on this point by no means decided the case ; for although the purchaser at a sale in execution of a mortgage decree must be considered to be representative in interest of the mortgagor, he must also be considered to be the representative in interest of the mortgagee ; and the question at once arises whether when a mortgagee himself becomes the purchaser of the property, it can be said that the charge is extinguished by the sale. In my opinion there can be no doubt whatever that a mortgagee, when he puchases the mort-

(1) [1914] 41 Cal. 926=23 I. C. 632=41 I. A. 91, (P. C.).

(2) A. I. R. 1922 Patna. 63=1 Patna. 174.

(3) [1909] 10 C. L. J. 150=1 I. C. 264.

gaged properties at a sale held in execution of a decree obtained by him, is at liberty to hold the mortgage as a shield against any attack that might be made against him by subsequent encumbrancers. It must be recognized that by virtue of the decision of the Judicial Committee in *Forbes* v. *Maharaj Bahadur* (1), Mr. Forbes's charge under S. 13, para. 4 of the Patni Regulation must take precedence over the charge which a landlord has on the tenure in question. I am assuming for the purpose of this case that the decision in the case between Surendra Narain and the present appellants to the effect that the decree obtained by Dhanpat on the 10th July 1896 was a rent decree is final between the parties and that Mr. Forbes is the representative in interest of Surendra Narain. But even if that be so, the rent decree cannot take precedence over such charge as Mr. Forbes had on the taluq by virtue of his position as a mortgagee under S. 13, para. 4 of Reg. 8 of 1819. What then is the position? Mr. Forbes was the holder of a charge under S. 13, para. 4 of the Putni Regulation. He had also purchased the interest of the mortgagor at a sale held in execution of a mortgage decree. It is well established that the purchaser acquires the equity of redemption of the mortgagor as at the time of the mortgage together with a lien of the mortgagee which he may use if necessary for his protection. It was, therefore, for Mr. Forbes to decide whether he should extinguish the security or keep it alive for his benefit. We must assume that he made that choice which was manifestly for his benefit. We must assume, therefore that Mr. Forbes kept alive the security to use it, if necessary, as against the present appellants. In this view, it is not necessary for me to enter upon the other questions raised in this case.

I must dismiss the appeal with costs.

Foster, J.—I agree that the appeal should be dismissed with costs; but, as the view of this case which I take differs from that of my learned brother, I think it necessary to express it. The first reason that I have for dismissing this appeal is that the Privy Council judgment in *Forbes* v. *Maharaj Bahadur* (1) constitutes res judicata binding the parties to the present litigation. We have here before us an objection raised by Mr. Forbes against his inclusion as a judgment-debtor in the execution proceedings based upon a decree of 1896, it being expressed in the decree-holder's application that the decree-holder proposes to follow the putni tenure in the hands of Mr. Forbes. Now, Mr. Forbes has obtained in the Privy Council not only a declaration that the decree of 1896 is not a rent decree but a money decree, not only a declaration that the tenure is not subject to a charge under S. 65 of the Bengal Tenency Act, but also a perpetual injunction prohibiting the decree-holder from putting the tenure to sale. But it is urged that Mr. Forbes now represents in some part of his estate the interest of Surendra Narain Singh, the recent putnidar and mortgagor, and to that extent Mr. Forbes is bound by such obligations as bound Surendra Narain Singh.

I return to the question whether the whole of the dispute is not concluded by the rule of res judicata. My proposition is that the present litigation is concluded by the findings of the Privy Council as to the respective rights of the decree-holder, the putnidar and the mortgagee of the putni. It is urged that because Mr. Forbes is now the representative of Surendra Narain, the putnidar, therefore, the High Court decision, which was the last decision on the merits in the suit brought by Surendra Narain against the decree-holder, and which has not been disturbed, still avails to confer upon the decree-holder the right to enforce a charge under S. 65 of the Bengal Tenency Act. The appeal in *Forbes* v. *Maharaj Bahadur* (1) included two respondents: one was the decree-holder Maharaja Bahadur and the other Surendra Narain Singh, the putnidar. It was my opinion that there is an estoppel, not only between the appellant mortgagee as he then was (Mr. Forbes), and the respondents in that appeal, but also between those two respondents themselves. I recognize the truth of the general rule that there is no estoppel by res judicata between co-defendants, but there are acknowledged exceptions. I cannot express the exception in the present case better than it is set out in the judgment of West, J., in *Rama Chandra Narain* v. *Narain Mahadeb* (4)

Where an adjudication between the Defendants is necessary to give appropriate relief to

(4) [1887] 11 Bom. 216.

the plaintiffs, there must be such an adjudication, and in such a case the adjudication will be res judicata between the defendants as well as the plaintiffs and defendants.

Reference is made to *Cottingham* v. *Earl of Shrewsbury* (5), a case in which a mortgagor sued a number of mortgagees, some of them in possession of part of his estate, for redemption, and the adjudication of the suit necessitated accounts being gone into between the defendants. Now, in regard to the case before us, we know with exactitude on what lines the adjudication in the case of *Forbes* v. *Maharaj Bahadur* (1) proceeded. Their Lordships of the Judicial Committee first found that there was no rent decree and then found that, even if there were a rent decree, it would not avail against Mr. Forbes' special rights which had accrued under S. 13 (4) of Reg. VIII of 1819. In the discussion of the former of these questions it was necessary to establish whether the respondent decree-holder Maharaj Bahadur had a charge upon the tenure which was the property of the respondent Surendra Narain Singh. West, J., in his judgment added the proviso that to produce the bar of res judicata between two defendants there must be a conflict of interest between those defendants, and a judgment defining the actual rights and obligations of those defendants inter se. In *Forbes* v. *Maharaj Bahadur* (1) there was a conflict of interest between the respondents, the decree-holder and the putnidar and a decision thereupon. We know that there was litigation between those persons in the Privy Council in a separate appeal. If, when Mr. Forbes' appeal was argued, the decree-holder respondent claimed, as he does now, that he had by virtue of the still subsisting High Court decision in Surendra's case, an established charge upon the tenure owned by the respondent Surendra, I have no doubt that his learned counsel put the claim before their Lordships of the Privy Council. The fact was that Mr. Forbes could not have his rights defined as a mortgagee unless and until it was settled whether there was a charge upon the mortgaged property under the decree of 1896. I, therefore, am of opinion that even if Mr. Forbes now represents Surendra Narain, he can still plead res judicata as against the claim of the decree-holder to put the tenure to sale.

I am also of opinion that the execution is barred by limitation. The painstaking and helpful judgment of the learned District Judge is, so far as I can see unassailable in this part of his discussion of the case. I agree with him that the petitions of the 22nd January 1915, 19th March 1917, 23rd November 1918 and 2nd December 1922 marked substantial departures from the original application for execution preferred in 1908—so substantial as to indicate breaks in continuity. In the application of 1917 we find a prayer to follow the moveable properties of Chatrapat Singh and properties other than the putni tenure. In the application of 1918 we find a proposal to follow the personal property of Surendra Narain Singh. These appear to me to show divergences of a fundamental character from the course of execution commenced in 1908. I therefore have no hesitation in finding that the present execution is barred by limitation.

Appeal dismissed.

(5) [1844] 3 Hare. 627=15 L. J Ch. 441.

✻ A. I. R. 1926 Patna 481

DAWSON-MILLER, C. J., AND FOSTER, J.

Pheku Pande—Appellant.

v.

Gena Lal Pande and *others*—Respondents.

Appeal No. 1109 of 1923 and Appeal No. 130 of 1924, Decided on 11th May 1926, from the appellate decrees of the Dist. J., Durbhanga, D/- 22nd September 1923.

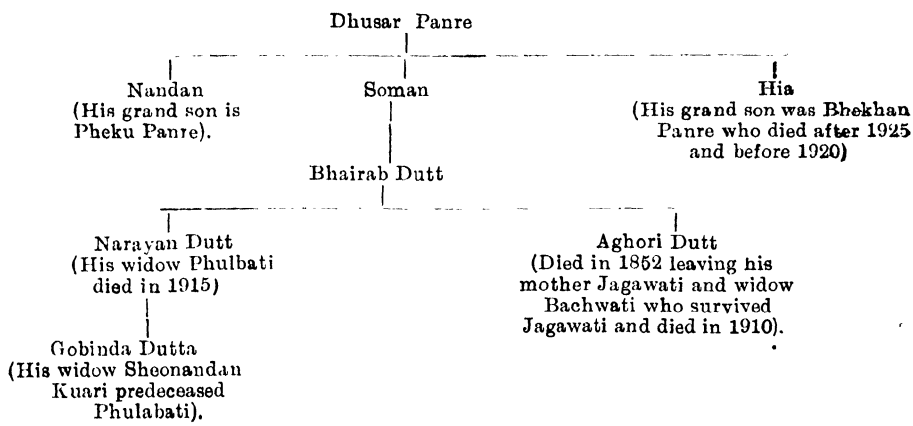
✻ (a) *Hindu Law—Mithila School—Widow—Grant of immovable property by karta of joint family for maintenance does not constitute her stridhan, nor does it create a widow's estate—After widow's death properties revert to donor.*

A grant for maintenance to a woman of immovable properties made by the karta of the joint family do not constitute her stridhan. Nor does she take it as her widow's estate, that is the estate created by a maintenance grant, leaves a residuary estate still untransferred in the grantors. just as happens in the case of grants of leases and usufructuary mortgages. The reversion in such circumstances would be, not the reversion as the term is used in Hindu Law, but the reversion of English Law such as is vested in a lessor for a term : 6 *M. I. A.* 1 (*P. C.*), *Dist.* [P. 484, C. 1, 2]

L. K. Jha and *Murari Prasad*—for Appellants.

K. P. Jayaswal and *S. N. Roy*—for Respondents.

Foster, J.—It is necessary for the purpose of understanding this case to set out in abridged form the genealogy of the family with which we are concerned .(see below)



Narayan Dutt and Aghori were stepbrothers. The line of Soman Panre, it will be noticed, is extinct. The plaintiff is the agnate grandson of Bhekhan Panre. The defendants are the descendants of Nandan Panre, led by Phyku Panre. The subject-matter of Suit No. 647 consists in certain lands alleged to have been held by Jagawati and Bachawati Kuari jointly by way of maintenance under a grant made on the 17th September 1853 by the surviving brother, Narayan Dutt. In the other suit (No. 652, the same plaintiffs, grandsons of Bhekhan Panre, sue one Hari Kishun Panre for recovery of possession of 8 cattahs alleged to be a part of the ancestral estate of Gobinda Dutt. Hari Kishun appears to be a stranger to the family ; he admits that he acquired the property from Bachawati, but denied that it was part of a maintenance grant.

I wish to deal with the two suits separately. Suit No 647, which was Appeal No. 210 in the lower appellate Court and is Appeal No. 1109 of 1923 in this Court, is the case which will require longer discussion. So I take it first. The plaintiffs allege that on the death of Aghori Panre a dispute arose between Aghori's surviving stepbrother Narayan Dutt and Aghori's mother and widow, Jagawati and Bachawati ; the former claiming that the family was joint, and the latter that it was separate. This dispute was settled by the ekrarnama or grant dated the 17th September 1853, with the construction of which this case is mainly concerned. The plaintiffs claimed through their ancestor Bhekhan Panre, alleging that on the death of Gobinda Dutt his widow succeeded, and after her death his mother Phulabati succeeded ; and, when she died in 1915, the nearest male agnates, Pheku and. Bhekhan , inherited the whole estate of Gobinda Dutt as reversionary heirs ; and it is claimed that the reversion included the properties which at that time Bachawati was holding in lieu of maintenance under the ekrarnama of 1853. On the other hand, the defendant Pheku Panre, who is in possession of the disputed property, claims through Bachawati Kuari, as heir of her stridhan ; and alternatively as reversionary heir, succeeding on the death of Bachawati. When he claims through Bachawati as her heir he alleges that the ekrarnama conferred upon Bachawati Kuari an absolute estate as stridhan when he claims as preferential heir of Narayan Dutt or Gobinda Dutt, he contends that the ekrarnama had the effect of putting Bachawati Kuari into the position of a Hindu widow in a separate estate, and thus the reversion would be delayed till the death of Bachawati Kuari in 1920, at which time admittedly Pheku Panre would be two degrees nearer to the last male holder (or to the grantor Narayan Dutt) than the defendants who are grandsons of Bhekhan Panre. In a

word, the plaintiffs claim to have inherited the property in 1915 and the defendants claim to have inherited it in 1920. If the defendant is correct in his contentions he gets the whole of the disputed property ; if his claim is wrong, he gets a moiety.

The suit was decreed and the appeal dismissed. The defendants Pheku and others are appealing The whole question is what estate came to Bachawati under the ekrarnama of 1853. The plaintiffs declare it to have been a maintenance grant made by the karta of the joint family to the mother and widow who survived his stepbrother. The defendant, as I have said, claims that the grant conferred either an absolute or a widow's estate.

It has been held in the lower appellate Court that Aghori and Narayan Dutt were "all along" joint in mess and property. It has also been held that not only the lands covered by the ekrarnama which are in Schedule I of the plaint but also the small parcel of land described in Schedule II were granted to Bachawati Kuari for her maintenance. These findings were also arrived at in the trial. Unfortunately the ekrarnama of 1853 is somewhat torn and worn away in important places, the learned District Judge thinks that possibly the land of Schedule II was included in the ekrarnama, but in any case it went with the other lands as part of the grant made by Naravan Dutt.

The first argument taken on behalf of the appellant is that there is a distinction in the ekrarnama between the properties in dispute and the emoluments consisting mostly of grain and money appropriated to the grantees as annual maintenance. This argument has necessitated a reference to the deed itself The punctuation in the translation is of course the work of the translator. Now the purport of the document, on reference to the original or to any correct translation, will be found to be as follows : The declarant Narayan Dutt Panre states that his brother Aghori Panre was joint in mess and died a natural death, and the declarant is in the possession of his interest ; it is therefore necessary that maintenance of Mts. Jagawati and Bachawati should be provided. The Musummats had entered an objection in the mutation department, and the dispute was settled amicably. So the declarant promises annually to give the Musummats Rs. 750 in cash and 790 maunds of grain and also certain parcels of land as well as furniture, cash and grain in existence in a village Barhi, and one-half of a house with a granary in the same village, as well as three families of servants, 86 head of cattle and two carts. The whole of this grant is obviously governed by the reiterated word maintenance Then the document proceeds :

> It is desirable that the said Musummats should hold possession of the moveable and immovable properties and continue to realize the cash and kinds given by me for their maintenance from me and after my death from my heirs. If I, the executant, or my heirs raise any objection to the payment thereof, they shall realize the same by instituting a suit in Court or by resorting to such steps as they think possible. Beyond getting the maintenance and holding possession of the moveable and immovable properties referred to above the said Musummats shall have no right of alienation in respect thereof. The said Musummats shall have no claim to or connexion with the properties left by Aghori panre. During the lifetime of the said Musummats I, the executant, shall not directly or indirectly transfer the properties left by Aghori Panre, by sale, conditional sale, usufructuary mortgage, etc., to anyone If I do so, the same shall be deemed null and void. If one of the Mussamats dies, even then the cash and kind and the moveable and the immovable properties fixed for their maintenance which are in their possession shall continue to be in the possession of the survivor.

As I construe this grant, it is a maintenance grant of a type common enough in joint Hindu families The learned Munsif and the District Judge both took the same view and they pointed out that there were on the record other documents which showed that the ladies had always regarded the properties as their maintenance grant ; and the learned Munsif points out that Pheku Panre joined the Musummats in this position, in certain suits for arrears of maintenance. I hold therefore that the properties in Schedules I and II of the plaint are proved by oral and documentary evidence to have constituted a maintenance grant to widows in a joint family.

The appellant has however, attempted to establish an argument on bare principles of law that the grant must be taken to be either an absolute grant or a grant of an outstanding widow's estate delaying the reversion to the nearest

agnate. As to the question whether the grant constituted an absolute estate, we may refer again to the ekrarnama where it imposes a restraint upon alienation and where it refers to the Musummats as personally entitled to maintenance. The learned vakil for the appellant has referred to Tagore's translation of the Vivad Chintamani at p. 263, as supporting his contention that in this family, which is governed by the Mithila system of Hindu Law, a maintenance grant must become part of the donee's stridhan. In the first place, if the grant constituted stridhan of the two Musummats, one would expect that the inheritance to the property of the two ladies being possibly in different channels, there would not have been provision for succession by survivorship. In the second place, looking at the Vivad Chintamani and the, translation put before us (Tagore, p. 263, Setlur, p. 257) and the Vivad Ratnakar Chapter VIII, I see much that indicates that a childless widow of a separate husband will in Mithila obtain an absolute right in the moveables left by her husband; and in fact we know that that is the Mithila Law: *Birajun* v. *Lachmi* (1). But it is equally certain that this anomaly does not extend to immovable property. As to money and grain delivered for maintenance of coparceners, of course they are prima facie absolute gifts. But the texts are quoted to support the proposition that a grant to a woman of immoveable properties made by the karta of the joint family constitutes stridhan. The text quoted is the familiar dictum of Devala, which is translated: "Maintenance, ornaments, sulka and grains are stridhan, that she may enjoy as she pleases." The question is how this text has been interpreted in the Mithila School: the text itself, which, I may observe, appears at first sight to be applicable only to moveables, cannot be detached from the commentaries and taken as the basis of a judgment. We know how this text is interpreted in the Mitakshara, and unless some special authority bearing upon the Mithila Law is shown to justify a departure from the Mitakshara, the appellant's mere quotation of the text cannot aid his argument. No such exceptional interpretation has been put before us. But in any case the last and final authority in the matter is the document itself. In my opinion its terms indicate quite clearly a mere life estate.

As to the contention that the ekrarnama created a widow's estate in Bachawati which had the effect of delaying the inheritance, it appears to me to be utterly inconsistent with the law and the known facts. We are asked to conceive a widow's estate as arising otherwise than by succession to a previous male holder and arising in a family which has been found to be joint. It is difficult to imagine who in such a case as that would be held to be the last male holder when the reversion re-opened. The answer given by the learned vakil for the appellant to these objections is that any arrangement is possible in a family settlement, and that the case of *Sreematty Rabutty Dossee* v. *Sib Chunder Mullick* (2), is an exemplification of this, supporting in its details the appellant's construction of the facts of this present case. But the alleged similarities in the two cases do not extend to the cardinal facts. There the claim of Zohra was made as widow, heiress and sole representative of Dwarkanath to her husband's share and the deed only professed to pay to her in that capacity the amount which was agreed upon by the parties to stand as the value of that share. In the present case we do not know clearly what the ladies claimed in 1853. Certainly what was granted to them was maintenance as the deed shows. From a legal point of view the estate created by the maintenance grant of this case would appear to be one that left a residuary estate still untransferred in the grantors, just as happens in the case of grants of leases and usufructuary mortgages. The reversion in such circumstances would be, not the reversion as the term is used in Hindu Law, but the reversion of English Law such as is vested in a lessor for a term. So the ownership of the properties of Schedules I and II of the plaint remained vested in Narayan Dutt and his heirs. The most apposite authority that I have been able to find is *Kachwain* v. *Sarup Chand* (3). Relying on that authority, on the terms of the ekrarnama, and on general principles of Hindu Law, I hold that the interest of Mt. Bachawati Kuari was a life

(1) [1884] 10 Cal. 892.

(2) [1856-57] 6 M. I. A. 1=1 Sar. 484 (P. C.).

(3) [1888] 10 All. 462=(1888) A. W. N. 200.

estate by way of maintenance and that the property before and after the ekrarnama was vested in Narayan Dutt the ekrarnama having only the effect of a grant of the usufruct for the terms of the joint lives of the two widows. I hold also that the lands of Schedule No. II of the plaint formed part of this grant. In this connexion I may point out that, so far as the pleadings go, no distinction is made as to Bachawati's title in the properties of these two schedules either in the plaint or in the written statement.

The plaintiff's appeal from the decision in Suit No. 652 is concluded by findings of fact. It has been found that the plaintiff has failed to prove that Bachawati Kuari got the land from her husband or by virtue of the ekrarnama. That being the case, the plaintiffs are admittedly not the heirs of Bachawati Kuari and cannot succeed to her property. The result is that they have not made out a cause of action.

I would dismiss both the appeals, with costs to the plaintiff-respondents in Suit No. 647 (Appeal No. 1109 of 1923), and costs in Suit No. 652 (Appeal No. 130 of 1924) to the respondent Hari Kishun Panre.

Dawson-Miller, C. J.—I agree.

Appeals dismissed.

A. I. R. 1926 Patna 485

DAS AND FOSTER, J.

Mahanta Ram Lochan Das—Plaintiff—Appellant.

v.

Nandi Jha and *others*—Defendants—Respondents.

Appeal No. 212 of 1923, Decided on 3rd February 1926, from the original decree of the Sub-J., Darbhanga, D/- 24th July 1923.

Bengal Tenancy Act, S. 103B—Zamindar is not presumed to be in possession of raiyati holding—Record of rights recording land to be occupancy holding—Onus is on zemindar to prove that the land is his malik zerait.

The right of the zamindar to rent is so universal as to be a presumptive right, but the zamindar has no right generally to possession of the raiyati holdings. Where zamindar plaintiff claims certain land to be malik's zarait while the defendant claims as his occupancy holding and the record of rights is in favour of the defendant, burden of proof lies on the plaintiff zamindar and the fact that the land in dispute fell in the zamindari of the plaintiff is not sufficient to rebut the presumption arising from the record of rights: 2 *Pat.* 38 and *A. I. R.* 1922 *P. C.* 272 (*P.C.*), *Dist.* [P 486 C 2]

Murari Prasad—for Appellant.

B. N. Mitter and *N. N. Sinha*—for Respondents.

Foster, J.—The plaintiff has proprietary interest to the extent of 11 annas odd in Mauza Biaspur and the defendants are proprietors of the residue. The plaintiff's suit is for partition. The only point which is in dispute between them is whether the lands described in Schedules A and B of the plaint are zerait land of the village or the occupancy holdings of the defendants. The learned Subordinate Judge heard the defendants' evidence first and then that of the plaintiff. In his judgment he first examined the defendant's evidence. He pointed out that the record of rights was entirely in favour of the defendants. As against this the plaintiff contended that it was brought about by the fraud of the defendants. The date of final publication was the 13th October 1899, and from 1883 to 1920 the defendants' ancestors held the plaintiff's share in Thika. So, it is urged, they had every chance of obtaining a fraudulent entry in the record. It is also urged that as the lands in dispute fell within the ambit of the plaintiff co-sharers' zamindari then under the ruling in *Jaydeo Narain Singh* v. *Baldeo Singh* (1), the record of rights must be considered to be rebutted. This is how the case is stated; I shall have more to say on this point later. The learned Subordinate Judge examined the oral evidence and came to a finding that the plaintiff's agents attended at the time of the survey and settlement operations. He remarked upon the uncertainty of the plaintiff's claim: though the suit was instituted in June 1922 the identity of the property claimed to be zerait was not established till June 1923, when the plaint was extensively amended and the claim largely reduced. After noting that it lay upon the plaintiff to prove what is zerait and what is kasht of the defendants, he points out that the plaintiff has not discharged the onus. The defendants produced old rent receipts which he found to be genuine, and he deduced from these documents the con-

(1) 2 Pat. 38=A. I. R. 1922 P. C. 272.

clusion that the defendants, from the time of very remote ancestors, have been raiyats of this village. He examined the two pattas granted to the ancestors of the defendants in 1883 and 1908 and pointed out that in the first one there is no mention of any zerait at all and laid great stress upon the second patta which mentions only 7 bighas and odd as zerait. He remarked that the defendants do not for a moment claim those lands described in the second patta to be part of their holding. Then he examined the road cess returns of 1919, and pointed out that the lands in dispute are shown there as raiyati kasht of the defendants and that these returns are signed by the plaintiff's manager and attorney. As to these documents the plaintiff pointed to the fact that they were drawn up on information provided by the defendants who were in possession as Thikadars.

Proceeding to the evidence of the plaintiff, the learned Subordinate Judge examined the kabuliyat of 1869 executed by an indigo factory manager in favour of the plaintiff's predecessor in interest. In that document there is mention of zerait but without specification. The learned Subordinate Judge thought that this must be a mere formality copied from precedents. It should be noted however that one at least of the plaintiff's witnesses, an old man of 75 years, Somedat Thakur, deposed "Kuthi grew indigo in the land and so I called it zerait." He also stated that during the time of the factory there were 30 or 40 bighas of zerait in the factory's possession. Now looking at the Terij Jamabandi of 1875 (Ex. 2), I see that within each tenant's holding there was some area appropriated to the cultivation of indigo; in the total it must amount to a considerable area. Each tenant's rent was at certain rates according to the classes of land comprised within the holding and a deduction of 10 annas per bigha was made upon the total area in consideration of the cultivation of indigo.

The learned Subordinate Judge then examined Ex. 3 series, khasras for the period 1875 to 1879. These are partly lists of trees subject to danabandi (appraisement), and there are several khasra danabandi (accounts of appraisement). The learned Subordinate Judge is not correct in saying that these do not show what village they refer to. They refer to Biaspur and the names of the Brahmin tenants include several persons who we know were ancestors of the defendants. The learned Subordinate Judge found that in the plaintiff's oral evidence there is no precise statement found as to the identity of the zerait lands. So he decided this issue against the plaintiff, who is now appealing.

The onus of proof rests upon the plaintiff, not only because he is plaintiff but because he has the record of rights against him. In my opinion the case of *Jagdeo Narain Singh* v. *Baldeo Singh* (1) which has been quoted on the plaintiff's side, has no application to the present discussion. The right of the zamindar to rent is so universal as to be a presumptive right; S. 114 of the Evidence Act would raise the presumption. It is a right all the more enforceable because the zamindar has to pass on a share of the collection to Government in the form of revenue. But the zamindar has no right generally to possession of the raiyati holdings. The raiyat existed before the zamindar came, and in the permanent settlement it was laid down that the raiyats are to be protected in their possession. That policy is carried out in the Bengal Tenancy Act. It is a mere truism to say that the zamindar has a right to all lands not held by tenants, and the proposition appears, to be irrelevant until the record of rights, prepared under the Bengal Tenancy Act, is rebutted. There is here no conflict of presumptions. In the case quoted from *I. L. R.* 2 *Patna* the fact that the land of the tenants fell within the ambit of the plaintiff's zamindari was sufficient to rebut the entry in the record of rights showing the defendants' land to be free of rent; and the defendant had the duty of showing by some grant or such like evidence, that he in particular was relieved from the universal duty of paying rent. In the case of *Sri Nath Ray* v. *Uday Nath Sahi Deo* (2) the plaintiff was purchaser of the pargana which in the judgment of their Lordships of the Privy Council is found to have been a rent-payjng jagir within the ambit of the zamindari of Chota Nagpur. The plaintiff's vendor purported to be an independent Talukdar of the pargana, and the defendant, the zamindar of Chota Nagpur, contended

(2) A. I. R. 1923 P. C. 217.

that the pargana had been resumed on failure of male issue in the line of dependent Talukdars. The plaintiff urged that the pargana was not resumable. The record of rights showed it to be resumable ; and their Lordships laid great stress on the presumption prescribed in S. 103 B of the Tenancy Act. This case appears to me to establish my argument as to the burden of proof. Had the entry been "non-resumable," the same presumptive weight would have attached to it, and the burden would have rested on the defendant zamindar : here also the zamindar has the duty of proving his claim, in face of the Record of Rights. (His Lordship then examined the evidence and continued.) The plaintiff has entirely failed to prove that the lands in the possession of the defendants, as recorded in the survey khatian, include zerait lands. There certainly is some zerait in the village ; the zerait within the plaintiff's share is defined by metes and bounds and survey numbers in the patta of 1908. The translation in the paper book is not accurate, on page 41, line 29, of part III. It should be :

With zerait land, exclusively belonging o me the proprietor measuring 7 bighas 9 kathas together with bhaoli, garden, bamboo clumps . . . .

It is suggested in argument that these 7 bighas and odd constitute a proportionate part of the 10 bighas 12 kathas 4 dhurs shown in Ex. 4. One thing, however, is clear : the words "exclusively belonging" relate to the entire share demised, including exclusively possessed zerait. These documents furnish some amount of positive evidence as to the identity of the so-called zerait lands, if we have to search for them in the present case. It may be mentioned here that it is not seriously contended that the term zeraiti as applied to the land in dispute is accurate : it should be probably bakast malik or ghairmazrua malik, according to its condition.

For these reasons I would dismiss this appeal with costs.

Das, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 487

DAWSON-MILLER, C. J., AND FOSTER, J.

Sir Rameshwar Singh Bahadur — Plaintiff—Appellant.

v.

Shaik Kitab Ali—Defendant—Respondent.

Letters Patent Appeal No. 19 of 1926. Decided on 3rd June 1926, from a decision of Adami, J., D/- 15th January 1920.

(a) *Deed—Construction—Lease—Dak fard is not a lease.*

A bid-sheet or dak fard showing the bids made at the auction of land for settlement is a verbal settlement, and the document which did not contain the most important terms and was never intended to be delivered to the lessee as a document of title cannot in such circumstances constitute a lease. [P. 487, C. 2, P. 489, C. 1]

(b) *Deed—Construction—Principles.*

Each document and the circumstances under which it came into existence must be considered separately, and the construction of one document is not generally of much assistance in constructing another which may differ materially in its terms and in the attendant circumstances. [P. 488, C. 2]

Murari Parsad and *Sambu Saran*—for Appellant.

Monohar Lal—for Respondent.

Dawson-Miller, C. J.—The question for decision in this appeal is whether a document referred to as a dak fard produced in evidence on behalf of the plaintiff is a lease. The plaintiff sued the defendant for rent at the rate of Rs. 5 per bigha for the years 1323 to 1326 F. The defendant had previously been in possession of the land under a registered kabuliyat for a term of five years which expired at the end of 1322 F. at a rental of Rs. 2-8-0 per bigha. Shortly before the expiry of the term the land was put up to auction for settlement from 1323 F. onwards under a permanent tenancy. The defendant bid Rs. 5 per bigha rent and Rs. 4 nazarana and his offer was accepted.

There was only one other bidder. The defendant remained in possession after the expiry of his original lease and at the beginning of 1327 F. (September 1919) he was sued for rent for the three previous years which he had not paid. His case was that although he bid for the land he only bid Rs. 2-8-0. The bid-sheet or dak fard showing the bids made at the auction was produced and

from this it appears that the plaintiff had bid Rs. 5 and it bore his thumb impression in the margin under the words:

Signature of the highest bidder with whom the settlement has been made.

In answer to this he admitted his impression, but said the form was not filled up when he impressed his thumb mark. This evidence was not believed and it was found by the Munsiff, who tried the case after remand, that the defendant did agree to pay Rs. 5 per bigha under the bid-sheet. This document is a printed form headed "Settlement by auction with the highest bidder," The particulars to be filled in are: (1) date; (2) officer conducting the sale, (3) details of the property and description, (4) name of the highest bidder, (5) period of settlement, (6) condition of settlement, (7) names of bidders and amount bid. In the margin there are spaces for the signatures of (a) the highest bidder with whom the settlement has been made, (b) the officer conducting the sale and (c) the muharrir in attendance at the sale. In the document in question the particulars numbered (5) and (6) above are left blank. The details of the property and description are entered as "23 bighas 5 cottahs 15 dhurs expired term land in village Sondeep, Pargana Dharampur," but no boundaries are given. It has nowhere been suggested, however, that the land so described was not the defendant's holding. Had the matter rested there I doubt if it would have occurred to anyone that the document was a lease or that it was any more than a memorandum kept by the landlord of the verbal transaction which took place by the bidding at the auction. It was in fact kept by the landlord's manager and was clearly not intended to be delivered to the tenent as a document of title. It may have been contemplated that a patta would eventually be granted and the document would no doubt have been of use for that purpose, but for some reason or other, possibly oversigbt, no formal lease was ever prepared.

After the defendant had impressed his thumb-mark in the space indicated for the signature of the highest bidder the plaintiff's sub-manager wrote in red ink at the foot of the document the following entry and initialed it:

Settled 23rd June 1915 of land at Rs. 5 rate and Rs. 4 per bigha salami with Shaikh Kitab Ali permanently from 1323 F.

The Courts below have differed as to the nature of this document. The Munsif held that it was a lease and being unregistered was inadmissible in evidence. He accordingly passed a decree for rent at Rs. 2-8-0 per bigha, the rate admitted by the defendant.

The Subordinate Judge on appeal considered that it was merely a memorandum and could not be construed as a lease or an agreement to lease and passed a decree for rent at the higher rate.

Mr. Justice Adami, on second appeal to this Court, held that it was a lease and restored the decree of the Munsif.

A number of cases have been referred to in argument in which various kinds of documents have been in question, some of which have been held to be leases and some of which have not, but each document and the circumstances under which it came into existence must be considered separately, and the construction of one document is not generally of much assistance in construing another which may differ materially in its terms and in the attendant circumstances. In the present case it is of importances to bear in mind that when the defendant appended his thumb-impression the document did not contain all the entries which now appear upon it. Neither the period of settlement nor the conditions of settlement were entered. It contained merely the date, name of the officer conducting the sale, description of the property, names of the bidders and their bids and the name of the highest bidder. The most material terms, namely, the period and the condition of settlement, were not recorded. Why then was the thumb-impression of the defendant taken? I think that the answer to this must be that it was for purposes of identification and as an acknowledgment that he was the person who made the highest bid and with whom the settlement had been made. He was already in possession and the rent was being increased in accordance with his own bid. There was nothing in the document at that time to show that he had taken a permanent settlement or a lease on any other conditions than those on which he already held except that he had bid a higher rent. The settlement

as the heading shows, was a settlement by auction; in other words, a verbal settlement, and the document which did not contain the most important terms and was never intended to be delivered to the lessee as a document of title could not, in such circumstances, constitute a lease. Can it make any difference then that the plaintiff's sub-manager afterwards noted thereon that the land had been settled permanently at the rent named with the defendant from 1323 F.? I think not. This was merely a note upon a document intended to be kept for his own purposes showing the terms of the agreement verbally come to by the defendant. In my opinion the document in question was not and never intended to be a lease and cannot be interpreted as such. I think that the judgment under appeal must be set aside and the decree of the learned Subordinate Judge restored. The appellant is entitled to his costs throughout.

Foster, J.—I agree.

Appeal allowed.

A. I. R. 1926 Patna 489

ADAMI, J.

Ramgobind Singh—Defendant—Petitioner.

v.

Sital Singh — Plaintiff — Opposite Party.

Civil Revision No. 498 of 1925, Decided on 15th March 1926, from an order of the 1st Sub-J., Arrah, D/- 27th October 1925.

Civil P. C., O. 32, R. 3—Defendant alleging to be minor—Issue should be framed and decided—Court's opinion about defendant's appearance is not sufficient.

If there is any doubt as to the minority of the defendant that question ought to be made an issue in the case and the Court ought to decide whether it is a case in which a guardian ought to be appointed. It is not sufficient for the Court by just looking at the defendant to come to a conclusion that he is not a minor.

[P 490, C 1]

B. P. Varma and *Parsuram Prasad Varma*—for Petitioner.

Sambhu Saran—for Opposite Party.

Judgment.—The opposite party sued the petitioner on a hand note dated the 30th April 1923. The suit was instituted on the 15th June 1925. On the 20th July 1925, the petitioner produced a medical certificate, before the Court of Small Causes signed by the Civil Surgeon, certifying that the petitioner on that date was between the ages of 17 and 19. The certificate was not produced by the petitioner himself but on his behalf, and the Court directed that the petitioner should himself appear before it, and he appeared on the 27th July. The Court, after looking at him and examining his appearance, came to the conclusion that he had reached the age of majority. The 17th August was fixed for the hearing, but the petitioner did not file his list of witnesses till the 8th August. Among the names of witnesses shown on his list was that of the Civil Surgeon. On the 17th August the plaintiff's witnesses were examined and in defence the petitioner and his elder brother gave evidence. The defence then seems to have closed, for no petition for further time for summonses on witnesses was asked for, but the Court gave time in order that the parties might have a chance of examining an expert in thumb-impressions who had sent in a report on the thumb-impression on the hand note in suit. The expert was not examined in Court. On the 5th October, after the vacation, the petitioner filed a petition asking for the examination of the Civil Surgeon, but his petition was rejected. He again made a petition on the 7th October, but that was again rejected, and, on the 26th October, the Court, having heard arguments, passed judgment in the case.

The learned Small Cause Court Judge stated that he could not rely upon the report of the Fingerprint Expert although it was in the plaintiff's favour because the Expert had not been examined.

Now, in the first place, if the Court could not use his report, no mention of it ought to have been made in the judgment; much less ought it to have been stated that the report was in favour of either of the parties. The judgment proceeds to the effect that the evidence on the plaintiff's side satisfied the Court as to the due execution of the pro-note and a bond in which the passing of consideration under the pro-note was mentioned, and the Court found that the plaintiff

had proved his case. Now the Court had noticed in the written statement of the defendant-petitioner that he claimed to be a minor. Further, the Court had seen the report of the Civil Surgeon showing that he was a minor in 1925. It was not sufficient for the Court, by just looking at the defendant, to come to a conclusion that he was not a minor at the time when the Court saw him, much less that he was not a minor two years before. If there was any doubt as to the minority that question ought to have been made an issue in the case and the Court ought to have decided whether it was a case in which a guardian ought to have been appointed. In my mind, after considering the materials before me, it is doubtful whether the defendant was a minor or not. If he was a minor, the decree of the Court of Small Causes is of no avail, for no guardian is appointed.

With regard to the failure to secure the attendance of the Civil Surgeon, I think that the defendant himself was, to a certain extent, responsible for it. He was very late in filing his list of witnesses. At the same time the evidence of the Civil Surgeon was necessary for the purpose of determining whether the defendant was a minor, and it would have helped the Court if it had complied with the request of the defendant to take the evidence of the Civil Surgeon. The case is one in which, I think, the Court below should be asked to determine the important question whether the defendant was in fact a minor when the pro-note was executed.

I must set aside the decree and direct that the lower Court do give the defendant-petitioner an opportunity of proving whether he is a minor after framing an issue on the point. At the same time the Court may find it convenient to secure the evidence of the Expert on thumb-impressions in order that a satisfactory decision may be come to in the case. The application is allowed and the directions I have given above should be followed.

The costs of this application will follow the result in the lower Court.

Application allowed.

A. I. R. 1926 Patna 490

DAWSON-MILLER, C. J., AND FOSTER, J.

Ram Karan Mahto—Defendant No. 1—Appellant.

v.

Dahur Mahton and *another*—Plaintiff and Defendant—Respondents.

Second Appeals Nos. 1085 and 1086 of 1923, Decided on 12th May 1926, from a decree of the Sub-J., Saran, D/- 20th March 1923.

Hindu Law—Alienation by widow—Defending title to property no longer hers is no legal necessity.

Where the widow was uncertain as to what property was in her possession but filed a suit for certain property as being in her possession.

Held : that in the circumstances of the case it was impossible to say that she had legal justification for spending money in defence of property which at the time of the expenditure had ceased to be hers. [P. 492, C. 1]

Sambhu Saran—for Appellant.

Sarju Prasad for *Manohar Lal*—for Respondents.

Foster, J.—Appeal No. 1085 of 1923 arises out of Suit No. 222 of 1921 and Appeal No. 1086 of 1923 arises out of Suit No. 223 of 1921.

These suits were brought by a reversioner Dahur Mahton (whose father was Ramiad) against Ram Karan Mahto for recovery of certain land. In the former suit Ram Karan is in possession of the land as purchaser in execution of his own mortgage decree obtained against the mortgagor Mt. Basmutia who, it is agreed, was the mother and heiress of the plaintiff's distant cousin's agnates Gulzari and Sheobaran. Basmutia was the widow of Moti and her sons, Gulzari and Sheobaran, died without issue shortly afther their father. In this case the suit turns on the question of legal justification of the mortgage. In the other suit Dahur, the reversioner, sued the said Ram Karan Mahto for recovery of other lands on the ground of deposit in Court made on the 6th June 1919, under S. 83 of the Transfer of Property Act of the redemption price of a zarpeshgi bond executed by the said Basmutia.

The two cases are so distinct in subject-matter that it is convenient to deal with them separately. Their only point of contact is that they are both brought by the reversioner of the last male owner, Gulzari or Sheobaran, for the

recovery of property originally belonging to the common ancestor of the plaintiff and his two cousins and of which Ram Karan, the defendant, has acquired possession by virtue of mortgage.

In Suit No. 222 of 1921 the facts leading to the present litigation are these: Basmutia having a Hindu widow's estate, in 1905, executed in defendant Ram Karan's favour a zarpeshgi bond for Rs. 192 and in 1908 a simple mortgage bond for Rs. 115. In 1914 or 1915 Ram Karan got a decree on foot of these two mortgages and in execution purchased 1 bigha 8 cottahs. The plaintiff-reversioner was not a party, and after Basmutia's death in November 1918, he demanded possession from Ram Karan on the ground that the mortgages could not bind the reversionary interest. The defendant's written statement purports to state the legal justification for the particular debts making up the two aggregate mortgage advances and the question we have to consider is whether the mortgage-deeds and the decree passed thereon can affect the plaintiff's interest as reversionary heirs. The two Courts below have agreed that the suit should be decreed and the defendant Ram Karan is now making a second appeal.

The consideration for the zarpeshgi bond of 1905 was made up of (a) Rs. 155-8-0 and (b) Rs 36-8-0, total Rs. 192; that of the mortgage-bond of 1908 was made up of (c) Rs. 69-15-6 (d) Rs. 46. In regard to the amount (a) above, it is necesssary to mention that shortly after the death of Basmutia's two sons, she and her co-widow Bahuri executed a deed of gift in respect of 5 cottahs in favour of a Brahmin Swami Bishudha Nand. In Suit No. 430 of 1905 the plaintiff's father won a declaration that the gift did not bind the reversionary interest. The active defendant was Mt. Basmutia. It is alleged that part of the sum of Rs. 155-8-0 was made up of small advances, totalling either Rs. 100 or Rs. 150, according to the oral evidence to Basmutia on chitta for her expenses in the suit ; and the rest was for the purchase of bullocks and agricultural expenses. There is little space left for the bullocks and agricultural expenses, if we accept the figure Rs. 150 or even Rs. 100 as the total of advances for the litigation. But the discussion has proceeded on broader lines. Moti and Basmutia and their sons had 6 bighas ancestral property, we are informed, and prima facie a gift by a widow of 5 cottahs, one twenty-fourth of the whole inheritance might not be considered an extravagance; nor, if that be granted, would money spent for securing the gift to the donee in the suit of 1905 be necessarily unjustifiable. The whole might possibly in certain circumstances be regarded as a gift to a Brahmin for the benefit of the soul of the last male owner or the souls of the members of the joint family. I think that we would be at liberty to take this view, which is quite independent of the result of the suit of 1905, because I cannot find any ground for application of the rule of res judicata to the present defendant Ram Karan.

But the circumstances which would support such a view are not to be found. Here was a matter in which the defendant could and should have helped the Court, but we are left in obscurity. We have no certainty what total area of lands was still in Basmutia's possession when she made the grant to the Brahmin, nor do we know with what intention she made the gift, whether for her own merits or for those of other members of the family. Then, when the suit came about, it must be remembered that she had no existing rights in the property she was defending. We do not even know how much the expenditure amounted to. We know nothing so far as has been put before us of her means at the time of the litigation. As to her property, we have confused accounts in the brief before us. In the Munsif's judgment it is mentioned that from the evidence of the defendant's Witness No. 3 it appears that in the year 1895 the Mt. was in possession of only 3 cottahs of land and the rest was in the possession of her creditors. In the Subordinate Judge's judgment the same witness is quoted as authority for the same statement. But in the plaint it is surprising to see that in 1895, the very year in which this witness limits the property to 3 cottahs, there was a dispute in the Court of the District Judge in a succession certificate case and in March 1896 by a compromise between the parties it was agreed that the Mt. should get a life interest in the properties without having any right to create a charge upon them. With all

this uncertainty as to what property was in possession of Mt. Basmutia, it is impossible to say that she had legal justification for spending money in defence of property which at the time of the expenditure had ceased to be hers.

As to the sum of Rs. 36-8-0 above, no remaks were addressed to us. It purports to have been taken for the cost of purchase of potatoes and paddy seeds and the two Courts have held that the Mt. had so small an area in her personal possession that it was unlikely that she would need to borrow so much for the expenses of cultivation. In my opinion it is not shown that the lower appellate Court took a wrong view in finding that legal necessity or legal justification for the zarpeshgi had not been proved.

I come now to the mortgage of 1908. The first item is Rs. 69-15-6 which I have marked (c) above. It was said to comprise the costs with interest decreed against Basmutia in the suit of 1905 already referred to The justification is said to be the salvage of her property which was attached in execution. We are told that 3 cottahs of land were attached, but it is not clear whether her life interest alone or the whole family interest was attached, and some of the evidence we are told indicates that only the potato crop on the land was under attachment. In such uncertain circumstances there are no grounds for forming an opinion which differs from that of the lower appellate Court.

No remarks have been made on the subject of the last item, Rs. 46 marked (d) above. I am of opinion that Appeal No. 1085 of 1923 should be dismissed.

I come now to Appeal No. 1086, Suit No. 223 of 1921. The zarpeshgi is of 1895 and the plaintiff has produced the challan showing a deposit of Rs. 98 on the 6th June 1919, the deposit purporting to have been made under the provisions of S. 83 of the Transfer of Property Act. The defendant says that this is not sufficient and that the redemption price is Rs. 596, that is Rs. 498 more. Here, however, the appellant is confronted with findings of fact. The learned Subordinate Judge has found that there is absolutely no satisfactory evidence to convince him that Ruchh Mahto (Moti's father who is stated to have originally taken the advance from the defendant) ever took any loan from the Defendant No. 1. There is no witness to support this part of the case, nor is there any scrap of paper to substantiate it. It is also in evidence that Ruchh Mahto died before his son Moti. It is also in evidence that Ruchh Mahto died 30 or 32 years ago. It is said that an adjustment of accounts took place four years before the death of Ruchh Mahto. How was it that the Defendant No. 1 did not take any steps to realize the amount from Ruchh or his son Moti or from the sons of Moti Mahto? Again the learned Subordinate Judge remarks that the debt of Ruchh Mahto has not been proved and therefore, he thinks that Basmutia had no justification or legal necessity to execute any bond in respect of this debt. Lastly, he remrks that in the Cadastral Survey Khatian the defendant's name is entered but the zarpeshgi is stated to be for Rs. 98. This scrutiny of the defendant's case is still more detailed in the judgment of the learned Munsif. Ram Karan Mahto has given his own evidence and the learned Munsif has examined it closely. His conclusion is that from the evidence of this defendant itself it appears that he could never have advanced any money to Ruchh. The point taken in appeal is that the lower appellate Court would have treated the case more correctly if it had taken into account the recitals in the zarpeshgi bond in question which being of the year 1895 is old enough to deserve this special treatment; and the case of *Nanda Lal* v. *Jagat Kishore* (1) is quoted, It appears to me that the facts of the present case are not such as to attract the rule mentioned in that decision.

It is to be remembered that in that case nearly 60 years had passed between the date of the first deed and the institution of the proceedings and the attempt to support by contemporary evidence statements as to the private affairs of the deceased man or his widows could only result as might have been expected, in a number of witnesses attempting to give first hand evidence upon matters which occurred when they were of tender years and now could only be dimly and imperfectly remembered. Their Lordships were of opinion that the recitals in the deeds could not be disregarded, nor, on the other hand

(1) [1917] 44 Cal. 186=36 I. C. 420=43 I. A. 249 (P. C.).

could any fixed and inflexible rule be laid down as to the proper weight which they were entitled to receive. It was held that the recitals in the circumstances of that case were clear evidence of the representation made to the purchaser as to legal necessity; and the principle underlying the rule was indicated in one sentence:

To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction perfectly honest and legitimate when it took place would ultimately be incapable of justification merely owing to the passage of time.

Here in the present case, as I have shown, the statement of the person most acquainted with the facts has been recorded. He is in fact the person who has the duty of proving his own case. It does not appear to me, therefore, that the rule can be invoked in the present appeal. Moreover there is a reservation in the judgment which I have quoted, that the representation should be consistent which the probabilities and circumstances of the case. It appears to me that the passages which I have quoted from the judgments of the two Courts below indicate that no recitals as to legal necessity could be sustained in the present, in view of the facts and circumstances which have been arrived at.

There is only one question remaining whether the mesne profits which have been awarded should have been awarded and whether a right time has been fixed.

In both cases the claim has been decreed. In Suit No. 222 it is obvious that the reversioner is entitled, if he succeeds in avoiding the sale to the defendant, to mesne profits from the date of suit, In Suit No. 223 mesne profits have been awarded from the date of the deposit purporting to have been made under S. 83 of the Transfer of Property Act. I have found that the whole dues under the mortgage, namely, Rs. 98 were in fact deposited, so that there was a compliance with the terms of the section. The consequence of the deposit under S. 83 is shewn in S. 84 which provides that

when the mortgagor or such other person as aforesaid has tendered or deposited in Court under S. 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Now, the interest due on the advance of Rs. 98 which has been found to have been made ceased when the deposit was made under S. 83. That interest consisted under the contract between the parties, in the usufruct of the land granted under the zarpeshgi. It follows from this that the mesne profits are finally taken from the date of the deposit under S. 83. The terms of S. 84 which I have quoted would indicate that possibly a week or two would be deducted for the purpose of serving notice on the mortgagee, but we are dealing with land which has its seasonable crops and it does not seem necessary to consider such a small matter as that. In my opinion mesne profits have been rightly awarded and the right time has been fixed in the two cases. I would dismiss both these appeals with costs.

Dawson-Miller, C. J.—I agree.

Appeals dismissed.

A. I. R. 1926 Patna 493

ROSS AND KULWANT SAHAY, JJ.

Nanhak Sao—Accused—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 143 of 1926. Decided on 10th March 1926, against an order of the S. J., Patna, D/- 2nd February 1926.

(a) *Penal Code, S. 361—Offence is complete as soon as minor is actually taken from the lawful guardianship.*

The offence of kidnapping from lawful guardianship is complete when the minor is actually taken from the lawful guardianship. It is not an offence continuing so long as he is kept out of such guardianship; 2 *C. W. N.* 81 : 27 *Cal.* 1041 and 26 *Mad.* 454, *Foll.* [P 494 C 2]

(b) *Penal Code, S. 361—Whether kidnapping from lawful guardianship is complete is a question of fact.*

The question whether the act of taking the girl out of the keeping of her lawful guardian is complete is one of fact and must in each case be decided upon the particular evidence of each particular case. 27 *Cal.* 1041, *Foll.* [P 494 C 2]

Khurshaid Husnain and *I. Hussain*—for Petitioner.

H. L. Nand Keolyar—for the Crown.

Kulwant Sahay, J.—The petitioner was convicted by a First Class Magistrate of Patna for an offence under S. 363/114 of the Indian Penal Code and sentenced to nine months' rigorous imprisonment. The conviction and sentence have been upheld by the learned Sessions Judge on appeal.

The only question of law raised in the case is as to whether the accused abetted the commission of the offence or whether he was merely an accessory after the act. The girl Sudamia, a minor of eleven years of age, was kidnapped from the lawful custody of Bazari Sao, who was appointed her guardian by the District Judge, on the 29th of June 1925, at about 5 A. M. The actual kidnapping of the girl was made by Sri Bhagawan, a nephew of Bazari Sao, who took the girl from Bazari's house. Sri Bhagawan was tried of an offence under S. 363, I. P. C., and convicted and sentenced to one year's rigorous imprisonment. In the course of the trial it appeared from the evidence that the present petitioner Nanhak also took part in the removal of the girl. He was, therefore, placed upon his trial and convicted and sentenced as stated above.

The evidence as found by the learned Sessions Judge is that Sri Bhagawan, who was a nephew of Bazari Sao, took the girl out of the house of Bazari Sao. They went to a place near the house of the petitioner where an ekka was standing. Nanhak and Sri Bhagawan helped the girl on to the ekka and Sri Bhagawan took her away. The petitioner Nanhak followed them sometime after on a bicycle. The petitioner was found near the Patna junction Railway Station at the time when Sri Bhagawan and the girl were getting down from the ekka. The learned Sessions Judge finds upon the evidence that the ekka was kept at Nanhak's door, that Nannak was standing near the ekka from before the arrival of Sri Bhagawan and Sudamia, that he helped Sudamia on the ekka, that he followed on a bicycle, and that he was seen with the eloping party near Patna junction Railway Station. The question is whether the act of kidnapping was complete the moment the girl was brought out of the house of Sri Bhagawan, or it was continuing when the petitioner helped the girl on to the ekka.

A number of cases have been cited by the learned advocate for the petitioner to show that the offence of kidnapping is not a continuing offence and that it is complete the moment the minor is removed from the keeping of the lawful guardian. In *Rakhal Nikari* v. *Queen Empress* (1) it was held that the offence of kidnapping a person is complete when he is actually taken out of the custody of the lawful guardian. In *Nemai Chattoraj* v. *Queen-Empress* (2) the Full Bench of the Calcutta High Court held that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from the lawful guardianship. It is not an offence continuing so long as he is kept out of such guardianship. The same view was taken in *Chekutti* v. *Emperor* (3). There can therefore be no doubt that the act of kidnapping would be complete as soon as the minor was taken out of the keeping of the lawful guardianship. The question is whether the act of taking the girl Sudamia out of the keeping of her lawful guardian was complete before she was taken to the place where the ekka was standing in front of the petitioner's house. In the case of *Nemai Bhattoraj* v. *Queen-Empress* (2) just referred to the learned Chief Justice observed that the question is one of fact and must in each case be decided upon the particular evidence of each case. In all the cases cited on behalf of the petitioner there was an interval of time and distance, so far as the place was concerned, between the actual removal of the girl and the abetment by the accused persons or taking part in the offence by the accused persons in those cases: In the present case the finding is that the accused took part in the actual removal of the girl immediately after she was taken out of the house of her guardian

It appears from the evidence that the place where the ekka was standing was a short distance from the house of Bazari Sao, only a few houses intervening between that place and Bazari's house. As I have said, the question is one of fact and the learned Sessions Judge as well as the Magistrate have both come to the finding, on a consideration of the evi-

(1) [1897] 2 C. W. N. 81.
(2) [1900] 27 Cal 1041=4 C. W. N. 645 (F.B.)
(3) [1903] 26 Mad. 454.

dence, that the act of kidnapping was not complete at the time when the petitioner helped the girl on to the ekka. Under these circumstances, the conviction under S. 363/114, I, P. C., appears to be correct.

The question, however, remains as to whether a sentence of nine months' rigorous imprisonment is an appropriate sentence. The actual culprit, Sri Bhagawan, was given one year's rigorous imprisonment. The present petitioner Nanhak does not appear to have had any sinister motive so far as the girl was concerned. It appears from the evidence that Bazari Sao wanted to give the girl in marriage to a certain person which was objected to by the near relation of the girl. Nanhak appears to be one of the party who objected to the marriage proposed by Bazari Sao. Under the circumstances, I think a sentence of three months' rigorous imprisonment would meet the ends of justice. The conviction is, therefore, upheld and the sentence passed on the petitioner is reduced to one of three months' rigorous imprisonment.

Ross, J.—I agree.

Sentence reduced.

A. I. R. 1926 Patna 495

DAWSON-MILLER, C. J., AND FOSTER, J.

Dindayal Singh and *others*—Plaintiffs—Appellants.

v.

Raj Keshwar Narayan and *others*—Defendants—Respondents.

Letters Patent Appeal No. 29 of 1926, Decided on 18th June 1926, from a judgment of Adami, J., D/- 10th February 1926.

(a) Bengal Tenancy Act, S. 70 (4)—No fresh notice need be given under sub-S. (4).

If sufficient time is given after service of notice and before the Collector passes his final orders, to enable tenants to come forward and make their objections, that is a proper compliance with the provisions of sub-S. (4) and no further notice is required upon the tenants to enable them to come and make their objections. [P 496 C 2]

(b) Bengal Tenancy Act, S. 70 (2)—Notice served by Amin—Person alleging absence of notice must prove it.

If the Amin comes to the village and gives notice to all and sundry either by informing them personally or by leaving notices at their houses, then that is prima facie compliance with the section. If that is done, then it lies upon those who are complaining that the section is not complied with to come forward and give evidence that they in fact had no notice.

[P 496 C 2 P 497 C 1]

(c) Civil P. C. S. 100—Question as to notice is one of law.

The question whether certain facts found amounted to giving notice within S. 70, Bengal Tenancy Act, or not, is a question of law.

[P 497 C 2]

S. N. Rai—for Appellant.

S. Dayal—for Respondents.

Dawson-Miller, C. J.—This is an appeal under the Letters Patent from a decision of Mr. Justice Adami, overruling the decree of the lower appellate Court.

The suit was brought by the appellants who were the tenants of mauza Rampur Uber against their landlords claiming a declaration that a decree passed under S. 69 of the Bengal Tenancy Act, dated the 12th January 1920, in favour of the Defendants Nos. 1 to 3 by the Sub-Divisional Officer of Jahanabad was quite fraudulent, and fit to be set aside and that the defendant had no right to realize the amount covered by such a fraudulant decree. The decree which is complained of in the plaint is one passed under S. 70 of the Bengal Tenancy Act and not under S. 69 as stated in the plaint. Both these sections, however, have reference to the same subject-matter and relate to appraisement of produce rents at the instance of either the landlord or the tenant in certain cases. I may say at the outset that the case of fraud set up by the plaintiffs was not established and their evidence in this respect was not accepted by either the trial Court or the Subordinate Judge in appeal. The case, however, upon which they succeeded in the trial Court and in the Court of appeal was that no notice had been served up on the plaintiffs who constitute some of the tenants in the village under the provisions of S. 70 of the Bengal Tenancy Act. That section provides in effect that the Collector may appoint an officer giving him certain directions as to the making of an appraisement referred to in S. 69 of the Act, and sub-S. (2). S. 70 says that of

the officer shall before making an appraisement or division, give notice to the landlord and tenant of the time and place at which the appraisement or division will be made: but if either the landlord or the tenant fails to attend either personally or by agent, he may proceed ex parte.

Then under the remaining provisions of the section the officer having made his appraisement must submit it to the Collector and by sub-S. (1) the Collector shall consider the report and, after giving the parties an opportunity of being heard and making such enquiry (if any) as he may think necessary, shall pass such order thereon as he thinks just.

The case apparently set up by the plaintiffs before the trial Court was that they or some of them had not been personally served with any notice under the provisions of sub-S. (2) of S. 70. The facts found by the Munsif in the trial Court were that in some cases the notice had been served personally; in other cases the tenants had refused to accept the notice and in some cases the tenants could not be found personally ; but where they were not personally served the notices were affixed at their houses which is a well-known form of service when persons cannot be found. It was also found that some of the tenants who were apparently either the jeth raiyats or important tenants in the village appointed a man called Jit Narain to be their salis and look after the interests of the tenants in the appraisement.

The Munsif finally came to this conclusion that he thought that the plaintiffs had full knowledge of the proceedings ; in other words, he considered that they had been served either personally or by affixing the notices upon their houses and that in fact they had full knowledge of the proceedings He considered, however, that, although proper notice was given within the meaning of sub-S. (2) nevertheless, under sub-S. (4) they were not given any notice so as to give them an opportunity of being heard upon the amin's report. The reason why the Munsif arrived at the conclusion that the plaintiffs had not been given an opportunity of being heard before the Collector in objection to the amin's report appears to have been that there was nothing in the order-sheet to show that any notice had been served upon them to appear before the Collector and take objection, if they thought fit, to the amin's report. What the Collector in fact did was, after receiving the report he kept his final order pending for a week to enable the parties, if they had any objection, to come forward and represent it before him, and in my opinion this being, I think, a mixed question of fact and law it seems to me that that was quite sufficient compliance with the provisions of S. 70, sub-S. (4), because, assuming that proper notice is given under sub-S. (2), then the parties know exactly what has been done by the amin when he made his report. They do in practice appoint a person to represent them known as a salis. He and the amin together between them discuss, and possibly dispute, as to the amount of the produce in each of the fields and between them they eventually arrive at the proper amount of produce. At all events the tenants have that opportunity of knowing exactly what is contained in the amin's report long before it goes to the Collector. Therefore if they have any objection to make and if sufficient time is given before the Collector passes his final orders to enable them to come forward and make their objections, that is in my opinion, a proper compliance with the provisions of sub-sec. (4) and no further notice is required upon the tenants to enable them to come and make their objections.

When the case went to the Subordinate Judge on appeal he did not in terms find any facts contrary to those found by the Munsif. He seems to have been of opinion that the service of notice under sub-S. (2) in the manner in which I have just described was not a proper compliance with that sub-section, and that in the cases where personal-service was not made the plaintiffs were entitled to have the decree set aside. This appears to me to be taking a highly technical view of the meaning of sub-S. (2). I may point out that there is nothing in sub-S. (2) about serving notice personally upon the parties and although to comply with that section it is I think essential that the parties should in one manner or another be given notice of the fact that the amin is about to make an appraisement, still no method of serving notice is prescribed in the Act, and the words used in the Act are not "serve" notice but "give" notice and it seems to me that if the amin comes to the village and gives notice to all and sundry either by informing them personally or by leaving notices at their houses then that is prima facie a compliance with the section. If that is done, then I think it lies upon those who are complaining that the section is not complied with to come forward and

give evidence that they in fact had no notice. That was not done in this case. The plaintiffs seem to have thought that the defendants would have some difficulty in proving personal service on each of the plaintiffs and one of the most important of the tanants at all events although he appears to have been in Court was not called as a witness. The others in so far as they stated that they had no notice, were not believed by the Munsif who came to the conclusion that they had full knowledge of the proceedings.

The learned Subordinate Judge having arrived at the conclusion that the serving of notice in the manner which I have described was not a proper compliance with sub-S. (2) further went on and said :

There was therefore no opportunity given to these persons to object to the report of the amin, and in my opinion this makes the decree against them void under S. 70, cl. (4) as interpreted in the ruling cited by the lower Court.

If in fact the plaintiffs had no notice under sub-S. (2) and nothing more was done, I quite agree with the learned Subordinate Judge that they had no opportunity of objecting to the Collector's report under sub-S. (4), but if, on the other hand, the mode of giving the notices as found by the Munsif in this case was a proper mode, then it seems clear that the parties had an opportunity under sub-S. (4) because the Collector postponed the final orders passed by him for a week and that could only be for the purpose of giving the parties an opportunity of coming forward and making their objections.

When the case came on second appeal to the learned Judge of this Court he came to the conclusion that there was service of notice even if it be granted that it was irregular as against some of the plaintiffs. He then went on and said that the Court below also found that an opportunity was given to the plaintiffs under S. 70, sub-S. (4) of the Bengal Tenancy Act, but in that respect either he had an imperfect copy of the judgment before him or there is some slip, because the actual finding of the Subordinate Judge was not that an opportunity was given under sub-S. (4) but that no opportunity was given. That, however, is not a matter of any importance in the view I take of this case for, although this is a question of fact, still the question whether certain facts found amounted to giving notice within the meaning of the section or not is a question of law. We know what the facts found were and upon those facts it seems to me that proper notice was given within the meaning of sub-S. (2) of S. 70 and in these circumstances all was done that was necessary to make the Collector's decree final and binding.

This appeal must be dismissed with costs.

Foster, J.—I agree.

Appeal dismissed.

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* A. I. R. 1926 Patna 497

DAS AND FOSTER, JJ.

Bibi Uma Habiba—Appellant.

v.

Mt. Rasoolan and *another*—Respondents.

Appeal No. 113 of 1925, Decided on 27th January 1926, from the original order of the Sub-J., Darbhanga, D/- 17th April 1925.

* *Civil P. C., S. 73—Another decree-holder applying for distribution—First decree-holder alleging his decree to be collusive and applying for judicial enquiry—Application should not be entertained.*

The act of distribution under S. 73 is a ministerial act and therefore where the first decree-holder objects to rateable distribution on the ground that second decree-holder's decree was collusive and urges for judicial decision on the point,

Held : that his prayer should be disallowed : 23 *All.* 313 *P. C., Foll.* [P 498 C 1]

Khurshaid Husnain, Ali Khan and *S. M. Wasi*—for Appellant.

S. M. Mullick and *Rajeswar Prasad*—for Respondents.

Foster, J.—The appellant held a money decree for her dower, her deceased husband being one Manzoorul Haq. In the course of the execution, after realization of certain assets, the respondent Bibi Rasoolan put in a claim for rateable distribution under S. 73 of the Code of Civil Procedure. Thereupon the decree-holder Bibi Uma Habiba made objection to this intrusion in the course of her execution on the ground that the decree of Bibi Rasoolan was obtained in collusion with the judgment-debtors. She therefore asked the Court to hold an

enquiry into the matter with a view to a decision whether Bibi Rasoolan was in possession of a bona fide decree, and whether she should not be excluded from the rateable distribution. The learned Subordinate Judge quoted a number of cases ending in *Shankar Sarup* v. *Mejo Mal* (1). In this last case their Lordships of the Judicial Committee remarked :

" The 295th section " (that is the section which corresponds to the present S. 73) :

While providing that the Judge under whose authority the sale takes place shall distribute the proceeds, provides also that if all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets . . . . . The scheme of S. 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present.

The learned Subordinate Judge, relying on this and other cases several of which are expressly opposite, found that the objection could not be made the occasion of a judicial enquiry whether there was a right to rateable distribution by virtue of the decree exhibited. It seems to me that the learned Subordinate Judge took a correct attitude in this matter. The section itself specifically states that when there are assets in the Court, they may be rateably distributed between the claimants money decree-holders ; and where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets. It appears to me therefore that the remedy indicated in the second clause of S. 73 is the only remedy. " The expression of one thing is the exclusion of the other. "

It was urged that the matter really was under S. 47, but it seems to me that the Privy Council decision must be deferred to, and this matter must be regarded as a purely ministerial act which has no element of a judicial decision.

I would therefore dismiss this appeal without costs and the Civil Revision is also dismissed.

Appeal and Revision dismissed.

[1901] 23 All. 313=28 I. A. 203=8 Sar. 72 (P. C.)

A. I. R. 1926 Patna 498

ROSS, J.

Hira Lal—Plaintiff—Appellant.

v.

Sarabjit Kamkar and *another*—Defendants—Respondents.

Appeals Nos. 1176 and 1177 of 1923, Decided on 1st June 1926, from the appellate decrees of the Sub-J., Motihari, D/- 5th October 1923.

Landlord and tenant — Tenant cannot deny landlord's title at the time of demise—Tenant can show that subsequent to the demise landlord's title had expired.

A plea cannot be set up by a tenant of which the necessary effect is to impeach the title of the person who gave the possession, that is, his title at the time of the demise. Subject to this requirement being satisfied the title, both before and after that time, may be disputed, i. e., it is always open to the tenant to show, either as against the person from whom the possession was obtained, or as against anyone claiming under him, that the title of such person has expired or become defeated at a period subsequent to the demise. [P 499, C 1]

N. C. Sinha and *Harihar Prasad Sinha*—for Appellant.

L. N. Singh and *Bhagwan Prasad*—for Respondents.

Judgment —The short point in this case is whether a tenant is entitled to show that his landlord's title has expired. The defendants who are respondents took a settlement from Mt. Nandraji Kuer, the widow of Dhunraj Dubey in 1918. In 1922 their lessor executed a zurpeshgi deed in favour of the present plaintiff after having married a Muhammadan and, therefore, forfeited her interest in her husband's estate. The question is whether the defendants who had been put into possession by her were entitled to show that her title had ceased. Reference was made to Bigelow on Estoppel, at page 562, where it is said that

it is well settled that a tenant in possession cannot, even after the expiration of his lease, deny his landlord's title without : (1) actually and openly surrendering possession to him ; or (2) being evicted by the title paramount or attorning thereto ; or (3) at least giving notice to his landlord that he shall claim under another and a valid title.

To the same effect are the decisions in *Bhaiganti Bewa* v. *Himmat Bidyakar* (1) and *Devalraju* v. *Mahamed Jaffer Saheb* (2). This statement of the law,

(1) [1916] 24 C. L. J. 103=35 I. C. 7=20 C. W. N. 1335.

(2) [1913] 35 Mad. 53=19 I. C. 555.

however, does not contain the whole rule on the subject of the tenant's estoppel:

Nor can a plea be set up of which the necessary effect is to impeach the title of the person who gave the possession, that is, his title at the time of the demise, for, subject to this requirement being satisfied the title, both before and after that time, may be disputed. The latter principle is expressed by saying that it is always open to the tenant to show, either as against the person from whom the possession was obtained, or as against anyone claiming under him, that the title of such person has expired or become defeated at a period subsequent to the demise: Foa's Landlord and Tenant, 6th Edition, page 524.

Woodfall in his "Landlord and Tenant", Twenty-first Edition, at page 264, says: "The tenant may, however, show that his landlord's title has expired."

No other point was raised in the appeal which must be dismissed with costs.

This judgment will govern S. A. No. 1177 of 1923 also.

Appeals dismissed.

✻ ✻ A. I. R. 1926 Patna 499

ROSS AND KULWANT SAHAY, JJ.

Nirsu Narayan Sinha—Accused—Petitioner.

v.

The King-Emperor—Opposite Party.

Criminal Revision No. 505 of 1926, Decided on 12th August 1926, from the order of the S. J. Saran, D/- 30th July 1926.

✻ ✻ (a) *Penal Code, S. 499—Statements made by advocate during professional work are privileged—Privilege is qualified—Prosecution has to prove express malice.*

The liability of a pleader charged with defamation in respect of words spoken or written in the performance of his professional duty depends on S. 499 and the Court would presume good faith unless there is cogent proof to the contrary. The privilege is not absolute but qualified, and the burden is cast upon the prosecution to prove absence of good faith. [P 500 C 1, 2]

Where express malice is absent the Court, having due regard to public policy, would be extremely cautious before it deprives the Advocate of the protection of Exception 9. The Court ought to presume his good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose. 19 *Bom.* 340, *Foll.* [P 550 C 2]

✻ (b) *Penal Code, S. 161—Penal Code, S. 499* Statement that Government servant worked for money in favour of a candidate at an election is not charging him with bribery as such work is not in discharge of his official duty. It is on the contrary prohibited. [P 501 C 1]

✻ (c) *Penal Code, S. 499—Advocate—Liability—English Common Law principles do not apply in India (Kulwant Sahay, J.)*

Under the Common Law of England an advocate can claim an absolute privilge for words uttered in the course of his duty as an advocate. But an advocate in India is not entitled to an absolute privilege, and in cases of prosecution for defamation his liability must be determined on reference to the provisions of S. 499. [P 502 C 1,2]

✻ (d) *Criminal P. C., S. 499—Question of proof of malice is one of law—Penal Code, S. 499 (Kulwant Sahay, J.).*

The question whether upon the facts found or proved, malice has been established is a question of law. [P 503 C 2]

S. Sinha, S. K. Banerji. Harnarain Prasad, Sambhu Saran, B P. Sinha and *Sarangdhar Sinha*—for Petitioner.

Sultan Ahmed H. L. Nandkeolyar and *Bankim Chandra Mukerjee*—for the Crown.

Ross, J.—In 1923 there was an election for the Bihar Legislative Council. Two of the rival candidates were Nirsu Narain Singh, the petitioner, and Rai Bahadur Chandraketu Narain Singh. The latter was successful; and the former disputed the validity of the election on various grounds. One of these grounds was that Zainuddin Khan, the Sub-Inspector of Police of Masrake Thana had used undue influence in procuring the votes of the chowkidari presidents of his thana for Chandraketu Narain Singh. An enquiry was held by Commissioners; and in that enquiry one Radhakant Prasad a president gave evidence for the petitioner to the effect that at the thana the head constable gave them a message from the Sub-Inspector to say that they were to support the candidature of Chandraketu Narain Singh. The Commissioners found that the charge of undue influence was untrue.

In December 1925 Zainuddin Khan prosecuted one Sheomangal Bari, a servant of Beni Prasad, a brother of Radhakant Prasad for an offence under the Arms Act. The petitioner who is an advocate of this Court, defended the accused in that case. Part of the evidence was that the Sub-Inspector had an old grudge against Radhakant Prasad

and therefore had concocted a false case against his brother's servant. Zainuddin Khan was cross-examined on the subject of the election and Radhakant Prasad gave evidence for the defence stating that he gave his vote as desired by the Daroga to Chandraketu Narain Singh, but that he advised his tenants to vote for the petitioner. He also said that he had given evidence for the petitioner in the case about the election. During his argument in that case the petitioner said that

the Sub-Inspector might have been given silver tonic in the matter of election between him and Rai Bahadur Chandraketu Narain Singh to side the latter,

The Sub-Inspector then laid a complaint of defamation against the petitioner on these words. The petitioner was convicted by the Deputy Magistrate of Chapra and sentenced to one week's simple imprisonment and a fine of Rs. 1,000 under S. 500 of the I. P. C. An appeal against the conviction was dismissed by the Sessions Judge of Saran. The present application in revision is directed against that conviction.

The law on the subject has been fully discussed by a Special Bench of the Calcutta High Court in *Satish Chandra Chakravarty* v. *Ram Dayal De* (1). That was not a case about the position of an advocate in defending a client : but all the cases on this subject were referred to. It was held that if a party to a judicial proceeding is prosecuted for defamation in respect of statements made therein on oath or otherwise, his liability must be determined by a reference to the provisions of S. 499 of the I. P. C. that the question must be solved by the application of the provisions of the I P. C. and not otherwise · that the Court cannot engraft thereupon exceptions derived from the Common law of England or based on grounds of public policy. Consequently a person in such a position is entitled to the benefit of the qualified privilege mentioned in S. 499 of the I. P. C. The case dealing with advocates were also referred to as ruling that the liability of a pleader charged with · defamation in respect of words spoken or written in the performance of his professional duty depends on the previsions of S. 499 of the I. P. C. and that the Court would presume good faith unless there is cogent proof to the contrary. The privilege is not absolute but qualified ; no doubt the burden is cast upon the prosecution to prove absence of good faith. *In re Nagarji Trikamji* (2) which was followed in *Upendra Nath Bagchi* v. *Emperor* (3) their Lordships, without deciding whether Advocates have or have not an unqualified privilege from criminal prosecution, said.

In considering whether there was good faith, that is under S. 52, due care and attention of the person making imputation must be taken into consideration. That of an advocate is well expressed by the Master of the Rolls in the passage cited above [i. e. *Munster* v. *Lamb* (4)]. He speaks from instructions , he reasons from facts, sometimes true, sometimes false. He draws inferences from these facts sometimes correct, sometimes fallacious. He does not express his own inferences, his own opinions or his own sentiments, but those which he desires the tribunal, before which he appears, to adopt. This duty the law allows, almost compels him to perform. Such being his duty it seems to us that where express malice is absent (and it ought not to be presumed) the Court, having due regard to public policy, would be extremely cautious before it deprived theadvocate of the protection of Exception 9.

In *Upendra Nath Bagchi's* case (3) their Lordships referred to *Emperor* v. *Purshottom Dass Ranchoddas* (5) where it was said that ·

when a pleader is charged with defamation in respect of words spoken or written while performing duty as a pleader, the Court ought to presume his good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose.

This decision was followed in *Nikunja Behari Sen* v. *Harendra Chandra Sinha* (6) where it was held that a pleader is entitled to the presumption of good faith and that, to rebut that presumption, there must be convincing evidence that the pleader was actuated by improper motives personal to himself and not by a desire to protect or further the interests of his client's case. These were referred to without being dissented from in the decision of the Special Bench. The law therefore is this : that while a case of defamation against an advocate is governed by S. 499 of the Indian Penal Code, good faith has to be presumed in

(1) A. I. R. 1921 Cal. 1=48 Cal. 388 (S. B.).

(2) [1895] 19 Bom. 340.
(3) [1909] 36 Cal. 375=13 C. W. N. 340=1 I. C. 147=9 C. L. J. 259.
(4) [1883] 11 Q. B. D. 588=49 L. T. 252=32 W R. 248=47 J. P. 805=52 L. J. Q. B. 726.
(5) [1907] 9 Bom. L. R. 1287=6 Cr. L. J. 387.
(6) [1914] 41 Cal. 514 = 20 I. C. 1008 = 18 C. W. N. 424.

his favour ; and it is for the prosecution to prove that he was actuated by malice and by indirect motives personal to himself.

That the words which form the subject of the charge were used by the petitioner is not disputed. It was argued on his behalf that the prosecution ought to have shown the context in which the words were used. It seems to me that if the defence relied upon the context as minimizing the effect of the words, that ought to have been established by the defence. The first question for decision is whether the words are defamatory. The meaning of the words is plain, although it is not expressed grammatically. The words mean that the Sub-Inspector actively supported the candidature of Chandraketu Narain Singh and that he might have been doing this for money. Both the Courts below have interpreted this as meaning that the Sub-Inspector was bribed. If this means that the Sub-Inspector was taking a gratification in the sense of S. 161 of the Indian Penal Code, then the construction is certainly wrong, because it is not suggested that anything that he did in the matter of the election, was doing or forbearing to do, was an official act or in the exercise of official functions. On the contrary, as the Magistrate has pointed out, Government servants are strictly prohibited under their rules from helping candidates in elections. The words therefore come to this that the Sub-Inspector was acting as an election agent for Chandraketu Narain Singh and might have been paid for his work. Used of a private person, such language would not be defamatory, but it is said that inasmuch as Government servants are prohibited from taking an active part in elections, these statements would have got the Sub-Inspector into trouble with his superiors. But the mere statements that he canvassed for a candidate would also have had this effect, and as has been shown above, there was evidence on the record to justify the advocate in making that statement at all events. The argument of the petitioner in the case under the Arms Act appears to have been this that the Sub-Inspector was acting on behalf of Chandraketu Narayan Singh in the election and that Radhakant Prasad had not carried out his directions ; and therefore, the Sub-Inspector had got up a false case against a servant of his brother, it was suggested as a link in the chain of reasoning that the Sub-Inspector might have had a pecuniary interest in the matter.

This leads to the consideration of the main question in the case, viz., whether the petitioner in advancing this argument was actuated by malice and indirect motives of his own. His own statement was that whatever he suggested in cross-examination of the prosecution witnesses and commented in argument was based upon instructions he received from his client and on the record of the case ; and that statement is supported by the evidence of one of his colleagues, Rai Bahadur Birendra Nath Chakravarti, an advocate who was examined in the trial as a prosecution witness. It was objected that no suggestion was made to the Sub-Inspector either in the trial of the case under the Arms Act or in the present trial or to Radhakant Prasad that the Sub-Inspector had been paid and that no such suggestion was made before the Commissioners in the election case. As the Sub-Inspector denied throughout that he had acted at all for Chandraketu Narain Singh, it is not clear that anything would have been gained by putting any further question. Neither side thought fit to put the question to Mr. Chakravarti. But it is not clear that it was for the petitioner to put the question when he made the statement that the petitoner acted and said everything on instructions, while it was for the prosecution to establish malice by positive evidence.

The prosecution mainly relies on the relations between the Sub-Inspector and the petitioner arising out of the election. The Sub-Inspector says that the petitioner's impression was that Rai Bahadur Chandraketu Narain Singh had succeeded through his efforts and hence the malice of the accused against him. It is not clear from what his knowledge of this impression was derived and it seems in the last degree improbable that the petitioner should have thought anything of the kind : he himself denies that this was his impression. It is also said 'that, after the decision of the Commissioners, this statement must have been malicious, and that is the ground upon which both the Courts below have proceeded. But the question before the Commissioners was as

to the exercise of undue influence over the chaukidari presidents by the Sub-Inspector in his official position. The present statement has no connexion with any such idea. In fact the trial Court based its finding entirely on the result of the election petition. The learned Sessions Judge seems to have deduced malice from the absence of instructions on this particular point and from the fact that the Commissioners had decided in favour of the Sub-Inspector. But even if it be true that in making his comments on the evidence the petitioner went beyond his instructions, this would not in itself amount to proof of malice; and the decision on the election petition is wholly immaterial. Consequently I am unable to find any evidence that the petitioner was actuated by malice or indirect motives of his own in arguing as he did, and I would therefore hold that he is entitled to the benefit of the ninth exception. It follows that the conviction and the sentence must be set aside and the petitioner must be acquitted and released from bail.

Kulwant Sahay, J.—I agree. Learned counsel for the petitioner commenced his argument by referring to the Common Law of England that no action, civil or criminal, lies against Judges, counsel, witnesses, or parties for words spoken in the ordinary course of any proceeding before any Court or tribunal recognized by law, and a reference was made to *Munster* v. *Lamb* (4).

Now under the Common Law of England an advocate can claim an absolute privilege for words uttered in the course of his duty as an Advocate. But this law is not applicable to this country. The question was considered at great length by a Special Bench of the Calcutta High Court in *Satish Chandra Chakravarty* v. *Ram Dayal De* (1) where it was held that if a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein on oath or otherwise, his liability must be determined by reference to the provisions of S. 499 of the Indian Penal Code. The Court cannot engraft thereupon exceptions derived from the Common Law of England, or based upon grounds of public policy. Consequently a person in such a position is entitled only to the benefit of the qualified privilege mentioned in S. 499 of the Indian Penal Code.

This was a case of a party to a judicial proceeding and not of an advocate. But the case of an advocate does not stand on a different footing, and all the authorities bearing on the subject were cited in the decision of the Special Bench referred to above. We must therefore accept the proposition that an advocate in this country is not entitled to an absolute privilege; and in cases of prosecution for defamation his liability must be determined on reference to the provisions of S. 499 of the Indian Penal Code. The Madras High Court has taken a different view. In *Sullivan* v *Norton* (7) a Full Bench of that Court held that an advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as advocate. In In re *P. Venkata Reddy* (8) a similar view was expressed as regards the Common Law doctrine of absolute privilege. But all the other Courts are agreed in holding that this doctrine is not applicable to this country. Mr. Sinha, although he began by a reference to this doctrine of the Common Law of England, subsequently accepted that the law laid down by the Special Bench of the Calcutta High Court was the correct law. We have, therefore, to consider whether the petitioner is entitled to take protection under the ninth exception to S. 499 of the Indian Penal Code.

Mr. Sinha has raised four points in defence of his client: first, that the petitioner was acting on instructions: secondly, that the words uttered by the petitioner and forming the subject-matter of the charge detached from the context do not convey any adequate idea of the meaning of the expression used by the petitioner, and they are not in themselves such as to make the petitioner liable on a charge of defamation; thirdly the meaning to be attached to the words used by the petitioner does not necessarily amount to defamation; and lastly that there was a presumption of bona fides in favour of the petitioner, and it was for the prosecution to prove malice, and that they have failed to do so.

It has been held by the learned Sessions Judge that in using the expression

(7) [1887] 10 Mad. 28 (F. B.).
(8) [1912] 36 Mad. 216=23 M. L. J. 39=14 I. C. 659=(1912) M. W. N. 476 (F. B.).

forming the subject-matter of the charge the petitioner was not acting on instructions. Learned counsel for the petitioner draws our attention to the deposition of Rai Bahadur Birendra Nath Chakravarty an advocate of this Court, practising in the Courts at Chapra, who was examined as Prosecution Witness No. 4. This witness was the colleague of the petitioner in the case against Sheomangal Bari and he stated in his deposition : "My colleague Nirsu Babu acted and said everything on instruction." The petitioner, when examined under S. 342 of the Criminal Procedure Code, stated that whatever comment he made in the course of the argument was based upon instructions received from his client. It is contended by the learned Government Advocate that if the petitioner wanted to escape liability on the ground of his uttering the words forming the subject-matter of the charge upon instructions received from his client it was incumbent upon him to prove such instructions.

The learned Sessions Judge observes that the Prosecution Witness No. 4 was not specifically asked whether Nirsu Narayan Singh had instructions regarding the "silver tonic." It is contended by Mr. Sinha that it was not for the petitioner to cross-examine the witness upon this point but it was for the prosecution to do so and he refers to S. 126 of the Indian Evidence Act. I am of opinion that having regard to the nature of the charge against the petitioner, the answer elicited from the Prosecution Witness No. 4 in cross-examination as quoted above discharged the onus that lay upon the accused and the evidence of the Prosecution Witness No. 4 that the petitioner said everything on instruction must be held to refer to the charge brought against the petitioner. It is contended that there was no suggestion in the examination of the Sub-Inspector as a witness in the Arms Act case as regards his taking any remuneration for his taking the side of Rai Bahadur Chandraketu Naraian Singh in the election matter and therefore the petitioner could have no instruction upon the point. The mere fact that no question was put to the effect would not necessarily lead to the conclusion that the petitioner had no instructions. The petitioner had elicited the point in the cross-examination of the prosecution witness and it was not necessary for him to adduce any further evidence upon the point. The question however as to whether he was acting under instructions or not is of importance in connexion with the question as to whether the petitioner was actuated by malice a d this is the really important question to be decided in this case.

It is conceded by the learned Government Advocate that the onus lies on the prosecution to provo malice in the case of advocates. The learned Magistrate also placed the onus upon the prosecution. He, however, found that malice had been proved. It is contended that this is a finding of fact, which cannot be interfered with in revision. I am of opinion that the question whether upon the facts found or proved, malice has been established is a question of law. The only evidence of malice consists of the deposition of the Sub-Inspector Zainuddin Khan. He stated :

> Babu Nirsu Narayan Singh's impression was that Rai Bahadur Chandraketu Naraian Singh had succeeded through my efforts and hence the accused's malice against me.

I fail to see how he could speak of what the impression of the accused was. The evidence is that he never met the accused after the Election dispute. The Election dispute had ended about 18 months previously. I am of opinion that the prosecution have failed to prove malice and the petitioner is entitled to acquittal. I would however desire to observe that advocates in discharge of their onerous and sacred duties must be very careful not to give rise to the faintest suspicion of a personal element in their speech or action as advocates.

Rule made absolute.

A. I. R. 1926 Patna 503

ROSS AND KULWANT SAHAY, JJ.

Durga Singh—Appellant.

v.

Mt. Ram Dasi Kuar and *others*—Respondents.

Appeal No. 254 of 1923, Decided on 10th June 1926, from the appellate Decree of the Sub-J., Gaya, D/- 21st December 1922.

Bengal Tenancy Act (1882), *S. 158B (2)—Sale without notice is not a nullity but a mere irregularity—Effect.*

The notice under S. 158B (2) is not essential to the validity of the sale and omission to serve the notice is a mere irregularity. The effect of such a sale is at least that of a sale in execution of a decree for money. [P 504 C 2]

A. N. Lal and *B. N. Mitter*—for Appellant.

S. N. Ray—for Respondents.

Ross, J.—This is an appeal by defendant in a suit brought by the plaintiff who was a tenant. The defendant is a co-sharer landlord who obtained a decree for rent under S. 148A of the Bengal Tenancy Act and sold the holding of the plaintiff and purchased it himself. The plaintiff sought to recover the holding on the ground that the rent-decree was fraudulent and that the execution was defective by reason of suppression of the processes.

The Courts below decided against the plaintiff on the merits of the case, but decreed the suit in his favour on the ground that notice to the co-sharer landlords under S. 158B. Cl. (2) of the Bengal Tenancy Act had not been given, The learned Subordinate Judge relied on the decision of this Court in *Ghanshyam Chaudhury* v. *Basdeb Jha* (1). The earliest decision on the point is *Sarip Hochna* v. *Tillattama Debi* (2) where it was decided that the provisions of S. 158 B (2) are mandatory and not merely directory, and that a sale without notice under that section is invalid. The next case was *Ahamad Biswas* v. *Benoy Bhusan Gupta* (3) where that earlier decision was followed, and it was further held that the effect of a sale without this notice was that the purchaser was in the position of an ordinary purchaser under a decree for money. This view was again taken in *Norendra Bhusan Roy* v. *Jotindra Nath Roy* (4) where it was laid down that the sale was not a nullity but had the effect of a sale under a decree for money.

In the latest decision in *Rajani Kanta Ghose* v. *Rahaman Gazi* (5) it was held that the omission to serve this notice does not nullify the sale and does not even alter its character to that of a sale held in execution of a decree for money if the co-sharer landlord has knowledge of the sale and acquiesces therein. The provision for notice to the co-sharer landlords is for the benefit of the co-sharer landlords, and the notice is not essential to the validity of the sale and omission to serve the notice is a mere irregularity. In the decision of this Court referred to by the learned Subordinate Judge these cases were not considered, and it seems to have been assumed without discussion that the sale was void. The weight of authority is that the effect of such a sale is at least that of a sale in execution of a decree for money. This is sufficient to give the defendant a valid defence and the suit must be dismissed.

It is said that the plaintiff filed the suit on the strength of the decision of this Court and that he ought now to be allowed to prove that the sale was irregular under O. 21, R. 90. But the fourth issue was whether the processes in Execution Case No. 476 of 1920 were properly served and whether the plaintiff had knowledge of them. Evidence on this issue was gone into and it was decided in favour of the defendant. Nothing further could have been done on an application under O. 21, R. 90.

The result is that the appeal,must be decreed and the suit dismissed but, in view of the conflict in the decisions, without costs in any Court.

Kulwant Sahay, J.—I agree.

Appeal decreed.

(1) [1921] 60 I. C. 529.
(2) [1918] 43 I. C. 3.
(3) [1919] 28 C. W. N. 931=53 I. C. 515.
(4) [1920] 55 I. C. 402.
(5) A. I. R. 1924 Cal. 408.

A. I. R. 1926 Patna 504

DAS AND ADAMI, JJ.

Kesho Prasad Singh— Defendant — Appellant.

Shamnandan Rai and *others*—Plaintiffs—Respondents.

Appeal No. 1013 of 1922, Decided on 3rd November 1925, from the appellate decree of the Dist. J., Shahabad, D/- 26th June 1922.

(a) Landlord and tenant—Rent decree—Some defendants dead at the date of decree—Whole decree is not nullity—Decree can be executed against living defendants only as money decree.

Where a landlord obtained a decree formal against certain tenants, some of whom were dead at the date of decree.

Held : that decree against all tenants was not a nullity as it is open to the landlord to bring a suit for rent against all or any of the tenants, though a decree against some of the tenants cannot be executed as a rent decree and can only be executed as a money decree : 11 *C. W. N.* 1026; 18 *C. W. N.* 170; 33 *Cal.* 580; 34 *All.* 604 and *A. I. R.* 1925 *Patna* 434, *Appr.* [P. 505, C. 2]

(b) *Decree.*

Decree against a dead person is a nullity : 4 *P. L. J.* 240 (*F. B.*), *Foll.* [P. 505, C. 2]

L. N. Singh and *N. N. Sinha*—for Appellant.

P. Deyal and *C. S. Banerji*—for Respondents.

Das, J.—At some date not very relevant to this case, the Maharaja of Dumraon who is the appellant in this Court brought a rent suit against the present plaintiffs, the present Defendants Nos. 4-10 and seven other persons who were dead at the date of the institution of the suit. The Maharaja was made aware of the fact that seven of the defendants were already dead and it appears that he filed a petition in the Court asking the Court not to pass any decree against the dead persons. He recovered judgment as against those tenants who are living, but in the decree the names of the dead persons were included. The judgment was pronounced on the 26th April 1919. In due course the Maharaja took out execution and the holding was purchased by the present Defendants Nos. 2 and 3. It is alleged by the present plaintiffs that Defendants Nos. 2 and 3 are the benamidars of the Maharaja. The present plaintiffs applied for setting aside the sale under the provisions of O. 21, R. 90 of the Code and that application was rejected on the 8th May 1920. On the 17th July 1920 Defendants Nos. 2 and 3 took delivery of possession of the holding. On the 18th August 1920 the suit out of which the appeal arises was instituted by the plaintiffs-respondents for setting aside the decree of the 26th April 1919 on the ground of fraud. Various allegations were made in the plaint so as to raise a case of fraud from start to finish. These allegations have not been examined either by the primary Court or by the lower appellate Court. The Courts below have decreed the suit on the ground that the decree of the 26th April 1919 obtained by the Maharaja was a nullity inasmuch as it was obtained against dead persons. It should be mentioned that the holding purchased by Defendants Nos. 2 and 3 comprises an area of 14·55 acres and that the plaintiffs in this suit claim to recover 6·36 acres as their share in the holding.

It is not open to doubt that a decree against a dead person is a nullity. This was laid down in *Jangli Lal* v. *Laddu Ram Marwari* (1), but the question whether the whole decree is a nullity must depend on the question whether the failure on the part of the landlord to bring the representatives in interest of the deceased tenants on the record affected his right to proceed with the suit. This again must depend on the question whether the tenants who are properly sued could take the plea that the suit could not proceed until the representatives in interest of the deceased tenants were brought on the record. Now on this question it seems to me that only one answer is possible. Under S. 43 of the Indian Contract Act the liability of the joint promisor is joint and several and that section excludes the right of the joint contractor to be sued along with his co-contractors. It was in my opinion open to the landlord to bring a suit for rent against all or any of the tenants, though it may be conceded that a decree against some of the tenants cannot be executed as a rent decree and can only be executed as a money decree. This view has been affirmed in cases far too numerous to mention. In *Ananda Kumar Naskar* v. *Hari Das Halder* (2) a decree was obtained in a suit for rent against some only of the tenants. It was held that the sale did not pass the entire jama, but that only the right, title and interest of the judgment-debtors passed, In *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (3) it was held that a suit for rent against some of several joint tenants is maintainable, as joint tenants are jointly and severally liable. In *Chandra Nath Tewari* v. *Protap Udai Nath Sahi* (4) it was held that a decree obtained against some of the tenants cannot be executed as a decree for rent but that is open to the landlord to treat the decree as a decree for money and to

(1) [1919] 4 Pat. L. J. 240=50 I. C. 529= (1919) P. H. C. C. 105 (F. B.).
(2) [1900] 27 Cal. 545=4 C. W. N. 608.
(3) [1907] 11 C. W. N. 1026.
(4) [1913] 18 C. W. N. 170=23 I. C. 105.

execute it as such. In *Joy Gobind Laha* v. *Manmotho Nath Banerji* (5) the question arose whether the whole appeal had abated because one of the tenants had died and no legal representative of the deceased had been brought on the record. It was held that the liability of the tenants being joint and several the death of one of the tenants without his legal representative being substituted in his place did not have the effect of exonerating the other defendants from the liability. This case was followed in *Abdul Aziz* v. *Basdeo Singh* (6). I find that a similar view has been taken in this Court in *Nathuni Narayan Singh* v. *Mahanth Arjun Gir* (7).

Now this being the position, it is quite clear that the entire decree obtained by the Maharaja on the 26th April 1919 cannot be regarded as a nullity. It is quite true that the holding did not pass at the execution sale which followed the decree of the 26th April 1919 and it is also true that the interests of these tenants who were dead before the institution of the suit did not pass at the sale. But the present plaintiffs were parties to the suit and their interests undoubtedly passed at the sale. In my opinion the Courts below were wrong in decreeing the claim of the plaintiffs on the ground that the decree of the 26th April 1919 was a nullity.

But the questions which were raised by the plaintiffs have not been investigated by the Courts below and I should like to point out that the course adopted by the learned Additional Subordinate Judge was wrong. It may be that he was confident that his decision on the point of law was a correct decision, but it is at least conceivable that a superior Court may differ from him as to his decision on the point of law and in my opinion the learned Additional Subordinate Judge should have tried all the issues that arose in the case. This would have had the effect of not only shortening the litigation, but of saving of costs to the parties.

I would allow the appeal, set aside the judgment and the decrees passed by the Courts below and remand the case to the lower appellate Court with instructions that it should remand the case to the Court of first instance for decision of the questions of facts raised in the case. The appellant is entitled to the costs both of this Court and in the Courts below. The costs incurred in the first Court will abide the result and will be disposed of by the learned Subordinate Judge.

We are informed that one of the plaintiffs is the representative in interest of one of the dead persons. If that be so, his interest has not passed by the execution sale. The learned Subordinate Judge in dealing with the case will bear this in mind.

Adami, J.—I agree.

Appeal allowed.

(5) [1906] 33 Cal. 580.
(6) [1912] 34 All. 604=17 I. C. 89=10 A. L. J. 183.
(7) A. I. R. 1925 Patna 434=4 Pat. 187.

☆ A. I. R. 1926 Patna 506

MULLICK AND BUCKNILL, JJ.

Deshi Sugar Mill—Petitioner.

v.

Tupsi Kahar and *others*—Opposite Party.

Criminal Revisions Nos. 534 and 550 of 1924, Decided on 28th January 1925, from the order of the 2nd Cl. Sub-Dy. Mag., Siwan, D/- 25th July 1924.

☆ *Criminal P. C., S. 133 (1)—Discharge into river of an effluent from a factory is covered—There must be definite, scientific and convincing evidence against the accused.*

The second paragraph of the Sub S. (1)of S. 133 gives ample power to make an order prohibiting the discharge from a factory into a river of an effluent which might be injurious to the health of the community which has rights to the use of the water in such stream.

In law it is not admissible for a tribunal to assume the attitude that, even if a nuisance is proved but not against any particular party complained of as causing it, an order prohibiting such nuisance can be issued against all parties against whom complaints are made. It would be necessary to prove substantially, before an order could be made against any of the parties that the effluent from its factory was noxious. No doubt it must be recognized by every one that it is of the utmost importance that sources of public water supply must be maintained pure and free from pollution by industrial factories, but such pollution must be convincingly proved by means of scientific enquiry against a wrongdoer before any order can be passed against him. The matter calls for scientific enquiry and cannot be decided merely because a number of persons, when the river is very low and hardly flowing, think that the stagnation and impurity

of the water, an outbreak of illness or the loss of some cattle may be due to the presence near of the factory in question. [P 507, C 2, P 508, C 1, 2]

S. Hasan Imam Akbari and *Sultan-uddin Husain*—for Petitioner.

S. P. Varma and *Hareshwar Prasad Sinha*—for Opposite Party.

Bucknill, J.—In this matter there were two applications in criminal revisional jurisdiction. They have been substantially heard together; they both raise substantially the same point. Application No. 534 of 1924 is made by the Manager of the New Sugar Mill, Siwan; Application No. 550 of 1924 is made by the Manager of the Deshi Sugar Factory, Siwan. Both these sugar factories or mills are situated on the bank of the river Daha; the New Sugar Mill is a good deal (some few miles) lower down the river than the Deshi Sugar Factory and the former has only been in existence some four years; the latter is an older institution. In April of last year a petition was filed before the Sub-Divisional Officer of Siwan which is in the Sarna district by nearly a hundred persons living in the neighbourhood of the river complaining that the river had been polluted by the Mills' effluents; they alleged that some cattle had died as a result, so they thought, of drinking the river water; they stated that they were afraid that there might be an outbreak of disease and they prayed that action might be taken against the two Mills under the provisions of S. 133 of the Criminal Procedure Code. The Sub-divisional Officer thought fit to refer the matter to an Honorary Magistrate for a report and this gentleman reported that he thought that there had been some contamination of the river by refuse matter which had been allowed to be discharged from the Mills, but that it was difficult to say which of the Sub-divisional Officers ordered on the 10th of May that notice should be issued on the Managers of both Mills to appear before him to show cause why they should not be prohibited under S. 133 of the Criminal Procedure Code from polluting the water of the river by discharging into it noxious and dirty water from their factories. Both parties eventually appeared; and an order was passed directing the Managers under what purported to be Sub-S. (1) of S. 133 of the Criminal Procedure Code to discontinue, prior to the 28th of May last, draining into the river dirty or noxious water and to abate the nuisance thus caused on that account. It was further ordered in the alternative that the applicants should move the Sub-Deputy Magistrate of Siwan to have the order set aside or modified. The applicants did appear before the Sub-Deputy Magistrate and evidence was heard on both sides. As a result the Sub-Deputy Magistrate made the orders absolute. The applicants then moved the Sessions Judge against this order, but the Sessions Judge refused to refer the matter to the High Court and rejected the application.

Now it is true that certain small legal points were raised before the Sessions Judge, but they have not been seriously pressed before this Court, the applicants preferring to rely upon a more cogent argument. It was, however, pointed out that under the provisions of S. 133 (1) of the Criminal Procedure Code the first paragraph regarding the removal of a nuisance from a river was, perhaps, hardly applicable to the case of the pollution of a river by an effluent from a factory. It is not now very material whether that is so or not; for it is quite clear that the second paragraph of the sub-section in question gives ample power to make an order prohibiting the discharge into a river of an effluent which might be injurious to the health of the community which has rights to the use of the water in such stream. What, however, is now urged on behalf in particular of the New Sugar Mill is that there was no evidence whatever of any real value that there had in fact been any contamination of the water of the river by any effluent from the factory; but that, on the other hand, there was overwhelming and scientific evidence on the part of the New Sugar Mill to show that that Mill discharged nothing noxious into the stream.

The Deshi Sugar Factory, which observing that no complaint had ever been taken against their factory, or as to the condition of the stream prior to the appearance on the bank of the New Sugar Mill, pointed out that no attempt had been made to prove that any discharge from their (the Deshi) factory was noxious.

The conclusions are clear: firstly that if examination of the waters of the river

below the New Sugar Mill showed no contamination, the Doshi Factory, which is rather higher upstream, was not a culprit any more than the new Sugar Mill. Secondly that in law it is not admissible for a tribunal to assume the attitude that, even if a nuisance is proved but not as against any particular party complained of as causing it, an order prohibiting such nuisance can be issued against all parties against whom complaints are made. To illustrate this principle in this case : even if it had been shown (which, incidentally on the evidence does not appear to have been the case) that a nuisance existed due to contamination of the water of the river by what was a noxious effluent from the Sugar Mills, it would be necessary to prove substantially, before an order could be made against either or both of the Mills, that the effluent from either or both was noxious. Unless this is done it is obvious that a totally illegal and unjust order might be made against one or other of the Mills which may have done absolutely nothing wrong.

It need hardly be said that it must be recognized by every one that it is of the utmost importance that sources of public water supply must be maintained pure and free from pollution by industrial factories ; but such pollution must be convincingly proved against a wrongdoer before any order can be passed against him.

There is no evidence which Mill contaminated the water and the evidence of contamination by effluent from Sugar Factories at all was in my opinion not supported by any adequate testimony. (The judgment then examined the evidence and continued). The Civil Surgeon and the Chemist think pollution of the river (if there is any deterioration) is due to vegetable growth, little flow at certain seasons and other incidental causes. Whilst, as I have occasion to repeat, it is most important to preserve sources of water supply pure, it is necessary, if charges of pollution are to be successfully prosecuted against parties alleged to be contaminating such sources, that convincing proof of such pollution be brought home to their doors.

This has certainly not been done here ; the complaints and evidence in support thereof do not even purport to do so against either Mill individually, nor in my opinion on the evidence do they in fact do so against either or both.

But there is nothing to prevent further steps being taken but the evidence should be properly prepared ; samples of the effluents actually flowing from any industrial concern suspected of contaminating the river should be taken and analyzed and, if it then be found that these samples contain matter which (taking into perspective the volume of the effluent and the volume of the river) would be deleterious to the water of the river when utilized for domestic purposes, the case is clear.

But the matter is, it must be emphasized, one which calls for scientific enquiry and cannot be decided merely because a number of persons, in April or May when the river is very low and hardly flowing, think that the stagnation and impurity of the water, an outbreak of illness or the loss of some cattle may be due to the presence near of two sugar mills.

I have no hesitation in coming to the conclusion that the orders must in both these cases be quashed firstly because it is not competent to make orders of the kind made against two parties simply because it is thought that either (or perhaps both) may be in fault : and secondly because the scientific evidence (which is all that matters in these cases) in my view is at present overwhelmingly in favour of the applicants.

Mullick, J.—I agree.

Order quashed.

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* A. I. R. 1926 Patna 508

DAWSON-MILLER, C. J., AND FOSTER, J

Mt. Razia Begum—Defendant—Appellant.

v.

Muhammad Daud—Plaintiff — Respondent.

Letters Patent Appeal No. 2 of 1926, Decided on 28th June 1926, from the judgment of Ross, J., D/- 9th December 1925.

Transfer of Property Act, S. 107—English doctrine that tenant, unless put in possession cannot sue for infringement of rights based on actual possession, applies to Indian leases for a term of years—In India lessee or sub-lessee can sue for

damages for being kept out of possession—Landlord and tenant—Tenant's rights.

In India under S. 107 a lease can be created by the mere registration of the deed, without delivery of possession, and therefore a lessee or sublessee can maintain an action against the lessor for mesne profits as damages for keeping the lessee out of possession.

The English Common Law doctrine that a lessee is not regarded a tenant for certain purposes unless he is actually put in possession of the demised property, and so he cannot, unless he is so put in possession, maintain any action for an infringement of his rights based upon actual possession applies only to leases for a term of years. [P 511 C 1 & 2]

Dawson-Miller, C. J.—This is an appeal under the Letters Patent from a decision of Mr. Justice Ross overruling the decision of the District Judge of Muzaffarpur and remanding the case to the trial Court to ascertain the amount of mesne profits due to the plaintiff from the surviving defendant in the suit. The question for determination in the appeal is whether the plaintiff who obtained a lease of certain property but was not put in possession by his lessor can maintain a suit against the defendant for mesne profits by way of damages for keeping him out of possession of the property. Learned counsel for the appellant, the surviving defendant in the suit, contends that the demise without possession merely gave the lessee a right of entry or, as it is known in English Law, an interesse termini, which is not sufficient to found a suit in trespass which, he contends, is the cause of action in this case.

The circumstances under which this litigation arises are as follows: Mouza Kothia Hussain situate in the Champaran district of this Province formed part of the estate of the late Saiyid Hussain Ali Khan, otherwise known as Saiyid Muhammad Nawab, a well-to-do Muhammadan who died in March 1914, leaving a daughter, Mt. Razia Begum, by a deceased wife and a widow, Mt. Azizunnissa alias Bibi Bakridan. Before his death he had expressed his intention of granting a mukarrari lease of the said village to his wife, Bibi Bakridan, by way of maintenance and in lieu of her dower-debt. A deed was drafted and approved by him; but before it could be executed he died and his property devolved upon his daughter Mt. Razia Begum as his heir under the Shia Law. About a month after his death in April 1914, Mt. Razia Begum in pursuance of her late father's wish executed a mukarrari patta of Mouza Kothia Hussain in favour of her step mother for her life at a nominal rental of one rupee per annum and took from her a kabuliyat. Bibi Bakridan's name was subsequently recorded in the Revisional Survey Record of Rights as mukarraridar of the village and she appointed an agent, one Babujan, to collect the rents on her behalf.

Disputes arose between them and early in 1917 she sued Babujan for an account but failed on the ground that she had never in fact acquired possession over the property which had remained in the possession of her step-daughter Razia Begum. It appears that Razia Begum refused to give up possession to her stepmother on the ground that the latter had not remained chaste after her husband's death. The execution of the mukarrari lease is not disputed by Razia Begum and it contains no condition as to defeasance in the event of the lessee ceasing to remain chaste. Bibi Bakridan finding her attempts to get possession unsuccessful executed a sub-lease of her life-interest in the mouza in favour of the plaintiff, Shaikh Muhammad Daud, dated the 25th July 1917, reserving an annual rent of Rs. 875. By this document the right to the arrears of rent for the three preceding years was also transferred. The plaintiff on attempting to take possession and collect the rents was opposed by Mt. Razia Begum and proceedings were instituted under S. 145 of the Criminal P. C., in which the possession of Razia Begum was upheld. The plaintiff accordingly instituted the suit out of which this appeal arises on the 1st February 1921, impleading Mt. Razia Begum as principal defendant and Bibi Bakridan as the defendant, second party. In his plaint he prayed for (1) a declaration of his title and the title of his lessor to the property in suit and possession thereof, (2) mesne profits for the three years preceding the suit and until recovery of possession, and, (3) costs and interest.

Bibi Bakridan by her written statement admitted the plaintiff's claim but repudiated liability for his failure to get possession. Mt. Razia Begum contested the suit. She admitted that she executed the mukarrari patta of April 1914, in favour of Bibi Bakridan but denied that the latter ever got possession, although she made several attempts to do so. She

alleged that the patta of July 1917, granted by Bibi Bakridan to the plaintiff was fraudulent, collusive and nominal, and pleaded that as her stepmother shortly after her father's death turned immoral which she came to know after the execution of the mukarrari. "She did not allow it to take effect" and did not put her lessee in possession but had herself remained in possession ever since her father's death. She does not plead that there was any condition attached to the grant rendering it defeasible in the event of the lessee's unchastity.

The Subordinate Judge at the trial found that neither the plaintiff nor Bibi Bakridan ever got possession over the mouza in spite of their efforts to do so, and that Mt. Razia Begum had all along been in possession, and from this he deduces that the mukarrari patta was not given effect to He did not determine whether the aspersions against the character of Bibi Bakridan were true or not, considering it immaterial as the mukarrari was an unconditional grant. He based his decision on the ground that the plaintiff's lessor had not acquired a perfect title as the mukarrari was not given effect to. Exactly what he means by this expression he does not explain. He also thought that the plaintiff's lease was of a speculative nature and, therefore, gave the transferee no right to retain possession. In support of this conclusion he cites the case of *Kalidas Mullick* v. *Kanhaya Lal Pundit* (1), which does not appear to support the proposition. He also thought that the mukarrari lease was more in the nature of a gift than a lease, as a nominal rental only was reserved and without possession it was not perfected.

On appeal the District Judge agreed with the finding of the trial Court that possession never passed to the plaintiff or his lessor. He further held, with regard to the mukarrari patta of 1914, that there was a separate oral agreement constituting a condition precedent to the attaching of an obligation under the contract. What the exact terms of the oral agreement were he does not very clearly specify, but it may be gathered from the context that what he meant was an oral agreement amounting to a condition which would have the effect of divesting the property if the lessee afterwards became unchaste, for, he adds :

> The document itself does not make any condition about Bakridan's future conduct; but such a condition is usual, and Razia has given evidence that her father included such a condition in his instructions to her. Bakridan herself was not put in the witness-box. The karpardaz of Razia (Witness No. 8 for the defendant) has corroborated the aspersions cast by Razia on Bakridan's character.

The learned District Judge appears to have had no very clear conception of the difference between a condition precedent which would prevent the instrument from taking effect and a condition which would operate as a defeasance after the interest had vested. The result of his judgment is summed up finally in the following words at the end :

> It appears that effect was never given to the mukarrari patta, and that Muhammad Daud has come into the affair merely as a speculator. I agree with the Subordinate Judge's finding that the plaintiff failed to establish his title to or previous possession of the disputed village.

The plaintiff preferred a second appeal to the High Court which was heard by Ross, J. The learned Judge pointed out that the oral agreement referred to by the lower appellate Court was not pleaded in the written statement by either defendant and that it was not open to the learned District Judge to find that there was any such oral agreement. In any view he considered that the oral agreement which the lower appellate Court found to have been proved did not amount to a condition precedent to the attaching of an obligation under the contract within the meaning of the third proviso to S. 92 of the Evidence Act, and if there was any oral agreement, it amounted to a condition that the estate vested in the lessee should divest on her becoming unchaste, and evidence of such an oral agreement was not permissible, being in conflict with the written contract which was an unconditional grant for life.

In my opinion Ross, J., took the correct view upon this part of the case. He was also of opinion that the suit could not fail on the ground that the plaintiff's lease was speculative. Here, again, I entirely agree with the learned Judge's view. There was nothing to show that the lease was not a genuine transaction and a substantial rent was reserved. Nor did the fact that the lessor was out of possession prevent her from transferring

(1) [1885] 11 Cal. 121=11 I.A. 218=4 Sar. 578 (P.C.).

her right to her lessee. The learned Judge further held that the finding that the mukarrari lease was not given effect to, if it had any meaning at all, must mean that neither party considered it binding, but such a view was contrary to all the facts of the case as it had been found that Bibi Bakridan did her best to obtain possession and to make the instrument effective. Pending the appeal to Mr. Justice Ross and before it came on for hearing, Bibi Bakridan died and the plaintiff's term expired. He was, therefore, no longer entitled to possession. The learned Judge, however, held that this did not prevent the plaintiff from recovery of damages by way of mesne profits from the first defendant, Mt. Razia Begum, for wrongfully keeping the plaintiff out of possession. He accordingly allowed the appeal upon that part of the claim, set aside the decree of the District Judge and remanded the case to the trial Court to ascertain the amount of mesne profits due from the 1st February 1918 to the death of the defendant second party.

From that decision the defendant first party has preferred the present appeal under the Letters Patent. The only question argued before us is that the suit is not maintainable, being confined, since the death of Bibi Bakridan, to a claim for damages for keeping the plaintiff out of possession of the demised lands. This argument is based upon the English Common Law doctrine that a demise of land without delivery of possession passes only a right of entry, or an interest in the term, known as an interesse termini, and such an interest is not sufficient to entitle the lessee to maintain an action in trespass, since actions of this nature are founded on the actual possession of the plaintiff which is interfered with by the trespasser. I had some doubt whether it was open to the appellant to raise the question at this stage, as the plea is not specifically taken in the written statement and was not argued in the Courts below; but as it was alleged that the mukarrari was not acted on and as all the facts necessary to determine the point are before us, I propose to deal with the legal argument.

The Common Law doctrine, so far as I am aware, applies only to a lease for a term of years and is based upon the law relating to English leases of this nature which, for some purposes, regards the lessee before actual entry as not being a tenant. He has, however, a right of entry, a vested interest, which is assignable and which, if he dies, passes to his representatives. He may maintain an action against third parties for injury to the property, *Gillard* v. *Cheshire Lines Committee* (2). He may sue his lessor for not putting him in possession, *Coe* v. *Clay* (3). *Wallis* v. *Hands* (4), and he may sue in ejectment: *Doe* v. *Day* (5). In fact, it would appear that he has a remedy for any infringement of his rights except such rights as arise out of actual possession. But in any event the present claim is hardly one in the nature of an action for trespass. It is one for damages against the appellant for keeping the plaintiff out of possession. The plaintiff's lessor could undoubtedly have sued the appellant for damages for failing to put her in possession. The plaintiff by the sub-lease took an interest in the whole term which is equivalent to an assignment and could, therefore, in my opinion, maintain an action against the appellant for damages for failing to put him in possession. Moreover, I doubt whether the English doctrine would apply to a case like the present where the lease is not one for a term of years. It is rather in the nature of a freehold lease: see *Ecclesiastical Commissioners* v. *Treemer* (6).

But, whether the view just expressed be right or not, I do not consider that the Common Law doctrine in England which is founded on the view that before actual entry by the lessee he is to be regarded for some purposes as not a tenant, livery of seisin being necessary to complete his title, can be applied to leases in this country which are governed by the Transfer of Property Act. Under that Act, as pointed out by Das, J., in *Midnapour Zemindary Co. Ltd.* v. *Ram Kanai Singh Deo* (7) certain leases including those reserving a yearly rent which includes the present case, can be

(2) [1884] 32 W.R. 943.
(3) [1829] 5 Bing. 440=7 L.J. C.P. 162=130 E.R. 1131=3 Moo. & P. 57.
(4) [1893] 2 Ch. 75=62 L.J. Ch. 586=68 L.T. 428=41 W.R. 471.
(5) [1842] 2 Q.B. 147=12 L.J. Q.B. 86=114 E.R. 58=2 G. & D. 757.
(6) [1893] 1 Ch. 166=62 L.J. Ch. 119=68 L.T. 11=41 W.R. 166.
(7) A.I.R. 1926 Pat. 130=5 Pat. 80.

made only by a registered instrument whilst all other leases of immovable property may be made either by a registered instrument, or by oral agreement accompanied by delivery of possession. Under this Act delivery of possession is essential to the vesting of the interest only where the lease is made by oral agreement, and a lease by oral agreement cannot be made where a yearly rent is reserved. Delivery of possession was, therefore, not necessary for the vesting of the interest in the lessee in the present case, and I can see no reason why we should apply a doctrine applicable to certain kinds of English leases to those governed in this country, not by the English Common Law, but by the Transfer of Property Act. In my opinion this appeal fails and should be dismissed with costs.

Foster, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 512

ROSS AND MACPHERSON, JJ.

Dinanath Rai—Defendant—Appellant.

v.

Rama Rai—Plaintiff—Respondent.

Appeal No. 12 of 1924, Decided on 29th June 1926, from the appellate decree of Sub. J. Saran 1-10-1923.

(a) *Evidence Act, S. 66, Proviso—Redemption suit—Mortgagee denying existence of mortgage deed—Notice is not necessary.*

Where in a suit for redemption the defendant mortgagee denied that there was or ever had been a mortgage deed at all [P 512, C 2]

Held: that it was not necessary for the plaintiff to give notice to the defendant to produce the original to entitle plaintiff to give secondary evidence. 6 *Cal.* 720 (*P. C.*) and 14 *Cal.* 486 (*P. C.*), *Dist.* [P 513, C 1]

(b) *Transfer of Property Act, S. 60—Tender of mortgage money is not condition precedent to suit for redemption.—T. P. Act. S. 83.*

Section 60 only defines the right to redeem and does not lay down that tender of the mortgage money is a condition precedent to the institution of a suit for redemption. 43 *All.* 638 (*F. B.*), *Rel. on.* [P 513, C 1]

(c) *Adverse possession—Mortgagee cannot acquire.*

A mortgagee cannot acquire a title by adverse possession against his mortgagor.

Sambhu Saran—for Appellant.

Hareshwur Prasad Sinha—for Respondent.

Ross, J.—This was a suit for redemption of some land which had been mortgaged by the grandfather of the plaintiff to the grandfather of the defendant in 1891. The defence was that the land was the ancestral kasht land of the Defendant and that he was in possession as zerpeshgidar. He denied that there had been any peshgi money or that he had ever been in possession by virtue of any zerpeshgi deed. The suit was decreed by the Subordinate Judge on appeal.

Three points have been taken in second appeal. In the first place it is contended that the trial Court erred in admitting in evidence a certified copy of the mortgage bond, on the ground that no notice had been given to the defendant to produce the original as required by S. 66 of the Evidence Act. I doubt whether this point is open in second appeal as there is no reference to it in the judgment of the lower appellate Court. But in any case there is a proviso to S. 66 that no notice shall be required in any case in which the Court thinks fit to dispense with it; and in the present case it must be taken that the Court dispensed with the notice for the sufficient reason that the defendant denied that there was or ever had been a mortgage deed at all. In view of the pleadings it was idle for the plaintiff to give notice to the defendant to produce a document the existence of which he denied.

The learned advocate for the appellant referred to the decision in *Maung Po Ni* v. *Ma Shwe Kyi* (1) which to some extent supports his contention. But that decision, so far as the present point is concerned, seems to be based on a decision of the Judicial Commissioner which is not an authority for this Court. Two decisions of the Judicial Committee were also quoted [*Bhubaneshwari Debi* v. *Harisaran Sarma Moitra* (2) and *Krishna Kishori Chaodhrani* v. *Kishorilal Roy* (3),] in which secondary evidence was rejected where the parties failed to account for the nonproduction of the original. But these decisions are not in point. The only question is, whether this was a proper case for the Court to dispense with notice. In my opinion

(1) A. I. R. 1925 Rang. 7=2 Rang. 397.
(2) [1881] 6 Cal. 720=8 C. L. R. 337 (P. C.).
(3) [1887] 14 Cal. 486=14 I. A. 71=5 Sar. 13 (P. C.).

in view of the pleadings, notice was altogether unnecessary and was properly dispensed with.

The second contention was that as the mortgage was redeemable at the end of Jeth each year and, according to the plaintiff's case, tender was made in Baisakh, the tender was not valid and, therefore, in the absence of valid tender no suit for redemption would lie. The learned advocate for the appellant relied on the decision in *Mahomed Ali* v. *Baldeo Pande* (4) which does support that propostion. But that decision has been clearly overruled by the Full Bench of the Allahabad High Court in *Raghunandan Rai* v. *Raghunandan Pande* (5), where that case among others is referred to and it is pointed out that S. 60 of the Transfer of Property Act only defines the right to redeem and does not lay down that tender of the mortgage money is a condition precedent to the institution of a suit for redemption. I fail to see how tender can be necessary before a suit can be instituted which is itself necessary in order that the amount payble by the plaintiff for redemption may itself be ascertained.

The third point taken was that as the defendant was recorded as kashtkar in the record-of-rights, and in the batwara proceedings to the knowledge of the plaintiff's ancestor, he must be taken to have acquired title by adverse possession. This argument that a mortgagee can acquire a title by adverse possession against his mortgagor runs counter to the elementary principle governing mortgages.

The appeal must be dismissed with costs.

Macpherson, J.—I agree.

Appeal dismissed.

(4) [1916] 38 All. 148=34 I. C. 183=14 A. L. J. 55.

(5) [1921] 43 All. 638=61 I. C. 812=19 A. L. J. 573 (F. B.).

A. I. R. 1926 Patna 513

KULWANT SAHAY, J.

Jagat Narain Singh and *others*—Appellants.

v.

Tulsi Chamar and *another*—Respondents.

Appeal No. 1142 of 1923, Decided on 17th June 1926, from the appellate decree of Sub-J., Monghyr, D/- 30th June 1923.

Landlord and tenant—Rent—Tenant dispossessed of a portion—Right to claim possession barred by lapse of time—Tenant can still withhold entire rent.

A landlord is bound to keep his tenant in peaceful enjoyment and possession of the holding. If he disturbs the possession of the tenant he is not entitled to recover rent from the tenant. The tenant's claim for recovery of possession may be barred by lapse of time, but he can still compel the landlord to restore possession of the holding or the portion thereof from which he has been dispossessed by the landlord by withholding payment of rent for the entire area. [P. 514, C. 1]

Ram Prasad for *Jagannath Prasad*—for Appellants.

Murari Prasad—for Respondents.

Judgment.—This is an appeal by the plaintiffs and it arises out of a suit for apportionment of rent and for recovery of arrears of rent for the years 1325 to the 12 annas kist of 1328. The original holding of defendants consisted of 2 bighas 11 kathas and 1 dhur with a rental of Rs. 13-3-6. The plaintiffs' case was that out of this area the tenant-defendants surrendered 8 kathas in favour of the plaintiffs, and they remained in possession of the remainder. The plaintiffs, therefore, alleged that they were entitled to recover Rs. 11-7-7½ with cesses as the rent for the land now held by the tenant-defendants. They accordingly brought the present suit for apportionment of rent and for recovery of arrears.

The defence of the tenant-defendants was that there was no surrender but forcible dispossession by the plaintiffs as regards 8 kathas out of the holding, and they pleaded that so long as the dispossession lasted there was a suspension of the entire rent and the plaintiffs were not entitled to recover any rent so long as they kept the defendants out of possession of the eight kathas.

The learned Munsif held that the story of surrender had not been proved and that the defendants' story of forcible dispossession had also not been proved. The plaintiffs were, however, admittedly in possession of eight kathas and the tenants continued in possession of the remaining area. The Munsif was of opinion that it would be highly unfair and inequitable to hold that the tenants should possess the remaining land and enjoy the usufructs thereof and still withhold the rent therefor. He accordingly made a decree apportioning the rent and making a decree for the

years in suit. On appeal the learned Subordinate Judge has set aside the decree of the Munsif and has held that so long as the dispossession lasts the plaintiffs are not entitled to recover any rent. He has accordingly dismissed the suit. The plaintiffs appeal against this decision.

A number of rulings were cited on behalf of the defendants-respondents to the effect that when there is a dispossession by the landlord either of the whole or of a portion of the holding, the tenant was entitled to withhold the entire rent so long as possession was not restored to the tenant. The proposition of law is not disputed on behalf of the appellants; but it is contended that under the facts of the present case the defendants are not entitled to withhold the entire rent? The contention is that the dispossession, according to the finding of the Munsif, took place in 1915, and therefore a claim for possession by the tenant-defendants would be barred by two years' limitation under Sch. III of the Bengal Tenancy Act and the plaintiffs cannot, therefore, be compelled to restore possession of the eight kathas inasmuch as they have acquired an indefeasible title by lapse of time. The appellants contend that the holding of the defendants must therefore be taken to consist of the area now in their possession and a fair rent ought to be settled therefor.

There is some force in this contention and it does appear inequitable as observed by the Munsif, that the tenant should take no steps to recover possession of the portion of the holding from which he has been dispossessed, should retain possession of the remainder of the holding, and yet should withhold the entire rent. The policy of the law, however, seems to be that a landlord is bound to keep his tenant in peaceful enjoyment and possession of the holding. If he disturbs the possession of the tenant he is not entitled to recover rent from the tenant. The tenant's claim for recovery of possession may be barred by lapse of time, but he can still compel the landlord to restore possession of the holding or the portion thereof from which he has been dispossessed by the landlord by withholding payment of rent for the entire area.

It is not necessary to refer to the reported cases where it has been held that a tenant is entitled to withhold payment of entire rent if he is dispossessed by the landlord from the whole or a portion of the holding; this proposition is admitted on behalf of the appellants, and the only circumstance relied upon by them, viz., the fact of the tenants' claim to recover possession being barred by limitation is not sufficient to entitle the plaintiffs-landlords to recover any portion of the rent. In my opinion, the decision of the learned Subordinate Judge is correct and must be affirmed.

The appeal is dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Patna 514

DAWSON-MILLER, C. J., AND FOSTER, J.

Jawahir Lal—Defendant—Appellant.

v.

Fateh Mahton and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 547 to 550 of 1923, Decided on 4th June 1926, from a decree of the Dist.-J., Gaya, D/- 2nd February 1923.

* *Civil P. C., O. 41, R. 23—Rule applies if whole suit is remanded—When remand is on a portion of suit it is not under R. 23, and no appeal lies.*

Rule 23, applies only to cases where the whole suit has been determined upon a preliminary point, and not to cases where a portion only of the suit has been so decided and reversed on appeal.

Where, therefore, a case is remanded not for the whole claim but only as to a portion, the remand is not one under R. 23, and is not appealable. [P. 515, C. 2]

W. H. Akbari—for Appellant.

S. C. Mullick, S. Dayal and *S. N. Bose*—for Respondents.

Dawson-Miller, C. J.—In these cases the landlord sued for rent against various tenants. Four suits in all were brought with which we are concerned in these appeals. The suits were brought for recovery of arrears of rent for the years 1325 to 1328 F. inclusive. With regard to the year 1328 F. the defence was that for that year proceedings had taken place under Ss. 69 and 70 of the Bengal Tenancy Act and the landlord's share had been ascertained. With regard to the years 1325 to 1327 the dispute was as to the amount of the crop

grown in those years, the rent being bhaoli rent recoverable under the batai system; but it appears, according to the findings of both the Munsif and the District Judge on appeal that there had been an appraisement with the consent of the parties for the years 1325 to 1327 as to the amount of the crop grown in those years.

These appeals arise out of two suits numbered 76 and 77 of 1922. There was an appeal in each of these suits to the District Judge by the landlord and there was also an appeal in each of the suits by the tenants or some of them. The landlord's appeals succeeded and the tenants' appeals failed, and the result is that we have before us to-day four appeals arising out of the two suits in each of which the same tenant is the appellant. In Appeals Nos. 547 and 549, which relate only to the year 1328, the only question is whether the proceedings under Ss. 69 and 70 of the Bengal Tenancy Act were regular and determined the amount of the tenants' liability for that year. The Munsif found that those proceedings were regular and decreed the suit upon that basis in so far as that year was concerned. That, however, was only one of the years for which rent was claimed in the suit.

On appeal the District Judge overruled that decision of the Munsif as to the year 1328 finding that the proceedings which purported to have been taken under S. 70 of the Bengal Tenancy Act were irregular and ultra vires and not binding upon the landlord. He accordingly allowed the appeal to that extent and directed that the case should be remanded to the Munsif to ascertain the amount of the produce in the year 1328.

A preliminary point has been taken in regard to these two appeals that this being an order of remand only no appeal lies from such an order. The appellant, on the other hand, contends that the order of remand was really one made under O. 41, R. 23 of the Code of Civil Procedure, the point upon which the learned Munsif had decided the case being really a preliminary point, the decision of which made it necessary for him to enter into any of the other question raised in the suit with regard to that particular year. In this respect I think that he is right, but at the same time as the remand was not made with regard to the whole of the suit, but only with regard to a portion of it, that is to say, with regard to the rent of one only out of four years' rent which was claimed, it does not appear to me to come within the provisions of O. 41, R. 23.

The rule provides that

> where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point, and the decree is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded

and so on. It has been held in the High Courts of Allahabad and Madras, and I think rightly, that this rule applies only to cases where the whole suit has been determined upon a preliminary point, and not to cases where a portion only of the suit has been so decided and reversed on appeal. I think further that there is wisdom in the rule which prevents appeals from orders of remand when they do not affect the whole case; for an appeal is always allowable after the questions for the determination of which the case was remanded have in fact been determined. Then, when the case comes up again on appeal after that the whole question can be gone into in that appeal, but it is certainly undesirable that cases should be heard on appeal piecemeal, and that every order of remand which is made should be subject to appeal to a higher tribunal, when after the matters to be decided on remand have been decided the whole case may then come on appeal to the higher tribunal. I consider therefore that in so far as Second Appeals Nos. 547 and 549 are concerned, they must be dismissed on the ground that no appeal lies at this stage.

With regard to the other appeals Nos. 548 and 550, they relate to the rent of the previous years. The Munsif who tried the case, and the District Judge who affirmed his decision on appeal, have both accepted the evidence of the plaintiff as to the actual outturn during the years in question and have rejected the evidence of the defendant and have passed a decree based upon the plaintiff's evidence. The only questions urged before us are that, although it was alleged in the plaint that the system was the batai system, the evidence in the case produced by the landlord is based upon an appraisement made between the land-

lord and the tenants during the years in question ; and as the defendants had pleaded in their written statement that no custom of appraisement existed the Court ought to have decided whether such a custom existed or not. It is not accurate to say that the plaintiff in his plaint relied upon any custom of appraisement but what he said was

> that the system of batai is prevalent in respect of the bhaoli produce of the said takhta and appraisement is made with the consent of the landlord and the tenants, the landlord's share being the half of the produce.

It is quite obvious that what is alleged there is not a custom of appraisement. What is alleged is that the system is batai, but where the landlord and the tenants consent then appraisement is made. It is quite obvious that anything can be done by consent between the parties, and there is no suggestion in the plaint that a custom of appraisement exists. It was unnecessary therefore for the Courts to enter into the question whether any custom of appraisement existed in this case. The evidence given on behalf of the plaintiff shows that in fact an appraisement was made during the years in question and it was upon that basis that the Court assessed the value of the rent payable to the plaintiff. The appellant has contended that evidence ought to have been given not merely of the appraisement made in the years in suit but of the value of the crops or the actual outturn of the crops during the previous years. It seems to me that the best evidence possible as to the value of the crop during the years in suit was the evidence of actual appraisement made at the particular time for which the rents are claimed. This part of the appeal also fails.

In the result these appeals are in each case dismissed with costs.

Foster, J.—I agree.

Appeals dismissed.

A. I. R. 1926 Patna 516

DAS AND ADAMI, JJ.

D. Jageshar Jha and *another*—Plaintiffs —Appellants.

v.

Mahtap Singh and *others*—Defendants —Respondents.

Appeal No. 999 of 1923, Decided on 7th May 1926, from the appellate decree of the Sub-J., Muzaffarpur, D/- 30th May 1923.

Civil P. C., S. 151 and O. 41, R. 23—Remand on the ground that suit was not properly tried—No appeal lies where remand is under S. 151 and not O. 41, R. 23.

Where the suit has not been disposed of by the Court of first instance upon a preliminary point, and where remand is ordered on the ground that the case was not properly decided by the lower Court, it is a remand under the inherent jurisdiction of the Court and there is no right of appeal. [P. 516, C. 2]

L. N. Singh and *Raghunandan Prasad* —for Appellants.

L. K. Jha and *B. N. Mitter*—for Respondents.

Das, J.—In my opinion no appeal lies. The Court of first instance decided all the issues in the case. The matter went up in appeal to the learned Subordinate Judge. He took the view that the case was not properly decided by the learned Munsif and he set aside the judgment and remanded the case for re-trial and gave liberty to the parties to adduce certain additional evidence. An appeal has now been brought to this Court against the order of the learned Subordinate Judge.

It is quite clear that the remand was not under the provisions of O. 41, R. 23 of the Code. The Civil P. C. gives the aggrieved party the right to appeal from an order of remand under O. 41, R. 23 but, as I have said, the suit not having been disposed of by the Court of first instance upon a preliminary point, the remand cannot be regarded as a remand under O. 41, R. 23 of the Code. It was obviously a remand under the inherent jurisdiction of the Court, and it follows that there is no right of appeal to this Court. The appellant is, however, not prejudiced. He will have the right to challenge this order when the matter again goes before the learned Subordinate Judge and if the learned Subordinate Judge decides against him and passes a decree in accordance with his judgment he will have the right to challenge the order of remand in this Court hereafter.

The appeal is dismissed with costs.

Adami, J.—I agree.

Appeal dismissed.

* A. I. R. 1926 Patna 517

SEN, J.

Hit Narayan Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 322 of 1925, Decided on 24th July 1925, from a decision of the S. J., Patna D/- 18th May 1925.

Penal Code, S. 193—Witness withdrawing his previous statement in same deposition as being false—No offence is committed.

A witness should be given a locus penitentiae and an opportunity to correct himself, and if he corrects himself immediately afterwards, or on a second thought in the same deposition, a prosecution for perjury would not lie. The essence of the offence of perjury consists in an attempt to mislead and deceive the Court: 26 *Mad.* 55, *Dist.* [P 517 C 2, P 518 C 1]

P. E. Lal and *Chandeshwar Prasad*—for Petitioner.

S. N. Sahay for *Asst. Govt. Advocate*—for the Crown.

Judgment.—The petitioner is a civil Court peon and in that capacity effected dakhaldehani of a certain plot of land on the 21st September 1924, to one Karu Gorain, the auction-purchasar of that property in execution of a rent-decree. Subsequently a criminal case arose as between the judgment-debtor in the civil case to whom the property belonged and Karu Gorain, and the crop of the fields of which delivery of possession had been given was cut and removed by the judgment-debtor. In this case the petitioner was called as a witness and he was giving evidence as to the delivery of possession which he had effected in September 1924. In the course of his deposition he made a statement as follows :

I sent Ganesh Chaukidar to call the men of Mts. Raj Kuer and Shewnandan Kuer at the field after I had delivered possession of the property.

Soon afterwards, in course of cross-examination he said :—

My statement just now that I sent Ganesh chaukidar to call the men of the Mussamats is false.

On this ground the Deputy Magistrate of Bihar, Mr. Ozair, who tried the case, preferred a complaint against the petitioner under S. 476 of the Criminal P. C. for an offence under S. 193 of the Indian Penal Code. The learned counsel for the petitioner urges that the petitioner as a witness had a right to withdraw a statement which he had made in the previous part of his deposition when he became aware that it was not correct, and that on that ground his two conflicting statements taken together would not amount to an offence under S. 193 of the Indian Penal Code. I think there is a great deal of force in his contention. If the second statement had been recorded in a slightly different form, that is, if instead of the word "false" the word "incorrect" had been recorded, I think it would obviously not have come under S. 193 of the Indian Penal Code. The point of the whole objection is that he admitted that his first statement made in his deposition was "false." It is very difficult to say whether the witness really intended to say that the statement previously made was "false" or whether his intention was rather to say that it was "incorrect." When a witness is under cross-examination and the question is put to him by the cross-examining counsel as to whether a statement previously made by him is false or not he may assent to it or dissent from it and his "yes" or "no" would be in due course recorded in a narrative form. In these circumstances I have very great doubt as to whether this would be a fit case for prosecution under S. 193, Indian Penal Code.

Moreover, the principle has been laid down in various judicial decisions that a witness should be given a locus penitentiae and an opportunity to correct himself,and if he corrects himself immediately afterwards, or on a second thought in the same deposition, a prosecution for perjury would not lie. This proposition is supported by rulings in the cases of *Lachhmi Narain* v. *Emperor* (1) ; *Maharaj Prasad* v. *Emperor* (2) and *In re Pandu Namaji Gavande* (3). In the last mentioned case the learned Judge went into the principle in some detail and observed that

a deposition must be read as a whole and a witness must always be given an opportunity of correcting any answer given by him, The present case does not, I think, in law substantially differ from a case of more frequent occurrence where a witness, having made a false statement, is cautioned by the trying Judge and is informed

(1) [1918] 16 O. C. 81=19 I. C. 712=14 Cr. L. J. 280.
(2) A. I. R. 1924 All. 83.
(3) [1917] 19 Bom. L. R. 61=39 I. C. 320=18 Cr. L. J. 480.

ot various circumstances which seem to establish the falsehood of that statement, and the witness, after such caution, acknowledges that his earlier statement was false and corrects it. In such circumstances, speaking within my own experience, I have not known any case where any Judge has thought it desirable to subject such a witness to a prosecution for perjury. And that a Judge should refrain from such directions seems to me not unreasonable, when it is remembered that the essence of the offence of perjury consists, as I take it, in an attempt to mislead and deceive the Court. In such a case as we have have here, it cannot be truly said that the opponent left the Court under the lie with which he began by attempting to deceive it. On the contrary, before his deposition was finished, he withdrew the lie and left the Court under the impression of the truth. It may well be, and in this case, I think, is, the fact that his motive in thus withdrawing his lie was a motive which does him no credit. That, however, is not, it seems to me, a decisive consideration upon this question of discretion.

The facts in the present case are much more favourable to the accused than the facts in the last-mentioned case. Here, as I have observed, it does not appear clearly that the accused deliberately meant to perpetrate a fraud upon public, justice He said no doubt that he had sent a man to the Mussamats but soon afterwards in cross-examination he said that his previous statement was false. The mpression, therefore, left in the mind of the Court was clearly that he had not sent a man to the Mussamats as he had previously deposed.

It is urged, on the other hand, that the case reported as *In the matter of Palani Palagan* (4) should apply to the present case and that, therefore, this Court should not interfere in the matter. The facts of that case seem to be somewhat different. In that case a witness had given his evidence before a Court; the evidence had been read over to him and signed by him, and thereafter he was again called to the box and he made certain statements in cross-examination. It was found that his statements made in the first piece of deposition were in conflict with the statements made in the second and the question arose as to whether it was a proper case for prosecution in the circumstances. This case appears to have been also referred to in a later decision reported *Girdharimal* v. *Emperor* (5). The question whether conflict of statements made in one and the same deposition can be the subject-matter of a prosecution under S. 193 appears to have been the subject-matter of conflicting decisions. That question does not arise in the present case because, as I have observed, it is not at all clear from the facts of this case as to whether the witness in question had a dishonest intention in making the statements that he did and from which he resiled later. That being so, I am of opinion that the prosecution against the petitioner should be withdrawn.

The order of the learned Sessions Judge is, therefore, set aside,

Order set aside.

(4) [1903] 26 Mad. 55.
(5) [1916] 9 S. L. R. 202=34 I. C. 656=17 Cr. L. J. 240.

A. I. R. 1926 Patna 518

DAS AND ROSS, JJ.

Jugal Kishore and *another* — Appellants.

v.

Mt. Sonabati Kumari—Respondent.

Miscellaneous Appeal No. 260 of 1925, Decided on 6th July 1926, from an order of the Sub-J., Dumka, D/- 5th August 1925.

Land Tenure—Ghatwali—Produce of impartible estate is not necessarily accretion—No distinction between realized and unrealized rents—Unrealized rents are liable to attachment in execution—Hindu Law—Impartible estate.

The produce of an impartible estate does not necessarily belong to and form an accretion to the original property, and there is no distinction between realized rent and unrealized rent. In the absence of any intention on the part of the late ghatwal to treat the produce of the estate as an accretion to the ghatwali estate, the unrealized rents are liable in execution to attachment and sale. [P 519 C 1]

S. Sinha, C. M. Agarwala and *K. P. Sukul* - for Appellants.

Sultan Ahmed and *Nirod Ch. Roy*— for Respondent.

Ross, J.—This is an appeal against an order passed by the Subordinate Judge of Dumka striking off an application for execution. As the decree is still capable of execution there is no merit in the appeal against the order striking off the execution petition because another execution petition can be brought; and in this view the appeal must be dismissed. The learned counsel for the appellant has referred to an order passed on the 17th of July dealing with the question of the decree-holder's right to

proceed against rents accruing due in the time of the late ghatwal judgment-debtor, but unrealized. It is conceded by the learned counsel for the respondent that the question did not properly arise for decision, inasmuch as the application for execution was an application for attachment of the immovable property and for the appointment of a receiver to collect the rents. The decision, therefore, cannot be res judicata. But, as the matter has been discussed, we think it right to express opinion upon the question raised.

The learned Subordinate Judge said that as the ghatwali property, the rents of which are in question, is inalienable and impartible the unrealized rents of the villages formed the corpus of the ghatwali property and could not be attached and alienated. This question has been dealt with by this Court in *Aparna Debi* v. *Sree Shiba Prashad Singh* (1) where, with reference to the decision of the Judicial Committee in *Rani Jagdamba Kumari* v. *Wazir Narain Singh* (2) it was observed that it had been held by the Judicial Committee that the produce of an impartible estate does not necessarily belong to and form an accretion to the original property. It was pointed out in the case now quoted that there was no evidence that the late Raja treated the produce of the estate as an accretion. With regard to the distinction which was sought to be drawn between realized and unrealized rents, it was pointed out that rent which had become due was produce of the impartible estate, whether the produce had actually come into the hands of the owner or not, and that there was no distinction between realized rent and unrealized rent in this respect. This decision was followed by the Calcutta High Court in *Prayag Kumari* v. *Siva Prasad* (3).

Learned counsel for the respondents contends that a distinction must be drawn between an ordinary impartible estate and a ghatwali, because an ordinary impartible estate is alienable whereas a ghatwali is inalienable ; and he argues that the rents and profits of a ghatwali estate would be subject to different incidents. But there is nothing in the special ghatwali law of inalienability to affect the question whether these unrealized rents are corpus of the estate or not. Consequently it would appear that the decision of the Subordinate Judge on this question is erroneous ; but this matter only arises incidentally in the present appeal because the question discussed by the Subordinate Judge did not properly arise on the application then made and ought not to have been dealt with.

With these observations the appeal is dismissed with costs.

Das, J.—I agree.

Appeal dismissed.

(1) A. I. R. 1924 Patna 451=3 Pat. 367.
(2) A. I. R. 1923 P. C. 59=2 Pat. 810.
(3) A. I. R, 1926 Cal. 1.

A. I. R. 1926 Patna 519

BUCKNILL, J.

Satyadeva Sahay and *others*—Plaintiffs—Petitioners.

v.

Mt. Jhamel Kuer and *others*—Defendants—Opposite Party.

Civil Revision No. 70 of 1925, Decided on 4th June 1925, from an order of the 2nd Munsif, Gaya, D/- 28th January 1925.

Civil P. C., O. 1, R. 1—Rent suit.

A person who alleges to be transferee from a co-sharer landlord, but who is not recognized as such by the plaintiffs-proprietors, cannot be joined in a rent suit against the wishes of the plaintiffs. [P 520 C 1]

S. M. Mullick, N. C. Sinha, S. N. Roy, Shiveshwar Dayal and *B. K. Prasad*—for Petitioners.

Jalgobind Prasad Sinha—for Opposite Party.

Bucknill, J.—This is an application in civil revisional jurisdiction made under simple circumstances.

Some of the applicants are proprietors of a certain property and brought a rent suit in the Court of the 2nd Munsif, Gaya, against the first of the opposite party for arrears of rent. They impleaded all the members of the opposite party (with the exception of the second opposity party) as being co-sharer landlords, as defendants, purporting to act under S. 148A of the Bengal Tenancy Act. So far no difficulty had arisen ; but in January last it would seem that one Mosaheb Singh applied to the

Munsif to be made a co-defendant; he alleged that the first opposite party had sold a portion of the property of which he was a holder to one Chamo Singh and that Chamo Singh had sold in his turn to this Mosaheb Singh. He, therefore, asked to be made a co-defendant alleging that he had some sort of interest in the suit. To this, however, the applicants not unnaturally object. They state that they had no knowledge of the transfer alleged to have been made and that he, Mosaheb Singh, had no locus standi. However, on the 24th of January last, the Munsif ordered that Mosaheb Singh should be made a co-defendant. It is against this order that this application has now come before this Court.

It is difficult to understand how it is possible for the Munsif to have acceded to the application of this Mosaheb Singh to be joined as a co-defendant. It is quite clear from the case of *Gananath Satpathy* v. *Harihar Pandhi* (1) decided by their Lordships the Chief Justice and Mr. Justice Mullick of this Court, that, so far as the plaintiff is concerned here in this suit, he was in no way bound to implead this Mosaheb Singh as a co-defendant. If he was not bound to implead him as a co-defendant, it is quite clear that he is not within the meaning of the law a necessary party to these proceedings; and, if he was not a necessary party to the proceedings, it seems to me to have been quite irregular for the Munsif to have acceded to his request that he should be made a co-defendant.

It is true that he, Mosaheb Singh, states in his counter-affidavit that he has got some sort of interest in the holding which was held by the first defendant in the suit. He states that the original holding which was in the name of the first defendant was sold in 1922 to one Chamo Singh so far as a portion of the holding is concerned and that this Chamo Singh came into possession of it. He also alleges that some of the co-sharer landlords did in fact recognize the transfer to Chamo Singh as being a tenant and that some rent receipts were given by some of the co-sharer landlords to this Chamo Singh. He further suggests that this portion of the holding of the first defendant, which was purchased by Chamo Singh and which subsequently passed into his (Mosaheb Singh's) possession, came to be recognized as an entire holding. Even supposing all his statements were correct, this would not affect his locus standi in this suit. The case to which I have referred shows quite clearly that none of the facts were material for the necessity for the impleading of this Mosaheb Singh as a defendant by the plaintiff. The converse appears to be equally the case; if he is not a necessary party he has no locus standi and need not be joined.

In these circumstances I think the order of the Munsif must be set aside and that Mosaheb Singh cannot properly be joined as a party to these proceedings. The applicants will have their costs.

Application allowed.

(1) [1918] P. H. C. C. 289=48 I. C. 359=5 Pat. L. W. 232.

A. I. R. 1926 Patna 520

ADAMI, J.

Jeobaran Singh and *others*—Accused—Petitioners.

v.

Ramkishun Lal—Opposite Party.

Criminal Revision No. 38 of 1926, Decided on 3rd June 1926, from an order of the S. J., Patna, D/- 15th January 1926.

(*a*) *Bengal Ferries Act* (1885), *S.* 16—*Limits of the ferry should be known.*

For the purposes of a prosecution under S. 16 read with S. 28, it is important that the limits of each ferry should be known. [P. 522, C. 2]

(*b*) *Bengal Ferries Act* (1885), *Ss.* 18 *and* 16—*Plying along one bank is no offence.*

The plying of a boat for hire along the one bank of the river would be no offence. [P. 523, C. 1]

(*c*) *Bengal Ferries Act* (1885), *Ss.* 16 *and* 6 — *Public Ferry is one declared to be so under S.* 6 *or Regulation* 6 *of* 1819, *or Bengal Act* 1 *of* 1866.

No ferry is a public ferry unless there has been a notification to that effect under S. 6 with regard to it, or unless the ferry has previous to 1885 been determined or declared to be a public ferry under Regulation 4 of 1819 or Bengal Act 1 of 1866. [P. 522, C. 2]

(*d*) *Bengal Ferries Act* (1885), *Ss.* 28 *and* 16—*Person maintaining ferry and carrying persons for hire is guilty and not his servants.*

The person intended to be punished by the section primarily is the person who maintains a ferry in contravention of S. 16 and who, in working such ferry, conveys for hire any passengers, animal, vehicle or other thing. His servants or other persons helping him cannot be

said to be doing so for hire because the hire does not belong to them, nor can they be said to contravene the provisions of S. 16, the ferry not being maintained by them but only by the former. [P 523, C 2]

K. B. Dutt, N. N. Sinha and *B. K. Prasad*—for Petitioners.

M. Yunus, Bhagwat Prasad and *G. N. Mukerjee*—for Opposite Party.

Asst. Govt. Advocate—for the Crown.

Judgment. — The petitioners have been convicted under S. 28 read with S. 16 of the Bengal Ferries Act (1 of 1885) and sentenced to pay a fine of Rs. 40 each. There are five ferries connecting the southern or Patna bank of the Ganges with the northern, or Chapra side and they are the following given in order from west to east :

Dighaghat to Paleza (Thana Sonepur) :

Mahendru to Sabalpur and Kalisthan (Thana Sonepur).

Ranighat and Pathri to Konhara (Thana Hajipur).

Khajekalan to Barabanki ; and

Maroofganj (Adrak) Damriahi and Jathuli (Thana Fathua), on the south bank of the Ganges, to Latiahi on the north bank.

They are collectively known as the Patna-Ganges Ferry but in fact each ferry is an independent ferry and they have generally been all held together under one kabuliyat. The petitioners, Jeobaran Singh and Rang Singh, were lessees of these ferries up to the 31st of March 1924 when their lease expired. In 1924, a notice was issued by the Magistrate of the Patna district that the above ferries would be re-settled under S. 9 of the Bengal Ferries Act on the 24th March 1924. In that notice it was remarked :

All these ghats will include the rights to ply both ways ; the five ferries are independent, and the lease of these does not give the lessee the right to ply between a point included in another ferry, nor does it give the right to ply between two points on the same bank.

It appears that Bhagwat Narain Singh asked permission of the Magistrate to bid on behalf of Jeobaran and Rang Singh but the Magistrate refused to allow either of these two petitioners to take lease of the ferry, since during the term of their late lease they had mismanaged the ferry. There was a keen contest at the auction and the highest bid was made by Rai Bahadur Chandra Khetu Singh and Bhagwat Narain Singh who together bid for the lease and it was knocked down to them. These two gentlemen then executed a kabuliyat which was registered. Under the terms of that kabuliyat, the lessees undertook not to sublet or transfer the lease to any other person. It appears that Bhagwat from the first had intended to represent Jeobaran and Rang Singh, and after he had obtained the lease he executed a sublease in favour of Jeobaran and Rang Singh but, when these two sought to have the sub-lease registered, Bhagwat Narain refused to register it, and thereupon there was an application for compulsory registration, which I believe, led to an application to this Court against the order of the registration officer and this Court directed its registration.

Jeobaran and Rang Singh were naturally disappointed at their failure to obtain a lease of the ferries, and were on bad terms with Rai Bahadur Chandra Khetu Singh and Bhagwat Narain because they had obtained the lease and because Bhagwat refused to register the sub-lease. They knew that they had no right to maintain a ferry. They had on their hands two steamers, the "Trout" and the "Phlox", which they had used during the term of their lease and, when the Sonepur fair came on, they conceived the idea of utilizing these steamers in carrying visitors to the fair across the Ganges. From the 9th to the 12th November, during the Sonepur fair, it is alleged by the prosecution that they carried passengers from the Maroofganj ghat to Sabalpur calling at other places on the way. Rai Bahadur Chandra Khetu Singh finding out what was going on informed the authorities. A drummer who was proclaiming on behalf of Jeobaran that steamers would carry passengers to Sonepur was stopped by the police, and also orders were passed under S. 144 restraining Jeobaran and Rang Singh from maintaining the ferry.

After that Rai Bahadur Chandra Khetu Singh, through his servant, filed 24 complaints at Patna and 11 at Chapra. The complaints stated that Jeobaran and Rang Singh had carried passengers from Maroofganj to Sabalpur. I may mention that Sabalpur is the ghat for Sonepur. The petitioners then put in a protest against the filing of so many as 24 complaints, asserting that the offence, if committed, was a continuing offence and

that there could not be 24 separate trials each relating to one crossing. In that same petition it was objected that the ferries were not public ferries and, therefore, no offence could have been committed. The matter came up to this Court and Jwala Prasad, J., in the case of *Jeobaran Singh* v. *Ram Kishun Lal* (1) held that each trip on which passengers were conveyed for hire would constitute a separate transaction, and that there could be a separate trial for each, but that the Magistrate should try at one time only three of these transactions. Consequently the petitioners were put on trial with regard to three trips only which were alleged to have been made on the 11th November, one starting at 11·30 a. m. another at 5 p. m. and another at 9 p. m.

In the complaints it was stated that the petitioners had carried passengers for hire from Maroofganj to Sabalpur, that is, from one end of the line of ferries to the other ; but evidence was produced to show that the steamer which the petitioners were plying stopped at Khajekalan, Pathri and Ranighat, each of which was the starting place of a ferry. As a matter of fact the judgment shows that only one of the prosecution witnesses mentioned these three places, the others mentioned only that the steamer stopped at some places but they did not know their names. The evidence showed that Jeobaran Singh and Rang Singh were on the boats and were superintending the collection of fares. The learned Magistrate found that, by their action, the petitioners had contravened the provisions of S. 16 and were guilty under S. 28. An application was then made to the Sessions Judge to make a reference to this Court, but the Sessions Judge refused to interfere.

Section 16 of the Bengal Ferries Act runs as follows :

> No person shall, except with the sanction of the Magistrate of the District, maintain a ferry to or from any point within a distance of two miles from the limits of a public ferry : Provided that in the case of any specified public ferry, the Lieutenant Governor may, by notification, reduce or increase the said distance of two miles to such extent as he thinks fit : Provided also that nothing hereinbefore contained shall prevent persons keeping boats to ply between two places, one of which is without, and one within, the said limits, when the distance between such places is not less than three miles, or shall apply to boats which the Magistrate of the District expressly exempts from the operation of this section.

Section 28 runs :

> Whoever conveys for hire any passenger animal, vehicle or other thing in contravention of the provisions of S. 16 shall be punished with fine which may extend to Rs. 50.

To obtain a conviction under S. 28 it is necessary to show that the ferry is a public ferry. S. 6 of the Act requires a declaration by notification in the Official Gazette of what ferries shall be deemed to be public ferries, and no ferry is a public ferry unless there has been a notification to that effect under S. 6 with regard to it, or unless the ferry has previous to 1885 been determined or declared to be a public ferry under Regulation VI of 1819 or Bengal Act I of 1866. In this latter case under S. 3 of the Act such determination or declaration shall be held to be equivalent to a notification under S. 6. S. 6 also enables the Government to define the limits of a public ferry by notification.

The point is taken before me that these ferries are not public ferries. (The judgment dealt with evidence and proceeded). Though it has been assumed that these ferries are public ferries, there is no certain evidence that they are public ferries, and the prosecution have not attempted to prove them to be such. I am inclined to think that the petitioners are entitled to take advantage of any shadow of doubt that there may be on the subject. It would be well, if the question were put beyond all doubt by the issue of a notification under S. 6.

(a) For the purposes of a prosecution under S. 16 read with S. 28, it is important that the limits of each ferry should be known. There is nothing to show what the limit of each of the five independent ferries is and there has been no notification under S. 6. The learned Magistrate held, that, because the petitioners had not pleaded that the spot at which they landed passengers was more than three miles from Ranighat and had in fact pleaded that they never plied a steamer at all, it was unnecessary for him to take into consideration the proviso to S. 16 ; but, in my opinion, in this case it was very necessary to find out whether in fact the accused were committing any offence by plying from Ranighat, which is the starting point of the ferry to Konhara, to Sabalpur

(1) A. I. R. 1925 Patna 623=4 Pat. 503.

which is the ghat of the ferry between Sabalpur and Mahendru. If the distance between the Ranighat ferry and the part of Sabalpur at which the steamer landed its passengers is more than three miles it would appear that the petitioners were entitled to the benefit of the proviso to S. 16.

It has to be borne in mind that these five ferries do not form a combined ferry, but according to the notice issued announcing the auction sale each ferry is an independent ferry. If a steamer started from Ranighat and proceeded to a point which is beyond three miles the limits of the Ranighat ferry, the offence under S. 28 read with S. 16 would not be committed even assuming that the Ranighat ferry and the Mahendru, Sabalpur ferries are both public ones. The prosecution have taken no pains either to show what the limits of the various ferries are or what the distance between Ranighat and Sabalpur is. It would seem, however, that the distance is well over three miles. Prosecution witness No. 3 states that Sabalpur is four or five kos, that is to say, eight or ten miles, from Khajekalan ghat, and it would appear that Khajekalan is only a mile or two from Ranighat. It has to be borne in mind that each of the ferries is independent, though leased under a combined kabuliyat, and we have to consider them from the point of view of each being under a separate lessee.

The plying of a boat for hire along the one bank of the river would be no offence. The Ganges is a navigable river and is a highway, and the taking of a steamer from Maroofganj right along the southern bank and stopping at Khajekalan, Mahendru and Digha would not make the petitioners liable to any punishment ; they would have a right to take a boat along the Ganges. The question is one only of ferrying across the Ganges from one bank to the other. It being somewhat uncertain whether all these ferries are public ferries, and it being more doubtful still whether the Ranighat to Konhara ferry was ever considered a public ferry previous to the passing of the Act of 1885, and there being also nothing to show what are the limits of the various ferries or whether the distance between Ranighat and Sabalpur was less than three miles, I think it should be found that the petitioners have not been satisfactorily proved to have committed an offence under the Act.

With regard to the claim put forward by the petitioners that under their sub-lease they had a right to ply a ferry it is quite clear that the contention cannot be supported. Only those persons have a right to ply a ferry who have a lease from the District Magistrate and the petitioners had no such lease. Any arrangement they came to with Bhagwat Narain could not avail them at all.

There is another point which has not been considered by the lower Courts. The petitioners other than Jeobaran and Rang Singh can hardly be said to have been maintaining a ferry and to have been conveying for hire the passengers, for they were mere servants of the other two petitioners. In the case of *Sheosahai Singh* v. *Cheta Narain Singh*, which was a case similar to the present one Bannerjee and Stevens, JJ., of the Calcutta High Court stated that

> Section 28 quoted above makes it penal for any one to convey for hire any passenger, animal, vehicle or other thing in contravention of the provisions of S. 16, and S. 16 is contravened when a ferry is maintained without the sanction of the District Magistrate to or from any point within a distance of two miles of a public ferry. The way in which the offence is defined by S. 28, which refers to S. 16, as containing one of the essential elements necessary to constitute the offence proved, goes to show that the person intended to be punished by the section primarily is the person who maintained a ferry in contravention of S. 16 and who, in working such ferry, conveys for hire any passengers, animal, vehicle or other thing. His servants or other persons helping him cannot be said to be doing so for hire because the hire does not belong to them, nor can they be said to have contravened the provisions of S. 16, the ferry not being maintained by them but only by the former.

There is not sufficient material to show that these other petitioners were cognizant of the fact that Jeobaran and Rang Singh were maintaining the ferry in contravention of S. 16 so as to make them liable as abettors. The conviction, therefore, of the petitioners other than Jeobaran and Rang Singh would have to be set aside in any case.

Jeobaran Singh and Rang Singh are said each to have had a steamer ; the "Trout" belonging to Jeobaran Singh and the "*Phlox*" belonging to Rang Singh, but neither the judgment nor the evidence shows clearly which of these steamers was travelled on by the

witnesses who give evidence as to their conveyance. It would seem that it was the "Trout" because one witness said that he saw from another steamer the "Trout" plying on that day. But it is quite uncertain which steamer really was used or whether it was the same steamer in each of the three cases. As a result, in my opinion, the prosecution has failed to show that the petitioners committed an offence under S. 28, and I would, therefore, direct their acquittal. The fines, if paid will be refunded.

Revision allowed.

A. I. R. 1926 Patna 524

ROSS, J.

Balak Singh Bhumij and *others*—Plaintiffs—Appellants.

v.

Srikanta Manjhi—Defendant—Respondent.

Appeal No. 553 of 1923, Decided on 25th May 1926, from the appellate decree of the Sub-J., Purulia, D/- 22nd March 1923.

Chota Nagpur Encumbered Estates Act (6 of 1876), Ss. 3 and 2—Usufructuary mortgage by proprietor—Decree for rent against tenants—Estate vested in manager—Decree cannot be executed.

Where the proprietor of the encumbered estate grants a usufructuary mortgage and the rent due by the tenants is taken by the mortgagee in lieu of interest on the loan.

Held: that in recovering a decree for rent against the tenants, the mortgagee is only recovering interest against his debtor and it is a debt or liability of the proprietor of the encumbered estate; and, that consequently, no proceedings in execution of the decree can be taken after the estate has vested in the manager. [P 524 C 2]

A. K. Roy—for Appellants.

A. B. Mukherji and *B. B. Mukherji*—for Respondent.

Judgment.—This is an appeal by the plaintiffs in a suit to cancel the sale of a holding in execution of a decree for rent on the ground that it was fraudulent and without jurisdiction, and for confirmation or recovery of possession. The suit was decreed by the Munsif and his decision was affirmed by the Subordinate Judge; but the appeal was remanded by this Court on the ground that there had not been a proper finding on the question of fraud, and the Subordinate Judge has now dismissed the suit.

Mr. A. K. Roy on behalf of the appellants, frankly admitting that the finding on the question of fraud was conclusive against him, advanced a new and ingenious argument based upon S. 3 of the Chota Nagpur Encumbered Estates Act, 1876. In order to understand this argument it is necessary to state certain facts.

The plaintiffs were the tenants of the zemindar of Barabhum who, in 1911, gave a usufructuary mortgage to the zemindar of Dumra, and he, in his turn, in the same year, assigned the mortgage to the Midnapur Zemindari Company, Defendant No. 2. The Company brought Rent Suit No. 612 of 1913 against the plaintiffs for rent from 1319 to the 12-annas kist of 1320 and obtained an ex-parte decree on the 20th of September 1913. In 1914, the estate came under management under the provisions of the Encumbered Estates Act and the manager brought Rent Suit No. 1514 of 1915 against the present plaintiffs for rent from 1319 to the 12-annas kist of 1322. That suit was decreed and the amount of the decree was deposited by the plaintiffs on the 24th October 1916. In that year the Midnapur Zemindary Company took out execution of their rent-decree in Execution Case No. 560 of 1916; and, on the 4th of December 1916, the plaintiffs' holding was sold at auction and purchased by Defendant No. 1. When the auction-purchaser took possession on the 17th of June 1917, the plaintiffs alleged that they came to know of the ex parte decree and applied to the revenue Court and got the ex parte decree set aside and the suit dismissed on the 15th of December 1917. They then applied to have the sale set aside, but failed and, therefore, they instituted this suit alleging that the sale was fraudulent and without jurisdiction.

The argument is that as the proprietor of the encumbered estate had granted a usufructuary mortgage, the rent due by the tenants was taken by the mortgagee in lieu of interest on the loan, and, that in recovering a decree for rent against the tenants the mortgagee was only recovering interest against his debtor and that this was a debt or liability of the proprietor of the encumbered estate; and, consequently, no proceedings in execution of the decree could be taken after 1914. It was for the manager of the

estate to realize rents from the tenants and to apply the income in the manner directed by the Act : and it was not open to any individual creditor to proceed by way of execution on his own account. It was contended that all that the Midnapur Zemindary Company could do, after the estate came under management was to file their decree before the manager. In reply to this argument, it is contended that S. 3 contemplated the stay of proceedings pending in Court with regard to the property of the proprietor of the encumbered estate and that the object of the rule is the protection of the estate. But here no proceedings were taken against the estate, but the Midnapur Zemindary Company was only executing a decree against the tenants.

It is further contended that when the decree was passed, the tenants' liability to pay and the zemindar's right to realize the rent were merged in the decree and the debt was no longer a contractual debt ; and that such a debt is not contemplated by S. 3 of the Act.

It is to be noticed that the manager sued the tenants for the rent of the years for which the Midnapur Zemindary Company had already brought a suit, and realized the rent from them. As the exparte decree of the Midnapur Zemindary Company was set aside, it must be taken that the tenants, and consequently, the manager had no notice that proceedings for recovery of this rent had been taken by the usufructuary mortgagee before the date when the estate came under management. The manager, finding arrears outstanding was bound to take steps to realize the rent and the hardship of the procedure adopted by the Zemindary Company is apparent, as the tenants have paid the rent for these years and have satisfied the decree, while their holdings have been taken from them in execution of another decree for the same years. A state of things like this could only happen because of the existence of an encumbrance and the claim of the mortgagee although directly against the tenant, is substantially a claim against the proprietor for interest on his mortgage. I am, therefore, inclined to think on the whole that the argument on behalf of the appellants is sound and that the precedure adopted by the Midnapur Zemindary Company in executing their decree after the estate had come under management was contrary to law ; and the sale in execution was without jurisdiction and must be set aside.

Two other points were taken on behalf of the appellants. The first was with regard to Jehur Singh, one of the recorded tenants. The learned Subordinate Judge found that he was not dead at the time of the decree as had been alleged by the plaintiffs ; but, it is argued that, if he was dead at the time of the execution, the sale was void unless his representative was brought on the record. But there is nothing to show, and no finding, that he was dead at the time of the execution. The second point was that the trial Court found that one Udhab, the son of one of the recorded tenants, Ridai Bhumij, was not brought on the record and, therefore, the decree was not a rent-decree ; and that this point has not been dealt with by the Subordinate Judge. The point is not specifically dealt with, but the learned Subordinate Judge says that it appears from the khatian and the decree that all the persons named in the khatian or their heirs were sued.

But on the first ground the appellants are entitled to succeed and the appeal must be decreed with costs and the decree of the Subordinate Judge set aside and the plaintiffs' suit decreed with costs throughout.

Decree set aside.

A. I. R. 1926 Patna 525

SEN, J.

Mahari Dhangar—Petitioner.

v.

Baldeo Narain—Opposite Party.

Criminal Revision No. 51 of 1925, Decided on 27th July 1925, referred by the S. J. Purneah.

Criminal P. C., S. 192—Complaint under S. 420—Police ordered to report—Police reporting the case to be false and instituting prosecution under S. 211—Complaint by complainant praying for judicial enquiry—Case transferred to another Magistrate—Transfer is one, under S. 192.

On a complaint being filed before the Sub-Divisional Officer, the complainant was examined and police was ordered to submit a report. The police submitted a final report stating that the case was maliciously false and filed a complaint for the prosecution of the

complainant under S. 211 of the Indian Penal Code. The Sub-Divisional Officer did not take cognizance of the case under S. 211, but merely asked the accused to show cause why he should not be prosecuted. At the same time the complainant put in a petition impugning the police report and praying for an enquiry by a Judicial Officer. The complainant was directed to adduce evidence. His witnesses, however, were not present on the day fixed and he prayed for time. The case was thereupon adjourned. but on the adjournment date the following order was passed: "Witnesses were present. To Mr. Q. (a Deputy Magistrate) for disposal." Mr. Q. did not examine any of the witnesses being of opinion that it would be a waste of time to do so. But on looking into the police report and hearing the pleader of the complainant he directed the investigating officer to submit a charge-sheet in the case. Subsequently the Sub-Divisional Officer purported to re-call the case from the file of the Deputy Magistrate and make it over to another Deputy Magistrate with certain instructions as to how he should proceed. *Held*: the order transferring the case to the Deputy Magistrate was under S. 192 and the whole case was transferred. The Deputy Magistrate had full seisin of the case and the Sub-Divisional Officer could not recall the case for the reasons shown in his order or transfer it to another Deputy Magistrate, much less with instructions as to how he should deal with the case. The order of the Sub-Divisional Officer transferring the case to another Magistrate as well as the order of the Deputy Magistrate asking for a charge-sheet from the police should be set aside. [P. 526 C. 1, 2; P. 527 C. 1]

B. P. Jamuar—for Petitioner.

S. Saran—for Opposite Party.

Judgment.—This is a Reference by the learned Sessions Judge of Purneah. It appears that on the 3rd December 1924 one Mahari Dhangar filed a complaint before the Sub-Divisional Officer of Purneah in respect of an offence under S. 420 of the Indian Penal Code. The Sub-Divisional Officer examined the complainant and passed an order in these terms: Examined complainant. The offence disclosed is cognizable. Sub-Inspector, Kazanchi Hat P. S. to investigate and report by 17th December 1924." The police submitted a final report stating that the case was maliciously false and filed a complaint for the prosecution of the complainant under S. 211 of the Indian Penal Code. It is to be noted that the Sub-Divisional Officer did not take cognizance of the case under S. 211 of the Indian Penal Code, but merely asked the accused to shew cause on the 27th January 1925 why he should not be prosecuted.

At the same time the complainant in the case under S. 420 of the Indian Penal Code put in a petition impugning the police report and praying for an enquiry by a Judicial Officer. This petition is under the law a complaint. The complainant was directed to adduce evidence on the 10th February 1925. His witnesses however were not present on that day and he prayed for time. The case was thereupon adjourned to the 19th February 1925, on which date Seven of the witnesses were present. The Sub-Divisional Officer on that day passed the following order:

"Seven witnesses were present. To M. Fakhrul Hussan Qadri for disposal."

Mr. Qadri did not examine any of the witnesses being of opinion that it would be a waste of time to do so. But on looking into the police report and hearing the pleader for the complainant he directed the investigating officer to submit a charge-sheet in the case on the 12th March 1925.

On the 12th March 1925 the Sub-Divisional Officer passed the order which has been recommended for revision by this Court. By that order the Sub-Divisional Officer purported to recall the case from the file of the Deputy Magistrate, Mr. Qadri, and make it over to another Deputy Magistrate, Mr. Duff, with certain instructions as to how he should proceed. The order of the Deputy Magistrate, Mr. Qadri, directing the police to submit a charge-sheet, is also recommended for revision. The ground upon which such recommendation is made is that by his order, dated the 12th March 1925, transferring "the case" to Mr. Qadri for disposal the whole case under S. 420 of the Indian Penal Code was transferred for disposal, and the transfer must be deemed to have been made under S. 192. In that view the Deputy Magistrate, Mr. Qadri, had full seisin of the case, and if he found that there was a prima facie case he had the right to issue summons against the accused. As regards the order of the Deputy Magistrate upon the police to submit a charge-sheet it is stated that the Deputy Magistrate was not competent to make such an order and, therefore, it is recommended that this order too should be set aside.

It is, however, contended by learned counsel appearing against the letter of reference that the Sub-Divisional Officer's explanation should be accepted to the effect that all that Mr. Qadri was asked

to do was to enquire and report as to whether the police report that the complaint was maliciously false was true or not. The substantive case under S. 420 of the Indian Penal Code remained on the file of the Sub-Divisional Officer and was not transferred to Mr. Qadri at all. Various arguments have been advanced on this theory, but it is unnecessary to enter into a consideration of the arguments as the meaning of the order, dated the 12th March, is quite plain on the face of it. It is not proper to decide this matter on the explanation submitted by the Sub-Divisional Officer and specially in view of the fact that the terms of the order itself are quite clear. They show that the order was under S. 192 and that the whole case was transferred. Mr. Qadri, therefore, had full seisin of the case and the Sub-Divisional Officer could not recall the case for the reasons shown in the order or transfer it to another Deputy Magistrate, much less with instructions as to how he should deal with the case. In my opinion the view taken by the learned Sessions Judge is sound. The reference is accepted and the order of the Sub-Divisional Officer dated the 12th March 1925, as well as the order of the Deputy Magistrate asking for a charge-sheet from the police, are set aside.

Reference accepted.

A. I. R. 1926 Patna 527

DAS AND ADAMI, JJ.

Maharaja Pratap Udainath Sah Deo—Plaintiff—Appellant.

v.

Lal Gobind Nath Sah Deo—Defendant—Respondent.

First Appeal No. 62 of 1923, Decided on 27th April 1926, from a decision of the Dy. Collector, Ranchi, D/- 31st March 1923.

(*a*) *Chota Nagpur Tenancy Act* (4 *B. C. of* 1908), *S.* 139 (2)—*Person sued need not be raiyat—Rent payable must be in respect of agricultural land.*

A suit against a person who is not a raiyat but a tenure-holder, and is collectiug rent in respect of agricultural land for the determination of the rent payable by him comes expressly under the provision of S. 139. In order that S. 139. Cl. (2). may apply, it is not necessary that the defendant should be an agricultural raiyat, but it is necessary that the rent should be payable for agricultural land. [P 527 C 2]

(*b*) *Chota Nagpur Tenancy Act—Definition of agricultural land appears purposely omitted.*

Agricultural land has not been defined in the Act, and it would appear that this omission is intentional. [P 527 C 2]

S. M. Mullick and *B. C. De*—for Appellant.

A. K. Ray—for Respondent.

Das, J.—The learned Deputy Collector was right in saying that there was no contract between the landlord and the tenants in this case to pay any definite rent for the disputed land ; but he was wrong in dismissing the suit on the ground that he had no jurisdiction to apportion the rent in a case of this nature. S. 139, Cl. (2) of the Chota Nagpur Tenancy Act provides that all suits and applications for the determination of the rent payable by any tenant for agricultural land shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of the Chota Nagpur Tenancy Act and shall not be cognizable in any other Court, except as otherwise provided in the Act.

The defendant, it is true, is not a raiyat but he is a tenure-holder, and if he is collecting rent in the respect of agricultural land, then clearly a suit for the determination of the rent payable by him comes expressly under the provision of S. 139 of the Chota Nagpur Tenancy Act. In order that S. 139, Cl. (2) may apply, it is not necessary that the defendant should be an agricultural raiyat, but it is necessary that the rent should be payable for agricultural land.

Now the learned Deputy Collector does not say that the land in respect of which the apportionment of rent is claimed is not agricultural land. Agricultural land has not been defined in the Chota Nagpur Tenancy Act. and it would appear that this omission is intentional.

It is pointed out by Mr. Rampini in his well known work on the Bengal Tenancy Act that the question of determining to what classes of land the Act should be applicable was felt to be a difficult one and so it was left to the Courts to overcome the difficulties involved in its solution.

We are informed that the record of rights shows that there are numerous raiyats in these villages from whom the defendant collects rent. If that be so, clearly the land is agricultural land. At all events, if it is land to which the Chota Nagpur Act applies, there is no reason to take the view that it is not agricultural land.

I would allow the appeal, set aside the order of the learned Deputy Collector, and remand the case to him for disposal according to law.

Adami, J.—I agree.

Case remanded.

A. I. R. 1926 Patna 528

ROSS AND MACPHERSON, JJ.

Raj Gopal Acharjya Goswami—Defendant—Appellant.

v.

Upendra Acharjya Goswami—Plaintiff—Respondent.

Appeal No. 1117 of 1923, Decided on 31st May 1926, from the appellate decree of the Dist. J., Manbhum Sambalpur, D/- 11th August 1923.

(a) *Decree—Setting aside—Fraud—Minor is equally bound by a decree as a major—Decree against minor properly represented—Fraud or collusion is the only ground for setting aside.*

An infant is bound by judgment as much as if he was of full age, unless gross laches or fraud and collusion appear in the *procheln ami*. In India the procedure in cases of gross laches is to apply for a review or, if the decree was ex parte to get the ex-parte decree set aside. If it be sought to set aside a decree obtained against an infant, properly made a party and properly represented in the case, and if it be sought to do this by a separate suit, then the plaintiff in such a suit can succeed only upon proof of fraud or collusion. [P. 529, C. 1, 2]

(b) *Chota Nagpur Tenancy Act, S. 258—Fraud is the only ground to remove the bar.*

Under S. 258 fraud and gross laches are not identical; and it is fraud, not gross laches, which removes the bar imposed by that section, i. e, so long as fraud, as distinct from gross negligence, is not established. S. 258 is a bar: 12 *Cal.* 69, *Rel. on.* [P. 529, C. 2]

S. M. Mullick and *S. N. Palit*—for Appellant.

S. C. Majumdar—for Respondent.

Ross, J.—The appellant contends that this suit was barred by the provisions of S. 258 of the Chota Nagpur Tenancy Act. The plaintiff-respondent brought the suit for a declaration that an ex-parte rent decree which had been obtained against him under the guardianship of his maternal uncle was invalid and inoperative. The ground on which the suit was brought was that there was a good defence open which was not taken, namely, that the holding was rent free and on the findings arrived at by the Courts below it must be taken that that was so. But S. 258 imposes an absolute bar against suits of this kind unless they are founded on fraud or want of jurisdiction. The question is whether it has been properly found that the ex-parte rent decree was obtained by fraud.

The findings of the Munsif were that the maternal uncle of the plaintiff was his lawfully constituted guardian and that he was not guilty of fraud or collusion, but that he was guilty of gross laches in conducting the defence. Dealing with S. 258 of the Act the Munsif said that 'that the law herein enacted contemplated that the judgment was obtained in an action, fought out adversely between two litigants, sui juris and at arm's length,' and that these elements were lacking in the exparte order in question. I do not know what authority the learned Munsif had for this statement: and the learned District Judge did not proceed on this ground. The learned Munsif further found that there was no reasonable distinction between the case of fraud and gross negligence since it equally jeopardized the interest of the minor. Finding the plaintiff's case established on the merits, he passed a decree in his favour.

The learned District Judge dealing with the plaintiff's allegation that his uncle was guilty of such gross negligence as amounted to fraud, said that his contention had been accepted by the learned Munsif and was the first point raised in the appeal. He then referred to certain decisions and followed those in *Lalla Sheo Churn Lal* v. *Ramnandan Dubey* (1) and *Punnayyah* v. *Rajam Viranna* (2) in which it was held that gross negligence in not defending where a valid defence is available amounts to fraud. He is of opinion that he should follow these rulings and hold that gross negligence amounts to fraud; and, dealing with the case itself, he found that

(1) [1895] 22 Cal. 8.
(2) A. I. R. 1922 Mad. 273=45 Mad. 425.

there was gross negligence and that the plaintiff was entitled to succeed on the merits.

The contention on behalf of the appellant is that there is no finding here that the ex-parte decree was obtained by fraud. I think this contention is sound. It can hardly be said that the District Judge has come to a finding of fact that there was fraud. It is true that the negligence may be so gross as to be evidence of fraud; and, if the District Judge had found that that was the case here he might have come to a positive finding that there had been fraud, although, in doing so, he would have had to set aside the finding of the Munsif that there was no fraud in the matter: that finding has not been dealt with at all. But in fact the learned District Judge has not taken this course. He has followed a decision which he thinks entitles him to say that gross negligence amounts to fraud. This is therefore, not a finding of fact.

It is difficult to see how negligence, however gross, could amount to a fraud. 'Negligence and fraud are in truth mutually exclusive conceptions; although the same facts may be evidence either of one or of the other'. The reason why gross negligence came to be treated as evidence of fraud or even equivalent to fraud was the historical reason that at first the Court of Chancery did not claim to deal with legal titles except in cases of trust, fraud and accident; and on the question of notice, they had to hold that while mere negligence would not affect the conscience, yet, acts of negligence were sometimes so gross and culpable that it could be inferred that the person concerned was deliberately shutting his eyes. In the circumstances, therefore, he was affected with notice of what he ought to have seen on the ground of fraud. Now, none of these considerations are present here. The question is a question of procedure. The learned District Judge has followed the decision in *Lalla Sheo Churn Lal* v. *Rambandan Dubey* (1) where it was held that there was no res judicata where the next friend of a minor plaintiff has been guilty of gross negligence in the original suit. Now this decision is not inconsistent with the law laid down in *Raghubar Dayal Sahu* v. *Bhikya Lal Misser* (3) where the question of procedure has been explicitly dealt with. Their Lordships there laid down that an infant is bound by judgment as much as if he was of full age, unless gross laches or fraud and collusion appear in the *prochein ami*; then the infant might open it by a new bill according to the Chancery practice; while in India the procedure in cases of gross laches was to apply for a review or, if the decree was ex-parte, to get the ex-parte decree set aside. Their Lordships distinctly laid down that if it be sought to set aside a decree obtained against an infant, properly made a party and properly represented in the case. and if it be sought to do this by a separate suit, I apprehend that the plaintiff in such a suit can succeed only upon proof of fraud or collusion. In this matter, therefore, fraud and gross laches, are not identical; and it is fraud, not gross laches, which removes the bar imposed by S. 258. It is argued on behalf of the respondent that where the infant has lost a valuabe property through the gross negligence of his guardian, he is entitled to bring a suit; but, in my opinion, the proper procedure was laid down in the decision in *Raghubar Dayal* v. *Bhikya Lal* (3) and so long as fraud, as distinct from gross negligence, is not established (and it has not been established or found as a fact in this case), S. 258 of the Chota Nagpur Tenancy Act is a bar.

I would, therefore, allow this appeal with costs and dismiss the plaintiff's suit with costs throughout.

Macpherson, J.—I agree.

Appeal allowed.

(3) [1886] 12 Ca.l 69.

A. I. R. 1926 Patna 529

DAWSON MILLER, C. J., AND FOSTER, J

Thirathman Jha and *others* — Plaintiffs—Appellants.

v.

Mt. Gunjeswari Kuer and *others* — Defendants—Respondents.

Second Appeal No. 52 of 1924, Decided on 10th June 1926, from a decree of the Dist. J., Darbhanga, D/- 4th October 1923.

Pardanashin lady—Liability under a deed executed by her — Execution by and explanation of document to her must be proved — When she is already aware of its nature, deed need not be explained to her.

Persons seeking to charge with liability under a deed pardanashin ladies have to prove not merely that they executed the document sued

upon, but also that they understood and appreciated the nature of the transaction which they were purporting to enter into; but it is not necessary in all cases to show that at the time when the document was executed the explanation was then given. Although it is usual and necessary that it should be read over to her at that time, it is certainly unnecessary that it should be explained to her when she is already well aware of the nature of the document.

[P 530 C 2; P 531 C 1]

C. C. Das and *Murari Prasad*—for Appellant.

S. Dayal, B. K. Prasad and *H. P. Sinha*—for Respondents.

Dawson-Miller, C. J.—The plaintiffs sued in this case to enforce a mortgage-bond executed on the 15th August 1907, by two brothers Surat Lal Das and Lachhuman Lal Das and the wife of a third brother, namely, Mt. Gunjeswari Kuer. The property mortgaged, it appears, was registered in the name of these three persons. The loan to secure which the mortgage was executed was a sum of Rs. 625 borrowed, it was said to pay off certain debts of one of the brothers and for the purposes of the family needs. The case of the plaintiffs was that at that time the two male executants of the bond and their brother, the husband of the female executant, were joint in estate and that this property which they mortgaged was presumably a part of the joint family property. The female defendant, Mt. Gunjeswari Kuari, entered a separate written statement in the suit and contended, amongst other things, that she never executed the bond at all; that she never borrowed any money from the plaintiffs nor was she in need of borrowing, and she claimed that her share in the property mortgaged, namely, one-third, was at all events not liable for the debt covered by the bond. Her case was that the parties were separate in estate at the date when the mortgage-bond was executed and that she, not being in need of money or in debt, had no necessity to join in the mortgage-bond hypothecating her interest in the property.

The Munsif before whom the case came for trial found in favour of the plaintiffs and passed a decree in their favour against each of the defendants and ordered the sale of the interest of each of them in the property. From that decision Mt. Gunjeswari appealed, and the main point urged before the District Judge on appeal was that, even accepting the plaintiffs' evidence, there was nothing to show that this mortgage-bond had been explained to the lady at the time when she executed it, or to show that she was aware of and thoroughly understood and appreciated its contents. Upon this part of the case the learned District Judge dealt with the evidence on behalf of the plaintiffs and came to the conclusion that there was no evidence on the plaintiffs' side that the bond was explained to the lady or that she understood that she was mortgaging her property. We have been referred to the evidence of the first witness for the plaintiffs and the statement of the learned District Judge which I have just referred to hardly appears to be borne out by the evidence given by that witness.

The learned Judge in criticising his evidence went so far as to say that in examination-in-chief this witness said nothing about the reading over of the bond. This is obviously a slip, because on looking at the witness' evidence it appears, at the end of his examination in chief, that he distinctly states that the bond was read out to the defendants and then adds: "The contesting Mt. was not fraudulently asked to sign the security bond." That, however, is a small matter because it is not disputed that in his cross-examination he dealt very much more fully with this question. But the main criticism of the learned Judge's finding is that it is based almost entirely upon a misapprehension of the real nature of the evidence given by the plaintiffs' witness and it is not correct to say that there is no evidence on the plaintiffs' side, that the lady understood that she was mortgaging her property. The learned District Judge seems to have assumed that unless it could be shown when the mortgage was actually executed, that it had not only been read over to the female executant but it had also been explained to her at that time, then she would not be liable under the mortgage. It is quite true that persons seeking to charge with liability under deeds of this sort, pardanashin ladies, have to prove, not merely that they executed the document sued upon, but also that they understood and appreciated the nature of the transaction which they were then purporting to enter into; but it is not necessary in all cases to show that at the time when the document was

executed the explanation was then given, for it is obvious that in many cases, for example, where the lady herself has been instrumental in bringing about the transaction which is given effect to subsequently by the execution of the document, she may be perfectly well aware of the contents of the document before she executes it and if she is, although it is usual and necessary that it should be read over to her at that time, it is certainly unnecessary that it should be explained to her when she is already well aware of the nature of the document.

Turning to the evidence in the present case, it appears from that of the first witness for the plaintiffs that he himself, if his evidence is accepted, had an interview with this lady on two occasions before the document was executed. The first occasion was about four days before the execution of the deed and the second occasion was the day before, and she told him at those interviews that she was in need of money and he asked her to register a mortgage-bond. She told him what the nature of her requirements was. She had to pay up a loan, she said, of Rs. 150 to repair her house and had to find money for cultivation and for other purposes. If this evidence is accepted it seems fairly clear that the lady knew before she actually signed the bond exactly what the nature of it was. The case put forward on her behalf at the trial was that when she executed this bond she did not know that it was a mortgage at all. She thought that she was merely executing some security bond. That story was not accepted in the trial Court and the learned District Judge says nothing about it but merely decided the case upon the ground that the plaintiffs had failed to produce sufficient evidence, or indeed any evidence, to show that this lady at the time when she executed the bond had it explained to her.

The result is that the learned Judge has arrived at his conclusion by omitting to consider the evidence which was given as to the lady's knowledge of the nature of the transaction under the misapprehension that no such evidence existed. I am not suggesting that the mere fact that he did not in terms refer to this evidence would be sufficient for sending it back for re-hearing, but in the present instance he has gone very much further than that; for he has stated that there is no evidence on the plaintiffs' side that this lady understood that she was mortgaging her property. Of course, if he thought that, it was clear that he was entitled to arrive at the conclusion at which he did, namely, that the bond was not valid as against her ; and that finding on his part, based as it was upon a misapprehension, for there was evidence on the plaintiffs' side to the fact which he mentions, was really the whole foundation of his judgment. For these reasons, it seems to me that the judgment cannot stand and must go back for further consideration and the Court will consider whether, in fact this lady first of all executed the bond at all, and, secondly, whether assuming she did execute it, she was aware of the nature of the transaction.

In remanding this case it must not be understood that this Court is necessarily taking a different view of the actual result which ought to be arrived at from that determined by the learned District Judge. It may be that the appellate Court when the case goes back to it may find many features in the evidence and in the document in the case which indicate that this lady did not really understand the nature of this document. It may be that he may find that she never executed it at all but all these are matters which must depend upon a review of the evidence before him.

We are not in a position to determine any of these questions: There are undoubtedly many suspicious facts appearing in connexion with this transaction if the other findings of the learned District Judge are to be accepted. At the same time the whole matter will be open to the lower appellate Court upon the rehearing of the appeal. Perhaps, I ought to add that in considering these questions the principles upon which the Courts in India ought to act are laid down at some length in the judgment of the Judicial Committee in the recent case of *Farid-un-nissa* v. *Mukhtar Ahmad* (1). The decision appealed from is set aside, and the case will be sent back to the Court of the District Judge for reconsideration upon the facts. The costs of this appeal will abide the result of the re-hearing.

Foster, J.—I agree.

Case sent back.

(1) A.I.R. 1925 P.C. 204=47 All. 768.

A. I. R. 1926 Patna 532

KULWANT SAHAY, J.

Jung Singh and *others*—Plaintiffs—Appellants.

v.

Dularchand Mahto and *others*—Defendants—Respondents.

Appeal No. 1161 of 1923, Decided on 17th June 1926, from the appellate decree of the Addl. Dist. J., Patna, D/- 15th June 1923.

Bengal Tenancy Act, S. 60—Registered and unregistered Thekadars—Claim by registered thekadar—Tenant cannot plead payment to unregistered thekadar.

Where the question arises between two sets of thekadars one of whom is registered and the other is not registered, it is not open to the tenant to plead payment to the unregistered thekadar in defence to a claim by the registered thekadar: 6 *P. L. J.* 658, *Rel. on.* [P 533 C 1]

Mohammad Hasan Jan—for Appellant.

N. C. Sinha and *B. C. Sinha*—for Respondents.

Judgment.—This is an appeal by the plaintiffs and it arises out of a suit for rent.

The rent was claimed for the period from 1326 to the 8-annas kist of 1328 F. S. The plaintiffs claim under a registered theca patta dated the 17th May 1919, executed by the 16 annas landlord who was the pro forma defendant in the suit, the theca being for a period from 1327 to 1335 F. S. This theca was preceded by an amal dastak dated the 15th of Asin 1326, granted by the 16 annas proprietor to the plaintiff No. 1 alone for the year 1326. The defence of the defendant-tenant was that the plaintiffs had no title as landlords; that one Shujait Ali held the village in which the holding in dispute is situated under a lease dated the 11th November 1914, granted by the proprietors for the years 1322-1330; that Shujait Ali was dead and his heirs were in possession; and that the rent for the years in suit had been paid to the heirs of Shujait Ali. The proprietor entered appearance and stated that Shujait Ali surrendered his lease in 1325, and thereafter the amal dastak and the theca patta were granted to the plaintiffs. The learned Munsif decreed that suit. On appeal the learned Subordinate Judge has set aside that decree and has dismissed the suit on the sole ground that the plaintiffs had failed to make out their title to sue.

On second appeal by the plaintiffs it is contended that the plaintiffs stand recorded in the Collectorate in Register D, and that under S. 60 of the Bengal Tenancy Act the tenant is not entitled to plead in defence to the claim of the plaintiffs, who have been registered under the Land Registration Act, that the rent is due not to the plaintiffs but to a third person.

In my opinion this contention is sound and ought to prevail. The learned Munsif referred to the fact that the plaintiffs' names appear in Register D. The learned Subordinate Judge makes absolutely no reference to this fact; he merely considers the question of the surrender by Shujait Ali and concludes that the plaintiffs had failed to prove the alleged surrender and, that, therefore, the theca of Shujait Ali still continues and that the lease to the plaintiffs was suspicious and could not, in any event, prevail against the lease granted to Shujait.

Having regard to the provisions of S. 60 of the Bengal Tenancy Act, I am of opinion that it was not open to the tenants to plead that the rent was not due to the plaintiffs but to the heirs of Shujait. On behalf of the respondents reliance has been placed upon *Durga Das Hazra* v. *Samash Akon* (1) and *Girish Chandra Chongdar* v. *Satish Chandra Sarkar* (2). Both of these decisions were, however, considered by this Court in *Nand Kuer* v. *Jodhan Mahton* (3), The decision in *Durga Das Hazra* v. *Samasa Akon* (1) was not followed, and the decision in *Girish Chandra Chondar* v. *Satish Chandra Sarkar* (2) was distinguished, and it was held by this Court that a person registered under the Land Registration Act was entitled to recover rent from the tenants without any further proof of title, and that the tenants were not entitled to plead that the registered proprietor was not in fact the proprietor and that the rent was due to a third person.

It is contended on behalf of the respondents that a thecadar is not required under the provisions of the Bengal Land Registration Act to have his name regis-

(1) [1900] 4 C. W. N. 606.
(2) [1907] 12 C. W. N. 622.
(3) [1921] 6 P. L. J. 658=(1921) P. H. C. C. 203 =61 I. C. 386=2 P. L. T. 337.

tered, and that Shujait Ali as thecadar could recover rent from the tenants even if he was not registered under the Land Registration Act, and that the proprietor who was registered and who had granted the theca to Shujait Ali could not be heard to say that payment of rent by the tenant to Shujait Ali was not a payment which he was bound to recognize inasmuch as Shujait Ali was not recorded. In my opinion this contention has no force. It is true that a thecadar is not required to have his name registered under the Land Registration Act ; but if a thecadar gets his name registered, it is not open to the tenant to plead that the rent is payable to another thecadar who has not got his name registered. The registered proprietor assigns his right to recover rent from tenants to the thecadar, and a payment of rent to the thecadar is in effect a payment to the proprietor and, therefore although a tenant can successfully plead that a payment of rent to the thecadar of the proprietor was a good payment, yet when the question arises between two sets of thecadars one of whom is registered and the other is not registered, I am of opinion that it is not open to the tenant to plead payment to the unregistered thecadar in defence to a claim by the registered thecadar.

As I have said the learned Subordinate Judge has not considered the effect, of the registration of the plaintiffs' names in Register D. The parties do not agree as to the date when the plaintiffs were registered. According to the plaintiff-appellants they were registered on the 21st March 1920, which corresponded to the 16th of Chait 1327, and payment is alleged to have been made to the heirs of Shujait Ali under a compromise in August 1920. It is, therefore, necessary to find as to when the plaintiffs were registered in the Collectorate under the Land Registration Act, and also as to whether any payment was made by the defendants to the heirs of Shujait for any portion of the year in suit prior to the registration of the plaintiffs' names in the Collectorate.

The decree of the learned Subordinate Judge must, therefore, be set aside and the case remanded to him for rehearing. He must consider the question as to whether the plaintiffs are recorded under the Land Registration Act, and if so when they were recorded, and whether any payment was made by the defendants to the heirs of Shujait for any of the years in suit before the date of such registration. A decree will be made in favour of the plaintiffs for such arrears of rent as were not paid to the heirs of Shujait before the date of the registration of the plaintiffs. Costs will abide the result.

Case remanded.

✻ A. I. R. 1926 Patna 533

ADAMI AND KULWANT SAHAY, JJ.

Bhupendra Narain Mander—Appellant.

v.

Janeswar Mander and *another*—Respondent

Misc. Appeal No. 17 of 1925, Decided on 1st July 1925, from an order of the Dist. J., Bhagalpur, D/- 23rd December 1924.

✻ *Civil P.C., O. 21, R. 11—Heading and column 8 blank—No correct entry in column 6—No list of properties—Sheet No. 2 blank—No copy of decree attached—Names of decree-holders not given—Application on last day of limitation—Time given for supplying defects—Application is barred.*

Where an execution application was defective in very many ways, that is, the heading was blank and so was column 8, column 6 was not correctly entered and no list of the properties sought to be sold was given ; Sheet No. 2 was blank and there was no copy of the decree attached to the application, column 10 did not show a clear statement of the petition, the names of the decree-holders were not given, and time was given to the applicant for supplying the defects without fixing any date and when the defects were supplied, it was found that the original application was made on the last day of limitation.

Held : that the application was time-barred [P. 534 C.1]

A. P. Upadhaya—for Applicant.

S. C. Mazumdar and *Nawadwip Ch. Ghose*—for Respondents.

Adami, J.—This is an appeal from an order of the District Judge of Bhagalpur, setting aside the order of the Munsif of Madhipura, rejecting an application for execution of a decree. It appears that the decree of which execution was sought was passed on the 28th October 1911, and time, therefore, would expire on the 28th October 1923. On the 13th

November 1923, the application was filed. It would be in time on that date because that date was the first date after the civil Court vacation. The application, however, was defective in very many ways ; the heading was blank and so was column 8, column 6 was not correctly entered and no list of the properties sought to be sold was given ; Sheet No. 2 was blank and there was no copy of the decree attached to the application ; column 10 did not show a clear statement of the petition, the names of the decree-holders were not given. The Munsif passed an order on the 13th November 1923 : "Petition returned for compliance of the omissions pointed out." No date was given for compliance. On the 19th November, the application was put in again, but it was found that all the defects noted had not been removed, and the Munsif passed an order on that date that the decree-holder must remove all the errors by the 4th of December. On the 7th December, the order sheet shows that the number and date of the previous execution proceedings had not been correctly given ; it was noted that the decree appeared to be time-barred, that is to say, I suppose, that the application was time-barred. The Munsif ordered that the decree-holder should show cause by petition why the application should not be rejected, and, if he failed, the petition would stand time-barred. The application was returned for compliance by the 17th December. The next order on the order sheet is not dated, but it is to the effect that the order of the 7th December must be complied with by the 17th of January, and it seems that some objection was taken that notice of the order of the 7th January had not been given to the pleader. No petition was put in on the 17th January 1924, but on the 18th January, the decree-holder filed a petition showing cause why the application should not be found to be time-barred and excused his failure to file the application on the 17th on the ground that he could not get any stamp on that date. The next order on the order-sheet is dated the 28th January 1924 and is "register the petition." This entry was made by a clerk without orders from the Muusif, and the Munsif paid no attention to it. He found that the application was beyond time and time-barred.

An appeal was made to the District Judge and he held that, as the Munsif had given no date on the 13th November 1923, for compliance with his order but on the 19th November gave time till the 4th December for compliance, it must be held that he had allowed time till the 4th of December and thus had saved the application from being time-barred. The learned District Judge admits that, even on the 4th December, the application was still defective, but he decided, on the basis of various rulings which he cited, that the defects on the 4th December were not material defects and, therefore, it must be held that time had been extended and the order had been complied with by the 4th December. He, therefore, admitted the application.

In my opinion, the application should be held to be time-barred. It is clear that at the last moment the decree-holder put in a piece of paper with certain facts written on it and certain prayers, but that application was not an application for execution such as is required by law. It was very flagrantly defective ; it was treated as being of no avail and it was returned to the decree-holder to be completed in proper form. At that time the question whether the application was time-barred could not be considered, because the facts stated in the application did not afford the necessary information : it was in fact treated as no application at all. On the 19th November time was given until the 4th December and it was then first noticed that the application appeared to be time-barred and the decree-holder was called upon to point out any reasons why it should not be condemned as time-barred.

In the case of *Salimulla Bahadur* v. *Sainaddi Sarkar* (1), a decree-holder applied for execution of his decree and, before the period of limitation had arrived, he applied to the Court under O. 21, R. 17 to be allowed to file a list of immovable properties. The Court simply made the order 'permitted" and did not fix any time within which the list was to be filed. The list was subsequently filed after the period of limitation had already run. It was there held that the proceedings in execution were barred by limitation inasmuch as the provisions of O. 21, R. 17 sub-R. (2) were not complied with and the neces-

(1) [1914] 18 C. L. J. 538=22 I. C. 337.

sary formalities were not carried out within the time prescribed by law. In that case as in this case it was not brought to the notice of the Court at the time the application was made that there was any question of limitation. The failure to file a list of properties was a material defect and by the time that the order was passed on the 19th November the application was already time-barred.

The learned District Judge has cited various cases where various defects were held to be individually not material. But in the present case, the application was defective in nearly every way and many of the defects were material. The decree-holder in the later stages seems to have continued to delay and his excuse that he could not file the petition on the 17th January, because he could not get the stamp, was not a good one. I can see no good reason for considering that it can be held that an application for execution was made within time and in my opinion the application should be held to be time-barred.

The appeal should be allowed with costs, the order of the learned District Judge set aside and that of the Munsif restored.

Kulwant Sahay, J.—I agree.

Appeal allowed.

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* A. I. R. 1926 Patna 535

ROSS AND KULWANT SAHAY, JJ.

Emperor

v.

Govind Singh—Accused.

Jury Reference No. 2 of 1926, Decided on 2nd March 1926, made by the S. J., Patna, on 20th January 1926.

* (a) *Penal Code, S. 464—Antedating document is not necessarily forgery.*

Mere antedating of the document would not necessarily make it a false document unless it operates or could operate to prejudice anyone. [P 536 C 1]

(b) *Criminal P. C., S. 307—Verdict of jury will not be upset unless it is unsupported by evidence.*

The High Court will not interfere in a reference under S. 307 against the verdict of the jury, unless it is of opinion that the verdict of the jury could not be supported by the evidence on the record. [P 536 C 2]

H. L. Nandkeolyar—for the Crown.

Hasan Imam and *R. V. Prasad*—for Accused.

Kulwant Sahay, J.—This is a reference made by the Sessions Judge of Patna under S. 307 of the Code of Criminal Procedure on a disagreement with the verdict of the majority of the jury finding the accused not guilty.

The charge against the accused was of using a forged document in a Civil litigation under S. 471 read with S. 467 of the Indian Penal Code. The document alleged to have been forged was a hand-note executed by one Umrao Singh in favour of the accused Gobind Singh for a sum of Rs. 500 bearing date the 20th of Chait 1329, which corresponds with the 2nd of April 1922. Gobind Singh instituted a suit on the basis of this hand-note in the Court of the Munsif at Barh on the 17th of May 1924, and the hand-note was filed along with the plaint.

The defendant Umrao Singh filed a written statement wherein he denied his liability under the hand-note, and denied the execution thereof. It appears that upon an application of the defendant, Umrao Singh the hand-note was sent to the stamp office at Calcutta for information as to whether the paper upon which the hand-note was executed had been issued on or before the 2nd of April 1922. The stamp office gave a reply saying that the paper upon which the hand-note was written had not been issued on that date. The plaintiff, however, appears to have taken no steps in the suit, and the suit was dismissed for default on the 11th of May 1925. The learned Munsif, on the same day made a complaint against the plaintiff, Gobind Singh, under S. 476 of the Code of Criminal Procedure. After the dismissal of the suit, Gobind Singh filed a petition for restoration of the suit on the allegation that there had been a compromise between him and Umrao Singh; and, in accordance with that compromise, Umrao Singh had executed a fresh hand-note for a sum of Rs 696-8-0, and the agreement between the parties was that none of them would take any steps in the suit and allow it to be dismissed for default. Gobind Singh produced this second hand-note alleged to have been executed by Umrao Singh. An expert was examined and his evidence was that the thumb-impression upon the second hand-note as well as that upon the original hand-note of the 20th Chait, 1329, were both the thumb-impressions of Umrao Singh. The

learned Munsif, however, dismissed the application for restoration, and Gobind Singh was prosecuted for an offence under S. 471 read with S. 467 of the Indian Penal Code.

At the trial the only evidence given was that of the head-assistant of the stamp office, who proved that the paper upon which the hand-note had been written had not been issued in April 1922; of the pleader, Babu Kandji Sahai, who filed the plaint and application for restoration of the suit on behalf of Gobind Singh; and of Gouri Dayal, a clerk of the pleader Kandji Sahai, who proved that he had written the plaint. The prosecution story is that the hand-note bears the genuine thumb-mark of Umrao Singh but that the paper was a blank paper upon which Umrao Singh had put his thumb impression and had made it over to Kashi Singh in order to obtain from him settlement of certain diara lands. Kashi Singh is the karpardaz of Gobind Singh; and Gobind Singh's case is that the loan was advanced to Umrao on the intervention of Kashi Singh and that the money was actually advanced on the 20th of Chait 1329, but that the hand-note was executed on a subsequent date as Umrao Singh failed to repay the loan of Rs. 500 which had been advanced to him; and that although the hand-note was executed on a subsequent date, yet the date of the original loan was entered therein so that he might not lose the interest on his money.

Now there is absolutely no evidence to show that a blank paper bearing the thumb-impression of Umrao Singh had been made over by him to Kashi Singh. There is evidence in the case to show that the hand-note in question bears the genuine-thumb impression of Umrao Singh. The presumption must therefore be that the hand-note was a hand-note executed by Umrao Singh. The only thing that is certain upon the evidence is that the document had been antedated; but this antedating of the document would not necessarily make it a false document. There is a total want of evidence in the present case to show that the antedating was done by Gobind Singh with the object of making any wrongful gain to himself or causing wrongful loss to Umrao Singh. The element of dishonesty is wanting in the present case. Moveover the fact of the second hand-note having been given by Umrao Singh goes to show that the previous hand-note had been executed by him. In any event, upon the evidence as it stands, it cannot be said that the view taken by the majority of the jury was a view which was incompatible with the evidence in the case; and it is clear that this Court will not interfere in a reference under S. 307 of the Code of Criminal Procedure against the verdict of the jury, unless, this Court is of opinion that the verdict of the jury could not be supported by the evidence on the record. In the present case the evidence is, as I have said, such that the view taken by the jury cannot be said to be an unreasonable view of the case.

In these circumstances, I am unable to accept the reference, which must be discharged; the verdict of the jury will be accepted, and the accused must be acquitted and released.

Ross, J.—I agree that this reference should be discharged. It is admitted that the document bears the thumb impression of Umrao Singh, the debtor, and therefore, in the absence of evidence to explain this fact, the hand-note must be taken to have been executed by him. It bears date the 20th of Chait, 1329, that is, the 2nd of April 1922. It is proved that the paper on which it was written was not in existence then; and it follows that the creditor antedated this hand-note. The question is, whether this is forgery. In my opinion, it is not. The conditions under which the antedating of a document by its executant will be forgery are discussed in *Reg* v. *Ritson* (1). There the Judges referred to the definition of forgery in Bacon's Abridgment where it was said:

> The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another which he is in no way privy to, or, at least, to make a man's own act appear to be done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and in justice it ought not to have.

That was a case where a conveyance executed subsequently to an equitable mortgage and an assignment of the same

(1) [1869] 1 C. C. 200=39 L. J. M. C. 10=21 L. T. 437=18 W. R. 73=11 Cox. C. C. 352.

property was made to bear a date anterior to these transactions in order to give it priority over them. This was held to be forgery on the ground that by this antedating of the document a false operation was given to it. Blackburn, J., in his judgment said:

In this case the false statement is in the date which, in ordinary cases, would not be material; but here, by extrinsic evidence, the false date was shown to be very material, and the forged deed would have passed the estate to another person than the prosecutor if the deed had been executed on the day it bears date.

Their Lordships relied upon an old decision, *Salway* v. *Wale* (2), which was a similar case; but in that decision it was added that antedating is not forgery if there is not a mesne interest in any third person who is prejudiced thereby. In the present case there is nothing to show that the antedating of this document had, or could have had, any operation to the prejudice of any one. The necessary element of fraud or dishonesty is, therefore, wanting.

I, therefore, think that the decision of the jury was correct and that the prisoner must be acquitted and released.

Reference discharged.

(2) [1519-1621] Moo. K. B. 655=72 E. R. 819.

✻ A. I. R. 1926 Patna 537

DAS AND ADAMI, JJ.

Bashist Narayan Singh—Defendant—Appellant.

v.

Bindeshwary Prasad Singh and *others*—Plaintiffs—Respondents.

First Appeal No. 49 of 1926, Decided on 7th July 1926, from a decision of the Sub-J., Darbhanga, D/- 18th February 1925.

✻ *Hindu Law—Partition—Mother takes equal to sons, but only half as much if she has got income producing stridhan.*

According to all the leading authorities of the Mitakshara School, both mothers and stepmothers are equal sharers with the sons: 8 *Cal.* 537 and 47 *I. C.* 204, *Foll.*; 16 *Cal.* 758 *P. C., not Foll.* She is, however, entitled to only half as much if she has got stridhan, but it cannot be said that when the text-writers lay down that the possession of stridhan should by itself reduce the claim of the widow to one-half, they meant to include ornaments within the term. A share given to a widow on partition is in lieu of maintenance, and it is difficult to understand how a widow can possibly maintain herself out of ornaments. Stridhan in the text clearly means stridhan capable of producing an income.

[P. 538, C. 1 & 2]

Sultan Ahmed, *K. P. Jayaswal* and *Janak Kishore*—for Appellant.

N. N. Sinha and *B. P. Sinha*—for Respondents.

Das, J.—This appeal arises out of a suit for partition instituted by the respondents against the appellant. One Parmeswar Narain Singh died in January 1923, leaving one son by his deceased wife and a widow and three minor sons by her. The plaintiffs are the sons of Parmeshwar by his second wife, who is Defendant No. 2 in this suit. His son by his deceased wife is the defendant-appellant. The plaintiffs are the minor sons and are represented in the record of this suit by their maternal uncle as their next friend.

Three material points were taken in the written statement: first, that the suit is not for the benefit of the minor plaintiffs; secondly, that the parties originally came from Oudh and that according to custom

partition takes place on the basis of Patni Bhag and as such the defendant is entitled to a share equal to half of the whole property, and the other half should go to the plaintiffs and their mother;

and, thirdly, that the widow of the deceased is not entitled to a share out of the whole estate. The learned Subordinate Judge has decided all these points against the defendant and has given the plaintiffs a decree substantially as claimed by them. He has also held that Defendant No. 2 is entitled to a share equal to that of each of the sons.

So far as the first point is concerned, I have no doubt whatever that the suit is for the benefit of the minors. The defendant is actually in possession of the entire estate and he has put forward a title to a moiety of the estate. As I shall presently show, there is not the slightest foundation for the claim put forward on behalf of the defendant. The parties are not on good terms and I have no doubt whatever that the plaintiffs will suffer considerable loss if the estate is left in the hands of Defendant No. 1.

So far as the second point is concerned the case of the defendant appears to be that under some custom he takes a moiety of the estate being the only son of one of the wives of the deceased and that the plaintiffs being the sons of the other

wife as between them take a moiety of the estate. The defendant seems to base his case on some custom recognized in Oudh; but no such custom has been established. The learned Subordinate Judge has dealt with this matter and, in my opinion, the conclusion at which he has arrived is right and must be affirmed.

The last point raised on behalf of the defendant in the written statement is settled by authorities which are binding on this Court. The contention of the appellant is that the mother on partition is entitled to a share only out of her own son's share. This is no doubt the law in families governed by the Bengal School of Hindu Law: See *Hemangini Dasi* v. *Kedarnath Kundu Chaudhury* (1). It was contended before us that although that case was a case of Dayabhaga, still the decision of the Judicial Committee is of general application and applies to Mitakshara family. I am unable to accept this contention as well founded. In dealing with the case the Judicial Committee expressly referred to the texts which are binding in the Bengal School of Hindu Law. They did not deal with Mitakshara texts and I am unable to hold that that decision should govern a case under the Mitakshara Law.

The leading case applicable to Mitakshara is that of *Damodar Misser* v. *Senibutty Misrain* (2). The decision was based on the Mitakshara, Chapter 1, S. 7, verse 1, where it is said that

> of heirs dividing after the death of the father let the mother also take an equal share.

It was conceded that the text left it in doubt whether the term 'mother' included 'step-mother'; but Mr. Justice Mitter who had a profound knowledge of the Hindu Law, examined the various texts which are of authority in the country governed by the Benares School of Hindu Law and came to the conclusion that

> according to all the leading authorities of the Mitakshara School, both mothers and step-mothers are equal sharers with the sons.

The decision of Mr. Justice Mitter has been consistently followed: see *Damodardas Maneklal* v. *Uttamram Maneklal* (3); *Mathura Prasad* v. *Deoka* (4); *Harnarain* v. *Bishambhar Nath* (5); *Subha Raut* v. *Manla Rautuin* (6). The last mentioned decision is of this Court and is binding on us. I hold that the decision of the learned Subordinate Judge is right and must be affirmed.

A new point was taken before us and is to the effect that as the widow has already received stridhan from her husband her share should be reduced to half the share of the son. The argument is founded on the text of Mitakshara as contained in Chapter 1, Section 7, verse 2, which is as follows:

> Of heirs making a partition after the decease of the father, the mother shall take a share equal to that of her son; provided no stridhan had been given to her. But, if any had been received by her, she is entitled to half a share, as will be explained.

The point was, however, not taken in the written statement and no issue was framed on this point by the learned Subordinate Judge. Mr. Jayaswal, however, relies upon the finding of the learned Subordinate Judge to the effect that there are ornaments belonging to the widow which cannot be the subject-matter of the partition. It appears that the defendant claimed that the ornaments should be partitioned between the parties. The learned Subordinate Judge held that those ornaments were the personal properties, namely stridhan of Defendant No. 2 and could not be held to be joint family properties. I am willing to accept that the widow is in possession of certain ornaments which were given to her by her husband. The value of these ornaments has not been ascertained and we are unable to say what their value is. But apart from any other consideration, I do not think that when the text-writers lay down that the possession of stridhan should by itself reduce the claim of the widow to one-half, they meant to include ornaments within the term. A share given to a widow on partition is in lieu of maintenance and it is difficult to understand how a widow can possibly maintain herself out of ornaments. Stridhan in the text clearly means stridhan capable of producing an income. I am accordingly of opinion that the contention of Mr. Jayaswal must be overruled.

I would dismiss this appeal with costs.

Adami, J.—I agree.

Appeal dismissed.

(1) [1889] 16 Cal. 758 = 16 I. A. 115 = 5 Sar. 374 (P. C.).
(2) [1882] 8 Cal. 537.
(3) [1890] 17 Bom. 271.
(4) [1890] A. W. N. 124.
(5) [1916] 38 All. 83 = 31 I. C. 907 = 13 A. L. J. 1129.
(6) [1918] 47 I. C. 201.

A. I. R. 1926 Patna 539

DAS AND ADAMI, JJ.

Kokil Chand Ram and *others*—Plaintiffs—Appellants.

v.

Banbahadur Singh and *others*—Defendants—Respondents.

Appeal No. 165 of 1924, Decided on 21st May 1926, from the original decree of the Addl. Sub-J, Hazaribagh, D/- 30th June 1924.

(a) *Contract Act, S. 19—Completed contract—Setting aside—Inadequate consideration amounting to fraud is ground for setting aside—Contract.*

A Court will set aside a completed transaction if it is shown that the consideration was so inadequate as to lead to the inference of fraud or undue influence, but the inadequacy of consideration must be apparent and must not be left to be spelled out by dexterous arguments as to value. In other words, in order to enable the Court to set aside a completed transaction, the thing must speak for itself. [P. 542, C. 1]

(b) *Contract Act, Ss. 16 and 17—Inadequate consideration may lead to inference of fraud or undue influence.*

The fact that a transaction was at an undervalue is evidence from which it may be inferred that the party thereby benefited was guilty of fraud or undue influence. [P. 541, C. 2]

(c) *Specific performance—Relief of specific performance is discretionary with Court, but Court has no discretion to refuse relief based on completed contract.*

The Court may refuse to enforce specific performance of a contract at suit of a party who has innocently made a representation to the other in cases where the party misled would have no right to rescind the contract. But the position is entirely different where a party comes to Court and seeks relief on completed transactions. There is no longer any discretion in the Court to refuse to give the plaintiff the appropriate relief unless it is established that at law he is not entitled to the relief. [P. 541, C. 2]

P. C. Manuk and *B. C. De*—for Appellants.

Hasan Imam, Sukti Khanta Bhattacharji, S. N. Bose and *Dhyan Chandra*—for Respondents.

Das, J.—This appeal arises out of a suit instituted by the appellants for recovery of possession of certain properties on the footing of certain deeds executed by Defendant No. 1 in favour of the plaintiffs, and for delivery of those deeds. The deeds referred to are (1) a ticca patta executed by Defendant No. 1 in favour of the plaintiffs on the 20th June 1920; and (2) a usufructuary mortgage bond executed by the same defendant in favour of the plaintiffs on the 30th June 1920. The execution of the documents was admitted, but the suit was resisted on the ground that there was undue influence and fraud exercised on the defendant by the plaintiffs. The learned Subordinate Judge rejected the case of undue influence and fraud, but he dismissed the plaintiffs' suit on the ground that Defendant No. 1 was in some way misled into entering into the transactions in question and that he made a bad bargain. The plaintiffs being dissatisfied with the judgment of the learned Subordinate Judge have appealed to this Court.

In order to understand the case it is necessary to deal with certain antecedent transactions. Defendant No. 1 is the Raja of Palganj, Defendant No. 2 is his wife: Defendant No. 3 is his son and Defendant No. 4 is a junior member of the family, in possession of certain khorposh properties which were the subject-matter of certain transactions between him and the plaintiffs. There were two sets of antecedent transactions which it was the object of the transactions in suit to extinguish: first, transactions between the plaintiffs and Defendant No. 2: and, secondly, transactions between plaintiffs and Defendant No. 4. On the 21st March 1910, Defendant No. 2 borrowed Rs. 2,000 from the plaintiffs and executed a hand-note in their favour. On the 6th May 1910, she borrowed another sum of Rs. 200 from them and executed another hand-note in their favour. On 14th January 1912, she executed two mortgages in favour of the plaintiffs; one for Rs. 5,000 and the other for Rs. 1,500. The mortgage for Rs. 5,000 was to pay off the principal and interest due to the plaintiffs on the two hand-notes. The mortgage for Rs. 1,500 was for cash advance made that day. These were all the transactions between the plaintiffs and Defendant No. 2. As between the plaintiffs and Defendant No. 4 there were the following transactions: On the 1st April 1916, Defendant No. 4 borrowed Rs. 11,898 from the plaintiffs and executed a mortgage in their favour in respect of his khorposh properties. On the 30th April 1917, he borrowed Rs. 4,800 from the plaintiffs and executed another mortgage-bond in their favour. The execution of the documents in respect of these antecedent transactions was admitted in

the written statement, but it was contended that the full consideration was not paid by the plaintiffs. It is to be noted that the defendants did not say in their respective written statements how much was actually received in respect of those transactions and they did not venture to come to the witness-box to contradict the case of the plaintiffs. The learned Subordinate Judge has found that the full consideration was paid in respect of all those transactions; and the finding of the learned Subordinate Judge on this point has not been challenged before us.

In order to wipe out all the transactions just narrated, a fresh arrangement was come to between the parties. It appears that over Rs. 25,000 was due to the plaintiffs from Defendant No. 4 on the mortgage-bonds of the 1st April 1915, and the 30th April 1917. The plaintiffs assigned these mortgage-bonds to Defendant No. 3 for a consideration of Rs. 25,000. The case of the plaintiffs on this point is that Defendant No. 1 who, as I have said, is the Raja of Palganj, was anxious to secure the properties covered by the transactions of the 1st April 1915, and the 30th April 1917, for his son, and he accordingly took an assignment of these mortgages for the benefit of his son, Defendant No. 3. He was, however, unable to pay the sum of Rs. 25,000 to the plaintiffs. There was also a large sum of money due to the plaintiffs from Defendant No. 2 on the two transactions of the 14th January, 1912. To discharge the liability of Defendant No. 2 and also to satisfy the claim of the plaintiffs for Rs. 25,000 as the consideration for the deed of assignment in respect of the mortgages by Defendant No. 4 in favour of the plaintiffs, the Defendant No. 1 executed two documents in favour of the plaintiffs; first, a ticca lease of 10 villages for 30 years; and, secondly, a usufructuary mortgage-bond in respect of his right to the rents in regard to 22 villages from 1921—1935. The ticca lease was executed on the 20th June 1920. The premium payable by the plaintiffs was Rs. 8,500 and the rent fixed in the lease was Rs. 925-15-0 payable in instalments with interest at 2 per cent. per month on all arrears. The sum of Rs. 8,500 payable by the plaintiffs was in fact not paid, and was set off against the claim of the plaintiffs as against Defendant No. 2 whose liability was assumed by Defendant No. 1. The usufructuary mortgage-bond was executed on the 30th June 1920. The consideration for this mortgage-bond was Rs. 25,000 which was not paid by the plaintiffs but was set off against what was due by Defendant No. 1 to the plaintiffs on the deed of assignment of the 30th June 1920. The result of the transactions of the 20th June 1920, and the 30th June 1920, respectively was as follows:

(1) Defendant No. 4 was no longer liable to the plaintiffs but became liable to Defendant No. 3 on the mortgage-bonds executed by him on the 1st April 1915 and the 30th April 1917, respectively.

(2) Defendant No. 3 was liable to pay Rs. 25,000 to the plaintiffs on the deed of assignment of the 30th June 1920 but that liability was discharged by Defendant No. 1 giving a usufructuary mortgage of certain villages to the plaintiffs.

(3) Defendant No. 2 was discharged from her liability to the plaintiffs in respect of her mortgages, the claim of the plaintiffs being satisfied by the execution of the ticca lease of the 20th June 1920.

Although the documents were executed on the 20th June 1920, and the 30th June 1920 respectively they were not registered till the 14th August 1920. It appears that pending the registration of the documents, an account was submitted by the plaintiffs to the defendant showing how the matter stood as between them and the defendants. This account is Ex. 15 and is printed at page 57, part 3 of the paper-book. It shows that Rs. 39,674-8-0 was due to the plaintiffs on the earlier transactions to which was added the sum of Rs. 1,000 for costs of stamps, etc. making a total of Rs. 40,874-8-0. Rupees 5,000 was wholly given up by the plaintiffs and Rs. 8,500 was shown as realized on account of the premium on the ticca lease of the 20th June 1920, and Rs. 26,700 was shown as realized on the usufructuary mortgage-bond of the 30th June 1920, though as a matter of fact Rs. 25,000 and not Rs. 26,700 was payable by the plaintiffs to the defendant as the premium on the usufructuary mortgage bond. In other words, the plaintiffs gave up another sum of Rs. 1,700. They showed Rs. 40,200 as having been realized by the ticca lease

and usufructuary mortgage-bonds as against the sum of Rs. 40,874-8-0 due by the defendant to the plaintiffs. There was still a balance of Rs. 674-8-0 which Defendant No. 1 agreed to pay later on. This account sheet waa signed by the defendant on the 13th August 1920 and thereafter on the 14th August 1920. All these documents, namely, the ticca lease of the 20th June 1920 the deed of assignment of the 30th June 1920 and the usufructuary mortgage-bond of the 30th June 1920 were registered in accordance with law. Defendant No. 1 however, refused to make over these registered documents to the plaintiffs, and declined to make over possession of the properties covered by those documents. The plaintiffs, therefore, brought the suit out of which this appeal arises for possession of the properties on the completed transactions on the 20th June 1920, and on the 30th June respectively.

The learned Subordinate Judge entirely misunderstood the scope of the suit. He thought that the suit was one for specific performance of a contract and he took the view that he had a discretion to refuse specific performance, if he considered that the defendant had made a bad bargain. He found that consideration passed in respect of the earlier transactions; he found that no undue influence was proved in respect of the earlier transactions into which Defendant No. 2 entered; but he thought

> it was not at all a good bargain for the defendant to make provision for his son by encumbering his otherwise encumbered estate.

He took the view that Defendant No. 1 did not understand the account, Ex. 15, and he says that

> it is not unreasonable to suppose that the Defendant No. 1 was misled into executing those documents.

It may be pointed out that Defendant No. 1 did not venture to come to the witness-box and in the absence of any explanation by him, it was not open to the learned Subordinate Judge to take this view of the evidence. His final view is that.

> it is impossible to conceive of a better example of one sided affair and very bad bargain for the Defendant No. 1.

In thir view he thought that it was open to him to refuse specific performance of the contract. As I have already said, the learned Subordinate Judge has misconceived the nature of the plaintiffs' suit which is not for specific performance of a contract but for relief on the footing of completed transactions. It is quite true that any misrepresentation whether fraudulent or innocent which is sufficient to avoid a transaction is a good defence to proceedings, against a party misled for the specific performance of the contract. It is also true that the Court may refuse to enforce specific performance of a contract at suit of a party who has innocently made a representation to the other in cases where the party misled would have no right to rescind the contract. But this is owing to the discretionary nature of the relief of ordering specific performance, and to the fact that, in granting or withholding this remedy, the Court may have regard to considerations of unfairness or hardship, and as to the party's conduct which would have no weight at law. But the position is entirely different where a party comes to Court and seeks relief on completed transactions. There is no longer any discretion in the Court to refuse to give the plaintiff the appropriate relief unless it be established that at law he is not entitled to the relief. Fraud and undue influence and fraudulent misrepresentations, if established, are good grounds for refusing the plaintiff the appropriate relief even where the matter has passed from the domain of contract to that of conveyance. But it is conceded that no such case has been established by the defendants. Mr. Hasan Imam, however, contends that there is such inadequacy of consideration in this case, that although there is no positive evidence of fraud, the Court will presume that the transactions were the result of an imposition on the defendant. It is well established that the fact that a transaction was at an undervalue is evidence from which it may be inferred that the party thereby benefited was guilty of fraud or undue influence and that where it is sought to set aside a sale on these grounds the inadequacy of the consideration given may possibly be so gross as to leave room for no other inference than that the bargain was obtained by undue influence or fraud. Mr. Hasan Imam who has argued this case on behalf of the respondents with conspicuous fairness has put his whole case on this basis. He contends that

the consideration is so grossly inadequate that we ought to presume that the transactions were the result of undue influence exerted by the plaintiffs on Defendant No. 1.

I now proceed to consider whether the consideration is so grossly inadequate as to give rise to the inference of fraud or undue influence. In considering this matter we have to distinguish between transactions of Defendant No. 2 and those of Defendant No. 4. (His Lordship the discussed the evidence and proceeded) The position, therefore, is that on the 20th June 1920, the date of the ticca patta, Defendant No. 2 had a complete title to the property which was the subject-matter of her mortgage. It is quite true that at the date of her mortgages she had only a lease for a number of years, but she represented to the plaintiffs that she was authorized to transfer the village to them and professed to transfer it for consideration. That being so, such a transfer would operate on the interest which Defendant No. 2 acquired in such property subsequently. It is not necessary to refer to the authorities on the point: it is sufficient to say that S. 43 of the Transfer of Property Act embodies the principle which has been accepted in decisions far too numerous to mention. Then dealing with the transactions of Defendant No. 4 his Lordship continued. I entirely agree that a Court will set aside a completed transaction if it is shown that the consideration was so inadequate as to lead to the inference of fraud or undue influence, but the inadequacy of consideration must be apparent and must not be left to be spelled out by dexterous arguments as to value. In other words, in order to enable the Court to set aside a completed transaction, the thing must speak for itself. I am of opinion that it has not been shown in this case that there is such inadequacy of consideration as to lead to the inference of fraud or undue influence.

I hold that there is no defence to the suit which should have been decreed by the learned Subordinate Judge. I would allow the appeal, set aside the judgment and the decree passed by the Court below and give the plaintiffs a decree in terms of prayers 1—5. The plaintiffs are also entitled to their costs both in this Court and in the Court below as against Defendant No. 1.

Adami, J.—I agree.

Appeal allowed.

A. I. R. 1926 Patna 542

ADAMI AND MACPHERSON, JJ.

Mt. Sheoratni — Defendant No. 2—Appellant.

v.

Munshi Lall—Plaintiff—Respondent.

Second Appeal No. 31 of 1924, Decided on 8th July 1926, from a decision of the Sub-J., Patna, D/- 5th October 1923.

(a) Muhammadan Law—Pre-emption—Owner of plot can pre-empt though not residing on the plot.

Owner of a plot on homestead can pre-empt the sale of adjoining land though the owner does not reside therein. [P. 543, C. 2]

(b) Muhammadan Law—Pre-emption—"Hait" includes small enclosure or plot of homestead land.

The word "hait" is not adequately represented by the English word "garden," probably not even literally, and certainly not in the sense in which "hait" is liable to pre-emption. In the latter contingency "hait" includes if not "zuyut" in the sense of any field, arable or pastoral, certainly a small enclosure in the shape of a plot of homestead land, which has been and is to be utilized as a site for a house, especially when it is situated in a thickly populated area of a large town: 6 *B. L. R.* 41; 2 *W. R.* 261 and 2 *B. L. R. A. C.* 63, *Rel. on.* [P. 544, C. 1]

N. C. Sinha and *N. C. Ghose*—for Appellant.

A. B. Mukerji and *B. B. Mukerji*—for Respondent.

Macpherson, J.—The plaintiff sued for pre-emption of a house in Mahalla Gudri in Patna City which the appellant had purchased from the owner, Defendant No. 1. The suit was decreed and the appeal of the vendee having been dismissed, she has preferred this second appeal.

The plaintiff claimed the right of pre-emption on the ground of vicinage as owner of a plot of homestead land adjoining the house brought by appellant. All the points raised in the Courts

below have been determined in his favour and in second appeal Mr. Naresh Chandra Sinha, on behalf of the appellant raises only one point. It is that the right of pre-emption on the ground of vicinage does not extend to the case of a person like the plaintiff whose property contiguous to the subject of pre-emption is only a plot of land on which no house stands, and which is not alleged to be a garden or walled enclosure.

The findings of fact are that the plot of the plaintiff is homestead land, that there are on it the remains of a house though these remains cannot at present be described as a house, and that the plaintiff intends to build upon it. His present dwelling-house is sixteen houses distant. It was conceded in the trial Court on behalf of the defendant appellant that the owner of the house in suit would have a right of pre-emption in respect of plaintiff's plot.

The learned advocate for the appellant contends that only the owner of a house or a garden contiguous to the subject of pre-emption has right of pre-emption on the ground of vicinage. In support of this contention he refers first to the fact that the object of the right is the exclusion of one who might be a disagreeable neighbour. But obviously it may be as desirable to ward off a disagreeable individual from proximity to the plaintiff's building site as from proximity to his garden and for the same reasons. He then cites paragraph 539 of Tyabji's 'Principles of Muhammadan Law' first as showing that 'akar' or land alone can validly be the subject of pre-emption, and then for the statement (1) that 'akar' a coording to the Fatwa Alamgiri strictly means "space covered with buildings" and (2) that

> The Prophet has said that there is no shoofa except in a ruba or mansion, and a hait or garden.

Now all these statements are based on Baillie's Digest and the portions relied upon give, to say the least, an inadequate idea of the original. At p. 472 we have.

> The thing sold must be 'akar', or what comes within the meaning of it, whether the 'akar' be divisible or indivisible, as a bath or well, or a small house.

To this statement in the text there is a foot-note 2.

> 2. The strict meaning of the word is "a space covered with buildings", so that properly speaking the term is not applicable to a Zuyut (Fut. Al. Vol. III, p. 605). But according to the Kifayah (Vol. IV. p. 940). and the Inayah (Vol. IV, p. 263), 'akar', in the sense in which it is liable to pre-emption, includes a Zuyut. According to Freytag, Zuyut is a field, whether arable or pasture.

Again at page 473 we have the following in the text:

> Our masters have said that moveables are not directly or by themselves proper objects for the right of pre-emption, but that they are so as accessories to akar; and that akar, such as mansions, vineyards, and other kinds of land (literally "and the rest from among lands") are directly the objects of the right. There is no pre-emption in moveables, because the Prophet has said, there is no shoofa except in a ruba or mansion, and a hait or garden.

There is a footnote to this statement

> 1. Hidayah, and Kifayah, Vol. IV, p. 940. Hait means properly a wall, or that which surrounds, though applied elliptically to the enclosure (Freytag). Comparing this with note 3, p. 471, and note 2, p. 472, it would seem that the right of shoofa is, strictly speaking, applicable only to houses and small enclosures of land. It has been held, however, to extend to a whole mauza or village: S. D. A. Calcutta Reports, Vol. III. p. 85.

As to shoofa, Baillie says:

> In law it is a right to take possession of a purchased parcel of land, (bukut a "picce or fragment of land" Note 3 p. 471).

Clearly, therefore, the argument finds no support from the quotations when they are read in their context. It is obvious that akar, in the sense in which it is liable to pre-emption, has an extended meaning. It is not confined to land covered with buildings. It may be a well or a bath, no less than a house. It need not be a garden in our sense of that term, but may be a vineyard and if not all, at least certain other lands besides the site of a house, well or bath and a vineyard, at least if the land is a small enclosure. It is difficult to see what 'other lands' could be more suitable subjects of shoofa than such as the plot now in controversy, which is less than one katha in area or rather more than the site of the house in suit which extends to half a katha.

It may be observed that the author of the text-book referred to sets out that the 'Jar' or neighbour who may be a pre-emptor "is the owner of property adjoining the subject of pre-emption," and he appears to consider that the property may be 'neighbouring land' of any

kind. No doubt the view expressed in Wilson's Digest of Anglo-Muhammadan Law is that pre-emption can only be claimed on the ground of mere vicinage as between continuous houses and gardens. But the only reference given, *Mahomed Hassein* v. *Saha Mohsin Ali* (1), does not support the proposition as it is stated. As will presently be indicated, the view which obtained in that case was that a neighbour's rights extend ...only to houses, gardens and small plots of land. Mr Ameer Ali in his "Muhammadan Law" appears to approve of that view. In my judgment the word "hait" in the saying of the Prophet is not adequately represented by the English word 'garden,' probably not even literally and certainly not in the sense in which hait is liable to pre-emption. In the latter contingency hait includes if not Zuyut in the sense of any field arable or pastoral, certainly a small enclosure in the shape of a plot of homestead land, which has been and is to be utilised as a site for a house, especially when it is situated in a thickly populated area of a large town.

Support is obtained for this view in the observations made in the judgment in *Mahomed Hossein* v. *Shaw Mohsin Ali* (1) and in cases there cited. The decision was indeed that a neighbour cannot claim the right of pre-emption on the ground of vicinage in respect of a mauza or a large estate; but in delivering the judgment of the Full Bench, Couch, C. J., remarked that

> that the better opinion might be that akar should be construed to mean houses and small enclosures of land. But we rely rather on the uniform series of decisions, which very clearly recognize that the right of pre-emption, on the ground of vicinage, does not extend to estates of large magnitude, but only to houses, gardens, and small parcels of land.

The same question had in 1856 been stated by the Judges of the Agra Sadar Court as

> whether entire mahals or estates were intended, or merely parcels of lands, gardens, and the like.

the latter view being supported by the saying of the Prophet already quoted. In *Ejnash Koer* v. *Sheikh Amzudally* (2) the principle is considered to be that,

> when either houses or small holdings of land make parties, in fact, such, near neighbours as to give a claim on the ground for convenience and mutual servience, the claim in right of pre-emption will lie.

In *Abdul Azim* v. *Khandkar Hamid Ali* (3) it was remarked that

> the law was intended to prevent vexation to holders of small plots of land who might be annoyed by the introduction of a stranger among them.

It would seem clear, therefore that the Courts even when referring to the saying of the Prophet never contemplated that the word 'hait' there used was restricted to a garden as ordinarily understood; and any small enclosure of land is included at least if it is of the nature of homestead land or what we may call compound land, where the convenience of the owner would be impaired by a distasteful neighbour.

On behalf of the respondent it is further pointed out that the doctrine of pre-emption is based upon reciprocity and the appellant having admitted that the owner of the house in dispute would have been entitled to claim pre-emption of the plaintiff's homestead plot, it follows that the plaintiff is entitled to claim pre-emption of the appellant's house and site. The contention has force; but I prefer to rest the decision in this case upon the view that the plot of plaintiff is akar and that 'hait' does not merely mean 'garden' but includes also other land among which the plaintiff's plot is certainly included.

Upon this view this appeal is without merits and I would dismiss it with costs

Adami, J.—I agree.

Appeal dismissed.

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(1) [1870] 6 B. L. R. 41.
(2) [1865] 2 W. R. 261.
(3) [1868] 2 B. L. R. A. C. 63=10 W. R. 356.

A. I. R. 1926 Patna 545

DAWSON-MILLER, C. J., AND FOSTER, J.

Raghunandan Prasad—Appellant.

v.

Mahabir Mahton and *another*—Respondents.

Second Appeal No. 1265 of 1923, Decided on 14th May 1926, from a decree of the Dist.-J., Patna, D/- 23rd July 1923.

(a) *Hindu Law—Partition—Ascertainment of shares that would fall to different members in the event of partition does not amount to partition—Intention to divide is necessary.*

The mere fact that the shares which co-parceners would be entitled to in the event of partition had been ascertained does not necessarily amount to any intention to separate. In order to effect a partition, although it is not necessary that the property should actually be divided by metes and bounds, still it is necessary that there should be a clear and unequivocal expression of intention on the part of one or more of the co-parceners to separate from the rest of the joint family and to hold his or their share or shares separately. Even the fact that a suit has been brought for a partition, if the suit is subsequently withdrawn, is not in itself conclusive evidence that there ever was an effective partition by the party who instituted the suit: *A. I. R.* 1925 *P. C.* 49, *Rel. on.* [P 546 C 1

(b) *Civil P. C., O.* 16, *R.* 1—*Application at a late stage to send for Chaukidar Register from Deputy Commissioner and admit it in evidence—Application should not be refused.*

Where on the day before the case had been fixed for final hearing a party applied to the Court to send a Court peon with an order to the Collector either to send his servant with the Chaukidari Register to be admitted in evidence or to deliver it over to the Court peon.

Held: that there was no reason why even at a late stage the application should not have been complied with. [P 547 C 1]

K. P. Jayaswal and *B. C. Sinha*—for Appellant.

S. Sultan Ahmad and *Hasan Jan*—for Respondents.

Dawson-Miller, C. J.—This is an appeal on behalf of Raghunandan Prasad, the Defendant No. 2 in the suit, from a decision of the Additional District Judge of Patna affirming a decree of the Munsif. The suit was instituted in May 1920, by Mahabir Mahton and his son, to set aside a deed of sale executed by his deceased brother's widow, Sakli Kuer, in favour of the appellant Raghunandan. The property which was transferred by the widow to Raghunandan consisted of about 17 bighas of land which she claimed to have inherited from her husband Bishun Mahton, the brother of the plaintiff. The plaintiff, on the other hand, contends that he and his brother Bishun were joint in estate and remained joint up to the time of the latter's death in the year 1918.

Both the trial Court and the lower appellate Court have found that the two brothers were joint and that the widow of Bishun had no interest in the property which she could transfer to the appellant Raghunandan. From that decision the appellant has preferred a second appeal to this Court. The only question for determination in this appeal is whether the two brothers were or were not joint in estate at the date of Bishun's death in 1918. The question is essentially one of fact. Both the Courts below have considered the evidence in the case and have drawn inferences from that evidence and both have arrived at the conclusion that the brothers were joint and, in my opinion, they have not committed any error of law in arriving at that conclusion and their findings are binding upon this Court in second appeal.

The appellant, however, has laid great stress upon the fact that in para. 4 of the plaint there is an allegation which he contends amounts to an admission of a separation of the two brothers. It appears that in the year 1911 a Record of Rights was finally published in which the property owned by the two brothers was entered in the Survey Khatian showing about 22 bighas held by Bishun Mahton and about 10 or 11 bighas held by the plaintiff Mahabir. In 1914 some question arose as to the correctness of the entry in the Record of Rights. Apparently one, if not both of the brothers were contending that the entry did not show that the property was held by them separately in the proportions which would appear from the Record of Rights. It is not very clear whether at that time the deceased brother Bishun acquiesced in the position taken up by the plaintiff, but however that may be, the matter was referred to a panchayat and the result of their decision is stated in para. 4 of the plaint in these terms:

Thereafter, owing to the bad temper of defendant No. 1, a dispute arose between plaintiff No. 1 and the said Bishun Chand Mahtan deceased and the entire kasht land was divided by the panchayat between Plaintiff No. 1 and the said Bishun Chand Mahton under an ekrarnama dated the 17th Pus 1321. But the said deed

never came into force. Although the above measures were adopted, yet only Defendant No. 1 (that is the wife of Bishun Chand Mahton) continued to have a separate mess of her own, whereas plaintiffs and Bishun Chand Mahton Plaintiff No. 1's full brother continued to live jointly and on friendly terms all along.

It is contended that the allegations, there made are an admission by the plaintiffs of a separation, that the matter was referred to the panchayat and the panchayat gave a decision on the question, and that the parties having expressed an intention to have the property divided, that intention was finally carried out by the decision of the panchayat. A great deal of evidence was given at the trial, and it appears from the decision of the learned Munsif that it was the plaintiffs' case that what the panchas really settled was that the entry in the Survey Khatian was wrong and that it would not affect the right of either brother in the joint family property and that they merely declared that the shares of each brother had been ascertained, each being entitled, if he should wish to separate, to a moiety. It can hardly be contended that the mere fact that the shares which co-parceners would be entitled to in the event of partition had been ascertained necessarily amounts to a partition of the property. It does not necessarily amount to any intention to separate. In order to effect a partition although it is not necessary that the property should actually be divided by metes and bounds still it is necessary that there should be a clear and unequivocal expression of intention on the part of one or more of the co-parceners to separate from the rest of the joint family and to hold his or their share or shares separately. Even the fact that a suit has been brought for a partition, if the suit is subsequently withdrawn is not in itself conclusive evidence that there ever was an effective partition by the party who instituted the suit. This would appear from the decision of their Lordships of the Judicial Committee in the case of *Palani Ammal* v. *Muthuvenkatachala Moniagar* (1) affirming the decision of the Madras High Court.

It seems to me that in each of the cases the question is purely one of fact and of the proper inferences to be drawn from the facts proved in the case, and although para. 4 of the plaint is worded in such a way that it might perhaps at first sight appear to indicate a state of separation still it is qualified by the succeeding words, which show that the deed never came into force, and it is further qualified by the evidence given at the trials which was to the effect that what the panchas really had to deal with was the question whether the Record of Rights recorded the position of the two brothers with regard to the property which belonged to them. The panchas merely decided if the evidence of the plaintiffs is accepted, and it was accepted by both the trial Court and the lower appellate Court, that there never really was any express intention to partition the property between them, but merely that the brothers really were joint and being only two of them they were each entitled on partition, if that event should in the future take place, to a moiety of the property. It seems to me that the lower Courts were perfectly entitled to take into consideration not merely the statement in the plaint, which might be of ambiguous import but also the evidence given by the parties in the case, and the lower appellate Court was the ultimate tribunal for deciding the facts. In these circumtances it seems to me that this appeal on that part of the case must fail.

The only other question which was raised was that certain evidence was improperly shut out by the trial Court, and we are asked on that accuunt to remand the case in order that the evidence shut out should be taken and the whole of the questions considered again in the light of that evidence. What happened was that the defendants obtained a certified copy of an entry in the Chaukidari Register of the village in which this property is situated. That was filed on the 13th July 1921. This document, however, the Court was apparently never asked to admit in evidence. On the 3rd August 1921, the day before the case had been fixed for final hearing, the defendants applied to the Court to call for the original Chaukidari Register containing the entry, a copy of which had already been filed. They apparently asked that a messenger should be sent to the Collector to ask him to produce the book or send it to Court for the purpose of

(1) A. I. R. 1925 P. C. 49=48 Mad. 254.

having it placed on the record. The Munsif said that it was too late to make an application of that sort then, and that he was not going to adjourn the trial for any such purpose. I should point out, however, that it would not have been necessary to adjourn the trial, because the defendants merely asked that a messenger should be sent at their own risk, and if the register was not produced in time, then, of course, it could not be put in evidence. The Court, however, refused the application and it is contended that thereby valuable evidence was shut out which the Court ought to have admitted. I think that there is some force in this contention as to the duty of the Court to have granted the application. By O. 16, R. 1 of the Civil P. C. it is provided that

At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

It is true that the Court was not asked for a summons upon any person to produce a document in Court, but the Court was asked to do something very like it, that is, send a Court peon with an order to the Collector either to send his servant with the book, or to deliver it over to the Court peon, and I see no reason why even at a late stage the application should not have been complied with. But even assuming that we should be of opinion that the trial Court failed in its duty in granting the application, still it seems to me that that is no reason in the present case why we should remand the case for a further hearing. We have seen the copy which was filed with the record in this case and all that appears from that copy is that at one time shortly before Bishun Mahton's death in 1918, both parties, that is to say, Bishun Mahton and the plaintiffs, were entered in the Chaukidari Register in respect to a separate Chaukidari tax, one of them in respect of one portion of the property and the other, in respect of the other. But the later Chaukidari receipts, which have been put in evidence on behalf of the plaintiffs, show that after Bishun's death the whole of the Chaukidari tax was paid by the plaintiffs and not by the widow who claims to have succeeded to Bishun's portion of the property after his death. There was a great deal of evidence, documentary and otherwise produced on behalf of the plaintiffs to show that these two brothers were joint right up to the date of Bishun's death and that the plaintiffs dealt with the property afterwards, that is to say, they paid taxes and carried out the duties that one would expect an owner to do. In these circumstances, therefore, it seems to me that it is a case clearly falling within the provisions of S. 167 of the Indian Evidence Act. (Here the section was quoted.) Having regard to the mass of evidence there was on the side of the plaintiffs, I cannot find that the admission of this Chaukidari Register, assuming it to show what appears in the copy, would have made the slightest difference to the decision either of the trial Court or of the District Judge on appeal.

For these reasons I think that this appeal must be dismissed with costs.

Foster, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 547

ROSS AND KULWANT SAHAY, JJ.

Chairman of the Tikari Municipality —Defendant—Appellant.

v.

Alam Ara Begum—Plaintiff—Respondent.

Appeal No. 1121 of 1923, Decided on 9th June 1926, from the appellate decree of the Addl. Sub-J., Gaya, D/- 16th May 1923.

(a) *Bengal Municipal Act* (1884), *Ss.* 114 *and* 113—*Objection to assessment disposed of without reference under S.* 114—*Disposal is ultra vires—Subsequent proceedings regarding assessment and collection are also ultra vires.*

Where an application objecting to the assessment is not referred to Commissioners as provided by S. 114, all the subsequent proceedings with regard to assessment and realization of taxes are ultra vires and the applicant is entitled to relief in respect thereof.

The Municipal Authority after acting ultra vires in not disposing of the objection to the original assessment under S. 113, cannot protect themselves by making a fresh assessment leaving the original objection to the assessability of the holding undisposed of. The two assessments cannot be treated independently.

[P. 548. C. 2]

(b) *Bengal Municipal Act* (1884), *S.* 362—*Assessment paid under protest, proceedings being ultra vires—Suit for recovery need not be filed within three months.*

Where demand is made from a taxe-payer and he pays the taxes under protest, that is to

say, on an understanding that he would be entitled to a refund if his contention that the demand was ultra vires was correct a suit for the recovery of such taxes need not be filed within three months. 2 *C. W. N.* 689, *Foll.*

[P. 549, C. 1]

Nawal Kishore Prasad No. II—for Appellant.

Hasan Jan and *Saiyid Ali Khan*—for Respondent.

Ross, J.—The plaintiff brought this suit for a declaration that the assessment of taxes made on premises Nos. 50, 53, 54 and 55, situated within the Tikari Municipality, was illegal and without jurisdiction and that she was not liable to pay the said taxes; and that the defendant, the Chairman of the said Municipality, had wrongfully realized from her the sum of Rs. 256-3-0; and for refund of that sum with interest and for an injunction on the defendant restraining him from realizing subsequent Municipal taxes for the said premises.

In her plaint she stated that the holdings were in a ruined condition, but nevertheless were assessed with taxes and, thereupon, her servant made an application before the Municipal Commissioners for remission of the taxes of the said holdings and for exemption of the plaintiff from payment thereof. She further alleged that the Acting Vice-Chairman inspected the holdings after this application was made and reported that they were ruined and that the taxes might be remitted and that the matter should be put up at the next meeting; but, without putting up the matter at the meeting the Vice-Chairman, Babu Matukdhari Singh, rejected the application without assigning any reason for the same. All that was pleaded in the defence on this part of the case was that the plaintiff was not entitled to occupy the holdings free of tax, because she did not keep them in repair and that Babu Matukdhari Singh, the then Vice-Chairman, was justified in rejecting the plaintiff's petition. Now on these pleadings it must be taken that this petition by the plaintiff was a petition under S. 113 of the Bengal Municipal Act disputing liability to assessment. S. 114 requires that every such application shall be heard and determined by not less than three Commissioners who shall be appointed in that behalf by the Commissioners at a meeting. The Vice-Chairman, therefore, in rejecting this application without referring the matter to the Commissioners, acted ultra vires, apart altogether from the further consideration that it does not appear what authority he had to override the order passed by his predecessor referring the matter to the Commissioners for consideration. The case, therefore, stands thus that an application was made according to law under S. 113 and it was not disposed of in the manner provided by law. Consequently all the proceedings with regard to assessment and realization of taxes for these holdings subsequent to this infringement of the statute were ultra vires, and the plaintiff is entitled to relief in respect thereof.

It was contended by the learned vakil for the appellant, the Chairman, that the application under S. 113 was made against the original assessment, but that subsequently another assessment was made in November 1920, under which taxes were realized and to which the plaintiff made no objection. He contends that this later assessment stands by itself independent of the earlier assessment, and as long as no objection was taken under S. 113, it was a valid assessment and taxes were lawfully collected under it. In my opinion the Municipal Authority, after acting ultra vires in not disposing of the objection to the original assessment under S. 113, cannot protect themselves by making a fresh assessment leaving the original objection to the assessability of the holding undisposed of. The two assessments cannot be treated independently. The plaintiff was under no obligation to go on objecting when her original objection remained undisposed of according to law. There ought not to have been any further assessment after that objection until it had been decided.

The second point taken was that the plaintiff was not entitled to any refund of the taxes already collected from her under protest, by reason of the provisions of S. 363 of the Act, inasmuch as the suit was not brought within three months of the cause of action, the last payment having been made on the 12th of January 1922 and the suit being brought on the 24th of April 1922. This matter, however, is concluded by the authority of the decision in *Ambika Churn Mozum-*

dar v. *Satish Chunder Sen* (1), where substantially the same point was taken. We are asked to differ from that decision on the ground that the act of the Chairman in realizing the taxes was tortious and not an act arising upon a contractual or quasi-contractual basis. But it seems to me that the decision is perfectly correct. There was no question of tort. Demand was made from the plaintiff and the plaintiff paid the taxes under protest, that is to say, on an understanding that she would be entitled to a refund if her contention that the demand was ultra vires was correct.

On both points, therefore, the appeal fails and must be dismissed with costs.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

(1) [1898] 2 C. W. N. 689.

A. I. R. 1926 Patna 549

ADAMI AND KULWANT SAHAY, JJ.

Shama Kant Lal and *another*—Plaintiffs—Appellants.

v.

Kashi Nath Singh and *others*—Defendants—Respondents.

First Appeals Nos. 287 of 1922 and 108 of 1923, Decided on 2nd March 1926, from decisions of Sub-J. and 1st Sub-J., Gaya, D/- 16th September 1922 and 17th March 1923, respectively.

(a) *Bengal Land Revenue Sales Act* (11 *of* 1859), *Ss.* 2 *and* 3—*Liability of estate to sale depends on three dates.*

The liability of an estate to sale under the Act depends on three dates. The first is the date on which the instalment of revenue is payable under the terms of the Settlement. If it is not paid on this date under S. 2 of the Act it does not become an arrear of revenue until the first of the following month which is the second date and though the unpaid sum has become an arrear of revenue, the estate is not liable to sale under the Act unless this arrear of revenue remains unpaid on the latest day of payment as fixed by the Board of Revenue under S. 3 of the Act. This is the third date: 22 *C. W. N.* 769, *Foll.* [P. 552, C. 1]

(b) *Bengal Land Revenue Sales Act* (11 *of* 1859), *Ss.* 2 *and* 3—*Original kistbandi unknown—Dates fixed under S.* 3 *are the kist dates.*

Where original kistbandi under S. 2 of the Revenue Sales Act is unknown and forgotten, the latest dates fixed under S. 3 are popularly known as the kist dates. They are not the kistbandi dates as provided for by S. 2, but the latest dates of payment fixed by the Board of Revenue under S. 3 of the Act. [P. 555, C. 2]

(c) *Bengal Land Revenue Sales Act* (11 *of* 1859)—*Register D kept by Collector erroneous—Full description of the estate not given—Notification describing estate correctly—Sale cannot be set aside.*

There is no direction either in the Act or in the rules framed by the Board of Revenue that the description of the estate in the sale notification should be on reference to the registers A, C or D which the Collector has to keep under the provisions of the Land Registration Act, and if the register D and the other registers kept by the Collector be erroneous, and do not give a full description of the estate, that is no ground for setting aside the sale of an estate if the notification of sale contains a correct description of the estate. [P. 557, C. 1, 2]

(d) *Bengal Land Revenue Sales Act* (11 *of* 1859)—*Sale under—All proprietors need not be mentioned in the proclamation.*

There is nothing in the law or in the rules framed under the Revenue Sales Law prescribing that when there are a large number of proprietors the names of all of them should be given in the notification. [P. 558, C. 2]

Manuk, H. L. Nandkeolyar and *S. N. Rai*—for Appellants.

Mehdi Imam, G. S. Prasad, Raghunandan Prasad and *Kailaspati*—for Respondents.

Kulwant Sahay, J.—These two appeals were argued at great length, and after the completion of the arguments, judgment was reserved, and when notice was given to the parties about the delivery of judgment they intimated that the matter was going to be settled out of Court and asked us to postpone the delivery of judgment. They have this day filed two petitions of compromise. By this compromise Appeal No. 287 is to be dismissed and Appeal No. 108 is to be decreed. This is exactly the decision that I had arrived at, but the terms of the compromise are that, although the title of the auction-purchaser at the revenue sale is confirmed, he agrees to re-convey the property on receipt of a certain sum of money to the plaintiffs-appellants in Appeal No. 287. The other respondents in the appeal are not parties to the compromise, and Appeal No. 108 cannot be decreed on compromise so far as the persons other than those joining the compromise are concerned. It is, therefore, necessary to write out a judgment in the appeals.

These appeals arise out of two suits brought by two sets of proprietors of a revenue paying estate, named Bara Lodhway, bearing Touzi No. 3040 in the

Gaya Collectorate for setting aside the sale of the estate for arrears of Government revenue held under the provisions of Act XI of 1859. The sale took place on the 6th of January 1919 for an alleged arrear of Rs. 6-11-0 on account of what is known as the kist September 1918. The Defendant No. 1 in both the suits, Rai Bahadur Kashi Nath Singh, was the ostensible purchaser. The two sets o plaintiffs preferred two appeals before the Divisional Commissioner which were both dismissed on the 21st March 1919. Thereupon Babu Radha Kant Lal, one of the proprietors, instituted Suit No. 177 of 1919 in the Second Court of the Subordinate Judge of Gaya on the 12th of April 1919. Another set of proprietors, Babu Basudeo Narain and others, instituted a separate suit in the said Court of the Second Subordinate Judge at Gaya on the 14th February 1920, and this suit was registered as No. 25 of 1920. Suit No. 177 of 1919 was tried by the Additional Subordinate Judge of Gaya and dismissed by his decision, dated the 16th September 1922. Suit No. 25 of 1920 was tried by another Subordinate Judge of Gaya who by his decision, dated the 17th March 1923, decreed the suit and set aside the sale. Appeal No. 287 of 1922 is by the heirs of Babu Radha Kant Lall, who is now dead, and arises out of Suit No. 177 of 1919. Appeal No. 108 of 1923 is by Rai Bahadur Kashi Nath Singh and others, the purchasers at the revenue sale, and arises out of Suit No. 25 of 1920.

The two appeals have been heard consecutively one after the other. Some of the points are common to both the appeals while there are some points which are not common.

The allegations contained in the plaint in the suit out of which Appeal No. 287 of 1922, viz., the appeal by the heirs of Babu Radha Kant Lal, arises, are shortly these :

Mahal Bara Lodhway bearing Touzi No. 3040 and sadr jama or Government revenue of Rs. 202-11-7 was held in proprietary interest by the plaintiff and Defendants Nos. 2 to 20. The mahal consisted of three villages, viz., Mouza Bara, Mouza Bazida and Mouza Pipra. The different proprietors held different shares in these three villages. Some of them had shares in all the three villages, while others had shares in two of them and some in only one of them. The shares held by the different proprietors are set out in Schedule A annexed to the plaint. The case of the plaintiff is that Defendant No. 2, Babu Matukdhari Singh, who, along with the members of his family, held a 2-annas 13-dams 6-kauri 10-bauris share in each of the Mouzas Bara and Bazida, and 5-annas 2-dams 13-kauris 10-bauris share in Mouza Pipra, was heavily indebted and his share was heavily mortgaged and in order to get rid of the mortgage he fraudulently made default in payment of the Government revenue with a view to have the whole estate sold for arrears of Government revenue and to purchase the same in the benami of some one, thereby avoiding the encumbrance under the provisions of Act XI of 1859.

It is alleged in the plaint that the plaintiff regularly paid his share of the Government revenue, but that Matukdhari Singh deliberately made default in payment of his share so that in the instalment of September 1918 there was an arrear of Rs. 6-11-0, and on account of this arrear the estate was put up for sale at auction and was actually sold on the 6th January 1919. It is alleged that the manager and tahsildar of the plaintiff, viz., Ramashankar Bhattacharji and Jawahir Singh, were aware of the existence of the arrear and of the fact of the estate being put up for sale ; but in collusion with Matukdhari Singh they refrained from taking any action to prevent the sale by payment of the arrears, and that Matukdhari Singh himself made the purchase in the farzi name of his relation, Rai Rahadur Kashi Nath Singh, Defendant No. 1 in the suit.

It is alleged in the first place that the sale was without jurisdiction and a nullity inasmuch as there was no arrear of revenue as contemplated by Act XI of 1859 on the date the estate was actually sold by the Collector. It is next alleged that the sale was bad on account of certain illegalities and irregularities in the conduct of the sale, as set out in para. 17 of the plaint. Next, it is alleged that the sale was brought about fraudulently by Matukdhari Singh and he was the real purchaser, Defendant No. 1 Rai Bahadur Kashi Nath Singh being a mere benamidar for him, and that under the circumstances of the case the plaintiff was entitled to a re-conveyance of his

share if the sale be held to be a valid sale. Lastly, it is alleged that what was sold was only Mouza Bara having an area of 120 acres 1 r. 32 p. and not the remaining two Mouzas Bazida and Pipra, the entire area of all the three mouzas being much more than 120 acres odd. The prayers in the plaint were : first, for a declaration that the sale held on the 6th of January 1919 was invalid and void and without jurisdiction; secondly, that the sale be set aside on account of illegalities and irregularities in the conduct of the sale ; thirdly, that if the sale cannot be set aside then a decree may be made directing a re-conveyance to the plaintiff of his share in the estate as set out in Schedule A to the plaint, and lastly, that, in any event, it may be declared that what passed by the sale was an area of 120 acres 1 r. 32 p. out of the estate bearing Touzi No. 3040.

In the second suit, viz., Suit No. 25 of 1920 giving rise to Appeal No. 108 of 1923, Defendants Nos. 1 to 4 are Rai Bahadur Kashi Nath Singh the purchaser at the revenue sale and the members of his family ; Defendants Nos. 5 to 15 are Matukdhari Singh and the members of his family. Defendants Nos. 39 to 42 are Babu Radha Kant Lal, the plaintiff in the first suit, and the members of his family, and the other defendants are the remaining co-sharers of the estate. In this suit the allegations as regards the points of law are the same as in the first suit, viz., that the sale was null and void on account of there being no arrears of revenue on the date of sale, and that the sale was bad on account of illegalities and irregularities in the conduct of the sale.

The allegation of fraud, however, as made in the plaint in this suit was different from that made by Babu Radha Kant Lal in his suit. It was alleged in this suit that the arrear of Rs. 6-11-7 falling due in the instalment of September 1918, was due not only from Matukdhari Singh and the members of his family but also from Radha Kant Lal and other co-sharers and that the sale was brought about by the said co-sharers who intentionally made default in paying their quota of the Government revenue in collusion and in conspiracy with one another for the purposes of depriving the plaintiffs of their share of the estate and of the heavy mortgage lien they had over the share of Matukdhari Singh in the estate. It was alleged that the Defendants Nos. 1 to 4, viz., Rai Bahadur Kashi Nath and the members of his family actively or inactively joined the other co-proprietors in the conspiracy to deprive the plaintiffs of their property.

It was alleged in this suit also that the real purchaser at the revenue sale was not Rai Bahadur Kashi Nath Singh and the members of his family but Matukdhari Singh and that Rai Bahadur Kashi Nath Singh was a mere benamidar for him. The prayer in this suit was for a declaration that the sale was illegal, null and void or at least bad in law on account of material irregularities and illegalities in the conduct of the sale, and that, therefore, the same may be set aside. There was a prayer in the alternative for a re-conveyance to the plaintiffs of their share in the estate as set out in the schedule annexed to the plaint. There was no prayer in this plaint for a declaration that what passed by the sale was merely an area of 120 acres and odd as alleged in the plaint of Radha Kant Lal.

It will appear from the above statement of the allegations of the plaintiffs in the two suits that the sale was sought to be set aside on the grounds, first, that it was without jurisdiction as there was no arrear on the date of sale; secondly, that the sale was bad in law on account of illegalities in the conduct of the sale; thirdly, that the sale was brought about by fraud of the co-sharers to which the auction-purchaser was alleged to be a party, and that what passed by the sale was only an area of 120 acres odd. The first two points are common to both the suits and may be considered together The question of fraud has to be considered separately as also the question as regards what passed by the sale.

The learned Subordinate Judge who decided the suit of Radha Kant Lal held that the sale was not null and void on the ground of there being no arrears on the date of the sale, while the learned Subordinate Judge who tried the second suit held that the sale was without jurisdiction inasmuch as there was no arrear on the date of sale. I shall first proceed to consider this question which is common to both the suits.

Section 2 of Act XI of 1859 provides that if the whole or a portion of a kist or instalment of any month of the era

according to which the Settlement and kistbandi of any mahal have been regulated be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue. S. 3 of the Act provides that the Board of Revenue shall determine upon what dates all arrears of revenue and all payments which by the Regulations and Acts in force are directed to be realized in the same manner as arrears of revenue shall be paid up in each district in default of which payment the estates in arrear in those districts shall be sold at public auction to the highest bidder. It will, therefore, be noticed as pointed out in *Amrita Lal Roy* v. *Secretary of State* (1) in the judgment of Newbould, J., that the liability of an estate to sale under the Act depends on three dates. The first is the date on which the instalment of revenue is payable under the terms of the Settlement. If it is not paid on this date under S. 2 of the Act it does not become an arrear of revenue until the first of the following month which is the second date and though the unpaid sum has become an arrear of revenue, the estate is not liable to sale under the Act unless this arrear of revenue remains unpaid on the latest day of payment as fixed by the Board of Revenue under S. 3 of the Act. This is the third date.

The allegation of the plaintiffs in the two suits in the present case is that there was no arrear of Government revenue as defined by S. 2 of the Act on the 6th of January 1919, when the estate was sold. Their case is that there was default in the September kist of 1918 and that accordingly under S. 2 of the Act it did not become an arrear until the 1st of October 1918, and the latest date of payment thereof as fixed by the Board of Revenue under S. 3 of the Act was the 12th of January 1919, up to which date the proprietors were entitled to pay up the arrears and that, therefore, the sale held before the 12th of January 1919, was void and without jurisdiction. It has been contended on the other hand by the auction-purchaser that what is called as the kist of September 1918, was not the kist or instalment contemplated by S. 2 of the Act, but the latest date of payment as contemplated by S. 3 of the Act and that the estate had already fallen into arrears before the instalment of September 1918, for which the latest date of payment was the 28th of September 1918, and that, therefore, the sale held after the 28th of September was a valid and legal sale.

The question of importance, therefore, for decision in the present case is as to when the estate fell into arrears. No evidence has been adduced in these suits as regards the original Settlement and kistbandi of the mahal in dispute. It is in evidence that all the records relating to the original Settlement of the mahals in the district of Gaya were destroyed during the Mutiny of the year 1857. It appears from the evidence that the estate bearing Touzi No. 3040 was constituted into a separate estate under a Collectorate partition effected under the provisions of Act VIII (B. C.) of 1876 which was completed in the year 1887-88 Under S. 123 of the Bengal Act, VIII of 1876, the Collector is required to serve a notice on every recorded proprietor of a separate estate informing him that from the date specified in such notice the separate estate assigned to him will be deemed to be separated from the parent estate and to be separately liable for the amount of land revenue specified in such notice and calling upon him to enter into a separate engagement for the payment of such revenue.

There is no evidence in the present case of any such engagement as is provided for in S. 123 having been entered into by the proprietors of the separate estate Touzi No. 3040. Indeed evidence has been produced in the present case to show that there is no such document in the record room of the Collector of Gaya. S. 125 of Act VIII of 1876 provides that

> from the date specified in the notice referred to in S. 123 each separate estate shall be borne on the Revenue Roll and General Register of the Collector as a distinct estate separately liable for the amount of land revenue assessed upon it under this Act, and shall be so liable, whether the proprietor has executed an agreement for the payment of the amount of land revenue so assessed upon the said estate, or whether he shall have failed to execute such agreement.

Therefore, we have got no evidence at all in the present case as regards the kists contemplated by S. 2 of Act XI of 1859 either of the original Settlement or of the engagement entered into by the proprietors after the

(1) [1918] 22 C. W. N. 769=46 I. C. 447=28 C. L. J. 51.

partition completed in the year 1888. The Board of Revenue has, however, fixed the latest dates of payment under S. 3 of Act XI of 1859. These dates, so far as the estate in dispute is concerned, are the 7th June, 28th September, 12th January and 28th March. These dates are commonly known as the June kist, the September kist, the January kist and the March kist. These dates are not the kist dates of the original Settlement as contemplated by S. 2 of the Act. Reference has been made on behalf of the appellants to the touzi Ledger which is Ex. 4 in Radha Kant's suit and Ex. 13 in the other suit. It appears on reference to this touzi Ledger of 1918 that in the first kist, which is the June kist of 1918, a sum of Rs. 5-3-4 is shown as arrear which was paid on the 6th June 1918.

Various other sums were paid on the 7th of June on account of the current demand. The lower portion in the same ledger for the first kist shows a demand of Rs. 5-3-4 on account of arrear and of Rs. 38 as current demand, and the payments as shown therein are Rs. 5-3-4 on account of arrear and of Rs. 44-13-0 on account of current demand leaving an excess at the end of the kist of Rs. 6-13-0. In the second kist which is the September kist of 1918, we find that there was no arrear of demand and the excess payment of the previous kist of Rs. 6-13-0 is brought forward in this kist. There was a demand of Rs. 63-10-0 on account of the current revenue for this second kist, and a sum of Rs. 50-2-0 only was paid in this kist which, together with the Rs. 6-13-0 excess payment of the previous kist, made up Rs. 56-15-0. Deducting this sum of Rs. 56-15-0 from the current demand of Rs. 63-10-0 a sum of Rs. 6-11-0 remained due at the end of the kist which is shown there as the balance at the end of the kist. It was for this arrear that the sale was held.

It is contended by the learned counsel for the appellants that the sum of Rs. 5-3-4, shown as arrear in the first kist was the sum which became an arrear in June and not in the previous kist of March, and that similarly the sum of Rs. 6-11-0, shown as the balance at the end of the second kist did not become an arrear until the first of the following month, viz., October 1918. This argument is based on the supposition that the kist dates in June, September, January and March are the kist dates of the original kistbandi as contemplated by S. 2 of the Act. But, as I have already remarked, there is nothing to show what were the original kistbandi dates under S. 2 of the Act. According to the defendants, these dates are the latest dates of payment under S. 3 of the Act, the original kistbandi dates fixed under S. 2 being unknown and forgotten. The presumption of law is that the Collector acted properly in holding the sale. It lies on the plaintiffs to prove that the sale was brought about improperly, and that the Collector had no jurisdiction to effect the sale. The plaintiffs have to prove that the dates in June, September January and March are the dates contemplated by S. 2 of the Act, otherwise the presumption would be that they are the lastest dates of payment, and everything in connexion with the sale was regularly done.

Under the provisions of S. 3 of Act XI of 1859, the Board of Revenue has fixed the latest dates of payments, and they are to be found in the rules made by the Board of Revenue under the Revenue Sale Law and printed at page 152 of the Revenue and Patni Sale Manual published under the authority of the Board of Revenue, Bihar and Orissa. The sum of Rs. 5-3-4, shown as arrear in the touzi Ledger, is clearly the balance due before the previous kist of the 28th of March, the latest date of payment whereof was the 28th of March, and the estate might have been sold for this arrear after the 28th of March. The touzi Ledger is prepared under rules framed by the Board of Revenue, and on a reference to R. 5, S. 18 of the Board's Rules, printed at page 58 of the Board's Touzi Manual, 1923, it would appear that the word " demand " occurring in the touzi Ledger means

sums due from proprietors, farmers or raiyats for the recovery of which legal steps can at once be taken on the day immediately following the latest day of payment.

The foot-note on pages 94-95 in Part III of the paper-book in Appeal No. 108 of 1923 shows that the dates 7th. June, 28th September, 12th Jan. and 28th March, which are shown there as the first, second, third and fourth kists, are the latest dates of payment. The heading is " Annual demand of the land revenue" and according to the definition of

"demand" as contained in R. 5 of the Touzi Manual just mentioned, it would mean the latest date of payment and not the kist dates as contemplated by S. 2 of Act XI of 1859. The word "kist" is defined in Chap. I, R. 5 of the Touzi Manual as indicating the period "between one latest day of payment of arrears of revenue and the next" and has not the restricted meaning assigned to it in S. 2 of Act XI of 1859. Therefore, no argument in favonr of the plaintiffs can be based on the use of the words "kist" and "demand" in the touzi ledger.

Reference has been made on behalf of the appellants in Appeal No. 287 to a document marked as Ex. 17 in that case and printed at pages 124-25 of Part III of the paper-book in that appeal. This is an extract from the revenue roll and it gives at the top the revenue as divided into instalments according to the months of the fasli year. In the lower part of this extract is given the land revenue Touzi Roll prepared under the Touzi Manual, Appendix P, and in this the instalments of the revenue are shown as payable on the 7th June, 28th September, 12th Jan. and 28th March, and from this it is argued that these are the kist dates as contemplated by S. 2 of Act XI of 1859 as fixed after the partition. But, on a reference to the Touzi Manual, it appears that this is not so. Chapter II, S. 1, R. 1 of the Touzi Manual states that the touzi roll of a district is a list of the estates from which the land and police revenue of the district is collected showing the revenue assessed upon each estate divided into amounts due on each latest day of payment. It is clear, therefore, that the dates given in this revenue roll as the instalments in June, September, January and March are the latest dates of payment.

Reliance has been placed by the appellants in Appeal No. 108 upon the deposition of their witness, Saiyid Abdul Ghani, who says that after confirmation of the batwara the kists payable for revenue were told to the maliks, they were the same four kists which existed from the Permanent Settlement, and that the maliks were also informed that in case of default of one kist the amount might be paid in the next kist. It is clear that this witness is not a competent witness to speak of the kists settled at the time of the Permanent Settlement. Moreover, from his cross-examination, it appears that this witness wants to make out that there was a regular proceeding before the Collector under which the kistbandi of the mahal was settled; but no such proceeding has been proved in the present case. This witness is not a reliable witness, and it cannot be held upon his testimony that the dates in June, September, January and March are the dates of the kistbandi under the Settlement as contemplated by S. 2 of the Act.

Reliance has been placed on behalf of the appellants upon a number of decisions, most of which have nothing to do with the facts of the present case. I propose to deal with the decision which have some bearing on the present case. In the case of *Haji Buksh Ilahi* v. *Durlav Chandra Kar* (2) the appellant was the holder of a Government tenure in Dihi Panchanagram under a kabuliyat executed by his predecessor-in-title in the year 1874. The kabuliyat provided for payment of the jama in the Collectorate within the 28th day of June every year. The provisions of Act XI of 1859 were made applicable to such tenures by Act VII of 1868. The revenue authorities treated the 28th of June as the latest date of payment. It was held by the Privy Council that by S. 2 of Act XI, the revenue became an arrear on the 1st of July following. The Board of Revenue by a notification under S. 3 of the Act had fixed 28th June of each year as the latest date of payment. The default was made on the 28th of June 1902; it therefore, became an arrear on 1st of July 1902, and the estate was not liable to sale until the 28th of July of the following year. Therefore, the sale which was held in March 1903 was held to be an invalid sale held without jurisdiction. In that case the original kistbandi under S. 2 of the Act was known, and the Privy Council held that the revenue did not become an arrear until the first of the following month. In the present case the original kistbandi under S. 2 is not known, and this case is of no help to the appellant.

Reliance has next been placed by the learned counsel for the appellants upon

(2) [1912] 39 Cal. 981=16 I.C. 821=39 I.A. 177 (P. C.).

a decision of a Division Bench of this Court in *Chhakowri* v. *Secretary of State* (3). This case, no doubt, lends a certain amount of support to the argument advanced on behalf of the plaintiffs-appellants, but no distinction was drawn there between the dates fixed under S. 2 and those under S. 3 of the Revenue Sale Law. The same dates were taken as fixed under both the sections. There was, however, nothing to show that the two dates contemplated by Ss. 2 and 3 coincided. Reliance was placed by the learned Judges for their decision upon the case of *Harkhoo Singh* v. *Bunsidhur Singh* (4). On an examination of that case, it is evident that it does not support the decision in *Chhakowri's* case (3). In the case of *Harkhoo Singh* v. *Bunsidhur Singh* (4) the original Settlement and the kists fixed after partition, were known, the March kist, as fixed after the partition, was not paid, and, therefore, it became an arrear on the 1st of April, and the latest day of payment thereof was the 28th of June. The sale which was held after the 28th of March and before the 28th of June was held to be without jurisdiction. The dates of the original kistbandi being known there was no difficulty in finding out when it became an arrear and what was the latest date of payment thereof. Mr. Justice Das who was one of the Judges who decided the case of Chhakowri Singh has expressed a different view in a recent case in *Suraji Narayan Chaudhury* v. *Saraswati Bahuria* (5), which is in accordance with the view contended for by the learned counsel for the defendants.

Reliance has also been placed upon the decision of this Court in *Bhirukhi Ojha* v. *Rajbansi Kuer* (6). In that case there was a default in the June instalment of 1911. The sale was held on the 21st of September 1911. The Subordinate Judge had held that the revenue did not become an arrear until the 1st of July, and the latest date of payment thereof was the 28th of September 1911, and so the sale held before that date was ab initio void. In the High Court, papers were produced to show what the original instalments were. This Court made a remand to find out upon evidence what were the kists of the original Settlement and what were the latest dates of payment thereof. This case, therefore, is of no help to the plaintiffs-appellants.

In *Amrit Lal Roy* v. *Secretary of State for India* (1) the estate was sold for arrears of January instalment of 1908. The sale was held on the 25th of March 1908. The sale proved abortive on account of the purchaser's failure to pay the purchase-money, and there was a re-sale on the 25th June 1908. The original kistbandi of the mahal, as fixed under S. 2 of the Act, was not known, and the arguments advanced in that case were similar to the arguments advanced by the plaintiffs in the present case. Mr. Justice Chatterjea held that the sale was without jurisdiction. Mr. Justice Newbould, however, held that the sale was a valid sale. Newbould, J., observed as follows :

> As the proprietor is safe, provided he pays his revenue before the latest day of payment, the earlier date on which it is payable under the terms of Settlement has been lost sight of in practice and the later date on which the kist must be paid is called the kist date. That is to say, the kist referred to as the January kist is not the kist payable in January under the kistbandi but the kist for which the latest day of payment falls in January.

Chitty, J., observed as follows :

> In the papers to which Mr. Justice Chatterjea has referred, no doubt, the kist is referred to as the 'January kist' or 'January talab.' This may be due to the fact that the original due dates of payment have been lost sight of, and the four latest dates for payment fixed by the Board of Revenue under S. 3, namely, 12th January, 28th March, 28th June and 28th September have been carelessly taken to give names to the several kists, which were really payable before those dates but payment of which might be received up to those dates.

These observations apply to the facts of the present case. It is clear that the original kistbandi under S. 2 of the Revenue Sales Act being unknown and forgotten, the latest dates fixed under S. 3 are popularly known as the kist dates. They are clearly not the kistbandi dates as provided for by S. 2, but the latest dates of payment as fixed by the Board of Revenue under S. 3 of the Act.

On a consideration, therefore, of the evidence and the circumstances of the case and the clear terms of Ss. 2 and 3 of the Bengal Revenue Sale Law, it is clear that in the present case 28th of September, 1918, was the latest date of payment, and that the sum of Rs. 6 odd

(3) [1920] 5 Pat. L.J. 66=52 I.C. 990=(1920) P.H.C.C. 1.
(4) [1898] 25 Cal. 876=2 C. W. N. 360.
(5) A. I. R. 1925 Patna 750.
(6) [1917] 2 Pat. L. W. 31=40 I. C. 638.

was in arrear for which the sale could legally be held before the 12th of January 1919, and the sale, therefore, held on the 6th of January was not without jurisdiction.

The next point is as regards the irregularities in the conduct of the sale. These are set out in para. 17 of the plaint in the suit of Radha Kant Lal, and in para. 20 of the plaint in the suit of Basudeo Narain Singh. The learned Subordinate Judge who decided the suit of Radha Kant Lal has dealt with the irregularities urged before him and has come to the conclusion that there was no irregularity in the sale. The learned Subordinate Judge who decided the suit of Basudeo Narain Singh having held that the sale was void did not think it necessary to dilate upon the alleged irregularities resulting in the sale. He refers only to one point, namely, that the revenue assessed on the estate was Rs. 202-11-7, but the notification under S. 6 of the Act showed the revenue to be Rs. 202-12-0. He does not refer to any other irregularity in the course of his judgment; but the finding that he comes to is that the sale was vitiated with irregularities and illegalities and was fit to be set aside. Before us the irregularity mainly pressed by the learned counsel for the plaintiffs-appellants was that the notification under S. 6 of Act XI of 1859 was not properly drawn up inasmuch as the description of the property was incomplete, the sadr jama stated therein was incorrect, and that the names of the proprietors of the estate were not set out.

The notification under S. 6 of Act XI of 1859 issued by the Collector is Ex. G-1 and is printed on page 45 of the Paper-book, Part III, Appeal No. 287 of 1922. The second column gives the name of the mahal which was going to be sold as Bara Lodhway, Perganna Maher. Reference has been made by the learned counsel to register D of Bara Lodhway (Exs. 5 to 52) printed on pages 90 to 93 of the paper-book in the said appeal, in which the area of the estate is shown as 120 acres 1 r. 32 p. Now, this, as a matter of fact, is the area of only one of the villages comprising the estate Bara Lodhway, Touzi No. 3040, namely, of Mouza Bara alone. The other two villages, Bazida and Pipra, are not shown anywhere in this register D. Exhibit 6 contains extracts from register A, and the serial No. 831 is of the estate Bara Lodhway Perganna Maher, bearing Touzi No. 3040, and the specifications of mouzas in Col. 5 contains the name of Mouza Bara Lodhway bearing No. 648 in the Mouzawar Register and having an area of 120 acres 1 r. 32 p. with a Government revenue of Rupees 202-12-0. Exhibits 7 to 73 are extracts from register C, namely, the Mouzawar register kept by the Collector. In this register we get the names of four mouzas: Bara Lodhway bearing No. 636; Bazida bearing No. 637; Pipra bearing No. 648 and Dhaneta (wrongly printed as Diha) bearing No. 198. The areas of the four mouzas are given in the third column, and the 5th column gives the numbers borne by these mouzas in the General Register A. In this register the area of 120 acres is shown as against the fourth village. It is further to be noticed that while in the register A (Ex. 6) Bara Lodhway is said to correspond to No. 648 in the Mouzawar Register; in the Mouzawar Register (Ex. 7) No. 648 is Mouza Pipra and not Bara Lodhway which has got a different number, viz., No. 636. The areas also do not agree, and the number in Col. 5 of the register C does not correspond with the number in the register A.

Exhibit 8 is the Mahalwar register of Bara Lodhway, and in this register the jama (revenue) is shown as Rs. 392-8-5 in respect of Bara Lodhway. The learned counsel for the plaintiffs-appellants refers to those registers kept by the Collector and contends that the description of the property as given in the notification of sale under S. 6 was misleading, and that the intending bidders were misled as regards the property which was going to be sold. He refers to the deposition of Mr. Yaqub who was one of the bidders at the sale who says that in bidding at the revenue sale he generally makes inquiries from Register D, that he had referred to register D about Bara Lodhway, and he found that only one mouza was on sale and the area thereof was 120 acres. He accordingly offered bids up to Rs. 4,800. If the area had been more, he would have bid much higher. Another bidder at the sale, Bipat Ram, also states that he ascertained from register D the area of the estate which he found to be 120 acres.

Muhammad Yusuf, another bidder, states that Bipat told him that the area of the estate going to be sold was 120 acres or 125 acres; and it is argued that, from this evidence, it is clear that the description of the property was not a sufficient description to enable the intending bidders to know as to what was actually going to be sold. His contention is that all the three villages comprised in the estate ought to have been named in the sale notification.

Now, the short answer to this argument given by the learned counsel for the defendants-respondents is that the Collector does not sell an estate under the Bengal Revenue Sale Law with reference to the registers which he has to keep under the various enactments; nor does Act XI of 1859 refer in any shape or form to those registers. Revenue sales are held under the Revenue Sale Law, and all that is necessary for the validity of the sale is a strict compliance with the provisions of the Revenue Sale Law alone. Now, the Revenue Sale Law distinctly lays down what is to be done when an estate has to be sold for realization of arrears of revenue. Section 5, 6, 7 and 13 of Act XI of 1859 prescribe the notifications which the Collector has to issue before holding the sale of an estate. In the present case it is conceded that notification under S. 5 was not necessary. It is also conceded that notification under S. 7 was duly issued and served. The only complaint is as regards the notification under S. 6. Section 13 relates to the sales of shares of an estate and has no application to the present case which was a sale of an entire estate.

The form of notification under S. 6, as approved by the Government is given on page 168 of the Revenue Sale Manual published under authority of the Board of Revenue; and R. 2 of S. 5 of the rules made by the Board says that the said form should be followed by Collectors as far as possible in notifying estates and shares for sale. The 2nd column of the form of notification contains the heading, names of mahal and parganna. It leaves it to the Collector to determine in each particular case what description should be given of the estate in order to notify to the public the estate intended sold. There is no direction either Act or in the rules framed by the of Revenue that the description estate in the sale notification should be on reference to the registers A, C or D which the Collector has to keep under the provisions of the Land Registration Act, and if the register D and the other registers kept by the Collector be erroneous and do not give a full description of the estate, that is no ground, for setting aside the sale of an estate, if the notification of sale contains a correct description of the estate.

No doubt, some of the witnesses speak of having referred to register D in order to find out the area of the estate; but the purchaser at the revenue sale has nothing at all to do with register D. What was put up to sale was the estate bearing Touzi No. 3040 and named as Mahal Bara Lodhway. Register D has nothing to do with the area of the estate. The Collector is required to prepare and keep four kinds of registers under S. 4 of Bengal Act VII of 1876 which are known as Registers A, B, C and D. Register D is an intermediate register of charges affecting the entries in the general and Mouzawar Registers which are registers A and C. Section 18 of the Act prescribes what are the particulars which the register D should contain. It nowhere prescribes the area of the estate to be entered in this register. The form of register D as prescribed by the Board of Revenue is printed at pages 86 and 87 of the Bengal Land Registration Manual published under the authority of the Board of Revenue, and this form does not contain any provision for entering the area of the estate in the register. There is no reason why the bidders, if they were really bona fide bidders and wanted to know the area of the estate going to be sold, went to look into the register D kept by the Collector for the area and not the Record of Rights of the estate prepared under Chap. X of the Bengal Tenancy Act and kept in the Collector's office.

The khewat of the estate would have given a correct idea of the area contained in the estate. It seems, therefore, hard to believe that the witnesses referred to by the learned counsel for the plaintiffs did really make inquiries as

provisions of the Land Registration Act and did form an incorrect idea of the area of the estate, that, in my opinion, is no ground for setting aside the sale if the description as given in the sale notification was a correct description of the estate. The plaintiff, if he can prove that he has sustained any damage on account of the Collector's keeping the registers incorrectly, may perhaps have his remedy in a suit for damages, but that will not entitle him to set aside the revenue sale. Moreover, although some of the witnesses say that they were misled as regards the area on a reference to the register D, none of them says that he was misled on a reference to the General Register A or the Mouzawar Register C. Under Ss. 7 and 15 of the Land Registration Act these registers have to contain a statement as regards the area; and none of them says that he was misled on a reference to these registers. As a general rule, an intending purchaser will not care so much for the area of the estate as for the income which he will derive from the estate, and this he can easily ascertain on a reference to the Settlement papers of the Record of Rights of the mahal.

The khewats (Exs. M and M2) give the area of both cultivated and uncultivated land and the Government revenue of the estate, and are sufficient to enable intending bidders to form an idea of the value of the estate put up for sale. Moreover, one does not find anything in the plaint of the two suits to suggest that the confusion in the registers kept by the Collector had misled anyone at the time of the sale; nor was this taken as a ground for setting aside the sale in the grounds of appeal presented by the plaintiffs before the Commissioner of the Division, a copy whereof has been filed and marked as Ex. C in the case of Radha Kant Lal. One does not find any suggestion in the grounds before the Commissioner to the effect that the wrong area misled any bidder at the time of the sale.

The next misdescription alleged in the sale notification was as regards the amount of the Government revenue, which was stated therein as Rs. 202-12-0 where as the real revenue was Rs. 202-11-7. No doubt, there is this slight difference in the statement of the Government revenue; but there is absolutely no evidence to show that this error did in any way misled any one or affected the sale in any way. This point was taken before the Commissioner, and in dealing with it the Commissioner in his judgment (Ex. A in Radha Kant's suit) observed that Rs. 202-12-0 was the correct demand as shown in the revenue roll and touzi ledger and on the appellant's own showing this was the revenue recorded as payable by the estate for more than 30 years. This misdescription cannot be urged as a ground for setting aside the revenue sale.

The next misdescription in the sale notification pointed out by the learned counsel for the plaintiffs was, that the name of Bhagwat Prasad alone appeared in the sale notification as the proprietor of the estate with the words "and others," and it is contended that the names of all the proprietors ought to have been set out. There is, in my opinion, no substance in this contention. On reference to register D of the Collector, already referred to, it appears that Bhagwat Prasad's was the first name in that register, the other names before his having been struck out on account of mutations of names, and his name was given in the notification with the addition of the word "and others." There is nothing in the law or in the rules framed under the Revenue Sales Law prescribing that when there are a large number of proprietors the names of all of them should be given in the notification. It is sufficient to give the name of any one of the proprietors. There is no evidence to show that the absence of the names of all the proprietors from the sale notification did in any way affect the sale; and the sale cannot be set aside on this ground.

These are all the irregularities complained of, and none of these is an irregularity which would affect the validity of the sale Reference was made by the learned counsel for the appellants to the decision of the Privy Council in *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* (7). That was a case relating to the sale of a 15-annas 6-dams ijmali share of Mahal Bisthazari bearing Touzi No. 336. This share consisted of 360 villages and there were 148 separate accounts opened in favour of transferees

(7) [1915] 42 Cal. 897=28 I. C. 699=42 I. A. 79 (P. C.).

or purchasers of the interest of individual co-sharers in specific villages or groups of villages. In the notification of sale was the specification of the share to be sold in these terms

ijmali share which cannot be specified, excluding the separate accounts No. . . . . .

Then followed a long list of the 148 separate accounts and at the end the following words occurred

all other shares besides that specified are excluded from the sale.

Their Lordships of the Privy Council, having regard to the circumstances of that particular case, held that this was not a proper description of the property sought to be sold. At page 910 of the report, however, we find that their Lordships observed as follows :

The object of the law as well as of the Board's Rules requiring specification of the properties to be sold is clearly to enable likely purchasers among the public to know exactly what was going to be sold, and to ensure thereby reasonable competition. When an estate is advertised for sale, it is not difficult to specify it; in the case of shares of estates the work of specification requires care and attention. No hard and fast rule can be laid down in regard to its sufficiency ; for it must vary according to the facts of each particular case.

In the present case, having regard to the nature of the property advertised for sale, which was an entire estate, it is clear that there was no misdescription of the estate, and the specification given was sufficient to enable the intending purchasers to know exactly what was going to be sold. In my opinion, therefore, the sale cannot be set aside on the ground of irregularities.

The next question is a question of fraud which would entitle the plaintiffs to a reconveyance of their shares in the estate. Now, the two sets of plaintiffs make different cases of fraud in the plaint, Radha Kant Lal alleges fraud against Matukdhari Singh and the purchaser Rai Bahadur Kashi Nath Singh. Basudeo Narain Singh and others in their plaint impute fraud to all the remaining cosharers including Radha Kant Lal. In fact their case is a case of conspiracy to deprive the plaintiffs in that suit of the heavy mortgage lien which they had upon the share of Matukdhari Singh. It is, no doubt, true that Matukhdhari Singh's share was heavily mortgaged. The mortgages are the Ex. 13 series in Radha Kant's suit, They come to a total amount of Rs. 30,000 and odd and what was mortgaged was the share of Matukhdhari Singh and the members of his family in Bara Lodhway. According to the plaint of Radha Kant Lal, Matukdhari Singh deliberately made a default in payment of Government revenue with a view to avoid the mortgages and to purchase the property himself in the benami of some one else. According to him the real purchaser at the sale is not Kashi Nath Singh, but Matukdhari Singh himself; and, if Matukdhari brought about the sale fraudulently and purchased it himself, it is contended that the plaintiff is entitled to a re-conveyance. It is, as I have said, true that Matukdhari's share was heavily encumbered. It also appears that Kashi Nath Singh is a near relation of his, being his own sister's husband. The question is whether the evidence is sufficient to establish fraud and a benami purchase by Matukdhari Singh so as to entitle the plaintiff to a re-conveyance. (His Lordship then proceeded to examine the allegations of fraud and the evidence on the point and concluded as follows :) The utmost that can be said in the present case is that the matter is suspicious; but the specific fraud alleged in either of the plaints has not been established. I am, therefore, of opinion, that neither plaintiff is entitled to succeed on the point of fraud and is not entitled to a re-conveyance of the property. (His Lordship then discussed the question as to what passed by the sale, and concluded as follows.). In my opinion there is no justification for this contention. There is no doubt that the entire estate, Touzi No. 3040, was sold and the whole estate consists of 852 bighas lying in the three villages, Bara, Bazida and Pipra. This contention also must fail.

As I have said above, the appellants and some of the respondents in the two appeals have filed petitions of compromise. Some of the parties to the compromise are minors. One of them is Srikant Lal who is one of the appellants in Appeal No. 287. He is represented by his elder brother, Shama Kant Lal, who is also an appellant in his own right. Having regard to the findings come to by us, the compromise is clearly for the benefit of the minor, Srikant Lal. There are other minors in Appeal No. 287, but they are not parties to the compro-

mise and so far as they are concerned the appeal will stand dismissed.

In Appeal No. 108 the Appellants Nos. 3 and 4 are minors; they are the sons of Rai Bahadur Kashi Nath Singh and Dwarka Singh, who are Appellants Nos. 1 and 2, respectively. The compromise is also for their benefit inasmuch as the sale is confirmed and they get the full price of the property. Mr. Nandkeolyar admits having received the sum of Rs. 38,000 for his clients-appellants in Appeal No. 108. In Appeal No. 108 the Respondent No. 2, Raj Kumar Prasad Singh, is a minor; he is represented by his father, Respondent No. 1, Basdeo Narain Singh. It is clear that the terms of the compromise are for the benefit of this minor inasmuch as he has got a chance of taking a re-conveyance of the property if the proportionate share of the price is paid by him or his guardian.

We are satisfied that the compromise is for the benefit of the minors concerned in both the appeals.

As regards the respondents in Appeal No. 287, the appeal will stand dismissed in terms of the petition of compromise. As regards Appeal No. 108, a decree will be drawn up in terms of the petition of compromise so far as the parties to the compromise are concerned and the appeal will be decreed so far as the other respondents are concerned.

Adami, J.—I agree.

Appeal No. 287 *dismissed*:
Appeal No. 108 *allowed.*

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* A. I. R. 1926 Patna 560

BUCKNILL, J.

Ramprit Ahir and *others*—Accused—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 240 of 1925, Decided on 12th June 1925, from an order of the S. J., Shahabad, D/- 24th April 1925.

* *Penal Code, S. 147—Because certain persons are in a certain place, at a certain time does not make them liable for arrest—Resistance to arrest is not rioting—Criminal P. C., S. 54.*

The detention and arrest of members of the public are not matters of caprice, but are governed by and must be conducted upon certain rules and principles which the law clearly lays down. To arrest persons without any justification is one of the most serious encroachments upon the liberty of the subject which can well be contemplated.

The fact that because a party of persons are in a certain place at a certain time it cannot be said simply from these circumstances that they are about to engage in a criminal act, and therefore there is no legal justification for the arrest of those persons by the police, and they are not guilty of rioting if they oppose their arrest.

[P. 561, C. 1]

P. C. Munuk and *B. P. Varma*—for petitioners.

H. L. Nandkeolyar—for the Crown.

Judgment.—This was an application in criminal revisional jurisdiction made by six men. They were tried before an Honorary Magistrate of the First Class at Arrah and were convicted by him of an offence punishable under S. 147, Indian Penal Code, and sentenced each to undergo rigorous imprisonment for six months. The applicants appealed to the Sessions Judge of Shahabad, who on the 24th of April last dismissed their appeal and upheld the convictions and sentences. The matter has now come up before me a rule having been issued by a Bench of this Court on the 14th May last. The circumstances in the case are very simple although somewhat unusual.

It would seem that some police received some sort of information that it was likely that if they, the police, went to a certain place along the railway line they would discover some people there who, it was said, were probably about to try to rob a train. With commendable zeal a party of police acting upon this information, proceeded to the locality indicated and there sure enough they found the applicants and some other men who were, so far as one can gather, sitting or roaming about somewhere near the railway line. It is said that some or perhaps all of them had actually encroached within the fencing or wire which usually runs along the side of the railway marking what I suppose is the railway property but even if this was so it hardly constitutes an offence for which one would suppose that it was possible for the police rightly to arrest such individuals. There is no doubt as to what actually took place, when the police arrived at the place, and I may say that it was night, they immediately caught hold of these persons who were standing there and endeavoured to arrest them.

The applicants and their friends or the persons with whom they put up a fight; they did not see why they should be arrested, it seems doubtful indeed whether the police were in uniform, and from what I gather they appear to have been in mufti; when the applicants were seized by the police, they fought; it is perhaps not surprising that they did. At any rate the applicants and others were eventually secured and taken to the police station. They were then charged with the offence which I have indicated and were convicted and sentenced in the manner to which I have referred.

Now the learned counsel who has appeared for the applicants points out that it does not seem that the police had any right to arrest these persons and the learned Assistant Government Advocate who has appeared in support of the convictions has not been able to disclose any clear indication as to the powers under which it might be suggested that the police had the right, under the circumstances to which I have referred, to arrest these individuals. It may possibly be, although we cannot say with certainty, that the applicants and their friends were at the locality where they were found for some purpose of a criminal nature, on the other hand, we have no authority for assuming that because a party of persons are in a certain place at a certain time they are simply from those circumstances about to enage in a criminal act. I must confess that I can see no legal justification for the arrest of these persons by the police.

Whilst I support and shall continue to support to the best of my ability the maintenance of law and order and the powers exercised by the police when they are properly exercised, I, at the same time, have the utmost respect for the rights of the subject. The detention and arrest of members of the public are not matters of caprice but are governed by and must be conducted upon certain rules and principles which the law clearly lays down. To arrest persons without any justification is perhaps one of the most serious encroachments upon the liberty of the subject which can well be contemplated. In this case, therefore, I have come to the conclusion without the least hesitation that there was no good ground shown for arresting these persons and that the convictions and sentences are bad and must be quashed.

Convictions quashed.

A. I. R. 1926 Patna 561

ADAMI AND BUCKNILL, JJ.

Chote Lal Nand Kishore Nath Shah Deo—Defendant—Appellant.

v.

Tula Singh and *others*—Plaintiffs—Respondents.

Appeal No. 1067 of 1925, Decided on 13th July 1926, from the appellate decree of the J. C., Chota Nagpur, D/- 24th June 1925.

(a) *Chota Nagpur Tenancy Act* (1908), *Ss.* 71 139 *and* 139-*A—Amending Act* (1920) *was not intended to take away vested rights under old Act. —Bihar and Orissa Act*, 6 *of* 1920, *Ss.* 38 *and* 39.

The amending Act of 1920 was not intended or expressed to have retrospective effect; that is to say, it was not intended to take away rights of action which had already vested.

A suit for possession by tenant against his landlord in 1921 the cause of action for which arose in 1919 was held to be cognizable by civil Court. [P 563, C.

(b) *Interpretation of statutes—Repealing Act—Vested rights under old Act are not taken away unless expressly provided—New procedure applies to further action.*

When an enactment changes or takes away rights, it is not to be construed as retrospective unless there are express words to that effect, but when it only changes the mode of procedure it is to be applied to further actions. [P. 563, C. 1]

(c) *Chota Nagpur Tenancy Act* (1908), *Ss.* 71 *and* 139—*Suit for possession by tenant against landlord —Question of tenant's status is immaterial.*

This question of the status of the tenant makes no difference in determining whether a suit is a suit by a tenant to recover possession from his landlord. [P. 564, C. 1]

Sultan Ahmad, *K. P. Jayaswal*, *S. Saran* and *Murari Prasad*—for Appellant.

S. K. Mitra—for Respondents.

Adami, J.—The only question which has been raised before us in this second appeal is the question whether the suit was maintainable by the civil Court. It is not necessary for the purposes of this second appeal to give in any detail the facts; it is sufficient to say that the plaintiff's case was that the Maharaja of Chota Nagpur had granted a jagir of village Ghunsera to his remote ancestor Kalyan Singh. In his family there was

a custom of lineal primogeniture and the jagir descended from Kalyan Singh downwards to the eldest member of the senior branch of the family. It thus descended to Kalo Raut, then Jairam Singh, then Ram Singh and then to Baro Ram. Baro Ram had five sons, the eldest of whom was Jhingtu, and the second Hathi Singh. Jhingtu Ram succeeded to the jagir and was followed by his son Asman Singh who died childless, leaving a widow Mt. Budhan Kuer. On Asman's death, Hathi Singh's son Tula Singh, Hati Singh being dead, claimed to succeed to the jagir as being the eldest member of the eldest branch after the death of Asman Singh. Mt. Budhan Kuer resisted his claim, and the result was that a settlement was arrived at through the assistance of one Bodh Singh. This Bodh Singh was the descendant of a person to whom the Maharaja of Chota Nagpur had granted an ijara thika of the lot Borokera in which Mauza Ghunsera was situated. According to the settlement arrived at.

Budhan Kuer was to remain in possession of the jagir during her lifetime and Tula Singh was to succeed her. Budhan Kuer died in 1918, and thereupon Tula Singh entered into possession of the village and granted half the village in mokurrari to Plaintiffs Nos. 3 to 13. Defendant No. 1 is the son of the Maharaja of Chota Nagpur. He had purchased the rights of the ijara thikadars who were the sons of Bodh Singh, and also the Maharaja of Chota Nagpur gave him the lot Borekera as khorposh, and thus Defendant No. 1 was the landlord of the village. Soon after Tula Singh had entered into possession he was dispossessed by Defendant No. 1 and thereupon proceedings were taken under S. 145 of the Criminal P. C., the result being that Defendant No. 1 was found to be in possession on the 21st August 1919. The suit was instituted on the 8th September 1921.

The defence case was that the village Ghunsera had been granted in thika a very long time ago to two persons Mohan Singh and Ram Singh. Mohan Singh was succeeded by his son Sobran Singh whose sister married Jhingtu Ram. Out of regard for the relationship, and for the purpose of supporting Sobran's sister's family, Sobran Singh and Ram Singh gave a jagir of village Ghunsera, cutting it out of lot Borekera to Jhingtu Ram Jhingtu Ram held the jagir and was succeeded by his son Asman who died issueless and on his death the jagir came to an end. The grantors of the jagir, however, allowed Asman's widow Mt. Budhan Kuer to remain in possession for her lifetime, and after her death Defendant No. 1 claimed that he had a right to resume the jagir.

It is clear then that Defendant No. 1 is admittedly the landlord of the jagir, and the question arises whether in view of the provisions of the Chota Nagpur Tenancy Act the suit by the tenant to recover possession of the jagir, from which he complained he had been unlawfully ejected by his landlord or any person claiming under or through his landlord, could be maintainable in the civil Court.

The cause of action arose on the 21st of August 1919 and at that time the Plaintiff No. 1 under the provisions of the Chota Nagpur Tenancy Act, as it then stood, had a choice of making an application to the Deputy Commissioner under S. 71 of the Act to be put back in possession or to bring a suit in the civil Court and such suit in the civil Court could be brought at any time within three years from the 21st of August 1919. Under S. 139, Cl. (5) of the Act, as it then stood, an application to recover possession by a tenant against his landlord could only be brought before the Deputy Commissioner. In 1920 the Chota Nagpur Tenancy Act was amended. The Bihar and Orissa Act VI of 1920, S. 38, amended S. 139 of the Act of 1908 and in Cl. (5) of S. 139 for the words "all applications" the words "all suits and applications" were substituted, but this amendment made by S. 38 of the Act of 1920 did not come into force till the 1st March 1924; thus when the present suit was instituted, S. 139 stood in its original form. By S. 39, however, of the Act of 1920 a new S. 139-A was inserted in the Act and under that section it was provided that

> no Court shall entertain any suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under S. 139, and the decision of the Deputy Commissioner on any such application shall, subject to the provisions of this act relating to an appeal, be final.

That new S. 139-A came into effect in Chota Nagpur on the 5th of Novem-

ber 1920 so that at the time the present suit was instituted that provision had been in force for about a year. Now the recovery of possession by a tenant from the landlord by whom he has been unlawfully dispossessed is a matter in respect of which an application is cognizable by the Deputy Commissioner; S. 71 and S. 139, Cl. (8), show this and, therefore, ordinarily, under S. 139-A the present suit would not be cognizable by a civil Court. At the time that this amendment came into force more than a year had elapsed since the date of the cause of action and, therefore, no application could be made to the Deputy Commissioner under S. 71 Furthermore, before 1924, when S. 38 of the Act of 1920 came into force, there was no provision for the trial of a suit of the nature of the present one by the Deputy Commissioner. Therefore, from the 5th of November 1920 up to the 20th of August 1922, when the present suit would be barred, it was not possible for the present plaintiff to bring a suit in any Court, for under S. 139-A a suit in the civil Court was barred and there was no provision for the bringing of a suit in the Court of the Deputy Commissioner. The question then arises whether the Act of 1920 was intended or expressed to have retrospective effect, that is to say, whether it was intended to take away the rights of action which had already vested. S. 6 of Act X of 1897, the General Clauses Act and the corresponding section of the Bihar and Orissa General Clauses Act lay down that where those Acts or any Act made after the commencement of these Acts repealed any enactment hitherto made or hereafter to be made, then unless a different intention appears the repeal shall not (a) . . . . (b) . . . (c) affect any right, privilege, obligation, or liability, acquired accrued or incurred under any enactment so repealed, or . . . (c) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding, or remedy may be instituted, continued or enforced . . . . . as if the repealing Act or Regulation had not been passed.

The general rule of interpretation is that when an enactment changes or takes away rights, it is not to be construed as retrospective unless there are express words to that effect, but when it only changes the mode of procedure it is to be applied to further actions. The Courts are very careful to protect a vested right and in several cases Judges have refused to allow suits to have retrospective effect although the language seems to imply that such was the intention of the Legislature, because, if the statute had been so construed, vested rights would have been defeated.

In the present case it is not a question of change of procedure, it is a question whether the right which the plaintiff had previous to the amendment of the Act to bring a suit on his cause of action can be taken away by the amending Act. It is more than a matter of procedure, it touches a right which was in existence at the time of the passing of the amending Act. The direction that suits of a certain kind shall be tried in a certain Court and not in another Court may be a matter of procedure, but the amendment in this case, if insisted on, would take away from the plaintiff his vested right to bring an action, and the Courts will be very slow to allow such a right to be taken away by the Amending Act. It may be said that since the suit was instituted after the passing of the Amending Act, it is not a question of retrospective effect But, however that may be, the fact remains that the Amending Act has deprived the plaintiff of a vested right and it is certain that it was not intended by the Legislature that such a right should be taken away. In my opinion, it was quite right that the civil Court should in the circumstances entertain the suit.

In the case of *Manijhoori Bibi* v. *Akel Mahamud* (1) and *Gopeshwar Pal* v. *Jiban Chandra* (2) the question was whether an Act amending the provisions of the law with regard to a period of limitation has retrospective effect. In the former case, Mookerjee, J., after consideration of the English case-law on the point stated :

It has been repeatedly laid down that in the absence of clear words to that effect a statute will not be construed as taking away a vested right of action acquired before it was passed.

Further he remarked :

To hold that this amended provision applies to suits in respect of dispossession which has

(1) [1913] 17 C. W. N. 889=19 I. C. 793=17 C. L. J. 316.

(2) [1914] 41 Cal. 1125=18 C. W. N. 804=2 I. C. 37=19 C. L. J. 549

ken place more than two years before the enactment of the new law is to maintain the position that the Legislature intended the litigant to accomplish what is impossible, in the nature of things, for him to do, in other words, to prescribe that his right are forthwith extinguished without previous notice and without opportunity afforded to him to escape the operation of the new law. To put the matter briefly, if this view is to be supported, we must hold that the Legislature acted in a most unreasonable manner i. e., that the legislature intended to penalise all under-raiyats who had been dispossessed by their landlords more than two years before the commencement of the new statute because they wanted to enforce their rights in a Court of Justice within the period of limitation allowed at that time by the Legislature.

In the second of the two cases above cited, it was pointed out that a right of suit is a vested right, and that where in accordance with the provisions of the amending Act, a suit could be brought after the passing of the amendment the amendment would apply to the suit, but where it could not be brought after the amendment the amendment would have no application.

In any case, though the plaint shows that the plaintiff claims to be a tenant seeking recovery of possession from his landlord who has dispossessed him, there are indications in the plaint that the real questions between the parties was whether the plaintiff was entitled to succeed as jagirdar to the property. The plaintiff asked for a declaration of the title but this mere relief, when asked for, need not always take away the jurisdiction of the Deputy Commissioner. In a case decided lately by me (Second Appeal No. 669 of 1923) the question between the parties was whether the tenant was an occupancy tenant or a non-occupancy tenant so that the question of the status of the tenant made no difference in determining whether the suit was a suit by a tenant to recover possession from his landlord.

As I have said the whole question depended on the decision of the question whether Jhingtu's jagir had come down to him from his direct ancestors or whether it had been granted to Jhingtu for the first time. If it was granted to Jhingtu for the first time, then the plaintiff would have no claim, for on Asman's death the landlord would be entitled to resume. On the ground that there was a substantial question of title to be decided and on the ground also that the vested right of the plaintiff could not well be taken away by the Amending Act, I am of opinion that the suit was properly triable by the civil Court and that there is no reason to interfere.

I would dismiss the appeal with costs

Bucknill, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Patna 565

KULWANT SAHAY, J.

Mina Mahto and *others*—Defendants—Petitioners.

v.

Doman Mahto and *others*—Plaintiffs—Opposite Party.

Civil Revision No. 169 of 1926, Decided on 9th July 1926, from an order of the Addl. Sub-J., Hazaribagh, D/- 25th March 1926.

Civil P. C., S. 151—Amendment of decree—A, original guardian of minors dying before appeal from preliminary decree—B appointed as guardian in appeal—Final decree mentioning A to be guardian — Amendment to substitute B for A should be allowed.

A preliminary decree was passed against some minors represented by A as guardian. In appeal from that decree B was appointed guardian of the minors, A having died, B's name appeared as guardian of the minors in the appellate decree. In the final decree passed by the trial Court A's name appeared as guardian by mistake. In execution the mistake having been discovered an application for amendment of the guardian's name was made.

Held: that the decree passed on appeal from the preliminary decree became the preliminary decree in the suit and B continued to be the guardian till the final disposal of the suit. It was not necessary either for defendants or plaintiffs to apply for appointment of B as guardian and therefore amendment should be allowed.

[P 565 C 2]

A. K. Roy and *S. S. Prasad Singh* — for Petitioners.

B. C. De—for Opposite Party.

Judgment.—The petitioners were Defendants Nos. 13, 14 and 15 in a partition suit instituted by the plaintiffs in the Court of the Subordinate Judge of Hazaribagh. They were minors and were represented by their father Teka Mahto, who was himself a defendant (No. 2) in the suit. A preliminary decree was made in September 1915. Against this decree the defendants preferred an appeal to the High Court. The present petitioners were also appellants and were represented by their father Teka Mahto.

Teka Mahto died in 1917 and Ramdayal Mahto, another defendant in the suit, applied to be appointed as the next friend and guardian of the present petitioners in the appeal in the High Court and he was so appointed by this Court. The appeal was finally dismissed by this Court on the 28th May 1918 and in the decree prepared by this Court, the present petitioners were described as minors represented by Ramdayal Mahto.

After the dismissal of the appeal, the matter went back to the Court below and a final decree was made on the 4th October 1920, the decree being prepared and signed on the 18th January 1922. In this final decree Teka Mahto is named as Defendant No. 2 and the present petitioners, Defendants Nos. 13 to 15, were described as minors represented by Teka Mahto. The description was apparently taken from the preliminary decree prepared by the Subordinate Judge in September 1915, ignoring the description of the parties as given in the decree of the High Court. The plaintiff filed an appeal against this final decreee to this Court which was First Appeal No. 112 of 1921. In the memorandum of appeal Teka Mahto was stated to be one of the respondents and the present petitioners were also made respondents and were stated to be under the guardianship of Teka Mahto. The description in the memorandum of appeal was apparently taken from the final decree prepared in January 1921. Notice of the appeal being issued, the peon reported that Teka Mahto and Ramdayal Mahto were dead. The Court ordered that the Deputy Registrar might be appointed guardian ad litem of the present petitioners. The appellants paid the guardian's cost and the Deputy Registrar was so appointed. The appeal was, however, finally dismissed by this Court for non-payment of the printing costs in April 1922. The plaintiffs then applied for delivery of possession in execution of the final decree made by the Subordinate Judge. Thereupon the present petitioners made an objection to the effect that the final decree was not binding upon them inasmuch as they were shown in the final decree as represented by Teka Mahto and that Teka Mahto was dead long before the final decree. As soon as this objection was made, the plaintiffs made an application for amendment of the final decree by describing the present petitioners as minors represented by Ramdayal Mahto as their guardian. The learned Subordinate Judge has allowed this amendment and the petitioners have come in revision against this order.

It is clear that the amendment made by the learned Subordinate Judge is correct. It is contended on behalf of the petitioners that it was the duty of the plaintiffs to make an application before the Subordinate Judge after the disposal of the appeal against the preliminary decree to appoint a guardian for the present petitioners in place of Teka Mahto. In my opinion it was not necessary for the plaintiffs to make any such application. In the appeal pending in the High Court an application had already been made for the appointment of a guardian of the present petitioners and Ramdayal was appointed guardian and in the decree made by this Court in the appeal against the preliminary decree the name of Ramdayal Mahto appeared as guardian of the present petitioners. That decree was the preliminary decree in the suit. The learned Subordinate Judge seems to be of opinion that it was the duty of Ramdayal to make an application again in the Court of the Subordinate Judge before the final decree was made for his appointment as guardian of the minors.

I think it was neither the duty of the plaintiffs, nor of the defendants, to make any such application. An application had already been made in the High Court and an order had been made appointing Ramdayal as guardian of the minor. This appointment continued until the disposal of the suit. Ramdayal died after the final decree was prepared by the Subordinate Judge. The appointment of the Deputy Registrar as guardian ad litem in the appeal filed by the plaintiffs against the final decree is of no consequence so far as the matter of the amendment of the decree is concerned. The Deputy Registrar was appointed guardian ad litem after the death of Ramdayal and at that time there was properly speaking no guardian of the present petitioners. The appointment of the Deputy Registrar in the appeal against the final decree will in no way affect the order of amendment made by the learned Subordinate Judge.

In my opinion there is no substance in this application. The application is dismissed with costs, one gold mohur.

Application dismissed.

A. I. R. 1926 Patna 566

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

Emperor—Petitioner.

v.

Zahir Haider Bilgrami and *another*—Opposite Party.

Jury Reference No. 5 of 1925, Decided on 11th December 1925, made by the S. J., Patna on 5th September 1925.

(a) *Criminal trial—Written statement by accused is not legal.*

There is no provision in law for the accused filing a written statement. [P 568 C 1]

(b) *Criminal P. C., S. 307 — Two inferences possible on evidence—Court of Reference will not interfere unless inference drawn by jury is inconsistent with evidence.*

Where one of two inferences is possible upon the evidence the Court of Reference will not interfere with the finding of the jury even though the Court is of opinion that it would have drawn the other inference if it had been a Court of appeal. But where the inference drawn by the jury is manifestly inconsistent with the documentary evidence and with the conduct of the parties, the law makes it obligatory on the Court to interfere.

In a reference under S. 307 it is not sufficient to show that another jury might have formed a different opinion: what the prosecution has to show is that no reasonable body of men would have returned the verdict complained of: *A. I. R.* 1923 *Patna* 476, *Foll.* [P 568 C 1, 2]

(c) *Criminal P. C., S. 444 — Ch. 33 does not apply to complaint by public servant on orders of Government.*

Where a public servant makes a complaint under the orders of Government, as such public servant, Ch. 33 does not apply. [P 568 C 2]

(d) *Criminal P. C., S. 444—Powers of High Court on reference are not co-extensive with those under S. 449.*

S. 444 does not enact that the powers of the High Court in the matter of a reference are co-extensive with those in an appeal under S. 449. [P 568 C 2]

Asst. Government Advocate — for the Crown.

Abdul Aziz, Naimatullah, S. A. Manzar, Yusuf Hussain, Noor-ud-din, Gholam Mohammad and *Syed Ali Khan*—for Opposite Party.

Dawson-Miller, C. J.—I have had no opportunity of perusing the judgment about to be delivered by my learned brother and I agree with the conclusions at which he has arrived.

Mullick, J.—This case arises out of the trial of Maulavi Saiyid Zahir Haider Bilgrami and Saiyid Alimuddin alias Ansar Husain alias Allan and has been referred under S. 307 of the Criminal P. C. to the High Court by the Sessions Judge of Patna.

Maulavi Saiyid Zahir Haider Bilgrami is 34 years of age and has been 12 years in the service of Government as a member of the Provincial Civil Service. In or about 1922 he was transferred in the course of his official duties to the District of Darbhanga of which Mr. King was then the District Magistrate and Collector. Mr. King deposes that he found Bilgrami to be a good and loyal officer and that he was mentioned for his revenue work in the Administration Report for the year 1923. In 1923 an exhibition was held at Laheriaserai which is the head-quarters of the District of Darbhanga and out of the funds collected for the same there remained in July 1923 an unexpended balance of Rs. 3,073-2-9 at the credit of the Exhibition Committee. On the 16th July 1923, a meeting of the Exhibition Committee was held at Laheriaserai under the presidency of Mr. King and a proposal was made by the Maharaja Kumar of Darbhanga that this balance should be devoted to the construction of a rest house near the Courts for the use of litigants and that others.

Khan Sahib Saiyid Mahbub Hasan otherwise known as Pearey Sahib who was the local Sub-Registrar and a man of some position moved an amendment that a public park should be laid out and a reading room constructed therein, and after some discussion the amendment was carried. Thereafter a Park Committee was formed and a President, two Vice-Presidents, a Treasurer and an Executive Committee of 21 were elected on the 31st August. Bilgrami was elected Honorary Secretary and three other gentlemen, namely, Babu Madhusudan Prasad Singh, Khan Sahib Saiyid Mahbub Hasan, Babu Kumar Kalyan Lal were appointed Joint Secretaries. It was further decided that the park should be called the "King Park" in honour of Mr. King who had successfully administered the Darbhanga District during his term of office and was about to leave the district. On the 27th

September 1923, an account was opened with the Muzaffarpur branch of the Imperial Bank of India by Bilgrami as Secretary of the Park Committee and the whole balance at the credit of the Exhibition Committee, namely, Rs. 3,073-2-9 was transferred to his account. The cash book of the Park Committee which was written up at first by Bilgrami himself and subsequently under his orders by his clerk Badri does not seem to have been opened till the 11th December 1923, and shows on that date a credit of Rs. 3,202-15-11. The collection of subscriptions was then rapidly pushed on and we find that by the 5th April 1924 the receipts had amounted to a sum of Rs. 12,690-5-11. Out of this sum a total sum of Rs. 260-2-9 had been expended on establishment and on contingencies leaving a balance of Rs. 12,430-3-6 which was made up as follows :

(1) Rs. 8,473-2-9 in the Bank : (2) Rs. 3,500 shown as deposited in the Bank but not in fact deposited, (3) Rs. 200 in the hands of the treasurer, (4) Rs. 232-0-5 in the hands of the Secretary, and (5) an uncashed cheque for Rs. 25 on the Alliance Bank.

It is admitted that on the 8th April 1924, Bilgrami as Honorary Secretary drew a cheque in favour of Saiyid Alimuddin for a sum of Rs 1,300 which was cashed by the accused Alimuddin on the 9th April at the Bank's branch at Muzaffarpur. This sum was not entered in the cash-book till July and it is alleged that it was never spent for the purposes of the Park Committee and that Bilgrami criminally misappropriated it. The cash-book again shows that on the 14th June Bilgrami drew a cheque in favour of Alimuddin for a sum of Rs 406. The Bank pass book shows that this cheque was cashed on the same date by the payee Alimuddin whose allegation is that he paid this money as well as the Rs. 1,300 not to Bilgrami but to Pearey Sahib. In respect of these two sums Bilgrami has been charged with offences under S. 406, Indian Penal Code, (criminal breach of trust), S. 465, Indian Penal Code, (forgery of the cash-book), and S. 477A, Indian Penal Code, (falsification of accounts). Alimuddin alias Ansar Husain alias Allan has been charged with abetting Bilgrami in respect of the offence under S. 406, Indian Penal Code.

There is also another sum of Rs. 10 in respect of which charges under Ss. 406, 465 and 477A, Indian Penal Code, have been preferred against Bilgrami. That sum is alleged to have been drawn by Bilgrami out of the park funds on the 30th July 1924. The allegation is that on that date a man named Jalil was collecting subscriptions for an Imambara at Darbhanga and that Bilgrami ordered his clerk Badri to pay to Jalil Rs. 10 on his account from the park funds. That money was never refunded by Bilgrami and he is charged with having committed criminal breach of trust under S. 406 in respect of it. A receipt was given by Jalil to Badri for this sum and it is alleged that subsequently under Bilgrami's orders Badri on the 4th August 1924, inserted words in the receipt indicating that the payment had been made on behalf of Khan Sahib Mahbub Hasan.

It is alleged that an entry in the cash book was made on the 4th August under Bilgrami's orders by Badri showing that a payment of Rs. 50 plus Rs. 10 had been made on the 30th July to Khan Sahib Mahbub Hasan to meet the expenses for registering conveyances relating to the purchase of lands for the park and that so far as the entry relates to the sum of Rs. 10 it is false and that the money was never received by the Khan Sahib. Bilgrami, therefore, has been charged with an offence under Ss. 465 and 477A in respect of this entry in the cash-book of the 4th August 1924. (Then the judgment discussed the evidence and proceeded.) On 19th January 1925, Mr. King, in accordance with an order made by the Government of Bihar and Orissa under the provisions of S. 197 of the Criminal P. C., lodged a formal complaint charging Bilgrami with criminal breach of trust as a public servant.

Bilgrami and Alimuddin were thereupon placed upon their trial but before any witnesses could be examined at Laheriaserai, the case was, upon the application of Bilgrami, transferred to the file of Mr. Owen, the District Magistrate of Patna, who in due course committed the case for trial to the Court of Session at Patna.

In Mr. Owen's Court Bilgrami did not offer any explanation of the evidence against him, nor had he appeared in person before Babu Sukhdeo Narain. In the Sessions Court he submitted a long

written statement which was accepted though strictly speaking there is no provision in law for such a procedure.

Alimuddin had made a statement on the 17th November before Babu Sukhdeo Narain. There he modified the statement which he had made on the 15th November before Mr. King and he said that he had cashed the cheques for Rs. 1,300 and Rs. 406 and paid the money Pearey Sahib.

It was contended before the Sessions Judge on behalf of Bilgrami that Ram Babu and Pearey Sahib had conspired to ruin Bilgrami, that Ram Babu had falsely denied payment of the sum of Rs. 1,706 and that Alimuddin was in fact represented to Bilgrami by Ram Babu as being Ram Babu's creditor. Alimuddin's defence in the Sessions Court was that he had at Pearey Sahib's request made over the money to Pearey Sahib and that he had falsely stated before Mr. King on the 15th November that he was Ram Babu's creditor. He denied that he had taken the money for himself. The jurors were divided, four being of opinion that the accused were not guilty of any of the charges and one being of opinion that both were guilty of all the charges.

The learned Sessions Judge is of opinion that the verdict of the majority is perverse and he has referred the case to us under S. 307 of the Criminal P. C. (Then the judgment dealt with evidence as to the time when excavation of tank began and other matters relating to the charge and held that the inferences which ought to be drawn from Bilgrami's letter are so irresistible that the jury should have considered themselves bound to find in favour of the version put forward by the prosecution.) It is true that where one of two inferences is possible upon the evidence the Court of reference will not interfere with the finding of the jury even though the Court is of opinion that it would have drawn the other inference if it had been a Court of appeal. But where as in this case the inference drawn by the jury is manifestly inconsistent with the documentary evidence and with the conduct of the parties, I think the law makes it obligatory on the Court to interfere. In a reference under S. 307 of the Criminal P. C. it is not sufficient to show that another jury might have formed a different opinion; what the prosecution has to show is that no reasonable body of men would have returned the verdict complained of. This was the view taken in this Court in *Emperor* v. *Ali Hyder* (1) and we think it is in accordance with law.

The learned Assistant Government Advocate who has submitted the evidence to a careful and scrupulously fair analysis also contends that as Mr. King, the complainant, was a European British subject the trial was held under the provisions of Ch. 33 of the Criminal P. C., and that if the Judge had, accepting the majority verdict of the jury, acquitted the accused he would under S. 449, Criminal P. C., have been entitled to appeal to the High Court on the facts. He argues that in a reference under S. 307 in such a case the High Court has a similar power to revise the findings of fact. The answer to this is firstly, that S. 444 enacts that where a public servant makes a complaint under the orders of Government, as such public servant, Ch. 33 does not apply and, secondly, that the Code does not enact that the powers of the High Court in the matter of a reference are co-extensive with those in an appeal under S. 449. There is a difference and though it may not be justifiable on principle yet the Code remains and must be strictly followed. I think, therefore, that the ordinary rule with regard to references must be followed and that we ought not to interfere unless we are satisfied that the verdict was not reasonable.

The result is that after giving due weight to the verdict of the jury and the opinion of the learned Sessions Judge, and after considering the entire evidence, we must disagree with the verdict of the majority of the jury and hold that the accused Bilgrami committed criminal breach of trust on the 8th April in respect of a sum of Rs. 1,300 and on the 14th June in respect of the sum of Rs. 406, that he committed the offence of falsification of accounts on or about the 10th and 14th June by making false entries in the cash-book, and that he also committed the offence of forgery in respect of these entries.

Bilgrami is, therefore, guilty of an offence under Ss. 406, 477A and 465 of the Indian Penal Code respectively. As for Alimuddin he clearly assisted Bil-

(1) A. I. R. 1923 Patna 474.

grami in committing the offence of criminal breach of trust and he is guilty of abetment of an offence under S. 406 read with S. 109, Indian Penal Code. His defence that the sums were made over to Pearey Sahib is proved to be false, and having regard to the circumstances the inference is irresistible that he made over the money to Bilgrami and that he knew that Bilgrami intended to misappropriate it. (Then his Lordship discussed evidence as to the sum of Rs. 10 and held that the finding of the majority of the jury should not be disturbed and proceeded). I, therefore, think that whatever our own opinion may be the verdict of the majority of the jury should not be disturbed in regard to the charge under S. 406 of the Indian Penal Code under this head.

The alteration of the receipt was certainly wrong and Bilgrami should not have ordered Badri to make in the body of it an interpolation purporting to have been made in the handwriting of Abdul Jalil. But if the money was in fact paid for Pearey Sahib it cannot be said that the interpolation was made with a fraudulent or dishonest purpose.

The same considerations apply to the charge under S. 477A of the Indian Penal Code. Bilgrami must, therefore, be acquitted of the charge under Ss. 465 and 477-A of the Indian Penal Code in respect of the sum of Rs. 10.

It remains to consider what orders should be passed by us in this case. The learned Sessions Judge's charge to the jury is so careful and complete that no room is left for any complaint of misdirection or non-direction. A re-trial cannot, therefore, be ordered, and it is our duty to convict the accused Maulavi Saiyid Zahir Haider Bilgrami of the offence of criminal breach of trust under S. 406 of the Indian Penal Code in respect of the sums of Rs. 1,300 and Rs. 406, also of the offence of committing forgery under S. 465 in respect of the false entries in his cash-book in respect of the sum of Rs. 1,300, also of the offence of falsification of accounts under S. 477A of the Indian Penal Code in respect of the sums of Rs. 1,300 and Rs. 406.

He is acquitted of all the remaining charges. The accused Alimuddin alias Ansar Hussain alias Allan must be convicted of the offence of abetment of criminal breach of trust under S. 109 of the Indian Penal Code read with S. 406 of the Indian Penal Code in respect of the sum of Rs. 1,300 and Rs. 406. With regard to the sentence to be passed on Maulavi Saiyid Zahir Haider Bilgrami we take into account his good service during the period of employment in the District of Darbhanga as well as the social and official ruin which will follow upon a sentence of imprisonment, and the fact that he has already suffered so much anguish of mind that he made an attempt upon his own life. The learned counsel who has represented him before us has said everything that could possibly have been said on his behalf but it must be remembered that he was entrusted with public funds and that he has endeavoured to place the blame on two perfectly innocent men.

The order of the Court is that he be sentenced under S. 406 of the Indian Penal Code to rigorous imprisonment for a period of two years. We pass no sentence in respect of the other charges of which he has been found guilty. As for the accused Alimuddin alias Ansar Hussain alias Allan, he appears to have been a mere tool in Zahir Haider Bilgrami's hands and the order of the Court is that he be sentenced under S. 109 of the Indian Penal Code read with S. 406 of the Indian Penal Code to rigorous imprisonment for six months.

Reference accepted.

A. I. R. 1926 Patna 569

DAWSON-MILLER, C. J., AND FOSTER, J.

Rambirich Ahir and *another*—Accused —Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 386 of 1926, Decided on 15th July 1926, from an order of the S. J., Saran, D/- 10th May 1926.

Criminal P. C., S. 109 (a)—Cl. (a) is not limited to cases where the accused has not been arrested, nor is it necessary to prove a continuous effort at concealment—Mere effort to run away on the approach of police is not sufficient—Whether a particular case falls within Cl. (a) depends on the facts of that case.

The application of clause (a) cannot be limited only to cases where a person has not been brought under arrest, nor is it necessary in all cases to prove that the accused has followed a continuous course of conduct in takin

precautions to conceal his presence : 22 *C.W. N* 163 and 41 *C.L.J.* 142, *Dissented from.*

A person, whether he be of good or bad character, who merely shows a disinclination for the society of the police and endeavours to avoid them by running away on their approach cannot be said to come within the mischief aimed at in Cl. (a).

It is certainly undesirable to lay down any general principles as to the conditions which would bring a case within the purview of the clause, for the circumstances which may arise are so multiple and various, but there must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise, indicating a desire to hide the fact that the accused is present within the local limits of the Magistrate's jurisdiction. The clause is one which should be used with proper discretion and was never intended to apply to a person merely found talking at night time with bad character in a place which is open to the public. [P 571 C 1, 2]

Jafar Imam—for Petitioners.

H. L. Nandkeolyar—for Crown.

Dawson-Miller, C. J.—This is an application in revision seeking to set aside an order of the Sessions Judge of Saran dismissing an appeal from the Deputy Magistrate.

The petitioners Rambirich Ahir and Mosafir were brought before the Deputy Magistrate under S. 109 of the Code of Criminal Procedure on the 24th April last and were each ordered to execute a bond of Rs. 200 with two sureties of Rs. 100 each to be of good behaviour for one year. An appeal to the Sessions Judge was dismissed on the 10th May.

Mr. Jafar Imam now appears on behalf of the petitioners and asks us to set aside the order on the ground that the facts proved do not bring the case within the provisions of S. 109. The section enables the Magistrates there enumerated to call upon persons to show cause why they should not be ordered to execute a bond with sureties for their good behaviour. The circumstances under which the Magistrate may take action are set out in Cls. (a) and (b) of the section. He may act on receiving information :

(a) That any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence ; or

(b) That there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself.

The facts proved in so far as they are material appear from the judgment of the Sessions Judge and are as follows : On the 15th March last a constable of the Ekma police-station was deputed to go round on night duty at villages Chainwa, Charwa and Rasulpur. He took two chaukidars and a daffadar with him, and at about 9-30 p.m. went to a bagicha, a short distance away from Chainwa railway station, on hearing soft voices. There they found about a dozen men armed with lathis, danta and bhalas talking to one another. On being accosted by the constable they began to run away. An alarm was raised and the men began to use their lathis. The constable and his men, however, warded off the blows and it does not appear that anybody received any injury. With the help of villagers who came upon the scene they managed to arrest four persons including the two petitioners. The petitioner Mosafir was carrying a spear and Rambirich carried a danta which, I understand, is a stick of any kind less formidable than a lathi. They gave their names but apparently not correct addresses These, however, were supplied later.

Rambirich lives at Rasulpur within the local limits of the Magistrate's jurisdiction. Mosafir lives at Maharajganj. Mosafir was unable to give a satisfactory account of himself and was dealt with as coming within Cl. (b) of the section. So far as he is concerned the learned counsel who appeared on his behalf was unable to suggest any valid reason why the order should be set aside and accordingly the application in his case must be dismissed.

With regard to Rambirich it was shown that he and his father had certain property at Rasulpur and that he was engaged in a law suit in connexion therewith. He stated that he was going to Chapra to get copies of certain documents in connexion with the law suit and was arrested by the constable and the chaukidars at Chainwa railway station. This was not quite accurate as the place where he was arrested was some distance from the station. He was able, however, to give a satisfactory account of himself and was not a person of no ostensible means of subsistence so that Cl. (b) of the section was not applicable in his case. He was, however, found by the Magis-

trate to come within the provisions of Cl. (a). Before a person can be ordered to execute a bond under Cl. (a) it must be shown that he was taking precautions to conceal his presence within the local limits of the Magistrate's jurisdiction and further, that such precautions were taken with a view to committing some offence. The offence is not definitely stated but it appears from the evidence of the Sub-Inspector that Rambirich was reported to be a bad character. It does not appear, however, that he was ever convicted of any crime. He called some witnesses who spoke to his character but apparently their evidence did not impress the Magistrate.

It was contended on behalf of Rambirich that a mere momentary effort at concealment in order to avoid detection or arrest was not sufficient to bring the case within Cl. (a) of the section but that there must be some continuous course of conduct shewing that the suspect was taking precautions to conceal his presence within the local limits of the Magistrate's jurisdiction. In support of this contention the case of *Reshu Kaviraj* v. *King-Emperor* (1) was referred to in which Samsul Huda, J., is reported to have said that in his opinion Cl. (a) of S. 109 refers to a continuous act and does not therefore apply to a case where there is a momentary effort at concealment to avoid detection or arrest, and further that that clause cannot apply to the case of a person brought under arrest, for it cannot be said of such a person that he is taking precautions to conceal his presence. That case was referred to with approval in a later case of the same High Court, *Sheikh Piru* v. *King-Emperor* (2).

I am not prepared to go so far as to limit the application of the clause to cases where a person has not been brought under arrest. A reference to S. 55 of the Act shows that an officer in charge of a police-station may arrest any person found taking precautions to conceal his presence within the local limits of such station under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence, or any person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself. If it is to be held that after he is once arrested and brought before the Magistrate no action can be taken under S. 109 (a) on the ground that the arrested person is no longer taking precautions to conceal his presence, there would appear to be little object in allowing him to be arrested at all, for the only manner in which he can be dealt with is under S. 109, and a large proportion of the cases dealt with under that section are cases where the person has already been arrested. Nor am I prepared to say that it must in all such cases be proved that the accused has followed a continuous course of conduct in taking precautions to conceal his presence. I consider, however, that a person, whether he be of good or bad character, who merely shows a disinclination for the society of the police and endeavours to avoid them by running away on their approach cannot be said to come within the mischief aimed at in Cl. (a).

Now, apart from the fact that the petitioner and his companions endeavoured to run away from the police there is practically nothing in this case which can be said to show that the petitioner Rambirich was taking precautions to conceal his presence. The fact that he was found at half-past nine at night talking to a number of other men, some of whom are proved to have been persons of bad character, in a bagicha close to a public railway station is, in my opinion, no evidence that he was taking precautions to conceal his presence. It is perhaps impossible, it is certainly undesirable, to lay down any general principles as to the conditions which would bring a case within the purview of the clause, for the circumstances which may arise are so multiple and various, but I think it may be said that there must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise, indicating a desire to hide the fact that the accused is present within the local limits of the Magistrate's jurisdiction. The clause is one which should be used with proper discretion and was never intended to apply to a person merely found talking at night time with bad characters in a place which is open to the public.

I am unable to find that in the circumstances proved the petitioner Rambirich

(1) [1917] 22 C.W.N. 163=41 I. C. 649.
(2) A. I. R. 1925 Cal. 616.

was taking any precautions to conceal his presence. The orders of the Magistrate and of the Sessions Judge must be set aside and the petitioner Rambirich who has been unable to find securities and is at present in prison must be released.

Foster, J.—I agree.

Application allowed.

A. I. R. 1926 Patna 572

ADAMI AND MACPHERSON, JJ.

Ram Lagan Singh and *others*—Appellants.

v.

Mrs. Mary Coffin and *others*—Respondents.

Appeals Nos. 318 and 319 of 1924, Decided on 12th August 1926, from appellate decrees of the Dist. J., Muzaffarpur, D/- 20th July 1923.

Transfer of Property Act, S. 63—Mortgagor allowing mortgagee to remain in possession of the accession as occupancy tenant—Subsequently mortgagor cannot claim as accession.

Under S. 63, if the mortgagor desires to have possession of accession, he should, on the expiry of the mortgage, tender to the mortgagee the costs incurred by him in making the acquisitions. If the mortgagor never treats the lands as accession or makes any claim and allows the mortgagee to remain in possession of the lands as occupancy raiyat, he cannot subsequently claim the accessions. [P. 574 C. 2]

L. N. Singh and *Sambhu Saran*—for Appellants.

S. Hasan Imam, S. K. Mitra, Khurshed Hussain, S. M. Mullick and *Sultan-ud-din Hussain*—for Respondents.

Adami, J.—These two second appeals arise out of a suit in which the plaintiffs, as proprietors of Mouza Nawtanwa, sought for recovery of possession of certain lands in the village from the defendants 1st and 3rd parties. The village was in 16-annas mokarari istimrari of three persons who, in 1902, granted a sadhaua pataua lease to Defendant No. 1 who was the owner of the Bhasurari factory, and who is now represented by his wife, Mrs. Coffin. In 1907 the plaintiffs purchased the mukarrari share but Defendant No. 1 continued in possession under the sadhaua pataua up to 1319 ; that is to say, 1911—1912. When the period of the sadhaua pataua lease had expired in 1320 the plaintiffs granted to Defendant No. 1 a simple lease from 1321 to 1327. After the expiry of this lease in 1327 the defendant gave up possession of the lands leased with the exception of the lands, which are the subject of the suit. These lands were divided into six different clauses in the schedule to the plaint.

Schedule 1*Kh* was shown in the Settlement Record to be the kasht lands of the factory, Schedule 1*Kh* was entered as the shikmi lands of the defendants 2nd party as under-tenants of the factory and Schedule 1*G* was shown as the kasht of the defendants 3rd party, Schedule 2*K* was shown as the kasht of the factory and gairmazrua : Schedule 2*Kh* was entered as the kasht of the defendants 3rd party and Schedule 2*G* as the gairmazrua lands of the factory. It is the plaintiffs' case that on the expiry of the lease the defendants should have given over these lands to the plaintiff. It appears that Mr. Coffin had held a lease of the village previous to 1902 when he obtained the sadhaua lease. The defendants did not contest the plaintiffs' claim to Schedules 2*K* and 2*G* lands for they admitted them to be the gairmazrua lands of the plaintiffs wrongly recorded in the name of the defendants so that with regard to these lands there is no appeal for both the Courts below have found that the defendants had no claim to them.

Defendant No. 1 in his written statement claimed that 11·42 acres had been purchased by him with the consent of the landlord, who had registeed his name in his shorista, while all the rest of the lands in that schedule and the lands in Schedule 1*Kh* had been acquired by him by purchase in Court sales in the execution of rent-decrees against different tenants, and that he had been in possession of all these lands, either himself or through his sub-tenants, ever since the purchase, and had acquired the right of occupancy, which the plaintiffs had admitted by their patta dated 1322 F. S. The lands in Schedule 1*G* of the plaint had been settled by Defendant No. 1 with tenants after the abandonment of surrender of the lands by previous, tenants : the lands in Schedule 2 *Kh* had been in possession of the tenants from before the time when Defendant No.1 had received the lease of the village and they had their houses on these lands.

It was the plaintiffs' case that on the expiry of the lease they settled tenants on the lands and that, when these tenants sought to cultivate the lands there was opposition resulting in criminal proceedings in which the men of the plaintiffs were convicted, and this gave rise to the present suit.

The Courts below have found that this allegation of the plaintiffs was not true, and that the defendants have been in possession of these lands all the time up to the date of the suit. This finding has not been contested before this Court.

The learned Subordinate Judge found that the purchase of holdings made by Defendant No. 1 having been made before 1907, when S. 22 of the Bengal Tenancy Act was amended defendant would acquire occupancy rights in those lands, and that the consent of the plaintiffs or of their predecessors-in-interest would not be necessary to validate those purchases. Defendant No. 1, therefore, had acquired the right of occupancy in the lands, or, at any rate, a non-occupancy right,and that the plaintiffs' suit with regard to these lands would be barred by limitation. This finding related to the lands in Schedule 1*K* and Schedule 1*Kh*, for the lands in Schedule 1*Kh* are really the raiyati lands of Defendant No. 1 put in shikmi possession of the under-tenants, the defendants 2nd party.

With regard to the lands in Schedule 1*G* and Schedule 2*Kh* in possession of the defendants 3rd party, with regard to which defendant No. 1 asserted that he had made settlement with the defendants 3rd party after surrender or abandonment by the tenants of the holdings, the learned Subordinate Judge has found that as the settlement was made in 1914 the defendants 3rd party could not have acquired the right of occupancy in them. He, however, did not come to any finding with regard to the right of the plaintiffs to eject the defendants 3rd party as being non-occupancy raiyats. He decreed the suit in part as against the defendants 3rd party as regards all the lands in Schedules 1*G* and 2*Kh*. With regard to the gairmazrua lands in Schedule 2*Kh* he found that Abdul Karim Sani had failed to prove that these defendants had been recognized by the landlord or that he had obtained the lands from Plaintiff No. 19. With regard to the lands in all the Schedules other then 1*G*, and 2*Kh* and the lands Schedules 2*K* and 2*G*, the learned Subordinate Judge dismissed the plaintiffs' suit.

Two appeals were filed against this judgment: one was by the defendants 3rd party and the other was by the plaintiffs and there was cross-appeal by Defendant No. 1 regarding the costs allowed to the plaintiffs with respect to the lands in Schedules 2*K* and 2*G*. The learned District Judge found that the lands of Schedules 1*K* and 1*Kh* had been acquired by Defendent No. 1 in or before 1905 and that thus he had acquired a right of occupancy. He considered the argument that the sadhaua pataua was a mortgage and not a lease and that Defendant No. 1 could not acquire rights for himself while he was a mortgagee, but must pass on the benefit of all accessions of the property to the mortgagor on the expiry of the mortgage; but he came to a finding that the sadhaua pataua was not a mortgage but a lease of lands for a fixed period, and he remarked that the point had not been raised before the Subordinate Judge.

The chief reason why the learned Subordinate Judge allowed the claim of the plaintiffs against the defendants 3rd party was that they had failed to show that they were settled raiyats of the village such as they claimed to be, because they had failed to produce the Cadastral Survey khatian to show that they held occupancy rights in the village. On appeal, however, these defendants produced the Cadastral Survey khatians which the learned District Judge examined and allowed to be taken in evidence, and from the entries in those khatians he found that as a fact four of the defendants 3rd party, namely, Ismail, Muharram, Walayat and Abdul Karim were settled raiyats of the village and had acquired occupancy rights in the lands held by them, whereas the defendants Thakur, Ramdat and Bindesari, who had not produced any Cadastral Survey khatians failed to prove that they were occupancy raiyats. He, therefore, allowed the appeal of the four defendants I have named and dismissed the appeal of Thakur Ramdat and Bindesari. The result then was that the plaintiffs' appeal was dismissed and the appeal of the four members of the defendants 3rd

party was allowed. The cross-objection of the defendants 1st party regarding the costs in respect to the lands in Schedules 2*K* and 2*G* was allowed, the District Judge holding that since the defendants 1st party had never asserted any claim to those lands, they should not be subjected to costs.

The first point taken is that the defendants 1st party failed to show which lands were purchased at auction sales and which were surrendered and abandoned, it being contended that in any case the lands surrendered or abandoned would have to go back to the landlords on the expiry of the lease.

Now looking to the written statement, it was found that Defendant No. 1 averred that none of the lands in Schedule 1*K* or 1*Kh* were lands which were surrendered or abandoned. The lands in Schedule 1*G* had been settled by Defendant No. 1, after their abandonment, with the defendants of the 3rd party. The plaintiffs failed to show, as far as one can see from the judgments of the lower Courts, that any of the lands in Schedule 1*K* or 1*Kh*, were lands which had been surrendered or abandoned by the tenants and taken into possession by Defendant No. 1. With regard to the lands in Schedule 1*G*, it has been found by the lower Court that the tenants with whom these lands were settled by Defendant No. 1 were settled raiyats of the village and having acquired an occupancy right they could not be ejected.

The next contention was that the sadhaua pataua was really a mortgage and not a lease as found by the District Judge. Being a mortgage, it is argued that the Defendant No. 1 was bound to make over to the landlord all the lands which he had acquired by abandonment, surrender, or purchase on the expiry of his sadhaua pataua lease.

Now with regard to this : after looking at the sadhaua pataua, I am of opinion that it was in reality a mortgage. The executant of the document states that he is in need of money and, therefore, "I mortgage 8 annas of the pataua property in security of Rs. 4,500." Under the terms of the sadhaua pataua principal and interest were to be satisfied out of the rents and profits. But even so, the point was not taken in the trial Court that the plaintiffs were entitled to all accessions, and, furthermore, when the sadhaua expired in 1912, the plaintiffs made no claim to the accessions nor did they offer to pay to the mortgagee the expense of acquiring the accessions; they in fact allowed Defendant No. 1 to remain in possession of the lands as an occupancy raiyat. Under S. 63 of the Transfer of Property Act, if the plaintiffs had desired to have possession of these lands acquired by Defendant No, 1, they should, on the expiry of the mortgage, have tendered to Defendant No. 1 the costs incurred by them in making the acquisitions. The plaintiffs never treated the lands as accessions or made any claim. Under the conditions of the sadhaua pataua there was really no redemption. The debt and interest were paid out of the rents and profits, and when the term had expired, the whole of the principal and interest had been paid; so that even if the sadhaua pataua was a mortgage, the plaintiffs cannot now come forward and claim the lands acquired by Defendant No. 1 before 1907.

The next contention is that the learned District Judge was wrong in allowing the Cadastral Survey khatian to be filed during the appellate stage, and that there was no reason to permit the additional evidence. The learned District Judge gave reasons for admitting the evidence and they seem quite sound. It was necessary to determine the point whether the defendants 3rd party were in fact settled raiyats, and the evidence was wanting. But Mr. Lachmi Narayan Singh points out that Exs. L to L-4, which the District Judge says are Cadastral Survey khatians are in fact Revisional Survey khatians and cannot help the defendants 3rd party. It seems that the learned District Judge made some mistake in referring to the Cadastral Survey khatians as Exs. L to L-4. There are Cadastral Survey khatians on the record which show that the four defendants of the 3rd party or their ancestors held occupancy rights in the village with regard to other lands and thus they are settled raiyats. It was to these other papers that the learned District Judge was evidently referring, but he made a mistake in calling them Exs. L to L-4. There is no doubt in my mind that the District Judge, as he

stated, saw the Cadastral Survey khatians showing these defendants to be settled raiyats.

I see no reason to find that the decision to which the District Judge has come is wrong, and I would, therefore, dismiss both the appeals with costs.

Macpherson, J.—I agree to the order proposed.

Appeals dismissed.

A. I. R. 1926 Patna 575

BUCKNILL, J.

Ramlakhan Pande—Petitioner.

v.

Dharamdeo Misir—Opposite Party.

Civil Revision No. 185 of 1926, Decided on 16th June 1926, from an order of the Small Cause Court J., Arrah, D/- 17th March 1926.

(a) *Evidence Act, S. 45—Evidence of Finger Print Expert as to age of thumb impression opposed to date on the document—Court should be careful to accept expert opinion.*

A Court should be very chary in accepting an opinion of Finger Print Expert as to the age of a thumb mark as fixing the date of the document when such date is markedly opposed to the date which appears upon the document itself so long as no serious extraneous testimony controverts the date which appears on the document. [P. 575, C. 2]

(b) *Provincial Small Cause Courts Act, S. 25—Failure to forthwith apply in revision on interlocutory order does not bar the right to apply when the case is over—Civil P. C., S 115.*

Where a Small Cause Court Judge refuses to summon witnesses, the aggrieved party can forth with apply in revision against that order, but his failure to do so does not bar his right to apply in revision when the case is over. [P 576 C. 2]

B. P. Varma—for Petitioner.

Nawadip Ch. Ghose—for Opposite Party.

Judgment.—This was an application in civil revisional jurisdiction made under the provisions of S. 25 of the Provincial Small Cause Courts Act. The facts in the case were very simple. The plaintiff brought a suit against the present applicant on a hand note for Rs. 400 alleged to have been executed by the applicant in favour of the plaintiff on the 11th November 1923. The suit was brought on the 13th November 1925. The defence was in effect that the thumb impression of the defendant had been taken on a blank piece of paper by the maliks of lands which he cultivated on bhaoli rent for the purpose of converting such rent into naqdi rent and that the plaintiff succeeded in some way or other, in collusion with one Kanahya Lal, who was a servant of the maliks, in turning this blank thumb marked paper into a hand-note.

The Small Cause Court Judge found in favour of the plaintiff and decreed the suit. The applicant has put forward two points in respect of which he claims that this Court should exercise its revisional jurisdiction.

I will take the second point first. The learned vakil suggests that, although the plaintiff's case was that the hand-note was executed in November, 1923, yet, when giving evidence in March 1926, the Finger Print Expert, who was called for the plaintiff, deposed that the thumb impression might be five years old or more. The learned vakil suggests that, under such circumstances, such a statement would throw considerable doubt upon the date attributed to the hand-note by the plaintiff and would support the applicant's claim that the actual date on which the thumb impression had been placed upon a blank piece of paper was of a date considerably anterior to November 1923. I do not think there is much force in this contention; for if the evidence of the Finger Print Expert is examined, it will be observed that he frankly admits that there is doubt as to the age of the thumb impression: and, indeed, I should be very chary in accepting an opinion as to the age of a thumb mark as fixing the date of the document when such date is markedly opposed to the date which appears upon the document itself so long as no serious extraneous testimony controverts the date which appears on the document.

Now, the first point which is put forward by the learned vakil who appears for the applicant has considerably greater force. It appears, as I have said, in the first instance, that the suit was commenced on the 30th November 1925, and that the 8th January was fixed for its disposal. On that date the defendant was present: he filed his written statement: the plaintiff prayed for time and the matter was adjourned to the 25th January and it was directed that the parties should be ready with their evidence on that date. On the 9th January the plaintiff filed his list of witnesses and diet expenses and it was directed that summonses should issue to these witnesses at once. On the 16th January defendant filed his list of witnesses:

according to his list he desired to examine four persons: the defendant at the same time filed the diet expenses.

Now for some reason or other, which is not altogether very clear to me (unless it be as is suggested by the learned vakil, who appears for the opposite party here, that it is customary to expect that at least a fortnight's notice is given by parties wishing to summon witnesses) the Small Cause Court Judge did not make any order as to summoning the defendant's witnesses on his application: what he did do was to say; "Put up on the date fixed as it is near." On the 25th January no summonses had been issued by the Court to the defendant's witnesses and the defendant asked for an adjournment which was refused. Then the Judge passed an order to the effect that the defendant had applied too late on the 16th January and that he (the Small Cause Court Judge) would not issue any summonses to the defendant's witnesses. The case then proceeded and the defendant did what he could. He examined himself and one witness whom he had succeeded in obtaining, but the other three were not present as no summonses had been issued to them. The plaintiff's efforts, as I have said, were unsuccessful, but he now complains, and I think with some justification, that under the circumstances the Small Cause Court Judge was at fault in acting as he did. After all, the defendant did put forward a bona fide list of witnesses on the 16th whatever rule of practice there may be in the mofussil as to the period which must exist between the filing of the list of witnesses and the date fixed for hearing.

We find that, as a fact, the case did not conclude until the 17th of March and there was in my view ample time for the Small Cause Court Judge to have issued the summonses to the defendant's witnesses even without, on the 16th, contemplating an adjournment of the date of the hearing itself which, as I have said, was fixed for the 25th of January. Under these circumstances I have come to the conclusion that justice has no been done to the defendant.

The principles upon which trial Courts should be governed with regard to the issue of processes to witnesses may be seen in such cases as *Bhagwat Das Debi Din* (1) and *Jadunandan Singh* v. *Sheonandan Prasad Singh* (2).

The learned vakil who has appeared here for the opposite party has ingeniously suggested that the proper course for the applicant to have taken was to have applied in revision to this Court immediately after the order of the 25th January, when, for the first time it seemed clear that the Small Cause Court Judge refused definitely to summon the defendant's witnesses. I think that it is possible that he might have applied then and there: but I do not know of any reason why he should not now apply, as he has done after the case is over. There are sometimes advantages in applying to this Court in an interlocutory matter but there is also obviously at times some disadvantage; if applications in revision were forthwith made in every case where it was thought that part or the whole of an interlocutory order of the trial Court was wrong this Court would be inundated with a vast number of applications with which it would be praactically impossible to deal. At any reter no authrity has been quoted to me, and I am satisfied that there is probably no good authority, for the suggestion that it is not possible now for the applicant to raise this point in revision before me.

Having, therefore, come to the conclusion that the Small Cause Court Judge has acted illegally and to the serious prejudice of the applicant in refusing to summon his witnesses I think that the only course properly to be adopted will be to send the matter back for a re-trial.

As Mr. T. D. Mukherji, the Subordinate Judgeof Arrah, sitting as a Small Cause Court Judge has already tried and decided the case, I think that it would be undesirable that he should deal with it again as he must perforce have made up his mind to a large extent upon the merits of the action. Under these circumstances, therefore, the case must be re-tried by another competent judicial officer possessing the powers of a Small Cause Court Judge. The judgment, therefore, of the Small Cause Court Judge of the 17th of March last will be set aside and the case remanded for re-hearing in accordance with the directions given above.

Case remanded.

(1) [1894] 16 All. 218=(1894) A. W. N. 45.
(2) A. I. R. 1922 Patna 276=1 Pat. 644.

A. I. R. 1926 Patna 577

DAWSON-MILLER, C. J., AND FOSTER, J.

Kesho Prasad Singh—Plaintiff—Appellant.

v.

Kirtarath and *others*—Defendants—Respondents.

Second Appeals Nos. 294 to 316 and 360 to 374 of 1923, Decided on 13th July 1926, from a decree of the Sub-J., Shahabad, D/- 15th December 1922.

(a) *Bengal Regulation* (11 *of* 1793)—*Re-adjustment of revenue does not confer new title.*

Where a permanently settled estate is subjected to re-adjustment of revenue under Regulation 11 of 1793 on account of additional areas coming into cultivation, that does not amount to new settlement enforcing new title.

[P 579, C 2]

(b) *Evidence Act, S. 40—A judgment is not evidence against persons not parties to it—It is admissible only in so far as it shows assertion of title made therein.*

A judgment, not being a judgment in rem, is not admissible in evidence against those who are neither parties to it nor derive title through such parties as proof of the facts determined therein. At the most it is admissible as an assertion of title claimed in that suit.

[P 579, C 1]

L. N. Singh, N. N. Sinha and *Sunder Lal*—for Appellant.

P. Dayal, Murari Prasad and *S. N. Bose*—for Respondents.

Dawson-Miller, C. J.— These 38 appeals which were heard together arise out of suits instituted by the appellant, the Maharaja of Dumraon, as proprietor of an estate in Shahabad known as Sheopur Diar Naubarar, or more shortly Naubarar, against the proprietors of the adjoining estate known as Sheopur Gangbarar Janubi, or Gangbarar, and certain tenants whose holdings, it is alleged, lie partly within one and partly within the other of those two estates.

Fifty-one such suits in all were instituted in September 1920, and were tried together before the Munsif of Buxar. The object of the litigation was to establish the appellant's title to a certain defined area of each of the holdings in question appertaining to his estate of Naubarar and to obtain an apportionment between himself and the neighbouring proprietors of Gangbarar of the rent payable by the tenants of those holdings who for many years have been paying the entire rent to the Gangbarar maliks. He also claimed from the tenants arrears for the four years before the suits of so much of the rent as was proportionate to the area of their holdings which he contended fell within his estate.

Various defences were raised by the respective defendants in the suits and were dealt with by the third Court, but for the purposes of this appeal two matters only remain for consideration. They concern the title of the appellant and a question of limitation.

But these questions were questions of fact and both were decided in favour of the respondents by the Subordinate Judge of Shahabad on appeal from the Munsif, and the findings of fact of the lower appellate Court are binding on this Court unless it can be shown that the learned Subordinate Judge has erred on some point of law material to the decision.

In the trial Court the plaintiff succeeded, or partly succeeded, in 13 of the suits. Of the rest, three were withdrawn with permission to sue afresh and the others were dismissed.

From the trial Court's decisions appeals were preferred by the plaintiff in 23 cases to the Subordinate Judge of Shahabad and ten appeals were preferred by some or other of the defendants. Of these two were remanded to the trial Court for disposal in accordance with the Subordinate Judge's directions and the remainder were decided against the plaintiff. The plaintiff has preferred the present appeals, 38 in number, which have been heard together the arguments in each case being the same.

It appears that the lands comprised in Naubarar and the vicinity, which are diara lands, were at one time submerged by the river Ganges which in that neighbourhood is liable to change its course, sometimes suddenly. In 1862, owing to changes in the course of the river in the preceding years, a large area of land to the south of Gangbarar became exposed as the river receded to the northward with a consequent encroachment on the lands of Gangbarar. This newly exposed area was re-measured by the Revenue Authorities and a certain portion was included in Gangbarar whilst the remainder lying to the south ward, said to measure some 2877 bighas

was formed into a new estate named Naubarar with a revenue of Rs. 1,104 estimated upon the area then fit for cultivation, said to measure 570 bighas. This newly formed estate was also settled with the proprietors of Gangbarar. As both estates belonged to the same proprietors the demarcation line between them was a matter of small importance at that time, and it is not improbable that the lands were settled with tenants comprising an area partly in one and partly in the other, which is the plaintiff's case.

In 1904, the revenue of Naubarar having fallen into arrears, that estate was advertised for sale by the Collector under the revenue sale law and was purchased by Maharani Beni Prasad Kuar of Dumraon, the predecessor-in-interest of the plaintiff. Subsequently boundary disputes arose between the plaintiff and the maliks of Gangbarar; and in 1911 a suit was instituted by the plaintiff against a number of the proprietors of Gangbarar the object of which was to obtain a judicial decision as to the line of demarcation between the two estates. That suit was afterwards re-registered as Suit No. 4 of 1913. The plaintiff succeeded in that litigation and obtained a decree from the trial Court in June 1918. That decree was affirmed on appeal by the High Court in 1919, and a further appeal to His Majesty in Council was dismissed in January 1925. The result of that litigation was to establish, as against the defendants in that suit, that the boundary line between the two estates was that shown on a map prepared by Mr. C. H. Parker, the District Engineer of Arrah, a Commissioner appointed in the case. The boundary so demarcated is the boundary now claimed by the plaintiff in the present suit. In pursuance of this decree obtained in the trial Court in 1926 the plaintiff, in the same year, obtained dakhildahani, or symoblical possession of the area awarded to him in that suit; but it does not appear that he ever got actual possession of the lands in dispute in the present appeal.

In 1917 the revenue of Naubarar was considerably increased by the Revenue Authorities and settled for a period of five years at a sum of Rs. 6,911 This was due to the fact that the cultivable area had materially increased since the original Settlement of 1862. There can be little doubt also that the Revenue Authorities accepted as accurate the boundary line determined by the previous litigation. It appears, however, that Naubarar is spilt up into a number of different pattis. It is stated that there are 17 separate pattis and each patti is sub-divided into several khewats the proprietors of which appear to be in possession of separate areas with a separate collection of rent from the tenants. The present respondents, as found by the lower appellate Court, were not parties to the previous litigation and contended that they are not bound by the decree passed therein or the dakhildahani which followed it. They dispute the boundary line as shown in Mr. Parker's map and contend that the lands claimed lie within the Gangbarar estate. They also contend that they have all along collected the rents as proprietors of Gangbarar without interruption and have in any case acquired title thereto by adverse possession even if the lands lie geographically within the plaintiff's estate.

The learned Munsif who tried the suit found that in certain cases the defendant proprietors had been parties to the previous litigation in which the plaintiff's title had been decreed and that the dakhildahani obtained in execution of the decree was conclusive of the question of possession against those parties, and in such cases he found for the plaintiff. With regard to those defendants who were not parties to the previous suit he held, and I consider rightly, that the decree and dakhildahani were not binding on them or evidence of title or possession in the plaintiff and, therefore, it was for the plaintiff to establish his title by other means than the production of the decree. He found that, apart from the decree there was absolutely no evidence on which the Naubarar lands could be demarcated and, therefore, the claim for an apportionment failed. He further found that the plaintiff since the inception of his title in 1904, had never been in actual possession of the lands claimed and that the defendants had during that time been realizing the rents and dealing with the lands as their own. Therefore, whether the suit was to be treated as governed by Art. 142 or Art. 144 of the Indian Limitation Act

the plaintiff's claim must fail even if he should establish his title. He further found that the enhancement of revenue in 1917 did not operate as a new settlement creating a new title, but was merely a re-assessment of Naubarar whatever it might include.

On appeal, the Subordinate Judge of Shahabad in the cases in which the defendant-proprietors had appealed, reversed the trial Court's finding that they had been parties to the previous suit and found as a fact that they had not been parties, or represented therein. This finding is not, and cannot be, questioned. In other respects in all the suits, with the exception of the two which were remitted to the trial Court for correction of certain errors of apportionment which have not been questioned before us, he affirmed the trial Court's decision.

From that decision the present appeals are preferred to this Court. The questions argued before us are three in number: (1) that the judgment in Suit No. 4 of 1913 is strong evidence of the plaintiff's title; (2) that certain maps and papers prepared by Government for revenue purposes are admissible in evidence and must be taken as correct unless rebutted, and (3) that no question of limitation can arise in face of the fact that Government re-settled the lands with the plaintiff in 1917.

On the first point it is sufficient to say that a judgment, not being a judgment in rem, is not admissible in evidence against those who are neither parties to it nor derive title through such parties, as proof of the facts determined therein. At the most it is admissible as an assertion of title to the land claimed in that suit.

On the second point it is to be observed that the evidentiary value of the documents referred to was weighed by the trial Court and the lower appellate Court who considered that they came into existence as a sequel to the plaintiff's success in the previous litigation, and added little or nothing to the authority of the decree in that suit and ought not to be taken as binding on the defendants who were not parties thereto, and, when weighed with the other evidence in the case, the value of these documents was small. It was also found that the daurapanchsala map (Ex. 12 in the suit) which is much relied on by the plaintiff was not supported by any evidence to show that it in fact proved the demarcation line between the two estates. The plaintiff appears to have fallen into the error of supposing that the judgment in the earlier litigation would be proof of the matters therein decided and to have come before the Court insufficiently supplied with evidence on material points. It was for the lower appellate Court to appraise the value of the evidence on either side, and even if we should on that evidence have taken a different view, it is not open to us to interfere on that ground alone. It is not made out that the lower appellate Court has contravened any law ar usage having the force of law or erred in any matter of procedure affecting the merits of the case.

As to the third point the argument assumes that a re-adjustment of revenue is a new settlement conferring a new title, but this is not so. Naubarar estate was settled permanently in 1862 at a low revenue based on the existing cultivable area. The same estate was sold to the plaintiff's predecessor in 1904. It was subject to a re-adjustment of revenue, as additional areas came under cultivation, under the provisions of Regulation XI of 1793, and that is what happened in 1917. There is nothing to show that a new estate was settled with the plaintiff in 1917. The argument, therefore, fails.

Before concluding this judgment I wish to add that the learned Subordinate Judge considered that the plaintiff had failed to prove his possession within 12 years of the suit and that on that account it was barred by limitation. If Art. 142 of Limitation Act applies, his decision on this point is correct. It is by no means clear, however, that the suit is founded upon dispossession of the plaintiff so as to attract the operation of Art. 142. Paragraph 5 of the plaint appears to refer to the lands claimed in the previous suit, and is not an averment of dispossession of the plaintiff by the defendants of the lands now claimed. In my opinion the proper article of the Limitation Act is Art. 144, in which case the onus would be upon the defendants to show that they had acquired title by adverse possession. Although the trial Court dealt with the case upon the hypothesis that Art. 144 applies and found that the defendants had been in

possession for more than 12 years, the learned Subordinate Judge on appeal did not consider the case from this point of view, although he does not differ from the findings of the trial Court. If, however, it is found, as it was, that the plaintiff has failed to make out his title, then the defendants' possession cannot be disturbed and the question of limitation does not arise.

In my opinion these appeals must be dismissed with costs. There will be one set of costs payable to the respondents who have appeared.

Foster, J.—I agree.

Appeals dismissed.

A. I. R. 1926 Patna 580

DAS AND ROSS, JJ.

Kirtya Nand Sinha and *another*—Plaintiffs—Appellants.

v.

Ram Lal Dube and *others*—Defendants—Respondents.

Appeal No, 566 of 1924, Decided on 5th July 1926, from the appellate decree of the Dist. J., Purnea, D/- 13th February 1924.

Bengal Tenancy Act, S. 22 (2)—Co-sharers—Part of proprietary right of a part of holding falling to a co-sharer purchasing the entire holding at rent sale—His status is not affected.

The fact that the proprietary right of part of a holding after partition has fallen to the co-sharer who purchased the entire holding in sale in execution of a rent decree, will not affect the question of his status with regard to that portion of the holding which falls in the takhta of another landlord.

If for the purposes of the partition, the name of a tenant who had long ceased to have any interest in the holding was recorded, that cannot affect the real rights of the parties, nor does the fact that the purchaser has settled the lands with a tenant make him a landlord. The peculiar status enforced in him by S. 22 (2) continues notwithstanding the settlement: *A. I. R.* 1925 *Patna* 547, *Appl.* [P 581, C 1, 2]

S. N. Palit and *G. P. Das*—for Appellants.

Ram Prasad—for Respondents.

Ross, J.—The plaintiffs, who will be hereafter referred to as the Banaili Raj, represent 13-annas 3-pies interest in Mouza Parora; the defendants first party, who will be hereafter referred to as the Srinagar Raj, represent the remaining 2-annas 9-pies interest; the defendant second party is the receiver of the Srinagar estate; the defendant third party, Ramlal Dubey, is the son of Subaklal Dubey, who was the tenant of a holding of 153 bighas 5 kathas and 17 dhurs in the village. He sold this holding to Dwarkanath Thakur and Bikan Thakur and in the Record of Rights, prepared somewhere about 1890, the name of Subaklal as vendor and Dwarkanath and another as vendees were both entered in respect of this holding.

The plaintiffs brought a suit for rent in 1897 against these vendees and sold the holding in execution of the decree in 1898 and purchased it themselves. They settled the land with different tenants from time to time and, eventually, the defendant fourth party became the tenant in 1911. Subsequently there was a partition of Mouza Parora between the Banaili Raj and the Srinagar Raj and by partition 71 bighas 15 kathas and 7 dhurs of that holding was allotted to the Banaili Raj and 81 bighas 10 kathas and 10 dhurs to the Srinagar Raj; but, in the partition papers the Record of Rights was used with the result that the name of the recorded tenant was given as Subaklal Dubey. Even after the partition, the Banaili Raj continued to pay to the Srinagar Raj the rent of that portion of the holding which had fallen to their takhta and received rent receipts. Notwithstanding this, the Srinagar Raj, in 1917, instituted a suit for rent of the 81 bighas against the defendant third party and obtained a decree and took proceedings for sale of the holding. This suit was, therefore, brought by the Banaili Raj for a declaration that the defendant third party had no connexion with the land; that the Srinagar Raj was only entitled to the proportionate rent of the 81 bighas; that the rent-decree was null and void; and that the property could not be sold in execution thereof.

The suit was defended only by Ramlal Dubey, defendant third party; and his contention was that since the partition the Banaili Raj had no concern with this holding and that they had no right to maintain the suit. The Munsif found that Subaklal Dubey had parted with his interest in the holding and that Dwarkanath Thakur and Bikan Thakur were in

possession as purchasers. He further held that the Banaili Raj had obtained possession of the holding and had paid rent to the Srinagar Raj both before and after the partition; and that the Banaili Raj had been realizing from the persons in actual possession and had been paying rent to the Srinagar Raj. He held, however, that inasmuch as the defendant fourth party must be deemed to be the raiyat of the land under S. 22 (2) of the Bengal Tenancy Act, he became a raiyat under all the proprietors and, therefore, since the partition, the plaintiffs have no interest now in the land in suit. He, therefore, dismissed the suit. The learned District Judge agreed with this view and dismissed the appeal of the plaintiffs.

It is now contended in second appeal that the partition did not affect the rights of the Banaili Raj in this land except to this extent that the Srinagar Raj became entitled to the entire rent of 81 bighas instead of a proportionate rent in the entire 153 bighas; that the Banaili Raj is still in possession through the defendant fourth party, and that they have been recognized by the Srinagar Raj who have accepted rent from them subsequently to the partition. Reference was made to the decisions of this Court in *Jhapsi Sao* v. *Bibi Aliman* (1); *Nandkishore Singh* v. *Mathura Sahu* (2); and *Basudeo Narain* v. *Radha Kishun* (3). The learned advocate for the respondents sought to distinguish these last-mentioned cases on the ground that they deal with a case where an entire holding has fallen to a co-sharer other than the purchasing co-sharer, whereas in the present case the purchasing co-sharer has in fact obtained 71 bighas and odd kathas out of the holding already and is, therefore, not entitled to claim any interest in the remainder which has fallen to the other takhta. This distinction does not seem to me to proceed on any principle. The fact that the proprietary right of part of a holding after partition has fallen to the co-sharer who purchased the entire holding will not affect the question of his status with regard to that portion of the holding which falls in the takhta of another landlord. The first mentioned decision is sought to be distinguished on the ground that it was a case between co-sharers, whereas the present case is a case between a co-sharer and a person alleging himself to be a tenant. That, however, would be no ground for distinguishing the decision so far as it deals with the effect of a partition upon the interest of a purchasing co-sharer.

It was further contended that the Banaili Raj ought to have set up this right in the partition proceedings; but, on the contrary, they allowed the name of the contesting defendant to be recorded in respect of this holding. In my opinion, nothing turns on this. It is stated in the plaint that the partition was made according to the Survey papers and that statement has not been controverted. If, for the purposes of the partition, the name of a tenant who had long ceased to have any interest in the holding was recorded, that cannot affect the real rights of the parties.

The main contention, however, on behalf of the respondents is that inasmuch as when the purchasing co-sharer settles the land, the tenant becomes a raiyat under S. 22 (2), the position of the purchasing co-sharer then becomes that of landlord and, consequently, on partition his interest ceases when the holding falls to the takhta of another landlord; when the purchaser makes a settlement, he is not himself a tenant nor a tenure-holder and must, therefore, be a proprietor. The question is not free from difficulty; but it is important to observe the exact language of S. 22 (2). It is not enacted that if the transferee sub-lets the land to a third person, such person shall be a tenure-holder or a raiyat, as the case may be, in respect of the land, but that such person shall be deemed to be a tenure-holder or a raiyat; that is to say, the section itself recognizes the relationship as artificial and, by implication suggests that, by making such a settlement, the transferee is not a landlord, but that the peculiar status conferred upon him by the section as held in *Bambhadur Lal* v. *Gungora Kaur* (4) still continues notwithstanding the settlement. Nor is it apparent on principle why the interest of the transferee co-sharer should be affected merely by his making a settlement with a tenant. It has been held in many decisions in this

(1) A. I. R. 1926 Patna 263=5 Pat. 281.
(2) A. I. R. 1922 Patna 193.
(3) A. I. R. 1922 Patna 62.
(4) A. I. R. 1925 Patna 547.

Court that he is entitled to hold the land which he has acquired, after partition, and I do not see how it can make any difference to this right that he has settled it with a person who is deemed to be a raiyat. The position is certainly anomalous; but the anomaly is the creation of S. 22 (2).

In my opinion, therefore, this appeal must be decreed with costs, and the decrees of the Courts below set aside and the suit of the plaintiffs decreed with costs throughout against the defendant third party.

Das, J.—I agree.

Appeal allowed.

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* * A. I. R. 1926 Patna 582

JWALA PRASAD AND BUCKNILL, JJ.

Ram Sumran Prasad—Plaintiffs—Appellants.

v.

Govind Das — Defendant — Respondent.

Appeal No. 189 of 1922, Decided on 3rd May 1926, from the Original Decree of the Dist. J., Darbhanga, D/- 29th March 1921.

(a) Registration Act, S. 28—Including a small property in the deed in a particular District to effect registration in that District—Property really existing and no fraud committed—Property really intended to be transferred—Registration is valid although transferrer does not take possession.

The registration of a document by the Registrar having jurisdiction over the property covered by it is not invalid in the absence of fraud or collusion on the part of or between the parties if in fact the property in question does exist: (14 *C. W. N.* 532 *Foll.*). It is enough for the purpose of registration that the donor had a good title to the property and intended to part with that property in favour of the donee. Whether the donee really exercised his right conferred by the deed is not at all essential: 41 *Cal.* 972 *(P. C.)* and *A. I. R.* 1921 *P. C.* 8, *Dist.* [P 584 C 2, P 585 C 1]

(b) Pradanashin Lady—Execution of document—Want of independent advice will not make document invalid unless such advice would have affected the execution.

Even if no independent advice was taken by a pardanashin lady, the document executed by her will not be invalid, unless it is shown that independent advice would have affected the execution of the document by the lady: 46 *I. A.* 272 *(P. C.)* and *A. I. R.* 1922 *Cal.* 203, *Rel. on.* [P 587 C 1]

* * *(c) Contract Act, S. 23—Gift by bride's parents to bridegroom and his relation in consideration of marriage are not prohibited—Gifts actually made cannot be recovered although they may not be enforceable by suit.*

Per Jwala Prasad, J.—The settlement of a nuptial gift on the bride or bridegroom at the time of the marriage is not prohibited. In practice the receiving of a gift by the bride's parents or relations at any time in connexion with the marriage is not permissible, but gifts by the bride's parents to the bridegroom and his relation is not considered to be bad and is in vogue. But, where the gift is actually made whether to the bride, the bridegroom or the father of the bridegroom by the bride's parents it cannot be recovered back when once the marriage is solemnized, though it may not be enforced in a suit: 32 *Mad.* 185 *(F. B.)* and 1 *U. P. L. R.* 119, *Rel. on.* In other words, a suit may not lie to recover the promised dowry, but when once the dowry is paid as a consideration for the marriage and the marriage is performed, the dowry cannot be recovered back. A nuptial gift includes not only the gift of money but also land and the like. [P 588 C 1, 2]

Per Bucknill, J.—It is generally contrary to public policy for a father to be paid money in consideration of giving his son or daughter in marriage and a contract to that effect cannot be enforced in a Court of Law, but an agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is not necessarily immoral or opposed to public policy. [P 600 C 2]

* * *(d) Hindu Law—Widow—Sonless widow succeeding her husband takes absolute estate, but her power of alienation is limited like that of a coparcener—Small gifts of immovables for spiritual benefit of her husband are not invalid—Gift of immovables to her daughter or son-in-law at the time of marriage will be upheld to a reasonable extent—Gifts may be promised at marriage and given afterwards.*

A sonless widow succeeds as any other male member to the entire estate of her husband (moveable and immovable) and takes possession of it as an absolute owner thereof. Her interest is not in any way limited nor does she hold a life estate only as sometimes it is supposed to be. Only her power of disposition is a qualified one and is analogous to the power of a male coparcener in a joint Mitakshara family. In this respect the property inherited by a widow from her husband differs from the properties which a woman receives as her stridhan. [P589 C 2, P 590 C1]

Within a proper limit a widow can alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit: 43 *Cal.* 574 and 11 *Beng. L. R.* 418, *Rel. on.* [P 591 C 2]

If the property sold or gifted by the widow bears a small proportion to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioners: 34 *Mad.* 288, *Rel. on.* [P 592 C 1]

The widow can make a gift of landed property to her daughter or son-in-law on the occasion of her marriage or any ceremonies connected with the marriage and that the promise made may be

fulfilled afterwards; and it is not essential to make a gift at the time of the marriage but that it may be made afterwards, upon the ground that the gift when made fulfils the moral and religious obligation of giving a portion of the property for the benefit of the daughter and the son-in-law. The only limitation placed upon this power of making a gift is that it should bear a reasonable proportion to the entire property of the deceased father and that it should be justifiable in the circumstances of the case; *Case-law fully discussed.* [P 586 C 1]

K. P. Jayaswal, S. M. Gupta and *L. K. Jha*—for Appellants.

N. C. Sinha and *A. P. Upadhya*—for Respondent.

Facts.—A suit was brought by the plaintiff to recover possession of the property in dispute as reversioners to the estate of one Banarsi Prasad, who was a wealthy banker and zamindar of Olao in the district of Monghyr. The whole case turned upon the validity or otherwise of a deed of gift executed by the widow of Banarsi Prasad on the 28th July 1901, whereby she conveyed the property to her son-in-law, the defendant Gobind Das, on the occasion of a certain ceremony connected with her daughter's marriage.

In 1888 there was a complete separation between Banarsi Prasad and his three brothers Madan Mohan Lal, Braj Mohan Lal and Krishna Mohan Lal. Banarsi Prasad died on 24th September 1897, leaving him surviving his widow Mt. Jainti Kumari and an unmarried daughter Chhotan Bibi. He left considerable properties, both moveable and immovable. Mt. Jainti Kumari inherited the properties and remained in possession thereof till her death as the widow of Banarsi Prasad.

Since the death of Banarsi Prasad Chhotan Bibi's marriage appeared to have occupied her mother's attention and at her instance her sister's husband Sheo Shankar Das entered into negotiations for marriage and ultimately Chhotan Bibi was married in the year 1899 to defendant Gobind Das, nephew of Sheo Shankar Das. When the negotiations were going on, a year before the marriage Ram Krishna Das, brother of Mt. Jainti Kumari, was also consulted by Sheo Shankar Das and he appeared to have approved of it as the horoscopes of the bride and bridegroom agreed.

The marriage was performed at a very moderate expense, considering the position of the families, the wealth which Mt. Jainti Kumari possessed and the fact that she had only a daughter and no other child male or female. The expenses of marriage came to about Rs. 600 or Rs. 700 and those of incidental ceremonies about Rs. 200 to Rs. 500. Afterwards Mt. Jainti Kumari executed a deed of gift by which she made a gift of the property in dispute to the defendant, her son-in-law, in Olao, valued at Rs. 50,000. The deed recited that the defendant Gobind Das and his father Bishwambhar Das had agreed to the marriage on the condition that the said property would be given to the defendant on the occasion of the marriage and that in pursuance thereof she had verbally declared the gift at the time of the Gantha Pakrai (catching hold of the skirt of the mother-in-law) performed during the marriage. The defendant acquired possession of the property and remained in possession during the lifetime of Mt. Jainti Kumari and was still in possession of the same at the date of suit.

After the death of Mt. Jainti Kumari the plaintiffs as reversioners came into possession of all the properties, moveable and immovable. The plaintiffs, however, did not get possession of the property covered by the deed of gift, which was in possession of the defendant. Therefore, they instituted the present suit in the Court of the Subordinate Judge of Darbhanga, for ejecting the defendant and for recovering possession of the property in dispute, on the ground that the deed of gift executed by the lady was not valid. The suit was tried by the District Judge of Darbhanga who dismissed the plaintiff's claim. Plaintiff appealed and the deed of gift was attacked as being invalid on various grounds.

Jwala Prasad, J.—(His Lordship set out the facts of the case as narrated above and proceeded). In the Court below the parties went to trial on various issues as set forth in the judgment of the Court below; most of these issues have been set at rest by the decision of the trial Court and have not been raised in this Court. We are concerned only with the issues which relate to the validity or otherwise of the deed of gift. These are Issues Nos. 6 to 11 of the Court below. Some of these issues again attack the validity of the gift on some technical grounds and may be dealt with in the

first instance. It is said that the deed is inoperative, inasmuch as it was not validly registered under S. 28 of the Indian Registration Act (Act 16 of 1908) by the Sub-Registrar of Beguserai, he having no jurisdiction to register it.

Now, the deed of gift in question deals with two properties: (1) eight-annas pokhta share out of sixteen-annas of Mahal Barsaon, old Tauzi No. 1404 and present Tauzi No. 6507, and (2) one bigha of jote land situate in mauza Semaris, otherwise known as Olao. The first property, Mahal Barsaon, which in fact is the bulk of the gifted properties, is situate in pargana Havi in the district of Darbhanga within the jurisdiction of the Sub-Registrar of Bahera; the second which consists only of one bigha of jote land, is situate within the jurisdiction of the Registrar of Beguserai in the district of Monghyr. The plaintiff's case is that this one bigha of land did not belong to Mt. Jainti Kumari and that it was falsely alleged in the deed in question that it was purchased by her and was her property, with a view to give jurisdiction to the Sub-Registrar of Beguserai to register it.

Reliance is placed for this contention upon the survey khatian, Ex. F (2), wherein the land is shown as the qaimi land of Sukhan Barhai, with a note that the produce rent of it is paid to Mt. Jainti Kumari as malik thereof. Sukan Barhai has not been examined. His son, Ram Lal Barhai, Witness No. 3, examined on behalf of the plaintiffs, admits that Mt. Jainti Kumari is the malik of this land and that he used to pay the manhundi rent for the land to her and after her to Jagdhar Babu Plaintiff No. 2. He admits that the land.

was formerly in the khas cultivation of Mt. Jainti Kumari.

Now the deed of gift was executed on the 28th July, 1901, whereas the survey record-of-rights was published on the 9th November 1902. The plaintiffs, therefore, have failed to prove that the land was not in the khas possession of Mt. Jainti Kumari when the deed of gift was executed. Mt. Janti Kumari had two-fold rights over the land; she was admittedly the proprietress of it and it was in her khas cultivation (probably at the time when the deed of gift was executed) as admitted by the aforesaid plaintiffs' witness Ram Lal Barhai. The fact that she was not in khas possession subsequent to the deed of gift does not in any way affect the validity of the registration of the document. It is immaterial how she had obtained khas possession over the land, whether by purchase as stated in the deed of gift or otherwise. The recital in the deed of gift about the lady's title to the land in question far from being in any way disproved finds support from the aforesaid evidence. The plaintiffs rely upon the fact that the defendant was not in khas possession of the land. He has given a reasonable explanation of it. He says that the land was at a great distance from Benares where he resides and he did not care to retain possession of it. It must be remembered that the land was given, as stated in the deed, probably with a view that the defendant might plant a garden on it. It is enough for the purpose of registration that the donor had a good title to the property and intended to part with that property in favour of the donee. Whether the donee really exercised his right conferred by the deed is not at all essential. He might change his mind, and in fact in this case it seems that the defendant did change his mind as to his retaining his possession over the property. S. 28 of the Registration Act does not require anything more than the existence of the property within the jurisdiction of the Sub-Registrar where it is sought to be registered.

The learned counsel on behalf of the appellants has relied upon the decisions of their Lordships of the Judicial Committee in the cases of *Harendra Lal Roy* v. *Hari Das Devi* (1) and *Biswanath Prasad* v. *Chandra Narain Chowdhury* (2). In the former case the property sought to be dealt with in the deed in question was a fictitious property and had no existence. In the latter case it was found that to the knowledge of both the parties the transferror had no title to the property and that he never intended to part with it. These decisions do not affect the present case, inasmuch as the property dealt with in the deed of gift admittedly does exist and it belonged to the donor Mt. Jainti

(1) [1914] 41 Cal. 972=23 I. C. 637. =41 I. A. 110 (P. C.)
(2) A. I. R. 1921 P. C. 8=48 Cal. 509.

Kumari, as proprietress thereof and at one time she was in possession of it, probably at the time the deed of gift was executed, and that she bona fide intended to make a gift of it to the defendant. Far from denying the title of Mt. Jainti Kumari to the land in question the plaintiffs are said to have taken possession of it after her death as reversioners to her husband. It is possible that the lady transferred the small piece of land in Olao in order to save herself the trouble of going to the Sub-Registrar's office at Bahera in the district of Darbhanga far off from her residence at Olao within the jurisdiction of the Sub-Registrar of Beguserai, she being a pardahnashin lady. This in itself is not a bad motive, and in fact nowhere has it been suggested that there was any fraud or collusion practised by the parties in the matter of getting the deed registered by the Sub-Registrar of Beguserai by including in it the land in question situated within his jurisdiction. It was pointed out in the case of *Brojo Gopal Mukerjee* v. *Abilash Chandra Biswas* (3) that the registration of a document by the Registrar having jurisdiction over the property covered by it is not invalid in the absence of fraud or collusion on the part of or between the parties if in fact the property in question does exist. Similar is the view taken by all the High Courts in India: vide *Durgaprasad Sahu* v. *Tameshar Prasad* (4), *Muhammad Abdul Hasan* v. *Fida Husain* (5), *Lakshmi Kantaraju Garu* v. *Sri Rajah Dantuluri Pada Venkata Jagannadharaju Garu* (6), *Mt. Ram Dai* v. *Ram Chandrabala Devi* (7), *Mt. Jasoda Kuer* v. *Janak Missir* (8) and *Pirthi Din* v. *Ram Lal=A. I. R.* 1926 *Oudh* 136.

The two recent cases decided by this Court to one of which I was a party seem to be on all fours with the present case. In those cases the registration was held to be valid. The learned District Judge has found, and we agree with his finding, that the land dealt with by the deed of gift in the present case did exist and that the lady had good title to it and in fact intended bona fide to make a gift of it to the defendant and that there was no fraud or collusion practised by her or any of the parties to the deed in including the property in the deed in order to give jurisdiction to the Sub-Registrar of Beguserai.

I, therefore, in agreement with the learned District Judge hold that the registration of the document in question was valid under S. 28 of the Indian Registration Act. The contention of the appellants must, therefore, be overruled. This disposes of the second part of Issue No. 6 framed by the Court below. The first part of that issue is:

> Did Mt. Jainti Kumari sign the deed of gift after understanding its contents and after independent advice.

There is the positive evidence of Bansidhar (Witness No. 4 for the defendant), one of the marginal witnesses to the deed, that the document was read out to the Mussamat and she understood the contents thereof and then signed the deed and thereafter the witnesses to the deed attested it. The witness was in service of the Mussamat at that time and was in charge of the bahis or account books which used to be written at her deorhi. He says that the Mussamat used to understand business and look after her affairs. There is no suggestion that the Mussamat was like other pardahnashin ladies ignorant of her affairs and in fact her able management of such a large estate is not disputed. According to the evidence of the witnesses on behalf of the plaintiffs Ram Sumran Prasad and others she so diligently managed her business that she augmented the income of the property during her management. Bansidhar also proves the identification of the lady by Sheo Karan Upadhyaya (Plaintiffs' Witness No. 9) before the Sub-Registrar, and that when asked by the Sub-Registrar she said to him that she had understood the document. The endorsement of the Sub-Registrar on the document supports this witness. Sheo Karan Upadhyaya (Witness No. 9 examined on behalf of the plaintiffs) does not deny the admission of the execution of the document by the Mussamat before the Sub-Registrar nor does he say that the Mussamat did not understand the document or that the Sub-Registrar did not satisfy himself as

(3) [1910] 14 C. W. N. 532=5 I. C. 127.
(4) A. I. R. 1924 All. 897=46 All. 754.
(5) A. I. R. 1924 All. 473.
(6) A. I. R. 1924 Mad. 281.
(7) [1919] 4 Pat. L. J. 438=52 I. C. 446.
(8) A. I. R. 1925 Patna 787=4 Pat. 394.

to her having executed it after understanding it, although he was examined on the 21st of March long after Bansidhar who was examined on the 5th of March 1921. Curiously enough, he is silent as regards the circumstances under which the document was executed, admitted and registered. In cross-examination he admits that he identified the Mussamat at the time of registration.

The other attesting witnesses to the deed Ram Krishna Das (P. W. 5), Sri Narain (P. W. 8) and Parmeshwari Prasad (P. W. 10), scribe of the document, want to make out that the document was written and attested at Monghyr, and not at Olao where the Mussamat is said to have executed it. The first two say that they signed the document as witnesses without the signature of the Musasmat thereon as they were told to do so by Bishwambhar Das, father of the defendant. This evidence is obviously false, inasmuch as the witnesses described themselves in the document as residing at that time at Olao, and the position of their signatures in the document indicates that they attested it after it was executed by the Mussamat. Ram Krishna Das is the brother of the Mussamat, it is not likely that he would attest it when it was not executed by the Mussamat in his presence and was executed at Monghyr where the Mussamat was not living, simply because he was told to do so by Bishwambhar Das.

The scribe was the karpardaz of Banarsi Prasad, husband of the Mussamat and continued to be so after his death during the time of the lady. He says that he came to Olao 10 or 12 days after he wrote the document on stamp-paper, but he did not tell the fact of his having written the document to the Mussamat. It is absurd. These witnesses are self-condemned for on their own showing they falsely described themselves in the document as residing at Olao at the time and attested the document without having seen its execution by the Mussamat. None of these witnesses for the plaintiffs proves that the document was not read out to the lady or that she did not understand it or that no independent advice was given to her, for, according to their own showing, the document was not signed by the Mussamat in their presence. Agreeing with the Court below I disbelieve them, and would prefer the straightforward evidence of the defendant's witness Bansidhar who was an accredited servant of the Mussamat and was her mukhtear-am, getting a decent salary of Rs. 50 a month.

It is suggested by the plaintiffs that the document was executed on account of the undue influence of Bishwambhar Das, but Bishwambhar Das at that time was not the manager of the Mussamat. He was appointed manager subsequently by managernamah (Exhibit A), dated the 5th October 1901. It may be that he used to be consulted in important matters and probably he was consulted with respect to the execution of this document. But it seems that the persons employed by the Mussamat in connexion with the transaction in question were the accredited servants of her from the time of her husband.

The learned District Judge was, therefore, right in holding that the plaintiffs' case of any undue influence having been exercised upon the Mussamat in the execution of the document in question, or her not having understood the contents thereof before executing it, is a myth. This is corroborated by the fact that the document was given effect to and the donee, the defendant, came in possession of it forthwith and has been so for over 16 years up to 1916 during the time of the Mussamat, without any objection on her part, although the connexion between the two families had to a large extent been severed by the death of the daughter Chhotan Bibi in 1904 and of her second son in 1906. All this time she has not been shown to be in any suspected atmosphere.

There is no substance in the contention of the plaintiffs. It must be held upon the evidence on the record and the circumstances of the case that the document was executed by the lady independently and that she understood its full nature and effect. She hardly needed any advice in the matter, she had before her the accredited servants to seek their advice in the matter. In fact, the nature of the transaction does not necessitate that she should have the advice of anybody. She was nominally a pardahnashin lady, but, as observed above, she had the full capacity of understanding business transactions.

Accepting the case of the plaintiffs, she was in touch with Bishwambhar Das who was shortly after appointed manager, and the document was executed upon the advice of Bishwambhar Das. There is no reason to suppose that this was not independent advice, simply because Bishwambhar Das's son the defendant, was the beneficiary under the deed. This would only require the transaction to be examined with caution. It must be remembered that the defendant was her son-in-law and the only person upon whom she could bestow her affection. Then her brother was also there, besides responsible servants of the estate. What more is needed for independent advice in a matter of this kind, I fail to understand. It will be too much to hold that a document of this kind should be held invalid simply because no independent advice was offered to the lady. The authorities have not gone so far, nor is the rule that a pardahnashin lady should have independent advice inflexible. Even if no independent advice was taken by her, the document will not be invalid, unless it was shown that independent advice would have affected the execution of the document by the lady. It is amply proved in this case, and the circumstances unmistakably point to the fact that the Mussamat intended to give the property in dispute to her son-in-law as a gift and she, as a matter of fact, did give effect to her intention by parting with the possession of the property. Any advice, therefore, would not have affected her action in the matter. The principles are well laid down in *re Coomber* (9), *Santi Bala* v. *Dharasundari* (10) and *Satish Chandra Ghosh* v. *Kalidasi* (11).

It is not denied that the lady signed the document. In fact, her signature thereon is admitted. The document was presented by her to the Sub-Registrar before whom she admitted its execution and signed the endorsement made by the Sub-Registrar. It must, therefore, be held that the deed of gift was executed by the lady of her own free will and that it was properly registered by the Sub-Registrar of Begusarai. (His Lordship then dealt with other issues of fact and proceeded). On behalf of the plaintiffs it is contended that the agreement was in the nature of marriage brokerage and as such it is immoral and opposed to public policy. It is said that under S. 23 of the Indian Contract Act the consideration of the gift was unlawful and hence the gift itself is vitiated. The section is based upon the English Law, as according to notions in the West every marriage ought to be free and open: *Scott* v. *Tyler* (12). In certain cases in India it was held that the aforesaid rule cannot be applied in its entirety in this country, as marriages are scarcely, if ever, free and open, the real contracting parties being the parents and the guardians. The Court has to consider the relation of the contracting party (the promisee) to the boy or girl given in marriage and the motive, that is, whether the main object was to benefit himself without considering the fitness or unsuitableness of the marriage, or whether the latter was the prime consideration, the benefit to himself being incidental. All the cases were considered by Mookerji, J., in *Bakshi Das* v. *Nandu Das* (13). In that case the brothers agreed to give their sister in marriage to the plaintiff upon his agreeing to pay them Rs. 190 as *pan* money, out of which Rs. 135 was paid in cash and the balance was to be paid on the day of the marriage. The plaintiff performed all the ceremonies and incurred expenses; but when he went to marry the defendants' sister they refused. He brought a suit for recovery of the money paid by him and damages for the expenses incurred. The lower Courts gave a decree to the plaintiff and Mookerji, J., in second appeal, upheld it. Upon a review of the authorities he laid down the following rules:

(1) An agreement to reward a third person in consideration of negotiating a marriage is contrary to public policy.

(2) An agreement to pay money to the parents or guardians of the bride or bridegroom in consideration of their consenting to the betrothal is not necessarily immoral or opposed to public policy. Where the parents of the bride are not seeking her welfare but give her to a husband otherwise ineligible the agreement by which such benefit is secured is opposed to public policy and ought not to be enforced.

(3) An agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is under the circumstances of the case neither immoral nor opposed to public policy. It will

(9) [1911] 1 Ch. 723=80 L. J. Ch. 399=104 L. T. 517.
(10) [1919] 46 I. A. 272=17 A. L. J. 937 = 53 I. C. 131=37 M. L. J. 483.
(11) A. I. R. 1922 Cal. 203.
(12) [1787] 1 Wh. & T. L. C. 573.
(13) [1905] 1 C. L. J. 261.

be enforced and damages also will be awarded for breach of it: *Umed Kika* v. *Nagindas Narotamdas* (14); *Muljt Thakersay* v. *Gomti* (15); and *Ranee Lallun Monee Dossee* v. *Nobin Mohun Singh* (16). The onus of proving that the agreement was opposed to public policy is upon the party who alleges it to be so. In this respect the English Law is not to be followed.

The text of Manu relative to the subject is as follows:

Let no father who knows the law receive a gratuity (sulka), however small, for giving his daughter in marriage, since the man who through avarice takes gratuity for that purpose is a seller of his offspring: Manu, Chapter III, S. 51.

Even the acceptance of a bovine pair by the father of the bride from the bridegroom is designated as a dowry by certain authorities. The acceptance of a dowry, be it costly or be it of insignificant value, constitutes the sale of the girl: Manu, Chapter III, S. 53.

A marriage in which the bride's relations do accept the dowry voluntarily presented by the bridegroom's father, etc., is no sale of the bride since such a present is but an adoration of the bride done out of love or affection: Manu, Chapter III, S. 54.

This is a prohibition against the father taking gratuity for giving his daughter, which amounts to selling her. This rule in Manu agrees with the English Law on the subject and with S. 23 of the Indian Contract Act with this difference that a gift voluntarily made out of love or affection is not a sale of the bride as laid down in Manu, Chapter III, S. 54, referred to above. But Manu does not seem to prohibit the settlement of a nuptial gift on the bride or bridegroom at the time of the marriage. In practice the receiving of a gift by the bride's parents or relations at any time in connexion with the marriage is not permissible; but gifts by the bride's parents to the bridegroom and his relations is not considered to be bad and is in vogue. Such is also the evidence in this case as referred to above. On the other hand, the Hindu Law requires gifts to be made to the bride and the bridegroom during marriage, and without such a gift the marriage is not considered to be properly solemnized and performed.

The Bombay High Court, in the case of *Dholidas Ishvar* v. *Fulchand Chhagan* (17) held that a stipulation for monetary payment for himself is an incentive and is dangerous both in the case of a father seeking a wife for his son and in the case of a father seeking a husband for his daughter. This was followed by a Full Bench of the Madras High Court in *Kalavagunta Venkata Krishnayya* v. *Kalavagunta Lakshmi Narayan* (18) which held that a contract to make a payment to a father in consideration of his giving his daughter in marriage must be regarded as immoral or opposed to public policy within the meaning of S. 23 of the Indian Contract Act and the money cannot be recovered by suit. If the money had been paid and the marriage solemnized, the money cannot be recovered back. In England such a practice will not be enforced as law: *Kean* v. *Potter* (19).

The prohibition in the text of Manu is against receiving a gift by the father of the girl or her relations through avarice or greed which amounts to selling the girl. But the gift actually made whether to the bride, the bridegroom or the father of the bridegroom by the bride's parents cannot be recovered back when once the marriage is solemnized, though it may not be enforced in a suit: vide *Kalavagunta Venkata Krishnayya* v. *Kalavagunta Lakshmi Narayana* (18) and *Jagdishwar Prasad* v. *Sheo Bukhsh Rai* (20). In other words, a suit may not lie to recover the promised dowry, but when once the dowry is paid as a consideration for the marriage and the marriage is performed, the dowry cannot be recovered back.

Colebrooke, in his Digest, volume I, pages 449-450, quotes the texts of Virhaspati and Narada, to show that a nuptial gift to the bride or her family is valid and not revocable. A nuptial gift is said to be a general term and to comprehend what is given to a bridegroom on his marriage by the parents of the bride. It includes not only the gift of money but also land and the like.

Shyamacharan Sarkar in his Vyavastha Darpana, 2nd edition, at page 621, mentions a nuptial gift as valid and irrevokable and relies upon the texts of Virhaspati and Narada referred to above: a nuptial gift or gratuity given to the bridegroom on his marriage to the daughter is not revocable nor is the property which is received after marriage from the wife's parents and kindred. Property given by

(14) [1870] 7 B. H. C. O. C. 122.
(15) [1887] 11 Bom. 412.
(16) [1875] 25 W. R. 32.
(17) [1898] 22 Bom. 658.
(18) [1909] 32 Mad. 185=18 M. L. J. 403=3 I. C. 554=4 M. L. T. 1 (F. B.).
(19) 3 P. Will 76=Story's Eq. J. Plac. 26.
(20) [1919] 1 U. P. L. R. 119=51 I. C. 856.

the husband's father at the bridal procession is also not revocable.

In the present case, in accordance with the promise or agreement made, Mt. Jainti Kumari actually made over the property to her son-in-law who has been in possession thereof. The question is whether the plaintiffs can now recover the property back. S. 23, which renders the consideration of an agreement, which is opposed to public policy, as unlawful, does not go far enough to entitle the plaintiffs to recover the property after the object of the agreement was fulfilled; otherwise the defendant would be put to a great hardship. If the lady had not agreed to give the property in question to the defendant, his father and others who were in charge of the marriage would not have agreed to the marriage and the marriage would not have taken place. Mt. Jainti Kumari herself was anxious, considering the position of the family, the fitness of the bridegroom and the former connexion with the uncle of the bridegroom through her sister, to have the marriage of her daughter settled with the defendant. Her wishes would not have been fulfilled at all if she had not promised to make the gift in question. After having obtained the object and having fulfilled the promise, I do not think that she could have availed herself of the provisions of S. 23 and recover back the property in question, far less could the plaintiffs, who have succeeded as reversioners of her husband, recover it back on that ground.

We have now to consider the most difficult question in this case covered by Issue No. 11, and that is, whether, under the Hindu Law, the lady having succeeded to her husband with the restrictions imposed upon her in the matter of the use and enjoyment and power of alienation, could validly make a gift of an immovable property to her son-in-law. It is undisputed that she inherited the property of her husband both moveable and immovable as a lawfully wedded wife of her husband, Babu Banarsi Prasad, who died in the year 1897 without leaving any male issue. The parties belong to the Agarwala community, a sect of Vaisya class called Bisa Agarwalas. The plaintiffs are the Purbia (eastern) Agarwalas of Monghyr district in Bihar, and the defendant is a Pachhanhi (western) Agarwala of Benares in the United Provinces. This division does not create any difference in the status, respectability or dignity of the parties. They are both high class and are governed by the Mitakshara (Benares) School of Hindu Law. According to this School, Mt. Jainti Kumari, after the death of her husband in 1897, without any male issue, inherited the entire estate of her husband consisting of moveable and immovable property.

The widow's right of succession is based upon the text of Yajnavalkya, Chapter II, verses 138-139, under which in default of a son the wife takes the estate of her husband in preference to the other heirs. Vriddha Manu and Katyayana also declare the widow's right to the whole estate of her sonless husband.

The commentary of Yajnavalkya by Vijnaneswara which is followed as an authority by the Benares School discoursing on the text regarding the succession of the widow sums up his conclusions as follows:

> Therefore it has been established that a wedded wife (patni) takes the whole estate of a man who being separated (from his co-heirs) and not subsequently re-united (with them) dies leaving no male issue": vide Colebrooke's Translation, Chapter II, S. 1, Cl. 39.

She, thus, succeeds as any other male member to the entire estate of her husband (moveable and immovable) and takes possession of it as an absolute owner thereof. Her interest is not in any way limited nor does she hold a life estate only as sometimes it is supposed to be. Only her power of disposition is a qualified one and is analogous to the power of a male co-parcener in a joint Mitakshara family, and the reason of this is in the nature of her relationship with her husband. She is supposed to be half the body of her husband and confers so much temporal and spiritual benefit on her husband as half of his own body does and associates with him in the performance of religious sacrifices: Smiritichandrika, Chapter XI, paragraph 6. A lawfully wedded wife is called 'patni' as a correlative of the term 'pati' (husband). The marriage is attended with nuptial rite and the object of such a marriage is to enable the husband to offer sacrifices and to discharge his religious duties and to beget a son unto him in order that he may be delivered from the hell called 'put' to which the shades of a sonless man, according to Hindu ideas, descend:

Manu, Chapter IX, paragraph 138 ; Dayabhaga, Chapter V, paragraph 6, Dattak Mimansa, Chapter I, paragraphs 3 and 5 ; Colebrooke's Digest, Volume III, pages 159, 293 and 294. A man is enjoined by the Sastras to marry a wife as his last Sanskara or religious rite. During the lifetime of the husband the wife acquires ownership of a dependant character and on his demise she obtains independent power over it. Vriddha Manu says'

The widow (patni) of a childless man, keeping unsullied her husband's bed and persevering in religious observances, shall alone present his funeral oblations and obtain also his entire share (कृत्स्नमंशम्) : vide quotation in the Mitakshara on widow's succession and Viramitrodaya, Chapter III, part 1, S. 2.

She takes the entire estate of her husband and is enjoined to perform acts calculated to increase the prosperity of her and her lord, such as, performing sraddhas, digging wells, etc., and giving presents with pious liberality in proportion to the wealth inherited by her. Thus, the performance of religious and charitable purposes and acts conducive to the welfare of her husband are the objects for which she takes the estate of her husband. Accordingly, Smiritichandrika in Chapter XI says that she possesses independent power of making gifts for religious and charitable purposes, for such gifts

her husband, even if wanting a son, shall reach the heavenly abodes,

and for purposes not being religious or charitable but purely temporal, such as, gifts to dancers, etc., she has no independent power. Hence arises the restriction imposed upon the widow's power of disposition.

In this respect the property inherited by a widow from her husband differs from those properties which a woman receives as presents at the time of marriage or at the time of going to her husband's family or on happy rites or ceremonies or those given to her by her father, mother or brother which are called Stridhan, or her own property or peculium. Over these latter she has absolute dominion and her power of disposition is not restricted.

Mitakshara in Chapter II, S. 11, clause (2) includes in the word Adya (आद्य) in Yajnavalkya's text among the aforesaid kinds of stridhan such property which a woman "may have acquired by inheritance." Interpreting the said clause in the light of Causes 11 to 25 of the same section, Sir James W. Colville, in the case of *Bhugwandeen Doobey* v. *Myna Baee* (21) would make it applicable only to property inherited in the husband's lifetime or from some persons other than him. The conclusion to which his Lordship arrived is summed up in the following words :

Their Lordships, therefore, have come to the conclusion that, according to the law of the Benares School, notwithstanding the ambiguous passage in the Mitakshara, no part of her husband's estate whether moveable or immovable, to which a Hindu woman succeeds by inheritance, forms part of her stridhan or particular property ; and that the text of Katyayana which is general in its terms and of which the authority is undoubted must be taken to determine first: that her power of disposition over both is limited to certain purposes ; and secondly, that on her death both pass to the next heir of her husband.

The text of Katyayana referred to above, which imposes restriction upon the widow's power of disposition is as follows :

Let the sonless widow preserving unsullied or inviolate the bed of her landlord and abiding with her venerable protector or strictly obedient to her spiritual parents enjoy her husband's property being moderate (or with moderation) until her death, and after her let,the co-heirs (dayadas) take.

A similar passage in Mahabharata Dandharama dealing with the religious merits of gifts runs as follows :

It is ordained that the property of the husband when devolving on wives has enjoyment for its use. Let not woman on any account make a waste or apahara of her husband's property.

Viramitrodaya, citing these texts and in commenting upon them in Chapter III. part I, S. 3, says that by the phrase "on any account" in the texts it is intended that waste under all circumstances is reprehensive. Literally apahara (waste) is theft. Making useless gifts to dancers, players and the like and the wearing of delicate apparel, etc., the tasting of rich food, etc., and the like being improper for a widow who is enjoined to restrain her passions are equal to theft. Thus, the term 'apahara' is used in a secondary sense, but gifts and the like for religious purposes are not so and cannot be included under the term 'apahara' or waste.

Viramitrodaya sums up his conclusions: Therefore it is established that making gifts for spiritual purposes as well as

(21) [1866-67] 11 I. A. 487=9 W. R. 23=2 Suth. 124=2 Sar. 327 (P. C.).

making sale or mortgage for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband. The restriction, however, is intended to prohibit gift to players, dancers and the like as well as sale or gift without necessity.

Katyayana's text enjoins the widow to use the husband's property being moderate or with moderation, which practically means the same as the word 'waste' used in Mahabharata, that is, the widow shall not uselessly spend the property which prohibits expenditure not useful or beneficial to the late owner of the property. The widow takes the whole property as heiress of her husband, and not merely the use of the whole or part of it. She is only enjoined by law not to commit waste. Thus, she has power to make a gift, mortgage or sale of the property at her pleasure for lawful purposes conformable to her duty as a Hindu widow and after her death what is left by her after the lawful use of it goes to the next heirs of her husband. They take only the residue of the estate remaining due after the use of it by the widow. Accordingly, she has power of disposition for religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband as well as for legal necessity.

Lord Gifford, in delivering the opinion of their Lordships in the case of *Cossinut Bysack* v. *Hurroosoondry Dossee* (22), which was heard by the Supreme Court at Calcutta in 1819 and by the Judicial Committee in 1826, stated that a Hindu widow had for cerrain purposes a clear authority to dispose of her husband's property and might do it for religious purposes including dowry to a daughter. His Lordship further stated that it is impossible to define

> the extent and limit of her power of disposing of it because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition.

This was a Dayabhaga case, but the rule laid down is the same as regards the Mitakshara Law. This has been firmly established by their Lordships of the Judicial Committee. At the Bar the following authorities were cited : *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (23), *Bhugwandeen Dooby* v. *Myna Baee* (24), *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (24), *Rao Kurun Singh* v. *Nawab Mahomed Fyzali Khan* (25), *Sham Sunder Lal* v. *Achhan Kunwar* (26), *Lal Sheo Pertab Bahadur Singh* v. *Allahabad Bank, Limited* (27), *Munshi Karim-ud-din* v. *Kunwar Gobind Krishna Narain* (28), *Janaki Ammal* v. *Narayanasami Aiyar* (29), *Sadasi Koer* v. *Ramgovind Singh* (30) and *Khab Lal Singh* v. *Ajodhya Misser* (31).

Justice Turner in the case of *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (23) stated the law as follows :

> For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity.

This distinction between legal necessity for wordly purposes on the one hand and the promotion of spiritual benefit of the deceased on the other has been recognized by the Indian Courts as well as by their Lordships of the Judicial Committee, and within a proper limit a widow can alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit, *Khub Lal Singh* v. *Ajodhya Misser* (31) and *Chowdry Janmejoy Mullik* v. *Sreemutty Russomoyee Dossee* (32 & 34).

In *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma* (35), Benson and Krishnaswami Ayyar. JJ. stated that the spiritual purposes should be such as are regarded by the Hindu community as reasonable and proper though not absolutely necessary. If the property sold or gifted

(22) [1820] 2 Morley's Digest, 193.

(23) [1859-61] 8 M. I. A. 529=2 W. R. 61

(24) [1869-70] 13 M. I. A. 209=12 W. R. 47=3 B. L. R. 57=2 Suther. 275=2 Sar. 518 (P. C.).

(25) [1871-72] 14 M. I. A. 176=10 B. L. R. 1=2 Suther 474=2 Sar. 722. (P. C.).

(26) [1899] 21 All. 71=25 I. A. 183=2 C W. N. 729=7 Sar. 417 (P. C.).

(27) [1903] 25 All. 476=30 I. A. 29=5 Bom. L. R. 833.

(28) [1909] 31 All. 497=3 I. C. 795=36 I. A. 138 (P. C.).

(29) [1916] 39 Mad. 634=37 I. C. 161=43 I. A. 207 (P. C.).

(30) [1911] 15 C. W. N. 857=11 I. C. 90=14 C. L. J. 91.

(31) [1916] 43 Cal. 574=31 I. C. 433=22 C. L. J. 345.

(32 to 34) [1868] 11 B. L. R. 418 Note=10 W. R. 309.

(35) [1911] 34 Mad. 288=20 M. L. J. 798=6 I. C. 240=(1910) M. W. N. 222.

bears a small proportion to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioners.

She is required to perform not only the funeral or periodical sraddaha ceremonies but also such religious ceremonies as the last holder was bound to perform and she has power within proper limitations to alienate the estate inherited by her from the last male holder thereof. This being the law, let us examine the gift of the property in question made by Mt. Jainti Kumari to her son-in-law on the occasion of the marriage of her daughter. It is the imperative and religious duty and a moral obligation of a father, mother or guardian to give a girl to be married before she attains puberty to a suitable husband capable of procreating children.

Yajnavalkya, in Chapter I, verse 64, says :

(A qualified person) not giving away (in marriage, a maiden) will be visited by the sin of the destruction of fœtus at every time of her menses. In the absence of a giver the maiden should herself give her away.

Vasishtha, in Chapter XV, says :

Fearing the appearance of the menses, the father shall marry his daughter while she still runs about naked. If she stays (in her father's house) after menstruating, sin visits the father. As often as are the menstrual courses of a maiden, who is desirous of, and is solicited in marriage by, a qualified bridegroom of the same caste, so often her father and mother are guilty of (the crime of) killing an embryo : such is the sacred law.

To the same effect is the enjoinment of all the Samhitas : Manu, Chapter IX. paragraph 4 ; Yama, verses 22 and 23 ; Gautama, Chapter XVIII ; Narada, Chapter XII, verses 24 to 27, Vyas, Chapter II, verse 7, and Vishnu, Chapter XXIV, verse 40.

Vyas, in the chapter referred to above, says :

He who does not give away his daughter in marriage before she attains puberty becomes degraded.

Narada concludes by saying :

This is the rule established amongst the virtuous.

Thus, according to the texts, the marriage of a girl by her father is enjoined as a religious duty in order to prevent him from being degraded and visited with sin and crime. There is, however, direct spiritual benefit also conferred upon him by such a marriage. According to Manu, marriage is religiously enjoined so that a man may beget a son and thus deliver himself from the hell called 'put' to which the shades of a sonless man, according to Hindu ideas, descend. The word 'putra' (son) literally means deliverer from the hell called 'put.' Manu says that there is no distinction between a son and the daughter's son in this world, inasmuch as a daughter's son like a son's son, can succour a man from hell : Manu, Chapter IX, slokas 138 and 139. In the earlier slokas 132-133 he says that a daughter is like unto a son and a daughter's son offers two oblations : one to his deceased father and another to his mother's father and that is the reason why a daughter and daughter's son successively take the estate of a sonless man: vide also Dayabhaga, Chapter V, paragraph 6 ; Dattak Mimansa, Chapter I, paragraph 3 ; Colebrooke's Digest, volume III, pages 159, 293 and 294. It is obvious, therefore, that the marriage of a daughter confers spiritual benefit on her father. The authorities also have taken the same view.

In the case of *Jummona Dassya* v. *Bamasoonderi Dassya* (36), Sir James W. Colvile observes—

The foundation for marriages between infants which so many philosophical Hindus consider one of the most objectionable of their customs, is the religious obligation which is supposed to lie upon parents of providing for their daughter, so soon as she is mature virgo, a husband capable of procreating children.

Vide also *Churaman Sahu* v. *Gop Sahu* (37); *Venkatacharyalu* v. *Rangacharylu* (38); *Devulapalli Kameswara Sastri* v. *Polavarapu Veeracharlu* (39); *G. Gopala Krishnam Razu* v. *S. Venkatanarasa Razu* (40); *D. Srinivasa Iqengar* v. *Thiruvengadathaiyangar* (41); *Sundrabai Javji Dagdu Pardeshi* v. *Shivanarayana Ridkarna* (42); *Ganpat* v. *Tulsiram Ukha* (43); *Bhagirathi* v. *Jokhu*

(36) [1875-76] 3 I. A. 72=25 W. R. 235=3 Suther 222=3 Sar 602 (P. C.).
(37) [1910] 37 Cal. 1=10 C. L. J. 545=1 I. C. 945=13 C. W. N. 994.
(38) [1891] 14 Mad. 316=1 M. L. J. 85.
(39) [1910] 34 Mad. 422=20 M. L. J. 855=8 I. C. 195=(1910) M. W. N. 649.
(40) [1914] 37 Mad. 273=23 M. L. J. 288=17 I. C. 308=1912 M. W. N. 903.
(41) [1913] 38 Mad. 556=(1913) M. W. N. 1034 =23 I. C. 264=25 M. L. J. 644.
(42) [1908] 32 Bom. 81=9 Bom. L. R. 1366.
(43) [1912] 36 Bom. 88=12 I. C. 271=13 Bom L. R. 860.

Ram Upadhia (44); and *Kasturi* v. *Panna Lal* (45).

According to the texts, after the death of the father the duty of giving his daughter in marriage falls upon, amongst other relations, his widow, both under the Mitakshara and the Dayabhaga, with this difference that the latter would postpone her right to that of a maternal-grand-father and maternal-uncle.

Marriage, according to the Sastras, is a religious act. It is the last Sanskara for a man or woman.

According to Hindu ideas marriage has for its object the performance of religious duty. It is a sanskara, that is, an essential ceremony held indispensable to constitute the perfect purification of a Hindu, both male and female. The sanskaras are ten or eleven in number and are performed by oblations to fire and customary offerings to idols: Wilson's Glossary, page 463.

According to Manu, Chapter II, verse 67, the sacrament of marriage is to a female what initiation with the thread is to a male. According to Yajnavalkya, the purificatory rites of a woman are performed without Mantras, except marriage which is accompanied with Mantras: Chapter I, verse 13. The Mitakshara also recognizes marriage as a religious obligation for both male and female: *Sundrabai Javji Dagdu Pardeshi* v. *Shivanarayana Ridkarna* (42).

The texts prescribe details of nuptial rites to be performed at the time of marriage and the authorities already quoted above have recognized it to be so. The widow of a deceased Hindu has a right not only to provide for the marriage of his girl but also the expenses thereof for the performance of ceremonies, etc. connected therewith. The moral and the religious obligation cast upon the parents or other guardians to provide a husband for a girl confers upon them the right to spend out of the estate, funds necessary for the performance of marriage ceremonies.

Atri Samhita in Chapter I, sloka 320 says,

It is essential to make gifts on the occasion of an eclipse, the marriage, the last day of month and at the delivery of a woman.

Accordingly, he says that such a gift can be made even in the night time.

Yajnavalkya, in Chapter II, verse 179, relating to gift, says:

Let the acceptance be public, specially of immoeable property; and delivering what may be given and has been promised; let not a man resume it.' In other words, whatever is promised to be given shall be given. Having once given it let him not resume it.

Mitakshara, commenting upon this with reference to the text of Narada makes a distinction between valid and invalid gifts and says that the valid gifts if once promised must be performed and among the seven valid gifts are mentioned a gift made "from affection" and "a woman's sulka." The former is defined as what is given out of affection to "daughters, sons and the like" and the latter, namely, sulka as

that which are given to the relations of a damsel for bringing about the marriage.

Continuing the author says,

These seven kinds of gifts are valid gifts and must not be resumed" vide Mitakshara by Gharpure, book II, Chapter XII, on the resumption of gifts, pages 314-315.

Shyamacharan in his Vyavastha Darpana, 2nd edition, page 54, paragraph 35, discussing the widow's limited power of disposition of the property inherited by her from her husband construes the word "waste" or "apahara" used in the Mahabharata Dana Dharma as implying

expenditure not useful or beneficial to the late owner of the property,

and says that a gift or other alienation by the widow is permitted for the husband's funeral rites, etc., as that is for the benefit of the husband. He sums up his conclusion at page 54, paragraph 35, as follows:—

Widow is, however, competent even without the consent of the reversioners to make sale or other disposition of her husband's property for the liquidation of his debts, for the marriage of his daughters for the support of such persons as it was incumbent upon him to support, likewise to defray expenses of such other acts as are beneficial to his soul or very necessary to be performed. Great benefit is done to a departed soul by paying his debts, by bestowing his daughter in marriage and supporting his family indeed if these debts are neglected he is doomed to hell. To maiden should be given a nuptial portion of the father's estate.

In support of his conclusion he refers to the text of Devala; see Colebrooke's Digest, volume I, page 185. In paragraph 38 he says,

But a gift or other alienation by a widow of a moderate portion of her husband's property for his spiritual benefit (be the same made with or

(44) [1910] 32 All. 575=6 I. C. 465=7 A. L. J. 667.

(45) [1916] 38 All. 520=36 I. C. 245=14 A.L.J. 754.

without the consent of his heirs) is religious and moral as well as valid.

The right of a Hindu daughter, whose father is dead, to receive a dowry at the time of marriage from the estate of her father is based upon the ancient texts: vide Manu, Chapter IX, verse 118, and Yajnavalkya, Chapter II, verse 127, which enjoin upon the brothers to perform the marriage of their uninitiated sisters by giving them a quarter of their share. According to Vishnu, the initiations of the unmarried daughters are to be defrayed in proportion to the wealth. Mitakshara, Chapter I, S. 7, clauses 5 to 14, discusses the question of allotment of a portion of the estate of the deceased for the marriage of his daughter and comes to the conclusion that it is not right to interpret the text of Yajnavalkya referred to above, as signifying giving money sufficient for her marriage and hence,

after the decease of the father an unmarried daughter participates in the inheritance and is entitled to a share." (Colebrooke's translation of Mitakshara) Chapter I, S. 7, clause 14.

Viramitrodaya in Chapter II, part I, S. 21, says that shares should be allotted to uninitiated or unmarried daughter out of the paternal wealth, which represents her dowry and marriage expenses and such a share is one-fourth of what she would have been entitled to receive if instead of being a daughter she had been a son.

These texts, particularly the Mitakshara which governs the present case, make it perfectly clear that when upon the death of a Hindu governed by the Mitakshara law the property is taken by his widow a gift by her to her daughter on the occasion of her marriage out of the estate of her husband is within her power provided that the portion so given is reasonable in amount and the question whether it is reasonable or not has to be determined with respect to what should have been the share of the unmarried daughter under the above rules laid down in the Mitakshara, Chapter I, S. 7, paragraphs 5 to 14. Such gifts are recognized in all the texts.

Among the sixfold properties of a woman called stridhan or her own peculium are the two most permanent ones, namely, what is given before the nuptial fire and what is presented in the bridal procession: vide Manu, Chapter IX, verse 194; Dayabhaga, Chapter X, S. 1, paragraph 4; Narada, Chapter XIII, stanza 8; Vishnu Samhita, Chapter XVII, verse 18; Yajnavalkya, Chapter II, verse 146.

Thus, gifts of property during the performance of the nuptial rites and in the bridal procession form two most important properties of a woman. This supports the view that during the marriage she is given out of the estate of her father dowry which represents her share in her father's estate.

Gifts during marriage have become customary and are coming down from the ancient times: Rig Veda, Mandal 10, Sukta 85, verses 9 and 11, refers to the presents given by Surjya to his sister in marriage. Marriage in the first four approved forms of Brahma, Daiva, Arsha and Prajaptya is a gift of the girl to the bridegroom, and the gift of the girl is accompanied with gifts of all kinds of necessaries in life including property to her and to the son-in-law so that both might live together with comfort and perform the religious duties having been united into one by the religious rites. The religious ceremony of giving the girl to the bridegroom must be accompanied with a gift of property to the son-in-law in order to enhance the merit of the spiritual ceremony of giving the girl in marriage, which is one of the highest Yajna or religious ceremony performed and a Yajna cannot become meritorious without a gift. The gift of land is ordained on every occasion of a Yajna as being efficacious for conferring spiritual benefit: vide Virhaspati Samhita. For these reasons Rishya Shringa ordains that one should give to the son-in-law according to his or her means lands cows, maids, cloths, she-buffaloes, horses, gold and jewels. The sloka runs as follows:

भूमिं गावश्च दासीश्च वासांसिच स्वशक्तितः ; ।
महिष्यो वाजिनश्चैव दद्यात् स्वर्णमणीनपि ॥

It has been quoted in: (1) Viramitrodaya, Vivaha Sanskara, page 831, edited by Parvatiya Nityananda Sarma, the Chowkhamba Sanskrit Series, No. 141, page 831; it also quotes at that page a similar passage from Linga Purana; (2) Nirnaya Sindhu, page 228, Bombay edition, Venkateshwara Press, Sambat 1965; 3) Dana Chandrika, page 28, Venkateshwara Press edition; (4) Dana Mayukha

page 170 (in the Bhagwanta Bhaskar by Nilkantha) edited by Pandit Ratna Gopala Bhatta, Benares edition, 1909. To the same effect is the sloka in Dana Mayukha at page 171 which enjoins, among other things, gift of land according to the means of the giver in order to enhance the merit of kanyadana कन्यादान (giving the girl in marriage.)

The learned vakil on behalf of the defendant produced manuscript editions of Parayoga Ratan, page 62, Girhya Karika by Bhatta Kumarila Swami, page 13, verses 7 and 8, and Nirnaya Sagar Press edition of Sanskara Bhaskara, page 248, which recommend giving of land to the son-in-law after marriage and also at the time of departure.

Parashar Grihya Sutra (Hari Har Bhashya), Venkateshwara Press edition, Sambat 1950, pages 28-29, recommends, among other things, gift of villages by the father of the girl; other relations should also give dowry or yautaka at the time of marriage. Such gifts to the son-in-law are also recommended on occasions other than marriage: vide Dana Mayukha, page 404, which quotes from Bhavishya Purana and Vishnu in support of it.

Hence gift of land to a son-in-law on the occasion of marriage or at the time of departure, that is, bidagi, is meritorious. Such a gift by the mother cannot be considered to be an apahara or waste which alone is a restriction placed upon her use of the property inherited from her husband, provided the gift is reasonable in extent and not extensive.

Thus the gift of a reasonable portion of landed property to the daughter or son-in-law by the widow is supportable by the texts as a part of religious ceremony of marriage of the daughter and as being conducive to the spiritual welfare of her husband. It is her duty to perform the marriage ceremony accompanied with gift as discharging an obligation of her own husband. In making a gift of landed property to her son-in-law she only gives what is due to her as the nuptial portion of the estate of her father. The gift can be made at the time of the actual marriage or in connexion with the ceremonies connected therewith; for gifts in the bridal procession as well as nuptial rites are permissible.

The authorities in India seem to have interpreted the texts as above. The well-known passage in Lord Gifford's judgment in the case of *Cossinaut Bysack* v. *Hurroosoondry Dossee* (22), referred to above, gives the widow power to dispose of property for religious purposes including dowry to a daughter.

In *Damoodur Misser* v. *Senabutty Misrain* (46), a Mithila case, it was held that property sufficient to defray all the nuptials should be given to unmarried daughters, and accordingly 1/24th share of the estate in view of there being several sons and daughters was directed to be set apart for nuptial purposes.

In the case of *Churaman Sahu* v. *Gopi Sahu* (37), Mookerji, J., reviewed the texts and the authorities and upheld a gift of a house made by the widow to her daughter a few days after the performance of the dwiragaman of gauna ceremony (that is, sending off the girl to reside in the family of her husband), a ceremony which was performed two years after the marriage. His Lordship overruled the contention that the gift should not be supported as the gauna ceremony had nothing to do with the marriage, and observed that the ceremony was connected with the marriage and there was no substantial distinction between gifts made at the nuptial fire or in the bridal procession and those made at the time of dwiragaman ceremony; the last may be regarded as dowry deferred. He also held that the gift was reasonable in extent upon the ground that the house in question was worth only Rs. 1,200 and the total value of the three houses inherited by the widow was Rs. 3,800 and the husband of the widow had left only one daughter.

Shortly after the above case, in 1910, his Lordship in the case of *Gobinda Rani Dasi* v. *Radha Ballabh Das* (47), upheld the decree passed by the Subordinate Court allowing maintenance to the son-in-law against the mother-in-law when it was found that the father-in-law had agreed to the marriage upon the understanding that he would be brought up in the family as a gharjamai. This case was decided upon the principle of putrika putra which finds place in the Sastras under which the marriage takes place upon the condition that the son born of the girl would belong to her father and

(46) [1892] 8 Cal. 537.
(47) [1910] 12 C.L.J. 179=7 I.C. 118=15 C.W.N. 205.

would be treated as his son and successor. "Putrika putra" means a "son of an appointed daughter.

The Madras High Court in the case of *Ramaswami Ayyar* v. *Vengidusami Ayyar* (48), upheld a gift of a portion of the landed property by the mother to the son-in-law at the time of the marriage of her daughter. The parties were Brahmans and it was found that there was a practice in that community of (bhudan) making a gift of land along with other things at the time of giving the girl in marriage. Subramania Aiyar, J., however, supported the gift also upon the ground that the gift was a provision for the married couple and that it was believed to enhance the merit of the primary act, namely, the giving of a virgin in marriage which from a religious point of view is supposed to be productive of considerable spiritual benefits to the parents. Referring to the texts relating to the allotment of a quarter of a share of a son by the brothers to the unmarried sisters, his Lordship held that the texts justify something more than the disbursement out of the estate of only the price of things required in connexion with the celebration of the marriage.

Following this case, the Madras High Court upheld the gift of landed property in favour of a son-in-law in the case of *T. R. Sundaram Aiyar* v. *Krishnasami Aiyar* (49).

In the case of *Kudutamma* v. *Narasimha Charyalu* (50), the plaintiffs were sisters and were married by their father to men of small means and were maintained by the father until his death which happened three years after the marriage. His son, Defendant No. 1, became the managing member of the family. He executed a deed of gift whereby he gave to his sisters, the plaintiffs, certain portions of the joint family property. He and his son subsequently resiled from the gift and hence the plaintiffs brought the suit to obtain possession of the gifted property. The plaintiffs' suit was decreed and the gift was upheld, upon the ground stated by their Lordships that there was a strong moral obligation on the joint family of which the father was the managing member to make a gift of the joint family property on the occasion of the marriage either to the girls or to their husbands as a provision for them; and the fact that the father maintained the daughters and their husbands out of the family property until his death may be regarded as the continuing recognition of such moral obligation which obligation continued until it was discharged by the deed of gift executed by the brother of the plaintiffs. The gift was found not to be in excess of the powers of the brother as the managing member of the family and therefore it could not be recalled by him or avoided by his son.

In *Pugulia Vettorammal* v. *Vettor Goundan* (51) (Sundara Aiyar and Spencer JJ.), the gift to the girl by her father's brother some years after the marriage which was performed by him was upheld as against his minor son who was joint with him. The property gifted was worth Rs. 400, and the family property was worth Rs. 2,400, that is, 1/6th of the entire joint family estate. The father of the girl had died without marrying her, leaving his brother and the minor son of the brother as the surviving male members of the family.

Following this decision a gift of 1/10th of the immovable property by a father to his daughters at the time of their marriage was upheld as against the nephew who was a co-parcener: vide *in re Subba Naicker minor* (52)

In *A. Sundararamayya* v. *C. Sitamma* (53), a gift by a father to his daughter of a small portion of ancestral property 40 years after the marriage was upheld as binding upon the coparcener, the son of the donor. There was no promise proved as having been made by the father at the time of the marriage. The gift was upheld, as it being a moral obligation could be discharged at any time. The important pronouncement in that case is that the gift to daughters stands in the same position as gifts to sons-in-law, for such gifts are intended to provide for the married couple and are probably given in lieu of her share of the family property when by marriage she is leaving it for another family. Such a gift is permissible both of moveable and immovable property.

(48) [1899] 22 Mad. 113=8 M.L.J. 170.
(49) [1915] 28 I.C. 992.
(50) [1907] 17 M. L. J. 528=5 M.L.T. 40.
(51) [1912] 22 M.L.J. 321=13 I.C. 475=(1912) M.W.N. 89.
(52) [1915] 2 L.W. 754=30 I.C. 781.
(53) [1911] 35 Mad. 628=21 M.L.J. 695=10 I.C. 56=(1911) 1 M.W.N. 422.

The Lahore High Court in *Jowala Ran* v. *Hari Kishen Singh* (54), upheld a gift of 70 bighas out of 300 bighas as being less than ¼th of the entire property by a Hindu widow as a dowry to her daughter on the occasion of her marriage.

In *Bachoo Harkisondas* v. *Mankorebai* (55), Harkishun Das and Bhagwan Das were brothers. Hirkishun Das died on 14th September 1898, leaving behind him as his survivors his wife who was pregnant and his brother Bhagwan Das. On the 5th November 1900, Bhagwan Das made a gift to his daughter, who was his only child, of promissory notes worth Rs. 20,000. On the 30th November 1900, he made a will directing his wife, to adopt even if a son was born to the widow of his deceased brother Bhagwan Das, and directing further that in the event of a son being born to his brother's widow she should before making an adoption enter into an agreement with the adopted son that he would be bound to accept as valid the provision made for his daughter and his wife. Bhagwan Das died on the 17th December 1900, and the next day a posthumous son was born to his brother. On the 13th February 1901, Bhagwan Das's widow already adopted Nagar Das Pitambar. The widow of his deceased brother brought a suit contesting the adoption and the gift on behalf of her posthumous son. Taiyabji, J., upheld the adoption but decided against the validity of the gift. On appeal Sir Lawrence Jenkins, C. J. and Russel, J., upheld both the adoption and the gift, setting aside the decision of Taiyabji, J. The promissory notes of Rs. 20,000 were purchased out of the income of the property, which represented 1/50th part of the estate valued at ten to fifteen lakhs of rupees. The gift was held to be valid on the ground that it was a gift of moveable property made through affection under the Mitakshara, Chapter I, S. 1, pl. 27 and Mayukha, Chapter IV, S. 70, pl. 11 and 13.

This decision was upheld by their Lordships of the Judicial Committee in *Bachoo Hurkisondas* v. *Mankorebai* (56).

In *Abhesang Tirabhai* v. *Raisang Fatesang* (57), a Hindu widow, shortly after the marriage of her daughter, conveyed all the properties by way of gift to her sons-in-law. Three days later the reversioners passed a deed of release in favour of the widow on receiving consideration. More than 50 years after, one of the sons of the reversioners questioned the validity of the gift. It was held that the consent of the reversioners validated the alienation as being evidence of the propriety of the gift. It was also observed that there is authority that gifts by a widow on the occasion of the daughter's marriage are understood in the Hindu law to conduce to the spiritual benefit of the widow's husband and, if so, it is another reason for upholding the transaction.

In *Rustom Singh* v. *Moti Singh* (58), it was held that when a Hindu father does not leave sufficient means to provide for the marriage of his daughter the mother of the girl can mortgage properties of her own stridhan, which she had inherited from her father, to meet the expenses of the daughter's marriage and that such an alienation was binding on the reversionary heirs of her father. It is noticeable that the property alienated in this case was not that of the father of the girl but that of the father of her mother, which the mother had got from her own father. The principle upon which the alienation was upheld against the heirs of the father of the mother to the property in question, with which the girl could have no concern, is that it is not only the duty of the father of the girl to provide for her marriage but that of the mother also to provide from her personal property in order to confer spiritual benefit upon her husband and upon herself.

In the case of *Bhagwati Shukul* v. *Ram Jatan Tewari* (59) Sir Grimwood Mears, C. J., and Stuart, J., upheld the gift of the entire property which the widow had inherited from her husband to her son-in law as a dowry as against the claim of the husband's brother's son. The daughter married was blind and a cripple, and the property was very small in value. The ground for the decision was stated to be that it was the duty of the mother to provide a husband for her daughter and the alienation was made for sheer legal necesssity, and that

(54) A. I. R. 1924 Lah. 429=5 Lah. 70.
(55) [1905] 29 Bom. 51.
(56) [1907] 31 Bom. 373=34 I.A. 107=9 Bom. L.R. 646 (P.C.).
(57) [1912] 14 Bom. L.R. 602=16 I.C. 561.
(58) [1896] 18 All. 474=(1896) A.W.N. 155.
(59) A. I. R. 1924 All. 29=45 All. 297.

she had power to dispose of her husband's property for religious purposes including dowry to a daughter, and that the extent of the power depends upon the circumstances of each case as held by Lord Gifford.

In the case *Madhusudan Prasad Singh* v. *Ramji Das* (60) (Sir Dawson Miller, C. J., and Mullick, J.), a verbal gift of cash and grains as monthly allowance to the son-in-law and his sons and heirs by a Hindu father at the time of his daughter's marriage was upheld. The father possessed considerable wealth, and the allowance was made with a view to maintain the position of the bridegroom and also the bride. The father's intention was to benefit the daughter. The contract was held to be legal and enforcible, and not in the nature of a marriage brokerage, though the son-in-law had stated that he would not have married in the family if the allowance had not been promised.

The case-law on the subject summarized above fully indicates the inclination of all the High Courts to uphold a gift by a widow of landed property to her daughter or son-in-law on the occasion of the marriage or any ceremonies connected with the marriage and that the promise made may be fulfilled afterwards; and it is not essential to make a gift at the time of the marriage, but that it may be made afterwards, upon the ground that the gift, when made, fulfills the moral and religious obligation of giving a portion of the property for the benefit of the daughter and the son-in-law. The only limitation placed upon this power of making a gift is that it should bear a reasonable proportion to the entire property of the deceased father and that it should be justifiable in the circumstances of the case in terms of the principle laid down in *Cossinaut Bysack* v. *Hurrosoondry Dossee* (22).

Now, gifts of a small portion of the deceased are permissible by a widow even if it is not for the performance of the strictly religious duties such as are expressly enjoined by the Sastras, provided the gifts are made upon the occasions which are conducive to the spiritual welfare of the deceased: vide *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma* (35); *Narainbali Kunwari* v. *Ramdhari Singh* (61) and *Khub Lal Singh* v. *Ajodhya Misser* (31).

In *Gopaljj Sah* v. *Manbirti Kuer* (62), the gift by a widow of a house on the occasion of her husband's anniversary saraddha ceremony was upheld upon the ground that it was conducive to her husband's spiritual benefit, and that it was not excessive.

Their Lordships of the Judicial Committee, in the case of *Sardar Singh* v. *Kunj Behari Lal* (63), upheld the gift of a small portion of the estate inherited by the widow for the observance of bhog or food offerings to the deity of Puri and the maintenance of the priest. In that case their Lordships observed that the lady had of course sufficient income to provide for the observances without any alienation of the part of the estate. The alienation was, however, held to be valid upon the ground that the property given formed only a small portion of the whole estate and the gift was for the continuous spiritual benefit of the deceased, though not for an observance essential to the salvation according to the Hindu religious law. It was pointed out that there were two sets of religious acts; one essential for the performance of obsequial rites and other pious observances which conduced to the bliss of the deceased soul. In the case of the former if the income is not sufficient to cover the expenses she is entitled to sell the whole of the property. In the other case she can alienate a small portion for the pious or charitable purposes she may have in view. It depends upon the circumstances of each case what is reasonable.

These decisions are based upon the texts already referred to that the widow takes the estate for the performance of religious duties and acts conducive to the welfare of her and her lord by "pious liberality." I need not quote the texts in extenso again. The words "pious liberality" imply acts conducive to the spiritual benefit of her husband and herself, such as, performing sraddhas, digging wells, and giving presents, all requiring for the accomplishment pecuniary aid.

(60) [1920] 5 Pat. L. J. 516=57 I. C. 341=1 Pat. L. T. 541.

(61) [1916] Pat. L. J. 81=20 C. W. N. 734=34 I. C. 277=3 Pat. L. W. 377.

(62) [1919] P. H. C. C. 396=52 I. C. 996.

(63) A. I. R. 1922 P. C. 261=44 All. 503.

It has already been shown by reference to the texts and authorities that the marriage of the daughter and the gift made to the daughter and the son-in-law are acts which confer spiritual benefit upon the husband of the widow and such gifts are enjoined to be made on account of the unmarried daughters having share in the estate as her nuptial portion to be given to her in the shape of dowry and for meeting the marriage expenses.

No prohibition anywhere in the texts or in the authorities against a gift of immovable property by the widow on the occasion of her girl's marriage or in connexion with any of the marriage ceremonies has been pointed out.

Therefore, the gift of the landed property in question in the present case by Mt. Jainti Kumari to Gobind Das, the defendant, is not in any way prohibited by the texts or the authorities. The gift in question has not been challenged as being in any way excessive. On the other hand, it has been shown that the property is only worth Rs. 50,000, whereas the deceased father of the girl had left behind property of very considerable value yielding an income of over a lakh of rupees from the landed property, the promissory notes and the money-lending business. The property gifted bears but a very small fraction of not more than one-fortieth of the entire estate. Chhotan Bibi was the only child of the deceased and would have succeeded to the estate in case she had survived her mother. The girls of the family of the brothers of the deceased were married at considerable expense, whereas the marriage of the girl in this case was performed at a very moderate expense and the property gifted, including the actual expense incurred otherwise at the marriage, does not in value exceed the amount spent in the marriage of the daughters of the family. The gift was, therefore, not unreasonable. It was in no sense a waste or apahara of the property inherited by the widow who by her good management and economy augmented the income of the estate and added to the corpus thereof. She has in terms of the texts used the property with moderation and without any waste and left it in a sounder and more substantial condition than what she inherited from her husband, in order to be taken by the reversioners, the plaintiffs in the present case. They have no reason for any complaint. They would certainly have no grievance if instead of giving the land the lady would have given cash in her possession even much more than the value of the property.

I have already disposed of the contention of Mr. Jayaswal that the gift is invalid, inasmuch as the consideration of it was in the nature of marriage brokerage by reason of the promise of the gift having been made prior to and as a condition for the bridegroom's party (father and uncle) consenting to marry the girl in question. The texts make such a gift unrevocable. Narada has gone so far as to make a woman's sulka, that is, the fee given to the relations of a damsel for bringing about the marriage as unresumable or unrevocable. Manu, while forbidding the acceptance of a gift by the father of a girl by way of sulka from the bridegroom in verses 51 and 53 of Chapter III condones it in verse 54 if the bridegroom's father voluntarily and out of affection presents the sulka. Manu does not forbid the giving of presents or dowry by the bride's parents and relations to the girl or the bridegroom. On the other hand, nuptial gifts at the bridal procession to the bride and the bridegroom are enjoined. The question in this case does not arise, inasmuch as the gift in the present case was actually made, and the donee has been in possession of the property for the last 26 years ever since the deed of gift was executed. The gift cannot be revoked or cancelled. The lady herself could not recover it upon the ground that the gift was invalid; much less can the plaintiffs, who are reversioners, recover it on that ground.

In the result, in agreement with the view of the Court below I dismiss the appeal with costs.

Bucknill, J.—(His Lordship set out the facts and dealing with the question of widows having any independent advice proceeded :) It is not imperative that she should have any independent advice if, from the environing circumstances it may safely be assumed that had she had any independent advice her conduct would not have been materially affected thereby vide *Mt. Hira Bibi* v. *Ramadhan Lal* (64). *Satis Chandra*

(64) A. I. R. 1922 Pat. 70=6 Pat. L. J. 465.

Ghose v. *Kalidasi Dasi* (11). Now there was nothing to my mind remarkable in a transaction of this kind. If one accepts any substantial part of the whole story, i. e., that it was with the object of obtaining a suitable husband for her daughter that the widow contemplated and did make this gift, I do not consider that the transaction was of such a character as would have been adversely affected by the advice of a prudent and independent person. As a matter of fact the widow's own brother was one of the attesting witnesses to the document and, although it is true that he now has given evidence in favour of the plaintiffs, yet, as is pointed out by the learned District Judge, this brother, at any rate, represented what may be called the widow's side of the family. Under these circumstances I do not think that the widow could be said to have suffered from the absence of independent advice even if she did not have such ; indeed, I am inclined to think that she did have and take advice which was not improper in any way.

As to the question of the validity of the registration it is suggested that, as there was some evidence to show that the bigha or jote land situated in Ulaon was not in the jote possession of the widow at the time when she executed the document, its inclusion in the deed was fraudulent or improper and solely for the purpose of enabling the registration to be effected in the Monghyr and not in the Darbhanga district. But this objection to the registration has I think little or no solid foundation. The record of rights which was published in 1902 (some time after the execution of the deed) shows that the bigha of land was in the zamindari of the widow although it is true that it is not shown as being in her khas possession. There is nothing to indicate that there was any intention on the part of the widow to effect any fraud on the registry or deliberately to do anything of a character which would invalidate the registration. The law as laid down in a number of decisions is quite clear that in circumstances similar to those disclosed in this case, the registration cannot be regarded as invalid unless there is some intention definitely to commit a fraud upon the registry : vide *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi* (1), *Mt. Ram Dai* v. *Ram Chandrabati Debi* (7) and *Mt. Jasoda Kuer* v. *Janak Missir* (8). (His Lordship then dealt with other issues of fact and proceeded.) Having dealt with this question of fact one now passes to the next issue. This issue is really the main question of importance in this case and is whether Mt. Jainti Kumari had any authority or power to make a valid gift of the property in suit to the defendant ; if she had, of course the gift binds the revsrsioners ; if she had not, it does not so bind them.

We have been favoured with references to a very large number of ancient texts from the Hindu sages' works and with a formidable array of cases bearing more or less upon the subject-matter of this point. I think that it would serve little purpose to attempt to refer to them all : but one may I think, attempt to collate the effect of decided cases (supposed to interpret the Hindu Law) in a series of simple statements.

It is, generally, contrary to public policy for a father to be paid money in consideration of giving his son or daughter in marriage and a contract to that effect cannot be enforced in a Court of law (per Farran, C. J. and Tyabji, J., in *Dholidas Ishvar* v. *Fulchand Chagan* (17), but an agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is not necessarily immoral or opposed to public policy. Where the parents of the bride are not seeking her welfare but give her to a husband otherwise ineligible in consideration of a benefit secured to themselves, the agreement, by which such benefit is secured, is opposed to public policy and ought not to be enforced ; where an agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is, under the circumstances of the case, neither immoral nor opposed to public policy, it will be enforced and damages will also be awarded for breach of it ; and semble an agreement to remunerate or reward a third person in consideration of negotiating a marriage is contrary to public policy and cannot be enforced [per Mookerjee, J., in *Bakshi Das* v. *Nadu Das* (13)] ; and where a contract provided that when a marrigage has been arranged and performed the parent of either the

boy or girl who is a party to the marriage shall pay a certain sum of money the contract is not void ab initio as being opposed to public policy [per Walsh and Ryves, JJ., in *Jagadishwar* v. *Sheo Bakhsh Rai* (20)]. There is a moral obligation imposed on a Hindu father to make a gift to his daughter on the occasion of her marriage ; he may legally for such purpose give her a small portion of ancestral property either at or after the wedding [per Munro and Sankaran Nair, JJ., in *Sundararamayya* v. *C. Sitamma* (53)] : see too *In re Subba Naiker* (52) (per Sankaran Nair and Oldfield, JJ.) ; the gift must be of a reasonable amount ; a Hindu brother, who is the managing member of a joint family, will not be acting in excess of his powers as such, in giving away a reasonable portion of the joint family property to his sisters, who though married in their father's lifetime, were left, for some reason or other without a marriage portion [per Wallis and Miller, JJ., in *Kudutamma* v. *Narasimha Charyalu* (50)].

A destitute sonless widow must, however, look for her maintenance primarily to her deceased husband's family and not primarily to her father's family [per Maclean C. J., Prinsep and Hill, JJ., in *Mokhada Dassee* v. *Nundo Lal Haldar* (65)], but if provision should fail and the widowed daughter has to return to live with her father and brother there is a moral social obligation but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estates in the hands of the heirs [per Parsons and Ranade, JJ., in *Bai Mangal* v. *Bai Rukhmini* (66)], and see, also *Mokhada Dassee* v. *Nuddo Lal Haldar* (67), per Ameer Ali, J. So much for the position as between a Hindu father and his daughters. Next as to the position as between a Hindu father and his son-in-law.

It is neither contrary to any tenet of the Hindu law or against public policy for a Hindu father to contract to maintain his son-in-law and such a contract can be enforced. Where a Hindu father who had no son gave his daughter in marriage on the understanding that the bridegroom should be brought up and maintained as a member of his family as also his daughter the bride and any issue, the son-in-law cannot subsequently be turned out without any provision for his and his wife's and issue's maintenance and even his separate maintenance can if the Court thinks fit be ordered [per Mookerjee and Teunon, JJ., in *Gobinda Rani Dasi* v. *Radha Ballabh Das* (47)], and where a Hindu father agreed to make an allowance to his son-in-law for the latter's maintenance, the sons and grandsons of the grantor are liable to discharge the debt out of the ancestral property which devolves on them [per Dawson Miller, C. J., and Mullick, J., in *Madhusudan Prasad Singh* v. *Ramji Das* (60)].

As to the position of a Hindu widow and her daughter. Where a Hindu husband dies intestate and without issue, the widow is entitled to the absolute possession of the property descended from him to enjoy it during her lifetime and to dispose of it under certain restrictions. The extent and limit of her power of disposing of the property are not definable in the abstract but must be left to depend upon the circumstances of the disposition when made and must be consistent with the law regulating such disposition [per East, C. J., in *Cossinauth Bysack* v. *Hurroosoondry Dassee* (22)] According to the Hindu Law prevailing in Benares (Western School) a widow cannot generally alienate the estate, inherited from her husband, to the prejudice of his heirs which at her death devolves on them [per Sir J.W. Colville in *Bhaugwandeen Doobey* v. *Myna Baee* (22)] ; a Hindu widow in possession of the estate of her deceased husband, who made a gift by deed of immovable property forming about one-seventy-fifth of the whole estate for the observance of bhog (food offerings) to a deity and for the maintenance of the priests was entitled to do so, such a widow is entitled to spend or alienate not only in connexion with the actual obsequies of her deceased husband but also for such rites which are considered as essential for the salvation of the soul of the deceased [per Mr. Ameer Ali in *Sardar Singh* v. *Kunj Behari Lal* (63)] ; such a widow is also justified in alienating a small portion of the property (which she had inherited) of her father at the time of performing her father's sradh ceremony and such alienation binds the reversioners [per

(65) [1901] 28 Cal. 278=5 C. W. N. 297.
(66) [1899] 23 Bom. 291.
(67) [1900] 27 Cal. 555=4 C. W. N. 669.

Benson and Ayyar, JJ., in *Vuppuluri Tatayya Verranna* v. *Garimilla Ramakrishnamma* (35). A Hindu widow has a larger power of disposition of her deceased husband's estate for religious and charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely wordly purposes but each case must be considered on its own merits as to the propriety and legitimacy of the transaction [per Mookerjee and Newbould, JJ., in *Khub Lal Singh* v. *Ajodhya Misser* (31).] A Hindu widow governed by the Mitakshara Law is competent to make a valid gift of a reasonable portion of the immovable property of her deceased husband to her daughter on the occasion of the daughter's gauna (transfer from father's to husband's house) ceremony and such a gift is binding upon the reversioners [per Mookerjee and Carnduff, JJ., in *Churaman Sahu* v. *Gopi Sahu* (37)].

The provision of a dowry for a daughter is a matter of legal necessity which would justify the alienation by a Hindu widow of a larger or smaller portion of her husband's property. No hard and fast rule can be laid down as to what proportion of the property may be alienated, but where the daughter was blind and a cripple and the property was small (Rs. 500 only in value) an alienation of the whole of it in favour of the son-in-law was upheld [per Ryves, J., *Bhagwati Shukul* v. *Ram Jatan Tiwari* (68), such a gift should consist only of a reasonable and moderate portion of the deceased's husband's estate [per Scott-Smith and Fforde, JJ., in *Jowala Ram* and *others* v. *Hari Kishen Singh* (54)].

Lastly, as to the position as between the widow and the son-in-law. The exact point or at any rate almost precisely the same point occurring in the present appeal was dealt with in the Madras High Court in the case of *Ramasami Ayyar* v. *Vengidusami Ayyar* (48), in that suit the circumstances were that a Hindu man (a Brahman) died in 1895 leaving a widow, a son and a daughter, the son took the whole of the estate of his deceased father but died unmarried and the widow inherited the property. Later on she gave her daughter in marriage and at the time of the marriage made a gift of a portion of the landed property to her son-in-law.

The widow then died and the heir brought a suit against her son-in-law to set aside the alienation; it was contended by the reversioner that this Hindu widow holding but a widow's limited interest in the estate had no power to make such a gift and that in any case the particular gift was not a justifiable one in the sense that it was an unreasonably large gift. The District Munsif and on appeal the Subordinate Judge held that the gift was quite a reasonable one and also bound the reversioner: the latter appealed. The learned Judges of the Madras High Court (Subramani Ayyar and Moore, JJ.), dismissed the appeal. They agreed with the lower Courts that the gift, having regard to the extent of the whole estate and the other circumstances bearing on the matter, could not be declared unjustifiable.

They also held on two grounds that the gift bound the reversioners. One ground was that:

> At the time a girl, belonging to the community with which we are concerned in this case, is handed over in marriage, certain other gifts have to be made to the bridegroom of which one is bhudanam or gift of land. That, according to the notions of these people, a gift of that kind on such an occasion is indispensable is clear from what is done even in cases in which the family of the bride is not really in a position to give any land, In such cases conformity to the requirements of custom is sought to be secured by giving some little money as and for land. Nor is it diffieult to understand how such a practice came to prevail from time immemorial. For apart from its being in reality a provision for the married couple, the gift is believed to enhance the merit of the primary act, viz., the giving of a virgin in marriage which, from a religious point of view, is supposed to be productive of considerable benefits to the parents of the virgin.

This was, I take it, a finding that there was a definite and indispensable custom amongst these Brahmans that a gift of land (or something allegorically representing land) should be made by a bride's family to the bridegroom.

The learned Judges referred in support of this custom to the well-known work by the Abbe J. A. Dubois entitled:

"Description of the character, Manners and customs of the People of India and of Their Institutions Religious and Civil."

Father Dubois was a missionary in Mysore and wrote in the 18th century

(68) A. I. R. 1922 All. 381 on appeal A. I. R. 1924 All. 23=45 All. 297.

about the people (chiefly Brahmans) with whom in that neighbourhood he was brought into contact. In Chapter 7 describing marriage ceremonies amongst the Brahmans he observes of the father of the bride:

He then takes the hand of his daughter and puts it into that of his son-in-law and pours water over them in honour of the great Vishnu. This is the most solemn of all the ceromonies of the festival, being the symbol of his resigning his daughter to the authority of the young man. She must be accompanied with three gifts, namely, with a present of one or more cows, with some property in land, and finally with a Salagrama, which consists of some little amulet stones in high esteem among the Brahmans, worn by them, as talisman and dignified even with the homage of sacrifices [P. 111, Society for the Resuscitation at Indian Literature. New edition of English translation, Calcutta, 1905.]

The gifts mentioned are said, by the learned Judges, to be gifts to the bride-groom and not gifts by the father of the bride to his daughter, and I think the proper reading of this passage from Father Dubois' work must bear that construction. Indeed from other passages in the same work the meaning of the extract becomes quite clear. In the Abbe's time daughters were valuable and had to be paid for as brides, at the present day it is rather the other way and it is the bridegroom who is the valuable commodity. On p. 108 of the edition which I quote of father Dubois' work he writes:

To marry, or to buy a wife, are synonymous terms in this country. Almost every parent makes his daughter an article of traffic, obstinately refusing to give her up to her lawful husband until he has rigorously paid down the sum of money which he was bound for according to the custom of the caste. This practice of purchasing the young women whom they are to marry, is the inexhaustible source of disputes and litigation, particularly amongst the poorer people. These, after the marriage is solemnized, not finding it convenient to pay the stipulated sum, the father-in-law commences an action, or more commonly recalls his daughter home, in the expectation that the desire of getting her back may stimulate the son-in-law to procure the money. This sometimes succeeds, but if the young man is incapable of satisfying the avarice of his father-in-law, he is obliged to leave his wife with him in pledge. Now there is time for reflection, and the father-in-law, finding that the sum cannot be raised, and that his daughter from her youth is exposed to great tempations which might lead to the disgrace of all his family, relaxes a littte and takes what the son-in-law is able to pay. A reconciliation is thus effected and the young man takes his wife quietly home.

Men of distinction do not appropriate to their common purposes the money thus acquired by giving their daughters in marriage, but lay it out in jewels, which they present to the lady on the wedding day. These are her private property as long as she lives and on no account can be disposed of by her husband.

The above observations refer to that part of the judgment which I have called the first ground upon which the learned Judges of the Madras High Court held that the gift bound the reversioners and as I have stated, it may, I think, be regarded as a ground which refers particularly to customs which existed amongst the Brahmans of whom Father Dubois was writing and amongst the Brahmans who were concerned in the case decided by Ayyar and Moore, JJ. But there was a second ground upon which they founded their judgment and which was of more general application. The learned Judges observed:

The question therefore is: had Thaiyyu Ammal (the widow) authority to make a gift of landed property inherited by her to her son-in-law at the time of her daughter's marriage. No direct ruling on the point was cited before us. Reference was, however, made to certain passages in the Mitakshara (Chap. I, S. 7, paragraphs 6-14) and the Smriti Chandrika (Chap. 4, S. 20, etc.), wherein the texts of Manu, Yajnavalkya and other Smriti writers dealing with the question of allotment to be made by brothers to their maiden sisters at the time of partition are commented upon.

With reference to the true meaning of these texts, commentators are divided. Some of them hold that all that the texts mean is that funds required for the marriage of sisters should be provided out of their father's estate. Other commentators—Vijnaneshwara among them—lay down that, inclusive of their marriage expenses, sisters are entitled to a provision not exceeding a fourth of what they would have got had they been males. For the purposes of this case it is not necessary to discuss which of the two views is to be taken as law. Assuming that, as argued for the appellant, the view advocated by Vijnaneshwara and his followers is not law, the fact that so high an authority as the author of the Mitakshara propounds a rule thus favourable to maiden daughters, ought to make one hesitate to accept as sound the exceedingly limited construction which was insisted on on behalf of the appellant and which can scarcely be in itself very reasonable; viz., that the texts justify a disbursement out of the estate of only the price of things required in connexion with the celebration of the marriage. In my opinion th better and sounder view is, as contended for, the respondents, that the authorities should be understood to empower a qualified owner like Thaiyyu Ammal to do all acts proper and incidental to the marriage of a female according to the general practice of the community to which she belongs.

This very important decision has been followed in the Madras High Court in

the case of *T. R. Sundaram Aiyar* v. *Krishnasami Aiyar* (49) (per Ayling and Tyabji, JJ.), where it was unequivocally held that a gift of family property to a son in-law is not necessarily invalid: it has also been followed in the case of *Bhagwati Shukul* v. *Ram Jatan Tewari* (68), per Ryves, J., and on appeal per Mears, C. J., and Stuart, J. (59), in which case it was held that a sonless widow was justified in alienating in favour of her son-in-law the whole of the property which she inherited from her husband; the property was of small value (Rs. 500 only) and the widow's daughter was a blind cripple; the gift was in order to promote the marriage and was held to be a matter of necessity and therefore to bind the reversioner. In this case the Madras case was cited with approval; the Madras case has also been quoted and referred to (apparently with approval) in several cases, e. g., by Mookerjee and Carnduff, JJ., in *Churaman Sahu* v. *Gopi Sahu* (37); by Dawson-Miller, C. J., and Mullick J., in *Madhusudan Prasad Singh* v. *Ramji Das* (60); by Mears, C.J., and Stuart, J., in *Bhagwati Shukul* v. *Ram Jitan Tiwari* (59), and by Scott-Smith and Fforde, JJ., in *Jowala Ram* v. *Hari Kishen Singh* (54); see too *Abeshang Tirabhai* v. *Raisang Fatesang* (57), per Batchelor and Heaton, JJ. In that case a widow alienated all her inherited husband's property in favour of her son-in-law shortly after his marriage he undertaking to support her; the transaction was upheld and declared to bind the reversioners, some of whom had acquiesced in what was viewed by the Court as a very proper "family arrangement."

Now if the decision given in the Madras case to which I have just referred at length is correct there can be no doubt that in the present appeal the gift by Mt. Jainti Kumari to the defendant must be regarded as valid. No objection could possibly be taken in this case to the value of the gift because it is common ground that it only formed a very small portion of the property in which the widow held her limited interest. The learned District Judge has pointed out in referring to the case decided in the Madras High Court that the fact that a gift of land to a bridegroom from the bride's family was regarded as an indispensable part of the nuptial ceremonies of Brahmins is of the strongest possible effect as indicating that such a custom could not have grown up or would not have been tolerated had it been in any way inconsistent with the Sastras and early Hindu Law. He therefore came to the conclusion that the plaintiff's suit must fail. But in this Court the learned counsel who has appeared for the appellant has strenuously argued that the decision of the Judges of the Madras High Court, if not actually incorrect, is incapable of being applied to persons who do not belong to a caste in which there exists no custom such as that stated to exist amongst Brahmins who were the parties in the Madras suit. It certainly cannot be said that in the present case any custom of giving landed property to a bridegroom by the family of the bride on the occasion of a wedding was satisfactorily proved to exist amongst the Agarwallas to which caste the parties here belong; on the other hand there certainly was some evidence amongst this community that presents are as a rule made to the bridegroom and are accepted without demur. But the Madras case was not decided only on the ground of caste custom.

An endeavour has been made to show that there are some texts in some commentaries which indicate that a gift such as that which was made by the widow in the present case is invalid according to Hindu Law. I have had the advantage of reading the judgment of my learned brother upon this somewhat intricate question and I agree entirely with the views which he has expressed thereon. I may, however, say that so far as I myself was able to form any opinion at all satisfactory to my own judgment, I thought that it could, at any rate, be stated with confidence that no authoritative texts had been placed before us which forbade or declared illegal a gift such as that made by the widow in this case.

In my view, therefore, the decision of the learned District Judge was correct and this appeal must be dismissed.

Appeal dismissed.

* A. I. R. 1926 Patna 605

ADAMI AND KULWANT SAHAY, JJ.

Bhairo Nath Roy—Plaintiff—Appellant.

v.

Shanke Pahan—Defendant Respondent.

Appeal No. 158 of 1924, Decided on 30th June 1925, from a decision of the Sub-J.. Ranchi, D/- 12th July 1923.

* (a) *Landlord and tenant—Zerpeshgidar lessee from landlord inducting tenant on rayati or bakasht lands—Tenant acquiring status of occupancy—Landlord cannot eject him.*

Where the landlord grants zerpeshgi lease, unless there is a restriction in the zerpeshgi lease itself restricting the power of the Zerpeshgidar as regards the settlement of raiyati lands, the zerpeshgidar in the ordinary course of management would be entitled to settle raiyati or baksht lands with tenants.

And therefore where zerpeshgidar has settled such raiyati land with a tenant has been in possession for more than 12 years and has therefore acquired an occupancy right, cannot be ejected by the landlord. If the zerpeshgidar has thereby committed any waste or created an encumbrance the remedy of the landlord would be against him. [P 606 C 1]

(b) *Words "Bahsht lands" are lands held by land lord on surrender or abandonment by tenants—They retain the character of raiyatt lands*

Baksht lands are primarily raiyati lands but are held by the proprietor for the time being on account of surrender or abandonment or purchase in execution of decrees or by such other means. Such lands retain the character of raiyati lands and occupancy right is acquired as soon as such lands are settled with settled raiyats of the village. [P 606 C 1]

Anand Prasad—for Appellant.

S. Dayal—for Respondent.

Kulwant Sahay, J.— This is an appeal by the plaintiff and it arises out of a suit brought by him for recovery of possession of one pawa of land known as Dabar Chaun Don in the village of Guffia. The plaintiff is admittedly the landlord. The defendant claims to be a tenant of the land. The plaintiff's case was that the land was in his possession as proprietor and he had let it out at first in bhugut bandha mortgage to one Durjodhan Manjhi and later in zerpeshgi to Chaitan Munda. Mangra. Dondra Pahan and Jhirka Munda, The zerpeshgi was granted in 1895 and it was redeemed in the Sambat year 1975. The plaintiff's case is that after redeeming the zerpeshgi he wanted to take possession but he was resisted by the defendant in respect of the land in dispute. The plaintiff says that this land was a part of the bakasht land and the defendant had no right to remain in possession. The defendant's case was that it was not the bakasht land of the proprietor but it was his ancestral raiyati land.

He relied upon the entry in the survey khatian which showed the defendant as a raiyat in respect of the land in dispute. Both the Courts below have held that the land in dispute was not the ancestral raiyati land of the defendant.

It has been found by the learned Subordinate Judge on appeal that the land in dispute was not manjihas land or the proprietor's private land in which no rights of occupancy could be acquired but that it was land in the khas possession of the proprietor and appertained to the raiyati class of lands. The finding further is that the defendant was inducted as a tenant upon the land in dispute by the zerpeshgidars during the period of the zerpeshgi. It is further found that the settlement by the zerpeshgidars with the defendant was not a collusive settlement but a bona fide settlement. The learned Subordinate Judge has further found that the plaintiff's evidence as regards possession and dispossession by the defendant was hopelessly conflicting and the learned Subordinate Judge agreed with the Munsif in holding that the defendant had been in possession at least from the date of the survey settlement which was more than 12 years before the institution of the suit.

The position therefore is that the defendant was inducted upon the land by the zerpeshgidars who had taken the land in zerpeshgi from the plaintiff for a period of time and the said period having expired and the zerpeshgi having been redeemed, the question is, whether the plaintiff is entitled to take possession of the land in the condition in which he had granted the same in zerpeshgi to the zerpeshgidars on ejecting the defendant. The learned Subordinate Judge has found that the zerpeshgidars were in the same position as lessees; that lessees are entitled in the ordinary course of management to induct tenants upon raiyati lands; and that such settlement of land by the zerpeshgidars would be binding upon the proprietor or the person who had granted the zerpeshgi. He relied upon the observations of this Court in *Sheo Barat Singh* v. *Padarath*

Mahton (1) and *Pitambar Singh* v. *Khago Kumhar* (2). These two cases support the decision come to by the learned Subordinate Judge.

It has, however, been argued on behalf of the plaintiff in second appeal that the zerpeshgidar had no right to settle tenants upon the lands which were in the possession of the plaintiff at the time when the zerpeshgis were granted. In my opinion there is no substance in this contention unless there is a restriction in the zerpeshgi lease itself restricting the power of the zerpeshgidar as regards the settlement of raiyati lands, the zerpeshgidar in the ordinary course of management would be entitled to settle raiyati lands with tenants. The cases cited by the learned vakil for the appellant refer to zirat lands or lands which were private lands of the proprietor and to which no right of occupancy could be acquired. Those cases are different from the raiyati lands which are temporarily in possession of the landlord and which are known technically as bakasht lands. Such lands are primarily raiyati lands but are held by the proprietor for the time being on account of surrender or abandonment or purchase in execution of decrees or by such other means. Such lands retain the character of raiyati lands and occupancy right is acquired as soon as such lands are settled with settled raiyats of the village.

In any case here the finding is that the defendent has been in possession for more than 12 years and has therefore acquired an occupancy right having regard to the finding arrived at it is clear that the plaintiff is not entitled to eject the defendant. His argument is that the zerpeshgidars had no right to create encumbrance or commit acts of waste in respect of the land given to them in zerpeshgi. If the zerpeshgidars have done any such thing the remedy of the plaintiff would be against them. As against the tenant who is the only defendant in the present suit no such claim can be raised and the settlement with him which has been found to be a bona fide settlement cannot be held to be invalid on account of any act done by the zerpeshgider to the detriment of the plaintiff. I am of opinion that the decision of the learned Subordinate Judge is correct and this appeal must therefore be dismissed with costs.

Adami, J.—I agree.

Appeal dismissed.

(1) [1919] 52 I. C. 473.
(2) [1917] 3 Pat L. W. 333=39 I C 521.

A. I. R. 1926 Patna 606

KULWANT SAHAY, J.

Madhusudan Singh and *others*—Plaintiffs—Appellants,

v.

Jeolal and *another*—Defendants—Respondents.

Appeal No. 344 of 1922, Decided on 15th April 1925, from the appellate decree of the Sub-J., Gaya, D/- 20th December 1921.

Bengal Tenancy Act, S. 182—*Person not a raiyat but residing in village homestead—S.* 182 *does not apply but Contract Act applies—Incidents of permanent tenancy pointed out.*

Where it was found that defendant who was not a raiyat in the village was in possession of a house in the homestead land of proprietors for about ten years and he had been living in the village, though not in the same house for about 25 to 30 years, and that for a period of ten or eleven years the rent had not varied, that there was no finding that the landlord had treated the tenancy or defendants as heritable, nor that the site was let out to defendants for building house thereon :

Held : that S. 182, Bengal Tenancy Act, did not apply ; that the rights of the parties must be determined by Contract Act, and that defendants had not acquired permanent rights of tenancy in the land : 16 *C. W. N.* 567, *Dist.* [P. 607, C. 2]

S. N. Bose—for Appellants.

S. Dayal—for Respondents.

Kulwant Sahay, J.—This appeal was heard on the 19th of March last ; and, as the parties expressed a desire to compromise the dispute between them, judgment was reserved and time was allowed to them to effect a compromise. On the 27th of March it was represented that the compromise had been effected between the parties and that a petition setting out the terms of the compromise would be filed on the 1st of April 1925. The case was accordingly again allowed to stand over until the 1st of April. On the 1st of April it was represented by the learned vakils on both sides that the matter had been finally settled between the parties and that in order to file a petition of compromise the khasra number of one of the plots had to be

stated, which was not available; and time was again asked for to obtain the khasra number of one of the plots in dispute. The case was accordingly allowed to stand over till to-day. On the case being taken up to-day it is represented by the learned vakils on both sides that no compromise has been effected. It is regrettable that if the compromise had fallen through, the matter was not brought to the notice of the Court earlier. I have, however, reheard the learned vakils on both sides to-day.

The appeal is by the plaintiffs and it arises out of action in ejectment. The suit was decreed by the Munsif, but, on appeal, it has been dismissed by the learned Subordinate Judge. The plaintiff's case was that the land in dispute was gair mazrua land of the proprietors and that the defendants, without any right, had constructed a house thereon in the year 1321 F.; that a notice was given to the defendants to vacate the land, and they having failed to do so, the present suit was brought for a declaration that the Defendant No. 1 had no right to the land in dispute and for recovery of possession thereof.

The defence of the defendants was that the land in dispute was in occupation of the defendants for a long period and that they had built a dwelling house thereon and that they had acquired a right to remain on the land as a permanent tenant thereof and could not be evicted. It is admitted by the defendants that they are not raiyats of the village and therefore S. 182 of the Bengal Tenancy Act has no application to this case.

The learned Munsif found that the land was the gair mazrua land of the proprietors and that, as the defendants could not acquire any right of occupancy under S. 182 of the Bengal Tenancy Act, the relationship between the parties must be determined by the provisions of the Indian Contract Act; and he found that there was nothing on the record to show that the tenancy was of a permanent or transferable nature. The learned Subordinate Judge has dismissed the suit and the reasons given by him are these: He finds that the allegation of the plaintiffs that the defendants built the house in the year 1321 fasli is false. He also finds that the defendants have been in possession of the house from the time of their ancestors and that therefore they have acquired a permanent right in the land and are not liable to be ejected. He further observes that the defendants are weavers and therefore members of the village community and therefore are not liable to be ejected. Next he finds that the defendants have paid mutarfa rents and have got receipts for a period of ten or eleven years from 1316 to 1326 Fs. Lastly he finds that the defendants have been living in the village for the last twenty-five or thirty years. From these facts he has come to the conclusion that the defendants are permanent tenants of the homestead land and could not be ejected.

On second appeal it has been contended by the learned vakil for the appellants that the reasons given by the learned Subordinate Judge are not sufficient in law to come to a finding that the tenancy of the defendants is of a permanent character. In my opinion, this contention is sound and ought to prevail. It is admitted by the learned vakil for the respondents that the reasons given by the learned Subordinate Judge by themselves are not sufficient in law to create a permanent tenancy in the defendants. He, however, relies upon the decision in the case of *Moharam Chaprasi* v. *Telamuddin Khan* (1). The facts of that case are, distinguishable from those of the present case. In that case there was a finding that the original tenant and his successors had been in occupation of the land for over 60 years; secondly, that rent was never varied; thirdly, that the tenancy had been treated by the landlord as heritable; and fourthly, that the land was let out for residential purposes. From these facts the Court came to a conclusion that the tenancy was of a permanent nature. In the present case it has not been found that the defendants and their predecessors had been in occupation of the land for a great length of time; all that has been found is that the defendants have been in possession from 1316 to 1326, and further that they have been living in the village (not in the house in dispute) for the last twenty-five or thirty years. Next there is no finding that the rent has never varied: all that is found is that for a period of ten or eleven years the

(1) [1911] 16 C. W. N. 567=13 I. C. 606=15 C. L. J. 220.

same rent has been paid, and not that rent has continued unvaried from the time of the ancestors of the defendants down to the present time. Thirdly, there is no finding that the landlord has treated the tenancy of the defendants as heritable; and fourthly, there is no allegation and no finding as to the land upon which the house stands having been let out to the defendants or their ancestors by the proprietor for the purpose of building a dwelling house thereon. The allegation in the written statement was that the defendants and their ancestors had been in occupation of the house in dispute. It may be that the house was standing on the land at the time the defendants and their ancestors first came to occupy it. No doubt the allegation of the plaintiffs that the defendants built the house upon the land for the first time in the year 1321 has been found to be false; but upon the findings arrived at by the Courts below it is clear that the defendants cannot acquire a permanent right of tenancy in the land. There was an allegation in the plaint that a notice to quit had been served upon the defendants. This was not denied in the written statement, and it appears that the sufficiency of the notice was admitted. In my opinion unless the defendants succeeded in proving upon evidence that there was a permanent lease granted to them or to their ancestors, the position of the defendants must be that of a tenant at will or from month to month or from year to year, and the tenancy is liable to be determined on a proper notice to quit. The legality or sufficiency of the notice in the present case has not been disputed and it must be taken that the notice given in the present case was sufficient.

In my opinion the decree made by the Munsif was correct. The decree of the Subordinate Judge must be set aside and that of the Munsif restored. The plaintiffs are entitled to their costs throughout.

Appeal allowed.

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