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ALL INDIA REPORTER

1929

BOMBAY SECTION

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

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(2) 31 BOMBAY LAW REPORTER
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TO

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IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

BOMBAY HIGH COURT

1929

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Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

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Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1929 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

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

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Please refer to COMPARATIVE TABLE *No II in* **A. I. R. 1929 Nagpur.**

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	30 *Cr L J*	1112	335	31 *B L R*	625		120 *I C*	862		121 *I C*	439
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	120 *I C*	340	348	31 *B L R*	666		120 *I C*	865		31 *B L R*	922
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	53 *Bom*	611		119 *I C*	771		31 *B L R*	925	467	53 *Bom*	773
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Jhunalal Sahu v. Emperor, (1917) 2 Pat. L. J. 657=41 I. C. 1002=2 Pat. L. W. 152=18 Cr. L. J. 890.	Overruled in A.I.R. 1929 Pat. 473 (F.B.)
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Labha Singh v. Basant Singh, (1927) 104 I.C. 545=A. I. R. 1927 Lah. 449=9 L.L.J. 237=28 P.L.R. 407.	" A.I.R. 1929 Lah. 481 (F.B.).

Maung Mra Tun v. Ma Kra Zoe Pru, (1928) 6 Rang. 259=A. I. R. 1928 Rang. 240=111 I. C. 878.	Overruled in A.I.R. 1929 Rang. 97 (F.B.).
Nanhe Mal Panna Mal v. Piare Lal Debi Sahai, (1928) 109 I. C. 399=A. I. R. 1928 Lah. 46=9 L. L. J. 502.	" A.I.R. 1929 Lah. 481 (F.B.).
National Bank of Upper India v. Bansidhar, (1926) 3 O. W. N. 83=A. I. R. 1926 Oudh 248=92 I. C. 94.	Reversed in A.I.R. 1929 P. C. 297.
Nilkamal v. Jahnabi, (1899) 26 Cal. 946.	Overruled in A.I.R. 1929 Cal. 374 (F.B.).
Raghunath v. Ramchandra, (1922) 46 Bom. 384=A. I. R. 1922 Bom. 289=64 I.C. 928.	" A.I.R. 1929 Bom. 357 (F.B.).
Ramji Ram v. Banshi Raut, (1925) 4 Pat. 89=6 P.L.T. 240=A. I. R. 1925 Pat. 241=84 I. C. 305=1924 P. H. C. C. 337.	" A.I.R. 1929 Pat. 460 (F.B.
Subrahmanya Somayajulu v. Seethayya, (1922) 46 Mad. 92=16 M. L. W. 462 =1922 M. W. N. 614=A. I. R. 1923 Mad. 1=70 I. C. 729 (F.B.).	Reversed in A.I.R. 1929 P.C. 115.
Suradhani v. Sittoo, (1922) 71 I. C. 378= A.I.R. 1922 Cal. 311=27 C.W.N. 280.	Overruled in A.I.R. 1929 Cal. 374 (F.B.).
U Teza v. Ma E Gywe, (1928) 5 Rang. 626=A.I.R. 1928 Rang. 3=106 I. C. 201.	" A.I.R. 1929 Rang. 354 (F.B.).
Vishnu Embadri v. Tazakat Manayul, 1928 M.W.N. 390.	" A.I.R. 1929 Mad. 20.
Vithaldas v. Murtaja, (1922) 46 Bom. 764=A.I.R. 1922 Bom. 201=24 Bom. L. R. 267=67 I. C. 151.	" A.I.R. 1929 Bom. 357 (F.B.).

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THE

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1929

BOMBAY HIGH COURT

* A. I. R. 1929 Bombay 1

FAWCETT, AG C. J., AND MURPHY, J.

Kondi Ravji Fadtare—Plaintiff—Appellant.

v

Chunilal Rupchand Marwadi—Defendant—Respondent

First Appeal No. 434 of 1925, Decided on 2nd August 1928, from decision of the First Class Sub-Judge, Poona, in Suit No. 548 of 1924.

*** (a) Practice—Fraud—Collusion.**

Where the Court had no jurisdiction to pass a decree in terms of a compromise for payment of the amount agreed, where, to avoid possible complication and difficulties arising out of recording a simple compromise in that Court, a form of having a reference to arbitration and award was gone through and where application to a competent Court was made to file the award and have a decree passed in its terms, without letting the Court know of the proceedings in the other Court,

Held, that this conspiracy of silence cannot be described as "collusion" in the sense in which the word is used in connexion with judicial proceedings, viz., a secret agreement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose, or even in the wider sense of a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose. [P 5 C 1]

(b) Civil P. C., O. 6, R. 4—Fraud—On failure to prove one kind of fraud, party cannot set up another kind of fraud.

A party alleging one kind of fraud cannot, on failure to prove it, set up another kind of fraud and try and get a decree on that basis : 11 *Bom.* 620, *Ref.* [P 5 C 1]

(c) Evidence Act, S. 115 — Participator in fraud cannot impeach transaction on that ground.

A participator in fraud, when the fraud is effected, cannot impeach the transaction on the ground of such fraud : 6 *Bom.* 703 and 11 *Bom.* 708, *Ref.* [P 5 C 1]

(d) Evidence Act, S. 115—Scope.

Where plaintiff has obtained a decree on the representation that a Court had jurisdiction, subsequently he cannot go back upon it and urge want of jurisdiction. [P 6 C 2]

G. N. Thakor and *K. V. Joshi*—for Appellant

H. C. Coyajee and *S. R. Parulekar*—for Respondent

Fawcett, Ag. C. J.—In this case the plaintiff sued to obtain a declaration that the decree obtained on an award filed in the Court of the First Class Subordinate Judge of Poona was unauthorized, null and void. The main ground on which he asked for this relief was that there never was a reference to arbitration with his knowledge or consent, that he knew nothing about the alleged arbitration, and that the award was, in fact, a forged document, and, therefore, null and void. He admitted that he made his thumb-impressions on some papers, so that there might be thumb-impressions on documents connected with this alleged arbitration and what purports to be his application to file the award ; but he says that he is an illiterate agriculturist and really made such thumb-impressions on papers delivered to his pleader in connexion with a suit that he had brought in the Court of the Subordinate Judge of Saswad. The defendant contended that all these allegations about the fraudulent nature of the award were false, and that the decree on the basis of the award was passed in the presence of the plaintiff himself in Court and with his knowledge and consent.

The case is one of some peculiarity, because the application to file the award was one made on behalf of the plaintiff by a pleader in whose favour the plaintiff admittedly had passed a vakalatnama, which bears the plaintiff's thum-impression, and also the Saswad suit was withdrawn, shortly before the award decree was passed, upon an application made by one Mr. Gokhale, a pleader admittedly employed by the plaintiff in that suit, and saying that the suit need not be proceeded with as an arbitrator's award has been passed in the matter The case of the plaintiff involves gross dishonesty and even forgery on the part of his pleader, Mr. Gokhale, who had died at the time this suit was brought ; and it may at once be said that no satisfactory explanation has been given as to why Mr. Gokhale should be guilty of such conduct All that we are told is that the plaintiff has no knowledge on the subject The Subordinate Judge, after recording evidence, held that the plaintiff had not proved that the reference to arbitration and the award were not genuine transactions made without the knowledge and consent of the plaintiff, and he dismissed the plaintiff's suit.

The first question in this appeal is whether the plaintiff has or has not established his case of a false and fraudulent award The main circumstances under which this question arises are as follows:

The plaintiff admittedly had mortgaged certain lands to defendant 1, who is his sawcar, and on 7th April 1921, he executed a deed in defendant's favour, which—on the face of it—was a deed of sale The plaintiff, however, contended that the document was not a sale but a mortgage transaction. The defendant filed a suit in the Court of the First Class Subordinate Judge to get possession of the lands under his sale deed, and the Court decided that suit in favour of the sawcar to this extent that it awarded him possession of the lands but gave the present plaintiff leave to file a suit for accounts under the Dekkhan Agriculturists' Relief Act within four months. The plaintiff accordingly filed such a suit, claiming an account of the alleged mortgage transaction. That was suit No. 425 of 1922 in the Court of the Second Class Subordinate Judge of Saswad, and it was instituted on 14th October 1922. As I have already said, Mr. Gokhale was the plaintiff's pleader in that suit. On 24th February 1923, the alleged reference to arbitration and award are said to have taken place. There is, in fact, an award document signed by the arbitrator, one Mr. Shedge, on a stamp paper of Rs. 20 ; and it has been proved that two stamp papers, one of Rs. 20 and the other of 8-annas, were sold to the plaintiff on that day. There is the evidence of the stamp vendor to that effect, which is supported by entries in his register bearing the thumb-impressions of the plaintiff ; and in Ex. 35 he admitted that the clerk of Mr Gokhale had taken him to the stamp vendor and that he had put his thumb-impresssion on his book, as well as on the stamp papers. The stamp paper of Rs. 20 does bear such a thumb-impression as well as the corresponding entry in the register kept by the stamp vendor. But the plaintiff says that he does not know what these stamp papers were meant for. The defendant, on the other hand, says that the eight annas stamp paper was brought for the purpose of a reference to arbitration and the Rs. 20 stamp paper was used for the award. That is certainly a reasonable suggestion. But, of course, it does not settle the controversy.

Then, on 8th March 1923, there was an application made purporting to be on behalf of the plaintiff and admittedly bearing his thumb-impression in two places, reciting the alleged award of the arbitrator and asking the Court to pass an order filing that award. On 23rd March 1923, notice was ordered to issue to the defendant to show cause why the award should not be filed, and the notice was sent to the Saswad Court for sevice upon the defendant. On 17th April 1923, there was an application made by Mr. Gokhale, purporting to be on behalf of the plaintiff, in the Subordinate Judge's Court at Saswad that the suit No 425 of 1922 should not be further proceeded with, as an arbitrator's award had been passed about the deed in suit (Ex 52) ; and thereupon the suit was dismissed with costs On 20th April 1923, the First Class Subordinate Judge recorded that the defendant had consented to the application as per his written statement, Ex. 6 in that case, and he directed that the award be filed and a decree be drawn up in terms of the award.

The present suit was brought on 11th June 1924, and it was alleged that the

plaintiff only came to know of the fraud in April 1924. The main evidence upon which reliance is placed for the plaintiff is that of the arbitrator, G. N. Shedge, Ex 40. He testified that he really effected no award whatever between the parties, but that Mr. Gokhale, the pleader, called him and asked him to sign a paper, saying it was an award in respect of a matter of the defendant Chunilal. He says that he hesitated to sign it, but that Mr. Gokhale assured him that there was no harm in doing so, and relying upon him, as he was his usual pleader, he signed the award Ex 41 He further says that he signed it even without reading it, and that the defendant Chunilal was not present when he did so. He also testifies that one Shivram Dhamdhere, a clerk of Mr. Gokhale, was not then present, but that one Sadashiv B. Joshi had called him saying that Mr. Gokhale wanted him This certainly is evidence which can be relied upon in support of plaintiff's case that, in fact, there was no real reference to arbitration or award But the Subordinate Judge has held that Shedge is a liar of the worst class, and he does not believe his testimony

Against this testimony there is the evidence of the defendant, who says that the plaintiff had filed a plaint before Shedge, and that he (defendant) filed his sale-deed and written statement as well as account extracts, that Shedge heard them both, and that Mr Gokhale and another were helping the plaintiff. He further says that Mr Shedge was looking into the matter for two or four hours, and that Sadashiv Joshi, to whom I have already referred, wrote the award Sadashiv Joshi has also given evidence in support of the defendant's story He says that he wrote the award at Mr Shedge's request, and at his dictation, and that both the plaintiff and defendant were present and consented to the award. He also says that the plaintiff made his thumb-impression upon the award There is, however, no such thumb-impression upon the award except the one made against the endorsement about the sale of the stamp paper to the plaintiff that I have already mentioned He further says that the arbitrator had before him the plaint and the defendant's written statement, that both the parties put their cases to the arbitrator, and that the defendant had brought certain account books, although in his cross-examination he contradicted this by saying that he did not see any account books there. He says that there was also a reference to arbitration, which bore the thumb-impression of the plaintiff and the signature of the defendant, and was written on a stamp paper of eight-annas on the same day, viz , 24th March 1923 This document has not been produced and the Subordinate Judge surmises that it has been suppressed by Mr. Shedge, to help the plaintiff. The arbitrator, however, does not appear to have been put any question on the subject.

The Subordinate Judge has accepted the testimony of the defendant and Sadashiv in preference to that of Shedge. At any rate, he says that he is inclined to believe the positive evidence on the defendant's side and that the evidence on the plaintiff's side is entirely negative and consists of denials and improbabilities bordering on falsehoods. He further comments upon the fact that the plaintiff failed to examine either Shivram Dhamdhere, Mr Gokhale's clerk, who is still alive, or the other pleader who was engaged for the plaintiff in the First Class Subordinate Judge's Court, viz , Mr. Shankar Laxman Joshi Some explanation has been given by Mr. Thakor as to why this was not done and it does appear that both the parties at one time were thinking of examining Mr. Joshi, but eventually he was not called. I do not, however, attach very much importance to this omission for reasons I am now going to give

I do not think that the case of either party is really the whole truth The Court cannot presume fraud and dishonesty. There must be something to justify a Court going to that length, and here the plaintiff's case involves the conclusion that his pleader was guilty of doing important things without the authority and knowledge of his client and that he has practically forged documents by getting thumb-impressions from the plaintiff on the representation that they were wanted for a certain purpose and using them for another, viz., in order that they may purport to show the authority of his client for things which he knew were unauthorized. Surely, a Court of law must hesitate before it comes to a conclusion of that kind. There is nothing in the evidence to suggest any satis-

factory reason why Mr. Gokhale should have been guilty of such conduct. On the other hand, there is a suggestion which during the course of the arguments, I put to the learned counsel, and which, to my mind, is consistent with the admitted facts of the case

There was this dispute as to whether the sale-deed was an actual sale or merely a mortgage transaction. It seems to me that there is an obvious explanation of these documents being in existence, viz , an actual award about the dispute on a stamp paper which admittedly bears the plaintiff's thum-impression, the application made by two pleaders for filing the award under vakalatnamas bearing the plaintiff's admitted thumb-impression in two places, and the application that in view of this award the Saswad suit was withdrawn by the plaintiff. This is that the parties had, in fact, come to an agreement on the matters in dispute They had settled terms which are recorded in this so-called award, and they adopted this procedure of having a fictitious award deliberately A reasonable explanation is forthcoming for it, viz , that the agreement involved the payment by the plaintiff to the defendant of a sum of over Rs. 5,000, so that the SecondClass Subordinate Judge could not pass a decree in terms of a compromise for payment of that amount, which was beyond the pecuniary limits of his jurisdiction. I will not say that there would necessarily be illegality: see *Ambadas Harirao* v. *Vishnu Govind* (1); but, at any rate, there would have been a possibility of complications and difficulties if a simple compromise had been recorded in the Saswad suit. It seems to me that Mr. Gokhale, the plaintiff's pleader, might well have advised his client that the safer course to take would be to go through the form of having a reference to arbitration and an award, and then to make a separate application in a Court having jurisdiction with regard to the pecuniary amount involved, viz., in the First Class Subordinate Judge's Court Poona, to file the award and have a decree passed in its terms. The other party's pleader might equally consent to this course. It was not an essentially dishonest arrangement, for it was one upon which the parties had in fact agreed and there is nothing to suggest that it was an unfair arrangement It is a device that can of course be abused, as it has often been in order to defeat the provisions of the Dekkhan Agriculturists' Relief Act This is referred to in para. 2, Chap 6 of the Manual of the High Court Circulars at p. 191; but the present is not a case of that kind.

This theory explains the withdrawal of the Saswad suit and also is consistent with the evidence of the defendant that he did, in fact, receive a payment of Rs. 614 from the plaintiff after the award had been passed, which is corroborated by the admission of the plaintiff that he had paid him Rs 1,000 or less in 1924. It also explains the arbitrator's evidence. As to his reliability, I differ entirely from the Subordinate Judge I think that this gentleman, who is a Vani, having no connexion with either of the parties, and is described by the Subordinate Judge as one of the well-to-do merchants of Saswad and Kopergaon, should not lightly be assumed to be a person who would falsely side with the plaintiff in a dispute of this kind and perjure himself. On the contrary I believe he has frankly told the truth, and that both the defendant and the clerk, Sadashiv, in trying to make out that there was a genuine reference to arbitration, a genuine hearing by the arbitrator and a genuine passing of an award, are telling lies. Therefore, I agree with the view taken by the lower Court that the plaintiff has not proved that this award transaction and the subsequent applications in the First Class Subordinate Judge's Court and in the Saswad Court, were all without his knowledge or authority. I do not believe that allegation, and I think it is a case merely of the plaintiff, after he had consented to these arrangements, going back upon his word Accordingly, on the facts, I see no sufficient reason to differ from the conclusion of the lower Court that the plaintiff had not made out his case of fraud on which he asks the Court to interfere with the award decree. But of course, my reasons for that view are very different from those of the lower Court.

Mr. Thakor urges that, even if that view is adopted, yet the plaintiff has a right to have the decree set aside. So far as this is based on the contention that the decree was passed without jurisdiction, it is a point with which I shall deal later. So far as it is based on any

(1) A. I. R. 1927 Bom. 83=50 Bom. 839.

suggestion that on the facts that I hold to be probably true, there was a fraud that would justify the setting aside of the award decree, I entirely differ. There are various grounds on which that conclusion can be based. There is, first of all, the rule that a party alleging one kind of fraud, on failure to prove it, cannot set up another kind of fraud and try and get a decree on that basis: see, for instance, *Abdul Hossein Zanail Abadi* v. *Charles Agnew Turner* (2). Then, there are, of course, the familiar rulings that a participator in a fraud, when that fraud is effected, cannot impeach the transaction on the ground of such fraud : see *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (3) and *Chenvirappa* v. *Puttappa* (4). In any case, there could not be said to be a fraud here, except in the sense that both parties colluded to keep the Court at Poona in ignorance of the fact that a suit between them was pending in the Saswad Court. But, that in itself, would not be sufficient ground for setting aside the judgment of the Court below. Even supposing that the case could not be said to fall within the rulings I have referred to about fraud, the plaintiff is not entitled to set aside the collusive decree, because, as held in *Chenvirappa* v. *Puttappa* (4) a party to a collusive decree is bound by it, except possibly when some other interest is concerned that can be made good only through his. That is not a case which arises here. But, in truth, this conspiracy of silence cannot, I think, be described as "collusion" in the sense, in which the word is used in connexion with judicial proceedings, viz., a secret agreement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose, or even in the wider sense of a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose: see Ameer Ali's Law of Evidence, 8th Edition, p. 417. In the present case though there was a conspiracy to deceive the Court, I do not think that there was a sinister or improper purpose within the meaning of those definitions.

(2) [1887] 11 Bom. 620=14 I. A. 111=5 Sar. 25 (P.C.).
(3) [1882] 6 Bom. 703.
(4) [1887] 11 Bom. 708.

Mr Thakor has also fallen back upon the point of law which is indicated in ground No. 15 of the memorandum of appeal, although he has rather altered it in his argument That ground says:

"The alleged reference and award having been admittedly alleged to have been made during the pendency of a suit in Court should have been held to be illegal and the decree based on such an award should have been set aside."

This contention, at any rate, is supported to this extent that in the Full Bench case of *Chanbasappa* v. *Basalingayya* (5) it was held by all the three Judges that para. 20, Sch. 2, Civil P. C., under which the award and subsequent application could only be justified, does not apply to arbitration in pending suits, but contemplates only a reference to arbitration where there is no pending suit covering the matters in dispute referred to arbitration. That also was the view that was held by Macleod, C. J. and myself in *Manilal Motilal* v. *Gokaldas Rowji* (6). Therefore it may be said that there was no proper reference or award upon which the First Class Subordinate Judge had jurisdiction to pass a decree in terms of the award. It was contended further that the decree is absolutely illegal and being without jurisdiction should be set aside, although that is not a ground upon which the plaintiff asked the lower Court to do this. On the other hand, Mr Coyajee, among other arguments, has contended that this objection does not really make the award or decree an illegality, but only constitutes an irregularity; and he has drawn our attention to what has been laid down in *Vishnu Sakharam* v *Krishnarao Malhar* (7), viz., that where jurisdiction in the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way, cannot afterwards challenge the legality of the proceedings due to his own invitation or negligence.

This argument is supported, at any rate to this extent that on the face of them, the papers, viz , the application to file the award and to have a decree passed in terms of it, and the further exhibits such as the defendant's written statement, contained nothing to show that the First

(5) A. I. R. 1927 Bom. 565=51 Bom. 908 (F.B.).
(6) A. I. R. 1921 Bom. 310=45 Bom. 245.
(7) [1886] 11 Bom. 153.

Class Subordinate Judge had not jurisdiction to pass the decrée he did. The reference to arbitration and the award had taken place within the jurisdiction of the Court, the parties resided within its jurisdiction, and the pecuniary value of the decretal order was also within jurisdiction The only thing which can be said to have deprived the Court of jurisdiction is the suit in the Saswad Court, which was a matter which both the parties deliberately did not bring to the notice of the Subordinate Judge On the other hand, that suit was not actually pending at the date of the decree, because it had been withdrawn on 17th April 1923, whereas the decree was passed three days later But, in my opinion, it is not necessary for the purposes of this case to decide whether the passing of the decree was entirely illegal or was merely an irregularity. The plaintiff comes to us and asks for certain relief. We have to consider whether that relief should be granted, and in deciding such a question we are not confined merely to the point whether in strict law the decree was passed without jurisdiction

We are a Court of Equity as well as a Court of law, and we are not bound to give relief to the plaintiff. It is not a case where he comes to us as a Court of appeal or revision in regard to the award-decree of the First Class Subordinate Judge In that case, of course, if the decree were shown to be without jurisdiction he would be entitled to consequential relief. But, in the present case, he asks us to interfere in separate legal proceedings on a ground, which suffers not only from the weakness of not having been placed before the lower Court, but also from the weakness that the plaintiff is basing his claim upon a ground of objection which he himself deliberately kept from the Court that passed the decree in question In fact he himself made the application to the Court to file the award, and pass a decree accordingly The case is one which falls within the principle *in pari delicto potior est conditio possidentis* which was applied, for instance, by Sir Lawrence Jenkins in *Sidlingappa* v *Hirasa* (8). This is also a case falling under a similar maxim *allegans contraria non est audiendus*. Plaintiff represented to the Court of the First Class Subordinate Judge, Poona, that it had jurisdiction. He obtained a decree upon that representation and now he wants to go back upon it and urges the contrary, viz., that the Court had no jurisdiction. Therefore, upon general grounds of equity, I think this is clearly a case in which we should not interfere with the lower Court's decree.

I may add that the contention seems to me to raise other questions of res judicata and estoppel, which might also be found to bar the claim Thus it is alleged that the plaintiff in fact acted upon the award and got the defendant to give him possession of the land in suit; in that case he is probably estopped from raising this particular plea, see, for instance, *Brij Mohan Lal* v *Shiam Singh* (9) and *Gauri Shankar* v. *Ganga Ram* (10), referred to in Ameer Ali's Law of Evidence, 8th Edition, at p. 855 The latter was a case where one of two plaintiffs joined with the defendant in an application to the Court for the case to be referred to arbitration On the next day the other plaintiff (one G R) made an oral application before the Court to the effect that he accepted the arbitration. The arbitration lasted for over a year and G R conducted the proceedings throughout on behalf of the plaintiff An award was duly filed but G R. objected to it on the ground that he had not signed the original application to the Court for an order of reference It was held that G R was estopped by his own action from raising any objection as to the legality of the arbitration proceedings on account of the want of his writing. This question would involve the taking of further evidence, because there is a dispute whether or not the plaintiff got possession under the award. If necessary, there would have to be a remand to have evidence taken on that point. But in view of the general considerations I have relied upon, I think it is unnecessary to go into this point of estoppel.

Then, as to the question of res judicata no doubt the judgment and decree of the First Class Subordinate Judge may be said to be entirely without jurisdiction, and that would ordinarily prevent any plea of res judicata arising from them, as was for instance laid down by the Privy Council in *Toronto Ry.* v *Toronto*

(8) [1907] 31 Bom. 404=9 Bom. L. R. 542

(9) [1901] 24 All. 164=(1901) A. W. N. 208.
(10) P. R. No. 77 of 1919.

Corporation (11). But, on the other hand, there is a possibility that the case might fall under the general principle illustrated by *Joint Committee of River Ribble* v. *Creston Urban Dist. Council* (12), which is summarized in Halsbury's Laws of England, Vol. 13, Art 491, at pp. 353-354, as follows :

" The absence of a condition necessary to found the jurisdiction to make an order, or give a decision, deprives the order or decision of any conclusive effect ; but it is otherwise where the order is good on its face and the Court adjudicating has jurisdiction to determine the existence or not of the condition, and the party denying its existence has neglected his opportunity of raising the objection at the hearing."

In the present case the defect of jurisdiction only arises out of the pendency of the Saswad suit at the time of the arbitration proceedings. Plaintiff had an opportunity of drawing the Court's attention to that and getting it to determine whether it had jurisdiction or not. But, leaving this aside, the general principles of equity that I have stated are clearly applicable to the present case and justify a refusal to interfere with the decree of the Court below For these reasons I would dismiss the appeal with costs

Murphy, J.—(After stating facts and discussing evidence as to the arbitration and award, the judgment continued) In any case, I cannot accept the plaintiff's allegation that there was no reference and no award of which he was aware, and that he had no cognizance of the proceedings. Neither can I believe that he did not engage Mr. Joshi of Poona to put through the proceedings which ended in the passing of the decree on the award.

I agree with the learned Subordinate Judge in finding that no ground for granting the declaration sought has been made out in so far as this question was discussed in the original Court

But the appeal has also turned to a great extent on another question raised in the 15th of the grounds of objection in the memorandum of appeal. It is :

15. " The alleged reference and award having been admittedly alleged to have been made during the pendency of a suit in Court, should have been held to be illegal and the decree based on such an award should have been set aside."

(11) [1904] A. C. 809=73 L. J. P. C. 120=20 T. L. R. 774=91 L. T. 541.
(12) [1897] 1 Q. B. 251=56 L. J. Q. B. 384=45 W. R. 348.

Now, it has been held by a Full Bench of this Court in *Chanbasappa* v. *Baslingayya* (5), that where in a suit parties have referred their differences to arbitration without an order of the Court, and an award is made, a decree in terms of such an award can be drawn up under O. 23, R. 3, but not otherwise, and it has been held in the course of the judgments in that case, that para. 20, Sch. 2, would not apply to such an award. The facts here were, that the arbitration proceedings went on while the suit in the Saswad Court was pending, and that the suit was not withdrawn until 17th April 1923, that is, three days before the decree was passed on the award. It has, in consequence, been argued that this decree was made without jurisdiction. The question was raised for the first time in this Court, which makes it from some points of view difficult to decide, since it is possible that evidence might be available on several of the points involved.

Primarily, I think, that the reference and award in themselves involve no illegality. There is nothing to prevent the parties to a suit settling it out of Court, either by compromise or by means of an award, and a Full Bench case already quoted holds that such an award may form the basis of a decree under O. 23, R. 3. But that ruling decides by implication that if such a settlement is arrived at, the machinery of para 20, Sch. 2, is not available to the parties to such an award, and here it was this machinery which was used. But does it follow that after resorting to the use of this procedure, plaintiff can be allowed to challenge the result—the award decree—a decree which, on the facts, he himself invited the Court to make, and which it is now urged he has acted on, having admittedly paid Rs. 614 of the first instalment due under it; and it is alleged—though of this there is no proof—taken possession of the fields in accordance with its terms. I think that for several reasons, he cannot be allowed to do this. For one thing, if fraud there was, in the form of inducing the First Class Court to pass an irregular decree, plaintiff himself was responsible for it, for in his application to file the award, the fact that a suit including the subject-matter of this dispute was pending in the Saswad Court, was suppressed. He cannot, I think, now come and plead it as a ground

or relieving him of the result of his own disingenuous action in misleadiug the Court.

Mr. Coyajee's argument on this point was, mainly, that there was no rule of law or of equity which allows a Court to set aside a decree obtained in the circumstances of this particular one, that is, that a decree can be vacated on the ground that it is irregular, and has referred us to Halsbury's Laws of England, Vol. 18, p. 216, and the principle referred to in the same author's Vol. 13, at p. 491 He has also referred us to the cases reported in *Nanda Kumar* v *Ram Jiban* (13), *Timmanna* v. *Putabhata* (14), and *Mahomed Golab* v *Mahomed Sulliman* (15), and to S. 44, Evidence Act, by which a decree can be avoided on certain grounds, but cannot be set aside.

After giving all these cases my most earnest consideration I agree with the learned Chief Justice in thinking that it is not necessary for us to decide whether the First Class Court's decree really was made without jurisdiction or not, and that it is sufficient to base our refusal to interfere with the lower Court's decree, on the equitable ground that where the plaintiff has himself, by a suppression of facts, caused an irregularity in the exercise of the Court's jurisdiction, it is not proper to allow him afterwards to come and to challenge the decree so obtained by him on that very ground because it would now suit him to get rid of this decree, since he has obtained all or some of its benefits. I agree that the lower Court's decree should be confirmed and that the appeal should be dismissed with costs

S L /R.K *Appeal dismissed.*

(13) [1914] 41 Cal. 990=19 C. L. J. 457=23 I. C. 337=18 C. W. N. 681.
(14) [1893] 2 Bom. L. R. 90.
(15) [1894] 21 Cal. 612.

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* A. I. R. 1929 Bombay 8

KEMP, J.

Standard Aluminium & Brass Works Ltd.,—In re

Misc Petn. Decided on 24th August 1928

*** Companies Act, S. 162 (6) — Company losing 5 out of 7 lacs of its capital — Loss due to previous mismanagement—Under new management Company showing good prospects—One shareholder petitioning to wind up—Petitioner opposed by great majority—Winding up is not justified.**

Under S. 162 (6) Court has jurisdiction in an extreme case to wind up a company at the instance of a shareholder, notwithstanding that he is not supported by a majority of the shareholders. The discretion of the Court under this clause is not limited by the application of the ejusdem generis rule. But the Court would not be justified in interfering, so long as the company has, with the capital which remains, whether already paid up or still uncalled, a chance of producing profit in the way in which it was intended to be produced.

A company incurred heavy losses and lost five lacs out of its total paid up capital of about 7 lacs. A shareholder petitioned the Court to wind up the company. He was opposed by a great majority of the shareholders. The loss was mainly due to the previous mismanagement of the company's affairs. But under the new management the company showed reason to believe that it would shortly be in a sounder position.

Held : that under the circumstances it was not proper for the Court to interfere and wind up the company. *In re Bristol Joint Stock Bank*, (1890) 44 *Ch. D.* 707 ; *Loch* v. *John Blackwood Ltd*, (1904) *A. C.* 783 ; *In re Blériot Manufacturing Aircraft. Co., Ltd.*, (1917) 32, *T. L. R.* 253, and *In re Suburban Hotel Co.*, (1867) 2 *Ch.* 737 ; *Rel. on.* [P 11 C 2]

B J. Desai—for Petitioner.

M V Desai — for supporting Shareholders

M. L. Manekshah—for Company.

B. J. Wadia — for Opposing Shareholders.

Judgment —This is a petition by a shareholder for winding up the Standard Aluminium and Brass Works Limited. The company was registered in February 1920 with an authorized capital of 25 lacs divided into 25,000 shares of Rs. 100 each, Rs 55 being called up on each share, the total amount of the paid-up capital, including sums received on certain forfeited shares re-issued, being just over rupees seven lacs. The petitioner is the registered holder of 5 shares and is supported by certain other shareholders alleged to hold about 1600 shares. It has since appeared, however, that certain of these persons had their shares forfeited five or six years ago, and are no longer on the register of the company, a fact which reduces the number of the shares held by the supporters of the petition to about 600. The petition is opposed by the company and by shareholders to the extent of about 6,500 shares.

The ground on which the petition is presented is that it is just and equitable

within the meaning of S. 162 (6) that the company be wound up. There is little dispute as to the actual figures which represent the working of the company during the past five or six years, and indicate its present financial position. It would appear from the figures set out in para 12 of the petition, which are taken from the balance sheets duly drawn up at the end of each financial year, that at the end of March 1922 there was a loss of about Rs. 88,500, and at the end of March 1923 a further loss of about Rs. 73,000 Thereafter the losses continued but in a diminished form, the losses for 1923-24, 1924-25, and 1925-26 averaging roughly from fifteen to sixteen thousand rupees. The last published balance-sheet shows that in the year ending February 1927 losses had risen again to Rs 44,000. I understand from the statement of counsel opposing the petition that it has been ascertained on a rough calculation that there was also a loss, although only of about Rs. 5,000, in the year ending March 1928 No figures, however, have been produced, and there is nothing on affidavit in that connexion

The above being the losses incurred during the last few years, the present position of the company, so far as its assets are concerned, is indicated in para 2 of the affidavit of Mr. Todiwalla, Chairman of the Board of Directors. Mr. B. J. Desai, who appeared for the petitioner, criticized certain of the figures there appearing with a view of showing that they were exaggerated. The Rs. 62,456, for example, is not in fact the present value of the machinery referred to ; it is the fixed capital expenditure incurred on that machinery, less the amount deducted on account of depreciation. If the original cost was inflated, as appears to be admitted, it is clear that that cost less depreciation would not represent the true present value. But, however that may be, it is in the circumstances comparatively a small matter. Taking the figures shown as strictly correct, it appears that the assets of the company at the present moment namely :

Rs. 50,000 in fixed deposit,
Rs. 62,456 machinery,
Rs. 28,000 stock,
Rs. 16,000 outstandings,
Rs. 6,000 in current account with the bank, amount to Rs. 1,62,456.

In addition, there is some portion of certain unsatisfied decrees of the face value altogether of Rs. 35,000. On a generous calculation, the assets might approach Rs two lacs, although Rs 1½ lacs would seem more probable. What then does this imply? It means that out of seven lacs capital already referred to, at least five lacs have entirely disappeared. It is true that the debts are few and the company can in no way be said to be in an insolvent condition. It is a position, however, which, in the absence of some satisfactory explanation of past losses and an assurance in regard to the future, might well give rise to serious anxiety in the mind of any shareholder.

In addition to the above facts, it should be added that a previous petition for the compulsory winding up of the company had been presented by a shareholder about the year 1922, but had been dismissed as a result of a meeting of shareholders held on the directions of the Court, whereat a large majority had apparently expressed themselves in favour of a voluntary winding up No step, however, was taken to put up the company into voluntary liquidation, and, although the question was thereafter from time to time re-agitated, nothing was in fact done.

In their report to the shareholders, dated 4th February 1927, the auditors, Messrs. S. B. Billimoria & Co , wrote as follows :

" The profit and loss account shows a net loss of Rs. 16,294-7-10, which is mainly due to the lean profit in trading. Otherwise the establishment and overhead charges are less as compared with the last year's figures. It is to be noted with regret that the company has been saddled with heavy recurring losses year after year, and unless some reconstructive measures are taken to place the affairs of the company on a sound basis, the whole of its capital will be wiped out. "

In commenting on the above statement the directors in their report, dated 16th February 1927, observed :

" Your directors inquired of the auditors as to what suggestion they proposed to make in connexion with the said statement, when they stated that they would suggest that the bad debts should be written off and the capital of the company should be reduced, Your directors are not in favour of the said suggestion and they would prefer to take the company into voluntary liquidation. It is for the shareholders to consider the matter and the directors will be glad to know the views of the shareholders at the next meeting. "

What happened at the next meeting and the action taken are described in the

director's report dated 9th March 1928, viz :

" In the last annual general meeting of the company, views had been expressed by almost all the shareholders present then to have the company taken into voluntary liquidation. In accordance with the desire expressed by the said members, the directors considered the matter and consulted the solicitors of the company and they have come to a conclusion that they should wait till the suit filed by the company against the past directors is over, which suit is expected to reach hearing shortly. And after the said suit is over they would take the necessary steps in the direction. "

I am told by counsel that the suit referred to was filed in 1924, and stands at present 141st on the prospective list of Davar, J Its decision would, therefore, not appear to be inmminent

I should add, while I am dealing with the question of the suggested voluntary winding up, that, whatever the wishes of the shareholders may have been in the past and whatever the circumstances may have been in which those wishes were expressed, it is a fact now, which is frankly admitted by Mr. Desai for the petitioner, that there has been a change of front, and at the present juncture there would be probability of the petitioner ever succeeding in getting the requisite majority of shareholders in favour of voluntary winding up. Apart therefore, from the light that may be argued to be thrown on the affairs of the company by the fact that until recently the majority of the shareholders had desired a liquidation, that mere fact is not in itself very material to the present petition It cannot, for example, in my opinion, be argued that what might be called a partial fulfilment of the condition of Cl. (1), S. 162 can be given any weight in considering whether it is just and equitable within the meaning of Cl (6) of that section that the company should be wound up.

Before passing on to consider the explanation offered by the company, and the legal aspect of the whole matter, I ought perhaps to notice that in spite of the admittedly serious state of affairs that has arisen as a result of the heavy losses sustained, and in spite of the acknowledged fact that the shareholders have in recent years frequently, if not indeed consistently, been demanding that the company be wound up voluntarily, the usual allegation, the making of which it is apparently so difficult to resist in these cases, has been put forward, namely, that the petition has not been presented bona fide.

The petitioner holds, it is said, only five shares, and therefore, even if the company goes on to utter ruin, stands only to lose a matter of Rs. 225. He has, it is added, given in his affidavit an incorrect version, vigorously referred to as " false and false to his knowledge, " of what happened at the general meeting of 14th April 1928, although it is obvious that the version he actually gave, so far as it is material at all, tells sufficiently against his case He is a great friend, it is alleged, of one of the old managing agents, and is in addition a friend of a close friend of one of the old directors, and this petition has been filed with a view of embarrassing the company in the prosecution of a suit filed against those agents and directors A further object with which the petition has been presented is stated to be the shielding of one of the old managing agents, who with his son, has been adjudicated insolvent, and to avoid their public examination so far as their dealings with the company are concerned The motives attributed, with the somewhat unfair reflections they involve on the zeal and ability of Official Liquidator and Official Assignee, and the efficacy of winding up proceedings generally, were wisely not developed in argument I have considered them and the grounds on which they are based, and have come to the conclusion that they may safely be disregarded, and the petition examined on its merits, without any atmosphere of prejudice being introduced.

It has been said—I refer more particularly to the remarks of Kekewich, J., in *In re Bristol Joint Stock Bank* (1)—that in cases where a contributory petitions for a winding up, two matters must from first to last be kept in view. The first is the unwillingness of the Court to interfere with shareholders in the management of their own affairs, including the question whether the business shall be continued or not, and the second is that there is, in fact, jurisdiction in an extreme case to wind up a company at the instance of a contributory, notwithstanding that he is not supported by a majority of the share-holders The jurisdiction referred

(1) [1890] 44 Ch.D. 703=59 L.J.Ch. 722=2 Meg. 150=38 W.R. 574=62 L.T. 745.

to has frequently been asserted and exercised under the "just and equitable" clause. The corresponding clause in the Act of 1882, viz., S. 128 (e), ran as follows :

"(e) whenever for any other reason of a like nature the Court is of opinion that it is just and equitable that the company should be wound up."

Whether the initial words above quoted, which found no place in the corresponding English section (S. 79 of the Act of 1862), were intended to restrict the powers of the Court or not, and, however, even the wide terms of the corresponding English section may at one time have been interpreted, it is now clear, both from the more recent English authorities on the point and from the significant change in the wording of the clause in the present S. 162 (6) to accord with that of the English Act as interpreted by those authorities, that the discretion of the Court is not to be considered as limited by the application of the ejusdem generis rule In other words, the Court's power to order a winding up is not confined to cases where grounds exist analogous to those mentioned in the previous clauses of the section

For the correctness of this view I need only refer to the judgment of the Privy Council in *Loch* v, *John Blackwood, Ltd.* (2) In that case the observations of Neville, J , in *In re Bleriot Manufacturing Aircraft Co. Ltd* (3) were quoted with approval, including the following passage (p. 255) :

"The words 'just and equitable' are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances."

I have emphasized this point because it has seemed to me that cases, which are in fact mere illustrations of the sort of circumstances in which a Court will normally consider it just and equitable to order a winding up, are apt to be put forward as indicating both the limits to be set to the Court's discretion and the circumstances in which a Court must definitely interfere It is admitted, for example, to take a common type of case, that where a company was formed to take over a particular mine and the title to the mine has altogether failed, or was formed to work a particular patent and it has turned out that the patent cannot be obtained, a situation would arise where it would be in the discretion of the Court to order a winding up on the ground, as it is put, that the substratum of the company has disappeared. The use of the expression "the substratum of the company has disappeared" tends to imply that the Court would, on this basis, be justified in ordering a winding up on a contributory's petition, if the whole, or substantially the whole, of the paid-up capital had disappeared. In such a case the substratum of the company, using the terms in an ordinary colloquial sense, might certainly be said to have disappeared I am not sure, however, that that is what is really intended by the decisions under this head. The contract by which shareholders are bound inter se is that the capital they have subscribed, or have agreed to subscribe, is to be applied to the objects specified in the memorandum until the requisite majority has determined that the business shall be discontinued ; and I doubt whether the Court would be justified in interfering, so long as the company has, with the capital which remains, whether already paid-up or still uncalled, a chance of producing profit in the way in which it was intended to be produced If, however, the attainment of the objects of the company has become impossible or obviously impracticable, there would appear to be no reason why the Court should not order a winding up.

Similarly, where a majority of the shareholders are using their power unfairly, or where there is something in the management and conduct of the company which shows the Court that the minority are being oppressed, it would be just and equitable to interfere. (The judgment then discussed the history of the company and concluded that there was mismanagement up to the end of 1922 but that there was prospect of its being in sounder position thereafter. It then continued.) Whether the expectations formed by the company are over sanguine or are likely to be realized, I do not feel called upon to consider, but would adopt, with respect, the view expressed by Lord Cairns in *In re Suburban Hotel Co.* (4), where he observed (p. 751) :

"This company may become successful, or may continue to be unprofitable, as I believe it has hitherto been ; and it may, therefore, hereafter re-appear in this Court under different

(2) [1924] A.C. 783.
(3) [1916] 32 T.L.R. 253.
(4) [1867] 2 Ch. 737=36 L.J.Ch. 710=15 W. R. 1096=17 L.T. 22.

circumstances, but it is not for this Court now to pronounce and, above all, not for this Court to pronounce on opinion-evidence, that this is likely to be an unprofitable speculation ; and that, therefore, at the wish of a minority of shareholders, against the will of a large majority, the company should be wound up and put an end to. "

I, therefore, dismiss the petition with costs, one set of costs to be paid to the company, and one to the opposing contributories. I have heard Mr. Desai on the question of costs, and I see no reason to deprive the company or the opposing contributories of the costs to which I think they are entitled. I do not think there was anything in their conduct either improper or likely to make the petitioner believe that he had a right to have the company wound up by the Court. He took the risk of not being able to make out a case. The contributories were entitled to oppose, and in my judgment he failed.

S N /R K. *Petition dismissed.*

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* A. I. R. 1929 Bombay 12

MIRZA AND BAKER, JJ.

Hiru Satua Desla—Applicant.

v.

Emperor—Opposite Party

Criminal Review No 213 of 1928, Decided on 11th September 1928, from an order of 1st Cl. Magistrate, Shahapur

*** Criminal P. C., S. 45 (1) (d)—Section is not punitive in itself—Duty does not extend to owner of house.**

The section is not intended to be punitive in itself, but to facilitate information as to the commission of an offence and thereby to facilitate steps being taken in the investigation of the same. The section speaks of the owner or occupier of land but not of a house. Where there are houses, it is expected that the place would be populous and the police would somehow get the information. In cases of land in the mofussil, it is necessary that the owner or occupier of the land should give such information to policeman. The section should not be extended so as to include owners or occupiers of houses: 12 *Mad.* 92, *Foll.* [P 12 C 2]

Mirza, J.—The accused has been convicted by the 1st Class Magistrate of Shahapur of an offence under S. 176, I. P. C., and released after admonition as contemplated under S. 562 (1-A), Criminal P. C. The accused is the head of a joint family A daughter-in-law of his who resided with him in the family-house committed suicide by throwing herself into a well situated in the compound of the house. Under S. 45 (1), Criminal P. C., every owner or occupier of land has forthwith to communicate to the nearest Magistrate or to the officer in charge of the nearest police-station, whichever is the nearer, any information which he may possess respecting the occurrence of any sudden or unnatural death The accused was convicted because he failed to give such information regarding the unnatural death of his daughter-in-law.

The accused must be regarded as the owner of the house and not the owner of the land within the meaning of S 45, Criminal P C In *Queen-Empress* v. *Achutha* (1), it was held that the duty of giving such information is cast only on the owner of land, and is not to be extended to the owner of a house It is clear that S 45, Criminal P. C. is not intended to be punitive in itself, but to facilitate information as to the commission of an offence, and thereby to facilitate steps being taken in the investigation of the same. The section speaks of the owner or occupier of land, but not of a house. Where there are houses it is expected that the place would be populous and the police would somehow get the information In cases of land in the mofussil there are not always enough policemen available in the locality. Hence it is necessary that the owner or occupier of the land should give such information to them Under the circumstances we are of opinion that S. 45, Criminal P. C., should not be extended so as to include owners or occupiers of houses. We set aside the conviction

Baker, J—I agree. For a conviction under S. 176 it must be shown that the accused is legally bound to give any notice or to furnish information on any subject to a public servant In the present case there is no finding by the Magistrate that the accused was the occupier of land. It has been held by the Madras High Court in *Queen-Empress* v. *Achutha* (1) that no obligation under S. 45, Criminal P. C., attaches to the occupant of a house in a village. The suicide of the accused's daughter-in-law amounts to an unnatural death within the meaning of S. 45 (1) (d), Criminal P. C., and therefore, any person who falls within the definition in that section would be bound to give notice of it. But, in the absence of any distinct finding that the accused is

(1) [1888] 12 Mad. 92.

the owner or occupier of land, or otherwise falls within the class of persons mentioned at the commencement of that section, S. 45 will have no application. I agree, therefore, that the conviction should be set aside

S L./R.K. *Conviction quashed.*

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FAWCETT AND MIRZA, JJ.

Supdu Daulatsing Daji Patil and *others*—Plaintiffs—Appellants.

v.

Sakharam Ramji — Defendant—Respondent.

Second Appeal No. 493 of 1925, Decided on 16th February 1928, from decision of Asst Judge, Dhulia, in Appeal No. 192 of 1922.

Limitation Act (1908), S. 7—Manager of Hindu joint family able to give valid discharge—Other member's minority will not save limitation.

The manager of a joint Hindu family can give a valid discharge without the concurrence of the minor members of the family in the case of an application to execute a decree, just as he can in the case of a suit and the mere fact that one of the members is a minor will not prevent time running against all the members of the family : 41 *All.* 435 ; *A. I. R.* 1921 *Bom.* 289 ; 42 *Bom.* 277; and 21 *M. L. J.* 1088, *Foll* ; 20 *Bom.* 383 *Dist.* ; and 34 *Bom.* 672, *not Foll.* [P 13 C 2]

P B Shingne—for Appellants.

P. V. Kane—for Respondent.

Fawcett, J.—The Assistant Judge has fully and carefully considered the point whether appellant 3, who was a minor at the date of the application for execution made in 1916, can avail himself of his minority so as to bring the application of 8th September 1921 within the period of limitation allowed by law. He has followed the view taken in *Rati Ram* v. *Niadar* (1) and *Bapu Tatya* v. *Bala Ravji* (2), as opposed to the view taken in *Govindram* v. *Tatia* (3) and *Manchand Panachand* v. *Kesari* (4) and similiar decisions. In our opinion the language of S. 7, Lim. Act of 1908, does make a change in what was held to be the law under the corresponding S. 8, Lim. Act of 1877. The observation of Scott, C. J., in *Manchand* v. *Kesari* (4) to the contrary is a decision of a single Judge not binding upon us, whereas the view taken in *Bapu Tatya* v. *Bala Ravji* (2) was that of a Division Bench and is, in our opinion, correct. S. 8, Act of 1877 used the words "joint creditors or claimants," and it was held in *Seshan* v. *Rajagopala* (5), that these words did not include execution creditors. This was because a joint decree-holder under certain provisions of the Civil Procedure Code could not give a valid discharge of the decretal debt without a supplementary authority or act of the Court executing the decree, whereas

> "Section 8 applies only to those cases in which this act of the adult joint owner is per se a valid discharge."

In other words, it was held that the case of one of joint decree-holders applying to execute a decree could never fall under S 8. But the legislature has clearly shown its dissent from this view by expressly including in S. 7 of the Act of 1908 the case of

> "one of several persons jointly entitled to make an application for the execution of a decree,"

and putting this on the same footing as one of several persons jointly entitled to institute a suit. We may refer also to the remarks in *Duraiswami Sastrial* v. *Venkatarama Iyer* (6) as to the change made by the legislature in 1908. As the law now stands, the manager of a joint Hindu family can give a valid discharge without the concurrence of the minor members of the family in the case of an application to execute a decree, just as he can in the cause of a suit (cf. *Huchrao Timmaji* v. *Bhimrao Gururao* (7), and the mere fact that one of the members is a minor will not prevent time running against all the members of the family. We, therefore, dismiss the appeal with costs.

Mirza, J.—I concur.

N.K./R.K *Appeal dismissed.*

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(1) [1919] 41 All. 435=49 I. C. 930=17 A. L. J. 649.
(2) A. I. R. 1921 Bom. 289=45 Bom. 446.
(3) [1895] 20 Bom. 383.
(4) [1910] 34 Bom. 672=7 I. C. 939=12 Bom. L. R. 682.
(5) [1889] 13 Mad. 286.
(6) [1911] 21 M. L. J. 1088=12 I. C. 503=(1911) M. W. N. 420.
(7) [1918] 42 Bom. 277=44 I. C. 851=20 Bom. L. R. 161.

* A. I R. 1929 Bombay 14

FAWCETT, AG. C. J., AND MURPHY, J.

Sayaji Rao, Gaikwar, of Baroda—Defendant 1—Appellant.

v.

Madhavrao Raghunathrao Dhavale—Plaintiff—Respondent.

First Appeal No. 244 of 1925, Decided on 16th July 1928, from decision of Joint 1st Cl. Sub-Judge, Poona, in Civil Suit No. 593 of 1922.

(a) Bombay Act (2 of 1863), S. 18—It is for Government to determine whether particular grant is inam or only saranjam—Bombay Act 7 of 1863, S. 32—Grant—Inam.

The mere use of wide expressions such as the grant of land "for ever" or "from generation to generation" does not prevent the grant being one of saranjam. Nor again is the use of the word "inam" instead of "saranjam" conclusive. It is for Government to determine in a particular case whether a grant is one of saranjam only. [P 16 C 1]

(b) Grant—Inam.

Where there is grant of the soil, the mirasi rights in the land would be covered by the grant. [P 16 C 1]

(c) Grant — Inam—Saranjamdar having mirasi rights in saranjam lands—He alienating saranjam estate together with mirasi rights without reserving any benefit to him—Such rights are resumable and alienation is not binding on saranjamdar's successor.

Where a saranjamdar who has occupancy rights in the lands included in the saranjam, grants the saranjam to a third party, together with the occupancy rights in the lands, and the alienation is absolutely rent-free and no benefit is reserved to the saranjam estate in the way of rent or in any other manner, and where there was no acquiescence in the continuance of the saranjam grant after the lifetime of the original grantee, such mirasi or occupancy rights are resumable when the grant of the saranjam is resumed, and an alienation is not binding on the saranjamdar's successors : *A. I. R.* 1927 *P. C.* 238 ; 40 *Bom.* 606 ; *A. I. R.* 1921 *Bom.* 303 , *A. I. R.* 1926 *Bom.* 316, *Dist.* : *A. I. R.* 1925 *Bom.* 177, *Foll.* [P 17 C 2]

(d) Evidence Act, S. 91 — Resumption of saranjam not required to be reduced to writing—Actual order of resumption need not be produced—Such cases are governed by Evidence Act, S. 114.

There is no law which requires a resumption of saranjam to be reduced to writing. The actual order of resumption therefore need not be produced in evidence. Such resumption can be proved under S. 114, Evidence Act, and S. 91 will not govern such cases. [P 18 C 2]

(e) Limitation Act, S. 3—The maxim "lex non cogit ad impossibilia" cannot prevail against the express provisions of S. 3.

The principle that when the law creates a limitation, and the party is disabled from conforming to that limitation, without any default in him, and he has no remedy the over, law will ordinarily excuse him, is merely an application of the maxim "*lex non cogit ad impossibilia*" cannot prevail against the express provisions of S. 3, any more than principles of equity can prevail against the provisions of statutory law such as S. 49, Registration Act and Ss. 91 and 92, Evidence Act, especially when there is no hardship or impossibility 10 *W. R.* 253 and 46 *Cal.* 526, *Rel. on.* [P 19 C 2]

*** (f) Limitation Act, S. 13—S. 13 must be read consistently with provisions in Part 4, Civil P. C.—Chiefs of Foreign States can be held to reside in British India in so far as they actually carry on their business through representatives in British India.**

Section 13 must be read consistently with the provisions contained in Part 4, Civil P. C., for "suits in particular cases" against defendants who ordinarily would be always out of British India , e. g., (1) the Secretary of State for India-in-Council ; (2) an alien corporation; and (3) a Sovereign Prince or Ruling Chief sued in the name of his State.

Section 13 must be read so as to avoid the obvious absurdity that arises, if such corporate bodies are deemed to reside out of British India, so that suits against them can never be barred at all. And this can be done by treating them as defendants, who, by reason of their special character, are not absent from British India within the meaning of the section, because they have not got the same liberty as private individuals to reside personally in British India and attend to their affairs and they must do so through agents or representatives. They can be held to reside in British India in so far as they actually carry on business through representatives in British India : 30 *Cal.* 103 ; 17 *Bom.* 662 , and 26 *Mad.* 544 ; *Rel. on.* : 14 *Cal.* 407 and 25 *Cal.* 496 (*F. B.*), *Dist. New York Life Ass. Co.* v. *Public Trustee*, (1924) 2 *Ch.* 104 and 4 *P. L. J.* 141, *Con. and Applied.* [P 20 C 2]

H. C. Coyajee and *R. W. Desai* — for Appellant.

G. S. Rao—for Respondent.

Fawcett, Ag. C. J — In this suit against the Gaikwar of Baroda, the plaintiff seeks to recover possession of certain lands situate in the village Davdi, in the Poona District, to which he claims to be entitled as the adopted son of one Raghunathrao, who died in February 1902. There is now no dispute that the plaintiff was in fact validly adopted by Raghunathrao's widow Chandrabai in October 1905. The main question in dispute is whether these lands vested in the plaintiff at his adoption, or, as the Gaikwar of Baroda alleges, had been validly resumed by him prior to the plaintiff's adoption. Then there is a subsidiary issue as to whether the plaintiff's suit is not in any case time-barred.

The main facts may be briefly stated. The village of Davdi was in the year 1728

A. D. conferred by Shahu Maharaj, the Raja of Satara, upon the then Gaikwar, Pilaji, under a sanad which is Ex. 180. The lands in suit are proved by evidence in this case to have been in the enjoyment of the Gaikwar or members of his family from about 1834 to 1854. In 1862 the then Gaikwar, Khanderao, made a grant of the village to one Limbaji, who was the grandfather of Raghunathrao. The grant is worded so as to confer even more than what was granted by the original sanad of 1728, and would certainly cover the particular lands in suit Limbaji died in 1879 and was succeeded by his son Madhavrao There is evidence that Madhavrao had possession and that after his death in 1900 the lands were in the occupation of his son Raghunathrao till his death in February 1902. Raghunathrao's name had been entered by the Collector of Poona as the occupant of these lands in 1901. Raghunathrao left two widows, Chandrabai and Sitabai, and the name of Chandrabai was then entered by the Collector because she was the senior widow of Raghunathrao The Baroda Darbar contested this entry, and succeeded in 1904 in getting it removed, and the name of the Gaikwar entered instead.

As already mentioned Chandrabai adopted the plaintiff in October 1905 After the name of the Gaikwar had been entered with the approval of Government of Bombay against these lands, the Baroda Darbar took action to take possession. Among other things, they entered into an agreement with Sitabai on 27th February 1906, by which in consideration of a grant of a maintenance allowance she assigned to the Gaikwar such rights as she had in the lands, including those under rent notes that she had already passed to certain tenants The Gaikwar then through his representative took proceedings in the form of assistance suits with the result that he eventually got possession of these lands, some in 1906, and some in 1907. The plaintiff applied on 25th July 1916, to the Government of India for permission to file a suit against the Gaikwar of Baroda in connexion with these lands. But he did not get permission to file the suit until over four years afterwards, namely, on 15th November, 1920 He then brought the present suit on 2nd June 1922, in order to recover possession with mesne profits, as already mentioned In his plaint he claims that he was entitled to exclude the period from 25th July 1916, to 15th November 1920, which had been spent in obtaining the necessary certificate under S. 86, Civil P. C., in calculating the period of limitation of the suit, and that, therefore, the suit was not barred. The two main issues, therefore, were the second and fourth of those framed by the Subordinate Judge, namely, (1) :

"Is it proved that the plaintiff is the owner of the lands in suit ?"

and (2) :

"whether the plaintiff's suit is within time."

As to the first issue, the original grant to the Gaikwar (Ex 180) was a grant merely of land revenue and not of the soil, as is mentioned in para 7, Subordinate Judge's judgment and is common ground before us Government in their resolution of 1904, which is Ex A in this appeal, held that that grant was one of saranjam I may here mention that Ex. A was admitted by consent in this appeal in view of the fact that a copy of the same resolution had been tendered in the lower Court but had been rejected as being a copy of a copy, and, therefore, technically inadmissible. This Court also considered it highly desirable that the original resolution should be on the record of the case. Therefore, it has been admitted as additional evidence in appeal under O. 41, R. 27, Civil P. C The Gaikwar accepts the position that in fact this was a saranjam grant It is contended by Divan Bahadur Rao for the plaintiff-respondent that really it is not a saranjam grant but an ordinary inam grant without any of the restrictions connoted by the word "saranjam" Divan Bahadur Rao points out that the grant contains wide words namely "a new inam" of the villages mentioned :

"to be enjoyed in lineal succession from generation to generation"

and that the word used is "inam" and not "saranjam." But, in my opinion, this does not justify this Court in differing from the view that Government had taken on this point Primarily, it is for Government to determine in any particular case of this kind, whether a political tenure such as saranjam exists. This is enacted in Bom. Act 2 of 1863, S. 16, and Bom Act 7 of 1863, S. 32 (cf. Act 11 of 1852, Sch. B, Cl. 10). It has accordingly been laid down in *Ramchandra* v. *Ven-*

katrao (1) and in *Sultan Sani* v. *Ajmodin* (2) that questions of this kind are primarily for Government to decide and that no civil Court can interfere with their decision The last mentioned case also points out that the mere use of wide expressions such as the grant of land "for ever" or "from generation to generation" does not prevent the grant being one of saranjam Nor again is the use of the word "inam" instead of "saranjam" conclusive The grant is mentioned as being given to Limbaji by virtue of his rank of Senapati, a military title, and of his being a devoted servant of the king ; this supports the view that the grant was one primarily for military purposes, so as to fall under the description of saranjam. Again, the grant has been so shown in the Alienation Register kept under S 53, Land Revenue Code. Even before the Resolution of 1904 it was so shown, as is mentioned in para. 3 of the letter of the Commissioner, C. D., dated 5th May 1903, which is recited in the preamble of that resolution. Therefore, I am of opinion that this grant to the Gaikwar must be held to be one of saranjam, and subject to the restrictions that apply to a grant of that nature.

The grant by Khanderao Gaikwar to Limbaji in 1862 was undoubtedly a grant of the soil, as has been held by the Subordinate Judge in para. 9 of his judgment, as it uses words which are associated with a grant of the soil. Divan Bahadur Rao contends that such a grant would cover mirasi rights in the lands in suit That is a contention which, I think, must be conceded Those rights are shown by Exs. 197 and 202 to have vested in the Gaikwar, whose family cultivated them through servants. How exactly they acquired such rights is not in evidence, but it has been common ground before us that they were presumably acquired by virtue of the powers of management that a saranjamdar or inamdar has to utilize vacant lands for the best purpose available, or to dispose of lands that have lapsed either through forfeiture, resignation or want of heirs. There is no evidence of this, but for the purpose of this suit, that may, I think, be taken to be the manner in which the Gaikwar obtained possession, in the absence of anything suggesting that the Gaikwar had acquired any rights in these lands apart from the grant of the village to him in 1728.

That being so, Divan Bahadur Rao further contends that these mirasi rights would not be resumable under the saranjam rules or otherwise, assuming that the original grant of 1728 is one of saranjam. The Subordinate Judge's remark in para. 8 of his judgment that :

> "it is immaterial whether the rights to these lands were held by the Gaikwar before the grant by Raja Shahu or thereafter"

is clearly wrong in view of the decision of their Lordships of the Privy Council in *Secretary of State* v *Girjabai* (3). As I have already stated there is no suggestion in this case that the Gaikwar acquired any right in these lands prior to the grant of 1728, and, therefore, the case is one which is of a similar nature to that which was the subject-matter of the decision in *Girjabai's* case (3). That also was a case of land included in a saranjam grant of the revenue of certain villages, and the Privy Council held that land included in such a saranjam grant, which had passed into the possession of the saranjamdar upon the Khatedar's family becoming extinct, or through his default in paying the revenue, did not go as the private property of the saranjamdar to his heirs, but was property, which, on the death of the saranjamdar, Government was entitled to resume as part of the saranjam estate. In the present case, however, the saranjamdar transferred his rights in these lands to a third party, and their Lordships in *Girjabai's* case (3) kept open the point whether a saranjamdar could create rights in favour of third persons by virtue of his powers of management, which would not be resumable but could be treated as the private property of such third party. It is, therefore, contended that this case is not governed by *Girjabai's* case (3), and that the alienation of the mirasi rights in these lands by the Gaikwar Khanderao in 1862 to the great-grandfather of the plaintiff is valid and binding on any successor of the then saranjamdar, Khanderao. In support of this contention Divan Bahadur Rao has cited *Madhavrao Hariharrao* v. *Anusuyabai* (4) ; *Sakharam* v. *Trimbak-*

(1) [1882] 6 Bom. 598.
(2) [1892] 17 Bom. 431=20 I.A. 50=6 Sar. 52 (P.C.).
(3) A. I. R. 1927 P. C. 238=51 Bom. 957=54 I. A. 359 (P.C.).
(4) [1916] 40 Bom. 606=36 I.C. 503=18 Bom. L. R. 768.

rao (5); and *Madhavrao* v. *Imam Bapu* (6). It is unfortunate for him that I am rather tied in regard to this point by the opinion I have already expressed against such a contention, or at any rate against the contention that, in every case, an alienation of this kind is binding upon a saranjamdar's successors I refer to my remarks in *Secretary of State* v. *Girjabai* (7), with regard to the decisions in *Madhavrao Hariharrao* v. *Anusuyabai* (4) and *Sakharam* v. *Trimbakrao* (5). It is true that in *Madhavrao* v. *Imam Bapu* (6) I was a party to a decision that the grant of mirasi rights is not necessarily an alienation invalid beyond the life time of the saranjamdar making the grant. That decision draws a distinction between an alienation of mirasi rights to a stranger which confers no benefit on the Saranjam estate and a grant of such rights to a cultivator for the benefit of the estate. At p. 438 I pointed out that none of the kabulayats conferred a rent-free estate. At p. 439 I said that each case must stand on its own facts. I further remarked that there had been acquiescence in the grant by the plaintiff's predecessor-in-title, and under the circumstances I held that there was a legitimate presumption that the grant had been made for necessary purposes and, therefore, was binding on the present saranjamdar. Such a case is on a quite different footing to the one we have to consider in the present suit Here the alienation was one which is absolutely rent-free.

No benefit is reserved to the saranjam estate in the way of rent or in any other manner. The rents of these lands all went into the pocket of Limbaji and his descendants. Limbaji appears from the remarks of Sir T. Madhavrao in Ex. 195 to have been an undeserving favourite of Khanderao; and although he is represented in a better light in Madhavrao's petition of 1880 (Ex. 186), he had no previous connexion with this estate. Far from there having been any acquiescence on the part of the present Gaikwar, who succeeded to the Gadi in about 1874-1875, we find that upon Limbaji's death in 1879, clear orders were passed that his son Madhavrao was held to have no right to a continuance of the village, but it was continued for his lifetime and until further orders as an act of grace (see paras. 6, 7 and 8 of the orders in Ex. 195). These orders were enforced, as clearly appears from Madhavrao's petition dated 8th July 1880, Ex. 186, where he says that the decision was enforced by the attachment of the village of Matraj and by the withdrawal of certain allowances. In view of these circumstances, I think that this is clearly not a case of an alienation that can properly be held to bind the successor of Khanderao Gaikwar. In regard to such an alienation I adhere to the view I have expressed in *Secretary of State* v. *Girjabai* (7) and *Madhavrao* v. *Imam Bapu* (6). Therefore, I differ from the view expressed by the Subordinate Judge in para 10 of his judgment that the rights of the Dhavle family remained unaffected by the formal resumption of the saranjam in 1904 by the Bombay Government and its re-grant to the present Gaikwar. Upon such re-grant the saranjam estate would pass as an estate unburdened by any alienation that is not binding beyond Khanderao's lifetime. If there was any technical defect in the validity of any prior resumption by the Gaikwar, that would be cured by the order of Government passed in 1904; or at any rate persistence in such resumption after the re-grant would be valid. It is to be noted that the re-grant was long before the plaintiff's adoption in 1905, so that, a valid resumption in 1904-1905, consequent on the death of Raghunathrao in 1902, would suffice to prevent the plaintiff obtaining any title to these lands.

I next come to the contention that there is no evidence of any further orders of the kind contemplated in para 8 of the Divan's orders of 14th July 1879, Ex. 195 That is a view which has been adopted by the Subordinate Judge in para. 12 of his judgment But, in my opinion, there is clear evidence of action by the Gaikwar showing that he was opposed to any further continuance of the grant of this village at any rate after Raghunathrao's death in 1902. This is, for instance, shown by the representation from the Baroda Darbar, which is recited in full in the preamble to the Government Resolution of 26th February 1904, Ex. A In para. 6 of that representation a reference is made to a communication by the Baroda Darbar, asking that the Collector of Poona should not entertain any application from the heirs of Madhavrao to

(5) A. I. R. 1921 Bom. 303=45 Bom. 694.
(6) A. I. R. 1926 Bom. 316=50 Bom. 195.
(7) A. I. R. 1925 Bom. 197=49 Bom. 126.

enter their names in the records of the village, until the question of succession to Madhavrao's emoluments was finally disposed of. That is relevant as an admission by defendant 1, which is against him so far as it implies that in 1901 there had been no final orders passed as to the resumption of the grant. Para. 7 says that after Raghunathrao's death in February 1902, a representation was made stating that on his death the village had reverted to His Highness' Government. That is no doubt an admission in favour of the person making the statement, which is not admissible in evidence. But apart from that statement there is clear evidence that the Gaikwar's Government took action to get the order of the Collector entering the name of Chandrabai on the revenue record upset and to have the name of the Gaikwar entered instead. That is a fact proved by Ex. A, and it is also deposed to by the Watandar Kulkarni of Davdi in para. 4 of his deposition, Ex. 118. There is the further evidence that the Gaikwar got possession of these lands in 1906-1907.

Against this, it is contended that there is no actual order of resumption on the record, and certainly this is a contention, which might, in certain circumstances, be conclusive against defendant 1 If such a resumption is a matter which by law requires to be reduced to the form of a document, then under S. 91, Evidence Act, no other evidence would be admissible except the document or secondary evidence of its contents in any case where secondary evidence is admissible. For instance in regard to a case where a Collector is alleged to have passed orders against an alienation of watan land under the Hereditary Offices Act of 1874, such a document would have to be produced to support a resumption under S. 9 or 11 of that Act, because these sections prescribe the Collector recording his reasons in writing, that is to say, the law requires the matter to be reduced to the form of a document. But, there is no law which requires that a resumption by a saranjamdar should be reduced to the form of a document. In the present case the resumption is one made by a Native State, i. e., not by an authority in British India, and the law applicable would be that of the Baroda State. It has not been alleged that in the Baroda State there is any law which requires that such a resumption should only be made after the Gaikwar or the Divan has recorded his reasons in writing for the resumption. Even if it was a case of a resumption by a saranjamdar in British India, there is no law, so far as I am aware, which requires a document of this kind. Therefore, in my opinion, the case is not one to which S. 91, Evidence Act, applies, and other evidence is admissible to show that in fact there have been orders of the kind contemplated in para 8 of the Divan's orders of 1879. The case is one which, in my opinion, falls under S. 114, Evidence Act. The clear evidence of the action taken by the Baroda Darbar is such that the Court can safely presume that there were orders for the resumption of the grant to Limbaji after the death of his grandson Raghunathrao.

It may be added that this is not a case where the plaintiff gave notice to defendant 1 to produce any such order of resumption and defendant 1 failed to comply with such a notice Mr. Coyajee for the appellant has, in the course of his arguments, said that, on account of the vague nature of the assertions in the plaint as to the plaintiff's title, in spite of the attempt made by defendant 1 to get him to state it more clearly, there has been a failure to put on record documentary evidence that might otherwise have been produced. It seems to me that, if defendant 1's advisers had realized the importance of showing that the order of the Divan in para. 8, Ex. 195 had been followed by "further orders," a plain assertion to that effect would no doubt have been made and the orders produced. The comments of the Subordinate Judge in para. 13 of his judgment about there being no plain allegation of resumption in defendant 1's written statement are to some extent justified. But it seems to me that in this matter the plaintiff is also to blame and that the omission to make such an allegation cannot, in the circumstances, be treated as virtually amounting to an admission by defendant 1 that in fact there was no such resumption. The evidence clearly goes all the other way.

Divan Bahadur Rao has urged that the agreement, Ex. 98, which was made in February 1906 with Sitabai supports his contention that in fact there was no resumption, and he has also drawn our attention to allegations in the plaints in

the assistance suits that the lands sued for had been in the possession of Raghunathrao owing to some right and that this agreement with Sitabai gave defendant 1 a right to claim rents from the tenants. On the other hand, Ex. 98 refers to the mirasi lands as belonging to the Gaikwar, and the only real admission against him is the statement that the village of Davdi, including the mirasi lands, was continued up to the death of Raghunathrao. That is not inconsistent with what I have held to be proved, namely, that after the death of Raghunathrao it was decided that the grant should no longer be continued in the family of Limbajirao. It was natural that, in order to get possession of these lands and recover rents, defendant 1 should have entered into an agreement of this kind with Sitabai, especially as she had already given rent notes for the lands, on which, under the agreement of 27th February 1906, the Gaikwar could sue as an assignee The agreement saved the necessity of establishing title aliunde and having to adduce evidence in a rent suit such as has been given in this suit I do not think, in the circumstances, that this agreement suffices to contradict the plain evidence of resumption that I have referred to above In my opinion, the view taken by the Subordinate Judge in para. 15 of his judgment that there are inconsistent allegations made by defendant 1, is not substantiated; and I hold, contrary to the Subordinate Judge, that there was a resumption after Raghunathrao's death and that such resumption was valid, at any rate, after the Bombay Government Resolution of 1904 I would, accordingly, answer issue 1 (that is issue 2 in the lower Court) in the negative

Then I come to the issue as to limitation According to the cause of action alleged in the plaint there was dispossession of the plaintiff in 1910, that is to say, the suit falls under Art. 142, Lim Act. On issue 3 in the lower Court the Subordinate Judge held that dispossession really took place in 1906-1907, and there is now no dispute before us about this. Therefore, in the ordinary course the suit should have been filed in 1918 or 1919, whereas, in fact it was brought on 2nd June 1922 As I have already mentioned the plaintiff claims that he is entitled to deduct a period of four years, three months and 21 days from 25th July 1916, to 15th November 1920, as time required to obtain permission to file a suit against defendant 1 under S. 86, Civil P. C. On issue 5 in the lower Court, the Subordinate Judge has held (para. 17 of his judgment) that this period can be deducted, in spite of the provisions of S. 3, Lim. Act, and although there is no express provision in that Act under which such a deduction can be made. He bases this decision on the principle referred to in *Rupchand Makundas* v. *Mukunda Mahadev* (8) namely, that (p. 658)

"when the law creates a limitation, and the party is disabled to conform to that limitation, without any default in him, and he has no remedy over, the law will ordinarily excuse him.

This is merely an application of the ordinary maxim "*lex non cogit ad impossibilia.*" But with due deference, this general principle, in my opinion, cannot prevail against the express provisions of S. 3, Lim. Act,, any more than principles of equity can prevail against the provisions of statutory law such as S. 49, Registration Act and Ss.91 and 92, Evidence Act. Thus it has been held that the fact of a plaintiff being absent from India on account of a sentence of transportation makes no difference and that time continues to run against him during such absence: *Domun* v. *Shubul Koolall* (9). Again it has been held that the time during which an alien bank had its right to bring suits suspended by an order of the Government of India could not be deducted: *Deutsh Asiatische Bank* v. *Hira Lall Bardhan & Sons* (10). As pointed out in that case, there was really no hardship or impossibility and the plaintiff had time to bring his suit in spite of the suspension Similar remarks apply to the present case. There was no real hardship or impossibility in this case. No doubt four years is an extraordinary time for the plaintiff's application to have been under consideration by the Government of India But the plaintiff could have applied very much earlier than he did, for instance, in 1910, and so obtained permission in plenty of time to bring his suit within 12 years. He allowed nine years to pass before applying for permission and 18 months after getting permission before he brought the suit. The maxim "*vigilantibus non dormientibus*

(8) [1914] 38 Bom. 656=25 I. C. 67=16 Bom. L. R. 444.
(9) [1868] 10 W. R. 253.
(10) [1918] 46 Cal. 526=47 I. C. 398=23 C.W N. 157.

jura subveniunt" applies, therefore, to the present case Even the maxim "*lex non cogit ad impossibilia*" is subject to the consideration

"that the party who was so placed used all practical endeavours to surmount the difficulties which already formed that necessity, and which, on fair trial, he found insurmountable"

as pointed out by Sir W Scott in a passage referred to in "Broom's Legal Maxims," Edn 8, p. 202. Therefore, in my opinion, the plaintiff is not entitled to deduct this particular period.

Finding that this excuse was a weak one, the plaintiff shortly before the case was decided relied on S. 13, Lim Act, see Ex. 205, dated 23rd March 1925; and the Subordinate Judge has allowed this plea. In para. 20 of his judgment he holds that defendant 1 was a Ruling Prince, who lived at Baroda, which is outside British India and practically must have been so outside, excepting for a few casual visits to Bombay or Poona, and that accordingly by reason of S 13, Lim. Act the present suit was in time. S. 13 says:

"In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India . . . . shall be excluded."

This view leads to a somewhat extraordinary result in the case of a suit against a Ruling Chief, viz., that ordinarily a suit against him can never be barred. The same plea might be raised as to a suit against the Secretary of State for India in-Council, who resides in London The point is, therefore, one of considerable practical importance. One thing to be borne in mind is that in a case like the present the suit is really against the Baroda State. S. 87, Civil P. C., requires that ordinarily suits should be brought against a Sovereign Prince or Ruling Chief in the name of his State. The Gaikwar has agents or representatives who manage his business in British India. That is shown clearly by the documents in the present case Thus Exs. 197 to 202 speak of the Gaikwar's vahivatdar (manager) in Davdi and Ex. A of his vakil at Poona The assistance suits, Ex 177 etc , were brought by his representative; so also the agreement, Ex. 98, was entered into by his vahivatdar. In the present suit he is represented by the Sar Subha of the Baroda State as a person specially appointed under S. 85, Civil P. C., (Ex. 13). His position, therefore, is analogous to that of the Secretary of State, who has representatives, i. e., officers of Government under him in British India. The question is how S. 13, Lim. Act, applies to cases of this description. In my opinion S 13 must be read consistently with the provisions contained in part 4, Civil P. C., for "suits in particular cases" against defendants who ordinarily would be always out of British India; e. g., (1) the Secretary of State for India-in-Council: see S 79, Civil P C., and S. 32 of the Government of India Act, which lays down that he can be sued as a corporate body; (2) an alien corporation, cf. S. 83, Civil P. C , and see *Singer Manufacturing Co* v. *Baijnath* (11), and *Girdhar Damodar* v *Kassigar Hiragar* (12), approved by the Privy Council in *Annamalai Chetty* v *Murugasa Chetty* (13); and (3) a Sovereign Prince or Ruling Chief sued in the name of his State: cf. Ss 85, 86 and 87, Civil P. C. S. 13 must, in my opinion, be read so as to avoid the obvious absurdity that arises, if such corporate bodies are deemed to reside out of British India, so that suits against them can never be barred at all. And this can be done by treating them as defendants, who, by reason of their special character, are not absent from British India within the meaning of the section, because they have not the same liberty as private individuals to reside personally in British India and attend to their affairs, and they must do so through agents or representatives. They can be held to reside in British India, in so far as they actually carry on their business through representatives in British India.

In such cases the contrary view adopted in *Atul Kristo Bose* v. *Lyon & Co* (14) and *Poorna Chunder Ghose* v. *Sassoon* (15), does not apply. There it was held that to hold that the section did not apply to cases where the defendants are, during the period of absence, carrying on business in British India through an authorized agent, would be legislating rather than adjudicating upon the section as it stands But there are provisions of law which go against such an interpretation in the case of a defendant who is a Sovereign Prince or Ruling Chief. The ordinary law of England is

(11) [1902] 30 Cal. 103.
(12) [1893] 17 Bom. 662.
(13) [1903] 26 Mad. 544=30 I. A. 220=13. M. L. J. 287=8 Sar. 523 (P.C.).
(14) [1887] 14 Cal. 457.
(15) [1898] 25 Cal. 496=2 C. W. N. 269 (F.B.).

that the English Courts have no jurisdiction over foreign Sovereigns, unless such persons submit to the jurisdiction (Halsbury, Vol. 6, Art. 278, p. 182). S. 86, Civil P. C, alters this by allowing a Sovereign Prince or Ruling Chief to be sued with the consent of the Governor General-in-Council, but there can clearly be no intention to put him in a worse position than a person, who is a resident in British India, as regards limitation of suits against him. The Sovereign Prince or Ruling Chief only represents his State for the purpose of such suits, as is shown by S. 87 which I have already mentioned. The whereabouts of his personal residence are, therefore, immaterial. The plea is really on the same footing as an absurd one that was set up in regard to the Crown in mediæval times. In Pollock's "History of English Law", Second Edition, Vol 1, p 525, it is stated that in the fourteenth century it was contended that the Crown, like a Church, was always under age, and that no lapse of time would bar the demands of this quasi infant This is a reverse case to the plea set up here that there is never any bar of limitation in a suit in British India against a Sovereign Prince or Ruling Chief.

There are no English precedents exactly on this point, because, as I have already mentioned, a Sovereign cannot be sued without his consent in British Courts. But there are some analogous decisions in regard to the domicile or residence of a corporation and a number of cases on this point are collected in Dicey's "Conflict of Laws", 4th Edition, pp. 151 to 154 At p 152 he summarizes, what has been laid down as to the difference between the domicile of a natural person and that of a corporation, as follows :

"The domicile of a human being is a fact which, on certain points, subjects him to the law of a particular country. The domicile of a corporation is a fiction suggested by the fact that a corporation is, on certain points, e. g., the jurisdiction of the Courts, subject to the law of a particular country. . . . Hence a corporation may very well be considered domiciled, or resident, in a country for one purpose and not for another, and hence, too, the great uncertainty as to the facts which determine the domicile, or residence, of a corporation. In each case the particular question is not, at bottom, whether a corporation has in reality a permanent residence in a particular country, but whether for certain purposes (e.g., submission to the jurisdiction of the Courts or liability to taxation), a corporation is to be considered as resident in England, or in some other country."

At p. 154 it is pointed out that in the case of corporation sole, there may be a distinction between the private domicile of the person, e. g., the Bishop at any given moment constituting the corporation, and his corporate domicile. Thus the Bishop may in his private capacity even acquire a foreign domicile and yet in his corporate capacity, he would be, in any case, held to be domiciled in his diocese. This point of the residence of a corporation is discussed in a recent case : *New York Life Insurance Co.* v. *Public Trustee* (16) At p. 120, Lord, J. Atkin, says :

"Now, when you are dealing with a corporation, you are dealing again with a legal notion, and you have to examine the question whether the debt can be said to be situate. It appears to me plain that a corporation according to our law is deemed to reside for the purposes of suit in the place where it carries on business in its own name, and in the case of corporations, you have many activities in many countries, such as the big insurance companies—for example, the plaintiffs in this case. It appears to me that the true view is that the corporation resides for the purposes of suit in as many places as it carries on business, and it is to be noticed that in ordinary case where an obligation is entered into by the corporation without any particular limits of the place where it is payable, inasmuch as that obligation is an ordinary personal obligation which follows the person, you have in each jurisdiction a right to sue the corporation there ; the corporation is resident there, and the obligation is enforceable there. Under ordinary circumstances the debt would be situate in each place where the corporation can be found."

This view has been taken also in an Indian case, viz, *Bank of Bengal* v. *Sarat Chandra Mittra* (17), in regard to a bank which carries on business in various branches throughout India. Expl. 2 to S. 20, Civil P. C, is also based on a similar principle. Therefore, I think that, it the distinction about the Gaikwar really being the State of Baroda, so far as this suit is concerned, is borne in mind, it is a just conclusion that he was not absent from British India within the meaning of S. 13, Lim. Act, as he carried on business through representatives in British India, in regard to his rights in the village of Davdi, where the suit lands are situate. Therefore, I hold that S. 13 Lim. Act, cannot be relied upon in this

(16) [1924] 2 Ch. 104.
(17) [1918] 4 Pat. L. J. 141 = 48 I. C. 943 = (1919) P. H. C. C. 155.

case, and that the suit, not having been brought within the twelve years specified in Art. 142, is clearly time-barred, even supposing the plaintiff has otherwise a good title

For these reasons I would reverse the decree of the Subordinate Judge and dismiss the plaintiff's suit with costs throughout.

Murphy, J.—The facts necessary to relate for the purpose of this appeal are the following :

In 1727-28 A. D. the village of Davdi in the Poona District was granted in inam by Shahu Rajah of Satara to Pilaji Gaikwar Exclusive of the rights of the hakdars and inamdars, the village was to be continued hereditarily to Pilaji's family. The terms of the grant are those of one of the royal share of the revenue, and not of the soil In 1863 the late Maharaja Khanderao Gaikwar, in his turn granted the village to Limbaji Dhavle, who appears to have been one of his courtiers, or servants. This grant is in terms one of the soil as well as of the royal share of the revenue, though actually all that could be granted was what had been given originally by the Raja of Satara. Limbaji Dhavle took possession and retained the village till his death on 16th May 1879 At this time Khanderao Gaikwar, the original grantor, was dead and there was an inquiry by the Baroda State authorities into the grants and allowances which had been given to Limbaji Dhavle These are detailed in Ex 195 which also contains the orders passed on the report by the then Dewan of Baroda, Sir T. Madhava Row. This order states that neither Limbaji nor his father had rendered any real services to the State, and that Limbaji had originally been a folder of turbans. Most of his allowances and a second inam village in Baroda State were resumed ; but by para. 8 of the order it is directed that

" Let the Poona village of Davdi be continued to the son during life and until further orders as heretofore. The half Patilki etc., under head No. 2, may also be continued to the son as heretofore."

The son was Madhavrao Dhavle who appears to have died in 1899, and to have left a son Raghunathrao who died in 1902. Raghunathrao left no son, his heirs being his two widows, Chandrabai and Sitabai. Chandrabai was the senior widow, and in 1905 she adopted the plaintiff in this case.

The original Court has found the adoption proved, and this point is not disputed in appeal. The suit was filed in 1922, and was for possession of six fields which include twenty survey numbers, and for future mesne profits at the rate of Rs 1,000 a year and costs.

The title on which this relief is prayed for is not exactly stated in the pleadings, though information on this point was sought by the other side.

The fact is, that in addition to his rights as an inamdar, H. H the Gaikwar of Baroda also held this particular property as Khatedar or occupancy tenant and it had been so held by Limbaji, Madhavrao and Raghunathrao in their turns When Raghunathrao died there was a question as to the name in which the village should be entered At first, the Collector of Poona entered it in the names of the widows, but there was a protest, and in the end the Government of Bombay held that the grant of Davdi village was a saranjam and it was resumed and formally regranted to His Highness the present Gaikwar, with the intimation that it would in future be treated under the saranjam rules This is shown in Ex 190, a letter addressed to the Minister of the Baroda State on 4th April 1904 It has accordingly since been held and managed by H. H. the Gaikwar, and all possible claims to the saranjam have been extinguished by these political proceedings.

The real foundation of the claim is that though the saranjam had been taken from plaintiff's family by these orders, the land in question, which includes the occupancy rights, has never been formally resumed, and for some time it remained in the possession of Sitabai, the second of Raghunathrao's widows. The plaint alleged that the plaintiff had received the income of the land till 1910, but for the reasons stated in para. 18 of the learned Subordinate Judge's judgment, it is clear that this statement is not true, there being ample evidence in the shape of rent notes, and the proceedings in assistance suits, to show that plaintiff was not in possession between 1906 to 1910.

This fact is further established by what occurred in that year. Chandrabai had adopted the plaintiff in 1905 ; but Sitabai, the junior widow, appears to

have been in actual possession of the property. She entered into an agreement with the local representative of the Baroda Darbar, and in consideration of an allowance of Rs 45 per month, she surrendered the property to the Darbar. The document is Ex. 98 in the case dated 27th February 1906. Of the survey numbers handed over, one, namely No. 329, is not involved in the suit.

All these facts taken together show that the plaintiff's real claim is, that though the village may have been, the property in the occupancy right of these survey numbers was never, formally resumed, and that consequently it descended in the ordinary way to the heir on his adoption, as private property This is the ground on which the learned Subordinate Judge has decided in plaintiff's favour.

Whether the suit is in time, and the learned Subordinate Judge is correct in holding that this property was unaffected by the resumption of the village, are the two issues which arise in appeal

The question of limitation comes up for decision in the following manner Defendant 1 being a Sovereign Prince, he could not be sued without the consent in writing of the Governor-General, obtained under S. 86, Civil P C This consent was sought on 25th July 1926, and was received on 15th November 1920,

The plaintiff accordingly claimed to exclude from the period of limitation four years, three months and 21 days, spent in obtaining the necessary consent. The rule is that subject to the provision of Ss. 4—25 every suit not brought within the period of limitation prescribed shall be dismissed; but Ss. 4—25 contain no statutory provision enabling a plaintiff to deduct the time spent in obtaining the Government of India's consent under S. 86, Civil P C. In view of this difficulty, the learned Subordiuate Judge has stated that the principle laid down at the end of the judgment resported in *Rupchand Makundas* v. *Mukunda Mahadev* (8) would come to the plaintiff's help, and that it is that when the law enacts a limitation and the party is disabled to conform to that limitation without any default in him and he has no remedy over, the law will ordinarily excuse him. The dictum is no doubt true in the circumstances of that case : but this is not an adjacent one, and I cannot agree that the suit was within limitation on this ground. A second ground has, however, been put forward. It is, that since defendant 1 has not resided in British India for a very large proportion of the period 1910-1922, plaintiff can avail himself of the provisions of S. 13, Lim. Act.

The facts are peculiar. The suit is against a Sovereign Prince who does not ordinarily, and cannot be expected to reside in British India. Does the law of limitation contemplate that in such a case S 13 continues to extend limitation or, in other words, for, pushed to a logical extreme in its application such would be the effect of S. 13, is there no period of limitation for such a suit ? I do not think that can have been the intention of the legislature, for the Indian Limitation Act is a complete statement of the law, and it cannot have been intended, by one of the general exceptions, to nullify the effect of Art 120 which provides for the cases where no specified period of limitation is laid down.

Again, the provisions of the sections relating to suits filed against Ruling Chiefs and Sovereign Princes in the Code of Civil Procedure are peculiar. They are an exception to the general law as to the jurisdiction of the Courts, against such persons, and consent can be given and a suit brought when it is, irrespective of such a defendant's residence in British India, or without it I think that it cannot have been the intention of the legislature when enacting these provisions to give the result, owing to S. 13, Lim. Act, that in certain cases no period of limitation should be available to a Ruling Chief or Sovereign Prince, and that the case is analogous to that of a suit against the Secretary of State for India in Council, whose residence is seldom if ever in India, and who is sued, though nominally in his own name, actually through his agents in India. It has never been suggested that on this ground the period of limitation against the Secretary of State may be indefinitely enlarged, and though the analogy is not exact, owing to the varying provisions regulating a suit against the Secretary of State and a Ruling Chief or Soverign Prince respectively, I think it is close enough to justify the Court in holding that S. 13, Lim. Act, cannot apply to such a suit in the circumstances This view does not involve any hardship on litigants in British India

for in fact a suit against such persons can always be brought, and it has not even been suggested that opportunity was taken of the temporary residence in British India of H. H. the Gaikwar to bring this one His Highness has been throughout represented by the Sar Subha of the Baroda State under the provisions of S 87, Civil P. C , and the provision in this section is evidently intended to meet the difficulty I also concur generally in the reasons given by my Lord the Acting Chief Justice for the finding on this point. I therefore, think that the learned Subordinate Judge's finding on this issue is wrong and that plaintiff's suit, which was brought in 1922 he having lost possession in 1906, was time barred.

On this view of the case it is really unnecessary to decide the main question in the appeal, but since it has been argued at some length, it is perhaps advisable to do so.

Radically, the plaintiff's case is that of an inamdar who is also a khatedar, or occupancy tenant, in the village of which he owns the royal share of the revenue But the case is not precisely that dealt with in the decided cases on this point such as the *Secretary of State* v. *Girjabai* (3), which related to the Vinchurkar saranjam As against the British Government the saranjamdar is H. H. the Gaikwar, and there has never been any question of a resumption by the British Government of these lands which could involve the point in *Girjabai's* case (3). The question is really a narrower one. It is whether the Baroda Darbar, having granted the saranjam of the village to plaintiff's predecessor-in-title, including these occupancy rights, can, in the circumstances, resume them, or can be deemed to have resumed them.

The Dewan's orders of 1879 (Ex. 155) assume the right of resumption and actually resume a village in Baroda territory and many different allowances, and in the absence of evidence to the contrary, I must assume that such orders are legal. The orders on this point are, that the village of Davdi should be continued to the son, for life, and until further orders, and we have seen, it was afterwards resumed on the grandson's death. There is no formal order produced in the case resuming the occupancy rights granted to Limbaji ; but there must have been such order preceding the arrangement with Sitabai in 1906, for the allowance of Rs. 45 per mensem is very similar to that passed in the case of Limbali's son, in para. 11 of the Dewan's orders, giving Madhavrao a compassionate allowance of Rs. 5,000 per annum.

There remains the fact that H. H. the Gaikwar's Government did actually take over these properties from the member of plaintiff's family in whose possession they were in 1906, and granted a compassionate allowance in their place, and has been managing the property ever since. I also think that in the circumstances this property was resumable, and that it must be assumed that it was resumed by His Highness' Government, and that plaintiff has, therefore, no title to it.

For these reasons, I agree with my Lord the Acting Chief Justice that the original Court's decree must be reversed and plaintiff's suit dismissed with costs.

Respondent 1, Madhavrao Raghunathrao, shall pay his own and the Sar Subha of Baroda State's costs of the appeal.

S N /R K. *Decree reversed.*

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* A. I. R 1929 Bombay 24

FAWCETT, J

Vallabhdas Mulji- Plaintiff.

v

Pranshankar Narbheshankar and *others*—Defendants.

Original Civil Jurisdiction Suit No. 4875 of 1921, Decided on 15th March 1926.

*** (a) Transfer of Property Act, S. 69—Mortgagee selling mortgaged property in accordance with S. 69, to his nominee—Transaction benami—There are not two persons promissor and promisee as required by S. 2, Contract Act—Sale, therefore, is void and need not be set aside—Art. 91, Limitation Act, does not apply—Contract Act, S. 2—Limitation Act, Art. 91—Trusts Act, Ss. 90, 94 and 95 (b).**

Where a mortgagee puts up the mortgaged property for sale under a power given him by his mortgage-deed, he cannot sell it to himself, either alone or with others, nor to a trustee for himself. [P 26 C 2]

Certain mortgagees, who were principal partners of a firm, sold the mortgaged property by auction under power of sale given to them by the mortgage-deed in accordance with the provisions of S. 69. The property was purchased by a constituent of the firm of which the mortgagees were principal partners. Afterwards a conveyance was executed of the property by the mortgagees in favour of a son of one of them with the purchaser as the confirming party. It was found that both at the date of the auction and at the date of the conveyance the transaction was benami.

Held : that as the transaction was benami and the purchaser was merely a nominee of the mortgagees, the sale did not affect the relations between the mortgagor and the mortgagees. There were no two persons as promissor and promisee as required by S. 2, Contract Act, and, therefore, the sale was inoperative, and void, and not voidable. In such cases no possession short of the statutory period of 60 years, nor any acquiescence of the mortgagor not amounting to a release of the equity of redemption, would be a bar to a suit for redemption. Trusts Act, S. 90 and S. 95 (b) do not but S. 94 would apply to such a case. Art. 91, Limitation Act, would not apply to such a case, as the sale being void need not be set aside : 42 *Bom.* 638 , *National Bank of Australia* v. *United hand-in-hand etc., Co.* 4 *A. C.*, 391; and *Henderson* v. *Astwood*, (1894) *A.C.* 150; *Foll.* : 35 *Cal.* 61 ; 14 *Bom.L.R.* 254 ; 41 *Bom.* 357 ; 40 *Bom.* 483 ; and *A.I.R.* 1916 *P.C* 227 ; *Dist.* [P 27 C 1 , P 28 C 1]

(b) Evidence Act, S. 115—Party not misled by statement—There is no estoppel.

Where the statement relied on is made to a party who knows the real facts and is not misled, there can be no estoppel . 30 *Cal.* 539, *Foll.* [P 28 C 1]

(c) Advancement—Person making irrevocable gift to his son—There is no presumption of advancement.

Where a person makes an irrevocable gift to his son of some property, there is in India no presumption in favour of an advancement to a child as there is in England · 13 *M.I.A.* 232 (*P.C.*) and *A.I.R.* 1921 *P.C.* 56, *Foll.* [P 29 C 1]

(d) Evidence Act, Ss. 76 (a) and 86—True copy of depositions recorded in Court in Cutch—True copy not certified by Political Agent—S. 86 does not exclude other evidence —Presumption arises that document was true copy—Evidence Act, S. 114.

Copy of evidence given in a Court in Cutch, was not certified by the Political Agent in a manner which fully satisfied the requirements of Ss. 76 (a) and 86.

Held: that S. 86 did not exclude other proof. 27 *Cal.* 639, *Foll.* [P 30 C 1]

Held further, that under S. 114 a presumption would arise that the copy was a correct copy of the record of the deposition as recorded by or under the supervision of the Judge who tried the suit. The fact that the certificate as to its being a true copy is given by a higher officer of the State than the trial Judge would really be an additional reason for accepting its authenticity, and there is no reason to suppose that the mode of certificate, viz., true copy, is not the one ordinarily in use in Cutch, just as it is in British India. [P 30 C 1]

Khergamvala, *Munshi* and *Bastavalla* —for Plaintiff.

M. V. Desai, *Jinnah*, *Pandia* and *Mulla*—for Defendants.

Judgment.—This suit relates to a house in Bazzar Gate Street, Bombay, which in 1907 was owned by the plaintiff. On 8th July 1907, he executed two mortgage-deeds in respect of this property. The first mortgage was for a sum of Rs. 30,000, to Mulji Meghji and Narbheshankar Ghellabhai. Defendant 1 Pranshankar is the son of Narbheshankar, and defendants 2 and 3 are the sons of Mulji Meghji. He and Narbheshankar are dead. On the same day the plaintiff mortgaged the property, subject to the first mortgage, to defendants 4 and 5 for Rs. 3,000. The due date for payment under these mortgages was 17th July 1908, and both the documents contain the usual power of sale, subject to the provisions of S. 69, T. P Act, in default of payment of the mortgage debt

About April 1908 the plaintiff admittedly was in monetary difficulties and left Bombay for Morvi and Kathiawar ; and he was away from Bombay till some time in 1918 No payments were made on account of the mortgage debt by the plaintiff, and the property was put up for sale by auction by the mortgagees in exercise of their power of sale It is alleged that this was done after a notice had been served on the plaintiff in accordance with the provisions of S 69, T P Act, but this is a point in dispute The auction was held on 18th November 1909, and the property was bought by one Dayashankar Devshankar for Rs 22,500. A deposit was made of Rs. 5,625. Dayashankar was a constituent of the firm of Meghji Parmanand, the two principal partners of which were Mulji Meghji and Narbheshankar The case of the plaintiff is that Dayashankar was a mere nominee of the mortgagees, or at any rate, of Narbheshankar, and that it was accordingly a benami purchase On 1st December 1909, Messrs. Shroff, Dinsha & Dharamsi, solicitors, purporting to act for the plaintiff, sent a notice (Ex. 7) to the mortgagees complaining that the sale of the property had not been sufficiently advertised, in consequence of which the property was sold at a considerable under-value, and, secondly; that the mortgagees had fraudulently purchased the property in the name of their nominee, in consequence of which the sale was not in any way binding upon the plaintiff. No reply was given to this notice. But from certain correspondence that has been filed in the case it appears that an amicable settlement was attempted. This, however, did not fructify, and, on 4th November 1910, a conveyance was executed by the mortgagees in favour of defendant 1, Pranshankar, with Days

shankar as a confirming party. The conveyance recites that Dayashankar Devshankar had purchased the property at the auction sale as the agent for and on behalf of Pranshankar The balance of the purchase money, Rs. 22,500, was paid, and the mortgagees were given credit for their respective shares in the accounts of the firm of Meghji Permanand.

Before the conveyance the building in question had been in a dangerous state A big crack appeared in one of the walls, and it actually fell down on 12th July 1919 The Municipality took action, and notices were issued about it both to the plaintiff at Morvi and to Narbheshankar The plaintiff refused to accept his notice, while Narbheshankar took action to comply with the requirements of the Municipality Considerable work was done, and the house was repaired and partly rebuilt The cost of these alterations is debited in the books of Meghji Permanand to an account of Pranshankar, defendant 1, which will be referred to in more detail later on

Pranshankar got the property transferred to his name in the records both of the Municipality and of the Collector On 14th September 1920, he sold the property to defendants 6, 7, and 8 for the sum of Rs. 85,000 On 4th November 1920, the plaintiff sent a notice to defendants 6, 7, and 8 challenging the sale to them, and on 5th April 1921, he sent a notice to all the other defendants requiring them to re-convey the property to him on payment by him of the mortgage-debt and to furnish a detailed statement of account. These notices were not complied with, and in November 1921 the present suit was brought

The hearing of the suit has been delayed by a consent decree that was passed before Kajiji, J. It is stated that the consent decree was subsequently cancelled, as there had been misapprehension among the parties on a question of interest ; but the suit as against defendants 6, 7, and 8 was dismissed with costs on the ground that plaintiff could not prove that they had notice of the alleged illegality of the auction at the date of their purchase.

The contesting defendants are 1, 4, and 5 They contend that the auction sale was properly held, that the property was purchased by Pranshankar through his nominee Dayashankar, and that the conveyance was a legal transfer in his favour. Defendants 2 and 3 have not appeared, and it is alleged by the other defendants that their whereabouts are not known It is obvious, however, that their failure to appear is mainly, if not entirely, due to certain allegations made by them in a suit No. 881 of 1919 brought by them against defendant 1 Those allegations favour the plaintiff's case that the purchase of the property at the auction-sale was one by Narbheshankar and not by Pranshankar (The judgment narrated the issues and proceeded). The main question in the suit is whether the purchase by Dayashankar Devshankar in the first instance, and subsequently by Pranshankar, is a benami purchase on behalf of one or more of the mortgagees? The plaintiff's case rests on the law, for which there is a clear authority in England that, where a mortgagee puts up the mortgaged property for sale under a power given him by his mortgage-deed, he cannot sell it to himself, either alone or with others, nor to a trustee for himself : cf Halsbury's Law of England, Vol 21, Art, 458, at p. 257 It is contended that as a result of such purchase the sale was entirely inoperative and did not affect the relations between the plaintiff-mortgagor and his mortgagees Consequently the plaintiff is entitled to the sum of Rs. 85,000, obtained by the second sale, subject to his paying all that may be due to the mortgagees in respect of the mortgage debt and the cost of any proper repairs to the property that they might make as mortgagees. For the other side it is argued that the alleged benami sale would at most only be voidable and not void, and that consequently the plaintiff's suit is barred as he has not brought a suit to set aside the sale within the proper period of limitation

It has been held by a Full Bench of this Court in *Narsagounda* v. *Chawagounda* (1), that if an instrument is entirely void or inoperative, then Art. 91, Lim. Act, does not apply to the case. There certainly is very strong authority for saying that a sale of the kind this one is alleged to be is an entire nullity and needs no such setting aside. To take only two authorities, that are important as being those of the Privy Council, I may refer to *Natianal Bank of Australasia* v.

(1) [1918] 42 Bom. 638=47 I. C. 581=20 Bom. L. R. 802 (F.B.).

United Hand-in-Hand etc., Co., (2) and *Henderson* v, *Astwood* (3).

In the latter case the facts were somewhat similar to the alleged facts in the present case. It was held there that the sale to a nominee of the mortgagee was inoperative, as a man cannot contract with himself and cannot sell to himself, either in his own person or in the person of another. Certainly on these authorities the benami sale would be a void one, falling under the Full Bench ruling But the defendant's counsel rely upon a passage in Williams' " Law of Vendor and Purchaser " 2nd Edn. Vol 2, at p. 984, where it is said :

" The transaction is . . . voidable on the mere proof that the vendor or purchaser was acting in exercise of such an authority and in effect sold to or bought from himself. "

Also at p 986 it is stated :

" And for this reason the sale so purported to be made is voidable in equity at the instance of those by or on whose behalf the authority was conferred. "

It seems to me, however, that the word " voidable " as there used is merely equivalent to the word " impeachable, " which is used by their Lordships of the Privy Council in *National Bank of Australasia* v. *United Hand-in-Hand etc Co*, (2), and that it does not signify that the transaction is a voidable one as opposed to one that is entirely void In such cases the transaction, if there is a dispute, has to be brought before the Court, and it can legitimately be said that, therefore, it is voidable at the instance of such and such a person This seems quite clear for the ground on which such a sale is held to be void, namely, that a man cannot contract with himself The result is that there is no actual contract, and the question whether the cantract is void or voidable accordingly does not arise at all, the transaction being, as the Privy Council says, entirely inoperative Such a transaction is clearly ineffective under the law in India, having regard to S 2 (a), Contract Act, which says :

" when one person signifies to another etc.,

and Cl (c) which says :

" the person making the proposal is called the ' promissor ' and the person accepting the proposal is called the ' promisee ' . "

The Act clearly contemplates those being two different persons, and unless there are these two persons there can be no contract. In Williams' " Vendor and Purchaser, " at p. 997, it is stated that the sale can be either affirmed or avoided at the option of the person affected. No doubt the latter can consent to the transaction in the sense that he raises no objection and the sale therefore, operates. But it seems to me clear that his consent cannot really operate to make the mortgagees' title a good one, any more than would the consent of a minor operate to make a minor's contract otherwise than void. It was at one time held that a minor could ratify such a contract, but this view was definitely rejected by the Privy Council in *Mohori Bibee* v. *Dharmadas Ghose* (4). I know of no clear authority in England for a contrary view, and none at any rate is stated in the paragraph of Halsbury's " Laws of England " that I have referred to, and the two Privy Council rullings of 1879 and 1894 are not, in my opinion, shaken in any way.

No doubt in the case of a sale through a civil Court a benami purchase of this kind by a mortgagee is not an absolute nullity but is treated as an irregularity which at the most makes the sale voidable: see *Khiarajmal* v. *Daim* (5), *Ashutosh Sikdar* v *Behari Lal* (6), *Sahadu Manaji* v *Devlya Jaha* (7), *Ganesh Narayan* v. *Gopal Vishnu* (8) But such a case is on an entirely different footing because a mortgagee can obtain leave to bid, and his failure to apply and obtain such leave can clearly be treated as an irregularity. There is a clear difference between a sale in execution of a decree, where the Court is responsible for conductiug the sale and a sale under a power contained in a mortgage Thus Lord Hobhouse says in *Mahomed Meera Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (9), (p. 28 of 27 *I. A.*)

" The conduct of the sale gives opportunities for influencing its course one way or another, which do not follow on mere leave to bid. "

In my opinion, therefore, the contention of the defendants is not sound.

It follows that, if the sale is benami as alleged, the pleas of estoppel, limitation,

(2) [1879] 4 A. C. 391=27 W. R. 889=40 L. T. 697.
(3) [1894] A. C. 150=6 R. 450.
(4) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441=8 Sar. 374 (P.C.).
(5) [1904] 32 Cal. 296=32 I. A. 23=9 C. W. N. 201=8 Sar. 734 (P. C.).
(6) [1907] 35 Cal. 61=6 C. L. J. 320=11 C.W. N. 1011 (F.B.).
(7) [1911] 14 Bom. L. R. 254=14 I. C. 780.
(8) [1916] 41 Bom. 357=39 I. C. 3=19 Bom. L. R. 75.
(9) [1899] 23 Mad. 227=27 I. A. 17=10 M. L. J. 1=7 Sar. 661. (P. C.).

and acquiescence, cannot avail the defendants as defences to the suit. In regard to estoppel the letter of Narbheshankar, Ex. E, which was written after the receipt of the notice Ex. 7, shows that he was fully aware of the invalidity of the sale if it was one to himself; and the principle applies that, where the statement relied upon is made to a party who knows the real facts and is not misled, there can be no estoppel : see *Mohori Bibee* v. *Dharmidas Ghose* (4). Similarly as held in *Khiarajmal* v. *Daim* (5), where the effect of an inoperative sale is to leave the relationship of mortgagor and mortgagee intact, no possession short of the statutory period of sixty years, nor any acquiescence of the mortgagor not amounting to a release of the equity of redemption, would be a bar to a suit for redemption

On the other hand I think the defendant's counsel are right in contending that the case is one which does not fall under S 90, Trust Act, 1882. The ordinary case of a mortgage, to which that section is applicable, is the one stated in ill (c) to that section that is to say, where the wilful default of the mortgagee leads to a sale in which he purchases the property either himself or through a nominee. Cases of this kind are *Chhita Bhula* v. *Bai Jamni* (10) and *Deo Nandan Prashad* v. *Janki Singh* (11) but that is not the case here. In my opinion it cannot be said that Narbheshankar, if he bought the property through Dayashankar or Pranshankar, "availed himself" of his position as mortgagee to buy the property. No doubt he had the conduct of the sale, and the remarks of Lord Hobhouse that I have mentioned are applicable. But the conduct of the sale did not give him any special advantage in regard to buying the property, and as a bidder he was just in the same position as any stranger present at the auction. On the other hand, I think that S 94, Trusts Act, would be applicable, because on the view taken above the sale was inoperative and the plaintiff was still the owner of the property, subject to the mortgages. The purchaser Narbheshankar had not the whole beneficial interest and was not a trustee but merely a mortgagee, so that that section can apply.

It was contended for the defendants that by virtue of proviso (b) to S. 95, Trusts Act, the purchase by Narbheshankar would be valid, but that provision is clearly inapplicable as Narbeshankar did not hold the property by virtue of contract with the person for whose benefit he held it. He was in fact a mortgagee without possession, and even if he had had possession he would not have held it for the benefit of the plaintiff but in order to exercise rights of ownership for his own benefit as mortgagee. He would in effect be acting against the contract with the plaintiff, if he bought the property for himself, as is pointed out in Williams' "Vendor and Purchaser" at p. 986, where it is stated that the authority to sell a property implies a bargain between the person authorized and some other person acting independently of him. It follows that S 96 of the same Act cannot be applicable, for Narbheshankar was not a bona fide purchaser within the ambit of that section

The main question, therefore, is whether this transaction is proved to have been benami for Narbheshankar or any other of the motgagees ? The main contention of counsel for the plaintiff is that Dayashankar bought as a nominee of Narbheshankar The burden of proving this lies upon the plaintiff, and the main test is of course the source whence the purchase-money came, as laid down in *Dhurm Das Pandey* v. *Shama Soondri Dobiah* (12) and *Bilas Kunwar* v *Desraj Ranjit Singh* (13). The question is tried under considerable disadvantage Narbheshankar died in 1918, so the Court has not the advantage of having his evidence in the matter Dayashankar although present in Court during the part of the trial, was called by neither side, and I did not think it desirable to try and call him myself, as his evidence would probably be coloured by his siding with one party or the other. Defendant 1, Pranshankar, was only twenty-one at the date of the auction. He says he was not present at it, and speaking generally, he says that he cannot remember the material events of that time. The other two witnesses namely, the plaintiff and

(10) [1916] 40 Bom. 483=37 I. C. 295=18 Bom. L. R. 438.

(11) A. I. R. 1916 P. C. 227=44 Cal. 578=44 I. A. 30 (P. C.).

(12) [1843] 3 M. I. A. 229=6 W. R. 43=1 Suther 147=1 Sar. 271 (P.C.).

(13) A. I. R. 1915 P. C. 96=37 All. 557=42 I. A. 202 (P. C.).

defendant 4, were away in Kathiawar at the time of this transaction, and their evidence does not help much except in regard to certain correspondence which has been put in. This correspondence is certainly of considerable use in an endeavour to ascertain the real truth of the matter, and it is a fortunate circumstance that some of these letters were disclosed by defendants 4 and 5 in interlocutory proceedings and so have become available at the trial. Most of the correspondence was put in by consent of the parties, and the letters of Narbheshankar in my opinion, fall generally under Cl. (2), S 32, Evidence Act, being made in the ordinary course of business, for Narbheshankar was the managing partner in the firm of Meghji Permanand and corresponded on behalf of the firm in the business of safeguarding their interests in respect of their mortgage security The only objection taken was by counsel for the defendants in respect of a portion of Ex E, which I held to be admissible as a statement of Narbheshankar against his interest for the reasons that are given in my notes of the proceedings. The letters are diffuse and often obscure. (The judgment then discussed the evidence and proceeded.) Then coming to the accounts, which are an important piece of documentary evidence in this case, these to some extent support the defendants' case and to some extent the plaintiff's.

Undoubtedly it is proved that in May 1902, Narbheshankar arranged with Mulji Meghaji to set aside Rs. 25,000 which stood to his credit with the firm, to be put in a separate account in the name of Pranshankar, under an agreement that Pranshankar alone was to operate on that account. Narbheshankar also the next day added a postcript to his will, under which in very clear language he makes an irrevocable gift to Pranshankar of this sum and the account in respect of it. There are two views that can be taken about this transaction. One is that this was a bona fide gift by Narbheshankar to his son made out of affection and as a provision for him when he attains majority. That is certainly an explanation, which prima facie, at any rate, is entitled to consideration, though in India there is no presumption in favour of an advancement to a child in such a case as there is in England cf, *Uzhur Ali* v. *Mt. Bebee Ultaf Fatima* (14) and *Kerwick* v. *Kerwick* (15). It may also be said that in form there was a valid gift under S. 126, T. P. Act, for no power of revocation was reserved to Narbheshankar and only delivery and acceptance were necessary to complete the gift. Such requisites after this lapse of time require little evidence to prove them, and Pranshankar's evidence would ordinarily suffice to show that he got control of this account and accepted the gift. On the other hand, an opposing view is covered by the following remarks of Sir George Campbell on the benami system which are cited in Mayne's Hiudu Law, 9th Edition, p. 628:

> "The most respectable man feels that if he has no need to cheat anyone at present, he may some day have occasion to do so, and it is the custom of the country. So he puts his estate in the name of his wife's grandmother, under a secret trust. If he is pressed by creditors or by opposing suitors, it is not his. If his wife's grandmother plays him false, he brings a suit to declare the trust,"

There certainly are circumstances which support the contention of the plaintiff's counsel that the transaction was a cloak of this kind. (The judgment considered evidence and proceeded) Finally, we have the evidence given by Narbheshankar in a civil suit of 1915 in the Cutch Court at Mandvi. The alleged circumstances, under which that deposition was given, are that Pranshankar had advanced certain moneys to Dayashankar, who as security for repayment mortgaged some property to him in Cutch That property was attached by one Amratlal, and on the objection being raised that the property was already mortgaged, he brought a suit against Dayashankar and Pranshankar. The contention of Amratlal was that this mortgage of Pranshankar was a nominal one and not binding on the property. Narbheshankar gave evidence that Pranshankar was separate from him and had an account with the firm of Meghji Parmanand, from which he could make advances such as led to the mortgage. Presumably he referred to the account gifted to Pranshankar in 1902. In the course of the evidence he says that the property in question in this suit was purchased by Pranshankar in the name of Dayashankar. Subsequently, however, he says:

(14) [1869] 13 M. I. A. 232=13 W. R. 1=2 Suther 279=2 Sar. 522 (P.C.).
(15) A. I. R. 1921 P. C. 56=48 Cal. 260=47 I. A. 275 (P.C.).

"I purchased it in the name of Dayashankar, therefore in the company (that is to say, the auctioneer) the name of Dayashankar was entered. The moneys have been paid in the name of Dayashankar. As we were the mortgagees, we could not purchase it in our name. Therefore the house was purchased in the name of Dayashankar, and in the pucca deed my name was written. The document is not made out in the name of Dayashankar."

The last statement, viz., that his name was entered in the conveyance, is of course wrong; but that does not affect the clear fact that he stated that he purchased the property in the name of Dayashankar. Pranshankar himself, in his evidence, did not contest the fact that his father made such a statement, and could give no satisfactory reason for his father making a false statement on the point. There is no apparent reason why he should have made this admission if it was not the real truth; and it supplies cogent evidence that this was a benami purchase, as alleged by the plaintiff. The document has, no doubt, not been certified by the Political Agent of Cutch in a manner which fully satisfied the requirements of Ss, 76 (a) and 86, Evidence Act, and an attempt to get this defect rectified in a reasonable time failed: see the correspondence, Ex. Y-10. But, as ruled by the Privy Council in *Haranund* v. *Ram Gopal* (16), S. 86 does not exclude other proof. In the present case Pranshankar's admission as to his father giving this evidence suffices to meet any doubts that might otherwise arise; and under S 114 a presumption arises that the document, purporting to be a copy of Narbheshankar's deposition in the suit is a correct copy of the record of that deposition as recorded by or under the supervision of the Judge who tried the suit The fact that the certificate as to its being a "true copy" is given by a higher officer of the State than the trial Judge is really an additional reason for accepting its authenticity and there is no reason to suppose that the mode of certificate, viz., "true copy" is not the one ordinarily in use in Cutch, just as it is in British India. Therefore, I have admitted the document in evidence as Ex. Y-9. Even, however, if it were excluded, this would not alter my conclusion, which, in my opinion, has ample other evidence to support it.

The result is that I hold that the purchase was in fact a benami one for Narbheshankar. It does not, I think, matter whether the state of affairs at the date of the auction or at the date of the conveyance is considered In either case the purchase was a benami one, as already mentioned. If the account of Pranshankar had been the result of a genuine gift, then no doubt it might afford a good ground for rejecting the plaintiff's claim; for during the interval between the auction sale and the conveyance it would, I think, be open to Narbheshankar to substitute for himself, or rather for Dayashankar, the nominal purchaser, a stranger-purchaser. As stated by Jessel M. R. in *Earl of Egmont* v. *Smith* (17) (p. 474):

"An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct."

Section 55 (1) (f), T P. Act, recognizes such a right on the part of a person who contracts to buy A reference may also be made to the remarks of Byrne, J, in *Delves* v *Gray* (18), as to the general practice that a purchaser may, in ordinary cases, take a conveyance to a nominee for himself The mortgage-deeds contain nothing to the contrary; indeed they gave the mortgagees power "to vary any contract for the sale" at the auction. This does not help defendants, however, in this case, in view of my finding that Pranshankar was not really a stranger-purchaser but merely a nominee of his father Narbheshankar. (The rest of the judgment is not material to the report)

S N./R K *Suit decreed.*

(16) [1899] 27 Cal. 639=27 I. A. 1=2 C. W. N. 429=7 Sar. 648 (P. C.).

(17) [1877] 6 Ch. D. 469=46 L. J. Ch. 356.

(18) [1902] 2 Ch. D. 606=71 L. J. Ch. 808=51 W. R. 56=87 L T. 425.

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MARTEN, C. J, AND MURPHY, J.

Krishnarao Bhaskar—Plaintiff.

v.

Lakshman Ramchandra—Defendant.

Civil Ref. No. 8 of 1928, Decided on 12th September 1928, made by First Cl, Sub-Judge, Ratnagiri, in Sm. Cause Suit No. 354 of 1927

Civil P. C., O. 46, Rr, 1 and 5--High Court can itself quash reference.

Rule 5 is wide enough to enable the High Court to quash the order of reference under R. 1 made by the lower Court. [P 31 C 2]

V. D. Limaye—for Plaintiff.

B. D. Manerikar—for Defendant.

Marten, C. J.—We directed this reference under O. 46, Civil P. C., by Mr. Padki, the learned First Class Subordinate Judge of Ratnagiri, to be set down before us for directions. He has referred the case to us under O. 46, R. 1. It is a case involving only Rs. 300 and is being tried by him in the exercise of Small Cause Court powers. Although, then, there may be no right of appeal, there would be a right in revision to any disappointed litigant, supposing there was a substantial point of law to be decided. The learned Judge, however, instead of deciding the matter between the parties, has referred it to us on certain points of law, which, he says, arise in the case Those points are said to arise under the Indian Limitation Act and to be of such a nature as to have caused disagreement between various High Courts in India. Those several decisions are accordingly set out in the reference, but in para. 9, the learned Judge says :

"It seems to me that each case depends on its own facts and has to be decided on its own merits."

So much for the case itself.

Looking at the matter next from a practical point of view, the learned Judge sent the above reference to this High Court shortly before the long vacation with a request for urgency, and he has followed it by certain correspondence asking that the matter may be disposed of promptly as he wishes to deliver his judgment. The practical answer is that at present, with our insufficient number of Judges, it is quite impossible to give priority to a small matter of this sort and thus to give it priority over a large number of appeals, some of which have been waiting for three or more years The course the learned Judge has taken is, in any event, an unusual one as far as my experience goes. I do not say that this order may not on proper occasions be resorted to. But if important points of law are to be decided by this High Court, I prefer that they should arise in cases where substantial amounts are involved and where we can have the advantage of the arguments of pleaders on both sides. In the present case, there is no appearance for the respondent, and this High Court was obliged to ask Mr. Manerikar to act as amicus curiæ for the purpose of arguing this case for the respondent.

The practical question, therefore, is this : If we give this reference its normal place in the list, then as far as I can see, having regard to the other appeals which have priority, it would not be heard for some 18 months or more. Under these circumstances, ought we to allow it to remain on the file of this Court any longer?

So far as O. 46, R. 5, is concerned, we have, of course, power to return the case for amendment. We also have power inter alia to :

"cancel any. . . . order which the 'Court making the reference has passed, and make such orders as"

we think fit. I think that rule is wide enough to enable us to quash the order of reference itself which the learned Judge has made I would, therefore, quash it accordingly.

But, apart from that, we have inherent powers under S. 151, Civil P. C , to make any order that may be necessary for the ends of justice, and in this small reference my own view is that the ends of justice require that the learned Judge should give his judgment, or else the case will have to stand over for some 18 months or more before it is reached in the appellate Court Mr. Padki, however, who originally heard this case, has now been transferred, at any rate, temporarily to another Court. Whether he will eventually return to Ratnagiri, I do not know But if he does not, then this case will have to be heard, I am sorry to say, by another Judge. We pronounce no opinion on the merits of the case nor on the points of law that are alleged to arise. Our order is that the order of reference to us be cancelled, and that the papers be returned to the Court of the First Class Subordinate Judge with directions to hear and determine the case according to law.

As regards costs, this reference is no fault of the plaintiff. Apparently, the learned Judge was prepared to pass judgment in his favour because he finds at the end :

"I am of opinion for the reasons stated that Art. 80, Lim. Act, applies to the case and that the entire claim is in time."

The plaintiff's costs of this reference should be costs in the cause.

Murphy, J.—I agree with the judgment of the Honurable the Chief Justice.

S.L./R.K. *Reference quashed.*

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MIRZA AND BAKER, JJ.

Ichhalal Jagmohandas — Plaintiffs—Appellants.

v

Anjibai Zujya—Deft —Respondent.

Second Appeal No. 23 of 1926, Decided on 11th September 1928.

(a) Bombay Land Revenue Code (5 of 1879) S. 84—Notice.

Where it was shown that the tenancy was to end in May and no subsequent contract to end it in October was proved,

Held: that notice dated 22nd June did not in law terminate the tenancy. [P 32 C 1]

(b) Civil P. C., S. 11—Ejectment suit—Rent decree only passed — Finding as to title need not be incorporated in the decree.

In an ejectment suit, where Court passes a decree for rent only, the finding as to title need not be incorporated in the decree: 6 *Cal.* 319 (*F.B.*), *Diss. from.* 18 *Cal.* 647 and 40 *Cal.* 29, *Ref.*: 44 *Bom.* 321, *Rel. on.* [P 32 C 2]

P. B. Shingne—for Appellants.

A. G. Desai—for Respondent.

Mirza, J.—The appellants brought this suit to eject the respondent from the tenancy of certain lands belonging to the appellants, and also claimed Rs. 20 for rent. The notice terminating the tenancy was dated 22nd June 1921, and inter alia stated that the year of cultivation would terminate in the month of Ashwin, i. e., 31st October, and that possession of the property along with Rs 20 for rent should be then given. The first Court found in favour of the appellants, and granted them a decree in ejectment as well as a decree for Rs 20 for rent. The appellate Court held that the appellants had failed to prove that the yearly tenancy was terminable on 31st October, in each year. The rent note of 1897, which was adduced in evidence, showed that the tenancy began in July 1897, and ended in May 1898. There was no evidence to show that there was any fresh contract between the parties or their predecessors-in-title that the year of tenancy should end in Ashwin or October. The lower Court, relying on S. 84, Land Revenue Code, held that the notice did not in law terminate the tenancy. We agree with the view of the lower Court. The lower Court, however, in reversing the decree of the first Court, lost sight of the fact that the first Court, in addition to giving possession of the land to the appellants, had passed a decree in their favour for Rs. 20 for rent. No point was specifically taken in the grounds of appeal in the lower appellate Court questioning the finding of the first Court that Rs. 20 were due for rent. The suit was filed on 4th September 1922, aud the amount of rent would be due as at the end of May 1922. There is no sufficient reason shown why the decree of the first Court in respect of this sum of Rs. 20 should not stand.

Mr. Shingne, on behalf the appellants, applies that the concurrent finding of the two Courts with regard to the title of the appellants to the land in suit may be incorporated in the decree. We see no sufficient reason to accede to the application In our opinion, the decree of the lower appellate Court should be varied by passing a decree for the appellants for Rs. 20 for rent As the appellants have only partly succeeded, there will be no order as to costs of this appeal. The cross-objections will be dismissed with costs.

Baker, J.—I agree. I should like to say a word about the argument of the learned pleader for the appellants as to incorporating the findings of the lower appellate Court, on the question of title, in the decree. That application he bases on the case of *Niamut Khan* v. *Bhadu Buldia* (1). We decline to do that, because it is unnecessary in the present case, for any question of res judicata will arise not in the present case, but in the subsequent case between the same parties. But the case on which he relies, *Niamut Khan* v. *Bhadu Buldia* (1). has been practically overruled by the case of *Thakur Magandeo* v. *Thakur Mahadeo Singh* (2), which is again followedin *Parbati Debi* v. *Muthura Nath Banerjee* (3). The subject will be found discussed in *Bai Nathi* v. *Nars Dullabh* (4), and in view of the remarks of Macleod, C. J. in that judgment it does not appear that any useful result would be secured by entering in the decree any findings on the issues dealt with by the lower Courts.

S L./R.K. *Decree varied.*

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(1) [1880] 6 Cal. 219=7 C. L. R. 227 (F.B.).
(2) [1891] 18 Cal. 647.
(3) [1912] 40 Cal. 29=16 C. L. J. 9=15 I. C. 453=16 C. W. N. 877.
(4) [1919) 44 Bom. 321=55 I.C. 322=22 Bom. L. R. 64.

A. I. R. 1929 Bombay 33

RANGNEKAR, J.

Manchersha Pestonji Damania, In re

Petition for Letters of Administration, Decided on 9th August 1928.

Succession Act (1925), S. 230—Though S. 230 applies to executors only person renouncing right of obtaining letters of administration can retract renunciation only on proper grounds—Mere change of mind is not proper ground.

No doubt S. 230 applies to the case of an executor but that by itself does not authorize administrator to act contrary to practice laid down in the section. In the absence of any provision, principles of English law are applicable which make no distinction as regards the right of renunciation of an executor or administrator. [P 34 C 1, 2]

A person, who has renounced his right to obtain letters of administration to the estate of a deceased intestate, cannot subsequently retract the renunciation except in a fit and proper case. A mere change of mind is not a proper ground on which he can be allowed to retract. [P 35 C 1]

Engineer—for Petitioner.

Framroze Vakil—for Soona Bai.

Judgment. — This is a petition for letters of administration of the property and credits of one Dorabji Pestonii Damania who died intestate in Bombay on or about 7th April 1928. The said deceased left him surviving as the only next-of-kin the petitioner, his brother, his widow Soonabai, and four sisters The petition was declared by the brother on 1st June. In para 4 of the petition it was stated that the said Soonabai, the widow of the deceased, had by her letter of renunciation dated 26th May 1928, renounced her prior right to the letters of administration of the property and credits of the deceased. The letter by the said Soonabai was annexed to the petition, but it was not verified.

It appears that on 6th June 1928, Messrs. Ardeshir, Hormusji and Dinshaw for the said Soonabai informed the petitioner's attorneys stating that their client, the said Soonabai, withdrew her renunciation and consent, and that the petitioner should not proceed any further with his petition. They further stated that they were instructed to apply for letters of administration by the said Soonabai.

The petition was filed in Court on 9th June, and on the 11th Messrs. Ardeshir, Hormusji and Dinshaw wrote to the testamentary registrar as follows :

"We are instructed to state that our client was made to sign a writing of renunciation and consent which the petitioner was trying to file in Court. We on our clients' behalf have already written to the petitioner's attorneys stating that our client withdraws her said writing of renunciation and consent."

On 13th June Messrs. Shamrao, Minocheher and Hiralal, the petitioner's attorneys, wrote to the testamentary registrar with refarence to the letter of Messrs. Ardeshir, Hormusji and Dinshaw of the 11th instant stating that the said letter of renunciation was signed by the said Soonabai of her free will, and the same being filed in Court was final and permanent.

On 2nd July the petitioner's solicitors, after setting out the facts already referred to above, requested the testamentary registrar to refer the matter to me. Accordingly, an appointment was given to them and also to the solicitors of the said Soonabai. The latter did not appear on the date fixed, and after hearing the petitioner's solicitors I ordered a notice to issue calling upon the said Soonabai to admit execution of the said letter of renunciation and intimating to her that the petitioner proposed to adduce the same in evidence.

On 26th July all the parties appeared before me, and arguments on the present notice were heard Mr Framroze Vakil, who appeared for the said Soonabai, stated that the widow had changed her mind, and that it was not necessary for her to assign any reason for retracting the said renunciation, as this being a case of intestacy, she was entitled to change her mind and to retract the letter of renunciation. A note of the admission made by the learned solicitor was taken down.

On these facts, the question which arises for consideration is whether the renunciation is final and cannot be withdrawn, and whether the widow can be allowed to retract the same. Mr. Engineer, on behalf of the petitioner, relies on S. 230, Succession Act, and on *Brojo Lal Banerjee* v. *Sharajubala Debi* (1). Mr. Framroze Vakil argues that Ss. 229-231, Succession Act, which deal with the subject of renunciation, are applicable only in the case of an executor and not in the case of a mere administrator, and that there is no corresponding provision in the Act with regard to an administrator or administratrix.

Now there is no section in the Act which in terms lays down as to when

(1) A. I. R. 1924 Cal. 864=51 Cal. 745.

and why an executor or administrator can renounce, and obviously for the simple reason that the act of renunciation is one which depends on the will of a person. No one is bound to act as an administrator or executor against his will. S. 229 up to 231 are sections which lay down and deal with the procedure to be followed when a person renounces or fails to accept the office to which he is entitled.

Thus S 229 says that when a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship S 230 provides for the form and effect of renunciation of executorship. S. 231 lays down the procedure to be followed where an executor renounces or fails to accept an executorship within the time limited for the acceptance or refusal thereof, and provides that the will in such a case may be proved and letters of administration with a copy of the will annexed may be granted to the person who would be entitled thereto

It is true that in terms these sections apply to the case of an executor. The question is whether that by itself would entitle an administrator or administratrix to act contrary to the practice and procedure laid down in these sections. R. 609 of the Rules of the High Court in its original jurisdiction provides that in cases not provided for by this Chapter, that is to say, Chap. 31, or by the rules of procedure laid down in the Indian Succession Act, 1925, or by the Civil Procedure Code, the practice and procedure of the Probate Division of the High Court of Justice in England shall be followed so far as they are applicable and not inconsistent with this chapter and the said Acts. R 590 contemplates the case of an administrator renouncing his right to obtain letters of administration of the property of a deceased person. I think, therefore, that the principles of the English law would apply in the present case.

In Tristram & Coote's Probate Practice, 16th Edn., at p. 266, "renunciation" is defined as the act whereby a person having a right to probate or administration waives or abandons it. Then the position with regard to a legal personal representative is stated in these terms (p. 268):

"An executor, or an administrator with the will annexed, or an administrator, may renounce the administration with the will annexed, or administration, which he would be entitled to take in his representative capacity. And such renunciation will be a sufficient waiver to admit other interests to administration, if the renunciant be the sole representative of his own deceased. If there be another qualified representative, the latter must renounce also."

Turning to the forms of renunciation given in this standard work, Form No 301, at p 1019, shows clearly that a legal personal representative or a person entitled to letters of administration can renounce his right to letters of administration of the estate of a deceased person It is clear, therefore, that according to the English law and practice, as regards the right of renunciation, there is no distinction made in the case of an executor or an administrator.

The next question is, when can a renunciation be retracted? The principles as to this are laid down in Tristram & Coote at p. 273 of the same edition as follows:

"The renunciation of an executor may, as a general rule, be taken to be final, he not being permitted to retract it except by permission of the Court, and this permission will not be given without regard to S. 5, Administration of Estates Act, 1925, (15 & 16 Geo., 5, C. 23.) . . .

"The Court may permit a retraction of an executor's renunciation "in a case fit for it," and of this the Court is the sole Judge.

"A retracting executor must, therefore, be prepared to show that his retraction is for the benefit of the estate, or of those who are interested under the deceased's will."

In *Cradock* v. *Western* which is cited in Tristram & Coote at p. 275, Dr. Bettesworth refused to allow the retraction under the following circumstances as stated by Dr. Cottrell:

"John Cradock died intestate, leaving four children. Upon the renunciation of three of them, administration was granted to a creditor. The other child appeared and the grant was revoked. Then his brothers retracted, and asked for administration to one of themselves. The Court said: "The persons renouncing had not been deceived or imposed upon in their renunciation, and if any inconvenience followed they must thank themselves for it."

Similarly, in *West and Smith* v. *Willby* (2), where the next-of-kin had renounced in order that a creditor might take and one of them retracted before the grant was made, the Court held him to his renunciation. The following statement as to the law and practice on

(2) [1820] 3 Phill. 374.

this question appears in Halsbury's Laws of England, Vol. 14, para. 261 :

"The Court may, in a proper case, allow one of several executors to withdraw his renunciation for the purpose of taking a grant, but when all the executors have renounced and letters of administration have been granted, a renunciation cannot subsequently be withdrawn, nor will the withdrawal be allowed merely on the ground that the executor has changed his mind. A renunciation cannot be withdrawn without the leave of the Court, and the renouncing executor must show that his retraction is for the benefit of the estate or of those interested under the will."

In my opinion, therefore, the same principles would apply in the present case. Now it is true that here the renunciation was made on 26th May 1928, and filed in Court on 9th June and it is true that it was retracted on 6th June. Even then the question is whether the widow can be allowed to retract her renunciation? The authorities to which I have referred show that no person has a right to retract, but may be allowed to retract his or her renunciation in a fit and proper case No such case is made out before me And when I offered to give an opportunity to the widow to state her reasons, her learned solicitor stated that he did not desire to have any further opportunity, and that the only ground on which he based his contentions was that the widow had changed her mind. The case referred to in para. 261 in Halsbury clearly shows that a mere change of mind would not be a proper ground on which a renunciation once made can be allowed to be retracted. I must, therefore, hold that the widow cannot be allowed to retract her renunciation in this case merely on the ground that she has changed her mind.

Apart from this, it appears that she had passed a writing in favour of the petitioner in April, long before the letter of renuuciation, on the faith of which the petitioner had made diverse disbursements, had recoverd outstandings, and otherwise carried out various acts of administration before the present petition was filed.

On the facts of this case, therefore, I am of opinion that this is not a fit case in which I should allow the widow to retract her renunciation. My answer to the only question raised now is that the widow cannot be allowed to retract her renunciation. The renunciation is, therefore, final. The renunciation is admitted, and, therefore, in my opinion, no further evidence is necessary as regards it, and no further proof as regards the execution of the letter of renunciation is needed In the result the petitioner will be at liberty to proceed further in the matter. Costs of all parties to come out of the estate. Counsel certified.

S.L /R.K. *Petition allowed.*

A. I. R. 1929 Bombay 35

PATKAR AND BAKER, JJ

Hirabharthi Jamnabharthi — Defendant 1—Appellant.

v

Bai Javer and *others*—Respondents.

Second Appeal No. 182 of 1926, Decided on 10th August 1928, from decision of Asst Judge, Ahmedabad, in Appeal No. 439 of 1923.

(a) Evidence Act, S. 101—Onus—Question is more material in trial Court.

The question of onus has greater force in original trial and hardly arises in an appeal where the appellate Court has to consider the facts and arrive at a conclusion on the evidence led before trial Court. [P 36 C 1, 2]

(b) Hindu Law — Adoption — Gharbhari Gosais.

The practice of adopting chelas by widows is not proved amongst the Gharbhari Gosais: 5 *Bom.* 682, 5 *Bom. L. R.* 114; and 5 *Bom. L. R.* 318; *Dist.* [P 36 C 2]

(c) Hindu Law—Custom—Special custom must be ancient, invariable and established by clear and unambiguous evidence.

It is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established by clear and unambiguous evidence. 14 *M. I. A.* 570 (*P.C.*) and 29 *All.* 109, *Foll.*: *A. I. R.* 1917 *P.C.* 181; *A. I. R.* 1922 *P.C.* 59; and *A. I. R.* 1928 *P. C.* 10; *Ref.* [P 36 C 2, P 37 C 1]

(d) Hindu Law—Adoption—Authority to adopt does not depend upon inheriting but cannot be exercised when power of adoption itself has come to an end.

The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished. The authority to adopt cannot, however, be exercised when the power of adoption itself has come to an end. The vesting of the estate in the senior widow is the proper limit to the exercise of the junior widow's power and the moment that limit is reached, the power of adoption of the junior widow is at an end: 1 *Mad.* 60 (*P.C.*); 31 *Bom.* 373 (*P. C.*); and *A. I. R.* 1918 *P. C.* 192; *Dist.*: 26 *Bom.* 526; *A. I. R.* 1918 *P. C.* 74; 28 *Bom.* 461 ;and *A. I. R.* 1928 *Bom.* 291; *Foll.* [P 37 C 2]

H. V. Divatia—for Appellant.

P. B. Shingne—for Respondent 1.

Patkar, J.—The question in this case is as regards the validity of the adoption of defendant 1 by Dahi, the junior widow of one Jamnabharthi who died in March 1921 leaving an infant son, Purshottamgir, and two widows, Javer (senior) and Dahi (junior). On 20th February 1921, he left a will authoriziug Dahi to make an adoption after the death of his son Purshottamgir. Purshottamgir died in August 1921, and on 13th September Bai Dahi adopted defendant 1. The senior widow Javer has brought this suit for a declaration that defendant 1 is not the adopted son of her husband Jamnabharthi.

Before the Subordinate Judge the defendants set up the custom of adoption of a chela by the Mathadhipati and the custom of the adoption of a chela by a widow if authorized by the Mathadhipati. The learned Subordinate Judge came to the conclusion that Gharbhari Gosais of Charotar did not countenance the right by birth of their sons in the ancestral property, and that there was no right of the sons by birth in this community and held that the adoption was valid, though he came to the conclusion that the custom set up of adopting a chela by the Mathadhipati and the custom of adoption by the widow being authorized by the Mathadhipati to adopt a chela were not proved.

The lower appellate Court came to the conclusion that Gharbhari Gosais of Charotar, i. e., a tract of Gujarat lying between the rivers Mahi and Sabarmati, form a distinct sect by itself governed by the same rules of property and succession which apply to secular masses under the Hindu law, including the son's right by birth in ancestral property. With regard to the practice of making chelas by widows, the only instance before the Court was that of an adoption by Amba, and the learned Judge came to the conclusion that the solitary instance was not sufficient to prove the custom of making chelas by widows among the Gharbhari Gosais.

It is urged on behalf of the appellant that the finding of the lower appellate Court should not be accepted as the onus of proof was thrown on the defendants and that the lower appellate Court has not considered the whole evidence in the case. The question of onus of proof has greater force in an original trial and hardly arises in an appeal where the appellate Court has to consider the facts and arrive at a conclusion on the evidence led before the trial Court. The finding of the lower Court is based on the evidence led before the Subordinate Judge after consideration of all the circumstances in the case, and is, therefore, binding on us in second appeal. We must, therefore, take it as found by the lower appellate Court that the practice of adopting chelas by widows is not proved amongst the Gharbhari Gosais to which sect the deceased belonged. The cases cited on behalf of the appellant do not bear upon this point. In *Gosain Rambharti* v. *Surajbharti Haribharti* (1) it was held that marriage does not work a forfeiture of the office of mahant and the rights and property appendant to it. In *Balgir* v. *Dhondgir* (2) the question was whether one of the sons of the Gharbhari Gosais could succeed as a tonsured chela to the property of the deceased father to the exclusion of the other sons, and it was held that though a stranger may be adopted as a chela, one of the sons could not be adopted so as to prejudice the rights of the other sons, and all the sons of the Gharbhari Gosais succeed, in the absence of an adopted chela, equally to the property of the deceased The decision does not deal with the question as to the custom relating to the right of a widow to adopt a chela to the deceased Gosai. The next case relied on is *Gitabai* v. *Shivbakas* (3), where the question was as to the right of the widow of a Gharbhari Gosai to succeed to his property in preference to the chela of a Gurubhau of the deceased, and it was held that she was not entitled to so succeed, but was entitled to residence in and maintenance from the property of her deceased husband.

The cases, therefore, cited on behalf of the appellant do not bear upon the question as to whether a widow of a Gharbhari Gosai can adopt a chela to the deceased Gosai. The evidence in this case consists of only one instance of Bai Amba. With regard to a custom of this character, it has been held by the Privy Council in *Ramalakshmi Ammal* v. *Sivanantha Perumal* (4) that it is of the essence of special usages, modifying the ordinary

(1) [1880] 5 Bom. 682.
(2) [1902] 5 Bom. L. R. 114.
(3) [1903] 5 Bom. L. R. 318.
(4) [1872] 14 M. I. A. 570 = 17 W. R. 552 = I. A. Sup. Vol. 1=3 Sar. 108 (P.C.).

law of succession, that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidences: see *Mahomed Ibrahim* v. *Shaikh Ibrahim* (5); *Abdul Hussein Khan* v. *Bibi Sona Dero* (6); and *Martand Rao* v. *Malhar Rao* (6). The evidence in this case falls short of the standard of proof necessary to establish a custom in favour of the right of a widow to adopt a chela. The decision in *Chhajju Gir* v. *Diwan* (8) bears on this question In that case the plaintiff set up a custom as prevalent amongst the Grihast Goshains of Hardwar and other places adjacent in the United Provinces whereby the widow of a ceased Goshain was entitled with the concurrence of the elders of the sect to adopt a chela and successor to her deceased husband, and it was held on the evidence in that case that such custom was not established. It is observed at p. 115 that a person who has had no association with a spiritual guide could not, except by fiction, be his chela, and that a posthumous chela was a contradiction in terms Reference was made to West and Buhler's Hindu Law, 3rd Edn. Vol. I, p 565, and the opinion of the Shastris, based on the Vyavahara Mayukha, para 142, which does not deal with the question as to the right of a widow to adopt a chela. We think, therefore, that it is not proved in this case that the widow of a Gharbari Gosai of Charotar can adopt a chela to the deceased Gosai.

Further, in the will, Exhibit 51, Dahi was not anthorized to adopt a chela but was asked to adopt a son, and the Gharbhari Gosais of Charotar being governed by the same rules of property and succession which apply to secular masses under the Hindu law, we have to consider whether the adoption of defendant 1 is valid. It appears that on Jamnabharthi's death in March 1921, the property went to Purshottamgir as his heir, and after the death of Purshottamgir in August 1921, the property went by inheritance to his mother Javer. The property, therefore, being vested in Javer, it would follow that the power of adoption of Dahi the junior widow, would come to an end. It is urged on behalf of the appellant that the power of adoption of Dahi did not come to an end as there was a specific authority given by her husband by his will. The decision in *Bachoo Hurkisondas* v. *Mankorebai* (9), *Pratapsingh Shivsing* v. *Agarsingji Raisingji* (10) and *Sri Virada Pratapa Raghunadha* v. *Brozo Kishoro* (11) relate to cases where the widow's power of adoption was not extinguished but was suspended. In *Pratapsing Shivsing* v. *Agarsingji Raisingji* (10) it is held that the right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate, and that she can exercise the power, so long as it is not exhausted or extinguished, even though the property is not vested in her In the cases above referred to, the property was not vested in the widow on account of the nature of the estate, either on account of its being an impartible zemindari or of the nature of a jivai grant or on account of its being property belonging to the joint family. The authority to adopt given by the husband cannot, however, be exercised when the power of adoption itself has come to an end: see *Ramkrishna* v. *Shamrao* (12); *Madana Mohana* v. *Purushothama* (13); and *Basangowda* v. *Rudrappa* (14). In *Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj* (15) and *Madana Mohana* v. *Purushothama* (13) the authority to adopt was as a matter of fact given but it could not be exercised on the ground that it was incapable of execution.

When the estate vested in the senior widow, Javer, by right of inheritance to her son Purshottamgir, she could not continue the line by adoption. The vesting of the estate in Javer was "a proper limit to the exercise of the power," and the moment that limit was reached, the power of adoption of the junior widow, Dahi, was at an end. To the same effect are the decisions in

(5) A. I. R. 1922 P. C. 59 = 45 Mad. 308 = 49 I. A. 119 (P.C.).
(6) A. I. R. 1917 P. C. 181 = 45 Cal. 450 = 45 I. A. 10 (P.C).
(7) A. I. R. 1928 P. C. 10 = 55 Cal. 403 = 24 N. L. R. 25 = 55 I. A. 45 (P.C.).
(8) [1906] 29 All. 109 = 3 A. L. J. 717=(1906) A. W. N. 289.
(9) [1907] 31 Bom. 373 = 34 I. A. 107 = 9 Bom. L. R. 646 (P.C.).
(10) A. I. R. 1918 P. C. 192 = 43 Bom. 778 = 46 I. A. 97 (P.C.).
(11) [1876] 1 Mad. 69 = 3 I. A. 154=25 W. R. 291 = 3 Suther 263 = 3 Sar. 583 (P.C.).
(12) [1902] 26 Bom. 526 = 4 Bom. L. R. 315.
(13) A. I. R. 1918 P. C. 74 = 41 Mad. 855 = 45 I. A. 156 (P. C.).
(14) A. I. R. 1928 Bom. 291 = 52 Bom. 393.
(15) [1865] 10 M. I. A. 279=3 W. R. 15 (P.C.).

Chandra v. *Gojarabai* (16); *Shivbasappa* v. *Nilava* (17) and *Adivi Suryaprakasa Rao* v. *Nidamarti Gangaraju* (18). The facts of this case resemble the facts in *Anandibai* v. *Kashibai* (19) and *Faizuddin Ali Khan* v *Tincowri Saha* (20). The adoption, therefore, of defendant 1 would be invalid as the property was vested in the widow Javer after the death of Purshottamgir, and Dahi's power of adoption came to an end On these grounds, we confirm the decree of the lower appellate Court and dismiss the appeal with costs.

S L./R K. *Appeal dismissed.*

(16) [1890] 14 Bom. 463.
(17) A. I. R. 1923 Bom. 17 = 47 Bom. 110.
(18) [1910] 33 Mad. 228 = 4 I. C. 386 =(1910) M. W. N. 251.
(19) [1904] 28 Bom. 461 = 6 Bom. L. R. 464.
(20) [1895] 22 Cal. 565.

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* A. I. R. 1929 Bombay 38

BLACKWELL, J.

In re *E D. Sassoon United Mills, Ltd.*

Misc. Petn. Decided on 21st December 1927.

*** (a) Company — Preferential rights of particular shares cannot be modified except under provisions of Companies Act for modification of memorandum of association.**

Where the memorandum of association of a company confers certain preferential rights upon a particular class of shares, the rights become unalterably attached and cannot be modified unless under the provisions for modification of the memorandum of association provided for by any of the sections of the Companies Act. [P 40 C 2]

(b) Companies Act, S. 54—Company proposing to abolish existing classes of shares and to create new classes of shares—S. 54 does not contemplate such a mode of re-organizing share capital but applies to two modes of re-organization only, namely (a) the consolidation of shares of different classes into shares of one class and (b) the division of shares of one class into shares of different classes.

A company limited by shares incurred loss and its paid-up capital to the extent of three crores and fifty lacs was lost or was unrepresented by available assets. The company accordingly proposed to reduce and reorganize its share capital and with that view duly passed and confirmed a special resolution whereby the existing twenty lacs preference shares of Rs. 10 each were to be converted into twenty lacs ordinary shares of Rs. 10 each and the existing forty lacs ordinary shares of Rs. 10 each into forty lacs of deferred shares of Re. 1 each. The company petitioned the Court to sanction the re-organization of the share capital under S. 54.

Held: that such scheme of re-organization was not a scheme for dividing shares into different classes but a scheme for the total abolition of the existing classes and creation of fresh classes of shares. S. 54 applies only to two modes of re-organizing share capital, namely, (a) the consolidation of shares of different classes into shares of one class, and (2) the division of shares of one class into shares of different classes, and had no application to a reorganization of this type. *Re Palace Hotel Ltd.*, (1912) 2 *Ch.* 438; *Re J. A. Nordberg Ltd.*, (1915) 2 *Ch.* 439, *Rel. on.* [P 41 C 2, P 42 C 1]

(c) Companies Act, S. 54 (1), Proviso—Company's capital divided into preference and ordinary shares—Memorandum of association excluding preference share-holders from participating in surplus assets in the event of winding up—Such exclusion confers special privilege on ordinary shares within proviso to S. 54 (1).

The capital of a company was divided into preference shares and ordinary shares, and the memorandum of association of the company provided inter alia that the preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 7½ per cent. per annum on the capital for the time being paid up thereon and the right in a winding up to payment of capital and arrears of dividend whether declared or undeclared upto the commencement of the winding up in priority to the ordinary shares but shall not confer any further right to participate in profits or assets.

Held that the exclusion of the preference share-holders from participating in surplus assets impliedly conferred upon the ordinary shareholders the special privilege of taking the whole of these surplus assets. This was a special privilege attached to or belonging to the ordinary shareholders of the company by virtue of the memorandum of association of the company. This right could not be affected unless a resolution had been duly passed and confirmed as a special resolution as required by the proviso to S. 54 (1): *In re Stewart Precision Carburetter Co., Ltd.* (1912) *W. N.* 100, *Dist.* [P 43 C 1, 2]

(d) Companies Act, S. 81, Sub-S. (3)—Chairman's declaration that a resolution is carried on a show of hands is conclusive evidence of the fact if poll is not demanded and minutes of meeting are not admissible in evidence to rebut it.

At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed a declaration of the Chairman on a show of hands that the resolution is carried is conclusive evidence and the minutes of the meeting are not admissible in evidence to show that the declaration of the Chairman is unwarranted. *Arnot* v. *United African Lands Ltd.*, (1901) 1 *Ch.* 518; *In re Hadleigh Castle Gold Mining Co. Ltd.*, (1900) 2 *Ch.* 419, *Appr. In re Caratal (New) Mines Limited*, (1902) 2 *Ch.* 498, *Dist.* [P 44 C 1]

B. J. Desai and *Kanga*—for Petitioning Company.

B. J. Desai, Munshi, Lalkaka, Thomas Strangman, Mulla and *Taraporewala*—for share-holders.

Blackwell, J.—This is a petition to sanction a reduction and re-organization of the capital of a company. The petition is opposed by certain shareholders of the company.

The capital of the company as fixed by its memorandum of association is Rs. 10 crores divided into twenty lacs preference shares of Rs. 10 each and eighty lacs ordinary shares of Rs 10 each, and the issued and subscribed capital of the company is twenty lacs cumulative preference shares of Rs 10 each and forty lacs ordinary shares of Rs. 10 each The whole of the issued and subscribed capital has been taken up and fully paid.

Article 52 of the articles of association of the company provides that the company may from time to time by special resolution reduce its capital as therein indicated. Art. 55 of the articles of association of the company is in the following terms:

"Whenever the capital, by reason of the issue of preference shares or otherwise, is divided into different classes of shares, all or any of the rights and privileges attached to each class may be modified, commuted, affected, abrogated, or dealt with by agreement between the company and any person purporting to contract on behalf of that class, provided such agreement is ratified in writing by the holders of at least three-fourths in nominal value of the issued shares of the class, or is confirmed by an extraordinary resolution passed at a separate general meeting of the holders of shares of that class and all the provisions hereinafter contained as to general meetings shall mutatis mutandis, apply to every such meeting, but so that the quorum thereof shall be members holding or representing by proxy one-fifth of the nominal amount of the issued shares of the class. This clause is not to derogate from any power the company would have had if this clause were omitted."

Clause 5 of the memorandum of association of the company, to which it is important to draw attention, is in the following terms:

"The capital of the company is Rupees 1,00,000,000 divided into 20,00,000 preference shares of Rs. 10 each and 80,00,000 ordinary shares of Rs. 10 each, and such preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 7½ per cent. per annum on the capital for the time being paid up thereon and the right in a winding-up to payment of capital and arrears of dividend, whether declared or undeclared, up to the commencement of the winding up in priority to the ordinary shares, but shall not confer any further right to participate in profits or assets. And upon any increase of capital the company is to be at liberty to issue any new shares with any preferential, deferred, qualified or special rights, privileges or conditions attached thereto. The rights for the time being attached to the preference shares in the initial capital or to any shares having preferential, deferred, qualified or special rights, privileges or conditions attached thereto, may be altered, or dealt with in accordance with Cl. 55 of the accompanying articles of association but not so as to prejudice the preferential rights hereby attached to the preference shares in the initial capital."

Paragraph 10 of the petition stated that with a view to giving effect to the proposed reduction and re-organization of capital, a provisional agreement dated 6th January 1927, was entered into between the company of the one part and the Bombay Trust Corporation Ltd,. on behalf of the holders of the preference shares of the company, of the other part, and that a similar provisional agreement of the same date was also entered into between the company of the one part and Mr. F. E Dinshaw on behalf of the holders of the ordinary shares of the company of the other part. These agreements were put in before me as Exs 2 and 3, the memorandum and articles of association of the company being put in as Ex. 1.

The petition further stated that at a meeting of the preference shareholders of the company held on 17th January 1927, the following resolution was carried unanimously, namely, that the agreement dated 6th January 1927, and made between the company of the one part, and the Bombay Trust Corporation Limited on behalf of the preference shareholders of the company of the other part be ratified and confirmed. The petition further stated that the shareholders present at the said meeting formed the majority in number of the preference shareholders and held 19,99,400 preference shares of the company out of the 20,00,000 preference shares issued by the company, and that at a further meeting of the holders of preference shares of the company held on 1st February 1927, the above resolution was confirmed unanimously, the same shareholders being present as at the first meeting.

The petition also stated that at a meeting of the holders of the ordinary shares of the company held on 17th January 1927, the following resolution was put to the vote, namely, that the agreement dated

6th January 1927, and made between the company of the one part and Mr. F. E. Dinshaw on behalf of the ordinary shareholders of the company of the other part be ratified and confirmed. On a show of hands 64 share-holders voted for the resolution and 50 voted against the same. A poll was duly demanded and taken and as the result of the poll, the resolution was carried, 1,47,093 votes being recorded for the resolution and 4,300 votes against the resolution.

The petition further stated that by special resolutions of the company duly passed and confirmed in accordance with the provisions of the Indian Companies Act, 1913, at extraordinary general meetings of the company held respectively on 17th January 1927, and 2nd February 1927, it was resolved as follows :

" 1. (a) That the capital of the company be reduced from Rs. 10,00,00,000 to Rs. 2,50,00,000 by cancelling 40,00,000 of the existing ordinary shares which have not been issued and by cancelling paid-up capital which has been lost or is unrepresented by available assets to the extent of Rs. 3,50,00,000.

(b) That such reduced capital of Rs. 2,50,00,000 be divided into 20,00,000 ordinary shares of Rs. 10 each and 50,00,000 deferred shares of Re. 1 each.

(c) That the existing 20,00,000 preference shares of Rs. 10 each be converted into 20,00,000 ordinary shares of Rs. 10 each.

(d) That the existing 40,00,000 ordinary shares of Rs. 10 each be converted into 40,00,000 deferred shares of Re. 1 each.

2. That all arrears of dividend on the existing preference shares be extinguished and that 10,00,000 fully paid deferred shares of Re. 1 each be allotted to the holders of the existing preference shares rateably in proportion to the number held.

3. The rights and privileges of the ordinary and deferred shares respectively shall be as follows :

(a) The profits of the company made during the financial year or other period comprised in the accounts submitted to the ordinary general meeting which it shall be determined to distribute in dividend with any profits carried forward from past years shall be applicable in order of priority in manner following :

Firstly to the payment of a dividend at the rate of 6¼ per cent. per annum on the capital paid up on the ordinary shares to the close of such period.

Secondly to the payment of a dividend for such period at the like rate on the capital paid up on the deferred shares.

Thirdly the residue shall be applicable as to one half to the payment of a further dividend on the ordinary shares and as to the other half to the payment of a further dividend on the deferred shares.

(b) In case of a winding-up of the company the assets available for distribution among the members shall be applied first, in paying off the capital paid up on the ordinary shares secondly in paying off the capital paid up on the deferred shares and thirdly the balance (if any) shall be divided as to one half among the holders of the ordinary shares rateably in proportion to the number held and as to the other half among the holders of the deferred shares rateably in proportion to the number held.

(c) On a show of hands every member holding deferred share or shares only present in person shall have one vote, and every member holding ordinary share or shares present in person shall have 10 votes. Upon a poll every member present in person or by proxy shall have one vote for every deferred share and 10 votes for every ordinary share, held by him.

4. That the company's memorandum and articles of association be altered in accordance with the above resolutions. "

According to the petition, at the meeting of 17th January 1927, 59 share-holders voted for the resolution and 13 against. At the meeting of 2nd February 1927, 67 share-holders voted for the resolution and 42 against, and on a poll being demanded and taken 16,38,047 votes were recorded for the resolution and 338745 votes against the same The petition further stated that before the passing of these special resolutions, the paid-up capital of the company to the extent of rupees three crores and 50 lacs and upwards had been lost or was unrepresented by available assets, and that the reduction of the capital did not involve either any diminution of any liability in respect of unpaid capital or payment to any shareholders of any paid-up capital.

Several objections were taken to the scheme and to its approval by the Court. I will deal with each of the main objections in turn. In the first place, it was contended that the scheme cannot be proceeded with under Art 55 of the articles of association of the company, inasmuch as Cl. 5 of the memorandum of association expressly provides that any alteration is not to prejudice the preferential rights hereby attached to the preference shares in the initial capital In my opinion, this is clearly a valid objection. The rights attached to the preference shares by Cl. 5 of the memorandum of association became rights unalterably attached unless and until these rights are modified in accordance with the provisions for modification of the memorandum of association provided for by any of the applicable sections of the Indian Companies Act itself, and not otherwise. If, therefore, and in so far as, any attempt has been made to alter those rights by virtue of the machinery of Art. 55, in my opinion, such at-

tempt is ultra vires of the powers of the company. If that be the true view to be taken in this case, the re-organization involved in this scheme could in my judgment only be effected either under S. 54 of the Act, if that is applicable at all, or under S. 153 of the Act.

In the course of his argument Mr. Desai stated that this scheme was put forward not under or by virtue of the provisions of Art. 55 of the articles of association, but under the provisions of S. 54 of the Act. An argument was, however, adduced to me upon the position which has arisen in this case supposing that the scheme can be proceeded with under Art. 55. I, therefore, propose very shortly to deal with the argument.

It was said that, having regard to the terms of Art. 55, the agreement, which has been purported to be contracted between the company and any person contracting on behalf of a class, must be confirmed by an extraordinary resolution passed at a separate general meeting of the holders of the shares of that class, but the quorum must be the quorum of members holding or representing by proxy one-fifth of the nominal amount of the issued shares of the class. Now in the case of the separate meeting of the ordinary shareholders, referred to in the petition, held on 17th January 1927, it is important to bear certain points in mind in connexion with this argument. The nominal amount of the issued shares of this class was forty lacs. One-fifth of that would be eight lacs. The persons who were actually present at that meeting, as appears from the affidavit of Mr. C. J. Barrow,—the secretary of the company,—(Ex. 7), were 20,54,631 shares. If those figures are taken as being the number of persons actually present, then it is true that there was a quornm, but there was then no three-quarters majority as required by the article. If, on the other hand, you take the number who actually voted, as being the number present, namely, 1,57,000 odd, though I do not think that this is permissible, then there was no quorum as required by the article. In my opinion, therefore, the resolution purporting to have been passed at this meeting of the ordinary shareholders on 17th January 1927, was not properly passed and is accordingly invalid.

The next point arising for consideration is whether the scheme falls within S. 54 of the Act. The first part of that section is in these terms :

" 54 (1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to re-organize its share capital, whether by the consolidation of shares of different classes or by the division of its shares of different classes. "

It was contended by those opposing the confirmation of this scheme that the scheme does not fall within that section because there is under it no consolidation of shares into different classes and no division of shares into shares of different classes. In connexion with this argument, the case of *In re Palace Hotel, Ltd.* (1), was cited to me. In the course of his judgment in that case Swinfen Eady, J., said with reference to the English section, namely, S. 45, which corresponds with S. 54 of the Act, as follows (p. 444) :

" It applies to two modes of re-organizing share capital, namely, (a) the consolidation of shares of different classes into shares of one class and (b) the division of shares of one class into shares of different classes. "

Reference was also made to the case of *In re J. A. Nordberg, Ltd.* (2) where Neville, J., referring to the distinction existing between the ambit of S. 120 of the English Act (which corresponds with S. 153 of the Act) and S. 45 of the English Act (which corresponds—as I have pointed out before—with S. 54 of the Act), said in reference to the arrangement proposed to be sanctioned in the case which he was considering (p. 441) :

" If S. 120 includes such an arrangement it must include all alterations of the memorandum with regard to capital which do not come under S. 45, that is to say, which do not involve consolidation of shares of different classes or the division of shares into shares of different classes. "

The contention of the opponents to the present scheme is that this scheme is not a scheme for the division of the shares of the company into different classes. They point out that the shares are already divided into different classes and that what this scheme involves is the total abolition of the existing classes into which the share capital of the company has been divided and the creation of other classes out of the re-organized capital, if that is sanctioned. Mr. Desai, on the other hand, argued that this was a completely errone-

(1) [1912] 2 Ch. 438=81 L.J.Ch. 695=56 S.J. 649=19 Manson 235=107 L.T. 521.
(2) [1915] 2 Ch. 439=84 L.J.Ch. 830=59 S.J. 717.

ous interpretation sought to be placed upon the section. He said the words of the section are

" by the division of its shares into shares of different classes. "

He contended that the company's shares are the existing preference shares and the existing ordinary shares, and he said that the present proposal is merely a proposal to divide up the company's existing shares into a division of ordinary shares and deferred shares. Accordingly, he contended that the scheme fell within the ambit of the section. I am unable to accept Mr Desai's argument. In my judgment, the words in the section

" by the division of its shares into shares of different classes "

assume the division of one class into shares of different classes. In order to give effect to Mr. Desai's contention, it seems to me that there would first have to be a consolidation of the shares already divided into a consolidated class followed by a division of shares of that class into shares of different classes. I do not think that this was ever contemplated by this section, or that the section has any application whatever to a scheme which is not really in my judgment a scheme for dividing shares into different classes, but a scheme for the total abolition of the existing classes and the creation of fresh classes of shares on a re-organization, if sanctioned. In this connexion it must be borne in mind that when Mr Desai in support of his contention said that the division contemplated is merely a division of the new reduced capital of Rs. 2,50,00,000 into different classes of shares, in my opinion, this is begging the question, because unless and until the capital is reduced, and the sanction of the Court is obtained for the reduction, it is impossible even to entertain the question of the division of that reduced capital into different classes of shares. In my judgment, therefore, the petitioners were entitled to invoke the assistance of S 54, Companies Act. If I am right in my judgment upon the construction of that section, this alone is sufficient to dispose of this petition, it being admitted by Mr. Desai that he relies only upon S. 54 for the re-organization of the capital, and upon S. 55 of the Act for the proposed reduction.

If, however, I am wrong in the construction which I have placed upon S. 54, and if it is competent for the petitioners to rely upon that section, then a further point arises, and that is this: ought not a confirmatory resolution to have been passed in the same manner as a special resolution of the company at a separate meeting of ordinary shareholders of the company? That question depends upon the proper construction to be placed upon the proviso to S. 54 (1) of the Act. That proviso is in these terms :

" Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class."

It was contended by the opponents of this scheme that there were certain special privileges attached to or belonging to the ordinary class of shareholders of the company, and that accordingly their rights could not be affected, unless a resolution had been duly passed and confirmed as a special resolution as required by the proviso of the section. It is admitted that there was no confirmatory meeting to confirm as a special resolution, but merely an extraordinary resolution passed by the ordinary shareholders. It is further admitted that if this contention of the opponents of this scheme is right, the petitioners are out of Court

Mr. Desai contended that there was no special privilege attached to or belonging to the class of ordinary shareholders. He said that the meaning of Cl 5 of the memorandum of association of the company was merely this, that certain preference rights were given thereby to the preference shareholders, and that the clause did not in terms confer any right upon the ordinary shareholders. They got, he said, what was not expressly conferred by that clause on the preference shareholders, but it could not be called a special right.

The opponents of the scheme, on the other hand, contended, among other things, that Cl. 5 of the memorandum of association undoubtedly conferred upon the ordinary shareholders, at any rate by implication, certain special privileges. They pointed out that under that clause the preference shareholders were given

a fixed cumulative preferential dividend at the rate of 7½ per cent. per annum on the capital for the time being paid up thereon, and the right in a winding-up to payment off of capital and arrears of dividend in priority to the ordinary shares, but that they were expressly deprived of "any further right to participate in profits or assets." They contended that this involved by implication the conferring upon the ordinary shareholders of the special privilege of participating to the exclusion of the preference shoreholders in any surplus assets in a winding-up. They pointed out that but for this exclusion of the preference shareholders to share in a winding-up in surplus assets, the preference shareholders would have been entitled to share in such surplus assets pari passu with the ordinary shareholders. Accordingly, they argued that this exclusion of the preference shareholders from participating in surplus assets impliedly conferred upon the ordinary shareholders the special privilege of taking the whole of those surplus assets. In my opinion this is a special privilege attached to or belonging to the ordinary shareholders of the company by virtue of the memorandum of association of the company.

Mr. Desai referred to *In re Stewart Precision Carburettor Co. Ltd.*(3) In that case the capital of the company was fixed by the memorandum of association at £10,000 divided into 4,000 six per cent cumulative preference shares of £1 each, and 6,000 ordinary shares of £1 each. The preference shares were preferential both as to interest and repayment of capital, and of the authorized capital 2,000 perference shares and 6000 ordinary shares had been issued. By a special resolution of the company it was resolved that the existing capital of the company should be re-organized by the division of the preference shares into 3000 A shares of £1 each entitled to certain rights, and 1,000 ordinary shares of £1 each ranking pari passu with the existing ordinary shares. No meeting of the ordinary shareholders had been called, aud the question was whether the Court could accede to the prayer of the petition seeing that there had been no meeting of the. ordinary shareholders. The petitioning company relied on the fact that by the memorandum no special privilege was attached to the ordinary shares and none had been, therefore, interfered with. In the note of the judgment of Eve, J., it was said:

"Undoubtedly the re-organization of the company's capital did interfere with the rights of the ordinary shareholders in that it transferred from them the right to participate in the surplus profits to the extent to which the preference shareholders were given an interest in such surplus profits. But his Lordship did not think that it could be strictly said that this right of the ordinary shareholder to receive such surplus profits was a preference or special privilege attached to or belonging to the class of ordinary shareholders, within the meaning of the section."

As to whether that decision was right or wrong, I do not myself think it necessary to express any opinion. I am satisfied in the present case, as I have said, that by the terms of Cl 5 of the memorandum of association of the company, there were special privileges attached to or belonging to the ordinary shareholders. By the present scheme the whole of these rights are completely wiped out Indeed, the class itself is wiped out. I am, therefore, clearly of opinion that before the class of ordinary shareholders could be wiped out, and before the special privilege,—which I hold were conferred npon them by Cl. 5 of the memorandum of association,—could be interfered with, it was certainly necessary that any extraordinary resolution passed at a separate meeting of the ordinary shareholders should have been confirmed as a special resolution as required by the proviso to S. 54 (1) of the Act. If I am right in my view on this part of the case, again this petition must fail

If, as I hold, the scheme does not fall within S 54 of the Act, or, if contrary to my opinion, it does fall within it, and S. 54 has not, as I hold, been complied with, then it is admitted that the company has not purported to proceed under the only available section, namely, S. 153 of the Act.

A further question which was hotly contested, and upon which I will shortly express my opinion, was the question whether the extraordinary resolution moved at the meeting of the company held on 17th January 1927, was passed by the requisite majority having regard to the terms of S, 81 of the Act? The relevant provisions of that section are as follows:

(3) [1912] W. N. 100.

"81 (1). A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2). A resolution shall be a special resolution when it has been:—

(a) passed in manner required for the passing of an extraordinary resolution ; and

(b) confirmed by a majority of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting of which notice has been duly given and held after an interval of not less than fourteen days, nor more than one month. from the date of the first meeting.

(3). At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed, a declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

In this connexion it must be borne in mined that such a resolution must be passed for the purpose both of Ss. 54 and 55 of the Act as a preliminary to the passing of a confirmatory resolution. I do not think it necessary to deal with the figures relating to this question because I have come to the couclusion that by reason of sub-S. (3), S. 81, the declaration of the chairman of the meeting on the show of hands that the resolution was carried is conclusive evidence of that fact without proof of the number or proportion of the votes recorded in favour of or against the resolution, no poll having been demanded. The declaration of the chairman, as appears from the company's minute book. Ex. 5, shows that fifty-nine votes were cast in favour of the resolution and thirteen were against. The opponents of the scheme desired to be permitted to show from the minute book itself that at least 138 persons were present at the meeting, and to found thereon an argument that the declaration of the chairman was quite unjustified and uuwarranted, and that in fact the resolution was not properly passed. In answer to this contention, Mr. Desai submitted that if the opponents were entitled to go behind the declaration of the chairman, he ought to be entitled to call the secretary of the company to prove what upon his instructions he said was the fact, namely, that a large number of persons left before the voting took place, and he was prepared to contend that upon the true construction of S. 81 (1) of the Act, the proper time for calculating the number of persons present at the meeting for the purpose of the three-fourths majority, was the time at which the resolution was proposed, and that it was not right to have regard in calculating that majority to the number of persons who might at any time have been present from the beginning of the meeting, even though they had left before the resolution was put to the vote. In my opinion, my duty is to have regard to the express words of S. 81 (3) of the Act in the first instance, regardless of any English decisions that there may be on the corresponding section of the English Act Now sub-S. (3) provides that :

"... declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution."

The words are " conclusive evidence " There are no words which say, unless it can be shown from the minute book of the company or the proceedings or the declaration of the chairman, that he was wrong in law or mistaken in fact The words are "conclusive evidence, unless a poll is demanded." I am, therefore, of opinion that I must give effect to the express words of sub-S. (3) and hold that where the chairman has declared the resolution carried, the declaration is conclusive evidence of the fact, unless a poll is demanded. No poll was demanded in this case. I, therefore, hold that the declaration of the chairman was conclusive. This being my view of the section, unaided by any decisions on the corresponding English section, I may nevertheless in passing refer to the case of *Arnot* v. *United African Lands, Ltd.* (4) and to the case of *In re Hadleigh Castle Gold Mining Co , Ltd* (5) ; decisions upon the corresponding section of the English Companies Act, and say that in my view those are authorities which support the construction which I have placed upon the words in sub-S. (3) of S. 81.

(4) [1901] 1 Ch. 518=70 L. J. Ch. 306=17 T. L. R. 245=3 Manson 179=49 W. R. 322.

(5) [1900] 2 Ch. 419=69 L. J. Ch. 631=16 T.L.R. 468=8 Manson 419=83 L.T. 400.

Mr. Munshi relied on the case of *In re Caratal (New) Mines, Ltd.* (6). There the chairman said : " I will now put the resolutions for the reconstruction." There was then a show of hands, on which he said :

" those in favour six ; those against twenty-three, but there are 200 voting by proxy, and I declare the resolutions carried as required by Act of Parliament."

Buckley, J., took the view, in construing the corresponding section of the English Act, that where the declaration of the chairman shows on the face of it that the statutory majority has not voted in favour of the resolution, such a declaration was not conclusive. He pointed out that (p. 500) :

" It has been held that, if the chairman by his declaration affirms erroneously or without sufficiently ascertaining the facts, but bona fide that a resolution has been carried, the Court cannot go behind that declaration,"

and he referred to the two cases which I have above referred to. But he went on to say that in his view (p. 501) :

" those decisions do not apply to a case where the chairman by his declaration finds the figures and erroneously in point of law holds that the resolution has been duly passed. That is what the chairman has done in the present case."

I do not think it necessary to express my own opinion whether, having regard to the words of S 51, English Act, that decision was right or wrong. It is enough for me to say that in the present case there was nothing on the face of the chairman's declaration which showed that he was taking into account something which he was not entitled to take into account, as according to the view of Buckley, J., was the fact in the case which he decided. Therefore, in any event, that case in my judgment is distinguishable from the present. But I prefer to construe the words of S. 81 (3) as I have done, unaided by any authority, because they seem to me to be plain upon the face of it.

A further point was raised by the opponents as to whether the confirmatory resolution purporting to have been passed by the company at the meeting held on 2nd February 1927, was in any event a valid resolution ? An argument was founded upon this that from figures supplied by the petitioners in the scrutineer's list of votes recorded (Ex. 12) at that meeting, one Smith-Wright recorded 1,520,133 votes. He was authorized to attend and vote at the meeting as appears from Ex. 11 by the Bombay Trust Corporation Limited, which held not merely the 1,520,133 ordinary shares in the company, but some nineteen lacs of preferences shares. Para. 15 of the petition states that on the taking of the poll which was demanded at this confirmatory meeting, 1,638,047 votes were recorded for the resolution and 338,745 votes against it. The opponents of the petition contended that inasmuch as the said Smith-Wright was present at the meeting, the nineteen lacs of preference shares held by the Bombay Trust Corporation Limited must be calculated in considering whether there was a majority of those present within the meaning of S. 81 (2) (b) of the Act. They drew attention to Art. 79 of the articles of association which provides that upon a poll being taken, every member present in person or by proxy shall have one vote for every share held by him.

They also drew attention to S. 81, sub-S (6) of the Act. They contended that as Smith-Wright was undoubtedly present at the meeting, these ninteen lacs of votes must be brought into the calculation for the purpose of ascertaining whether there was a majority, and if they were so brought in, the 1638047 votes recorded for the resolution was not a requisite majority On the other hand, Mr. Desai contended that if the opponents of the scheme were entitled to maintain this argument, he was entitled to show, if necessary, that the figure put down in the scrutineer's list (Ex. 12) of 15,20,133 was erroneous, and that the ninteen lacs of preference shares ought also to have been inserted. Mr. Desai pointed out that Smith-Wright in virtue of Ex. 11 represented the Bombay Trust Corporation Limited. He could only do what the Corporation could do. That Corporation, he submitted, could not split its vote. It could only give one vote, the value of which would be calculated of course by virtue of the number of shares held by the voter, and he contended that inasmuch as it was plain from the scrutineer's list that Smith-Wright had given the vote of the Corporation in favour of the resolution, he must have intended to cast the whole

(6) [1902] 2 Ch. 498=71 L. J. Ch. 883=18 T. L. R. 640=9 Manson 414=50 W. R. 572=87 L. T. 487.

of the votes held by that Corporation in favour of the resolution. In my opinion, this is a sound argument, and it is not open to the respondents to go into the question of figures as they seek to do. I, accordingly, hold that the confirmatory resolution passed at the company's meeting held on 2nd February 1927, was validly carried

Certain arguments were addressed to me upon the merits of the scheme. Having regard, however, to my view that the Court cannot be asked to sanction this scheme for the reasons I have given above, I do not think it necessary to say anything upon the merits of the scheme For the reasons given by me, this petition will be dismissed. Company's costs, and costs of brief of one supporting shareholder, and two sets of costs allowed to the opponents of the petition, to come out of company's assets, and to be taxed as a long costs

S N./R.K. *Petition dismissed.*

A. I. R. 1929 Bombay 46

FAWCETT, AG C. J. AND MURPHY, J.

Secy. of State—Defendant—Appellant.

v.

Vasudeo Venkatesh Shetti and *another*—Plaintiffs—Respondents.

First Appeal No. 224 of 1926, Decided on 26th July 1928, from decision of Dist. Judge, Karwar, in Suit No. 8 of 1925.

(a) Bombay Land Customs Act (1857), S.8—"At any station etc.," must be read after "passed or attempted to be passed" in para.2—S. 8 does not cover case of goods whose conveyance is complete.

Para. 2, S. 8 must be read as if the words "at any station established for the levy of duties and passing of goods" followed the words "passed or attempted to be passed." It is doubtful whether it would cover a case of goods whose conveyance from foreign territory had been completed so that they could not be said to be in the process of being passed or attempted to be passed. [P 48 C 2]

(b) Bombay Land Customs Act (29 of 1857), S. 14—S. 14 is confined to officer at station under Act.

Section 14 is in express terms confined to an Officer of Customs employed at a station established under the Act. It does not cover the case of the seizure by another officer, who is not so employed. [P 49 C 1]

(c) Bombay Land Customs Act (1857), S. 21—Good faith should not be brought in construing S. 21—S. 21 should be confined to seizure proper under the Act.

Question of good faith cannot be brought into the construction of S. 21. That section must be confined to cases where goods have been properly seized as liable to confiscation or properly detained as under-valued, that is to say seized or detained under circumstances at least approximating to those where the Act authorized such seizure or detention. The words "under this Act" must be given due weight. [P 49 C 2]

P. B. Shingne—for Appellant.

G. R. Madbhavi—for Respondents.

Fawcett, Ag. C. J.—The facts out of which this appeal arises are fully stated in the judgment of the Court below, and need not be repeated, except that it should be mentioned that the quantities of matches, which are alleged to have been unjustifiably seized, were in the shops of the plaintiffs at Ankola, which is a sea-port, a long way from the frontier of the Portuguese territory, and which is not one of the stations established under the Bombay Land Customs Act (29 of 1857). The Superintendent of Salt Revenue, Goa Frontier and Kanara, passed an order confiscating these matches, and the main questions are: (1) whether the suit is barred under the provisions of S 21 of that Act because there had been a proper adjudication by the special tribunal set up in that Act for adjudicating upon confiscations, etc. and (2) whether, if the suit is not barred, the order of confiscation was ultra vires, not being authorized by the Act.

The questions at issue turn mainly upon the proper construction of Ss. 8, 14, 20 and 21 of the Act, and these questions have been fully discussed in the judgment of the Court below.

Taking first S. 8 the contention of the learned Government Pleader is that para. 2 of that section is not restricted, as the lower Court has held, to the case of goods which are passed or attempted to be passed at any station established under the Act for the levy of duties and passing of goods, but applies to a case of goods being passed or attempted to be passed at any place whatsoever. The District Judge has held that the natural interpretation to be given to the word "passed" in this para. 2 is the same as is attached to it in para. 1 of that section, namely,

"passed at any station established for the levy of duties and passing of the goods."

That certainly is, in my opinion, the natural interpretation, because para. 2 is, under the ordinary rules of construction, to be read in relation to the context of para. 1; and it is clearly legitimate under ordinary rules of construction to read in

as an ellipsis after the word "passed" in para. 2, the words "at any station," etc., that follow that word in para. 1. The reference in para. 2 to "such an application in writing as is above described" brings in the applications that is mentioned in para. 1; and with such a close connexion between the two, the draftsman might have considered it unnecessary to add the words "at any station established for the levy of duties and passing of goods" after the word "passed" in para. 2, because the sentence sufficiently shows that it refers to cases where goods have been brought to be passed at such a station and such an application has to be made. But of course, there may be other parts of the Act which might justify a different construction of this para. 2 I have carefully studied the Act with a view to see whether there is anything that would justify this, but I fail to find anything sufficient for not adopting the natural construction that I have already mentioned. This is an old Act, and its main provisions are based upon a still older Act, which was passed in Madras in 1844; and the conditions in those days were not quite the same as they are now. The legislature perhaps would not have felt the need for passing an enactment to prevent smuggling of goods to the same extent as circumstances may require it now-a-days; and the general scheme of the Act seems to me to be very simple, namely, there are certain customs-stations established under S. 4 and for the levy of customs-duties on goods exported by land to, or imported by land from, foreign territories, which under the repealed S. 2 meant

"Foreign European settlements situated on the line of coast within the limits of the Presidency of Bombay,"

and under the repealed S. 3 could be extended to cover Native States. In order to facilitate the levy of such duties, provision is made by S. 6 for power to notify particular roads or passes, by which alone goods coming from foreign territory into British India shall be allowed to pass. That section also says that after due notice goods which may be brought to any station established on other roads or passes than those so prescribed shall be detained and shall be liable to confiscation. S. 7 covers the case of goods attempted to be smuggled across any frontier guarded by stations between sunset and sunrise. That contemplates action by officers at the stations which have been established on or near the frontier. Then we come to S. 8, which says that when goods are brought to be passed at any station that has been so established, a written application about the goods must be made and that must contain certain particulars. Para. 2, as I have already said, would ordinarily mean that if the goods are brought to a station and they are attempted to be passed without such an application, then they are liable to be seized and confiscated. There might, for instance, be goods concealed in carts; or there might be no attempt at concealment but the goods might be brought at a time when it was thought that the officer in charge of the station would not be on the look out. Then in S. 9 there is a provision that if there is a misdescription of goods brought to be passed at any such station, they shall be liable to confiscation Ss. 10 to 13 deal only with the question of fixing the value, etc., of goods for the purpose of levying the duties Then comes S. 14, under which the officer at the station in which the goods are passed has to grant a certificate of the payment of duty. Para. 2 of that section authorizes

"any officer of customs employed at a station established under this Act"

to require production of that certificate, and says that if the goods are unaccompanied by a certificate or are found on examination not to correspond with the specification contained in the certificate produced they shall be detained and shall be liable to confiscation. That no doubt does contemplate a case of an officer who is not necessarily employed at the station where the goods were passed; he may, for instance, be employed at a station on a road or pass other than those by which alone goods may pass into or out of foreign territory. But he has to be a public officer employed at a station established under the Act. It was, for instance, open to the Local Government to prescribe that the Customs office at Ankola should be such a station; but admittedly that has not been done. This section does not authorize any officer of customs, wherever he may be employed, to exercise this particular power, but only an officer of customs employed at a station established under the Act. The following Ss. 15 to 19 contain nothing relevant to the point that I

am considering, except that S. 16 refers to the case of a station officer permitting goods liable to duty to pass without payment of duty by any road or pass other than by those prescribed. That again contemplates the case of an officer of a station which is established under the Act. Then S. 20 empowers certain officers to adjudicate confiscations. But this power is limited to cases

"in which under this Act goods are liable to confication."

That section can perhaps best be discussed later on; but at any rate, it does not extend the powers of confiscation that are conferred by the preceding sections. Then S. 21 provides for restoration of forfeited goods by the adjudicating officer on certain terms and conditions that can best be discussed later. But just as in the case of the preceding section, this does not extend the power conferred on a customs-officer to detain and confiscate the goods, and it has a somewhat limited application. I can see nothing which is intended to authorize action in regard to examination, detention and seizure of goods by customs-officers generally wherever they may be employed, for instance, customs-officers at a sea-port, whose main duties are to see that goods arriving by sea are not imported without payment of the duty or that prohibited goods are not allowed to be imported by sea. There is no reference to such officers in this self-contained Land Customs Act.

The preamble can of course be referred to for the purpose of clearing up any ambiguity but that does not help the Government case. It merely refers to the expediency of making better provision for the collection and management of land customs on certain foreign frontiers of the Presidency of Bombay. That supports the contention that the scope of the Act is mainly directed to action on or near the frontier of British India and foreign territory and that the Act does not contemplate action by a customs-officer a long way from that frontier,at any rate unless there is a customs-station established under the Act, where those customs-officers are employed, so as to bring their duties within the range of the Act. There is, for instance, no such wide power of detention and confiscation of goods as is conferred in the case of excise articles in the possession of any person without a license by S. 36, Cl.(d). and Ss. 43 and 54, Bombay Abkari Act, 5 of 1878. Nor is there a general provision in this Act that goods that have been attempted to be passed or have been passed without payment of the prescribed duty shall be liable to seizure and confiscation wherever they may be found. This Act has recently been supplemented by the Government of India Act, 19 of 1924, which received the assent of the Governor-General on 30th September 1924, but which only came into force on such date as the Governor-General-in-Council might, by notification in the Gazette of India, appoint. If that Act had applied to the seizure complained of in this case, then possibly that seizure might be justified by that Act, which is considerably wider than the Act of 1857. For instance S. 7 provides that :

"any person who conveys or attempts to convey to or from any foreign territory or to or from any land customs-station any goods by a route other than the route, if any, prescribed for such passage under this Act, or aids in so passing or conveying any goods, or, knowing that any goods have been so passed or conveyed, keeps or conceals such goods or permits or procures them to be kept or concealed, shall be liable to a penalty . . . . . and any dutiable goods in respect of which the offence has been committed shall be liable to confiscation."

Accordingly if the plaintiffs were proved to have kept goods which to their knowledge had been smuggled from Goa territory without a permit, they would be liable to punishment under this section and the goods would be biable to confiscation. But we have no provisions of the same kind in the Act of 1857, which must be interpreted without undue straining.

It seems to me, therefore, that S. 8, should be construed in this natural meaning that I have mentioned, and, accordingly, I agree with the view taken by the lower Court that the second paragraph of S. 8 must be read as if the words :

"at any station established for the levy of duties and passing of goods"

followed the words "passed or attempted to be passed," so that, it does not cover the action of the customs-officer at Ankola in seizing the matches I may add that, even supposing that this second paragraph is read in the wider meaning that the learned Government Pleader has asked us to adopt, there would still be a doubt in my mind as to whether it would cover a case of goods whose conveyance from foreign territory had been completed, so that they could not be said to

be in the process of being passed or attempted to be passed. The goods were not actually "passing," but were inside the plaintiffs' shops, when they were found by the customs-officer who seized them. Therefore, so far as the merits of the case are concerned, I see no sufficient reason to differ from the view taken by the lower Court that the seizure was wrongful.

Section 14 has also been referred to as one that would justify the seizure. I have already mentioned that that section is in express terms confined to an officer of customs employed at a station established under the Act, and, therefore, it would not cover the case of the seizure by this particular officer, who was not so employed. I entirely agree on this point with what the District Judge has said in his judgment.'

We have next to consider, whether in spite of that the suit is barred for the reasons I have already mentioned. S 20 is the main section authorizing adjudication, and (as I have said) is confined to cases :

"in which under this Act goods are liable to confiscation."

The sections of the Act under which goods are liable to such confiscation are Ss. 6, 7, 8, 9, and para. 2 of S. 14, and in my opinion, this section can only operate in cases which properly fall under those sections. For the reasons I have given, this case does not fall under any of those sections, including Ss. 8 and 14 which have been relied upon, and accordingly the suit is not barrrd on the principle that has been followed in *Ganesh Mahadev* v. *Secretary of State* (1). In that case, no doubt, the question was whether the adjudication was a proper one. The present case is really stronger because there has been an adjudication in a case which is not one of those where such an adjudication is authorized. S. 21 is confined to a case where any goods shall be seized as liable to confiscation or detained as under-valued under this Act. It might possibly be construed as covering cases where goods are bona fide, though wrongly, seized as liable to confiscation by a customs officer. In the present case, I am ready to believe that the action of the customs officer at Ankola was bona fide, but it is a case, where, to use the phrase in *Spooner* v. *Juddow* (2), the officer in question "absurdly" believed that he was acting in pursuance of statutes and according to law. He no doubt followed past practice, which had the sanction of his superior officers ; but it cannot be said that, if he used proper intellignce, he could reasonably believe that he was authorized by the Land Customs Act of 1857 to act in the way he did. But I do not think that the question of good faith can be brought into the construction of S. 21. That section must be confined to cases where goods have been 'properly seized as liable to confiscation or properly detained as under-valued,' that is to say, seized or detained under circumstances at least approximating to those where the Act authorized such seizure or detention, The words "under this Act" must be given due weight. Therefore, though otherwise the payment of the sums fixed in the adjudicating officer's order would operate as an acceptance ef the terms and conditions laid down by the adjudicating officer, so as to bar any action for recompense or damage on account of the seizure and detention of the plaintiffs' goods, yet, inasmuch as there was not an authorized adjudication upon which to base a subsequent offer under S. 21, that section cannot be availed of by Government. I agree, therefore, with what the District Judge has held on this point.

To avoid misunderstanding, I may add that I do not in any way intend to say that the adjudication order was not otherwise a proper one. All I decide is that, unfortunately for Government Act 29 of 1857 does not justify the action that was taken in this case. If such action is to be justified, either the Act must be amended or other provisions of law availed of. Accordingly I would dismiss the appeal with costs.

Murphy, J.—In my opinion also the judgment and decree of the learned District Judge of Kanara are correct and must be confirmed and the appeal dismissed.

The findings in the suit, so far as they are relevant to the point raised in the appeal, were (1) that the order of confiscation was wrong and unjustifiable, and the procedure adopted was illegal, and (2) that there was no adjudication within

(1) [1918] 43 Bom. 221=49 I. C. 427=21 Bom. L. R. 27.

(2) [1848-50] 4 M. I. A. 353=6 Moo. P. C. 257=1 Sar. 363 (P.C.).

the meaning of the Act, and the jurisdiction of the Court is not barred by its provisions. The adjudicating officer's proceedings purported to have been held under S. 8, Land Customs Act, but it does not appear to have been a proper adjudication under the section. This section seems to contemplate, not a seizure of goods on suspicion of having been smuggled, at any place, irrespective of that place being a station established for the levy of duties and the passing of goods or not, but a seizure at one of the places indicated under the Act. The frame of the section, as I read it, is to provide for goods being brought to a station so established. Admittedly the place where the goods in this case were seized is not such a station. It is further provided that there shall be a written application accompanying such goods and asking for permission to pass them, the application being required to contain a true description of the goods with a statement of their value and the marks, numbers, and description of the packages necessary for their being identified. Para. 2 of the section clearly refers to the language used in the para. 1. It says :

"If any goods shall be passed or attempted to be passed without such an application in writing as is above described, they shall be liable to be seized and confiscated."

The whole construction of the section seems clearly to contemplate proceedings at one of the stations established under the Act and not proceedings in respect of goods seized at any place whatever on suspicion of having been smuggled.

The next section under which the seizure of these goods has been sought to be justified is S. 14. This refers to a certificate of payment of duty. It requires that when goods are passed "at any such station"—meaning a station established under the Act—the officer authorized to receive customs duties shall grant a certificate of the payment of such duty or (if the case so require) of the goods having been passed free of duty. Para. 2 empowers an officer employed at a station to require any person in charge of dutiable goods which have been passed across the frontier, to produce the certificate granted for such goods ; and any goods which are unaccompanied by a certificate or which on examination do not correspond with the specification contained in the certificate produced, shall be detained and shall be liable to confiscation. The language of this section also seems to contemplate the detention and confiscation of goods by an officer appointed at a station determined under the Act. I think that it cannot be applied to goods found at any other place by an officer not so appointed, as was the case in this instance.

The only other point I need refer to is the application of S. 21 of the Act. This provides that when any goods have been seized as liable to confiscation, or detained as under-valued, under this Act, the adjudicating officer may order the same to be restored to the owner, on such terms and conditions as he may think fit to direct ; and where the owner of the goods accepts these terms and conditions then he shall not have or maintain any action for recompense or damage on account of such seizure or detention. The learned Judge's view as to the application of this section is that had there been a proper and legal adjudication, this provision would have been a good defence to the suit. But in his view there was no legal adjudication. For the reasons already stated as to the inapplicability of Ss. 8 and 14 to the circumstances of this case, I agree that there was here no adjudication according to law, and it follows that S. 21 is not available to Government as a defence.

I agree with the learned Chief Justice that the District Judge's decree should be confirmed, and that the appeal should be dismissed with costs.

R.K. *Appeal dismissed.*

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FAWCETT AND MIRZA, JJ.

Keshavlal Mohanlal Jhaveri and *others* —Applicants.

v.

Bai Lakshmi—Opponent.

Civil Revn. Appln. No. 83 of 1928, Decided on 5th April 1928, from order of Jt. Sub-Judge, Ahmedabad, in Civil Suits Nos. 347 and 471 of 1925.

*** Arbitration—Plaintiffs appearing under protest—Arbitrators returning proceedings to Court—Court writing to arbitrators with request to resume work, protest being unjustified—Further proceedings of arbitration were not vitiated as Court did not compel them.**

Certain arbitrators returned proceedings to Court on the ground that plaintiffs appeared

before them under protest. The Court wrote to them requesting to finish the work and saying that the protest did not matter, it was unjustified and that the Court had confidence in them.

Held: that the writing did not amount to an order forcing or compelling arbitrators to resume their work. It was simply a request to reconsider their decision and to resume the arbitration if they were agreeable to do so. And so the writing does not vitiate further proceedings in arbitration: 7 *All.* 20, *Dist.*; 10 *All.* 137 and 23 *W. R.* 429 and *A. I. R.* 1921 *All.* 361, *Rel. on.* [P 51 C 1]

H. C. Coyajee and *H. V. Divatia*—for Applicants.

G. N. Thakor and *M. K. Thakor*—for Opponent.

Judgment.—We have heard full arguments in this matter but the point seems to us to be a simple one, and depends upon the interpretation we are to put upon the writing sent to the arbitrators by the learned Judge. The application made by the plaintiffs to the arbitrators was that certain suits having been sent to the arbitrators and fixed by them for taking evidence that day the applicants were present under protest and wished that arbitrators would note that fact. On that application the arbitrators made the endorsement.

"As the plaintiff gives the application as stated above, we do not think it proper that we should decide these matters under these circumstances. Therefore, we return the proceedings."

On receipt of the papers and proceedings the learned Judge returned them with a note as follows:

"The arbitrators are requested to finish the work. The protest does not matter. It is unjustified. The Court has confidence in the arbitrators. The arbitrators should not retire for that would mean that the plaintiff succeeds in his tactics. If not for anything else at least for the sake of principle and in order to put down such tactics they ought to continue.

After receipt of this note the arbitrators resumed their arbitration and fixed a meeting to proceed with the arbitration from a point where they had left it At that meeting the applicants appeared by their pleader without any protest, and applied for an adjournment. That application was acceded to, and the proceedings were adjourned to 18th March, Meanwhile on 16th March 1928, the applicants took out this rule and obtained an interim stay of the arbitration proceedings. The interpretation we put upon the writing of the learned Judge is, that it is not an order which forces or compels the arbitrators to resume the arbitration against their own wish. It is in the nature of a request made to the arbitrators to reconsider their decision and to resume the arbitration if they were agreeable to do so. Had it been an order compelling the arbitrators against their will to resume the arbitration, the case would fall under the ruling in *Shibcharan* v. *Ratiram* (1) and the further proceeding in arbitration would be vitiated. But that is not the case here. In our opinion the present case falls under the rulings in *Har Narain Singh* v. *Bhagwant Kuar* (2), *Joymungal Singh* v. *Mohun Ram* (3) and *Basdeo Mal Gobind Prasad* v. *Kanhaiya Lal Laxmi Narain* (4). In the view we have taken, no question of jurisdiction arises, and the application is, therefore, dismissed with costs. The interim stay granted is dissolved and the rule discharged with costs.

S.N./R.K. *Application dismissed.*

(1) [1884] 7 All. 20=(1884) A. W. N. 212.
(2) [1888] 10 All. 137=(1888) A. W. N. 28.
(3) 23 W. R. 429.
(4) A. I. R. 1921 All. 361=43 All. 101.

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PATKAR AND BAKER, JJ.

Bhogilal Tarachand Javeri and *others* —Plaintiffs—Appellants.

v.

Jethalal Motilal Kumbhar — Defendant—Respondent.

Second Appeal No. 437 of 1926, Decided on 18th July 1928, from decision of Joint Judge, Ahmedabad, in Appeals Nos. 249 and 228 of 1923.

*** (a) Civil P. C., O. 6, R. 17—*S* purchasing property from *P*—*P* wrongfully receiving mesne profits—*S* selling to *Y*—*Y* suing *P* making *S* pro forma plaintiff but praying decree in his favour only—*S* applying for amendment after his claim for mesne profits due before transfer to *Y* was time barred—Amendment having no legal bar could be granted although claim was time barred—Civil P. C., O. 1, Rr. 1 and 4, and O. 2, R. 3.**

A person *S* purchased certain property from *P*, the latter however remaining in possession and wrongfully receiving rents and mesne profits. *S* then sold the property to *Y* who sued *P* for possession and mesne profits joining *S* as pro forma plaintiff. In the plaint no relief was claimed in favour of *S* and it was prayed that the decree should be passed in favour of *Y* alone. An amendment of plaint for relief in favour of *S* was applied for after his claim had become time barred.

Held: that O. 1, R. 4, did not apply and a decree could not be passed in favour of *S* for rents due before transfer to *Y* without an amendment. [P 53 C 1]

Held further: that the amendment would not offend either against O. 1, R. 1, or against O. 2, R. 3; and could be granted although the application for it was made after the claim of *S* was barred by time: *A.I.R.* 1921 *P.C.* 50 (*P.C.*); 33 *Bom.* 644 and 36 *Mad.* 378, *Rel. on.* [P 53 C 1]

(b) Transfer of Property Act, S. 8—Rents accruing before transfer are not legal incidents.

Legal incidents of property include the rents and profits thereof accruing after the transfer, but not the rents accruing due before the date of transfer. [P 53 C 1, 2]

H. V. Divatia—for Appellants.

R. J. Thakore—for Respondent.

Patkar, J.—This suit was brought by the plaintiffs for an injunction to restrain the defendant from interfering with the plaintiffs' possession and from collecting rent from the tenants in occupation of the property, and for recovering the rent due in respect of the half-share of the property. It is not necessary to go into the detailed facts of the case. It is sufficient for the purpose of this appeal to state the necessary facts.

Plaintiff 2 was entitled as a purchaser to a moiety of the property belonging to one Pitambar and was entitled as a mortgagee with respect to the other moiety belonging to Pitambar's nephew, the defendant Jetha. The defendant sought to disturb the possession of the plaintiff as a purchaser of the moiety and as a mortgagee of the remaining moiety. Plaintiff 2 acquired the rights as purchaser with respect to Pitambar's moiety on 30th July 1918, and as a mortgagee with regard to the other moiety on 24th January 1916. Plaintiff 2 established his right to possession on the strength of his purchase with regard to a moiety and on the strength of the mortgage with regard to the other moiety. On 3rd September 1920, plaintiff 2 sold to plaintiff 1 both his rights as a purchaser and as a mortgagee. The defendant disturbed the possession of the plaintiffs and took the profits to which plaintiff 2 was entitled by virtue of his purchase with regard to Pitambar's moiety. The suit was brought by both the plaintiffs and a decree was asked for in favour of plaintiff 1. The learned Subordinate Judge held that the defendant was accountable for Pitambar's share of the rent received by him, to plaintiff 1, but only from 3rd September 1920, that is, the date of the sale-deed of plaintiff 2 in favour of plaintiff 1, to 21st January 1921, when the plaintiffs obtained a temporary injunction. The claim with regard to Pitambar's share of the profits received by the defendant from 30th July 1918, to 3rd September 1920, was dismissed on the ground that plaintiff 1 was entitled to the rent of Pitambar's share from the date of the sale-deed and the decree was asked in favour of plaintiff 1 and not in favour of plaintiff 2, who alone was entitled to the rent received by the defendant Jetha. Plaintiff 1 was allowed the rent of Pitambar's share from 3rd September 1920 to 21st January 1921, and the Subordinate Judge passed a decree in favour of plaintiff 1 to the extent of Rs. 306-10-8. On appeal, the lower appellate Court held that the net rent was Rs. 1,500 instead of Rs. 1,600 and awarded the claim in favour of plaintiff 1 to the extent of Rs. 230. Both the plaintiffs have appealed.

It is urged on behalf of the appellants that the lower appellate Court erred in reducing the amount from Rs. 306-10-8 to Rs. 230. We are of opinion that the finding of the lower appellate Court is on a question of fact, and is binding on us in second appeal, and plaintiff 1 is not entitled to anything more than Rs. 230 as found by the lower appellate Court.

It is urged on behalf of plaintiff 2 that the defendant has admittedly received the rent of Pitambar's share to which he was not entitled from 30th July 1918, to 3rd September 1920, and a decree ought to have been passed in favour of plaintiff 2 under O. 1, R. 4, Civil P C. It is urged on behalf of plaintiff 2 that a decree can be passed in favour of plaintiff 2 without an amendment under O. 1, R. 4, and if a decree cannot be passed in favour of plaintiff 2 without an amendment, it is urged that plaintiff 2 should be allowed to amend the plaint. An application was made to the lower Court to allow amendment of the plaint. It is urged on behalf of the respondent that the defendant clearly raised an objection in the written statement that plaintiff 2 had not transferrred his rights to plaintiff 1 to collect the rent which accrued due for the half share of Pitambar sold by plaintiff 2 to plaintiff 1 before the date of the transfer, and, therefore, plaintiff 1 is not entitled to the share of the rent which accrued due before the date of the transfer; that the

decree was asked for in favour of plaintiff 1 and 2 was made merely a formal party; that O. 1, R. 4, could not apply to the present case, and that the amendment should not be allowed as it would offend against the provisions of O. 1, R. 1, and O. 2, R. 3, and further that the amendment should be disallowed on the ground that the claim was barred by limitation at the time when the application was made to the lower Court on 11th November 1925, and reliance is placed on the decision in the case of *Kisandas Rupchand* v. *Rachappa Vithoba* (1).

Under S. 8, T. P. Act, a transfer of property passes forthwith to the transferee all the interest which the transferrer is then capable of passing in the property and in the legal incidents thereof, and such legal incidents include the rents and profits thereof accruing after the transfer. Plaintiff 1 is, therefore, entitled only to the rents and profits of Pitambar's share after 3rd September 1920, and he is not entitled to the rents accruing due before the date of transfer. In the plaint a decree was sought for in favour of plaintiff 1 alone, and, therefore, the lower Courts were right in disallowing the claim with regard to the rent before the date of the transfer in favour of plaintiff 1. We are, however, of opinion that under the circumstances no decree can be passed under O. 1, R. 4, in favour of plaintiff 2 without an amendment, for a decree was not asked for in favour of plaintiff 2. If both the plaintiffs had asked for the amount of the rent in respect of Pitambar's share from the date of the purchase till the date of the temporary injunction, a decree could have been passed in favour of plaintiff 2 in respect of the rent from the date of the purchase till the date of the transfer, and in favour of plaintiff 1 in respect of the rents due from the date of the transfer to the date of the temporary injunction. The plaint in this case asked for a decree in favour of plaintiff 1 and plaintiff 2 was merely made a formal party. We think, therefore, that O. 1, R. 4, does not apply and a decree cannot be passed in favour of plaintiff 2 without an amendment.

The question is whether an amendment of the plaint should be allowed. There is no doubt that the defendant has received the amount of the rent in respect of Pitambar's moiety to which he was not entitled. It is urged on behalf of the respondent that the amendment, if allowed, would offend against the provisions of O. 1, R. 1. We do not think that the amendment, if allowed, would offend against the provisions of O. 1, R. 1, for there was one cause of action against the defendant in respect of the wrongful recovery of Pitambar's share from the date of the purchase till the date of the temporary injunction, and the right of relief in respect of that cause of action can be alleged to exist severally in favour of plaintiff 1 and plaintiff 2. It is clear that if plaintiff 1 and plaintiff 2 brought separate suits common questions of law and fact would arise. In our opinion, therefore, the amendment, if allowed, would not offend against the provisions of O. 1, R. 1. Similarly, the amendment, if allowed, would not offend against the provisions of O. 2, R. 3, for, in our opinion, the cause of action is one as against the defendant in that he recovered the share of the rent from the date of the purchase till the date of the temporary injunction, and there would not, therefore, be several causes of action within the meaning of O. 2, R. 3. There is one cause of action, and the reliefs in regard to that cause of action are alleged to exist severally or in the alternative in plaintiff 1 and plaintiff 2. There is, therefore, no legal objection to allow the amendment.

The suit was brought within time and plaintiffs 1 and 2 are parties to the suit from the beginning. It is not the case of a joinder of a new plaintiff seeking a relief in respect of which the claim is barred. No doubt, the application for amendment was made in the lower Court on 11th November 1925, but in the present case the suit was brought in the name of both the plaintiffs and relief was claimed in regard to the whole amount from the date of the purchase till the date of the temporary injunction, and though the defendant contended in the written statement that plaintiff 1 was not entitled to the rent accruing due before the date of his purchase, it cannot be said that the suit was beyond time. Instead of claiming the reliefs severally in favour of plaintiff 1 and plaintiff 2, relief was wrongly claimed in favour of plaintiff 1 There is no ground for suspecting that

(1) [1909] 33 Bom. 644=4 I.C. 726=11 Bom. L.R. 1042.

the plaintiffs had not acted in good faith, and amendment can be allowed where through some blundering or inexpertness of pleading plaintiffs did not assert the rights to which they were entitled in the proper form in the plaint. See *Charan Das* v. *Amir Khan* (2), *Kisandas Rupchand* v. *Rachappa Vithoba* (1); and *Sevugan Chetty* v. *Krishna Aiyangar* (3). We think that under the circumstances of the present case, the amendment should be allowed, but plaintiff 2 should be disallowed the costs in respect of the claim.

We would, therefore, allow the plaintiff to amend the plaint as prayed for in the application made in the lower Court. The amount of the rents due to Pitambar's share from 30th July 1918, to 3rd September 1920, comes to Rs. 1,562-8-0 at the rate of Rs. 1,500, the amount of net rent for the entire property. Payment of Rs. 376-8-0 is admitted and, therefore, the amount due is Rs. 1,186. We would, therefore, vary the decree of the lower appellate Court and pass a decree in favour of plaintiff 2 in respect of Rs. 1,186. The appeal of plaintiff 1 is dismissed with costs, but the appeal of plaintiff 2 is allowed, no order as to costs. The cross-objections of the defendant will be dismissed with costs.

Baker, J.—The point raised in this appeal is peculiar. It is unnecessary to go into the facts which are given at length in the judgments of the lower Courts. It is now found, and it is not disputed, that by reason of the transactions detailed in the judgments, plaintiff 2 was entitled to the rent of the buildings in suit and that the defendant had wrongfully received the rents. Plaintiff 2, however, transferred his rights to plaintiff 1 in September 1920, there being no stipulation as to past rents. Under S. 8, T P. Act, the right to recover the rents prior to the date of the transfer did not pass to plaintiff 1, but remained with plaintiff 2. Plaintiff 1, however, sued for the rents, and plaintiff 2 was added only as a pro forma party to avoid any objections as to non-joinder, no relief being claimed by him. The somewhat curious result is that while the plaintiffs severally are undoubtedly entitled to the rents, plaintiff 2 for the period prior to the transfer to plaintiff 1, and plaintiff 1 for the period subsequent to the transfer, no relief can be granted with respect to the rents prior to the transfer, because plaintiff 1 cannot get them, and plaintiff 2 has not claimed them in the suit. These rents were admittedly wrongfully received by defendant 1, and he now contests the right to recover these rents on technical as opposed to equitable grounds. No question of misjoinder of parties or causes of action arises, because the plaintiffs are both proper parties to the suit, and the cause of action in the case of both plaintiffs is the same, the cause of action in the case of plaintiff 2 being the series of transactions by which he became the owner of the property, and the cause of action in the case of plaintiff 1, the same series of transactions plus the transfer of the rights of plaintiff 2 to plaintiff 1. In other words the title of plaintiff 1 is the same as that of plaintiff 2 or depends on it, the only difference between them being that the plaintiffs were entitled not jointly, but severally, to the rents for the period prior to, and subsequent to, the transfer,

There is, therefore, no bar under O.1,R. 1, Civil P. C., since both plaintiffs have a right to relief in respect of the same series of acts or transactions severally, and if they had brought separate suits a common question of law or fact would arise. Nor is there any bar of O. 2, R. 3, since plaintiffs have causes of action in which they are jointly interested against the same defendant, for both plaintiffs are interested in proving the series of transactions by which plaintiff 2 became entitled to recover the rents from the defendants. The difficulty is that plaintiff 2 did not ask for the relief to which he is undoubtedly entitled. In these circumstances, though the Court has wide powers in granting relief, there may be some objection in granting relief when none is sought, and the learned pleader for the appellant has, therefore, asked for leave to amend his plaint so as to recover rents prior to the date of the transfer.

It has of course frequently been laid down by all the High Courts that a party should be awarded such relief as he is found to be entitled to, though it may differ from the relief which he claims, the commonest case of

(2) A. I. R. 1921 P. C. 50=48 Cal. 112=47 I. A. 255 (P.C.).
(3) [1911] 36 Mad. 378=13 I. C. 268=22 M. L. J. 139.

that character being when a plaintiff claims exclusive possession and fails to prove his case as regards that but proves a right to joint possession, and in such a case he can be awarded joint possession. The present suit is not a case of that character, and I think there is a technical difficulty in the way of granting plaintiff 2 relief without an amendment. The amendment is opposed on the ground that it will deprive the defendant of the right he has acquired by limitation, the claim to the rents prior to September 1920 being now time barred. It is argued that leave to amend should be refused, where the effect of the proposed amendment is to take away from the defendant a legal right which has accrued to him by lapse of time. There is, however, no absolute prohibition to the granting of an amendment in such circumstances, and in several cases where equity required it, the High Courts have allowed amendments to be made which have deprived the defendant of the right he had acquired by the statute of limitation. I may refer to the cases of *Kisandas Rupchand* v. *Rachappa Vithoba* (1) and *Sevugan Chetty* v. *Krishna Aiyangar* (3). These cases will be found collected at pp. 459 and 460 of Mulla's Code of Civil Procedure, 8th Edn, under O. 6, R 17. The Privy Council, in the case of *Charan Das* v. *Amir Khan* (2) said that there was no ground for suspecting that the plaintiffs had not acted in good faith:

"all that happened was that the plaintiffs, through some clumsy blundering, attempted to assert rights that they undoubtedly possessed under the statute in a form which the statute did not permit."

These observations will, in my opinion, apply to the facts of the present case, and I am, therefore, of opinion that the present is a case in which it is equitable that the amendment should be allowed for the reason that the defendant has no right to retain the rents, and that the plaintiffs appear to have made a mistake of law in not splitting the rents into two parts and making their respective claims to the portion of rents to which they are separately entitled. I am, therefore, of opinion that the amendment should be allowed, and the decree of the lower appellate Court modified by awarding plaintiff 2 rents prior to the date of transfer to plaintiff 1.

S.N./R.K. *Decree modified.*

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MIRZA AND BAKER, JJ.

Gajanan Sitaram and *others*—Plaintiffs—Appellants.

v.

Sitaram Raghunath — Defendant 2—Respondent 1.

Second Appeal No. 880 of 1926, Decided on 27th September 1928, from decision of Dist. Judge, Ratnagiri, in Appeal No. 153 of 1925.

(a) Hindu Law—Alienation—Legal necessity—Amount due to mortgagee becoming payable five days after sale—Sale was for legal necessity.

Property had been mortgaged by the father. After his death, one of his sons, who had attained majority, sold the property with the consent of his mother because the amount payable to the mortgagee was to become payable five days after the date of the sale.

Held : that there was a legal necessity to sell the property in order to pay off the mortgagee. [P 56 C 1]

(b) Hindu Law—Alienation — Manager — Sum not proved for legal necessity not exceeding one-third—Sale is valid.

Where a purchaser acting in good faith upon due inquiry, is able to show that the sale itself was justified by legal necessity, he is under no obligation to inquire into the application of any surplus and is not bound to make repayment of such surplus to the members of the family challenging the sale. [P 56 C 2]

Out of Rs. 4000 of the sale proceeds of property, Rs. 1400 were not proved to be for legal necessity.

Held : that the sale was not invalid, because the balance did not much exceed one-third of the total sale-proceeds : *A. I. R.* 1927 *P. C.* 37; *A. I. R.* 1927 *P. C.* 121 and *A. I. R.* 1927 *P.C.* 246, *Foll.* [P 56 C 1]

D. S. Varde—for Appellant.

V. B. Virkar—for Respondent 1.

Mirza, J.—The finding of the lower appellate Court is that the sum of rupees 4,000 was paid by defendant 2 for the purchase of the property in which the appellant (original plaintiff 1), original plaintiff 2, and defendant 1 were interested. Out of the purchase money Rs. 2,600 were paid to the mortgagees for redeeming the property. To that extent, it is admitted that the sale would be for a legal necessity, if the mortgage amount had then matured. The balance of Rs. 1,400 was paid by defendant 2 to defendant 1, the eldest male member of the joint family. Defendant 1 admitted that part of this sum of Rs. 1,400 was utilized by him for the payment of family debts.

It is urged, on behalf of the appellant, that his interest in the property is not affected by the sale to defendant 2 as the

the sale was not for a legal necessity. Mr. Varde has argued that there would be no legal necessity to pay off the mortgage amount before it matured and could be demanded. The amount payable to the mortgagee was to become payable five days after the date of the sale. There can be no hard and fast rule as to when the legal necessity arises in respect of the payment of a mortgage debt. The evidence showed that defendant 1 and his mother were both satisfied that the sale would be advantageous to the estate and as the time was drawing near for the payment to the mortgagee, and the mortgage amount would then have to be found, there was, in my opinion, a legal necessity to sell the property in order to pay off the mortgagees. With regard to the balance of Rs, 1,400 it was admitted by defendant 1 that he had told Ketkar, defendant 2's agent, that the sum was required by him to pay off other debts. As Ketkar had since died defendant 2 was unable to show what other inquiries Ketkar had made with regard to the legal necessity for the balance of Rs. 1,400. In my opinion, there was no reason for Ketkar to disbelieve the information which he had admittedly received from defendant 1 that this amount was needed to pay off other debts. The purchaser is not bound to see to the application of the money, The recent rulings of the Privy Council have laid down that where the major portion of the consideration is for legal necessity and it has been shown that the transaction is bona fide and the consideration has been paid by the purchaser the sale would be binding. In *Srikrishan Das* v. *Nathu Ram* (1) their Lordships of the Privy Council in reviewing the Indian case law on the subject have not disapproved of certain cases where the proportion between the amount required for legal necessity and the amount not proved to be required for legal necessity was as ⅔rds to ⅓ and yet the sale was upheld. In the present case the proportion would be very nearly as ⅔rd to ⅓rd, if Rs. 1,400 are to be excluded from family necessity. In my opinion the judgment of the lower appellate Court should be upheld aud this second appeal dismissed with costs. The claim for pleaders' fees should be ascertained by the Taxing Officer.

Baker, J.—I agree. The case is covered by the Privy Council decisions in *Srikrishn Das* v. *Nathu Ram* (1); *Niamat Rai* v. *Din Dayal* (2); and *Gauri Shankar* v. *Jiwan Singh* (3). The only difficulty that may arise is that the part of the consideration which is not proved to be for legal necessity, viz., Rs. 1,400 out of Rs. 4,000, is rather high but it does not very much exceed the ⅓rd which in several other cases reviewed in the judgments of the Privy Council has been held as not invalidating the sale. In any case the Privy Council has laid down that, in accordance with authority, where a purchaser acting in good faith upon due inquiry, is able to show that the sale itself was justified by legal necessity, he is under no obligation to inquire into the application of any surplus and is not bound to make repayment of such surplus to the members of the family challenging the sale.

In *Gauri Shankar* v. *Jiwan Singh* (3) the Privy Council has laid down that transactions of sale of family property which, in their real essence and substance, are sales for family necessity will not be narrowly scrutinized, especially when such transactions have stood unchallenged for a considerable length of time The application of arithmetical calculations to such transactions is a question of doubt. It may be that a purchaser may be willing to buy a block of property for a price which exceeds the mortgage amount but he will not be willing to buy a portion of the property for a lesser amount and it is not possible for a manager always to sell only so much of the family property as would just suffice to meet the amount for which necessity is proved There must be a certain amount of latitude in such matters. In view of the rulings of the Privy Council referred to above, I think the view taken by the learned District Judge is reasonable, and although he has not quoted these decisions the general principles of them seem to have been present to his mind at the time of writing his judgment. I agree, therefore, that the decree of the lower appellate Court should be confirmed and the appeal dismissed with costs.

S L./R.K. *Appeal dismissed.*

(1) A. I. R. 1927 P. C. 37=49 All. 149=54 I A. 79 (P.C.).
(2) A. I. R. 1927 P. C. 121=3 Lah. 597=5 I. A. 211 (P.C.).
(3) A. I. R. 1927 P. C. 246.

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MARTEN, C. J., AND MURPHY, J.

Motising—Defendant 1—Appellant.

v.

Mt. Durgabai and *another* — Plaintiff and Defendant—Respondents.

First Appeal No. 53 of 1925, Decided on 28th August 1928, from decision of 1st Class Sub-Judge, Dhulia, in Civil Suit No. 407 of 1921.

Hindu Law—Schools of Law — Family of Raghuvamshis migrating from Oudh to Khandesh — Departure from several customs of Oudh — Departure not amounting to abandoning original personal law—Benares school of law continued to govern the family—Express authority to adopt was necessary.

Long before living memory, a family of Raghuvamshis migrated from Oudh to Khandesh. In spite of the departure from the customs of Oudh in some matters, there was no proof showing that the personal law as to succession had been given up or that any particular custom of adoption had been engrafted on the personal law.

Held : that the family continued to be governed by the Benares school of law and that adoption, without express authority, was, therefore, invalid : *A. I. R.* 1921 *P.C.* 59 ; 12 *M. I. A.* 81 (*P.C.*) ; *A. I. R.* 1915 *P.C.* 86 ; 29 *Cal.* 433 (*P.C.*) ; *A. I. R.* 1923 *Cal.* 485 and 1 *S. D. A.* (*Beng.*) 56, *Rel. on.* [P 59 C 1]

H. C. Coyajee and *K. H. Kelkar* — for Appellant.

G. N. Thakor, *R. W. Desai* and *P. V. Kane*—for Respondents.

Marten, C. J.—This is an appeal by the minor defendant 1, Babu Motising alias Baliram Dagdusing, against the decision of the learned trial Judge in favour of the plaintiff Durgabai, the widow of one Dagdusing, to the effect that the deceased Dagdusing was governed by the Benares school of Hindu law at the date of his death, and that accordingly it was necessary for the validity of any adoption by his widow that she should have been given express authority by the deceased, and that on the facts of this particular case no express authority was proved. Before the learned Judge it was also contested whether the adoption had been made at all, but that point was found in favour of the minor, and no contest arises as to that before us.

We are left, therefore, with two main points : (1) Did the deceased ever expressly authorize his widow to adopt the minor? (2) If not, was the deceased governed by the Benares school as being the school of Hindu law governing his community before it migrated to Khandesh? Or, on the other hand, was his law that of the Bombay school as being the law prevailing in Nandurbar in West Khandesh where he and his community had lived for a great number of years? (The judgment then discussed evidence and holding that the minor failed to establish the alleged express oral authority, proceeded) I now come to the next point as to what school of law the deceased was governed by, because, if he was governed by the Bombay school of law, then no express authority would be necessary and the senior widow could adopt. Now here I may interpolate this because I had intended to say it before. The learned Judge thinks that the true explanation of the omissions in the documentary evidence is that Dodhusing, the pleader's clerk, knew a little law but not quite enough, and that he did not realize that if the deceased was governed by the Benares school, express authority was necessary. Accordingly, all his plans were laid on the basis that the ordinary law of Bombay applied and that that is the explanation of incidentally the delay in the case, and why the validity of the adoption was not in the first instance effectively challenged.

On the main point, I think, it is clear that, to borrow the language used in *Soorendrnath Roy* v. *Mt. Heeramonee Burmoneah* (1), this community of Raghuvamshis migrated to Khandesh at some distant period of which no record is preserved. It must be at least five or six generations ago. It may very well be at a much earlier date. On the evidence before us it is impossible to give even an approximate date, except that it is long before living memory. The place from which they migrated was in all probability Oudh. Before us, it was not disputed that the law of the place from which they migrated was the Benares school of law.

Now that being so, the ordinary presumption that the law to apply is the law of the province in which the parties reside, is rebutted. The presumption next applicable is that this community on migration to Khandesh carried with them the law which had governed them up to migration, namely, the Benares school of law. That is quite clear from numerous authorities. Thus it is stated by Lord

(1) [1868] 12 M.I.A. 81=10 W.R. 35=2 Suther 147=2 Sar. 372 (P.C.).

Haldane in *Abdurahim Haji Ismail Mithu* v. *Halimabai* (2) (p. 41 of 43 *I. A.*):

"Where a Hindu family migrate from one part of India to another, prima facie they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Mahomedans, settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from the circumstances."

That was a Mahomedan case. Cases where the parties were Hindus will be found in *Balwant Rao* v. *Baji Rao* (3) and also in *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (4), where it is said (p 96 of 29 *I. A*):

"The tenacity of such customs, even under the strain of migration, has been repeatedly recognized by the law, in questions such as the present. Accordingly, the question being primarily one of personal as distinguished from geographical custom, it is of the first importance to inquire of the origin of the family."

Then at p. 97 it is said:

"When, returning from successions, regard is had to the evidence relating to ceremonies at marriages, births, and shradhs, it cannot be disputed that there is a strong body of affirmative evidence in support of the continuance and against the relinquishment of the Mitakshara in this family."

Then in *Soorendronath Roy* v. *Mt. Heeramonee Burmoneah* (1), to which I have already alluded, it is said (p. 96):

"This, indeed, is not decisive of the question as to the devolution of property in the family by right of succession, since a family might retain its religious rights, and yet acquiesce in a devolution of property in the common course of descent of property in that district, amongst persons of the same race. But still there is in the Hindu law so close a connexion between their religion and their succession to property, that the preferable right to perform the shradh is commonly viewed as governing also the question of the preferable right to succession of property; and as a general rule they would be expected to be found in union."

These last two cases show the importance to be attached to ceremonies as indicative of the prevailing personal law of the community in question.

So, too, in *Sarada Prasanna Roy* v. *Umakanta Hazari* (5), the way in which a presumption may shift according to various facts is shown in the judgment of Mookerjee, J., at p. 373. That was a case where the family of the deceased had migrated into Bengal from the North West Provinces where the Mitakshara law prevailed, but had adopted the Dayabhaga law of Bengal for generations; and it was held that the succession to the deceased ought to be governed by the Dayabhaga law.

Another instance where the change of personal law was held proved will be found in an old case from Bengal, viz., *Rajchunder Narain Chowdry* v. *Goculchand Goh* (6) There, there had been a somewhat similar migration, and the Court came to the conclusion that as the family priest was then a Brahmin of Bengal, and as the ancestors of the parties had intermarried with Bengal women, and as their religious ceremonies connected with funerals or marriages were conducted sometimes according to the Mithila law and sometimes according to the Bengal law, and there had been no uniform observance of the ordinances of the Mithila law, under all the circumstances of that particular case, the law of Bengal ought to prevail.

Now those being the general principles of law, we have to consider whether the minor has discharged the onus of proof that this community had abandoned their original law, and had adopted the law prevailing in Khandesh with respect to succession to Hindu property. As regards any evidence to show that they had expressly accepted the law of adoption prevailing in West Khandesh, it is quite clear that nothing of the sort is shown. The evidence as to any adoption at all having ever taken place is extremely meagre. Much less is it shown that any particular custom of adoption has been engrafted on to the personal law of that community. Therefore any attempt to prove an express custom of adoption according to the Bombay school is hopeless on the evidence before us.

But what the appellant does rely on is the fact that in many important respects

(2) A.I.R. 1915 P.C. 86=43 I.A. 35 (P.C.).
(3) A.I.R. 1921 P.C. 59=48 Cal. 30=47 I.A. 213 (P.C.).
(4) [1902] 29 Cal. 433=29 I.A. 82=6 Sar. 205 (P.C.).
(5) A.I.R. 1923 Cal. 485=50 Cal. 370.
(6) [1801] 1 S.D.A. (Beng.) 56.

the community has departed from the customs of the place from which they migrated. These are principally in relation to marriage. For instance, as regards Oudh, the evidence is that the community there is looked at as one family, and that its members can only marry outside that one family, which it regarded as being one gotra. On the other hand in the present community, they are broken up into many gotras, and it is clear that they are not confined to marriages outside the community.

Another important point is that in Oudh widows cannot remarry. In this community they can and do. In fact we understand that the plaintiff Durgabai herself had a previous husband before she married the deceased. So, too, about divorce. In Oudh, there is no divorce, whereas, in this community there is. Thus in the present case the deceased, in addition to the two widows we are concerned with here, had another wife, whom he had divorced.

On the other hand, as the learned Judge points out the actual ceremony connected with their marriages is the ceremony that prevailed in Oudh. His view is that this particular community closely resembles a similar community in the Central Provinces, who had also migrated from Oudh; and that, in the course of that migration, this community had gradually fallen away from the higher standard prevailing in Oudh, and prevailing possibly amongst a rather higher class of people than the ones we have to deal with in the present case. Accordingly, his view is that though in certain particulars this community has deteriorated according to an orthodox standpoint, yet that deterioration does not amount to this that they have abandoned their original personal law of succession and acquired as a new personal law the law of the country to which they have migrated.

We have carefully considered what has been urged upon us in this respect, and in our opinion the view the learned Judge took is the correct one. In other words the minor has also failed to discharge the onus of proof that lies upon him in this respect also. The result is that the learned Judge's judgment in our opinion ought to be affirmed on both points with the necessary result that the appeal must be dismissed.

Murphy, J. — This appeal relates to the estate of one Dagdusing Purdeshi, who died at Nandurbar, on 14th December, 1915. About a month later, on 16th January 1916, one of Dagdusing's widows Hirabai, adopted a minor boy to her husband. The plaint in the case was filed by another widow Durgabai, and her complaint was that defendant 1, the boy alleged to have been adopted by defendant 3, had not really been adopted, but that the adoption had been put up by interested persons, including one Dodhusing, a relative of the late Dagdusing, and Nathu Ravji, who had been Dagdusing's gumasta. It is also alleged in para. 6 of the plaint that, if the adoption had been carried out it was invalid by the personal law of the parties, who are governed, not by the Bombay school, but by the Benares school of Hindu law, and that by the teachings of that school an adoption by a widow is invalid, unless she has been expressly authorized by her late husband to carry it out.

The first point involved in the appeal, therefore, is, what is the personal law which applies to the family of the late Dagdusing? The ordinary presumption in India is that the inhabitants of a particular district are governed by the provisions of Hindu law which prevail generally in that district. But this presumption does not exist in the case of immigrants, the reasons of this exception being that a Hindu is allowed to carry his personal law with him, because this personal law is so closely connected with his religion, that it cannot well be separated from it. It appears that Dagdusing belonged to a colony of people of an extraction different from the ordinary inhabitants of Nandurbar in the Khandesh district, and known as Raghuvamshis. They are mentioned in the Bombay Gazetteer, Vol. 12, at p. 54, and are described as immigrants from Northern India, and the evidence in the case also points to the same conclusion, as it shows that there are colonies of Raghuvamshis scattered over a large area at various places in India, and with a common tradition that their clan came originally from somewhere in Oudh. The Raghuvamshis in fact appear to be one of the Rajput clans, and a good deal of evidence has been produced to show what their proper ceremonies and customs as to and in connexion with marriage, inheritance and adoption are. It

is unnecessary now to discuss all this evidence in detail, but I think it has been made out that in the cases of the better class of Raghuvamshis, the customs in Benares and Oudh and the Central Provinces, where there are similar colonies of Raghuvamshis, differ from those in Khandesh. For instance, in one part of the country the Raghuvamshis possess only one 'gotra,' and consequently can only marry their daughters to a man of a different clan. But in Khandesh the Raghuvamshis as a whole are divided into several 'gotras' and a Raghuvamshi may marry another Raghuvamshi, provided the sub 'gotra' is different. Again, in Oudh, widow remarriage is not allowed: so also divorce. While in Khandesh, both these customs have been introduced into the caste. There is, however, no evidence as to any custom allowing a widow of a man of this caste to adopt without his express authority. In fact, according to the witnesses, adoptions among them are very rare indeed, and very few have been instanced in the evidence. The Raghuvamshis of Khandesh appear to have departed in many important particulars from the customs of their ancestors, but there is nothing to show that on the one point with which we are now concerned, that is, the custom of adoption, they have come over to the Bombay school of Hindu law which allows a widow to adopt without any express authority from her husband. I, therefore, think that the Benares school of law has been correctly applied by the learned Judge to this family of Raghuvamshis of Nandurbar. (His Lordship next dealt with the question of express authority to adopt, and concluded.) For these reasons, I agree with the learned Chief Justice that it has not been satisfactorily proved that Dagdusing gave specific directions to his widow to adopt the appellant, and that the lower Court's decree must be confirmed and the appeal dismissed.

Marten, C. J.—As regards the question of costs, the costs of respondent 1, the plaintiff Durgabai, of this appeal must be paid by the minor. But as between the minor and respondent 2 Hirabai who purported to adopt him, this litigation is largely due to the fact that Hirabai made this adoption which she now says is invalid.

Under all the circumstances of this case we think that as regards this appeal Hirabai must be left to bear her own costs, and the minor left to bear his own costs. But this will be without prejudice to any application that the minor may make either in the guardianship proceedings or in another suit which Hirabai has brought in respect of her alleged half-share of the property that such costs of his should be refunded by Hirabai. Then as regards Hirabai's cross-objections they will be dismissed with costs.

S.L./R.K. *Appeal dismissed.*

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BAKER, J.

Baslingava Revanshiddappa — Plaintiff—Appellant.

v

Chinnava Karibassappa and *another*—Defendants—Respondents.

Second Appeal No. 463 of 1926, Decided on 4th September 1928, from decision of Dist. Judge, Bijapur, in Appeal No. 130 of 1925.

*** (a) Transfer of Property Act, S. 55—Property sold—Purchase money not paid—Suit for possession by purchaser—Decree may be passed according to conditions and circumstances of the case—Equitable relief may be given.**

In a suit by vendee to recover possession of property, where all or part of the purchase money remains unpaid, the decree may be subjected to restrictions and conditions appropriate to the circumstances of the case. The Court has power to give equitable relief. 30 *All.* 125; 11 *Bom. L. R.* 383; 17 *C. W. N.* 1161 and 11 *All.* 244, *Foll.*: 43 *Mad.* 712, *Diss. from.* [P 62 C 2]

(b) Practice — Rights of various parties should be decided in single suit as far as possible to avoid succession of suits.

Rights of various parties should be decided in one suit rather than in a number of suits, as it is obviously undesirable that the matter in controversy which may be settled without disadvantage to any of the parties in a single litigation should be repeatedly agitated in a succession of suits : 17 *C. W. N.* 1161, *Appr.* [P 63 C 1, 2]

G. B. Chitale—for Appellant.

H. B. Gumaste and *G. R. Madbhavi*—for Respondents.

Judgment.—The plaintiff and the defendants are sisters. The plaintiff sued to recover possession of the house in suit alleging that it belonged to her father Shivlingappa, who sold it to her on 15th December 1920, for Rs. 1,000 and delivered possession. During her absence

from the village she was dispossessed by the defendants, her sisters. Defendant 3 admitted the plaintiff's claim. Defendants 1 and 2 alleged that the transaction was hollow and colourable and without consideration, and denied plaintiff's possession. The first Court, the Subordinate Judge of Muddebihal, held that the purchase was proved, but no consideration was paid. He held that it was not proved that the transfer was colourable and without consideration, and he passed a conditional decree in the following terms :

"Plaintiff should take possession of the entire house described in plaint if within three months from the date hereof she pays defendats 1 and 2 Rs. 500. In default of such a payment her claim to a moiety of the house shall stand dismissed and in case of such default plaintiff will recover by partition only a half share in the house ; . . ."

The reason of the form of the decree is that Shivlingappa, the vendor, who is the father of plaintiff and defendants, having died without leaving male issue, the plaintiff and defendants became owners of the house. Defendants 1 and 2, who contest the claim, are entitled to one-half, and the plaintiff is entitled to the other half, that is, one-fourth in her own right, and the remaining one-fourth of defendant 3 who admits her claim. Consequently defendants 1 and 2, being owners of half the house, are entitled to half the original consideration of Rs. 1,000 that is, Rs. 500. That is the reasoning on which the decree of the first Court is based. The plaintiff appealed to the District Judge, and the only grounds taken in appeal were, first, that the burden of proof on the issue of consideration should have been thrown on the defendants, and secondly, that plaintiff had proved the consideration. The point as regards the conditional terms of the nature of the decree was not taken in appeal. The District Judge of Bijapur dismissed the appeal summarily, holding that the burden of proving consideration lay on the plaintiff, and that even if it did not, the burden of proving failure of the consideration had been discharged by the defendants. He, therefore, dismissed the appeal under O. 41, R. 11, Civil P. C. The plaintiff makes this second appeal.

Two points are taken in the appeal. The first is that the burden of proof of consideration has been wrongly placed, and the second, which is the more important point and which was not taken in the Courts below, is that the decree in its conditional form cannot be supported. The first point may be disposed of very shortly. It is contended, on the authority of *Gangadas* v. *Dama* (1), that the burden of proof rests on him who impugns the authenticity of a deed, the execution of which by the owners of the property to which it relates is admitted or proved, and the onus should properly be placed on the defendant who disputes payment of consideration when execution and receipt of consideration are admitted by the obligor. Shivlingappa, the original vendor is dead, and beyond his admission on the sale-deed, there is no other evidence to prove the consideration except what has been brought forward in the present suit, but the same judgment goes on at p. 178 to say :

"No doubt a defendant may be regarded as sustaining the onus as to consideration by eliciting statements from the plaintiff's witness sufficient to make the payment of consideration grossly improbable."

The Judge of first instance at p. 4, line 59 of his judgment states :

"There is such a great divergence in the statements of the three witnesses that I feel convinced that they are lying."

This, therefore, supports the view of the learned appellate Judge that granting that the burden of proving failure of consideration is on the defendants, they have discharged it. So far, therefore, as the question of burden of proof is concerned, there are no reasons for differing from the view which has been taken by the lower appellate Court.

The second point, which was not taken in the lower Courts, is one of rather more difficulty. The learned pleader for the appellant has contended that under S. 55, T. P. Act, Cl. (1) (f), the seller is bound to give the buyer or such person as he directs such possession of the property as its nature admits, and he, therefore, contends that he is entitled to take possession of the property, that under S. 55, Cl. (4) (b), the seller is only entitled to a charge upon the property in the hands of the buyer for the amount of the purchase money or any part thereof remaining unpaid, and therefore, the conditional decree of the lower Court by which the plaintiff was awarded possession on payment of Rs. 500 to defendants 1 and 2, being the unpaid purchase money, is wrong in law. In support of this contention he relies on a ruling of the Madras High Court in

(1) [1903] 5 Bom. L. R. 177.

Krishnamma v. *Kottipalli Mali* (2). The first Court, in the last paragraph of its judgment, has relied for the terms in which the decree is framed, on two cases of the Allahabad High Court: *Shib Lal* v. *Bhagwan Das* (3) and *Baijnath Singh* v. *Paltu* (4), which were followed in *Kevaldas* v. *Nagindas* (5). The Madras High Court, in the case of *Krishnamma* v. *Kottipalli Mali* (2), laid down, relying on another case of the Madras High Court in *Velayutha Chetty* v. *Govindaswami Naiken* (6), that it is not in the power of the Court to give equitable relief to mitigate or suspend the consequences laid down by a Statute, and that the plain words of the Statute, that is, of S. 55, T. P Act, could not be whittled away by the application of so-called equitable doctrines, and they expressly dissent from the contrary decision in *Baijnath Singh* v. *Paltu* (4). Now, whatever may be my own view of a question, I am bound, in a case where varying High Courts have expressed differing views on a point of law of some importance, to follow the rulings of this Court. The ruling to which I have referred above, viz., *Kevaldas* v. *Nagindas* (5), expressly follows the ruling in *Baijnath Singh* v. *Paltu* (4), that is to say, this Court has expressed its approval of that decision of the Allahabad High Court, which has been dissented from in *Krishnamma* v. *Kottipalli Mali* (2) and, therefore, although there may be no case of this Court exactly on all fours with the present case, if I were to follow the Madras decision, I should be dissenting from that which has been approved of by this Court, viz., the case of *Baijnath Singh* v. *Paltu* (4). It is quite true that in *Kevaldas* v. *Nagindas* (5), it is stated (p. 385):

"The fact that part of the consideration for a sale has not been paid does not make it void wholly or partially. All that the vendor is legally entitled to in that case is a lien on the property sold to the extent of the amount not paid."

Now in the Allahabad case of *Baijnath Singh* v. *Paltu* (4), it is stated that (p. 127):

"In the case of *Shib Lal* v. *Bhagwan Das* (3), to which we have already referred, it was laid down by Mahmood, J., rightly, we think, that equities may exist in favour of a defendant to a suit like the present one so as to subject the decree to restrictions and conditions appropriate to the circumstances of the case. Here there is such an equity arising out of the non-payment of the purchase money by the plaintiff, and regard ought to be paid to it in any decision which the Court may pass,"

and the decree was that (p. 127):

"if within six months from this date, the plaintiff pay to the defendants the sum of Rs. 200, the amount of the purchase money, the property mentioned in the plaint be delivered to him, but in default of such payment the plaintiff shall forfeit his right to recover the property. If the plaintiff do not pay the purchase money within the time aforesaid, his suit will stand dismissed with costs in all Courts."

The principle, therefore, laid down by the Allahabad High Court, was that in a suit by a vendee to recover possession of property, where all or part of the purchase money remains unpaid, the decree may be subjected to restrictions and conditions appropriate to the circumstances of the case. That decision was approved by this Court in *Kevaldas* v. *Nagindas* (5), although in that particular case no restrictions were imposed in the decree. I do not think it necessary to refer to *Umedmal Motiram* v. *Davu* (7), where certain conditions were imposed in a case where one of the parties had a lien on the house for the amount of the unpaid purchase money, because that case is prior to the Transfer of Property Act. But the other cases which are referred to above are subsequent to the Transfer of Property Act, and this Court appears to have followed the view of the Allahabad High Court in preference to that taken by the Madras High Court. The learned pleader for the respondents has referred to the case of *Nilmadhab Parhi* v. *Hara Proshad Parhi* (8), where it was held that the vendor had a lien on the land for the unpaid balance of the purchase money, and though the lien does not entitle him after execution of the conveyance to resume possession of the land sold, it gives him the right to keep the title-deeds until payment, and that a Court of equity can direct the vendor to be again let into possession, if on a sale directed by it for enforcement of his lien the property is found unsaleable at an adequate price, and that the right of the purchaser to obtain possession under S. 55 (1) (*f*), T. P. Act,

(2) [1920] 43 Mad. 712=38 M. L. J. 467=56 I. C. 530=(1920) M. W. N. 380.
(3) [1889] 11 All. 244=(1889) A. W. N. 96.
(4) [1908] 30 All. 125=5 A. L. J. 96=(1908) A. W. N. 38.
(5) [1909] 11 Bom. L. R. 383=2 I. C. 429.
(6) [1910] 34 Mad. 543=8 I. C. 364=(1910) M. W. N. 637.
(7) [1878] 2 Bom. 547.
(8) [1913] 17 C. W. N. 1161=20 I. C. 325=19 C. L. J. 146.

and the right of the vendor to realize the unpaid balance of the purchase money under S. 55 (4) (b) may be enforced in one action. In the decree the purchaser was directed to deposit in Court the unpaid balance of the purchase money within a time specified, failing which the suit was directed to be dismissed. At p. 1146 their Lordships say :

"We entirely agree in the observation of Mahmood, J. in *Shib Lal* v. *Bhagwan Das* (3), that in a case, such as this, an equity may exist in favour of the defendants so as to subject the decree for possession to restrictions and conditions appropriate to the circumstances of each case. This view has been adopted by the Bombay High Court in *Umedmal Motiram* v. *Davu* (7), by the Allahabad High Court in *Baijnath Singh* v. *Paltu* (4), and by the Madras High Court in *Subrahmania Ayyar* v. *Poovan* (9). With all deference to the learned Judges who decided the case of *Velayutha Chetty* v. *Govindaswami Naiken* (6), we are not able to adopt the view they took of the effect of the statutory provisions on the subject : there is no reason why the right of the purchaser to obtain possession under S. 55 (1) (f), T. P. Act, and the right of the vendor to realize the unpaid balance of the purchase money under S. 55 (4) (b) should not be recognized and enforced in one action."

The case of *Krishnamma* v. *Kottipalli Mali* (2), referred to above, is based on the case in *Velayutha Chetty* v. *Govindaswami Naiken* (6), which has been disapproved of by the Calcutta High Court. The result, therefore, of the decisions would seem to be that the view adopted by the Allahabad High Court has been approved of by the Calcutta High Court and by this Court in the decisions referred to above, and it is only the Madras High Court that has taken the opposite view of the effect of S 55, T. P. Act, in prohibiting the imposition of equitable considerations in the framing of a decree in a suit of the character of the present In these circumstances I am bound to follow the previous decisions of this Court in approving of the decisions of the Allahabad High Court rather than that of the High Court of Madras, and, with respect, I may say that I agree with the views expressed by the Calcutta High Court in *Nilmadhab Parhi* v. *Hara Proshad Parhi* (8) that there is no reason why the rights of the various parties should not be decided in one suit rather than in a number of suits. If the plaintiff in this suit is given unconditional possession, and defendants 1 and 2 are driven to a separate suit for the purpose of enforcing their lien for the unpaid purchase money, the result will be exactly the same as that pointed out by their Lordships of the Calcutta High Court at p. 1164 of the case quoted above, where they say :

"If we accept the contention of the respondents the result will be that the plaintiffs will obtain an unconditional decree for possession, the vendor will be driven to institute a suit to enforce the lien which he possesses over the property for the unpaid purchase money . . . . . It is obviously undesirable that the matter in controversy which may be settled without disadvantage to any of the parties, in a single litigation should be repeatedly agitated in a succession of suits."

I entirely agree, with respect, with these remarks, and in view of the considerations which I have referred to above, I am of opinion that although there is no Bombay case in which a conditional decree of the nature of the present decree has been passed, yet in the peculiar circumstances of the present case the decree of the lower Court should be confirmed, and the appeal dismissed with costs.

A.L./R K. *Appeal dismissed.*

(9) [1902] 27 Mad. 28.

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MARTEN, C. J , AND MURPHY, J.

Assistant Collector, Salsette — Appellant.

v.

Damodardas Tribhuvandas Bhanji and *others*—Respondents.

First Appeal No. 38 of 1927, Decided on 16th August 1928, from decision of Jt. Judge, Thana, in Reference No. 109 of 1924.

Land Acquisition Act (1 of 1894), Ss. 27 and 53—Collector's award upheld — Costs refused by lower Court—Landowner's exaggerated demands explained by uncertainty of land market—Government costs ought to have been awarded under Civil P. C., S. 35.

The lower Court upheld the Collector's award but refused Government costs by explaining that the exaggerated demands of landowners were due to the uncertainty of the land market due to the boom and its aftermath. There was nothing in the case inconsistent with the special provisions of the Land Acquisition Act.

Held : that S. 35, Civil P. C., governed the case, and that the lower Court had exercised its discretion in violation of well-recognized principles of law and, therefore, an appeal lay for costs only : *Cooper* v. *Whittingham*, (1880) 15 *Ch. D.* 501 ; 27 *Mad.* 341 and 16 *Bom.* 676, *Rel. on. Upmann* v. *Forester*, (1883) 24 *Ch. D.* 231 and *Civil Service Co-operative*

Society v. *General Steam Navigation Co.* (1903) 2 *K. B.* 756, *Ref.* [P 65 C 2]

P. B. Shingne—for Appellant.

K. V. Joshi—for Respondents.

Marten, C. J.—I now turn to the four other appeals, namely, Nos. 38, 39, 195 and 233 which are all by Government on the question of costs. Now here there has been no appeal by any of the claimant-landowners. Therefore, we must take it that the decision of the learned Judge upholding the award of the Land Acquisition Officer in respect of these particular pieces of land was correct. The award so made was at the uniform rate, as far as these lands are concerned, of Rs. 1,250 per acre But as regards costs, the learned Judge stated as follows in para. 28 of his judgment :

"I, therefore, dismiss all the claims, but without costs. The uncertainty of market created by the boom and its aftermath has been greatly responsible for the exaggerated demands. And having regard to that fact, I think this is not a fit case where I should saddle the owners with Government costs under S. 27."

Now, what jurisdiction are we exercising in the matter of costs in these land acquisition proceedings? S. 27 (2), does not apply in the events which have happened, because the award of the Collector has been upheld. One relevant section is S. 27 (1) which directs :

"Every such award shall also state the amount of costs incurred in the proceedings under this part, and by what persons and in what proportions they are to be paid."

Further S. 53 says :

"Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act."

It seems to us, therefore, that in a case like the present where there is nothing inconsistent in the special provisions of the Land Acquisition Act, we have to refer to S. 35, Civil P. C., which deals with costs. That section, shortly stated, leaves the costs in the discretion of the Court, but provides in sub-S. (2) that

"where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing."

Now, the general rule is clear both in England and under the Code, in India, namely, that speaking generally, costs ought to follow the event. But there may be certain circumstances to justify the Court in departing from that general rule and in depriving the successful party of his costs. Illustrations will be found in some of the authorities which have been cited to us. For instance, in *Cooper* v *Whittingham* (1), Sir George Jessel says (p. 504) :

"As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts : for instance there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs ; but where there is nothing of the kind, the rule is plain and well-settled, and is as I have stated it. It is, for instance, no answer, where a plaintiff asserts a legal right, for a defendant to allege his ignorance of such right, and to say, 'if I had known of your right, I should not have infringed it."

That decision was followed in India in *Kuppuswami Chetty* v. *Zamindar of Kalahasti* (2) Another English authority is *Upmann* v *Forester* (3), which is a decision by Chitty, J. In our own Court in *Ranchordas Vithaldas* v. *Bai Kasi* (4), Bayley and Farran, JJ., state the circumstances under which an appeal lies from the exercise of discretion by the lower Court as to costs. They say (p. 682) :

"The principle to be deduced from these decisions is that appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any misapprehension of facts, or violation of any established principle, or where there has been no real exercise of discretion at all."

In that case they held that there had been a clear misapprehension of fact and law, and accordingly varied the judgment of the Court below. I may also refer to *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (5), where Lord Halsbury, sitting in the Court of appeal, came to the conclusion that there was no material upon which the learned Judge in that particular case could properly deprive the successful party of his right to costs.

Therefore, it comes to this, that although the suceessful party is prima

(1) [1880] 15 Ch. D. 501=49 L. J. Ch. 752= 43 L. T. 16=28 W. R. 720.
(2) [1903] 27 Mad. 341.
(3) [1883] 24 Ch. D. 231=52 L. J. Ch. 946= 49 L. T. 122=32 W. R. 28.
(4) [1892] 16 Bom. 676.
(5) [1903] 2 K. B. 756 = 72 L. J. K. B. 933= 89 L. T. 429=52 W. R. 181=9 Asp. M.C. 477=20 T. L. R. 10.

facie entitled to his costs, the Courts have a discretion which is to be exercised on well-recognized principles and that if they fail to exercise their discretion on those principles then an appellate Court may vary it. Can we say then here, that there was any violation of well-established principles as to costs? In the first place, the learned Judge makes no reference to the general rule that the successful party's costs should follow the event. The only reason he gives is that the boom and its aftermath had created uncertainty in the land market and that that was responsible for the exaggerated demands put forward. Therefore, the learned Judge seems to consider that some, at any rate, of the claims were exaggerated. I think that was so as regards appeal No. 38 of 1927 where Rs. 2 a square yard were claimed, and as regards appeal No. 195 of 1927 where Re. 1-4-0 a square yard was claimed, and also as regards appeal No. 233 of 1927 where Re. 1-8-0 a square yard was claimed. On the other hand, I am not prepared to say with regard to appeal No. 39 of 1927 that the claim of approximately annas ten a square yard was extravagant. I will, however, deal with the matter generally on the ground that some, at any rate, of the claims were extravagant, although in one there was not perhaps an exaggerated demand.

Let us next consider the general result of the learned Judge's decision. We know that, under the Act, claimants can appeal to the Judge from the decision of the Land Acquisition Officer without any fear that the Land Acquisition Officer's award can be reduced Therefore, at the worst they will get what the Acquisition Officer awarded. Further, if they can succeed in increasing the award of the Acquisition Officer, then under S. 27 (2) of the Act, they must get their costs, subject to special circumstances such as an extravagant demand. But, if the learned Judge is right, then in his view extravagant claims can be safely made, if there are any grounds for putting them forward, because even if the claimants fail to reduce the award they have not to pay costs, and if only they can increase it they get their costs under S. 27 (2). In other words, the claimants are to be in the happy position of being able to say, "Heads I win, tails you lose."

I can conceive no greater inducement to litigants to appeal in land acquisition proceedings than the adoption of a principle of this sort. One can indeed test the matter by what has happened in this large group of cases, namely, that substantially every one of these 100 or more claimants has in fact appealed to the Judge from the decision of the Land Acquisition Officer, for the Government appeals for the moment before us represent only a few of the cases and are in the nature of test appeals.

And, as a matter of mere common sense, one can well understand that, for if the learned Judge is correct, then the most each claimant stood to lose was his own pleader's fees whereas, if he won, there might be a substantial addition to the purchase price and he would also get his costs. The temptation to appeal is further increased by the knowledge that land valuation is not an exact science and that different minds may well reach different conclusions as to value. Therefore, if we were to admit in principle the accuracy of the learned Judge's views as to costs, then it would mean that substantially in all land acquisition proceedings, claimants could make extravagant demands without any real risk, except that they might have to bear their own costs. After all who are Government? They, in effect, represent the interests of the public. The land here has been taken for the public benefit and, speaking for myself, I fail to see on what principle of justice or equity, Government as representing the public should be deprived of their costs when they have successfully resisted the attempts of these numerous claimants to increase the awards which the Land Acquisition Officer made. We have before us a statement of the aggregate amount of costs Government are involved in. The total amounts to something over fourteen thousand rupees. This is by no means then a trifling matter which we have to deal with.

The result, in my opinion, is that the learned Judge exercised his discretion in violation of well-recognized principles of law and that he was not justified in law in exercising his discretion in the way he did, whether or not the claimants' demands were extravagant. In my judgment, no adequate reason is shown for departing from the ordinary rule that costs should follow the event.

Accordingly, I would hold that these appeals should all be allowed, and that the respondents should be directed to pay the costs of Government in the Court below and also before us. But the same qualification will be imposed as in *Assistant Development Officer, Kurla Area*, v. *Zuje* (6), namely, that in regard to the amount of the pleader's fees awarded, the respondents should not have to pay anything in the lower Court in excess of what is certified by the Governmont Pleader concerned to have been really received by him from Goverument. That proviso does not apply to the costs in the appeal Court.

Murphy, J.—I agree in the judgment delivered by the learned Chief Justice.

S.L./R.K. *Appeals allowed.*

(6) F. A. No. 126 of 1926, decided on 25th June 1928 by Fawcett, Ag. C. J. and Mirza, J.

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PATKAR AND BAKER, JJ.

Abdulrahim Funumulla and *others*—Appellants.

v.

Sarafalli Mahamadalli—Respondent.

Second Appeal No. 574 of 1926, Decided on 15th August 1928, from decision of Dist. Judge, East Khandesh, in Appeal No. 197 of 1925.

Lease—Construction—Lease for stipulated period—Lessee free to continue possession on regular payment of rent — Principle of mutuality does not apply—Lessee can continue for his lifetime.

A lease for a particular period, after which an option is given to the lessee to continue in possession on payment of rent enures for lessee's benefit, and the principle of reciprocity or mutuality cannot be invoked. After the expiry of the lease, the lessee can continue in possession as long as he pays the rent, that is, it enures during the lifetime of the lessee: 12 *Cal.* 117 (*P.C.*); (1874) *P. J.* 177 and 36 *Mad.* 557, *Ref.*; 4 *Bom.* 424; 11 *C. W. N.* 803; *A. I. R.* 1927 *P. C.* 116, *Foll.*; *A. I. R.* 1915 *P. C.* 59 and *Wood* v. *Beard*, (1876) 2 *Ex. D.* 30, *Dist.* [P 67, C 1 & 2]

H. C. Coyajee and *W. B. Pradhan*—for Appellants.

Jayakar and *R. W. Desai*—for Respondent.

Patkar J.—The land in suit belonged to defendant 1's father, Funumulla, who leased to the plaintiff on 2nd April 1892, for a period of twenty-five years up to the last day of Falgun, Shake 1839, corresponding to 11th April 1918. Defendant 1 mortgaged the land to defendant 2 on 23rd January 1922. The plaintiff alleged an oral agreement between him and the defendant 1 by which he secured a lease for fifty-one years on a rental of Rs. 300. Plaintiff, therefore brought this suit for specific performance of the oral agreement for a lease for fifty-one years, and in the alternative, for a declaration that he was entitled to remain in possession so long as he pleased on the payment of Rs. 100 as rent. Both the Courts have found that the oral agreement with regard to the lease of fifty-one years is not proved. The only question arising in these appeals is as to the construction of the lease, Exhibit 67. It is urged on behalf of the defendant that the lease is only for a period of twenty-five years. On the other hand it is urged that the lease is to continue after the period of twenty-five years during the lifetime of the plaintifi's firm.

It was never contended in any of the lower Courts that the lease being granted for a building purpose was a permanent lease. If the subsequent conduct of the parties can be taken into consideration, according to the ruling in *Toolshi Pershad Singh* v. *Ram Narain Singh* (1), it would appear that after the expiry of the lease of twenty-five years the plaintiff paid to the defendant an amount of Rs. 1,158 on account of payment of rent to the defendant. There is also the promissory note, Ex. 97, passed by the defendant on 16th November 1919, in which the amount borrowed is said to have been taken in part payment of the prospective rent. If the subsequent conduct of the parties be taken into consideration, it would follow that the lease did not come to an end at the expiry of twenty-five years. On the other hand the agreement set up by the plaintiff for fifty-one years on a rental of Rs. 300 is inconsistent with the supposition that the lease was a permanent lease. If, however, the subsequent conduct of the parties be excluded from consideration, and the question is considered simply on the terms of the document, we agree with the view of the lower Court that the lease was for a period of twenty-five years certain, and that after

(1) [1888] 12 Cal. 117 = 12 I. A. 205 = 4 Sar. 646 (P. C.).

the period of twenty-five years, the lessee, the plaintiff was to remain in possession so long as he paid rent, and could not be ousted from the possession of the property if he paid the rent regularly.

It is urged on behalf of the defendant, relying on the case in *Manicka* v. *Chinnappa* (2), that the lease by which the lessees were to hold for such time as they wished, was a tenancy at the will of the lessee which in law was a tenancy at the will of the lessor also. In the present case the lease was for a period of twenty-five years after which the lessee was to remain in possession so long as he paid the rent. The lease in the present case, therefore, represents a transaction where there was a lease for a particular period after which an option was given to the lessee to continue in possession on payment of rent. Such an option, if expressly given to the lessee, ought to enure for his benefit, and the principle of reciprocity or mutuality cannot be invoked in such a case. The decision in *Manicka* v *Chinnappa* (2), is quite contrary to the ruling of this Court in *Vaman Shripad* v. *Maki* (3), which follows the earlier decisions in *Gopalrao Vilhal Deshpande* v. *Bhavanrav Nagnath Mutalik* (4) and *Suleman Abraham Moredhar* v. *Asmad Isap Dathra* (5) It was held in those cases that where the lessee was to remain in possession so long as he pleased or so long as he paid rent, the lease was to enure during the lifetime of the lessee. The termination of the lease was dependent upon the will of the lessee, and the exercise of the will by the lessee terminated on his death, and, therefore, it was held in those cases that the lease lasted till the lifetime of the lessee. In a subsequent case in *Bai Sona* v. *Bai Hiragavri* (6) it was held that the benefit of such an agreement could also be taken advantage of by the heirs of the lessee under S. 108 Cl (j), T. P. Act The case in *Vaman Shripad* v *Maki* (3) was dissented from in *Bai Sona* v *Bai Hiragavri* (6). It was not contended in this case in the lower Court that the lease was a permanent lease, and it could not be so contended if regard is had to the subsequent conduct of the parties and the character of the suit. It is not, therefore, necessary to consider whether the ruling in *Vaman Shripad* v *Maki*, (3) or the conflicting decision in *Bai Sona* v. *Bai Hiragavri*, (6) should govern the facts of the present case

We have to consider in this case whether the lease expired at the end of twenty-five years or continued after the expiry of twenty-five years during the lifetime either of the lessee or the firm of which the lessee was the manager. The lease at one place recites that it is to continue for twenty-five years and "only for twenty-five years the ownership is yours." In another portion of the lease it is stipulated that

"after the expiration of the (period of the) karar, when you will vacate the field of your own will, on that day we shall take (the same) into our possession. After the period of the karar we shall go on taking the said rent as long as the field will remain (in your possession.)"

It is further agreed that

"on the day on which you will hand over the field into our possession, on that day you should remove the building of your karkhana and we shall take the field and the repaired well into our possession. Till then the ownership of the field is yours."

It appears clear from these stipulations that the lease was not to expire at the end of twenty-five years, but the lessee was to remain in possession so long as he pleased and so long as he paid the rent. Following the decision in the cases of *Vaman Shripad* v. *Maki* (3) and *F. W Higgins* v. *Nobin Chunder Sen* (7), we think that the lease was for a period of twenty-five years, and after the expiry of the lease, the lessee was to continue in possession as long as he paid the rent, that is, it was to enure during the lifetime of the lessee.

On behalf of the plaintiff it is urged that the lease was to enure after the period of twenty-five years till the firm lasted No authority has been cited in support of that contention The will of the firm could only be exercised by the manager, in whose name the lease was passed. It would, therefore, follow that the lease would last till the manager was capable of exrcising the will, and would last till his lifetime On behalf of the defendant, reference was made to the case of *Secretary of State* v. *Bai Rajbai* (8). In that case, there was no option given

(2) [1912] 36 Mad. 557 = 24 M. L. J. 641 =16 I.C. 1002=(1912) M. W. N. 811.
(3) [1879] 4 Bom. 424.
(4) [1874] P. J. 279.
(5) [1877] P. J. 177.
(6) A. I. R. 1926 Bom. 274.
(7) [1907] 11 C. W. N. 809.
(8) A. I. R. 1915 P. C. 59=39 Bom. 625= 42 I. A. 229 (P.C.).

to the lessees, and the only agreement in Cl. 10 was that they were to retain during the pleasure of Government nine of the villages found under their management when the Pargana fell into their possession. The option given there was in favour of the lessor, and the principle of reciprocity or mutuality was not urged in that case, and was negatived by the judgment. Reference was made to the case of *Wood* v. *Beard* (9). In that case, the duration of the lease was made dependent on the lessor's power of letting, and it was held that the lease was void for uncertainty. But a lease for life even under the English law could be created where there is an agreement to pay rent as long as the tenant paid it regularly. Reference may be made to para 931 of Halsbury's Laws of England, Vol 18, where it is stated :

" Consequently, if it is of such a nature that the Court would order specific performance, the lessee can obtain the grant of an effectual lease, or, without this being done, the informal lease is, for the purpose of any question arising in a Court which has jurisdiction to order specific performance, equivalent to a lease by deed. Cases of this kind occur when a landlord lets a house and agrees not to raise the rent as long as the tenant pays it regularly Provided that the agreement is in writing, it operates as an agreement to lease for the life of the tenant, subject to regular payment of rent, and, for most purposes, is equivalent to a formal lease by deed for the tenant's life ".

I may here refer in this connexion to the decision of the Privy Council in *Nayan Munjari Dasi* v. *Khagendra Nath Das* (10) where a dispute between a landlord and his tenant was settled by a compromise which granted the land to the tenant at a fixed rent for 7 years and contained a stipulation that after that he was to enjoy the land on payment of the then reasonable ground rent, and the landlord, after once enhancing the rent, demanded a second enhancement, and on the tenant's failure to pay sued for ejectment, it was held that the lease was binding so long as the tenants were willing to pay the prevailing rent We think, therefore, that the view taken by the lower Court is correct, and both the appeals should be dismissed with costs.

Baker, J.—I agree, and have nothing to add.

S L./R.K. *Appeal dismissed.*

(9) [1876] 2 Ex. A. 30=46 L. J. Q. B. 100=35 L. T. 866.

(10) A. I. R. 1927 P. C. 116 (P.C.).

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MARTEN, C., J. AND MURPHY, J.

Chhipa Allarakha Isakji— Appellant.

v.

Bai Sona—Respondent.

Appeal No. 8 of 1928, Decided on 20th August 1928, from order of Workmen's Compensation Commr., Bombay, in Appln. No. 351/B-25 of 1927.

(a) Workman's Compensation Act (1923), S. 30—Whether parties to a suit agreed or not to a certain decree is a pure question of fact—Civil P. C. S. 100; and S. 110.

A dispute as to whether two parties have agreed or not to a certain decree is not in general a question of law. Still less is it a substantial question of law. It is in general a pure question of fact. [P 69 C 1]

(b) Workmen's Compensation Act (8 of 1923), Ss. 28 and 30—Commissioner has power to pass any decree or order by consent of parties—Such decree or order is not appealable—Civil P. C. S. 96 (3).

Under Workmen's Compensation Act, Commissioner has power in contested proceedings before him to pass any order or decree by consent of parties, and appeal from such decree or order does not lie to the High Court. [P 69 C 1 & 2]

(c) Workmen's Compensation Act (8 of 1923), S. 28—S. 28 refers to agreement prior to any hearing by Commissioner.

Section 28 refers primarily to cases where the parties have arrived at an agreement prior to any hearing before the Court. [P 69 C 1]

G. N. Thakor and *H. V. Divatia*—for Appellant

R. J Thakor—for Respondent

Marten, C J —This is an appeal under the Workmen's Compensation Act, 1923 It is of rather a curious nature Both parties were represented by pleaders before the Commissioner, and the order appealed from is quite simple, viz :

"By consent Rs. 2,250 to be deposited with Commissioner on or before 3rd January 1928. No order as to costs."

The expression "deposited" there clearly refers to S 8 of the Act, which provides that

"compensation payable in respect of a workman whose injury has resulted in death shall be deposited with the Commissioner,"

and then the sum so deposited is to be dealt with in certain ways. So, too, in the diary, which was kept by the Commissioner under the rules, after recording that certain issues had been raised and two witnesses heard, the entry runs as follows :

"At this stage parties agree that the opposite party should deposit Rs. 2,250 on or before

3rd January 1928. Ordered accordingly. No order as to costs."

Now the first point that arises is what jurisdiction have we to interfere with what purports to be a consent order. The appeal is based on S. 30 of the Act, but there are two provisos to that section, viz:

"(a) No appeal shall lie against any order unless a substantial question of law is involved in the appeal";

and

"(b) no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner or in which the order of the Commissioner gives effect to an agreement come to by the parties."

The first question, therefore, is whether there is here a substantial question of law involved in the appeal Now a dispute as to whether two parties have agreed or not to a certain decree is not in general a question of law Still less is it a substantial question of law It is in general a pure question of fact. But it is argued that under this Act the Commissioner has no power in contested proceedings before him to pass any order or decree by consent of the parties. He must either give his decision, or else the parties must comply with the provisions of S. 28 which deals with the registration of agreements. That section, however, seems to me to refer primarily to cases where the parties have arrived at an agreement prior to any hearing before the Court In that case S. 28 provides inter alia that the agreement shall be registered after notice. Further, the rules which have been framed by the Governor-General in Council, under S. 32 (c) of the Act, provide in R 44 for this agreement being in a particular form, and for the Commissioner issuing notices with reference to it and so on. Those rules, I think, clearly contemplate an agreement prior to any hearing by the Commissioner. I should here like to take this opportunity on behalf of the Court of thanking Mr. Coyajee (junior) as amicus curiae for his industry in obtaining for us these rules which have been published in the Gazette of Government of India on 28th June 1924, at p. 586, and which were unknown not only to the Sheristedar of the Court, but also to counsel appearing in the case. Nor apparently were they included in, at any rate, one of the text books which counsel had in Court.

Proceeding with the agreement of counsel for the appellant, it is contended that we have here a substantial question of law, because the Commissioner had no jurisdiction to pass a consent decree in the way that he did. Moreover, although R. 38 of the Workmen's Compensation Rules applies certain provisions of the Civil Procedure Code including Rr. 1 and 2, O. 23, they do not include R 3, O. 23, viz:

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, . . . the Court shall order such agreement, compromise . . . to be recorded, and shall pass a decree in accordance therewith, so far as it relates to the suit."

But that rule also contemplates, I think, in general, a case where the parties have come to an agreement outside the Court, and ask the Court to settle the suit in accordance therewith

In the present case the parties were actually before the Court on a contested matter in which issues had been raised, and some evidence led and then the parties agreed to terms Thereupon the Court passed an order in accordance with their consent. I confess it is rather startling to be told that in an ordinary case the Court has no power to pass an order by consent of the parties, except under O 23, R 3, assuming of course the matter is one within its general jurisdiction That proposition is certainly quite erroneous as regards the Original Side. And as regards the Commissioner's Tribunal, I should have thought that the answer was one of common sense, and that no objection could be taken to the present order as being in any way illegal. The workman, or rather his representatives, were getting the full amount of their claim, minus costs. If the employer was willing to pay that amount, what more was to be said Surely no judgment was required. It was sufficient to record the matter by consent, and direct the money to be paid The only concession which the employer obtained was that he had not got to pay the costs, and, as to this, the Commissioner had already heard enough of the case to know if it was a fair concession for the workman's representatives to make. It seems to me, therefore, that it cannot be successfully argued here that there is any substantial question of law raised in this appeal. Consequently, I think, the first proviso bars this appeal.

Under these circumstances it is unnecessary for us to consider whether the second proviso to S. 30 applies also. I do not think this is a case where the parties have agreed to abide by the decision of the Commissioner, but the other part of this proviso as to whether the order of the Commissioner gave effect to an agreement come to by the parties, is another matter Prima facie these, words are wide enough to cover the present order But it is argued that the proviso only refers to a registered agreement within S 28, and I leave it at that.

As to consent orders generally, if one was dealing with a matter not before the special tribunal constituted by this Act, but before an ordinary Law Court under the Civil Procedure Code, then it would, I think, be clear that in general no appeal would lie from a consent decree Thus S 96 (3), Civil P C says :

"No appeal shall lie from a decree passed by the Court with the consent of parties."

Accordingly, in general, it would be necessary to bring a fresh suit, if it was sought to set aside a consent decree on such grounds as misrepresentation, fraud, or mistake ; see Mulla's Civil Procedure Code, 8th Ed p 265

It has been urged that unless we can interfere here, then litigants are without a remedy, supposing there is a case where the Commissioner has made a mistake in recording an order as being by consent I appreciate that, having regard to S 19 (2) of the Workmen's Compensation Act which largely ousts the jurisdiction of the Courts, there may be a difficulty in the way of the appellant bringing a fresh suit before the ordinary civil Courts to set aside this alleged consent decree Nor is there any provision in the Workmen's Compensation Act itself for any such suit being brought before the Commissioner. But after all this is a matter for the legislature to amend, if at all, and not for ourselves The legislature has created a special tribunal ousting the jurisdiction of the ordinary civil Courts of the land, and if this results in any hardship to individuals, then the hardship must be rectified by the legislative authority which created the special tribunal.

So far as the facts of the present case go, I confess on the materials before us that the appellant hardly excites one's sympathy In the first place, as he was represented by a pleader, there should certainly have been an affidavit by his pleader, stating that in fact no consent decree was arrived at, or explaining the circumstances under which what purports to be a consent decree was obtained. There should at least have been a reference in the appellant's affidavit as to why he could not get his pleader to make any affidavit if that be the fact. In the result, however, the present application comes before us without even a reference to the pleaders ; and as to what actually happened before the Commissioner the affidavits on their side are at total variance. Clearly one side or the other is committing perjury They cannot even agree as to who was present at the hearing before the Commissioner.

There is also another point. This consent order was passed on 12th November 1927, but it was not till 5th January 1928, that any appeal was filed in this High Court. This delay is hardly consistent with the appellant's story that the Commissioner purported to pass by consent an order which in fact the apppellant did not consent to. Moreover, it does not appear that any application whatever was made to the Commissioner to review his order, or to ask him for any explanation or statement with reference to the allegations which the appellant now makes. I do not say one way or the other whether legally the Commissioner has power to review any decision he has once given. But, I, at any rate, would strongly discourage an application of the present type, which is made behind the back of the Commissioner, from what purports to be a consent order and makes allegation against him which is totally denied by the other side

In my judgment this appeal ought to be dismissed with costs.

Murphy, J —I agree.

A L /R K. *Appeal dismissed.*

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MIRZA AND BAKER, JJ.

Emperor

v.

Dinshaw Cursetji Driver and *others*— Accused.

Criminal Appeal No. 307 of 1928, Decided on 3rd October 1928 against order of Ag. Ch. Presy. Mag., Bombay.

*** Evidence Act, S. 25—Excise peon is police officer and confession made to him is inadmissible.**

An excise peon having the power to detain, search, seize and arrest any person whom he believes to be guilty of any offence under Opium Act or Bombay Abkari Act has powers which are very similar to those exercised by a police officer. Any confession made to him is therefore inadmissible under the provisions of S. 25 : *A. I. R.* 1927 *Bom.* 4 (*F.B.*), *Appl.*

[P 71 C 2]

P. B. Shingne—for the Crown.

G. M. Joshi and *A. A. Adarkar*—for Accused.

Mirza, J.—It is conceded on behalf of the Government of Bombay that apart from certain incriminating statements made by the accused to an excise peon, which statements were excluded by the Magistrate from evidence, the evidence on the record would not be sufficient to convict accused 3 or accused 4. The only point, therefore, which we have to consider in this appeal and its companion revision application is whether those statements were rightly excluded by the Magistrate from being admitted in evidence

In the recent Full Bench decision of *Nanoo* v *Emperor* (1) the authorities on the point were exhaustively gone into and considered The Government Pleader distinguishes that case from the present on the ground that what the Full Bench had to decide related to statements made to excise officers on whom powers of investigating the offence had been conferred He contends that an excise peon is not an officer on whom any such powers are conferred, and, therefore, the ruling in the Full Bench case would not apply. Under S. 15, Opium Act, the excise peon would have the power to detain, search, seize and arrest any person whom he had reason to believe to be guilty of any offence against the Opium Act or any other such law. It would also appear from S 3, Bombay Act 2 of 1923, that officers of the department of salt and excise not below the rank of an Inspector, who in the right of their office are authorized by the Local Government in that behalf, shall within the area for which they are appointed, exercise with regard to offences under the Bombay Act, powers similar to those exercised by an officer in charge of a police station under the Code of Criminal Procedure. By referring to S. 157, Criminal P. C., it would appear that an officer in charge of a police station is empowered to depute his subordinate officers not being below such rank as the Local Government may by general or special order prescribe in that behalf to investigate the facts and circumstances of the case, and if necessary to take measures for the discovery and arrest of the offender. There is no doubt that a police constable is one of such subordinate officers to whom an officer in charge of a police station may depute such powers. The Government Pleader contends that in the absence of a special provision putting the excise peon on the same footing as a police constable, the excise peon cannot be described as a subordinate officer to whom the excise superior officer contemplated by S. 3, Bombay Act 2 of 1923, could depute the power of investigation. It is not necessary, in my opinion, to decide this point in the present case. In my judgment, the excise peon having the power to detain, search, seize and arrest any person whom he believes to be guilty of any offence, has powers which are very similar to those exercised by a police officer I would be prepared, therefore, to extend the principle of the Full Bench ruling in *Nanoo* v. *Emperor* (1) to the case of an excise peon, and hold that any confession made to him is inadmissible under the provisions of S. 25, Evidence Act. That being the only point for disposal in the case, the appeal should be dismissed, and the rule granted against accused 4 discharged.

Baker, J.—I agree. It has now been definitely laid down by this Court in the Full Bench case of *Nanoo* v. *Emperor* (1), that an abkari officer, who in the conduct of an investigation of an offence punishable under the Bombay Abkari Act, exercises the powers conferred by the Code of Criminal Procedure upon an officer in charge of a police station for the investigation of a cognizable offence, is a police officer within the meaning of S. 25, Evidence Act, and any confession made to such an officer in the course of his investigation under the Abkari Act or the Criminal Procedure Code is inadmissible in evidence. In the present case the alleged incriminating statements were made not to the Abkari Inspector, but to his peon. The powers of excise peons are defined in S. 37, Bombay Abkari Act, and S. 15, Opium Act (Act 1 of 1878). The powers are practically the same except that in one case they refer to excisable

(1) A. I. R. 1927 Bom. 4=51 Bom. 78 (F.B.).

articles, and in the other, specifically to opium, and those powers are to seize in any open place or in transit anything which is liable to confiscation under either of the Acts and to detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and if such person has any such article in his possession, to arrest him. The powers, therefore, exercised by the excise peon are those of search, seizure, arrest and detention. In relation to the Abkari Inspector the position of the excise peon is very much that of a police constable towards an officer in charge of a police station. It would, I think, be very difficult to draw a distinction and to say that because an officer has the powers of an officer in charge of a police station, therefore a confession made to him would be inadmissible under S. 25, Evidence Act, while because an officer has only powers of seizure, search, arrest and detention, a confession made to him would not be so inadmissible.

It may be that the powers of an ordinary police constable are wider than those of an excise peon, because the duties of a police cotable extend to the prevention and detection of offences of all descriptions, whereas the powers of an excise peon are only exercisable in the case of offences falling under the Abkari Act But when we are dealing with a prosecution under either of those Acts, it is obvious that the position of the excise peon towards the accused is practically the same as that of an ordinary police constable towards an accused charged with some offence under the criminal law, and I see no reason why a confession made to such an excise peon should be held to be admissible on the ground that he does not exercise all the powers conferred upon an officer in charge of a police station. For all practical purposes, in a case of this character, the position is exactly that of a police constable in a case falling under the ordinary law, and in view of the remarks made by this Court in the Full Bench decision in *Nanoo* v *Emperor* (1), I see no reason why the prohibition of S. 25, Evidence Act, should not be extended to incriminating statements made by persons accused of an offence under the Abkari or Opium Act, to excise peons who are actually engaged at the time in the investigation of the offence under the orders of the Abkari Inspector, and who have the power both to seize any prohibited articles found in the possession of the accused, and also to arrest the accused and keep him in detention. It has been argued that some distinction should be made between confessions and statements made by accused persons which are not in the nature of admissions As the statements which were made by the accused in this case to the abkari peon were not allowed to be put in, it cannot be said exactly what they were, but the questions themselves are on the record, and from those questions I have no hesitation in holding that if those questions had been truly answered, they would have amounted to incriminating admissions against the accused, to whom those questions were put. One of the questions is: Where did you get the opium from? and the other is: What was the rate fixed for the opium? Obviously any answer made to a question of that description must necessarily amount to an admission that the person to whom these questions were put was dealing in opium In these circumstances I agree that the learned Magistrate was correct in disallowing these questions on the ground that they were prohibited by S. 25, Evidence Act. It is not contended by the prosecution that in the absence of these confessional statements there is sufficient evidence on the record to warrant the conviction of accused 3 and 4 The result, therefore, must be that the appeal against the acquittal of accused 3, Dinsha Cursetji Driver, must be dismissed, and so also the rule issued in the case of accused 4, who is discharged must be discharged also.

R K. *Appeal dismissed* and *Rule discharged.*

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MIRZA AND BAKER, JJ

Nurmohomed Rajmahomed—Accused.

v.

Emperor—Opposite Party

Criminal Revn. Appln. No 129 of 1928, Decided on 12th October 1928, against the order of the Presy Mag., 3rd Court, Bombay.

*** Criminal P. C., S. 202—Case referred under S. 202—Police must report and not send charge-sheet.**

When a Magistrate has referred a complaint for investigation under S. 202 the police are

not entitled after investigation to send up the accused for trial under a charge-sheet as if they had taken cognizance of the case under their ordinary powers of investigation. The only action they can take is to make a report to the Magistrate : *A. I. R.* 1928 *Cal.* 24, *Foll.*; 8 *Bom. L. R.* 589, *Dist.*; (1911) 2 *M. W. N.* 74; *Appl.* [P 73 C 2]

B. J. Desai, V. F. Vicaji, S. B. Kapadia and *G. S. Rao* for *K. N. Koyajee*—for Accused.

P. B. Shingne—for the Crown.

Craigie, Blunt and *Caroe*—for Complainant.

Mirza, J.—A complaint was made to the Chief Presidency Magistrate that the three accused had committed offences under Ss. 411 and 114, I P. C The Magistrate took cognizance of the offence against accused 1 and 2 under S. 200, Criminal P C., and after examining the complainant, directed an inquiry and investigation to be made in the matter by the Bombay Police under S 202. The police officer concerned made no report, but sent up a charge-sheet charging the two accused under Ss 411 and 114, I P C The learned Magistrate in the meanwhile was proceeding with the case against accused 3, and the case of accused 1 and 2 stood adjourned from time to time. As the trial of accused 3 resulted in his conviction and sentence, the case against the accused 1 and 2, was, on their application, transferred by the Chief Presidency Magistrate to the Court of the Presidency Magistrate, Third Court Endorsements were made by the Magistrate on the charge-sheet from time to time indicating the various adjournments and the final order made by him transferring the case to the Third Court. In the Third Court an objection was taken on behalf of the accused that the charge-sheet was illegal, and the case could not proceed. The Magistrate upheld the objection and discharged the accused. An application was made to the Magistrate on behalf of the prosecution that he should himself issue process in the matter, but the Magistrate held that as the case transferred to him was a case under the charge-sheet, he was not competent to deal with the matter as asked for. The prosecution thereupon applied to the Chief Presidency Magistrate to re-transfer to himself the case under the charge-sheet and to issue process. The Chief Presidency Magistrate rejected the application. The Government of Bombay have now applied for revision of the order passed by the Presidency Magistrate, Third Court, discharging the accused.

It is clear from the record that what was transferred by the Chief Presidency Magistrate to the Third Court was not the case including the complaint, but the case as made out by the charge-sheet The complaint remained on the file of the Chief Presidency Magistrate, and was put in as an exhibit in the proceedings before the Third Court. Under the ruling in *Isaf Nasya* v. *Emperor* (1), it was not competent to the police, when they were directed to investigate the offence to have charged the accused with the offence on a charge sheet. The proceeding was clearly illegal, and the Third Presidency Magistrate. in my opinion, was right in discharging the accused. The complaint was not before him, and he could, therefore, not make any order on the complaint The application made by the prosecution to the Chief Presidency Magistrate was misconceived. The prosecution did not apply to him to proceed with the complaint, but asked him to re-transfer to himself the case as made out by the charge-sheet. The result is that the complaint is still on the Chief Presidency Magistrate's file, and has not yet been disposed of. It would be open to the prosecution to apply to the Chief Presidency Magistrate to dispose of the complaint according to law. The present application in revision is dismissed, and the rule discharged.

Baker, J.—I agree. The point of law in the present case is this, whether, when a Magistrate has referred a complaint for investigation under S. 202, the Police are entitled after investigation to arrest the accused and send him up for trial under a charge-sheet as if they had taken cognizance of the case under their ordinary powers of investigation. The difficulty which has arisen in the present case is, in my opinion, due to the complainant in his complaint having asked for a police investigation which gave rise to the supposition that this investigation was under S. 156 (3), Criminal P. C. It has been held by the Madras High Court in *In re Arula Kotiah* (2), that it is the duty of a Magistrate, on presentation of a complaint of any offence, to immediately proceed in

(1) A. I. R. 1928 Cal. 24=54 Cal. 303.
(2) [1911] 2 M. W. N. 74=11 I. C. 999=12 Cr. L. J. 463.

the manner laid down in Ch. 16 (Ss. 200 et seq.). and that if Cl. 3, S. 156, had been intended to provide an alternative procedure to that laid down in Ss. 200 et seq.. it would have found a place in Ch. 16 and not in Ch. 14 which deals with the procedure and powers of the police in cases in which information of an offence is given to a police officer There is a ruling of this Court in *Emperor* v. *Vishwanath* (3), which at first sight might seem to lay down a contrary rule. On reference to that decision, however, I find that in that case there was no complaint. In making the reference the Sessions Judge said:

"Here, the learned Magistrate had no complaint before him nor did he examine the complainant—both of which are conditions precedent to the delegation of the enquiry."

That case, therefore, is on different facts to the present case, and is not of any assistance in the decision of the point which is now before us. It is quite clear on the ruling of the Calcutta High Court in *Isaf Nasya* v. *Emperor* (1), that the Magistrate to whom a complaint is made can only proceed under Ss. 202, 203 and 204, and in the present case, from the Magistrate's own order, it would be seen that he sent the case for investigation to the police after examining the complainant on oath That must be taken to be an order under S. 202 In that case the police had no power to arrest the accused or send him up for trial on a charge sheet The only action they could take was to make a report to the Magistrate, after consideration of which it was open to him to proceed either under S. 203 by dismissing the complaint, or S 204 by issuing process. The view taken by the learned Presidency Magistrate is, therefore, in my opinion, correct, and must be upheld The sole remaining point is as to the result of the proceedings. It is quite clear that the result is that the original complaint made by Cunningham is still undisposed of, because no order has been passed by the Magistrate on the result of the investigation made by the police The question whether such an order should be made by the Chief Presidency Magistrate to whom the complaint was originally made or by the Presidency Magistrate to whom the proceedings under the charge-sheet were transferred, is of minor importance. I agree that what appears to be transferred to the Third Presidency Magistrate were the proceedings initiated upon the police charge-sheet. In any case, as the complaint is still undisposed of, it will be necessary for the proceedings to be taken up at the point where the irregularity commenced, that is to say, it will be necessary that the police report should be made in reply to the reference under S. 202, and the Chief Presidency Magistrate should then proceed to dispose of it in accordance with law, that is to say, under S. 203 or S. 204 as the case may be. The rule will be discharged.

R.K. *Rule discharged.*

(3) [1906] 8 Bom. L. R. 589.

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MIRZA AND BAKER, JJ.

Tribhovan Motiram—Accused.

v.

Emperor.

Criminal Revn. Appln. No. 212 of 1928, Decided on 25th September 1928, against the decision of Sub-Divl. Magistrate, 1st Class, Broach.

(a) Bombay Prevention of Gambling Act (4 of 1887), S. 6—Complaint on oath may be oral or in writing—It need not be recited in warrant—Issuing of warrant raises presumption that complaint was on oath.

The complaint on oath referred to in S. 6 does not appear necessarily to be a complaint in writing on the filing of which process is to issue as in ordinary criminal trials. It may be either oral or in writing. It is not necessary that it should be recited in the warrant or set out in any complaint that may be subsequently filed before the Magistrate. The fact that the warrant has been issued would raise a presumption that *omnia rite esse acta.* [P 75 C 2; P 76 C 1]

(b) Bombay Prevention of Gambling Act (4 of 1887), S. 6—District Superintendent of Police can administer oath to complainant.

Section 6, Gambling Act, confers the power inter alia on the District Superintendent of Police to receive a compiaint on oath in cases contemplated by the section and such a power necessarily implies that the District Superintendent of Police is competent in cases contemplated by S. 6 to administer an oath to the person making the complaint before him. [P 76 C 1]

(c) Bombay Prevention of Gambling Act (4 of 1887 as amended by Act 6 of 1919), S. 12—Currency notes and cash if used for gaming are instruments of gaming.

Although currency notes and cash found on the person alleged to be a gambler cannot in themselves be regarded as "instruments of gaming" but if they are used as a subject or means of gaming they would fall within the definition of "instruments of gaming": 1[6]

Bom. 283 (*F.B.*), *held overruled by Act* 6 *of* 1919. [P 77 C 1]

(d) Bombay Prevention of Gambling Act (4 of 1887), S. 5—Person seen coming out of gaming house and arrested then—He is found in the house.

When a police officer armed with a warrant sees a person come out of a house, and he is arrested as he comes out, he is found in the house. "Found in the house" does not mean "arrested in the house": 8 *B. H. C. R.* 1; and 22 *P. R.* 1895, *Rel. on.* [P 76 C 2]

M. T. Patel and *K. V. Patel*—for Accused.

P. B Shingne—for the Crown.

Mirza, J.—The applicant along with three others was summarily tried before the Sub-Divisional Magistrate, First Class, Broach, for offences under Ss. 4 and 5, Bombay Prevention of Gambling Act, 1887 (Bom Act 4 of 1887), was convicted and sentenced to pay a fine of Rs. 125 or in default to undergo one month's rigorous imprisonment. He applies for revision of the order of conviction and sentence.

Mr. Patel, on behalf of the applicant, contends that the warrant under which the gaming house was entered and searched, the persons arrested and the things seized was illegal He also contends that the arrest and search of the applicant were likewise illegal. The ground for the first contention is that the warrant was issued by the District Superintendent of Police not upon a complaint on oath as required by S. 6 of the Act, but only on credible information received. For the second contention, Mr. Patel relies upon an additional circumstance, that the arrest of the applicant was made not by the officer named in the warrant, but by an officer to whom the officer named in the warrant had delegated his powers of arrest. He relies also on the further circumstance that the arrest of the applicant was not made in the gaming house, but on the public road outside the house. Mr. Patel further contends that the currency notes and cash found on the person of the applicant and the books and vouchers found in the house are not instruments of gaming within the meaning of that term in the Act.

This having been a summary trial the notes of the learned Magistrate are necessarily meagre. It appears, however, from the complaint filed ay the Sub-Inspector of Police, Manilal Joitaram, on behalf of the Crown, that on obtaining information to the effect that Kanayalal Nathalal, the original accused 1, had kept a common gaming house to which he and others resorted for gambling, the Sub-Inspector of Police obtained a warrant from the District Superintendent of Police authorizing him to enter the house, arrest persons found there, and seize all instruments of gaming and articles suspected to have been used or intended to be used for the purpose of gaming. The Sub-Inspector proceeded with the warrant to the house of accused 1 accompanied by certain police officers and the panch. When he was at a distance of ten paces from the house of accused 1, he saw the applicant and two others, being the original accused 2, 3 and 4, coming out of the house. The Sub-Inspector with his party followed the applicant and accused 3 and 4 and arrested them at some distance from the house. He then asked Police Sub-Inspector Baburao, who was with him, to take search of their persons and himself proceeded with some of the Panch to the house of accused 1 which he entered and took search of in the presence of the Panch. He arrested accused 1 and seized certain articles produced before the Court as being instruments of gaming found in the house. Baburao later on rejoined him and handed over to him the articles he had found on the persons of the applicant and accused 3 and 4. The complaint further stated that the applicant and accused 3 and 4 were found in the gaming house gathered there for the purpose of gambling.

The complaint is silent on the point of there having been a sworn complaint before the District Superintendent of Police on the strength of which the warrant was issued by that officer. The complaint on oath referred to in S. 6, does not appear necessarily to be a complaint in writing on the filing of which process is to issue as in ordinary criminal trials No condition is imposed that it must be in writing. It may, therefore, be either oral or in writing. When made to a District Superintendent of Police, it does not, in my judgment, stand on a higher basis than an information given to the police and the provision that it must be made on oath before a District Superintendent of Police is with a view to deter

police informants from making false or reckless complaints of this nature and in order to make sure that action is being taken on the responsibility of the informant. It is not necessary, in my judgment that the complaint on oath contemplated by S. 6 should be recited in the warrant or set out in any complaint that may be subsequently filed before the Magistrate. The fact that the warrant has been issued would raise a presumption that *omnia rite esse acta*. Illustration (e) to S. 114, Evidence Act seems to be to the point. If the opponent relied upon the illegality of the warrant on the ground that no complaint on oath was previously made before the District Superintendent of Police, he should in my opinion, have questioned the complainant Manilal about it when he gave evidence in the case There is no evidence in the case which would rebut the general presumption arising in favour of the validity of the warrant. Mr. Patel, however, contends that there could not have been a complaint on oath before the District Superintendent of Police as that officer is not empowered under the Indian Oaths Act (Act 10 of 1873) to administer oaths. Under S 4, Indian Oaths Act, the authority to administer oaths and affirmations is given to Courts and persons having by law, or consent of parties, authority to receive evidence. S. 6, Gambling Act confers the power inter alia on the District Superintendent of Police to receive a complaint on oath in cases contemplated by the section. Such a power in my judgment necessarily implies that the District Superintendent of Police is competent in cases contemplated by S. 6 to administer an oath to the person making the complaint before him.

The next point to consider is whether on the facts recited in the complaint and presumed to have been proved before the learned Magistrate it can be said that the applicant was found in any common gaming house or was present there for the purpose of gaming within the meaning of S 5, Gambling Act. The term 'found gaming" has been interpreted in the case of *Reg.* v. *Nana Moroji* (1), with reference to S. 57, Act 13 of 1856. which was in similar terms to S. 5, Bombay Gambling Act, now in force. In construing the term, Green, J. remarked p. 8):

> " . . . The seeing of the gaming going on by the Inspector, and the arrest of those who were engaged in it, must, I think, be considered to form part of one transaction, and as a connected series of facts constituting the finding ; and it would, in my opinion, be an unreasonable construction of the Act to hold that persons are not found gaming when they are seen doing so by an Inspector of Police, and are forthwith arrested by police officers assisting the Inspector who so saw them, though the arrest may not have taken place in the very house or room where the gaming was seen to take place."

In that case the Police Inspector had before entering the house looked through a window and seen accused in the place in question playing with dice, cards and money Only two of the accused were arrested in the room itself, the others being arrested elsewhere and with the exception of one of the accused not in that house at all but in closely adjoining places, and none of them were actually arrested by the officer who had seen the gaming going on. In the present case, the facts are somewhat different. The Police Sub-Inspector did not see the applicant gaming in the house, but only saw him coming out of the house. It would be unreasonable, in my judgment, to construe the section as requiring that the person " found " in the gaming house should be actually arrested in the place where the gaming has been going on. The Sub-Inspector of Police was acting on a warrant which authorized him to arrest any person " found " in this house. Had he looked into the house through a window, as was done by the police officer in the case before Green, J , and seen the applicant inside the house, it would not be contended, that he had not " found " the applicant in the house. In my judgment it makes no material difference whether the applicant was seen inside the house or was seen coming out of the house, if the door through which the applicant was seen coming out of the house was a means of ingress and egress to this particular house and no other. An inference could legitimately be drawn from that circumstance that the person so seen coming out had previously been inside the house. Soon after the arrest of the applicant the Sub-Inspector and the Panch entered the house and found gambling going on there. They also found instruments of gaming. The books seized on the occasion showed that the applicant and accused 1 were partners in the gaming house. From these cir-

(1) [1871] 8 B. H. C. R. 1.

cumstances a presumption arises under S. 7 of the Act and a legitimate inference could be drawn that the applicant was in the house when gambling was in progress and was present there for the purpose of gaming.

With regard to Mr. Patel's contention that the arrest of the applicant was made not by the Sub-Inspector Manilal mentioned in the warrant, but by Sub-Inspector Baburao, that contention is not borne out by the evidence. From the complaint it appears that the arrest was made by Manilal and after the arrest Baburao was delegated by him to search the persons of the applicant and accused 3 and 4. This is supported by the panchnama which shows that the search was made by Baburao in the presence of the panch. No mention is made in the panchnama that Baburao had arrested the applicant and accused 3 and 4.

Mr. Patel's next contention is that the currency notes and cash found on the person of the applicant are not "instruments of gaming." He relies upon the Full Bench decision in *Queen-Empress* v. *Govind* (2), where the Court held that a coin was not an "instrument of gaming" within the meaning of S. 12, Bombay Act 4 of 1887 as amended by Bombay Act 1 of 1890, and that the expression "instrument of gaming," as used in S. 12 of the Act of 1887, means an implement devised or intended for that purpose. No doubt the currency notes and cash found on the person of the applicant cannot in themselves be regarded as "instruments of gaming,', but if they were used as a subject or means of gaming they would fall within the definition of "instruments of gaming," as now contained in the Gambling Act. By a clause added by Bombay Act 6 of 1919, S. 2 (b), "instruments of gaming" now include any article "used as a subject or means of gaming." This clause did not form part of the definition of "instrument of gaming" in Act 4 of 1887 as amended by Act 1 of 1890, which was the definition the Full Bench was construing. In the light of the evidence in the case, it can be ligitimately inferred that the currency notes and cash found on the person of the applicant were articles used by him as a subject or means of gaming.

Mr. Patel has also contended that the books seized under the warrant cannot be said to be "instruments of gaming." The books to which objection is taken disclose that the applicant and accused 1 were partners in the common gaming house. The books in my judgment would fall under the last clause of the definition of "instruments of gaming" contained in S. 3, Bombay Gambling Act, viz., "any document used as a register or record or evidence of any gaming." This clause was also first added by Bombay Act 6 of 1919, S. 2 (b), and was not part of the definition which the Full Bench had to construe. The books in question showed that transactions in American futures were registered in them. In my opinion there was no illegality in seizing the books. Having regard to these amendments by the legislature the Full Bench ruling is no longer applicable.

On the points urged before us the applicant has failed to show that there was any illegality in the proceedings which would vitiate his conviction. The application fails and must be rejected. The rule granted on 30th July 1928, is discharged.

Baker, J.—The applicant was convicted under Ss. 4 and 5, Bombay Prevention of Gambling Act, 4 of 1887, and was sentenced to a fine of Rs. 125. A number of points of law are raised in this case. The warrant in this case was issued by the District Superintendent of Police under S. 6 of the Act to the Sub-Inspector, Broach City. The Sub-Inspector proceeded to the house and saw the present accused and some others who are not before the Court coming out of the house. They were arrested at some distance from it. Subsequently betting slips were found in the house. It is contended, first, that the District Superintendent of Police has no power to issue a warrant, secondly, that such a warrant can only be issued upon a complaint made on oath, a condition which was not complied with in the present case, thirdly, that the power to arrest under S. 6 can only be exercised by the person to whom the warrant was directed whereas the present accused was arrested by some other officer, fourthly that the accused not being found in the house, no presumption under S. 5 could arise, and the conviction is therefore illegal.

Taking these points in order, S. 6, Bombay Act 4 of 1887 specifically autho-

(2) [1891] 16 Bom. 283 (F.B.).

rizes any District Superintendent of Police outside the city of Bombay to issue a warrant on complaint made before him on oath. It is contended that a Superintendent of Police is not one of the persons empowered to administer oaths under the Indian Oaths Act, 10 of 1873, and that an enactment of the local legislature cannot override an Act of the Imperial Legislature. Under S. 4, Indian Oaths Act, anthority to administer oaths and affirmations is granted to all Courts and persons having by law or consent of parties authority to receive evidence. If the receiving of a complaint on oath is regarded as receiving evidence, then a District Superintendent of police is a person who has by law authority to receive evidence, namely, under S. 6, Bombay Prevention of Gambling Act. I am, however, of opinion that the power to administer oaths mentioned in the Indian Oaths Act refers only to the taking of evidence as is shown by S. 5, which refers to witnesses, interpreters and jurors. Under S. 14, Criminal P. C. the Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the First, Second or Third Class in respect to particular cases or to a particular class or particular classes of cases or in regard to cases generally in any local area outside the presidency towns, and under the old Criminal Procedure Code (Act 10 of 1872) certain powers under Ss. 83, 86, 96, 98, 99, 101, 143, 144 and 176 were conferred on all District Superintendents and Assistant Superintendents of Police. In view of this power possessed by the Local Government, and of the express power conferred by S. 6, Bombay Prevention of Gambling Act, I am of opinion that the District Superintendent of Police has power to receive a complaint on oath in cases contemplated by that section.

It is next contended that the section requires that before the issue of a warrant there should be a complaint made on oath, and that no such complaint was made in the present case. The present case was tried summarily, and there is only a summary of the evidence. It is true that the warrant contains the words "on credible information." It does not appear from the record whether or no a complaint was made on oath but there is no statement that it was not so made. Under S. 114, Evidence Act the presumption is that judicial and official acts are regularly performed. This is a question of fact. The accused were defended by pleaders, and if as a matter of fact, no complaint was made on oath, the complainant Sub-Inspector, who has been examined in the case, should have been asked this question. No such question appears to have been put to him, and in the absence of anything to show that the warrant was not issued in accordance with the provisions of S. 6 of the Act, I am not prepared to assume that the provisions of law have been disregarded.

Then it is argued that under S. 6 the power which is given to search and arrest is given to the officer acting under the warrant, and cannot be delegated, and that the present accused were arrested not by the Sub-Inspector, but by some other officer. From the complaint and from the panchnama it will appear that the actual arrest of the accused was made by the Sub-Inspector, although they were searched by another Sub-Inspector. The actual entry into the house was made by the Sub-Inspector to whom the warrant was directed. No question was put in cross examination to the Sub-Inspector Manilal as to by whom the actual arrest was made, but it appears that he was present when they were arrested, and I do not think that there is anything in this argument.

Then it is contended that the accused were not found in the house. The Sub-Inspector, however, has given evidence that he saw all the accused come out of the house and stand in the verandah, and it has been held in *Reg.* v. *Nana Moroji* (1) that it is sufficient if they are seen in the house. There is a Punjab case, *Veer Singh* v. *Queen-Empress* (3), which lays down that it is not necessary that the accused should be actually found in the house if he is seen there : cf. also Velinker's Law of Gaming and Wagering, 137. It would be unreasonable to hold that when a police officer armed with a warrant sees a person come out of a house and he escapes or is arrested as he comes out, that he was not found in the house. "Found in the house" does not mean "arrested in the house". It must mean "seen in the house" or "coming out of the house, which amounts to the same thing. In this house were found betting

(3) [1895] 22 P. R. 1895 Cr.

books which were before the Court, in which the accused's name appears. The Magistrate held that the entry shows that he was a partner in the gambling in American futures which went on there, which is a finding of fact based on documentary evidence, and is not open to argument in revision. The finding of the books, which are instruments of gaming, raises the presumption under S. 7 that the persons found therein were there present for the purpose of the gaming, and the evidence of the complainant shows that his agent gave a marked rupee and a marked note and a chit to accused 3 in the presence of the panch, and accused 2 and 4 were standing in a circle with accused Nos. 1 and 3 at the time the money and the chit were given to accused 3, who passed on the money to accused 1. In these circumstances I am of opinion that the conviction was correct, and the rule should be discharged.

R.K. *Rule discharged.*

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* A. I. R. 1929 Bombay 79

MIRZA AND BAKER, JJ.

V. R. Kothari, In re

Criminal Revn. Appln. No. 285 of 1928, Decided on 9th October 1928, from order of City Mag., 1st Class, Poona.

*** Criminal P. C., (amended 1923), S. 138 —Magistrate must exercise his own discretion in appointing jurors.**

A Magistrate must exercise his own discretion in nominating a proportion of the jury. He cannot accept the names suggested by the original complainant without exercising his own discretion in the matter; otherwise it is an illegality. 23 *Cal.* 499 and 26 *Cal.* 869, *Foll.* 37 *All.* 26, *Dist.* [P 81 C 1]

S. G. Patwardhan—for Applicant.

A. G. Desai—for Opponent.

P. B. Shingne—for the Crown.

Mirza, J.—The applicant owns an oil mill situated at 8, Bhavani Peth, which prior to these proceedings he used to work continuously during night and day. The opponent whose residence adjoins the mill made a complaint to the City Magistrate, First Class, Poona, under S. 133, Criminal P. C. The City Magistrate made a conditional order requiring the applicant to desist from working the mill between the hours 7 p. m. and 7 a. m. and to appear before him on a date fixed to move to have the order set aside or modified. The applicant appeared before the Magistrate as required and applied under the provisions of S. 135, Criminal P. C., to appoint a jury to try whether the conditional order made was reasonable and proper. The Magistrate decided to have a jury of five persons for the purpose and called upon the applicant under the provisions of S. 138 to nominate two out of the five. The applicant nominated two jurors and suggested a third name which was accepted by the Magistrate who nominated him as foreman. The Magistrate addressed a letter, dated 30th September 1927, to the present opponent which was as follows :

"You have applied against Mr. V. R. Kothari (applicant) as regards an oil mill under S. 133, Criminal P. C. It was written to you to inform the names of the jurors, you wanted to nominate ; but you have not till to-day. arranged to do so. Now, do arrange to do so by 3-10-27. Take note."

The opponent replied :

"I have received the summons."

The names of the jurors appointed are :

(1) Mr. Ardeshir Bomanji Sethna, residing at Convent Street, Camp, Poona.

(2) Khan Saheb Aspandiar Rustom Irani, residing at Gutta Street, Poona.

The jurors as above should be appointed on my behalf, Dated 1st October 1927."

On receipt of these two nominations the Magistrate treated them as completing the jury. On 3rd October 1927, the opponent wrote to the City Magistrate as follows :

"I received an intimation from you, through a police constable. I have given to him names of two jurors on my behalf ; and I am also giving (those two names) to-day in this application.

(1) Mr. Ardeshir Bomanji Sethna, Pleader, Convent Street, Camp Poona.

(2) Khan Saheb Aspandiar Rustom Irani, Gutta Street, Poona.

"Thus the names of the two jurors have been given, which may be taken note of."

On 14th October 1927, the opponent made an application to the Magistrate as follows :

"In the above case, Mr. Ardesar Bomanji Sethna was appointed one of the jurors on behalf of the complainant (opponent). But he being a pleader, and as the civil Courts are now closed, he has to go to Bombay for some private business. He is going in a day or two. I came to know that the jurors were to return their verdict after inquiry on 18th October 1927. I, therefore, request that another juror should be nominated on my behalf who should be Mr. Jehangir Pestonji, pleader. The period of 18th October 1927, should therefore be extended and Rao Bahadur Lalubhai should be informed accordingly."

Accordingly, Jehangir Pestonji, pleader, was substituted for Ardeshir Bomanji Sethna. On 19th October 1927 the opponent again applied to the Magistrate as follows :

"I had informed your honour on 11th October 1921, that I had appointed Mr. Jehangirji Pestonji as a juror. But 'Pestonji' as the name of the father of Mr. Jehangirji was given through mistake. Instead of that, the name is Jehangirji Dinshaw. This fact should be made known to your honour and hence this application."

Accordingly the name of the juror was corrected

It seems that the applicant raised no objection in the trial Court to the procedure followed by the Magistrate in accepting two of the nominees of the opponent as members of the jury instead of nominating such jurors himself. The point was raised by the applicant before the Sessions Judge in appeal, but was not seriously pressed there. The point is now taken in this Court in revision.

It is not shown that the appointment of the two nominees of the opponent on the jury has resulted in any apparent injustice to the applicant. The jury including the applicant's nominees were unanimous in modifying in the applicant's favour the conditional order of the Magistrate by requiring that the mill should be closed from 9 p. m. to 6 a. m. instead of from 7 p. m. to 7 a. m. It is not shown that the nominees of the opponent were in any sense his partisans. They were members of a different community from his and were not residents of the locality where the alleged public nuisance had become the subject matter of the complaint. It is also conceded that they are men of position and respectability in Poona The only question to consider, therefore, is whether the nomination of these two persons as members of the jury by the present opponent amounts to an irregularity or is an illegality which vitiates the proceedings.

Under S 138, Cl. (1) (a), a duty is cast upon the Magistrate to nominate the foreman and one-half of the remaining members of the jury. In *Upendra Nath* v. *Khitish Chandra* (1) a Division Bench of the Calcutta High Court has held that in the nomination of those members of the jury, the nomination of whom devolves upon the Magistrate under the provisions of S. 138, Criminal P. C., it is his duty to exercise his own independent discretion, and not merely to accept persons who may be put forward by the party who set him in motion, and that a jury constituted in violation of the provisions of S. 138 is not legally constituted, and is incapable of making a legally binding award. In *Kylash Chunder Sen* v. *Ram Lall Mittra* (2) the Calcutta High Court gave a similar ruling that in nominating the foreman and one-half of the remaining members of the jury as required by S. 138, Criminal P. C., the Magistrate must exercise his own independent discretion and not appoint the nominees of the party who first made the complaint.

Reliance is placed on behalf of the opponent upon a ruling of Piggot, J., sitting as a single Judge in *Farzand Ali* v. *Hakim Ali* (3). It was held there that it is not illegal on the part of a Magistrate to address any inquiry to the complainant, with a view to ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury ; but the Magistrate should see that he does not appoint friends or partisans of the complainant. The Court laid down the principle in such cases as being that the person at whose instance the proceedings were instituted should not be allowed to exercise rights not conferred upon him by law as if he were a party to the litigation. That case, in my opinion, can be distinguished from the present on the ground that the Magistrate there was investigating a complaint undsr S. 133 with regard to a property in a village to which he was a stranger. He called upon the person who had put him in motion to submit the names of respectable and independent persons of the neighbourhood who might be acceptable for being nominated by him to the jury, and when such names were submitted to him the Magistrate used his own discretion in nominating them to the jury. In the present case the Magistrate has treated the nomination of the remaining two members of the jury as a right of the opponent as if he were a party to the litigation The procedure here adopted would be in direct conflict with the principle laid down by Piggot J. in *Farzand Ali* v. *Hakim Ali* (3). The nominations here

(1) [1896] 23 Cal. 499.

(2) [1899] 26 Cal. 869.

(3) [1914] 37 All. 26=26 I. C. 632=12 A. L. J. 1241.

are made not by the Magistrate as required by S. 138, but by the opponent. This, in my opinion. is an illegality which vitiates the proceedings. The order of the Magistrate is set aside and the case remanded to him for disposal according to law.

Baker, J.—I agree. I do not think there is any reason to suppose that the jury were not impartial, but in view of the distinct rulings of the Calcutta High Court as well as the terms of the section itself, it appears that the Magistrate must exercise his own discretion in nominating a proportion of the jury, whereas in the present case it appears that he has accepted the names suggested by the original complainant without exercising his own discretion in the matter, and this has been held to be an illegality in *Upendra Nath* v. *Khitish Chandra* (1) and again in *Kylash Chunder Sen* v. *Ram Lall Mittra* (2). I agree, therefore, that the order should be set aside, and the case remanded for disposal according to law.

R.K. *Case remanded.*

**. A I. R. 1929 Bombay 81

MIRZA AND BAKER, JJ.

Bai Aisha —In re

Criminal Revn. Appln. No 193 of 1928, Decided on 4th October 1928, against order of Chief Presy. Magistrate, Bombay

**** (a) Extradition Act, S. 7—Order of District or Chief Presidency Magistrate executing warrant under S. 7 can be revised —Criminal P. C., Ss. 439, 491 and 561-A.**

Execution by the District Magistrate (or the Chief Presidency Magistrate) in British India of a warrant under S. 7 of Extradition Act is not an executive act. The Magistrate has judicially to consider the matter and decide whether the warrant can be executed according to law and the order of the Magistrate is subject to the revisional powers of the High Court. The order can also be interfered with under S. 561-A. On proper proceedings being taken High Court can also interfere under S. 491 : 42 *Cal.* 793, *held too widely stated*; 7 *Bom.L.R.* 463; 41 *Cal.* 400 and *A.I.R.* 1922 *Pat.* 442, *Rel. on.* [P 83 C 1]

**** (b) Extradition Act — Construction—Criminal P. C.**

Extradition Act and Criminal Procedure Code both being penal enactments their terms must be strictly construed in favour of accused persons wherever such construction can be reasonably justified. [P 84 C 1]

**** (c) Criminal P. C., S. 4 (i)—European British woman marrying Indian subject of Native State does not cease to be European British subject.**

The words "naturalised or domiciled" which follow "born" are disjunctive of and not conjunctive with what precedes. A European British subject who marries a native British Indian husband or an Indian subject of a Native State does not thereby cease to be a "European British subject" as defined in the Code. [P 85 C 2, P 86 C 1]

P. N. Godinho, E. J. Biem and *M. A. F. Coelho*—for Applicant.

P. B. Shingne—for the Crown.

Mirza, J.—This is an application for revision of an order of the Chief Presidency Magistrate, Bombay, ordering the applicant to surrender herself on a warrant dated 20th April 1928, issued by the Resident at Baroda, or in the alternative to give bail as required by the warrant to attend before the Second Class Magistrate at Navsari in the Baroda State. The warrant is issued under the provisions of S. 7, Extradition Act (15 of 1903). It recites that the applicant Bai Aisha (Mabel Ferris alias Isa Badruddin) wife of Akuji Isabji of Asana, Taluka Navsari, stands charged with having committed in the Baroda State the offences of criminal breach of trust and theft, which in British India would be punishable under Ss. 406 and 380, I. P. C.

It appears that on 17th July 1927, the Bombay Police had at the instance of the Baroda Police arrested the applicant for the same alleged offence. The proceedings were adjourned from time to time as the extradition warrant from Baroda had not been issued. By his letter dated 6th September 1927, the Resident at Baroda informed the Chief Presidency Magistrate at Bombay that the Baroda Government had intimated to him that there was not sufficient evidence to enable them to apply for the extradition of the applicant and that she might, therefore, be discharged. On 16th September 1927, the Chief Presidency Magistrate passed orders discharging the applicant. The same charge has since been revived at the instance of Sakharam Gangaram Surve, Naib Sub-Inspector, Baroda State, and the Bombay Police again arrested the applicant on 14th April 1928. The Magistrate, on 16th April 1928, made an order granting bail on certain terms and in default remanded the applicant to jail custody. The extradition warrant was received in Bombay on 23rd or 24th April 1928. The Chief Presidency Magistrate

then heard the evidence of two prosecution witnesses and recorded the applicant's statement. He intimated that as the applicant's statement made before him had not been challenged by the prosecutor he would, before proceeding further, report the case to the Local Government. The case was adjourned for that reason. By his letter to Government dated 28th April 1928, the Magistrate recommended that the Local Government should refuse the applicant's extradition. He stated in the letter that the accused (applicant) was a European British subject and it was open to the complainant, if so advised, to proceed against her in British India on obtaining the certificate required by S. 188, Criminal P. C The report to Government was made by the Magistrate under the provisions of S. 8-A, Extradition Act. The Government would be competent under the provisions of S.15 of the Act to have the extradition warrant cancelled and the person for whose arrest such warrant was issued discharged. By their letter dated 25th June 1928, the Government, acting on a report made to them by the Remembrancer of Legal Affairs, intimated to the Chief Presidency Magistrate that the applicant should be surrendered to the Baroda State for trial The Legal Remembrancer's report, dated 19th June 1928, states:

"As the woman (applicant) is the wife of a Baroda subject, she is not a European British subject .... For the rest there is a prima facie case which satisfied the Resident at Baroda before he issued his warrant. I do not see any reason why extradition should not be granted in the ordinary course."

After the receipt of this letter the Chief Presidency Magistrate further heard the matter and made his order now complained of. In the reasons given for the order the Magistrate states:

"There is nothing before me to show what the law of South Africa is or to show that the marriage contracted by the applicant is not valid. The facts as at present disclosed show that she is married to a Baroda subject and thus she ceases to be a European British subject. Moreover the applicant was informed on the last occasion that any application she had to make with regard to these proceedings should be made to the High Court. Applicant is, therefore, ordered to furnish bail or surrender herself."

It is contended on behalf of the Crown that this Court has no jurisdiction to revise the order made by the Chief Presidency Magistrate. It is urged that the act of the Magistrate is not a judicial but an executive act and that he is bound, under the terms of S. 7, Extradition Act, to act in pursuance of the warrant, and that the only discretion he can exercise is that given him by S. 8-A, which provides that he may, if he thinks fit, after the statement (if any) of the accused person has been recorded, before proceeding further, report the case to the Local Government and, pending the receipt of orders, detain such accused person in custody or release him on his executing a bond with sufficient sureties for his attendance when required. It is further urged that by S 15 of the Act, the jurisdiction of this Court is ousted and the Government of India or the Local Government alone are empowered, by order, to stay any proceedings in respect of such a warrant or to direct that the warrant be cancelled and the person for whose arrest it has been issued be discharged. Reliance is placed in this connexion on the ruling in *Gulli Sahu* v. *Emperor* (1), which is to the effect that where a warrant has been issued by the Political Agent, under S. 7, Extradition Act, its execution by the District Magistrate (or the Chief Presidency Magistrate) in British India in accordance with the Act, is an executive act, and the High Court cannot interfere in revision with the proceedings of the Magistrate and the order to surrender the fugitive criminal, but if the latter considers himself aggrieved thereby, he can invoke the action of the Government under S. 15. A reference to the petition in that case shows that the applicant there was challenging the issue of the extradition warrant against him on four grounds, two of which related to the reliability of the prima facie case made out against him in the Native State.

Ground 3 related to the allegation of the applicant that he was a British subject and not a subject of the Native State. The District Magistrate had considered the evidence produced by the applicant on this point and had given an adverse finding on it. Ground 4 was that the Resident in a Native State could not be regarded as a Political Agent within the meaning of the Act. On this point too, the District Magistrate had held against the applicant. There was no point before the Court that the extradition warrant

(1) [1914] 42 Cal. 793=21 C.L.J. 112=26 I.C. 335=19 C.W.N. 221.

was without jurisdiction and hence illegal. If such a point was raised before the District Magistrate he had found against it and it does not appear that the appeal Court was invited to reverse that finding. With great respect, the proposition laid down in *Gulli Sahu* v. *Emperor* (1) appears to me to be too wide and should be confined to the facts of that case The intention of the legislature in referring the extradition warrant to the District Magistrate or the Chief Presidency Magistrate for orders is that the Magistrate should judicially consider the matter and decide whether the warrant can be executed according to law. The execution of the warrant depends not upon the order of the Political Agent or Resident, but upon the order of the District Magistrate or Chief Presidency Magistrate as the case may be.

If the warrant is without jurisdiction or there is some other illegality to be found on the face of the warrant, the Magistrate in the exercise of his judicial powers would not be justified in issuing an order for its execution Any order judicially made by the Magistrate would be subject to the revisional powers of this Court under S 439, Criminal P. C. This Court has also, in my opinion, been given powers under S. 561-A, Criminal P C, in addition to what it possesses under its Charter and Letters Patent to interfere in order to secure the ends of justice. This Court would also have power on proper proceedings being taken to interfere under S. 491, Criminal P. C., by which, whenever the Court thinks fit, it can direct that a person illegally or improperly detained in public or private custody within the limits of its jurisdiction be set at liberty. In *Emperor* v. *Huseinally* (2) Russel, J, expressed the opinion that S. 15, Extradition Act, ousts the jurisdiction of the High Court to enquire into the propriety of the extradition warrant, but leaves open the question of the High Court's power to interfere with a Magistrate's action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal. In *Gulli Sahu* v. *Emperor* (3) it was held that S. 15, Extradition Act, ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Ch. 3, but where the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, when it is in fact without jurisdiction, such order is revisable by the Court at the instance of the party whose liberty is affected by it. In *Jaipal Bhagat* v. *Emperor* (4) it was held that although S 15 empowers the Government of India and the Local Government to stay proceedings taken under Ch. 3 of the Act and to direct any warrant to be cancelled and the accused person to be arrested discharged, this does not oust the jurisdiction of the High Court to interfere in a case where action under the act has not been taken under a valid warrant. The extradition warrant in execution of which the accused in that case was arrested mentioned that the accused had absconded from jail and had fled from Nepal to British territory. The Court held that S. 7 applied only to an "extradition offence" and the absconding from jail was not one of the offences mentioned in the schedule to the Act enumerating such offences; that S. 7 would have no application and the warrant issued by the Political Agent was, therefore, without jurisdiction. The Court held that the warrant was wholly illegal as it was without jurisdiction.

In my judgment, this Court clearly has jurisdiction to revise the order of the Magistrate

The applicant's contention is that she is a European British subject. S. 7, Extradition Act, excludes from its operation persons who are European British subjects. If, therefore, the allegation of the applicant that she is a European British subject is established, the Resident at Baroda would have no jurisdiction to issue a warrant against her under S. 7, Extradition Act. If the warrant is issued without jurisdiction it is illegal and a nullity. The Magistrate cannot validly give effect to a warrant which is issued without jurisdiction.

The inquiry before the Magistrate seems to have proceeded on the basis that the facts disclosed showed that the applicant, although a European British subject by birth, had ceased to be such owing to her marriage to a Baroda subject. It is owing to this finding that the Magistrate has given effect to the

(2) [1905] 7 Bom. L. R. 463.
(3) [1913] 41 Cal. 400=21 I. C. 993=18 C. W. N. 869.
(4) A. I. R. 1922 Pat. 442=1 Pat. 57.

warrant. If the finding is based upon an error of law, this Court can revise it.

By S. 2 (a), Extradition Act, "European British subject" is said to mean a European British subject as defined by the Criminal Procedure Code for the time being in force. European British subject is defined by S. 4, Cl. (i), Criminal P. C., as meaning : (1)

" any subject of His Majesty of European descent in the male line born, naturalized or domiciled in the British Islands or any Colony, ..."

It is not disputed that the applicant was born in Cape Town of European parents. Cape Town is in South Africa which is a British Colony. The question, therefore, to be determined is whether by her marriage to a subject of the Baroda State she has ceased to be a European British subject within the meaning of the Indian Extradition Act. The Indian Extradition Act and the Criminal Procedure Code both being penal enactments their terms must be strictly construed in favour of accused persons wherever such construction can be reasonably justified.

The definition of " European British subject " given in the Criminal Procedure Code is silent on the subject of a female European British subject ceasing to be such on her marriage to an alien. No doubt by a presumption of the law relating to civil matters, e. g , of succession, a woman by her marriage is presumed to adopt the domicile of her husband ; but nationality and domicile do not always go together. Nationality attaches to a person, generally speaking, by birth. Generally speaking he owes allegiance to the Sovereign in whose territory he is born if he is born of parents who owed similar allegiance to that Sovereign. He may subsequently by his own act become a naturalized subject of another Sovereign It would not necessarily follow from such act that he ceases to owe allegiance to the Sovereign whose subject he originally was, although by his act of naturalization he undertakes allegiance to another Sovereign and his duty to the one might under certain conceivable circumstances conflict with his duty to the other. Domicile is a matter of a person's own choice and intention. He can have but one domicile at a time, although he may change it as often as he pleases. In the case of a married woman although she acquires the domicile of her husband, on her diverce or widowhood she may adopt any other domicile or revert to the domicile of her birth. The change of domicile in itself would not necessarily amount to a change of nationality.

In the present case it is urged by the Government Pleader that the applicant owes allegiance to His Highness the Gaikwar of Baroda and not to His Majesty the King. The position of Native States in India is somewhat peculiar. The more important ones among them—Baroda belongs to that class—enjoy a certain amount of autonomy in internal matters. They are under the protection of the British Empire and the Ruler of the State owes allegiance to the British Sovereign. No doubt by adopting the domicile of a Native State the applicant would from the very fact of her residence within the territorial jurisdiction of the Native Prince owe a certain allegiance to him, but that allegiance cannot, in my judgment, in the absence of any statutory provision in British India to the contrary, be said to oust the allegiance which she owes to the Sovereign whose subject she is by birth.

Under the English common law up to 1844 marriage did not affect a woman's nationality. In the *Countess Conway's* case (5) Baron Park said (p. 368) :

" .....A Frenchwoman becomes in no way a British subject by marrying an Englishman ; she continues an alien, and is not entitled to dower. "

He referred to Coke on Littleton, p. 326. Since 1844 several statutes have been enacted in England by which a woman is deemed to have the same nationality as her husband. By the British Nationality and Status of Aliens Act 1914 (Ss 10 and 11) a British subject who becomes the wife of an alien is deemed to be an alien. S 10, Naturalization Act, 1870, expressed it in the simpler form that a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject. According to Dicey (Conflict of laws, p. 187, 4th Edn.) the explanation of the change in terminology is probably a desire to avoid ascribing to a woman a nationality which may not be her nationality under the law of the State of which her husband is a subject as some States do not admit the principle that a wife's na-

(5) [1834] 2 Knapp. 364.

tionality is always that of her husband, e. g., France: see *In the Goods of Brown-Sequard (deceased)* (6).

The English Statutes on the subject have not been made applicable to British India. On grounds of equity and good conscience, we are still governed by the old English common law as it stood in 1776. There is no evidence to show what the law of Baroda on the subject is. No doubt for purposes of English law natives of Native States in India which do not form part of British India are not British subjects. The status of a woman married to a subject of a Native State would be governed by the same considerations which apply to independent Sovereign States. The subject of a Native State owes allegiance directly to his own Prince and indirectly to the King-Emperor. In law, he would be regarded as an alien although for practical purposes he enjoys most of the amenities extended to British subjects more especially outside his own State. The sovereign or semi-sovereign powers of a Native State are confined strictly to its own territory. In the absence of a special enactment or usage to the contrary, it would not be reasonable to hold that a European British subject by her marriage to a subject of a Native State becomes the subject of that State. Such a proposition may lead to an anomalous position in the case of Native States where as under the French law marriage of an alien to a husband who is a subject of a Native State does not confer the husband's nationality upon the wife. In such a case the wife would find that she has lost the nationality of her birth without acquiring a new one or in other words that she is the subject of no State and owes allegiance to no Sovereign The Court would be reluctant to declare that such a result has ensued, unless there is clear authority to the contrary that the laws of British India contemptate it. If the Baroda authorities were relying upon a change of nationality in this case it was incumbent on them to prove that at any rate according to Baroda law or usage the fact of the marriage would confer upon the wife the nationality of her husband.

If the authorities were to the effect that by marriage the applicant has lost her nationality or birth and has acquired the nationality of her alien husband it would still remain to consider whether the change of nationality under any rule of international law, public or private, having the force of law in British India, amounts to a change of nationality within the meaning of the criminal law of this country. The language of the definition of "European British subject" in the Criminal Procedure Code does not, in my opinon, provide for such an exception to the general definition and we would not be justified in reading into the terms of the definition any such provision imported from another branch of the law.

It is clear from the definition of a "European British subject" in the Criminal Procedure Code that certain rights and privileges which belong to the class are conferred upon it *qua* such class irrespective of considerations of change of status owing to marriage. It will not be contended that a native British Indian woman if she marries a European British subject would come under the definition of "European British subject" although she may thereby he said to acquire his domicile, nor will it be contended that a European British subject who marries a native British Indian husband thereby ceases to be a "European British subject" as defined in the Code. It must be assumed that by excluding European British subjects from the operation of S. 7, Extradition Act the legislature had a similar intention The onus in such a case would be on the Baroda authorities to show that by the fact of her marriage to a Baroda subject the applicant has ceased to be a European British subject within the meaning of the Indian Extradition Act.

Mr. Singne has further urged that to come under the definition of "European British subject," it is necessary not only that the applicant should be a European British subject by birth but that she should also be domiciled at the time in the British island or any colony. In my judgment the definition cannot be so restricted. If it were so restricted it would exclude from its operation all European British subjects who are domiciled in British India unless British India can be said to come within the definition of a colony. Such could not have been the intention of the legislature. The use of "a" after "born" in S 4 (i) indicates, in my opinion, that the words "naturalized or domiciled" which follow it are

(6) [1894] 70 L. T. 811=6 R. 565.

disjunctive of and not conjunctive with what precedes. The applicant, in my judgment, can claim the privilege of being a European British subject apart from any foreign domicile she may have acquired by her marriage In this view of the case the extradition warrant issued by the Resident at Baroda would be without jurisdiction and illegal

The applicant's case has been that her marriage with Akuji Isabji was from its inception a nullity as at the time of that marriage he had a wife Khatijabai living. The marriage was performed at Johannesburgh in 1914 according to the South African law. That law being the law of a Christian country, must be presumed to have made a polygamous marriage illegal. The prosecution have not denied the applicant's allegation that the marriage in South Africa was performed under such conditions If the marriage was a nullity the applicant acquired no domicile in the Baroda State, apart from her intention to adopt such domicile If such intention is to be presumed from her residence in the Baroda State from 1921 to 1925, she must be deemed by her departure from that State in 1925 and her settling down in British India since, to have abandoned her former domicile and to have adopted the domicile of British India.

The order of the Magistrate is set aside, the warrant discharged, the bail bonds cancelled, and the applicant set at liberty.

Baker, J.—The petitioner, Mabel Ferris alias Bai Aisha, applies for revision of the order passed on 11th July 1928, by the Chief Presidency Magistrate, Bombay, directing her to furnish bail or surrender herself, a warrant under S. 7, Extradition Act having been issued against her by the Resident of Baroda in respect of a charge of theft brought against her by her husband The theft was alleged to have been committed within the jurisdiction of the Baroda State

Several points of law arise in the case The facts are that the applicant, Mabel Ferris, was a European British subject born in South Africa, a British colony, of European parents. In 1914 she went through a form of marriage before a Registrar at Johannesburgh with a Mahomedan, a native of Baroda State, and afterwards lived with him as his wife. She alleges that she was at that time a minor, and that the marriage was without the consent or knowledge of her parents. That part of the case has not been pressed, and no birth certificate has been produced. Subsequently the petitioner came to India with her husband, who may be so called for the purposes of this judgment, and lived for some time in a village in the Baroda State. Petitioner states that her husband represented himself to be a bachelor and that on arrival she found he had another wife living. Disputes broke out between her and her husband which resulted in her being turned out of the house, and she went to reside in British territory. Subsequently a charge of theft was made against her by her husband, but proceedings were dropped as the Government of Baroda considered there was not sufficient evidence The proceedings were, however, revived, and ultimately a warrant under S. 7, Extradition Act, was issued against her by the Resident of Baroda, who is the Political Agent under the section for her arrest and extradition directed to the Chief Presidency Magistrate. The petitioner was arrested by the Bombay Police, but on her representation to the Chief Presidency Magistrate that she was a European British subject to whom S. 7 did not apply, a reference was made to Government, who under S. 15 have the power to refuse extradition The matter was referred to the Remembrancer of Legal Affairs for opinion He was of opinion that as the petitioner was married to a subject of Baroda State, she was not a European British subject, and the Government refused to interfere. The Chief Presidency Magistrate directed her to furnish bail or to surrender herself to the Baroda authorities It is against this order that the petitioner applies in revision.

The important question in this case is whether the applicant by her marriage with a subject of the Baroda State has lost her right to be dealt with as a European British subject under the Criminal Procedure Code At present I am assuming the marriage to be valid The question of jurisdiction will, in my opinion, to a great extent, depend on whether the applicant has lost her right to be dealt with as a European British subject. In this case we are dealing with a construction of a specific definition, and any remarks in my judgment must be taken as having reference to the particular

question before us. This appears to be the first time in which this particular point has come before the Courts, and the matter is, therefore, one of importance. S. 7, Extradition Act (15 of 1903), states where an extradition offence has been committed or is supposed to have been committed by a person, not being a European British subject, in the territories of any State not being a Foreign State, and such person escapes into or is in British India, and the Political Agent in or for such State issues a warrant, addressed to the District Magistrate of any district in which such person is believed to be, or if such person is believed to be in any Presidency-town, to the Chief Presidency Magistrate of such town, for his arrest and delivery at a place and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly. It will be seen that a European British subject is expressly excluded from the provisions of this section By S. 2 of the Act a European British subject is defined to mean a European British subject as defined by the Criminal Procedure Code for the time being in force "European British subject" is defined under S. 4 (1) (i), Criminal P. C., as follows :

"(i) any subject of His Majesty of European descent in the male line born, naturalized or domiciled in the British Islands or any Colony, or

(ii) any subject of His Majesty who is the child or grandchild of any such person by legitimate descent."

It is not disputed that the applicant was born in Cape Town, a British Colony, of European parents, and, therefore, until her marriage she fulfilled the definition under the Criminal P. C. But it is contended that by her marriage to a subject of the Baroda State she ceased to be a subject of His Majesty. The Criminal Procedure Code does not provide for marriage with a subject of another State being a manner in which a European British subject loses a right to be dealt with as such. On reference to Sohoni's Criminal Procedure Code, 12th Edn. p. 21, it will appear that a male European British subject forfeits his privilege to be dealt with as such by being declared to be a European vagrant under the European Vagrancy Act (9 of 1874) and in no other manner.

Natives of the Native States of India, which do not form part of British India are not British subjects for the purposes of English Law : (Dicey's Conflict of Laws, 4th Edn, p. 159). Consequently I assume that the husband of the applicant is not a subject of His Majesty. The opinion of the Remembrancer of Legal Affairs is on the record, and the decision of Government under S. 15, Extradition Act, not to interfere, is based on it No reasons were given for the opinion except that the applicant is the wife of a Baroda State subject. The learned Government Pleader has based his arguments, mainly on the point of domicile. No doubt under the general law, not only of England, but of all nations, a wife takes the domicile of her husband, and if he changes his domicile, her domicile changes also. S 15 and the following sections of the Indian Succession Act (39 of 1925) deal with this subject, and, therefore, in a civil matter such as succession the applicant will no doubt have the same domicile as her husband, and be governed by the law appertaining to persons of that domicile, in this case, Baroda. But in this case we are dealing with a specific definition in a penal statute, which must be strictly construed

Apparently under the definition the status of a European British subject can, in certain cases, be acquired by domicile in the British Islands or any Colony, but the question is whether it can be lost by a change of domicile. In my opinion the definition in the Criminal Procedure Code does not contemplate the loss of the status of a European British subject by change of domicile, whether by marriage or otherwise. The learned pleader for the applicant has put the case of a male European British subject marrying an Indian wife, and contended that though the wife would acquire the domicile of her husband, it would be ridiculous to suppose that she would fall within the definition of a European British subject, and obviously this is so, because the wife would not be of European descent. And even a clearer case is that of a European British subject born in England and coming out to India, who by choice acquires an Indian domicile, as he is perfectly competent to do. By reason of his change of domicile he undoubtedly would not lose his right as a European British subject under the Criminal Procedure Code. The definition does not contem-

plate a change of domicile as involving a loss of status. The section does not say so, and we cannot read in the section what is not there. We must be guided by the definition as framed. The applicant being a subject of His Majesty of European descent in the male line born in British Colony, fulfils the condition of the definition, and there does not appear to be any provision in the Criminal Procedure Code by which her marriage can deprive her of her status. It is argued that the question of nationality is distinct from that of domicile. The learned pleader for the applicant has quoted a number of authorities to that effect, but so far as England is concerned the matter is covered by an express provision, for under the British Nationality and Status of Aliens Act, 1914, Ss. 10, 11, a British subject who becomes the wife of an alien shall be deemed to be an alien and shall not by reason only of the death of her husband or the dissolution of her marriage cease to be an alien.

Formerly marriage was not recognized as in itself working any change in the national character of a woman, and hence till 1844 (7 & 8 Vict. c. 66) an alien woman, e. g., a Frenchwoman, who married a British subject, did not cease to be an alien and on the other hand a British subject, who married an alien husband, e. g., a Frenchman, did not till 1870, in the eye of English law, become an alien. The Naturalization Act, 1870, S. 10, enacted that a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject.

We are not, however, dealing with the status of the applicant under the British Nationality and Status of Aliens Act, 1914, but under the Criminal Procedure Code. If it had been the intention of the legislature that a female European British subject should lose her status for the purpose of the Act by marriage with a non-British subject it would have said so. The Criminal Procedure Code was revised in 1908 and again in 1923, when numerous changes were made and the definition of European British subject amended, but no amendment was made as regards the status of married women, and in the absence of authority to the contrary I feel justified in assuming that it was not the intention of the Indian legislature that a woman who was a European British subject by birth should lose that status for the purpose of the Code by reason of her marriage. I am considering the question solely from the point of view of the Criminal Procedure Code, which is the only question in this case.

Assuming the marriage to be valid, I am of opinion that the applicant has not lost her status as a European British subject.

If the marriage is not valid of course no question of the applicant losing her status could arise.

It is the applicant's contention that her marriage is invalid as her alleged husband had a wife living. Polygamous marriages are not recognized by the English law and would presumably be invalid in South Africa, but in the absence of evidence as to the former marriage, though it has not been denied by the Crown, I do not think it necessary, in view of my opinion expressed above, to enter into this part of the case.

In view of my finding that the applicant is still a European British subject no warrant under S. 7, Indian Extradition Act, could validly be issued against her

It was held by this Court in *Emperor* v. *Huseinally* (2) that S. 15, Extradition Act, ousts the jurisdiction of this Court to inquire into the propriety of the warrant, but leaves open the question of the Court's power to interfere with the Magistrate's action if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal. In the case of *Gulli Sahu* v *Emperor* (3) the accused was arrested under S 10 on certain information received from the Nepal authorities and the Sub-Divisional Magistrate directed his surrender. It was held that on the facts the procedure followed by the Sub-Divisional Magistrate was not according to law and the Court said (p. 404) :

"It is true that S. 15 of the Act ousts the jurisdiction of this Court to enquire into the propriety of a warrant issued under Chap. 3, but where the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, but is in fact without jurisdiction, not being sanctioned by it, we cannot but assume that the Magistrate has acted in his general jurisdiction, and as such his order is revisable by this Court and liable to be set aside at the instance of the party whose liberty is affected by it."

In *Gulli Sahu* v. *Emperor* (1) the petitioner was the same as in the case cited above. He had previously been released as the result of the decision in the above case. After his release a warrant was issued by the Resident in Nepal under S. 7 of the Act, and the case was again brought before the High Court in revision. It was held that the District Magistrate was merely performing an executive act, and the Court had no power to interfere in revision. But the Court went on to say that the absence of revisional powers did not affect its powers under S. 491, Criminal P. C., which were powers not created by the Indian Extradition Act. The rule was, however, discharged. On the other hand, in *Jaipal Bhagat* v. *Emperor* (4), the accused was arrested under a warrant issued by the Resident in Nepal for absconding from jail. It was held that the absconding from jail was not an extradition offence and the arrest was, therefore, illegal. As regards S. 15 the Court said (*p.* 62 *of* 1 *Pat*) :

"No doubt S. 15 of the Act empowers the Government of India and the Local Government to stay any proceedings taken under Chap. 3 of the Act and to direct any warrant to be cancelled and the person arrested to be discharged. But that does not necessarily oust the jurisdiction of this Court to interfere in a case where the action under the Act has not been taken under a valid warrant."

The view of the Patna High Court is the same as that taken by this Court in *Emperor* v. *Huseinally* (2). In the circumstances of the present case where the applicant has been held to be a European British subject, and as such excluded by the Act itself from the terms of S. 7, the case is, in my opinion, within the ruling in *Emperor* v. *Huseinally* (2) and *Jaipal Bhagat* v. *Emperor* (4), and I agree with my learned brother in holding that this Court has jurisdiction. The terms of S. 439, Criminal P. C., are very wide.

The High Court has also extensive powers under S. 561-A of the Code.

The present proceedings are not under S. 491, Criminal P. C; but the powers of the High Court under that section are not restricted by the terms of the Indian Extradition Act, and even if this Court had no jurisdiction in revision it would be open to us to consider the validity of the warrant on a proper application under S. 491 being made.

The question of the powers of the Court to interfere under the Letters Patent and the Charter Act has not been argued.

In any case I have no doubt that Government would, in view of the finding of this Court as to applicant's status, reconsider their decision not to interfere under S. 15 of the Act, but in view of my finding that this Court has jurisdiction that question does not arise.

I concur in the order proposed that the applicant should be set at liberty and her bail bond cancelled.

R. K. *Order set aside.*

A. I. R. 1929 Bombay 89

MIRZA AND PATKAR, JJ.

Punjabai Bhilasa—Plaintiff—Appellant.

v.

Bhagvandas Kisandas — Defendant — Respondent.

Second Appeal No. 98 of 1928, Decided on 14th September 1928, from decision of Asst. Judge, Dhulia, in Appeal No. 210 of 1924.

(a) Contract Act, S. 65—Scope.

Section 65 does not apply where one of the parties is wholly incompetent to contract : 30 *Cal.* 539 (*P.C.*) and *A.I.R.* 1921 *Bom.* 147, *Foll.* [P 90 C 2]

(b) Contract Act, S. 70—Act is done "lawfully" for another when he is entitled to look for compensation to that other.

In ascertaining whether an act is "lawfully" done for another the test to be applied should be, whether the person so acting held such a position to the other as either directly to create or by implication reasonably to justify the inference that by the act done for the other person he was entitled to look for compensation for it to the person for whom it was done: 11 *All.* 234, *Foll.* ; 2 *I.A.* 131 ; 38 *Cal.* 1 ; 26 *Bom.* 504, *Rel. on.* [P 91 C 1]

(c) Evidence Act, S. 18—Admission by pleader on question of law is not binding on client.

Per Patkar, J.—The pleader's admission on a pure question of law is not binding on his client and amounts to no more than his view that the question is unarguable : 28 *Bom.* 408, *Rel. on.* [P 92 C 2]

P. B. Shingne—for Appellant.

D. R. Patwardhan—for Respondent.

Mirza, J.—The question raised in this second appeal is whether on the facts found the appellant can maintain her claim under the provisions of S. 70, Contract Act. The Court of first instance found in favour of that plea and decreed the claim. The appellate Court reversed

the decree and dismissed the suit with costs in both Courts

The appellant is the widow and legal representative of one Bhilasa. The respondent obtained a money decree against Bhilasa in suit No. 192 of 1912 and sought after his death by darkhast No. 1076 of 1918 to execute the decree against his estate While the darkhast was pending the appellant purported to sell certain lands belonging to the estate to one Dhanraj Shivlal for Rs 4,200 The amount due to the respondent was then about Rs. 4,000. The respondent owed a sum of Rs 500 to the panch of the Dasalat Gujarati community of which he was a member Dhanraj Shivlal through the intervention of certain panchas of that community purported to compromise on appellant's behalf the decretal amount due to the respondent by payment of Rs. 500 in cash to the panchas for the claim of the panch against the respondent and passing a demand promissory-note for Rs, 3,000 in favour of the respondent The respondent executed a pavti in favour of the appellant acknowledging the receipt of full consideration of the decretal amount. It was well-known to everybody concerned at the time that the respondent was of unsound mind and that no guardian had been appointed to enter into the compromise on his behalf The appellant set up the pavti in the darkhast proceedings It was then contended on behalf of the respondent that at the date of the pavti he was of unsound mind and that the compromise arrived at was not binding on him The appellant then filed a suit against the respondent, being suit No. 264 of 1920, to have it declared that the pavti was binding on the respondent, but subsequently withdrew it The execution Court held that the respondent was at the date of the pavti of unsound mind and that the compromise was not for his benefit The Court ordered the sale of the attached properties and the respondent's claim under the darkhast proceedings has since been satisfied in cash. This suit was brought by the appellant to recover from the panchas, the original defendants 1 to 7, or in the alternative from the respondent, the original defendant 8, the sum of Rs. 500 paid to the panchas for the debt due by the respondent to the panch.

The Court of first instance applying the provisions of S. 70, Contract Act decreed the appellant's claim against the respondent and dismissed the suit against the other defendants.

The lower appellate Court reversed the decree of the first Court holding that as the payment of Rs 500 was alleged to be made at the express request of defendant 8, S. 70, Contract Act, would not apply.

Mr Shingne on behalf of the appellant has urged that the view taken by the first Court should be adopted. In the lower appellate Court, the pleader on behalf of the present appellant had conceded that S 70, Contract Act, would not apply to the case and had relied upon S 65, Contract Act, as being applicable. Mr. Shingne concedes that so far as the argument under S. 65, Contract Act, is concerned it is concluded by the ruling of the Privy Council in *Mohori Bibee* v *Dhurmodas Ghose* (1), and of this Court in *Motilal Mansukhram* v. *Maneklal Dayabhai* (2), that S. 65, Contract Act, would not apply where one of the parties is wholly incompetent to contract. Mr Shingne, however, relies upon S. 70, Contract Act Mr Shingne is not precluded from arguing this point

Section 70 has been held by the lower appellate Court to be inapplicable on the ground that the case pleaded and proved for the appellant has been that the payment of Rs 500 to the panchas was made at the request of the respondent. Under normal conditions no doubt that would create a contractual relationship between the parties and the case would not come under S. 70 which applies not to a contract but to certain relations resembling those created by contract. Here, however, the request made was a nullity as the person making it was of unsound mind and the request could not create a contractual relationship between the parties. In considering whether S. 70 applies it must be assumed that what was done on behalf of the respondent was without his authority and not at his request.

By S. 70, Contract Act, three conditions are required to establish a right of action at the suit of a person who does anything for another: (1) the thing must be done lawfully; (2) it must be done by a person not intending to act gratuitously; and (3) the person for whom the act is done must enjoy the benefit of it. In the pre-

(1) [1903] 30 Cal. 539=30 I.A. 114=7 C.W.N. 441=8 Sar. 374 (P.C.).
(2) A.I.R. 1921 Bom. 147=45 Bom. 225.

sent case conditions 2 and 3 appear to be satisfied. It is clear from the evidence that the appellant did not make the payment of Rs. 500 gratuitously, but as part of the consideration for the compromise of the decretal amount. If the pavti evidenced a binding contract between the parties the payment of Rs. 500 would be regarded as the discharge of an obligation undertaken by the appellant in consideration of the contract It must also be conceded that the respondent has enjoyed the benefit of the payment of the sum of Rs. 500 by the appellant, for the debt due by the respondent to the panch has thereby been extinguished But whether the act of the appellant can be said to be "lawfully" done for the respondent requires further consideration.

The term "lawful" no doubt has a wider meaning than the term "legal" "Legal" is what is in conformity with the letter or rules of the law as administered in the Courts; "lawful" is what is in conformity with (or frequently not opposed to) the principle or spirit of the law whether moral or judicial In ascertaining whether an act is "lawfully" done for another the test to be applied should be, as was laid down by Straight and Mahmood, JJ, in *Chedi Lal* v. *Bhagwan Das* (3), viz, whether the person so acting held such a position to the other as either directly to create or by implication reasonably to justify the inference that by the act done for the other person he was entitled to look for compensation for it to the person for whom it was done. According to Mahmood, J (p. 244) any other view of the law would amount to saying that the effect of S 70, Contract Act, is to enable a total stranger, without any express or implied request on behalf of a debtor to put himself into the shoes of the creditor by the simple fact of paying the debts due by such debtor The section, in the opinion of the learned Judge, could not have been intended to involve such a result. With great respect it seems to me that this is the proper test to apply in interpreting the term "lawfully" in S. 70. In *Ram Tuhul Singh* v. *Baseswar Lall Sahoo* (4), their Lordships of the Privy Council remark (p. 143):

"....it is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well-settled that there is no such obligation in the case of a voluntary payment by *A* of *B's* debt."

In *Suchand Ghosal* v. *Balaram Mardana* (5), Jenkins, C. J., observes (p. 7):

"The terms of S. 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is, however, especially incumbent on final Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious."

In the same case Doss, J. remarks (p. 11):

"....notwithstanding the apparent generality of the language of S. 70, Contract Act, it seems to me reasonable to presume that it was not the intention of the legislature that this section should be invoked where relief might be obtained under any other section of the Act."

In *Gordhanlal* v. *Darbar Shri Surajmaliji* (6), where the Chief of a State had paid cess to Government and had thereafter sought to recover it from the holders of the village, this Court held that the Chief had such an interest in the village as would entitle him to pay the cess to Government if there was any danger of forfeiture in consequence of non-payment by the holders of the village. In such a case the Court held S. 69, Contract Act, would enable him to sue for reimbursement; but it did not appear that any such emergency had arisen or was likely to arise. The Court expressed the opinion that S. 70, Contract Act had no application, for it could not be said that the Chief had "lawfully" made payments for the holders of the village as he had no authority from them and was under no obligation to pay.

Applying the principle to be gathered from these cases it would seem that the act of the appellant does not come under the description of being "lawfully" done for the respondent. The appellant in making the payment was really making it on her own behalf in pursuance of the terms of the compromise arrived at. The compromise, as found by the execution Court was certainly for the benefit of the appellant and in complying with its terms

(3) [1889] 11 All. 234=(1889) A. W. N. 67.
(4) [1874] 2 I. A. 131=23 W. R. 305=3 Sar. 477 (P.C.).
(5) [1910] 38 Cal. 1=12 C. L. J. 566=6 I. C. 810=14 C. W. N. 945.
(6) [1902] 25 Bom. 504=4 Bom. L. R. 299.

she was seeking to benefit herself rather than the respondent. In my opinion the payment of the sum of Rs. 500 by the appellant cannot be taken as a separate transaction but must be regarded as part of the compromise. The compromise as found by the execution Court was detrimental to the interest of the respondent. With regard to the discharge by the appellant of the debt due by the respondent to the panch that must, in my opinion, in the absence of a valid authority from the respondent, be deemed to be an " officious " and not a " lawful " act within the meaning of S. 70, Contract Act. There was no relationship subsisting at the time between the appellant and the respondent which would, apart from such authority, have made it " lawful " for the appellant to intermeddle in the private affairs of the respondent by paying off a debt on his behalf. In my opinion the terms of S 70, Contract, Act, are inapplicable to the case and the appeal should be dismissed with costs.

Patkar, J.—I agree. In this case a decree wae obtained by defendant 8 against the plaintiff's husband. In order to pay off the decretal debt to the extent of Rs 4,000 the plaintiff sold her land to one Dhanraj Shivlal for Rs. 4,200. Defendants 1 to 8 are the panch of Dasalat Gujarati community Defendant 8 was not then in a sound state of mind The panch of the community brought about an arrangement under which defendant 8 was made to pass a receipt acknowledging that the whole debt was settled at Rs. 3,500 and the amount was paid to the judgment-creditor by Dhanraj Shivalal. The panch got a sum of Rs 500 paid to themselves in satisfaction of the debt due by Bhagwan, defendant 8, to the community and got a promissory note for Rs 3,000 in his favour from Dhanraj In the execution proceedings the guardian sought to recover the whole of the decretal debt. The Court in execution held that the pavti was taken from the judgment-creditor Bhagwan while he was in an unsound state of mind, and was not, therefore, binding on the judgment-creditor, that the panch had no business to secure their own money directly from Dhanraj, and that though Bhagwan was forced to pass the receipt under pressure, he was not in a fit state to understand his own interest. The whole of the decretal amount was ordered to be recovered in execution. The present suit is brought by the plaintiff to recover the amount of Rs 500 paid for defendant 8 and damages from the defendants. The learned Subordinate Judge allowed the claim as against defendant 8 alone. On appeal by defendant 8, it was conceded before the learned Assistant Judge that S. 70, Contract Act, did not apply to the present case. The learned Assistant Judge held that S. 65, Contract Act, did not apply on the ground that the section applied when the parties to the contract were competent to contract and as defendant 8 was of unsound mind when the agreement was entered into, the section had no application.

Before us it is conceded on behalf of the appellant that S. 65, Contract Act, would not apply according to the ruling of the Privy Council in *Mohori Bibee* v *Dharmodas Ghose* (1), and the decision in *Motilal Mansukhram* v. *Manecklal Dayabhai* (2) and reliance is placed on S 70, Indian Contract Act. In the lower Court it was conceded that S 70, Indian Contract Act, had no application. But the pleader's admission on a pure question of law is not binding on his client and amounts to no more than his view that the question is unarguable. See *Narayan* v *Venkatacharya* (7)

The question, therefore, in this appeal is whether S. 70, Contract Act applies to the facts of the present case, It is urged on behalf of the respondent that the payment was not made by the plaintiff but by Dhanraj, and, therefore, the plaintiff cannot claim the benefit of S 70, Contract Act. It appears, however, from the circumstances proved in the case that Dhanraj made the payment as agent of the plaintiff. Under S. 70 it must be proved firstly that the plaintiff has lawfully done anything for defendant 8; secondly that the plaintiff did not intend to do so gratuitously; and thirdly that defendant 8 has enjoyed the benefit thereof. It is clear that the plaintiff or Dhanraj on her behalf in making the payment did not intend to do so gratuitously, and it is not disputed that defendant 8 has enjoyed the benefit thereof as the debt due by him is discharged to that extent The only question, therefore, is whether the plaintiff has lawfully made the payment for defendant 8. In

(7) [1904] 28 Bom. 408 = 6 Bom. L. R. 434.

Chedi Lal v. *Bhagwan Das* (3), it was held that by the use of the word "lawfully" in S. 70, Contract Act, the legislature had in contemplation cases in which a person held such a relation to another as either directly to create or reasonably to justify an inference that by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. The plaintiff held no relation either directly to create or by implication reasonably to justify an inference that by the payment made for defendant 8, the plaintiff was entitled to look to defendant 8 for compensation for it. The payment was made by or on behalf of the plaintiff in order to support the compromise which was beneficial to the plaintiff and detrimental to the interests of defendant 8 who was not then in a sound state of mind It was held in the execution proceedings that the panch intermeddled and brought about an arrangement under which they got themselves paid Rs 500 on account of the debt due by defendant 8 The transaction thus brought about by the panch was held not binding on defendant 8. Defendant 8 being then in an unsound state of mind was incompetent to bind himself by any agreement.

In *Suchand Ghosal* v. *Balaram Mardana* (5), Sir Lawrence Jenkins observed that the terms of S 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract, and that it was incumbent on Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that were really officious. In that case, the person making the payment had a tenant's right and the payment was made for the benefit of himself and the other tenants who were liable under the decree and had no alternative but to pay the decretal debts. In the present case, the plaintiff was under no legal obligation to pay the amount due by defendant 8. She was trying to support the compromise which was beneficial to her and detrimental to the interests of defendant 8. In *Gordhanlal* v. *Darbar Shri Surajmalji* (6), where the plaintiff, the Chief of Patri, paid the local cess and sued to recover the same from the defendants as Bhayats to whom the village had been granted as jiwak giras, it was held that S. 70, Contract Act, had no application, for it could not be said that the plaintiff had lawfully made the payment for the defendants as he had no authority from them and was under no legal obligation to pay.

In *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (4), it was held by the Privy Council (p. 143);

"It is not in every case in which a man has benefitted by the money of another, that an obligation to repay that money arises. The quesiton is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B's*. debt. Still less will the action lie when the money has been paid, as here, against the will of the party for whose use it is supposed to have been paid. . . . Nor can the case of *A* be better because he made the payment not *ex mero motu*, but in the course of a transaction which in one event would have turned out highly profitable to himself, and extremely detrimental to the person whose debts the money went to pay."

See also *Jyanibegam* v. *Umravbegam* (8).

In order that the payments should have been made lawfully under S. 70, Contract Act, it must be proved that they were not made for any fraudulent purpose nor with any improper or ulterior motive nor for any undue gain to the payer. See *Desai Himatsingji Joravarsingji* v. *Bhavabhai Kayabhai* (9). It is not shown that the plaintiff had either lawful authority to pay or was under a legal obligation to pay. The plaintiff in this case in making the payment on behalf of the defendant was endeavouring to support the compromise which was beneficial to her and detrimental to the interests of defendant 8 who was then in an unsound state of mind. The payment, therefore, made by the plaintiff cannot, under the circumstances of the present case, be considered to have been made lawfully and cannot be placed on a higher footing than an officious or voluntary payment. In the present case the plaintiff could have safeguarded her own interest by taking an assignment of the debt. I think, therefore, that S. 70, Contract Act has no application to the facts of the present case.

(8) [1908] 32 Bom. 612 = 10 Bom. L. R. 764.
(9) [1880] 4 Bom. 643.

I would, therefore, confirm the decree of the lower appellate Court and dismiss the appeal with costs.

R.K. *Appeal dismissed.*

** A. I. R. 1929 Bombay 94

MARTEN, C. J , AND MURPHY, J.

Ardeshir Jivanji Mistri and *others*—Plaintiffs—Appellants.

v.

Aimai Kuvarji and *others*—Defendants—Respondents.

First Appeal No. 266 of 1925, Decided on 21st September 1928, from decision of Jt Judge, Thana, in Civil Suit No 6 of 1922.

(a) High way—Passage used within living memory as public road—Dedication to public should be presumed.

Where so far as living memory goes, a passage has been proved to have been used as a public cart road, the correct inference to be drawn is that it has been so used from time immemorial as a public highway, and dedication should be presumed from long user. *A. I. R.* 1920 *P. C.* 43, *Rel. on.* [P 95 C 1, 2]

*** (b) Civil P. C., S. 91 (2)—Obstruction to public road causing special damage to a person—He can sue without consent of Advocate-General.**

Where an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff, he can bring a suit to remove it without the consent of the Advocate-General: 3 *Cal.* 20 (*F.B.*), *Foll.* [P 95 C 2]

**** (c) Bombay Land Revenue Code, S. 37—Government cannot block public road—High way.**

Government have no inherent power to block or to divert existing public highways. If they wish to obtain it, legislation is necessary. [P 98 C 1]

(d) Specific Relief Act, S. 55—Substantial building erected after notice—It should be ordered to be pulled down.

A mandatory injunction should be granted to pull down even a substantial building erected on a portion of a public highway after notice from plaintiff. [P 98 C 1]

A. G. Desai—for Appellants.

Ratanlal Ranchhoddas with *Shroff & Co.*—for Respondent 5.

Marten, C. J.—This is an appeal from the judgment of the learned Subordinate Judge dismissing the plaintiffs' suit for the removal of an encroachment and obstruction to what is alleged to be a gowan or public passage. The learned Judge held that there was or had been a public passage at any rate up to the time of construction of another road about the year 1910, but that Government had in effect an inherent right to stop up or divert any public road and that consequently they were entitled to stop this gowan and to sell it to the original defendant 1 for a cash consideration.

This finding raises a question of considerable public importance. But I should also mention that one of the defences raised was that no public right of way ever existed, and even if it did, the action was defective because the consent of the Advocate-General or Collector had not been obtained under S. 91, Civil P. C.

The locus in quo is well shown on the plan Ex 67. There are three plaintiffs. Plaintiff 1, Ardesar Jiwanji Mistry owns plots 10/2 and 13/1 on that map. They adjoin the disputed passage which runs from X on the Kurla-Versova road to the point Y in the village The second plaintiff, Benedicto DeMello is the owner of plots 10/1 and 13/2, which are to the north of plaintiff 1's land Plot 10/1 adjoins the disputed right of way. Plaintiff 3, however, has his lands some way further off, namely, plot 18 in the north of the village. It does not abut on the passage in question. As regards the point Y, if one goes south-westwards from Y one reaches the point Z on the Kurla Versova road It was along this line ZY that the new road was constructed in about 1910. One main contention of the defendants is that by construction of that new road the public right of way in the old road thereupon ceased.

Now first of all on the facts as to whether there was a public right of way over the passage XY, to my mind the evidence is overwhelming, and shows conclusively that there was such a public right of way. The evidence proves that it was an ancient cart track which was the only main access to and from the Kurla-Versova road for the villagers of Gondavli and of Mogre beyond. When this cart road came to the point Y, it branched right and left, the right hand branch leading towards the centre of the village of Gondavli and the left branch going towards the other village of Mogre. It is hardly necessary, I think, to refer in any detail to the evidence, but I may instance Mr. E. F. Gomes, Ex. 76, President of the District and Taluka Local Board and an Honorary Magistrate. He says:

"The passage in question was an old zigzag cart road. It existed from the time of my first knowledge of the village which was about 20 or 25 years back. There are two lamps at *X* and *Y*."

Plaintiff 2 whose age is 50 says that his ancestors owned pardi No. 10 and that he knew of this passage from the time of his infancy, that carts used to pass by his gowan before the new road XY was constructed and that it was the only cart road. Then one of the few witnesses for the defendants a man of 65 stated in cross-examination:

"The gowan was the old cart way for the whole village. I used to notice it from my young age."

The old witness Bapu Hiru Ex. 84 who gives his age as about 75 or 80 states that the gowan was the only road to reach Rami's house, and also the only road to reach the other houses in the village, and that there was no other way to go to the village in cart except this gowan prior to the making of the new road. I may also refer to the formal request Ex. 92 made on 29th May 1920, by the Assistant Collector, E. W. Perry, to the Collector in which he, the Assistant Collector, himself refers to this passage as a gowan He says:

"The gowan is not needed as there are tracks to Gundowli village on the south of the plot and 30 yards to the north of it and also adequate lateral communication in the gaothan behind."

He then asks leave to sell that particular passage to Mr. Gazdar the original defendant 1.

Counsel for the Crown referred us to the decision of their Lordships of the Privy Council in *Muhammad Rustom Ali* v. *Municipal Committee of Karnal* (1) to show what is necessary to infer "dedication to the public." In that case the dispute arose over an enclosed Courtyard. The point at issue was whether the yard was a public street and that depended on whether there was a public right of way over it. Admittedly the place was enclosed by gates, and from p 566 it appears to be clear that there was no user of such long duration from which an inference of such a dedication would naturally arise.

In the present case, on the contrary, the evidence proves conclusively that so far as living memory goes this passage has been used as a public cart road. Under these circumstances the correct inference to draw is that it has been so used from time immemorial, and that at all material dates in question in this suit it was a public highway. In using the expression public highway, I do not overlook what is stated in the case just cited, namely, the quotation from *Poole* v. *Huskinson* (2), where it is said (p. 830):

"There may be a dedication to the public for a limited purpose, as for a footway, horse-way or drift-way; but there cannot be a dedication to a limited part of the public."

Now the present case, in one aspect of it, has been put by the plaintiff as if the right of way was limited to the villagers of this particular village of Gondavli or two surrounding villages. But on the whole I do not think it correct to limit the way in this manner. I think the correct conclusion of fact is that it was a public highway in the ordinary sense of the word. So far then as dedication is necessary I would hold that dedication must be presumed from long user

And while I am on this branch of the case I will deal with the point under S. 91, Civil P. C. On my finding that there was here a public highway then it would follow, I think, that ordinarily the consent of the Advocate General or the Collector would be necessary under S 91 just as it would be necessary to join the Attorney General or to sue on his relation in the English Courts. But there is an exception, viz., S. 91 (2), which says:

"Nothing shall be deemed to limit or otherwise affect any right of suit which may exist independently."

Now it is clearly established on the authorities that if once you find that the plaintiff is specially damnified by the obstruction of a public thoroughfare, then he may bring his action without the consent in this country of the Advocate General. One authority for this proposition will be found in the Full Bench case, *Raj Koomar Singh* v. *Sahebzada Roy* (3) There the question referred to was whether when a civil Court finds that an obstruction to a public road caused a particular inconvenience of a substantial kind to the plaintiff, it can direct the defendant, who has placed the obstruction there to remove it although the Advocate General is not a party. The answer was in the affirmative, following English decisions to the same effect.

(1) A. I. R. 1920 P. C. 43=1 Lah. 117=47 I. A. 25 (P.C.).

(2) [1843] 11 M. & W. 827.

(3) [1877] 3 Cal. 20 (F.B.).

Do then the plaintiffs come within the exception supposing they establish the rest of their case? In my opinion plaintiffs 1 and 2 do. Their respective lands adjoin this public passage, and, therefore, from any part of their land they can go on to this passage by foot or by cart, and thence take the shortest way southwards to the main road and on towards Versova. Similarly it enables them to go northwards up the passage to the point Y on their way to the village of Mogre if they are so minded. To my mind it is no answer to say that they can get to Versova by going to the point Y, and then to the point Z and then to the point X, or in other words by going round two sides of a triangle instead of one. Nor do I see why these plaintiffs should thus be obliged to take their carts or their persons over this extra 80 or 100 yards. Further when the passage is blocked up at both ends as it is now, it follows that the person at the bottom of the plot 10/1 would be practically landlocked unless he went over other portions of 10/1. This might seriously affect the owner of 10/1 hereafter if he wished to cut up that plot into building lots. Nor do I think it sufficient to say that the back footpath to some of these plots might enable them to reach the point X on the Versova road. If they have thus got an extra back passage so much the better. It appears at best to be only a footpath and not a cart road. And I fail to see why they should be deprived of having the benefit of this front cart road as well. Therefore I would hold that these particular plaintiffs have a special interest in the preservation of the right of way which would enable them within the authorities to maintain on their own account an action to prevent its encroachment.

In saying this I appreciate that they have obtained leave to sue on behalf of themselves and all other villagers of this particular village. But the title to the plaint at any rate is in their individual names. And it is I think clear on the pleadings that they claim rights in themselves although their fellow-villagers are alleged to have similar rights. I think, therefore, that in a case of this sort from the districts we ought not to stand too strictly on the precise form of the pleadings, but that we should take the suit as if it involved a claim by these plaintiffs in the alternative in their individual capacity as being members of the public specially injured by the defendants' interference with this public right of way and that if necessary any formal amendment for giving effect to that alternative plea should be deemed to have been made.

When, however, we come to plaintiff 3 he stands on a different footing As I have already stated his land is not even abutting on this passage. It is some distance away, and unless one is prepared to hold that all the villagers of this village have a special interest in the preservation of this passage I think it difficult to uphold his right to sue without the consent of the Advocate General. On the whole he has failed to satisfy me that he has a special interest within the meaning of the authorities, and accordingly so far as he is concerned I think he cannot maintain this suit. But this does not I think prove fatal to his co-plaintiffs. O. 1, R. 4, Civil P C., enables the Court to give judgment for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to. There are also other rules which enable us to prevent a claim being defeated merely by some misjoinder which can be cured by a proper amendment.

On my findings then that there was a public right of way and that the plaintiffs 1 and 2 having a special interest in it can sue, what defence is there left for consideration? The one put forward is a very striking one, viz., that Government have an inherent right to block any public road they like. Strange to say this contention is based on S. 37, Bombay Land Revenue Code of 1879. That section provides that all public roads and all lands wherever situated :

> "which are not the property of individuals . . . . and except in so far as any rights of such persons may be established in or over the same"

are thereby declared to be the property of Government. The section then proceeds :

> "and it shall be lawful for the Collector, subject to the orders of the Commissioner, to dispose of them in such manner as he may deem fit, or as may be authorized by general rules sanctioned by Government, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting."

I draw particular attention to these concluding words for the protection of public and other rights of way.

Now the argument presented to us is that at the date when this new road ZY was built the old public highway XY including the soil thereunder was vested in Government. But as all public highways were vested in Government it was for Government to decide what should be a public road and what should not, and accordingly in 1910 they decided that the road ZY should be the public road for this village and that the old road XY should not. Therefore, it is argued that on the construction by Government of the new road, ipso facto all public rights in the old road ended. I have great difficulty in even stating this proposition because it seems to me to involve so many hopeless contentions. In the first place there was no disposal in 1910 of the old cart road. All that was done was to construct a new road some little way off. Further if there was any "disposal" of anything, such disposal must under S. 37 be subject to the

"rights of way, and all other rights of the public or of individuals legally subsisting."

Therefore, the public rights of way here could not be and were not affected by any alleged disposal or theoretical disposal that took place in 1910 or by any actual disposal namely by sale to the original defendant 1 in 1921.

The question of course is not as to who is entitled to the soil of the old cart road. That of course vested in Government up to the date of the sale, and doubtless it is now vested in the purchaser the original defendant 1 or his representatives. The question we have to decide is whether the public right of way over the soil has in any way been affected. And here I may cite one of the most familiar of English legal principles namely "Once a highway always a highway." In England no rights are more keenly upheld and contested in country districts than the rights of the public over public highways of various descriptions. Indeed societies exist for the sole object of preserving the numerous highways whether for carriages or for foot-passengers which are part of the advantages of life in England. The only manner in which a public highway can there be stopped up or diverted is under special statutory powers for the purpose.

I appreciate that one may imagine a foreign country where some autocratic sovereign may say:

"I will make such public roads as I like and I will stop up such public roads as I like."

But even if one goes further and imagines that in former days the Government of India or the Government of Bombay or any predecessor was such an autocratic sovereign, yet nowadays their powers have been expressly limited by S. 37, Bombay Land Revenue Code, for they can only be exercised subject to the rights of way of the public. That being so Government nowadays at any rate have no power to take any step in violation of the rights thereby expressly reserved to the public, for to my mind S. 37 is perfectly clear in preserving for the benefit of the public any public rights of way.

Then it was said that in municipal areas there is a statutory power to stop up streets, and, therefore, we must imply that power in districts outside such areas as well. That again to my mind is a hopelessly inconsistent argument. If in municipal areas it was necessary to confer that power upon a municipality by statute, then outside those areas it must be also conferred by statute if at all on those who are to exercise this alleged power. But in fact no such statutory power is given outside those areas. On the contrary the general power of disposal under S. 37 is expressly limited by the proviso "subject to the rights of the public."

Next it was alleged that this particular cart road comes within the area of a Local Board. No point of that sort was raised in the Court below. However we looked at S. 50, Bombay Local Boards Act, 1923, which was relied on and found that it has no bearing on the case. It merely provides that it is the duty of Local Boards to make adequate provisions for inter alia (a)

"the construction of roads and other means of communication and the maintenance and repair of all roads and other means of communication vesting in them."

But how that section can be twisted to mean that the Local Boards are thereby empowered to stop up and divert high-roads, I am quite unable to see.

An attempt was also made in the course of the argument by counsel for the Crown to show that Government had let out at certain times a part of the passage. But when the evidence on the point came to be looked at, it became quite clear that nothing of that sort took place in fact. Nor was any

contention to that effect raised in the Court below.

The main point on which the learned Judge arrived at his conclusion in favour of the defendants was as follows :

"There must obviously exist some authority somewhere, in the interest of the public, to divert public roads. Outside municipal area it must necessarily vest in Government in virtue of their general power as custodian of public rights and interest. I am therefore inclined to hold that a mere diversion of a public road by Government in an area not within the municipal jurisdiction of any local body cannot give any private individual a right of action."

With all due deference to the learned Judge I would hold that as a matter of law these propositions are wholly unsound In my judgment Government have no such power to divert existing public highways Consequently if they wish to obtain it, then, in my opinion legislation is necessary, and in that event safeguards may be imposed, such as exist at present in England on application to the Quarter Sessions for diverting a highway

Then it was said that the learned Judge had exercised his discretion and had held that it was merely a case of *injuria sine damno* and, therefore, he would not grant any declaration or injunction. But with all respect to the learned Judge this discretion is a judicial discretion to be exercised on well-recognized principles, and on the findings that I have arrived at I have no hesitation in holding that the declaration and the injunction asked for ought to be granted in favour of plaintiffs 1 and 2.

There is one further point namely as regards the successors of the original defendant 1 who was the purchaser from Government. They point to the plan and say that they have erected a substantial building on a portion of this public highway, and it would be hardship on them to order it to be pulled down and that they have left a passage ten feet wide for the public to go along In fact the passage XY has been blocked up at both ends but I assume the obstructions at the ends can easily be removed. Now what counsel alleges is that in the Court below he took up a non-contentious attitude and merely stated that he got the land from Government. But unfortunately the evidence does not show that his clients constructed these buildings or a substantial portion of them before notice was given by the plaintiff. The plaintiffs allege in the plaint that they gave a formal notice in September 1921. This is not denied in the pleadings and must be taken to be correct. But defendant 1 has not put forward any evidence to show what was the condition of his building in September 1921. That being so we cannot assume in his favour that the whole of the building or even a substantial part of it was erected before the plaintiffs in any way interfered Under these circumstances it seems to me that a mandatory injunction must be granted. Also, I think, it is not sufficient to say that a ten feet passage has been left. The public are entitled to use the whole of this passage and I fail to see what right this defendant has to block at that particular point about half the passage.

That being so it follows in my judgment that this appeal must be allowed and there must be a declaration that the property in suit was a public passage and that the plaintiffs 1 and 2 and other members of the public have a right to use the same and that defendant 2 was only entitled to sell the same subject to such public rights of passage Then there will be mandatory injunction on the present defendants 1 (a) to (e) to remove the encroachments and obstructions on the passage and to set the passage free and that both these defendants and defendant 2 be permanently restrained from interfering in the use and enjoyment thereof by plaintiffs 1 and 2. The defendants must pay the costs of this suit throughout including this appeal of plaintiffs 1 and 2. So far as the plaintiff 3 is concerned the suit will be dismissed but without costs having regard to many false defences having been raised.

Murphy, J.—The only point for decision really is, whether the learned Judge of the Court below was right in holding that, although the cart track within the village site of Gondavli, marked XY in Exhibit 67, the map in the case, was a public road and had been used for the purposes of the villagers and of persons coming to the village, for a very great number of years, it had ceased to be one when a new Local Board road was made, giving similar access to the village, though at another point; and that plaintiffs were consequently not entitled to the relief

prayed for which was for a declaration that they had a right to use this road and to have the obstructions made in it by defendant 1 removed. It appears that the new Local Board road was constructed about 15 years before suit; but the old road, or gowan, was not then closed, but continued to be used by some of the villagers probably because it was a short cut to the village, and to the main road, which runs near this place. In 1920, on the application of defendant 1 to the Collector, it was thought that the old gowan or cart-track was no longer needed by the villagers, and since the ownership of all roads vests in Government under S. 37, Bombay Land Revenue Code, it was sold to defendant 1 at the price of Rs. 3-8-0 per square yard. There is no doubt on the evidence that the gowan was a public road till the new road was constructed for it was the only cart-track from the village to the main Kurla-Versova road at this point, and the evidence shows that it was fenced off from the private properties on both sides. After the Collector's permission had been obtained, defendant 1, Mr. Gazlar, included the land within the boundaries of his own adjacent property, and it appears from the plan that a corner of his larger building and a good deal of the smaller one are on part of the site of the old cart-track.

Both plaintiffs 1 and 2 own lands which are adjacent to the gowan. Plaintiff 3 has only a general interest in the question, as a villager, as his property is far away in the centre of the village.

The learned Judge of the Court below presumed that, on the construction of the new Local Board road, the plaintiffs' interest and rights in the old road were extinguished, and that Government had then a right to sell the land to any private person who wished to buy it. He relies on S. 37, Bombay Land Revenue Code, for his view of the law on the point. It is true that that section vests the ownership of the soil of all roads in Government; but the section itself contains a saving as regards the rights of individuals and rights of way, and does not contain any power to close any road, or to substitute one road for another. It is also true that, in certain cases, by the authority of some statutes such as the District Municipal Act, powers have been taken to close roads when necessary and so to obstruct rights of way. But there is no similar provision in the Bombay Land Revenue Code, or in any enactment, such as the District Local Boards Act which could relate to a village such as this one, where there is no Municipality or Notified Area Committee in existence, and defendant's learned pleader was unable to quote any authority to justify the learned Judge's decree on this point. On the contrary, it is clear that the road in question was a public one, and that Government not having reserved to themselves any power to close public roads which have been in existence from time immemorial, it could not close this one, or allow it to be closed, in the manner this has been done.

The learned Judge was also of the opinion that the suit was not maintainable under Ss. 91 and 93, Civil P. C. On the facts, it seems to me that this was not a correct view to take, for I think plaintiffs 1 and 2 come within sub-S. (2), S. 91. Their bundaries ran with the old cart-track, and their enjoyment of open access to it was specially affected by having the ownership of the land adjacent to this side of their properties transferred from the public to a private owner and having it put to another use. This change considerably affects the value of the adjacent property. In their cases the defendants' actions constitute, not only a public nuisance, but also an infringement of private rights.

In the case of plaintiff 3, it cannot be said that he had any right of suit, his position being similar to that of his fellow villagers who have only been generally inconvenienced, and not otherwise affected. I think that plaintiffs 1 and 2 were competent to maintain this suit and that plaintiff 3 was not, and I agree for this reason with the view taken on this point by the learned Chief Justice.

The final position, therefore, is that defendants 1 and 2 have been unable to show that the cart-track was not a public road. In fact, the evidence is overwhelmingly against their contention, and there can be no doubt that the gowan was one of the old village roads. Defendants have also failed to establish any authority by which the old cart-track could legally have been closed, whether an alternative for it was or was not provided for the plaintiffs' use.

This being so, the ancient maxim "Once a highway, always a highway" must prevail, and I hold that the obstruction of the gowan was not according to law, and that plaintiffs have a right to the relief claimed. The original Court's decree must, therefore, be reversed, and the plaintiffs given the decree which has been set out in the learned Chief Justice's judgment.

R.K. *Appeal allowed.*

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* A. I. R. 1929 Bombay 100

FAWCETT AND KEMP, JJ.

Tukojirao Holkar—Defendant—Appellant.

v.

Sowkabai Pandharinath Rajapurkar Plaintiff—Respondent.

Original Civil Jurisdiction Appeal No. 1 of 1928, Decided on 11th September 1928, from decree in Suit No. 402 of 1927.

(a) Letters Patent (Bombay), Cl. 14—Defendant's admission of at least one cause of action arising within original jurisdiction is not necessary.

To bring a case within the four corners of Cl. 14 it is not necessary that there must be at least one cause of action which the defendant admits has arisen within the original jurisdiction of High Court: 16 *Cal.* 98, *Rel. on,* [P 101 C 2]

(b) Letters Patent (Bombay), Cl. 14 — 'Such cause of action not being for land or other immovable property" is equivalent to "excluding any cause of action which is for land or other immovabla property"—"Several" in "several causes of action" means "separate."

The natural interpretation of Cl. 14 would be that the words "such causes of action not being for land or other immovable property" are intended merely to qualify the words "several causes of action" that appear just before them. That is to say, in considering Cl. 14 any cause of action which is one for land or other immovable property must be excluded. The word "several" in the expression "several causes of action" of course means "separate:" *A. I. R.* 1927 *Bom.* 278, *(F.B.), Cons.* [P 102 C 2]

(c) Letters Patent (Bombay), Cl. 14 — Cl. 14 should be construed consistently with Civil P. C., O. 2, Rr 3 and 4.

Two or more causes of action arising within the jurisdiction of the High Court can be joined together by the plaintiff, without any leave of the Court. Cl. 14 should be construed, as far as possible, consistently with the provisions of Rr. 3 & 4 of O. 2. [P 103 C 1]

(d) Letters Patent (Bombay), C. 14—Suit for land (*Obiter*).

The cause of action for trespass on immovable property is not a cause of action for land or other immovable property within the meaning of Cl. 14, if no question of title apparently arises. [P 103 C 2]

(e) Letters Patent (Bombay), Cl. 14—Defendant's ability to raise plea of want of jurisdiction does not deprive High Court of its jurisdiction to pass order under Cl. 14.

Although a defendant can set up a plea of want of jurisdiction in respect of a cause of action allowed under Cl. 14 to be joined in the suit with a cause of action which is within jurisdiction, still the mere fact that defendant may succeed in any such plea does not deprive the High Court of jurisdiction to pass an order under Cl. 14. [P 103 C 2]

(f) Letters Patent (Bombay), Cl. 14 — Cl. 14 is not limited to causes of action within jurisdiction of Court subordinate to High Court.

Clause 14 by its terms necessarily contemplates cases where the other causes of action are not within the original jurisdiction of High Court, and there is nothing in the clause to limit such causes of action to those arising within the extraordinary original civil jurisdiction of the Bombay High Court that is mentioned in Cl. 13, that is to say, a cause of action which has arisen within the limits of the Bombay Presidency proper, or within the jurisdiction of some Court outside that Presidency, but subject to its superintendence: 33 *Bom.* 564, *Appr.* 22 *Cal.* 222 *(P.C.), Expl.* and *Dist.* [P 104 C 2]

***(g) Interpretation of Statutes—Language unambiguous—Interpretation, though violating international law, if clear, should be put.**

Per Kemp, J.—Where language of an Act is unambiguous, effect must be given to it and it is not the province of the Courts to give any other construction to it than that which it clearly bears. The legislature may by special legislation purport to violate the rule of international law limiting legislation to territorial limits and in such a case the Courts must give effect to it. [P 106 C 2]

Mulla and *Engineer*—for Appellant.

Billimoria—for Respondent.

Fawcett, J.—This appeal arises out of a suit brought by a lady in Bombay, by name Sowkabai, against the Ex-Maharaja of the State of Indore. The plaint certainly makes serious allegations against the defendant. It alleges, in brief, that she and her daughter were kept mistresses of a cousin of the defendant and were decoyed from Bombay to Indore under orders of the defendant in 1915. The defendant is there alleged to have made an indecent proposal to the plaintiff and her daughter that the latter should stay with the defendant as his mistress. Upon their refusal, it is alleged, they were cruelly treated and in-

prisoned in a fort near Indore, where they were kept in confinement until 1926, i. e., for a period of about eleven years. Upon a petition to the Viceroy, they were, it is said, released and they returned to Bombay on 30th April of that year. The plaintiff further alleges that after their seizure the defendant by his agents took forcible possession of the house in which the plaintiff had been residing, and which she says is her property. It is said to have been transferred to the name of the Indore State in the municipal records, and eventually all the furniture and various valuable articles, including a motor-car, that belonged to the plaintiff are said to have been also seized by the directions of the defendant. The house was restored to her on her return, but the furniture and other articles have not been received back. On these allegations she claims damages, first of all for the false imprisonment that she was subjected to, and the personal injury she suffered while under such imprisonment; secondly damages for the trespass on her immovable property during the time that she was away in Indore; and, thirdly, the value of the articles that were wrongfully converted or misappropriated by or under the directions of the defendant There are thus three principal causes of action alleged in the plaint.

Of these, the first, viz., the false imprisonment and the personal injury suffered were committed primarily in the Indore State, according to the allegations made in the plaint; but there is a statement in the plaint that the decoying of the plaintiff and her daughter from Bombay was part of a plot which ended in their confinement, so that it is said that part of the cause of action for damages for false imprisonment arose in Bombay. The other two causes of action, viz., trespass on immovable property and wrongful conversion of moveable property are clearly causes of action arising within the original jurisdiction of this Court. The plaintiff asked for leave under Cl. 12 of the Letters Patent in regard to bringing the suit in Bombay, so far as it asked for damages for false imprisonment, on the basis that part of that cause of action arose within this Court's jurisdiction. The plaintiff further asked that, in the event of its being held that that cause of action arose wholly outside Bombay an order should be made under Cl. 14 of the Letters Patent for joining together in this suit the several causes of action that I have mentioned. At the time of filing the plaint leave both under Cl. 12 and under Cl. 13 was granted by Blackwell, J., ex parte. The defendant filed his written statement on 18th July 1927. There are three principal contentions raised in it The first is that the defendant was the ruling chief of the Indore State at all material times mentioned in the plaint and, therefore, the suit against him was not maintainable. The second is that the wrongful acts complained of are alleged to be of the various officers and servants of that State acting under the orders of the defendant, who was the ruling chief of that State, but that as he had abdicated he ceased to be the ruling chief or to represent the Indore State; consequently, it is alleged that the plaint does not disclose any cause of action against him. And thirdly, it is urged that except the cause of action in regard to trespass and wrongful conversion no part of any of the other causes of action arose within the ordinary original civil jurisdiction of this Court, and, therefore, this Court had no jurisdiction to entertain the suit in respect of any of these causes of action except those for trespass and wrongful conversion. Subsequently there were various proceedings, which ended in December 1927 in a hearing of the question whether an order should be made in favour of the plaintiff as asked for in the plaint under Cl. 14 of the Letters Patent. The defendant was, in fact, called upon to show cause why such an order should not be passed, which is the procedure that is contemplated in Cl. 14. Davar, J., held that no sufficient cause for not passing the order prayed for had been shown by the defendant, and on 12th December 1927, passed an order that the leave granted by Blackwell, J., both under Cl. 12 and under Cl. 14 should stand. The defendant has appealed against this order to us.

Mr. Mulla on his behalf has raised three main contentions. The first is that to bring a case within the four corners of Cl. 14 there must first of all be at least one cause of action which the defendant admits has arisen within the original jurisdiction of this High Court

but he has adduced no authority for this proposition and there is nothing in Cl. 14 to support it. On the contrary the remarks of their Lordships of the Privy Council in *Chand Kour* v. *Partab Singh* (1) distinctly go against such a contention. There, among other things, it is pointed out that the cause of action in a plaint has no relation whatever to the defence which may be set up by the defendant, it depends almost entirely upon the allegations in the plaint. In any case, the causes of action for trespass on immovable property and wrongful conversion of moveable property as stated in paras 6 and 7 of the plaint clearly arose in Bombay, assuming, as the Court must, for the purpose of determining the point, that the allegations there made are true, and it would be impossible for the defendant to deny that these causes of action did so arise. I do not, therefore, think that there is anything substantial in this objection.

The second point taken was that if any of the several causes of section which are under consideration, is a cause of action for land," then Cl. 14 cannot avail the plaintiff. I may here give the terms of Cl. 14 :

"And we do further ordain that, where plaintiff has several causes of action against a defendant, such causes of action not being for land or other immovable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit."

There are three possible constructions of the words
"such causes of action not being for land or other immovable property"
in this clause. First of all, (a) they may mean
"none of such causes of action being for land or other immovable property,"
or (b) they may mean
"such causes of action not being all for land or other immovable property,"
or (c) they may be equivalent to saying "excluding any cause of action which is for land or other immovable property."

There appears to be no reported authority upon this point, except the remark of the Honourable the Chief Justice, Sir Amberson Marten, in *Hatimbhai Hassanally* v. *Framroz Eduljee* (2) at p. 524 (*of* 51 *Bom.*) about this clause, and my remark about it at p 573 of the same case. The Chief Justice's remark may be said to favour the first construction (a) and mine might be said to favour the second construction (b), but each of these remarks is obiter without the point being argued before us.

It would have been easy for the draftsman to have substituted the words "including one" for the word "being" in this phrase, so that it would run,
"such causes of action not including one for land or other immovable property,"
if the construction (a) was what was meant, or he might have said "any such causes of action" instead of "such causes of action" so that it would run
"any such causes of action not being for land or other immovable property."

On the other hand, it may be said that he would have inserted the word "all" after the word "being," if the construction (b) was meant. It seems to me that no conclusive answer can be obtained as to the real meaning of these words from such considerations. On the other hand, it seems to me that the natural interpretation of this clause would be that they are intended merely to qualify the words "several causes of action" that appear just before them, as if the clause had run
"where plaintiff has several causes of action other than causes of action for land or other immovable property against defendant."

That is to say, in considering Cl. 14 any cause of action which is one for land or other immovable property must be excluded. If the sole cause of action within jurisdiction is one for land, or if the sole cause of action outside the jurisdiction is one for land, then Cl. 14 will have no operation. In the present case this construction will not affect the plaintiff's right to ask for leave under Cl. 14, as besides the one for trespass stated in para 6 of the plaint, she has the cause of action for wrongful conversion of furniture, &c , stated in paras. 7 and 8, and that cause of action is clearly not one for land or other immovable property. The word "several" in the expression "several causes of action" of course means "separate," so that the fact of there being only two causes of action which come under consideration is immaterial.

(1) [1888] 16 Cal. 98=15 I. A. 156=5 Sar. 243 (P.C.).

(2) A. I. R. 1927 Bom. 278=51 Bom. 516 (F.B.).

This construction is, I think, supported by the state of the law in England in 1865, when Cl 14 was for the first time inserted in our Letters Patent. The Judicature Act, 1873, was not then in force ; but S. 41, Common Law Procedure Act, 1852, enacted that

"cause of action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit,"

except in actions of replevin and ejectment. This latter exception shows the probable origin of the qualification under consideration ; but it does not necessarily imply construction (a) rather than (c).

The connexion between the Letters Patent and the Civil Procedure Code, 1859, is well-known. Ss. 8 to 10 of the latter show that there was no restriction on other causes of action being joined with a "claim for recovery of land," except that the Court might under S. 9 order separate trials to be held. This state of the law distinctly favours construction (c).

Under O. 2, R. 4, Civil P. C., which under S. 117 and O. 49 applies to this High Court, leave can be given for other causes of action to be joined even with a suit for the recovery of immovable property. Under Cl. 44, Letters Patent, Cl. 14, is subject to this provision. The present is, however, not a suit for recovery of immovable property, for (as I have already mentioned) the plaintiff alleges that the property has been returned to her, so that no such leave is necessary in this case.

Having regard to these considerations, I think the Court should lean towards construction (c). Even, however, if construction (a) is adopted, the case would fall under Cl. 14, if the prayer for relief as to trespass to the house was struck out, or dropped, and a separate suit brought in respect of that cause of action. But such a proceeding would be opposed to O. 2, R. 3, Civil P. C., which also applies to this High Court. So far as both the alleged trespass and the alleged wrongful conversion are causes of action arising within the jurisdiction of this Court, they can be joined together by the plaintiff, without any leave of the Court. Cl. 14 should, under ordinary rules of construction, be construed, as far as possible, consistently with the provisions of Rr. 3 and 4, O. 2.

In this view, it is unnecessary to consider whether the cause of action for trespass is a cause of action for land or other immovable property within the meaning of Cl. 14. But I may say that, if that question did arise, I should be inclined to hold that in view of no question of title apparently arising, it could not be said to be a "suit for land." I, therefore, overrule this contention.

The third objection is that Cl. 14 does not contemplate a cause of action where there is an entire absence of jurisdiction of the usual kind, viz., the case of a foreigner not residing or carrying on business within the local limits of the Court's jurisdiction and no part of the cause of action having arisen within those limits.

The clause does not say anything like this, but it is contended that it must be read subject to the ordinary presumption that the legislature did not intend to violate any rule of international law or comity : cf. Maxwell's Interpretation of Statutes, 6th Edn. pp. 149 and 262. Mr. Mulla, in arguing this, relied strongly upon the Privy Council case of *Sirdar Gurdyal Singh* v *Rajah of Faridkote* (3). In that case it was held by the Privy Council that jurisdiction, being properly territorial and attaching, with certain restrictions, upon every person permanently or temporarily resident within the territory, does not follow a foreigner, after his withdrawal thence, living in another State ; and that no territorial legislation can give jurisdiction, which a Court of a Foreign State ought to recognize, over an absent foreigner owing no allegiance to the State so legislating. Mr. Mulla contends that, if this Court assumed jurisdiction in the present case in regard to the alleged false imprisonment, it would be going against the principles laid down in that case.

I think that this contention really confuses two things, viz., (a) the right of this Court to act under Cl. 14 in regard to joinder of causes of action in a suit, and (b) the pleas of want of jurisjurisdiction, which a defendant may be able to set up in respect of a cause of action allowed under Cl. 14 to be joined in the suit with a cause of action which is within jurisdiction. The mere fact that defendant may succeed in any such plea does not deprive the Court of jurisdiction to pass an order under Cl. 14.

(3) [1895] 22 Cal. 222=21 I. A. 171=6 Sar. 503 (P.C.).

But besides this I think it would also be premature to decide this question of jurisdiction at the present stage. Mr. Mulla's argument is all on the basis of the defendant being an absent foreigner who has not submitted to the jurisdiction of this Court, in regard to this claim for damages for false imprisonment ; but it cannot, I think, be said that the defendant will necessarily be absent if this cause of action is allowed to be joined and tried in the suit. At present he is not absent. He has appeared before us, although under protest, in order to urge objections as to this leave being granted under Cl. 14 and to the jurisdiction of the Court generally. The charges that are brought against the defendant in the plaint, as I have already remarked, are of a serious nature, and there has been considerable publicity about them given in the public press. In these circumstances, I should myself have thought that the defendant, if he has a good defence, would welcome the opportunity that this suit affords him of appearing and repudiating the charges made against him ; all the more because he will have the advantage, so far as I can see that for the plaintiff to succeed she must show that there has been a tort committed in Indore which is not only wrongful under English law, but also wrongful under the law of the State of Indore.

I may refer in this connexion to the conditions on which Courts in England exercise jurisdiction in personam regarding torts committed abroad, which will be found in Halsbury's Laws of England, Vol. 6, Art. 369, at page 248 and in Dicey's conflict of laws 3rd Edition, R. 188 at page 694. Then again, I see that the defendant's written statement is signed by the Legal Remembrancer of the Holkar State as his constituted attorney, and it seems probable that the authorities of the Indore State would assist the defendant in his defence. Therefore, there is ground, in my opinion, for thinking that possibly the defendant may adopt, what seems to me, the more manly procedure of submitting to a Court of superior jurisdiction and having the matter tried in this suit. Consequently, I am not prepared to make the assumption upon which Mr. Mulla's argument is based. But, even supposing that the defendant does remain absent and does not submit to the Court's jurisdiction, then there are other points which may affect the Court's jurisdiction even on the basis of the law laid down as to foreigners. It is to be remarked that the decision in *Gurdyal Singh* v. *Raja of Faridkote* (3) makes an exception in regard to special local legislation, which will be found in *Gurdyal Singh* v. *Raja of Faridkot* (3) at p. 238, where it is said that

"a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the forum by which it was pronounced."

An instance of such special local legislation will be found in *Ashbury* v. *Ellis* (4), where it was held that the New Zealand Legislature had the power to subject to the tribunals of that country persons who were neither by themselves nor by their agents present in the colony ; and in this connexion a question may possibly arise whether Cl. 14 does not, in fact, form legislation of this kind, having the authority of the Crown and Parliament at its back. Cl. 14 by its terms necessarily contemplates cases where the other causes of action are not within the original jurisdiction of this Court, and there is nothing in the clause to limit such causes of action to those arising within the extraordinary original civil jurisdiction of this Court that is mentioned in Cl. 13, that is to say, a cause of action which has arisen within the limits of the Bombay Presidency proper, or within the jurisdiction of some Court outside that Presidency, but subject to its superintendence Certainly, it has not been given that narrow construction in previous cases, for instance, in *J. G. Dobson* v. *Krishna Mills Ltd.* (5), the cause of action regarding what is there called "claim (c)" arose either at Beawar in the Ajmere Scheduled District, or in Manchester in England. And then a further thing to be borne in mind is that the Privy Council case of *Gurdyal Singh* v. *Raja of Faridkote* (3) deals mainly with the question of a British Court recognizing a foreign Court's judgment. There is

(4) [1893] A.C. 339=62 L.J. P.C. 107=69 L. T. 159=1 R. 388.

(5) [1910] 34 Bom. 564=8 I.C. 649=12 Bom. L.R, 988.

a distinction between that question and the question whether the judgment of a Court regarding an absent foreigner is valid within the territory in which that Court is situate. That is a distinction which has been v. pointed out by this Court in *Rambhat Shankar* (6), and which isreferred to in *Srinivasa Moorthy* v.*Venkata Varada* (7).

Thirdly, there is a possibility of the contention being raised and succeeding that there has been a waiver or submission to jurisdiction, which prevents such an objection to the Court's jurisdiction being raised by the defendant. It cannot therefore, I think, be said to be clear that this Court will have no jurisdiction in respect of the cause of action for false imprisonment, so as to justify our holding either that this is a case not falling within the terms of Cl. 14 or that in the exercise of our judicial discretion leave should be refused under that clause. No doubt, the Court should be cautious about allowing such causes of action to be joined with a cause of action within jurisdiction. But the present is certainly an exceptional case, and I will content myself with saying that there are reasons which, in my opinion, justify the order of the Court below. It is to be noted that the cause of action regarding false imprisonment is connected with the other cause of action, viz , the wrongful conversion that arose within jurisdiction. It is not a case of an entirely independent cause of action which is sought to be dragged in and tried with one that arises within jurisdiction. Nor do I think that the leave that has been given will unduly prejudice the defendant if he defends the claim for damages on its merits, especially as he apparently has the assistance of the Indore Durbar. I cannot hold, therefore, that the Judge in the Court below has failed to exercise his judicial discretion properly in the present case.

Some comments have been made on some remarks that the learned Judge made in the course of his judgment about the plaintiff not having any reasonable prospect of redress, if she is left to a suit in the Indore State. I think the learned Judge clearly in those remarks was acting, as he properly could, in an interlocutory matter of this kind, merely on the assumption that the allegations in the plaint were true. I need scarcely add that supposing that the defendant does submit to the jurisdiction of this Court, then he need not for one moment fear that he will not receive an impartial hearing by any Judge of this Court, whatever may be the general impressions that have arisen from the Bawla murder case that has been mentioned in the pleadings and in the reasons given by the learned Judge for his order. I think, therefore, that that order was correct and should be confirmed, subject to the defendant's right to raise such pleas as are open to him about this Court having no jurisdiction to entertain the suit, so far as it relates to the cause of action for false imprisonment and personal ill-treatment. In this view of the case it is unnecessary to go into the contention that Mr. Billimoria for the plaintiff has raised, viz., that there had, in fact, been a waiver by the defendant of his objection to the Court's jurisdiction, through his having taken certain action, which was unnecessary if he merely intended to object to the jurisdiction of the Court. I think that is a question that can best be left to the trial Court, which both in regard to that and in regard to any question of jurisdiction that arises will have before it fuller materials to dispose of the issues than this Court has at the present interlocutory stage. I would, therefore, dismiss the appeal with costs.

As a consequential order, we extend the time that was fixed for the defendant to file a supplemental written statement under Davar, J.'s order of 12th December 1927 to 10th October 1928, but this will be without prejudice to the right of the defendant to make any application that he thinks fit to the proper Court or Judge that the question of jurisdiction should be tried as a preliminary issue before the filing of any further written statement.

Kemp, J.—The facts of the case have been set out in the judgment of my brother Fawcett.

The plaint shows three causes of action, namely, for trespass, conversion, and wrongful imprisonment. The causes of action for the first two rose wholly within the jurisdiction. It is immaterial, except for the purpose of considering the question of a joinder under O. 2, R. 4, whether the cause of action for trespass was in effect a cause of action "for land or other immovable property." The land

(6) [1901] 25 Bom. 528=3 Bom. L. R. 82.
(7) [1906] 29 Mad. 239=16 M.L.J. 238.

was in Bombay and the trespass took place in Bombay. As the plaintiff does not seek to establish her title by way of a suit for trespass the suit is not one for land. In *Hatimbhai* v *Framroz Dinshaw* (2), I was prepared to extend the expression "suits for land" to cases of trespass where, as in *Vaghoji* v. *Camaji* (8) and *Sudamdih Coal Co., Ltd.* v. *Empire Coal Co , Ltd.*(9) the question of title was sought to be established. But anything beyond the decision that a suit for sale under mortgage of lands outside the jurisdiction was not a suit for land that can be suggested from my judgment is merely "obiter dicta."

Now O. 2, R. 3, Civil P. C., permits the joinder of several causes of action against the same defendant and the suit here for trespass not being a suit for the recovery of immovable property, which in the present case was restored to the plaintiff in 1926, R. 4 of the same order has no application. Under R. 3, therefore, the causes of action for the conversion and the trespass may be joined. It remains to consider whether the plaintiff may join the third cause of action for wrongful imprisonment which it is contended was outside the jurisdiction, to either of the two causes of action.

Clause 12 of the Letters Patent deals with two classes of suits, (1) for land or other immovable property, (2) all other suits. Clause 14 deals with the joinder of causes of action. It only applies to the joinder of a cause or cause of action outside the jurisdiction with one within the jurisdiction. As to causes of action within the jurisdiction they can be joined under O. 2, Rr. 3 and 4. Cl. 14 does not apply to any cause of action which is for land or other immovable property. In the view I take of its construction the intention is to permit cause of action other than any cause of action for land or other immovable property to be joined if one of them is within the jurisdiction. In other words Cl. 14 does not deal with a cause of action for land or other immovable property. Therefore the cause of action for false imprisonment not being one for land or other immovable property, may be joined to the cause of action for conversion which in its turn may under O. 2, R. 3, be joined with the cause of action for trespass. Indeed, if the cause of action for trespass be not one for land or other immovable property it may under Cl. 14 be joined to the cause of action for false imprisonment.

The next objection raised by counsel for the appellant is that Cl. 14 is not intended to violate the rule of international law which makes all legislation territorial. Where the language of an Act is unambiguous, effect must be given to it and it is not the province of the Courts to give any other construction to it than that which it clearly bears. The legislature may by special legislation purport to violate the rule of international law limiting legislation to territorial limits and in such a case the Courts must give effect to it. It is not, however, for us to say in this appeal what the intention of the legislature in this respect in framing Cl. 14 was. Cl. 14 merely speaks of joinder of causes of action in general terms and that is all we have to determine whether these causes of action may be joined in this suit. Any question whether the joinder of the cause of action for false imprisonment violates any rule of international law is a matter for the trial Judge.

It may be that some part of this cause of action accrued within the jurisdiction. We have not the admitted or proved facts before us and cannot decide on assumptions Nor are there any words in Cl. 14 which say that the causes of action must be admitted before Cl. 14 can be applied. Plaintiff says in her plaint that she was induced to submit herself to the custody of the defendant's officer sent to bring her to Indore on the false representation that her presence was required at Indore. There apparently she first realized she was actually in confinement. The restraint may be illegal from the start though assisted by a pretence that it originally is not so. A man may be induced to enter a jail on the pretext that it is the only available place to temporily house him and later on he may discover that his incarceration is real and not innocuous, as he originally thought. Moreover, the restraint may be none the less an illegal one although not strict or at first apparent to the person detained. Or the plaintiff here may have obeyed an order she did not dare to refuse. The assumption of control over her would be the commencement of the imprisonment ;

(8) [1904] 29 Bom. 249=6 Bom. L. R. 958.
(9) [1915] 42 Cal 942=3 I. C. 531.

and detention though the exercise of moral force is sufficient to found an action for damages. The evidence in the Bawla case shows to what extent moral force could, at any rate recently, be applied against the subjects of Indore State by some of those connected with the late administration.

There may further be, although I do not say there is, a question of estoppel by submission by the defendant to the jurisdiction. Such a question was discussed in the *Duff Development Company Limited* v. *Government of Kelantan* (10), where, although no suit can lie against an independent sovereign (and in the appeal before us the appellant cannot now aspire to that status), the Courts discussed the question whether the independant sovereign in that case had, as a matter of fact submitted to the jurisdiction. The Court was not competent otherwise to try the execution proceedings in that case. If submission to the jurisdiction cannot affect the matter where the Court is incompetent then *cadit quaestio* raised and discussed in that case.

It is impossible wholly to ignore the inference to be drawn from the compulsory though ostensibly voluntary abdication of the defendant. No prohibition has been placed on his re-entry into Indore State and the influence which he so recently enjoyed may still remain.

I agree that the appeal should be dismissed.

R.K. *Appeal dismissed.*

(10) [1924] 40 T. L. R. 566.

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FAWCETT AND KEMP, JJ.

Krishna Chinnoo & Sons — Appellant.

v.

Matubhai Kasanbhai and *others*— Respondents.

Original Civil Jurisdiction Appeal No. 55 of 1927, Decided on 12th September 1928, from order of Davar, J., in Suit No. 639 of 1924.

(a) Presidency Towns Insolvency Act, S. 2 (g)— Mortgagees of leasehold — Official Assignee of mortgagor disclaiming lease— Mortgagee not obtaining vesting order under S. 66 (i)—Mortgagee is not secured creditor.

A creditor was a mortgagee of a lease-hold belonging to an insolvent and another. The Official Assignee disclaimed the lease. The creditor then reconveyed the leasehold to the comortgagors of the insolvent for consideration received from a person who had stood surety for the mortgagors. By this the comortgagors and the surety were alone discharged from all liability. On being invited to prove their claims to the insolvent's estate the mortgagees submitted their proofs as unsecured creditors.

Held: that the Official Assignee having disclaimed the lease and the mortgagees not having obtained a vesting order under S. 66 (i) the security of the mortgagees in the leasehold property so far as regards the interest of the insolvent in it was concerned, was extinguished and the mortgagees became unsecured creditors: *In re Finley Ex-parte Clothworkers' Co.* (1888) 21 *Q. B. D.* 475 and *A. I. R.* 1924 *Bom.* 513, *Rel. on.* [P 109 C 2]

(b) Presidency Towns Insolvency Act. S. 2 (g)—Definition is not exhaustive—English Acts may be referred.

The definition of 'secured creditor' is not exhaustive and as the Act largely adopts the wording of the English Bankruptcy Acts, the definition of "secured creditor" in those Acts may be accepted as intended equally to apply under Indian Act. [P 109 C 2]

(c) Presidency Towns Insolvency Act— Official Assignee is bound to adjudicate within certain time—Bombay High Court Rules, R. 119.

Per Kemp, J.—The Official Assignee is bound to adjudicate upon the proof submitted by claimant within seven days of the latest date mentioned in the notice of dividend as the latest date for lodging proofs. [P 110 C 1]

(d) Presidency Towns Insolvency Act— Latest date of proving must be given in notice—Date is important for limitation for appeal—Bombay High Court Rules, R. 122.

Per Kemp, J—The notice must state the latest date within which creditors can prove. The necessity of giving such a date is important because it limits the time for proof and dates the rejection of the proof within that time as the starting point for an appeal against the Official Assignee's decision. [P 110 C 2]

(e) Presidency Towns Insolvency Act, S. 72—Debt proved before declaration of dividend—Official Assignee's failure to accept cannot prejudice creditor—Distribution being invalid may be disturbed.

Where a creditor had proved his debt before the declaration of dividend, failure of the Official Assignee to accept the proof in accordance with the provisions of R. 119 (made by the Bombay High Court) cannot be allowed to prejudice the rights of the creditor and is an adequate ground for disturbing the distribution of the dividend as one not validly made. [P 111 C 1]

Coltman and *Engineer*—for Appellants.

Munshi and *Talyarkhan*—for Respondents.

Kemp, J.—This is an appeal by certain opposing creditors against the order

of Davar, J. sitting in Insolvency allowing the claim of respondents 1 to 2 (whom I shall call the claimants) in the insolvency of one Evans. The material facts are as follows :

Evans and one Kaderbhoy carried on business as joint building contractors and as such entered into an indenture of lease for 999 years, dated 26th July 1920, with J R. Patel and B. S. Shroff, of certain land situated at Tardeo in Bombay at a monthly rent of Rs. 694-7-2 and subject to certain conditions one of which was that the lessees should build upon the land buildings to the value of Rs. 50,000 within 1½ years from 26th July 1920. The lessees proceeded to erect two buildings and then being in want of funds they assigned by way of mortgage to the claimants on 21st December 1921, the leasehold land and the partially erected building for Rupees 1,25,000, of which Rs. 25,000 were to be paid in cash on the execution of the mortgage and the balance from time to time as the buildings progressed. J. R. Patel stood surety for the mortgagors for the moneys advanced under the mortgage. On 22nd September 1922, there was a sum of Rs. 97,000 due to the mortgagees. On 13th June 1924, Evans presented a petition in insolvency and was adjudicated the same day. On 10th October 1924, the Official Assignee disclaimed the lease having first obtained permission, on 3rd September 1924, from Kajiji, J to do so On 20th March 1926, the mortgagees in consideration of Rs. 2,000 paid to them by J. R. Patel reconveyed the mortgaged premises with the partially erected buildings thereon to the heirs of Kaderbhoy who had in the meantime died. The intent and effect of this reconveyance has been much discussed in the arguments of counsel before us but, as I read it, it in effect discharged the heirs of Kaderbhoy and the surety of all liability for the moneys due under the mortgage whilst reserving the mortgagees' rights to claim for the whole debt in Evans's insolvency. Of course, no arrangement between the mortgagees on the one hand and the heirs of Kaderbhoy and the surety on the other could deprive the Official Assignee of any rights he might have on behalf of the general body of creditors in the security.

On 5th February 1927. the Official Assignee invited claims to the insolvent's estate. Certain correspondence then ensued between him and the claimants. On 23rd February 1927, the claimants lodged their proof under the rules in Sch. 2 to the Presidency Towns Insolvency Act (3 of 1909) for the whole sum due to them under the mortgage. The affidavit in support of it by a person claiming to be in the employ of the claimants and their attorney mentions the mortgage but does not assess its value and no credit is given for the Rs 2,000 which it realized or any part of that sum. On 24th February 1927, the Official Assignee replied asking whether the claimants intended to surrender the security and, if not, what they had done with it. On 7th March 1927, the claimants' attorneys replied that the securities which consisted of two half-built houses had already been surrendered to the surety as the properties were unremunerative They sent with the letter, the deed of surrender for the Official Assignee's inspection The Official Assignee took inspection of the deed on 10th March 1927. On 8th April 1927, the Official Assignee wrote asking for a reply to his letter of 24th February 1927. It is not clear what he meant by this letter as he had seen the deed of surrender and had disclaimed the lease, but it may have been that he had in his mind that the claimants must elect what position they were going to adopt under Rr. 9, 10 and 11 of Sch. 2.

Then on 29th April 1927, the Official Assignee declared a first and final dividend. The only intimation before us of his intention to declare a dividend is the notice of 26th January 1927, published in the press on 5th February 1927. On 21st July 1927, the claimants wrote to the Official Assignee saying they had replied to his letter of 24th February 1927, on 7th March 1927, and asking if he admitted their claim. On 23rd July 1927, the Official Assignee rejected the proof on the ground that the deed of surrender operated to extinguish the whole debt against the insolvent.

Davar, J. decided in favour of the claimants on 20th September 1927, and admitted the proof and ordered the Official Assignee to recover from the creditors who had participated in the distribution on 29th April 1927, a pro-

portional share of their dividend. Subsequently, on other claimants coming forward he ordered the whole dividend to be opened up. Those other claimants are respondents in appeal No. 69 of 1927. Davar, J. gave no reasons for his decision but intimated he would give them should an appeal be preferred. Subsequently, on 19th January 1928, after the memo. of appeal had been filed on 10th October 1927, and more than three months after the decision, he gave his reasons. This is unfortunate as it has been contended before us that some of the points taken by counsel in this appeal were not taken by his client in the lower Court. Nor had counsel any reasons for the finding before him when he drafted the memorandum of appeal.

The rules in Sch. 1 to the Presidency Towns Insolvency Act, which I shall hereafter refer to as "the Act" relating to the proof of debts are, by virtue of S. 48, statutory rules. S. 48 is imperative in its terms Similarly the rules framed by the High Court under Ss. 112 and 114 of the Act and the forms annexed thereto must be strictly followed. S. 112 (p) refers specially to the forms to be used in proceedings under the Act. S. 114 enacts that such rules shall have the same force and effect as if they had been enacted in the Act

It is contended that when the claimants lodged their proof with the Official Assignee on 23rd February 1927, they claimed as unsecured creditors although they had a security which they incorrectly regarded as worthless. In their latter of 7th March 1927, they say they have surrendered the security which was "unremunerative." R. 5 of the rules in the schedule requires the creditor to state in the affidavit in support of his proof whether he is or is not a secured creditor R. 3 of the rules made under the Act lays down that the forms in Appendix 1 to the rules "shall" be used with such variations as circumstances may require. R. 116 of the same rules requires in imperative terms that a proof shall be in the form No. 45 in the Appendix to the rules with such variations as the circumstances may require. The deponent in his proof whilst mentioning the mortgage failed, if he were a secured creditor, to comply with Rr. 9, 10 and 11 in the schedule; for he did not assess his security nor surrender it nor state that it had been realized. These particulars should have been stated on oath and it is not sufficient to merely show the Official Assignee the deed of surrender after the proof had been lodged. R. 16 of the rules in the schedule says that if a secured creditor does not comply with the rules in the schedule for secured creditors, he shall be excluded from all share in any dividend.

But I am of opinion the form of their proof shows they were and claimed as unsecured creditors in this case; for, as a matter of fact, they were not "secured creditors" within the meaning of that term under the insolvency law. The definition in S 2, Cl. (g) of the Act is not exhaustive and as the Act largely adopts the wording of the English Bankruptcy Acts, we may accept the definition of "secured creditor" in those Acts as intended equally to apply under our Act That definition requires that the mortgage, charge, or lien should be on the debtor's property. See also our Provincial Insolvency Act 5 of 1920, S. 2, Cl. (e), which is an exact copy of the definition in S, 167, English Act of 1914. In the present case the Official Assignee having properly disclaimed the lease and the mortgagees not having obtained a vesting order under S. 66 (1) there was no interest of the insolvent with the mortgagees and, therefore, at the date of the proof no security on the debtor's property That this is the effect of the disclaimer is, I think, clear from Ss. 62 (2) and 66 of the Act. No vesting order was made in respect of the disclaimed property and by the proviso to S. 66 (1) the mortgagees failing to take advantage of the sub-section were excluded from all interest in and security upon the property. I have had the advantage of perusing my brother Fawcett's judgment on this point and with respect agree with his conclusions.

There was property burdened with onerous covenants for the Official Assignee to disclaim. In India the equity of redemption in a mortgage is immovable property: *Parashram Harlal* v. *Govind Ganesh* (1), *Vithal Narayan* v. *Shriram Savant* (2), and S. 108 (j), T. P Act preserves for the lessor the liabilities under

(1) [1897] 21 Bom. 226.
(2) [1905] 29 Bom. 391=7 Bom. L. R. 313.

the lease of a lessee who transfers by way of mortgage or sub-lease the whole or part of his interest in the property.

The Official Assignee was bound under the proviso in R. 119 of the rules made under the Act to admit or reject the proof and in case of a disputed proof to retain under S. 73 (1) (c) and R. 122 (2) sufficient assets in his hands when distributing the dividend to meet what would be due if the proof were ultimately allowed. He did not adjudicate on the proof until long after the distribution of the dividend on 29th April 1927. The claimants were entitled under the R. 119 to an adjudication on their proof by the Official Assignee within seven days of the latest date mentioned in the notice of dividend as the latest date for lodging proofs. This was imperative, as by R. 122 (2) of the same rules a right of appeal is given to a creditor whose proof has been rejected and provision is made by that rule for retaining sufficient assets to meet the dividend on his claim. This is a constitutional right of which the creditor cannot be deprived. The Court has since allowed the claim but the Official Assignee has distributed the assets a available for dividend.

Before considering what should now be done I wish to refer to the form of notice of intention to declare a dividend in this case. The dividend in this case was the first and final dividend. S. 73 (1) provides that the Official Assignee before declaring a final dividend

"shall give notice in manner prescribed to the persons whose claims to be creditors have been notified to him but not proved."

to prove their claims within the time limited by the notice. R. 122 of the rules made under the Act lays down the form and contents of this notice. The notice must be in the forms Nos. 81 and 83 in the Appendix to the rules: see, R. 122 (4). It must be published not more than two months before the declaration of the dividend and a special notice must be given in addition to such creditors in the schedule as have not proved their debts. It must also state the latest date up to which proof must be lodged which shall not be less than fourteen days from the date of such notice.

In the present case the insolvent did not file his schedule. The claimants, therefore, were not entitled to a special notice but they were "persons whose claims to be creditors have been notified" to the Official Assignee under S. 73 (1) of the Act because before the notice of 5th February 1927, there had been correspondence and negotiations regarding the sale of the security and the disclaimer of the lease by the Official Assignee: see the Official Assignee's letter of 17th July 1924, and the affidavit of the claimants dated 18th August 1924, para 6. But even if the claimants cannot be regarded as persons who before the notice to declare dividend were entitled to the benefit of a notice under S. 73 (1), there is nothing in the Act or the rules that I can see which prevents any creditor coming in or proving before the latest date fixed in the notice and published as required by R. 122. The notice as a matter of fact did not comply with R. 122. It was published more than two months before the declaration of dividend and it did not state the latest date within which creditors could prove. The necessity of giving such a date is important because it limits the time for proof and dates the rejection of the proof within that time as the starting point for an appeal against the Official Assignee's decision. As a matter of of fact the notice merely stated that creditors were to prove "as soon as possible" which is indefinite and in conflict with requirement in the rule that the latest date for proof must be "not more than fourteen days from the date of the notice"

We have been informed by the Official Assignee that the practice is for the notice calling upon the creditors to prove their claims "as soon as possible" to be followed up by a further notice requiring them to prove within a fortnight from the date of the notice; but though we have had enquiries made as to such a second notice having been issued in this case, solicitors of the parties have been unable to find any trace of it.

The fact that the claimants had entered into possession of the mortgaged premises has, in my opinion, no bearing on the claimant's rights because there is nothing to show that by doing so they waived their right to prove for the balance of the mortgage-debt. They did not do so in extinction of the debt. Indeed it is scarcely credible they would considering what they realized on the security, notwithstanding their assertion at first that it would amount to 75 per cent. of the mortgage-debt.

We, therefore, hold the dividend should be disturbed as the claimants' claims should have been taken into account, and as the Official Assignee failed to comply with the rules; but we will pass our final order after our judgment in the connected Appeal No. '69 of 1927.

Fawcett, J.—My learned brother has in the judgment he has just read, fully stated the facts out of which this appeal arises The main contention of the appellants is that stated in para. 6 of the memorandum of appeal. It was alleged by Mr. Munshi for the respondents that this was a ground that had not been urged in the lower Court, and that respondents 1 and 2 are prejudiced by their not having had an opportunity of putting in all relevant evidence upon this point. In the view, however, that we take the question of their being allowed to put in any additional evidence becomes unncessary.

The contention of Mr. Coltman for the appellants is briefly as follows: He says that the disclaimer of the insolvent's interest in the lease by the Official Assignee in October 1924 did not operate to extinguish the security, which respondents I and 2 had by the mortgage of the insolvent's interest in the leased property in their favour ; (2) that any surrender or release of the equity of redemption in regard to the insolvent's interest in the property under the date of 20th March 1926, was invalid and did not operate to put respondents 1 and 2 in the position of unsecured creditors of the insolvent ; and (3) that, as they were really secured creditors, the proof that they submitted on 23rd February 1927, being on the basis of their being unsecured creditors, did not comply with Rr. 9 to 15 in Sch. 2, Presidency Towns Insolvency Act. 1909, and that accordingly under R. 16 they should be excluded from all share in the dividend declared by the Official Assignee

Mr. Munshi, on the other hand, contends that the disclaimer put an end to all rights and liabilities of the insolvent, that the respondents ceased to be secured creditors, and that the proof submitted was a valid one. He also raised other contentions which need not be considered at present.

The first question, therefore, is what was the effect of the disclaimer by the Official Assignee in regard to the position of respondents as mortgagees. Mr. Coltman argued that the deed of 20th March 1926, purported to be a release and surrender not only of the interest of the deceased Kaderbhoy Mulla Noorbhai in the property and a full discharge of his liability to pay the mortgage money, but also of the interest and liability of the insolvent Evans. I do not, however, think that the document is really open to this interpretation, having regard to the definition of the expression " the mortgagors " in its preamble. This definition confines that expression to the legal representatives of Kaderbhoy. Moreover, the final clause about the right being reserved to the mortgagees to rank as creditors to the full extent of the estate of the insolvent and to receive dividends which might be declared in regard to it, is against such a construction. The deed was drawn up by solicitors, respondent 1 being himself a solicitor, and he would presumably be aware that the last clause would be open to objection, if his deed purported to deal with any part of his security so far as the interest of the insolvent was concerned. Therefore, the main ground on which Mr. Coltman put his contention that the respondents remained secured creditors is not, in my opinion, made out. On the other hand, Mr. Munshi's contention that sub-S. (2), S. 62, Presidency Towns Insolvency Act, 1909, in itself made the disclaimer operate so as to extinguish the insolvent's equity of redemption and the security that the mortgagees had in respect of Evans's interest in the mortgaged land, ignores the closing words of the sub-section, viz. :

" but (such disclaimer) shall not, except so far as is necessary for the purpose of releasing the insolvent and his property and the Official Assignee from liability, affect the rights or liabilities of any other person. "

Prima facie, those words would cover such rights of the mortgagees as could be enforced without affecting the liability of the insolvent and the Official Assignee under the terms of the lease in the insolvent's favour. I was at first inclined to think that some security remained, so that in February 1927 the respondents were secured creditors of the insolvent. But a consideration of the provisions of S. 66 of the Act, and of the English authorities in regard to corresponding provisions in S. 55 (6), Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) from which S. 66, Sub-S. (1) was

taken verbatim, has led me to a different opinion. Sub-S. (2), S, 66, is similarly based on S. 13, Bankruptcy Act, 1890 (53 & 54 Vic. c. 71); and both of these are now reproduced in sub-S. (6), S 54, Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59). These provisions put any under-lessee or mortgagee of a leasehold property burdened with onerous covenants, &c, in rather an awkward position; in fact, such under-lessee or mortgagee is liable to lose his interest in or security upon the property, unless he accepts a vesting order making him either (a) subject to the same liabilities and obligations as the insolvency petition was filed, or (b) subject to such liabilities and obligations as arise on or after the date of the filing of the petition. In *In re Finley. Ex parte Cloth workers' Co.* (3), it was pointed out by Lindley, L. J., that the effect of the proviso corresponding to that in sub-S. (1), 66 was that, if an application for a vesting order is made by the under-lessee or mortgagee (hereinafter called the sub-lessee) (p. 486):

"the vesting order can only be made in favour of the sub-leasee, subject to the covenants and conditions of the original lease, and, the sub-lessee will not take the property on those terms, which, of course, he need not do, then these consequences appear to follow: First, the sub-lessee will be excluded from all interest in the disclaimed property. Whether the latter part of the proviso in Cl. 6 (i. e., sub-S. (1), S. 66, of the Indian Act) will apply will depend upon whether there is any such person as is there referred to. There may or may not be. If no vesting order is made, the lease will be determined under sub-S. 2 (i. e., sub-S. (2), S. 62 of the Indian Act, the sub-lease will be determined under sub- S. 6, i. e., sub-s. (1), S. 66, and the lessor will take the property freed from both lease and sub-lease".

He pointed out that this was a very startling result and would very seriously affect the old practice of taking securities on leasehold property by way of sub-demise, the whole object of which was to prevent the mortgagee from becoming liable to the rent and to the covenants and obligations of the original lease. It appears to have been in consequence of this that S. 53, Bankruptcy Act, 1890, was enacted. But, as pointed out in *Carter & Ellis, In re, Savill Brothers. Ex parte* (4), that provision did not (p. 749):

"give the Court any power to put the mortgagee back in his old position. The sole choice is between taking a vesting order "subject to the same liabilities and obligations as the bankrupt was subject under the lease in respect of the property at the date when the bankruptcy petition was filed," and taking the order "subject only to the same liabilities and obligations as if the lease had been assigned to him at that date."

In *In re Smith Ex parte Hepburn* (5), there had been a disclaimer of a lease granted to the bankrupt by the trustee in the bankruptcy with the permission of the Court. One day prior to the Court's order the mortgagees executed a deed by which they absolutely assigned the mortgage debt and all interest therein to a clerk of the mortgagees, who, admittedly, was a man of small means. It was held that this was a sham assignment and that the original lessor was entitled to an order that unless the mortgagees would, within a certain time, accept an order vesting in them the mortgaged property, subject to the same liabilities and obligations as the bankrupt was subject to in respect thereof under the original lease at the date when the bankruptcy petition was filed, the mortgagees would be excluded from all interest in, and security upon, the mortgaged property. This decision gave effect to the provisions of the law corresponding to sub-S. (1) S. 66. The question is whether the fact that the lessor has not, in the present case, obtained an order excluding the mortgagees from all interest in and security upon the insolvent's property makes any difference.

The record shows that the mortgagees applied to the Commissioner in insolvency for an order inter alia that the equity of redemption of the insolvent in the property comprised in the lease was extinguished and that the right, title and interest of the insolvent in the said lease and the property built in pursuance thereto vested in the applicants. (See the affidavit of 18th August 1924, by respondent 1). The Minutes of the Court's order of 3rd September 1924, show that the mortgagees were represented before it but the Court passed no vesting order of the kind applied for. It merely sanc-

(3) [1888] 21 Q. B. D. 475=57 L. J. Q. B. 626=5 Morrel 248=37 W. R. 6=60 L. T. 134.

(4) [1905] 1 K. B. 735=74 L. J. K. B. 442=21 T. L. R. 334=12 Manson. 118=53 W. R. 433=92 L. T. 523.

(5) [1890] 25 Q. B. D. 536=59 L. J. Q. B. 554=38 W. R. 744=7 Morrell. 246.

tioned the disclaimer of the Official Assignee. The reasons for this are not on record, but I think it is a safe presumption that that was mainly due to the terms of sub-S. (1), S. 66 and the unwillingness of the mortgagees to accept a vesting order upon the terms laid down in that subsection or in sub-S. (2), of that section. Sub-S. (1) says that any under-lessee or mortgagee declining to accept the vesting order upon such terms shall be excluded from all interest in and security upon the property. That is a positive provision, which does not depend upon any actual order of the Court. It seems to me, therefore, that the effect of the proceedings before the Commissioner in insolvency in 1924, is that the security of the mortgagees in the leasehold property in question, so far as regards the interest of the insolvent in the property, was extinguished.

I may add that this agrees with the view taken by Lindley, L.J., in *In re Finley* (3), in the passage I have already cited. He there says (p. 486) :

"If no vesting order is made, the lease will be determined . . . the sub-lease will be determined . . . and the lessor will take the property freed from both lease and sub-lease."

This was followed by this Court in *Abubaker, In re* (6), though in that case there were no complications of an under-lease or mortgage.

Accordingly, I think that the respondents were in law entitled to say that in February 1927 they were unsecured creditors of the insolvent. I was at one time inclined to think that, in so far as they had further security by virtue of the lessor J. R. Patel having been a surety under the mortgage of 21st December 1921, they still were secured creditors. This was because the definition of the expression "secured creditor" in S. 2 (g) of the Act of 1909 is not the same as the definition of that expression in S. 168 (1), Bankruptcy Act of 1883. Under the latter definition

"a "secured creditor" means a person who holds a mortgage, charge or lien on the debtor's property or any part thereof, as a security for a debt due to him from the debtors,"

whereas the Indian definition only says the expression

"includes a landlord who under any enactment for the time being in force has a charge on land for the rent of that land."

But I think that there is no reason to suppose that the legislature intended the expression to have a different meaning from that which it has in England, having regard to the closeness with which the Indian Act follows the provisions of the English Bankruptcy Act of 1883. That view is further strengthened by the fact that in the Provincial Insolvency Act of 1920, the definition of "secured creditor" follows the English definition instead of the one in the Presidency Towns Insolvency Act of 1909, which was also contained in the Provincial Insolvency Act of 1907.

It follows that upon the disclaimer there was no property of the bankrupt and a third party jointly, which was security for the debt due from the insolvent to the mortgagees, so that the test about the property, if given, augmenting the bankrupt's estate would not come into operation : cf. Halsbury's Laws of England, Vol. II, p. 224, Art. 368.

It is unnecessary to consider whether the disclaimer by the Official Assignee was unnecessary in view of what was held in *In re Gee. Ex-parte Official Receiver* (7). As pointed out by Mr. Munshi, this case does not apply in India for reasons which are set out in *Vithal Narayan* v. *Shriram Savant* (2). The affidavit actually filed as proof in the insolvency recited that the respondents had not had or received any manner of satisfaction or security whotsoever in respect of the debt due under the deed of mortgage. That statement is open to criticizm. It would, I think, have been better if it had said, as the form contemplates :

"save and except the following, viz, the security provided by the mortgage-deed dated 21st December 1921, which has been extinguished by virtue of the disclaimer of the Official Assignee of the insolvent's interest in the lease to the insolvent and Kaderbhoy Mulla Noorbhai and its consequences."

This does not, however, substantially affect the validity of the proof. It is at the most an irregularity falling under R. 197, Bombay Insolvency Rules, 1910. I, therefore, think that Rr. 9 to 15 do not apply in this case and that R. 16 accordingly does not come into operation

In regard to S. 72 of the Act the respondents had lodged their proof in accordance with the Rr. 1 to 4 in Sch. 2 of the Act and they are not, therefore, creditors, who had not proved their debt

(6) A. I. R. 1924 Bom. 513=48 Bom. 580.

(7) [1889] 24 Q. B. D. 65=59 L. J. Q. B. 16 =6 Morrell. 267=38 W. R. 143=61 L. T. 645.

before the declaration of a dividend, so as to fall under the bar against disturbance of a distribution of dividends contained in S. 72. The fact that the Official Assignee had not accepted the proof in accordance with the provisions of R 119 under the Presidency Towns Insolvency Act cannot be allowed to prejudice the rights of the respondents. It is true that they should have used more expedition in bringing to the notice of the Official Assignee that they had already replied to his letter of 24th February 1927; but they had sent the deed of 20th March 1926, to his office for inspection and the Official Assignee had access to the documents under which the disclaimer had been made by him. I think, therefore, there is adequate ground for disturbing the distribution as one not validly made, and agree with my learned brother on this point, as well as to the irregularities in the action taken by the Official Assignee in this case that he has stated in his judgment Our orders in the appeal can best be passed, after our judgment in the connected Appeal No. 69 of 1927 has been delivered.

As regards the question of costs we have heard counsel in this case. Respondents 1 and 2 have succeeded and would ordinarily be entitled to their costs either from the appellants or from the insolvent's estate We certainly do not think that this is a case where the insolvent's estate should be made further liable in respect of costs. There is also the consideration that respondents 1 and 2 are in some way to blame for the Official Assignee not recognizing them as creditors who had proved their claim; first of all because they did not show due expedition in answering his reminder about the letter he had sent them, secondly because of their negligence in not fully stating the circumstances under which they contended that they were not secured creditors; and even in the appeal before us, these respondents have really succeeded mainly upon a view taken by us in regard to S. 66 which was not, so far as I remember, even referred to by either of the learned counsel, while the appeal was being argued. We, therefore, think that the proper order to pass would be that the appellants must bear their own costs of the appeal and half the respondents' costs Respondents 1 and 2 must bear their remaining costs. We do not think that this is a case where we can properly certify for two counsels.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Bombay 114

MADGAVKAR, J.

Kisan Yemaji and. *others*—Applicants.

v.

Shripat Tatya and *others*—Opposite Party.

Civil Revn. Appln No. 291 of 1927, Decided on 3rd April 1928, from order of Collector, East Khandesh, in Revn. Appln. No 22 of 1927.

(a) Practice—Plea not only not raised in lower Court but inconsistent to those raised —Appellate Court should not allow.

A plea which is not merely absent in the pleas taken in the trial Court but is inconsistent with them should not be allowed in the appellate Court. [P 115 C 2]

(b) Bombay Mamlatdars' Courts Act (2 of 1906), S. 5, Expl.—Person claiming joint possession ousted by cosharer—Court cannot decree joint possession under Expl. to S. 5 (*obiter*).

A Court has no jurisdiction under Expl. to S. 5 to decree joint possession in favour of one who claimed to be in joint possession but was ousted by the cosharer (*obiter*): (1883) *P. J.* 120, (1890) *P. J.* 316 and *A. I. R.* 1922 *Bom.* 126, *Foll.*; (1895) *P. J.* 502, *not Foll.* [P 115 C 2]

(c) Bombay Mamlatdars' Courts Act (2 of 1906), S. 5—Cosharer having sole possession dispossessed by another taking law into his hand, is entitled to the summary remedy of the Act.

A cosharer, when he actually has sole possession, and is dispossessed by another cosharer who has taken the law into his own hands, is entitled to the summary remedy of the Act. [P 115 C 2; P 116 C 1]

(d) Bombay Mamlatdars' Courts Act (2 of 1906), S. 5—Where tenant of one cosharer is obstructed in possession by another cosharer it is not landlord but tenant who must sue.

Possession of tenant is not possession of landlord under Mamlatdars' Courts Act and where a tenant of one cosharer is obstructed in his possession by another cosharer, it is not the landlord but the tenant who must sue. And the Court in such cases need not consider if the lease of the tenant would conclude by the time the Court's order would be enforced: 20 *Bom.* 260 (*F.B*) and (1893) *P. J.* 147, *Foll.* [P 116 C 1]

(e) Bombay Mamlatdars' Courts Act (2 of 1906), S. 5 (1)—Construction.

The words "not being a person who has been a former owner or part-owner" in Cl. 1 qualify only the words immediately preceding "of any other person," the determination of whose tenancy or other right is in question. [P 116 C 1]

G. N. Thakor and *S. T. Damle*—for Applicants.

P. V. Kane—for Opposite Party.

Judgment.—The question raised in this application is on the construction of the newly added explanation to S. 5, Mamlatdars' Courts Act (Bom. Act 2 of 1906).

The lands originally belonged to one Magan. He passed a conveyance in favour of Tatya, the father of opponent 1, Shripat The purchaser sued both Magan and his son Sandu for possession on the ground that the entire survey number had passed to him He succeeded in the trial Court But in appeal the appellate Court held that Sandu's share had not been transferred, and granted opponent 1 a declaration that he had a half-share and was only entitled to joint possession. Opponent 1 took no steps to execute the decree or to be placed in joint possession. On 15th May 1927, Sandu placed the applicants-plaintiffs in possession under a lease for 11 months as tenants On 13th June 1927, opponent I dispossessed them The applicants brought the present suit under the Mamlatdars' Courts Act for being re-instated in possession and succeeded before the Mamlatdar who disbelieved the opponent's defence that he had obtained peaceful possession from Sandu. In revision the Collector upheld the plea not expressly taken before the Mamlatdar and held that the opponent had taken possession as a cosharer on the strength of his decree, and that he was, therefore, protected by the explanation to S 5, Mamlatdars' Courts Act The plaintiffs apply in revision.

The argument for the petitioners is that in the light of the history of the addition of the explanation to S. 5 and on the findings of fact of the Mamlatdar, as opponent 1 had taken the law into his own hands and had dispossessed the petitioners within six months, the petitioners are entitled to succeed For the opponent it is contended that as a cosharer and, therefore, a part owner within the period of 12 years before the suit, the opponent is protected by S. 5, Illus. 1 and, if, as held by this Court a cosharer cannot be placed in joint possession, neither can the tenants of a cosharer such as the present petitioners avail themselves of the Mamlatdars' Courts Act. S. 5 does not apply to a cosharer such as opponent 1 with his right to a share unless within 12 years.

The Collector was, in my opinion, wrong in allowing a plea not merely absent from the pleas taken before the Mamlatdar but in fact entirely inconsistent with them. Before the Mamlatdar the opponent's case was expressly that Sandu had placed him in possession of the southern half of the field now in question. His argument before the Collector was expressly based on joint possession of the whole field taken by him as a cosharer without Sandu's consent. Further, the view of the Collector with regard to the explanation is not, in my opinion, correct It has been held by this Court in *Keso Dinkar* v. *Moro Sakharam* (1), that a plaintiff cosharer who never had sole possession but only claimed to have been in joint possession could not be re-instated in such joint possession against another cosharer inasmuch as the issues and the decrees open under the Mamlatdars' Courts Act did not provide either for joint possession or for partition. This view was followed in subsequent cases such as *Krishna* v *Gopala* (2), and doubted in others such as *Shivdevrao* v. *Bhagvantrao* (3). The subsequent addition of the explanation now in question was, as held in *Jinajibhai* v. *Mathurjibhai* (4), in confirmation of the view in the earliest case above: *Keso Dinkar* v *Moro Sakharam* (1). In *Jinajibhai* v. *Mathurjibhai* (4) the whole field was in the joint possession of the plaintiff and the defendant. The defendant had ousted the plaintiff from joint possession. This Court in revision held, as in *Krishna* v. *Gopala* (2), that the Mamlatdar had no jurisdiction under the explanation to decree joint possession to the plaintiff and set aside his order, which the Collector had upheld

The present case, where admittedly a cosharer such as Sandu had sole possession, could not, in my opinion, fall within the scope of the explanation or of these cases,—all of which related to the admitted joint possession prior to the alleged dispossession of one of the cosharers. And speaking for myself, I am unable to see why a cosharer, when he actually has sole possession, and is dis-

(1) [1883] P. J. 120.
(2) [1890] P. J. 316.
(3) [1895] P. J. 502.
(4) A. I. R. 1922 Bom. 126=46 Bom. 289.

possessed by another cosharer who has taken the law into his own hands should be less entitled to the summary remedy of the Act than any other person. In the present case, the actual dispossession has been not of the cosharer Sandu but of his tenant the petitioner. As has been held by this Court in *Goma* v *Narsingarao* (5), the Act being concerned with actual physical possession a tenant dispossessed must sue himself and the landlord cannot sue, and for the purposes of that Act, the posse sion of a tenant is not on behalf of the landlord. To an obstruction by one cosharer to a tenant in possession the Mamlatdars' Courts Act applies: *Shiddapa* v. *Vishnu* (6).

In regard to the argument based on S. 5 and Illus 1, the words 'not being a person who has been a former owner or part-owner" in that clause qualify only the words immediately preceding "of any other person" the determination of whose tenancy or other right is in question, as is also plain from the illustration; and is is, therefore, of no avail to the opponent.

As regards the expiry of the period of the petitioner's lease within a few days, this Court is concerned with the rights of the parties on the date of the intsitution of the suit rather than with the consequences of the enforcement of the order. The petitioners were in possession as their lessor. The cosharer, Sandu, had himself been in possession. The opponent, for some reason or other, not apparent, failed in the civil suit to claim joint possession in the alternative and has never obtained it from Court. But instead, he took the law into his own hands and ejected from the southern half the petitioner who was in legal possession On these facts, the Mamlatdar, in my opinion, was right and Collector's order was wrong. The rule is made absolute, the Collector's order is set aside, and the order of the Mamlatdar restored with costs throughout on opponent 1.

S.N./R K. *Rule made absolute.*

(5) [1895] 20 Bom. 260 (F.B.).
(6) [1898] P. J. 147.

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PATKAR, J.

Kashiram Laxman Kadam and *others* —Plaintiffs—Appellants.

v.

Maheswar Laxman Gondhalekar and *others*—Defendants—Respondents.

Second Appeal No. 195 of 1927, Decided on 30th March 1928, from the decision of 1st Cl. Sub-Judge, Ratnagiri, in Appeal No. 29 of 1923.

(a) Civil P. C. S. 11—"Heard and finally decided."—Mortgagee in possession being also cosharer suing for partition — Court overlooking stipulation of payment in mortgage and assuming mortgagee to be owner of the mortgaged property — Suit for redemption is not barred.

In a suit for partition by a mortgagee in possession who was also a cosharer the Court overlooking the fact that the mortgage deed provided a period of 25 years for redemption assumed the mortgagee had become the owner of that property .

Held. that the question as to the extinction of the mortgage had not been "heard and finally decided," in the partition suit and a subsequent suit for redemption would not be barred. [P 117 C 1]

*** (b) Transfer of Property Act, S. 60—Redemption suit dismissed for default under 1859 Code does not bar second redemption suit, even if dismissal was before Transfer of Property Act was made applicable—Civil P. C., S. 11.**

The dismissal of a suit for redemption for default under S. 127, Civil P. C. of 1859, is not an order extinguishing the right of redemption under S. 60, T. P. Act, and does not bar a second suit for redemption of the mortgage. And this rule holds good even where the previous suit was dismissed before the Transfer of Property Act was made applicable to the province : 39 *Bom.* 41 ; 40 *Bom.* 248 ; *A. I. R.* 1928 *Bom.* 67; 13 *M.I.A.* 404 ; 22 *W. R.* 172 and 43 *Bom.* 334, *Rel. on*; 13 *Bom. L. R.* 658 and 15 *Cal* 422 (*P.C.*), *Dist.* [P 119 C 2]

P. V. Kane—for Appellants.

K. H. Kelkar—for Respondents 1 to 4 & 10

Judgment.—This suit was brought by Kadams the presnt plaintiffs to redeem a mortgage, dated 2nd June 1829, which comprised four pies takshim belonging to the present plaintiffs. It is conceded that the mortgage security was split up. By Ex, 47, the purshis signed by the pleaders on behalf of the defendants, it is admitted that the plaintiffs' share comprises only four pies and if accounts are taken under the Dekkhan Agriculturists' Relief Act, the profits in respect of the four pies share will be found sufficient to wipe off the whole mortgage debt. The only question, therefore, that arises for

decision is whether the present suit is maintainable notwithstanding the previous decision in Suits Nos. 1217 of 1866 and 351 of 1911. Both the lower Courts held that the present suit was not barred by virtue of the decision in Suit No. 351 of 1911. The learned Subordinate Judge held that the suit was not barred by the decision in Suit No. 1217 of 1866, but the lower appellate Court held that it was so barred.

Suit No. 351 of 1911 was filed by defendant 1 for partition of his share of 1 anna and 9⅛ pies. The present plaintiffs being owners of four pies share and interested in the equity of redemption, were joined in the suit as defendants 33 to 35. The Court assumed that the family of defendant 1, that is Gondhalekars, had become owners as more than sixty years had elapsed from the date of mortgage. It appears that the Courts then failed to notice one important point, namely, that the period for redemption of the mortgage of 1829 was twenty-five years, and, therefore, the redemption would be due in the year 1854 and the suit for redemption would not be barred till 1914. It was, however, held in 1911 that the right of redemption was barred by reason of the fact that ths parties to the suit lost sight of the fact mentioned above that the mortgage had provided for a period of twenty-five years for redemption Further, the Gondhalekars as mortgagees would in any event be entitled to remain in possession and the question as to the extinction of the mortgage was not gone into in that suit Therefore, on both these grounds namely, that the parties were under an erroneous belief that the mortgage deed of 1829 did not provide for a period of redemtion, and secondly, that the mortgagees in any event were entitled to remain in possession, the question as to the extinction of the mortgage cannot be considered to have been heard and finally decided in that suit. It was held by both the Courts that the present suit is not barred by the decision in Suit No 351 of 1911, and it is not argued before me on behalf of the respondents that the present suit is barred by the decision in Suit No. 351 of 1911. I would therefore agree with the view of the lower Courts that the present suit is not barred by the principle of res judicata by virtue of the decision in Suit No. 351 of 1911.

With regard to Suit No. 1217 of 1866, it appears that it was brought by three plaintiffs of whom Pandbarao Kadam was the assignee from the present plaintiffs with regard to the four pies share in the property. The defendants in that suit contended that two annas takshim was already redeemed in the year 1842 and Pandbarao was joined as he had purchased eight pies share in 1866 from the present plaintiffs and others belonging to the Kadam family Plaintiffs 1 and 3 in that suit were ordered to be present in Court under S. 127 of Act 8 of 1859. They made default in appearance. The suit was therefore dismissed so far as their share was concerned, and redemption was allowed with regard to the 16 pies takshim, and a decree was passed in favour of plaintiff 2 Ramajirao. During the course of the judgment, which is in Marathi, the learned Subordinate Judge stated:

"That the plaintiffs did not appear and show proper cause and therefore they have got the adverse decision against themselves. Therefore, the right of redemption so far as they are concerned is extinguished. Only Ramajirao's right has remained and he has, therefore, the right of redemption."

In the final decree, however, the right of redemption of the plaintiff Ramajirao was decreed, and nothing was said with regard to the extinction of the right of plaintiffs 1 and 3 with regard to their eight pies share.

The learned Subordinate Judge held that the present suit was not barred by res judicata on the ground that in the previous suit it was unnecessary to decide whether the vendors of Pandbarao had a right to redeem any part of the mortgage right, and that as a matter of fact, there was no decision on that point as the suit was dismissed for default of plaintiffs 1 and 3. The lower appellate Court, however, came to an opposite conclusion and relying on the case of *Punamchand* v. *Mollison* (1) and S 127 of Act 8 of 1859, held that the present suit was barred by the decision in Suit No. 1217 of 1866.

It is urged on behalf of the appellants that there was no issue raised in the previous suit and no adverse finding on the question as to whether the plaintiffs' right of redemption subsisted at the date of the previous suit. In fact, S. 127, Act 8 of 1859, appears in the old Civil Procedure Code before the settlement of

(1) [1911] 13 Bom. L. R. 658=11 I. C. 986.

issues, and the dismissal of the suit was for default of appearance under S. 127 at a stage prior to the framing of the issues, and, therefere, it cannot be said that the issue as to whether the plaintiffs' right to redeem was extinguished, was heard and finally decided in the previous litigation. S. 127, Civil P. C. 1859, corresponds to O. 10, R. 4 of the present Code. There is no provision in S 127 similar to the provision in O. 9, R 9, or O 22, R 9, or O. 23, R. 1, Cl (3), precluding a fresh suit after an order is passed for dismissal of the suit Under S. 60, T. P. Act the right of the plaintiff to redeem could not be barred unless there was an extinguishment of the relation of mortgagor and mortgagee by act of the parties or by order of a Court There is no act of party which has resulted in the extinguishment of the relation of mortgagor and mortgagee. It is not suggested that there is any release passed with regard to the equity of redemption The question is whether there is an order of the Court extinguishing the relation of mortgagor and mortgagee between the parties.

It was held in *Rama Tulsa* v *Bhagchand* (2), relying on the case of *Hansard* v. *Hardy* (3), that a dismissal for want of prosecution of a mortgagor's action for redemption does not prevent him from bringing a fresh suit for redemption In *Ramchandra* v *Shripatrao* (4) a second suit for redemption by the son was held maintainable notwithstanding the order for abatement of the suit for redemption brought by the father. In *Shridhar* v. *Ganu* (5) it was held that the dismissal of a suit for redemption of a mortgage for default is not an order extinguishing the right of redemption under S, 60, T P Act, and does not bar a second suit for redemption of the mortgage. Under O. 9, R 9, where a suit is wholly or partly dismissed under R. 8, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. Notwithstanding such a provision in O 9, R 9, it was held that the general terms of that rule did not override the specific directions given in S. 60, T. P Act.

(2) [1914] 39 Bom. 41=27 I. C. 249=16 Bom. L. R. 687.
(3) [1812] 18 Ves. 455.
(4) [1915] 40 Bom. 248=33 I. C. 771=18 Bom. L. R. 33.
(5) A. I. R. 1928 Bom. 67=52 Bom. 111=30 Bom. L. R. 34.

Reliance has been placed on behalf of the respondents on the decision in the case *Shankar Baksh* v. *Dya Shankar* (6). That case has been distinguished in *Shridhar* v. *Ganu* (5), (*p.* 37 *of* 30 *Bom. L.R.*) on the ground that a particular tenure was involved in the decision of the case and that S. 60, T. P. Act, was not called in aid. It is urged however, on behalf of the respondents that the Transfer of Property Act was enacted in 1882 and was made applicable to the Bombay Presidency in 1893, and, therefore under the ruling in *Shankar Baksh* v. *Daya Shankar* (6) the present suit should be held barred by res judicata It is urged on behalf of the appellants that though S 60, T P Act, was enacted in 1882, the principle of law, namely, that once a mortgage always a mortgage, should be held applicable and that the equity of redemption should be held not barred unless there was an extinguishment of the relation of mortgagor and mortgagee by act of the parties, or by order of the Court

In the year 1870, when Act 8 of 1859 was in force, it was held by the Privy Council in *Nawab Azimut Ali Khan* v. *Jowahir Singh* (7) as follows (p. 412) :

"That decree, in fact, did nothing but dismiss the then pending suit for redemption, on the ground that the full and entire amount of the mortgage money had not been deposited (the sums tendered being only Rs. 26,400 and Rs. 400). According to the course and practice of the Courts in India, the only point to be determined in such a suit is whether the mortgage debt has been fully satisfied after taking into account the sum tendered or deposited ; nor is the finding of any particular amount as still due conclusive against the mortgagee in a subsequent suit."

So also in the year 1874 it was held by the Calcutta High Court in *Roy Dinkur Doyal* v *Sheo Golam Singh* (8) as follows (p 173) :

"What then was the cause of action which was heard and determined between the present parties in the former suit, and what is the cause of action which is put forward by the plaintiffs in this present suit, and which they ask to have now heard and determined.

"It seems to us plain that the principal cause of suit is the relation which subsists between the parties as mortgagor and mortgagee, and the consequent right on the part of the mortgagor at all reasonable times to ask for an account from the mortgagee. The suit is brought for the purpose of obtaining an adjust-

(6) [1887] 15 Cal. 422=15 I. A. 66=5 Sar. 107 (P.C.).
(7) [1870] 13 M.I.A. 404=14 W.R. 17=2 Suther 346=2 Sar. 573 (P.C.).
(8) [1874] 22 W.R. 172.

ment of accounts or adjudication of the state of the accounts between the parties, and for such relief at the hands of the Court as the plaintiff may be entitled to upon that adjustment or adjudication of the accounts. Now the former suit effected an adjustment of accounts up to the date of 18th April 1868. The substantial cause of action within the meaning of S. 2, Act 8 of 1859, in the present suit, that which the plaintiff desires to have heard and determined is the state of accounts which has arisen since 18th April 1868, obviously an entirely fresh cause of action. The matter which the Court is asked in this suit to hear and determine, is a matter which has arisen and come into being since the matter of the last suit was heard and determined. And consequently S. 2, Act 8 of 1859, does not bar the Courts from entertaining this suit."

Further it is stated at p 174 :

"That decree did not put an end to the relation of mortgagor and mortgagee The Court did not in that suit pretend to foreclose the plaintiff's right of redeeming in the event of his not paying the money then declared to be due. . . . and it would be very hard upon him therefore that his equity of redemption should nevertheless be indirectly foreclosed by the effect which the Subordinate Judge has given to S. 2, Act 8 of 1859, without any period of grace or any terms whatever being attached to this foreclosure."

Those decisions under the Act of 1859 were relied upon in the Full Bench decision in *Ramji* v. *Pandharinath* (9), where it was held that the mortgagor could bring a second suit for redemption and the same would not be barred by S. 11 or S 47, Civil P. C., 1908 The case of *Punamchand* v. *Mollison* (1), relied upon by the lower appellate Court, was not a case relating to a mortgage but to a money bond, and, therefore, the considerations applicable to a suit on a mortgage would not apply to that case. The case of *Shankar Baksh* v *Dya Shankar* (6) might be distinguished on the ground that the document in that case was a conditional sale which became absolute after a period of three years. If reference is made to the argument of Mr. Mayne on behalf of the respondent, it appears that the cause of action failed the plaintiff because his case was one of conditional sale, on breach of which condition the sale had become absolute ; and it was argued that even if S 6, Act 1 of 1869 would have placed him in a better position had he sued thereafter for the first time, still, as he had elected to sue before it, the Act did not undo the state of things which he had created.

I think, therefore, that I am bound by the decisions of this Court in *Rama Tulsa* v. *Bhagchand* (2), *Ramchandra* v. *Shripatrao* (4) and *Shridhar* v *Ganu* (5).

I am therefore of opinion that the present suit is not barred by the principle of res judicata by virtue of the previous decision in the Suit No. 1217 of 1866. I would therefore reverse the decree of the lower appellate Court and restore that of the Subordinate Judge Each party to bear his own costs throughout.

S.N./R.K. *Decree reversed.*

(9) [1918] 42 Bom. 334=49 I.C. 894=21 Bom. L.R. 56 (F.B.).

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FAWCETT AND KEMP, JJ.

Raneegunge Coal Association Ltd.—Defendants—Appellants

v.

Tata Iron & Steel Co Ltd —Respondents.

Original Civil Jurisdiction Appeal No 17 of 1928, Decided on 12th September 1928, from decree in Suit No 1885 of 1927.

(a) Arbitration Act, S. 19—Courts should refer parties to forum of their deliberate choice—Onus is on plaintiff to show why stay should be refused.

The discretion given by S. 19 should be judicially exercised, and the onus of showing that the stay should not be granted lies on the party who opposes the stay as the Court will as a rule refer the parties to the forum which they have deliberately selected as the one to which they wish to refer their disputes.

On a breach of an agreement of a commercial contract, which provided for arbitration in case of disputes, a suit was filed. Stay of suit was prayed for under S. 19 and was opposed on three grounds, viz., (1) that a difficult question of law concerning the construction of the agreement in question was likely to arise ; (2) that question as to a fraud in relation to S. 18, Limitation Act, was likely to arise and (3) that the arbitrators would be unable to enforce discovery and attendance of witnesses.

Held : that the order for stay should be granted and in such a commercial case there ought to be very strong grounds for refusing the order: *Willesford* v. *Waston*, (1873) *L. R.* 8 *Ch.* 473; *Bristol Corporation* v. *John Aird & Co.* (1913) *A. C.* 241; *Produce Brokers Co., Ltd.* v. *Olympia Oil* and *Cake Co., Ltd.* (1916) 1 *A. C.* 314 and *Metropolitan Tunnel* and *Public Works* v. *London Electric Ry. Co.* (1926) 1 *Ch.* 371, *Ref.* [P 125 C 2]

Per Kemp, J.—(1) The arbitrators could not only determine a point of law but could also determine a question of the construction of the agreement, and a mere allegation that a difficult point of law arises is no ground for refusal to stay. (2) The alleged fraud cannot be

properly coupled with an alleged difficult question of law so as to have a cumulative effect justifying the refusal to stay, and an allegation of fraud is no proof of it. The party charged with fraud, who might prefer to clear its character in a Court of law, is content that its commercial integrity should be submitted to arbitration of business men. (3) The nonproduction of documents and nonattendance of witnesses is a mere possibility and there is no reason to apprehend that the difficulty is certain to occur and is no reason for a refusal to stay because otherwise all arbitrations would be restricted to cases where there are no witnesses and no discovery is sought and such restriction is not warranted by the Arbitration Act.

Per Fawcett, J.—(i) The question of construction of agreement does not really arise and if it did it can be considered by the arbitrators; (ii) no question of law as to whether there was fraud arises. [P 126 C 2]

(b) Arbitration Act, S. 19—English decisions subsequent to English Arbitration Act should not be applied—English Courts exercising greater control over arbitration—It is no reason to refuse stay.

Per Kemp, J.—It is erroneous to apply the English decisions subsequent to the English Arbitration Act and to deduce that applications for stay here should be more strictly dealt with. The greater control exercised by Courts in England over arbitrations under the English Arbitration Act should not be applied as a main reason for refusing a stay under S. 19. [P 121 C 2; P 123 C 2]

(c) Limitation Act, S. 18—Not furnishing information in breach of contract cannot be fraud under S. 18.

Per Fawcett, J.—Section 18 requires that a person should have been kept from certain knowledge by means of fraud. There must be actual fraud in the means adopted to keep the person out of knowledge, and it is entirely a misuse of words to say that merely because certain persons did not furnish the particulars which they ought to have done under the contract, there was fraud. [P 126 C 1]

(d) Practice — Pleadings—Cause of action contractual — Allegation of fraud cannot change basis.

Per Kemp, J.—Where the real cause of action alleged in the plaint is one ex contractu, the plaintiff cannot by merely alleging fraud base a cause of action on fraud. [P 124 C 1]

Coltman and *Daphtary* — for Appellants.

Mulla and *Desai*—for Respondents

Kemp, J.—This is an appeal against an order made by Blackwell, J., dismissing, on 5th March 1928, a summons taken out by the defendants for stay of the suit under S. 19, Arbitration Act, 1899.

The plaintiffs sue the defendants for breach of an agreement, dated 16th January 1919, for the sale by the defendants to the plaintiffs of the output of coal raised by the defendants from certain seams Nos. 12, 13 and 15 in the defendants' collieries at Kustore and Alkusa which, we were informed during the arguments, are situated some ten hours by rail from Calcutta. It is unnecessary to refer to the agreement in detail. It is sufficient to state that the plaintiffs contend that under the agreement the defendants were bound to maintain the output of the particular seams up to 15,000 tons and deliver to them the output for that amount and over up to 25,000 tons. The plaintiffs do not say in the plaint that the defendants dispute this construction, but on the argument of the summons, the defendant's learned counsel asserted that the only obligation on the defendants was to supply a minimum quantity of 15,000 tons per month. These contentions arise from the wording of Cls. 3 and 9 of the agreement. Under Cl. 5 of the agreement the sellers were to furnish the buyers with weekly particulars of the raisings available for despatch under the agreement. The coal was to be loaded into wagons on the colliery sidings and despatched at the risk of the buyers who were to pay all the freight and railway charges. Shortly put, the plaintiffs contend that recently they came to know that from 1st April 1920, when the agreement came into operation up to 1925-26 and 1926-27, the output of the coal raised by the defendants from the seams in question monthly was considerably larger than the quantity supplied to the plaintiffs. They say that the defendants instead of delivering to them the output up to 25,000 tons, sold that quantity to other people in the market at a higher rate. They also state that the defendants "fraudulently refrained" from furnishing the particulars required by Cl. 5 of the agreement and led the plaintiffs to believe that the total output of the said seams was being supplied to the plaintiffs from month to month. They allege that by this "fraud" the defendants kept them from a knowledge of their rights until April 1927. They thus seek to take advantage of S. 18, Lim. Act. The prayers of the plaint pray for a full and complete discovery of the output of coal "at all times material to this suit," damages for fraud and breach of contract and costs.

The agreement itself was signed by the defendants at their registered office in Calcutta and by the plaintiffs at their registered office in Bombay. The contract

was to be performed at the collieries where delivery was to be given on the wagons at the colliery siding. All the evidence in the case will be obtainable either there or in Calcutta where the Head Offices of the railway companies concerned are. The only part of the cause of action which may be said to have accrued in Bombay is that part of the performance which requires the defendants to send to the plaintiffs weekly particulars of the raisings. Presumably they were to be sent to Bombay.

Clause 13 of the agreement is the clause relating to arbitration. It is in these terms :

"If any dispute or difference shall at any time arise between the parties touching the construction, effect or meaning of these presents or any matter or thing arising hereunder then and in every such case the matter in difference shall be referred to the tribunal of Arbitration of the Bengal Chamber of Commerce to be determined in accordance with the rules for the time being of that tribunal. The award of such tribunal may at the instance of either party be made a Rule of the High Court of Judicature at Fort William in Bengal."

Clearly the parties contemplated Calcutta as the "venue" for the decision of any dispute.

The learned Judge dismissed the summons on various grounds.

Section 19, Arbitration Act, is in these terms :

"Where any party to a submission to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Clearly under that section, the Judge has a discretion to stay the suit pending the arbitration. Russell on Arbitration, 11th Edition at p. 102, referring to this discretion states :

"This discretion, in accordance with the ordinary rules of law, must be judicially exercised, but where it has been so exercised it will not readily be interfered with, even though the tribunal which is asked to review it may feel that, if the decision had rested with them, their own conclusion might have been different."

The question is whether the learned Judge has exercised a judicial discretion in this case having regard to the principles by which he must be guided. With all respect to him, I am of opinion that he has not, and that he has taken into account the principles of decisions in England which since the English Arbitration Act of 1889 make the Courts there reluctant to stay the suit where the main point in dispute is a pure question of law, because such a question must ultimately return by way of a case stated to the Court for decision. The greater control exercised by Courts in England over arbitrations under the English Arbitration Act should not, I think, be applied as a main reason for refusing a stay under the Indian Arbitration Act Before the English Arbitration Act, the Courts in England did not hesitate to order a stay where there was a pure question of law.

The learned Judge refused to stay the suit on the grounds, firstly, that there was an important point of law for determination which would be more properly tried by the Court than by the arbitrators. As he puts it :

"In a case such as this, where there are likely to arise difficult questions of law, I do not think it reasonable to leave the parties to the tender mercies of the arbitrators, seeing that they cannot be compelled to seek the guidance of the Court for determining the difficult questions of law likely to arise before them."

Secondly, he finds that there is a plea of fraud which has been set up in the plaint which is a matter that demands that the question in dispute should be determined by the Court. He says :

"An allegation of fraud, however, is in my judgment only one of the elements in a case like the present which an Indian Court should consider having regard to the difference existing between the Courts in England and in India in respect of the control exercisable by those Courts over arbitrations. In the present case the allegation of fraud made in the plaint is in my opinion likely to give rise as I have already pointed out, to a difficult question of law upon the true construction of S. 18, Lim. Act."

The allegation of fraud bringing S. 18 into operation is apparently the concealment of the monthly output by deliberately refraining to send plaintiffs the weekly particulars under Cl. 5 of the agreement. It will be noted that the plaint was filed on 13th September 1927, and the claim in respect of the raisings

prior to 13th September 1924, would be barred by limitation but for the plea of fraudulent concealment The third ground is the alleged difficulty the arbitrators would encounter in securing the attendance of witnesses to produce documents and in enforcing discovery. Reference is made in the judgment in this respect to O. 11, R. 14, by which the Court can punish any refusal to comply with an order for discovery.

Before proceeding to deal with these points I wish to point out again that in this particular case the parties deliberately chose a "forum" to which they were willing to confide any dispute and which would be the most convenient "forum" for the trial of any matter arising out of the contract. The intention clearly appears to have been that the dispute should be determined in Calcutta where the railway receipts to be obtained from the railway companies could more easily be applied for and obtained and where the tribunal would have expert knowledge of this kind of business. Indeed there must be many cases in which the Bengal Chamber have had to construe contracts in coal. Bengal is one of the main centres of the industry. Certain terms have been referred to in the agreement which an expert tribunal would be better able to construe than a Court which would have to take voluminous evidence on their meaning. As it is, the defendants find that they are brought down to Bombay to meet this suit on a cause of action the only real part of which apart, perhaps, from the execution of the agreement by the plaintiffs in Bombay that has arisen within its jurisdiction is that part of the performance which required defendants to send to plaintiffs the particulars in Cl. 5 of the agreement. And even this is not clear in the agreement, for Cl. 5 of the agreement merely says that the particulars are to be furnished to the buyers, i. e., the plaintiffs. Moreover, the defendants have their place of business in Calcutta. It seems inequitable that the defendants should be called upon to meet this claim in a suit filed in Bombay.

Now the effect to be given to an arbitration clause in a contract has been clearly stated so far back as the case of *Willesford* v. *Watson* (1), where Lord Selborne stated (p. 480):

"If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament (i. e., the Common Law Procedure Act of 1854) was passed, a prima facie duty is cast upon the Courts to act upon such an agreement."

Then in *Bristol Corporation* v. *John Aird & Co.* (2) a passage has been cited by the learned Judge in his judgment where Lord Moulton states (p. 259):

"It (the Court) must consider all the circumstances of the case, but it has to consider them with a strong bias, in my opinion, in favour of maintaining the special bargain between the parties, though at the same time with a vigilance to see that it is not driving either of the parties to a tribunal where he will not get substantial justice."

It cannot reasonably be contended in the present case, apart from the contention as to the possibility of not securing the attendance of witnesses and discovery, that the Bengal Chamber of Commerce is not a tribunal from which the parties would get substantial justice Then in *Produce Brokers Co. Ltd.* v. *Olympia Oil and Cake Co. Ltd.* (3), a case, I think, not cited to us in the arguments, Lord Sumner states (p. 332):

"Arbitration clauses, substantially the same as that before your Lordships, are characteristic of all those forms of contract. The system has been devised by mercantile men to suit their needs and they have found it highly beneficial; they have been naturally anxious to establish trade control over the transactions of the trade as completely as possible."

It will be observed that the case referred to was a case where the question to be determined by the arbitrators was a question of construction. Then, in the case of *Metropolitan Tunnel and Public Works* v. *London Electric Ry. Co.* (4), referred to in judgment, Lord Hanworth M. R, in considering the meaning and proper interpretation of a certain clause in that case states (p. 385):

"The meaning and proper interpretation of such a clause as that in the present case is that the Court has to be satisfied that sufficient reason exists why the matter cannot or ought not to be referred to arbitration, and that the burden lies upon the party who alleges it to show that such sufficient reason exists."

Further on, in the report, he goes on to say (p. 385):

"It is said that the question raised is one of law, and that if the matter goes to arbitration, it may have to come back to the Court for

(1) [1873] 8 Ch. 473.

(2) [1913] A. C. 241=82 L. J. K. B. 684=29 T. L. R. 360=77 J.P. 209=108 L. T. 494.

(3) [1916] 1 A. C. 314=85 L. J. K. B. 160=21 Com. Cas. 320=60 S.J. 74=114 L. T. 94=32 T.L.R. 115.

(4) [1926] 1 Ch. 371.

judicial interpretation of the meaning of this and other clauses of the contract."

This passage is relevant with reference to the distinction drawn by the Courts when deciding cases under the Common Law Procedure Act of 1854 and those subsequent to the English Arbitration Act of 1889. Then Lord Justice Scrutton states at p. 388 of the same report:

"On the one hand, it is eminently desirable, in all business matters, that parties who have made a contract should keep it. Business could not satisfactorily go on if persons were to be at liberty to disregard contracts they had made."

Later on he says (p. 389):

"But undoubtedly a guiding principle on one side, and a very natural and proper one, is that parties who have made a contract should keep it."

Then comes the passage cited in the judgment of Blackwell, J.:

"On the other hand, the Courts have always firmly adhered to the principle that their jurisdiction is not to be ousted by agreement between the parties, and that in cases where the Courts think it better that the dispute should be decided by the Courts, rather than by a private arbitrator, they will not be fettered in their decision by the fact that the parties have agreed to oust the jurisdiction of the King's Court."

I think it is unnecessary to quote further authorities to establish the well-recognized principle, firstly, that the "onus" of showing the dispute should not be referred to arbitration lies upon the plaintiffs, and, secondly, that the Courts will, as a rule, refer the parties to the "forum" which they have deliberately selected as the one to which they wish to refer all their disputes. It is clear from these references that the arbitrator cannot only determine a point of law but that he can equally determine a question of the construction of an agreement, and, therefore, unless some special reason is shown why the point of law in this case is beyond the powers of the arbitrator it seems to me that the Court should incline to passing the order asked for in the summons. The learned Judge in his judgment states as a reason why the stay order should not be passed that because under the English Arbitration Act of 1889 the Courts exercise greater control over arbitrators by virtue of Ss. 7 and 19 of that Act and Lord Justice Scrutton states that their discretion should not be fettered where they think it better that the dispute should be decided by the Courts notwithstanding an agreement to refer, the Courts in India, which have less control over arbitrators under the Indian Arbitration Act, should be even more ready to refuse a stay of the suit. But, as is pointed out in Halsbury's Laws of England, Vol. 1, at pp. 453 and 454, the Courts in England prior to the English Arbitration Act of 1889 did not consider that the determination of a point of law was a sufficient ground for refusing a stay of the suit. Since 1889 the Courts in England have been less inclined to stay a suit as the arbitrator can be compelled to state a case for the opinion of the Court on any question of law arising in the course of the reference. There would, therefore, be little point in England, since the English Arbitration Act of 1889, in referring a pure question of law to an arbitrator. This was the chief reason apparently why in the case of *Barnes* v. *Youngs* (5) Romer, J., refused to stay the suit. There was only one point and he described it as a simple point of law and saw no use in referring it to an arbitrator when he might ultimately be called upon to decide it. It is erroneous to apply the English decisions subsequent to the English Arbitration Act without qualification to cases under our Arbitration Act and to deduce that applications for stay here should be more strictly dealt with No doubt as the Chief Justice in *The Toyo Menka Kaisha Ltd.* v. *Joomabhai Laljee* (6) said, the distinction is one to be borne in mind. *Non constat*, however, that it decides the Court's discretion.

Now, the mere fact that the plaint alleges a difficult point of law is by no means proof that it is so or that a stay should be refused. In *The Toyo Menka Kaisha, Limited* v. *Joomabhai Laljee* (6), the learned Chief Justice described the case as a very exceptional one and the contention there was that the arbitrators might go wrong on the question as to the admissibility of oral evidence under S. 92, Evidence Act. There does not appear to me to be any difficult or complicated question of law regarding the agreement which the Bengal Chamber of Commerce, with its special experience, would not be fully competent to determine. The parties specially provided in

(5) [1898] 1 Ch. 414=67 L.J. Ch. 263=46 W. R. 332.

(6) O. C. J. A. No. 82 of 1926 decided on 1st April 1927 by Marten, C. J., and Blackwell, J.

the arbitration clause that the Chamber's tribunal should construe the agreement.

The plaintiff alleges fraudulent concealment. I think the alleged fraud cannot be properly coupled with the alleged difficult question of law so as to have a cumulative effect justifying the refusal to stay the suit. If neither ground be sufficient in itself it would require a very strong case to say that the combined effect should suffice Mr. Mulla in his argument has laid more stress on the combined effect of the grounds relied upon by the lower Court than on the weight to be given to each separate ground.

Where fraud is alleged, particulars of the fraud must be given The plaint. which counsel, in my opinion, rightly described as a "sketchy" one, merely alleges in paras. 7 and 8 that defendants fraudulently refrained from furnishiug particulars under Cl. 5 of the agreement and by reason of that fraud the plaintiffs were kept without knowledge of their rights. Now the contract was one for the sale of coal, and the particulars of the fraud are not stated but in effect there is merely a general allegation that by not sending the weekly particulars the defendants intended a fraudulent concealment. The fact that the partioulars of fraud have not been stated is clear from the judgment where the learned Judge states:

"The case, however, is based upon an allegation of fraud and it is vital to the plaintiffs that they should succeed in getting discovery to enable them to make out a 'prima facie' case for the defendants to answer."

Clearly, therefore, he was of opinion that particulars of fraud had not been furnished and plaintiffs could only establish fraud by what is really a "fishing" inquiry. Moreover the real cause of action alleged in the plaint is one ex contractu, and a party cannot by merely alleging fraud base a cause of action on fraud when the real cause of action is one ex contractu.

Mr Mulla contends that the fraud consisted in conversion, that all the coal which was to be raised from these seams belonged to plaintiffs up to the limits of the contract, and that the defendants by selling this coal to other persons have converted the plaintiffs' property But this is not pleaded in the plaint. Nor are any damages sought for conversion. Nor is there anything to show that there was any appropriation of the coal raised to the surface to the plaintiffs.

Driven from that position, Mr. Mulla contended that this was a case of agency and that the defendant-agents have misappropriated their principal's goods. The answer to this is that it is not pleaded in the plaint and that on the facts of the case it is clearly a contract between a seller and a buyer and has no reference to agency whatever. Here I would point out that the mere allegation of fraud in a pleading is not sufficient, without furnishing particulars, to give the plaintiffs a right to successfully contest an application for stay.

The plaintiffs say they were kept from knowledge of their rights by the fraudulent omission to furnish particulars under Cl 5 of the agreement. An omission of this sort does not amount to a fraudulent concealment but merely to a breach of contract The plaintiffs, if they had wished, could have asked for these particulars and the means of knowing the amount of coal alleged to have been raised from the seams were within their power. Indeed, until the date mentioned in para. 5 of the plaint, they made no efforts whatever to obtain such particulars from the defendants. There is no reason to assume that the defendants would have supplied the plaintiffs with false particulars. In para 2 of the affidavit of Mr James Gibson Foster, one of the managers of the defendant company, he states that plaintiffs wrote to defendants in March 1923 requesting them to send statements and in accordance with such request the defendants sent to the plaintiffs statements showing raisings, despatches and stocks in the month of February 1923 and similar statements every month thereafter up to the date of the filing of the suit. Had the plaintiffs chosen to ask for statements, which no doubt under the contract there was an obligation on the defendants to supply weekly, the defendants would have in all probability supplied them. Had those statements been false then the plaintiffs might have been in a position to say that having accepted them they were kept in ignorance of their rights. It is to be noted that the plaintiffs made no request for any of these statements prior to that date and it would almost seem as if they had waived the necessity of demanding them. There can, therefore, be no question here of any suppressio veri. There was nothing actively done by the defendants

to conceal the true facts from the plaintiffs but there was merely a breach of the contract to supply weekly particulars which breach the defendants do not appear to have taken very seriously.

But there is another reason why fraud should not be regarded as a ground for refusing a stay in this case, and I think too little weight has been given to it. The defendants who are charged with the fraud and who might prefer to clear their character in a Court of law do not want to do so in the suit. They are content that their commercial integrity should be submitted to the arbitration of business men.

The third ground on which the lower Court refused the order of stay was that the arbitrators would be unable to enforce discovery and the attendance of witnesses. Here I may say, at once, that if this ground were to be considered a sufficient ground to refuse a stay, then all arbitrations under the Arbitration Act would be restricted to cases where there are no witnesses and no discovery is sought. I see no reason to give that limited construction to the Arbitration Act and there are no words in the Act which suggest it It is obvious that this difficulty may arise in the case of every arbitration but when it does arise and if it seriously prejudices the efforts of the arbitrator in arriving at a fair decision, there is nothing to prevent either party applying to the Court, under S. 5, Arbitration Act (9 of 1899), for revocation of the submission. But there is no reason to apprehend that any such difficulty is certain to occur, and in the ordinary course the mere possibility would not be a ground for refusing the stay. Nor could this Court compel the attendance of a witness who resides more than two hundred miles from the Court house: O. 16, R 19 (b).

Moreover, the documents which have been referred to in connexion with this point, viz , the railway receipts, are all obtainable at Calcutta, and there seem no reason why the railway companies should not allow them to be inspected or copies to be taken. Nor can the plaintiffs state that there are any witnesses who refuse or will refuse to attend.

Lastly, with regard to the power to revoke, it is stated in Russell on Arbitration (11th Edition) at p. 61 :

" The principle underlying the exercise of the power to revoke is that the parties take the arbitrator for better for worse, that his decision is final both as to law and fact, and that unless a substantial miscarriage of justice will take place in the event of leave to revoke being refused, leave will not be given."

which shows how strong is the principle of law that the matter should be left in the hands of the arbitrator No doubt the English Act (52 & 53 Vic. c 49, S 8) provides for enforcing the attendance of witnesses and the Indian Arbitration Act does not, but this makes no difference in the present case, for, as I have said, it has not been shown that witnesses are not going to attend. Under the circumstances, I am of opinion that the order for stay should have been granted and that in a commercial case like this, there ought to be very strong grounds for refusing the order. The refusal to stay in this case would, I think, amount to an injustice to the defendants. I would, therefore, allow the appeal and set aside the order of the Court below with costs throughout.

Fawcett, J. — This Court must, I think, attach considerable weight to the discretion exercised by the learned Judge in the Court below, especially as he has very fully and carefully stated the reasons for the conclusion that he came to. I would myself be very reluctant to interfere, unless I was convinced that there were adequate grounds for saying that his discretion had not been judicially exercised or that the weight of argument is very much against the discretion being exercised in the way it was by the learned Judge. I think, however, that in this case there are grounds for holding that the suit should have been stayed, and that the reasons given by the learned Judge for refusing to stay it are entirely inadequate.

The first point that he takes is that a difficult question of law is likely to arise upon the true construction of the agreement in question. It is to be noted, in the first place, that Cl. 13 of the agreement between the parties expressly covered a dispute touching the construction, effect or meaning of any part of the agreement, and therefore the parties certainly did contemplate that a question of construction of the agreement might have to be decided by the chosen arbitrators, viz., the Bengal Chamber of Commerce But, apart from that, I agree with the contention of the appellants that the question about the construction of Cl. 9 of the agreement does not really arise upon

the allegations in the plaint on which the suit is based. Paragraph 5 of the plaint only says that the output of coal raised from these particular seams was considerably larger than the quantity supplied by the defendants to the plaintiffs and the defendants wrongly sold the balance of the said output to third parties. That is a pure statement of fact, viz., that the plaintiffs were not supplied with the full amount of the raisings, as they should have been under the contract, and that the difference between what the plaintiffs got and what was actually raised from the seams was sold to third parties. No question of construction of the agreement can, it seems to me, possibly arise on that statement of the plaintiffs' case. It was answered that the defendants might say that under the agreement, although they raised more than 15,000 tons, they were not bound to supply anything in excess of that quantity to the plaintiffs. That is a contention which it would be hardly open to the defendants to raise, in view of the fact that the details furnished in Ex. B to the plaint show that from the very first the defendants did in fact supply large quantities over this amount of 15,000 tons in particular months; and in view of the precise terms of Cl. 9 of the agreement, which obviously contemplate at least a possibility of 25,000 tons monthly being supplied, it would, in my opinion, be absurd to put any weight upon this supposed plea.

Paragraph 6 of the plaint could in fact have been entirely dropped without making the slightest difference to the claim for damages in respect of the alleged fraud of the defendants. The learned Judge must have felt this difficulty because he only says that, if the case did go to the arbitrators, they "may be" faced at the outset with the necessity of determining this particular question of the construction of the document. Even if they were faced with that difficulty, it does not seem to me that a body like the Bengal Chamber of Commerce, whose members must be constantly having questions of this kind before them in connexion with collieries, would find it one of very great difficulty. With every respect to the learned Judge, I cannot agree with him that this is a difficult question which really arises and which could not be dealt with by the arbitrators.

With regard to the question of fraud in relation to S. 18, Limitation Act, which is the second ground on which the learned Judge's order is based, it seems to me that the mere omission of the defendants to supply particulars of raisings in accordance with Cl. 5 of the agreement cannot per se possibly be described as fraud. Both parties were aware of this particular obligation. The plaintiffs, a body of business-men, knew that they had only to write to the defendants if these particulars were not furnished in order to obtain them, or if there was any default they had at any rate remedies which they could adopt. No doubt in certain cases silence or inaction may amount to misrepresentation, and I have considered all the cases of that kind which are collected in Halsbury's Laws of England, Vol. 20, Arts. 1656 to 1658 and in Art. 1784. But none of those particular cases, in my opinion, can possibly apply to the present case. There is no question of the plaintiffs being misled by the mere failure to supply these particulars. It is said that they would presume that defendants would supply the full raisings. But that in itself cannot justify an effect being given to mere silence or inaction, which does not naturally arise from that position. As is stated in Halsbury's Laws of England, Art. 1659, of the same volume:

"Except as already stated, mere silence or inaction neither constitutes, nor is equivalent or contributory to, misrepresentation, however amenable it may be to the consequences which ensue on a breach of that positive duty of disclosure which is imposed, under another head of jurisprudence, on parties standing to one another in certain relations, or engaged in transactions *uberrimæ fidei* or however censurable it may be *in foro conscientiæ*. The reticence must amount to concealment or suppression, in order to make it an element in misrepresentation."

Section 18, Limitation Act, requires that a person should have been kept from certain knowledge by means of fraud. There must be actual fraud in the means adopted to keep the person out of knowledge, and it is to my mind entirely a misuse of words to say that, merely because defendants did not furnish the particulars which they ought to have done under the contract, there was fraud. The Courts, as is well-known, do not define fraud. But as stated in Pollock's Law of Fraud in British India (p. 17):

"Fraud may be described, for most usual purposes, as the procuring of advantage to oneself, or furthering some purpose of one's own

by causing a person with whom one deals to act upon a false belief."

He points out that that is not a definition, and that there may be fraud without any seeking of personal advantage. But certainly a necessary element in ordinary fraud is deception or deceit and getting somebody to believe something that is not really correct. The exceptional case of concealment by a party standing in a fiduciary relation to the person from whom knowledge is withheld, does not arise here. In my opinion, therefore, the view taken by the learned Judge that another question of law may arise as to whether there was fraud by the defendants within the meaning of S. 18, Limitation Act, cannot be sustained.

As regards the points about disclosure and the Indian Courts not having the same control over the arbitrators as in England, I agree with what my learned brother has said; and we pass the following order: Summons made absolute. Suit stayed. Respondents to bear appellants' costs of the appeal and of the Court below. Costs to include costs of the petition made before Fawcett, J.

M.N./R.K. *Appeal allowed.*

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CRUMP, J.

Mariambi—Plaintiff.

v.

Fatmabai and *others*—Defendants.

Original Civil Jurisdiction Suit No. 1054 of 1911, Decided on 24th January 1928.

Succession Act (1925), S. 89—Khairat—Will.

A bequest for "Dharma" "Khairat" etc., is void for uncertainty: 23 *Bom.* 725 (*P. C.*), *Rel. on*; 41 *Bom.* 181, *Ref.* [P 128 C 1]

J. H. Vakeel—for Plaintiff.

Manekshah and *K. M Taleyarkhan* for *Kanga*—for Defendants.

Judgment.—The position, so far as concerns the Advocate-General, is peculiar. When the matter was argued his counsel contended that the bequest was good and in this plaintiff supported him. For this reason I reserved judgment though I was of a contrary opinion. Subsequently the Advocate-General himself appeared and stated that he did not think the bequest could be supported. I propose now to give shortly my reasons for the view which I take . . . . .

In *Runchordas Vandrawandas* v. *Parvatibai* (1) their Lordships of the Privy Council have adopted as appropriate to India the test laid down by Lord Eldon in *Morice* v. *Bishop of Durham* (2) and as regards the case before them they say (p. 81):

"The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control."

The word there considered was "Dharam" which is another form of the word "Dharma" used in the will before me. The meaning of that word is stated in their Lordships' judgment. The Gujarati word "Kherat" is derived from the Arabic "Khairat." In Arabic "Khair" means "good" and in Pratt's Urdu Dictionary "Khairat" is said to mean "Good works, alms, charities." In Wilson's Glossary the word "Khairat" is explained as meaning "Alms, charity; lands given as charitable endowments." And it is said that the term is more especially applicable to "grants or alms given by, or to, Mohammadans." Pathak's Gujarati Dictionary gives "kherat" as "alms, charity." The word "vigere" may be fairly translated as "et cetera" and like the phrase "et cetera" is to be read as ejusdem generis with the words which it follows. The word "charity" must of course be understood in the sense in which lexicographers use it, and not as in any way connoting anything which English lawyers understand by that term. The English cases upon the technical meaning of the word "charity" are no guide, and we are not concerned with the preamble of the English Statute (43 Eliz. c. 4).

If the words "dharma" and "kherat" are to be read disjunctively then it is plain that "the objects are too vague and uncertain": cf. *Blair* v. *Duncan* (3) and *Grimond (or Macintyre)* v. *Grimond* (4). But it is argued that we must take the three words used as a composite phrase. That is, I think, the correct view. "Dharma" and "kherat" are, as I understand the matter, practically synonym-

(1) [1899] 26 I. A. 71=23 Bom. 725=1 Bom. L. R. 607=7 Sar. 543 (P.C.).
(2) [1805] 10 Ves. 522,
(3) [1902] A. C. 37=71 L. J. P. C. 22=86 L. T. 157=18 T. L. R. 194=50 W. R. 369.
(4) [1905] A. C. 124=74 L. J. P. C. 35=92 L. T. 477=21 T. L. R. 323.

ous, one derived from the Sanskrit, the other from the Arabic, the former probably due to Hindu ancestry, the latter to Islamic religion On that construction it is urged that the vagueness of the word "dharma" is clarified by its conjunction with the more definite term "kherat." I am unable to accept that interpretation. It might with equal justice be said that the definiteness of the word "kherat" is obscured by the vagueness of the word "dharma." Nor is it easy to concede that "kherat" is a definite term. In *Suit No* 604 *of* 1902 on the Original Side of this Court, it was rendered "good works of charity" and Batty, J., held that a bequest as made was void for uncertainty. In another case *Advocate-General of Bombay* v. *Jimbabai* (5) Beaman, J , apparently held that "Khairat" was correctly rendered by the English word "charity" but did not decide whether a bequest so defined was good or not. On the words of the will in that case it was not necessary for him to do so. In the case before me I do not know what the testator meant. Even if the word "kherat" stood alone, it would, in view of its indefinite meaning, be very difficult to say what the objects are to which the property is to be applied The difficulty is not diminished by the addition of the word "vigere." Having regard to the position finally taken by the Advocate-General, I do not consider it necessary to say more. In my opinion the bequest of one-third is void for uncertainty (The judgment then dealt with other matters not material for report.)

R.K *Order accordingly.*

(5) [1915] 41 Bom. 181=31 I.C. 106=17 Bom. L. R. 799.

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MADGAVKAR AND BAKER, JJ.

Emperor—Appellant.

v.

Gopal Raghunath—Accused.

Criminal Appeal No 404 of 1928, Decided on 6th November 1928, against conviction and sentence passed by Sess. Judge, Nasik.

***(a) Criminal P. C., S. 239 (d)—*G*, *M* and *D* jointly tried under Penal Code, Ss. 120-B and 489-A, B and D and alternatively under 489-D—*G* and *M* also charged under S. 489-A and *G* charged under S. 489-B—*M* and *D* acquitted of all charges—*G* convicted only under S. 489 B—Joinder is not illegal as all charges as allged by prosecution formed one transaction although they were not proved.**

One *G*, *M* and *D* were jointly tried on charges : (1) of conspiracy to collect and possess materials for counterfeiting currency notes and of counterfeiting currency notes and of using such notes as genuine, under Ss. 489-A, B, D read with S. 120-B, Penal Code : (2) alternatively, under S. 489-D that they all had in their possession materials for the purpose of being used or knowing or having reason to believe that it would be used for counterfeiting currency notes, (3) *G* and *M* counterfeited notes of Rs. 100 (S. 489-A) , and (4) accused *G* used as genuine a counterfeit note of Rs. 100 knowing or having reason to believe that the same was counterfeit. At the trial, the charges of conspiracy and the charges laid against *M* and *D* were not proved and therefore, they were acquitted. *G* was found guilty of an offence uuder S. 489-B and sentenced to suffer rigorous imprisonment for five years. On appeal to High Court.

Held : that although the prosecution in the result failed to prove conspiracy that of itself did not necessarily make the trial illegal, the test being, not what the prosecution has proved in the end, but what they alleged at the beginning in the charges The offence of which *G* was found guilty formed part of the same transaction of conspiracy in the sense that it was the working, the fruit and the result of the alleged conspiracy and if so, the separate act done by any of the conspirators in pursuance of that conspiracy could be joined in the same trial : 30 *Bom.* 49 ; 42 *Cal* 957 *Rel. on.* [P 129 C 2 ; P 130 C 1]

(b) Penal Code, 498-B—Accused in possession of forged currency note—Genuine note of same number in accused's house—Paper containing green honey-comb pattern resembling one in forged note also found in his house—Accused's father and brother living in same house—Accused disposing forged note to shop keeper—Accused must be inferred to have known the note to be a forged one.

One *G* was prosecuted under S. 489-B for using as genuine a counterfeit note knowing it to be counterfeit. A counterfeit note was in possession of the accused. A genuine note bearing the same number was found in the house of the accused ; one other forged note also bearing the same number was traced to the same village. A piece of paper containing a honey-comb pattern in green ink resembling the pattern on the forged note was also found in his house.

Held : that although there was no evidence that the accused made this pattern, but as it was found in the house in which he lived with his father and brothers it was a very fair inference that this pattern must have been made by somebody in that house and that the forged note was copied from the original note, which was also in the same house, and as the accused was disposing of the copy of the genuine note to a shop keeper no other inference was possible but that it was done with the knowledge that the note was forged. [P 133 C 2]

(c) Criminal P. C., S. 517—Genuine note from which counterfeit note supposed to be forged—No evidence of any offence being committed in respect of genuine note—Order confiscating genuine note while convicting accused under Penal Code, S. 489-B, is wrong.

G was prosecuted for using a forged note as genuine. A genuine note of the same number from which it was alleged the counterfeit note was forged was found in the house of the accused. The Sessions Judge while convicting the accused ordered the genuine currency note also to be confiscated under S. 517.

Held : that in the absence of evidence that any offence had been committed in respect of the genuine note, the order of confiscation was not correct. [P 133 C 2]

H. C. Coyajee and *D. R. Patvardhan*—for Accused.

P. B Shingne—for the Crown.

Madgavkar, J.—This is an appeal by accused 1, Gopal, against his conviction, and sentence of five years' rigorous imprisonment under S 489-B, I.P C, by the Sessions Judge of Nasik. The first point of law raised before us on his behalf is that the joinder of the charge of which he has been convicted with the other charges, was illegal, and is not covered by S. 239, Criminal P. C.

The case for the prosecution was that the appellant, accused 1, with two others, accused 2 and 3, acquitted in the lower Court, were all privy to the counterfeiting and passing of false currency notes, and committed offences under Ss 489-A, 489-B and 489-D, I P. C. The committing Magistrate had charged all three of them with offences under these three sections. Before the trial commenced in the Court of Session, the learned Sessions Judge elaborated the charges into, first, a conspiracy under these three sections, alternatively with offences in the course of the same transaction under S. 489-D. He further charged accused 1 and 2 with offences under S. 489-A, and lastly accused 1 alone with an offence under S. 489-B. In the result, excepting the conviction of the appellant, accused 1, on the last charge, the trial resulted in the acquittal of all the accused on all the other charges.

It is argued for the appellant that the joinder was illegal, the offences charged numbering more than three, and in any case they caused serious prejudice to the appellant by letting in evidence which would not have been admissible, had the present charge under appeal, under which alone he was convicted, been tried separately. For the Crown it is contended these charges form part of the same transaction, and are, therefore, covered by S 239, Cl (d), Criminal P, C , as well as by S. 235

As is often the case with a number of elaborate charges, it is difficult to lay down any single test or criterion The cases, in my opinion, divide themselves into three. First, a case such as the one in *Subrahmania Ayyar* v *Emperor* (1), not covered by S 235 or 239, in which case, prejudice or no prejudice, the illegality entitles the appellant to an acquittal. The second case is where without such illegality, prejudice might nevertheless be caused to the accused so that even though the Crown may have the power of joinder, it might be fairer not to exercise that power. The third class of cases is where there is such a common thread or purpose underlying the alleged offences of the accused, even though separated by time and space, that they form part of the same transaction, and are difficult to present separately, in which case the law permits, and the Crown usually adopts a joint trial with numerous accused and numerous charges. The question in each particular instance is as to which of these three classes of cases the particular case for decision falls In the present instance the question turns upon whether the offence now under appeal is part of the same transaction as the offences in the other charges. The only transaction, if any, is the alleged conspiracy. True, the prosecution in the result failed to prove it, but that of itself does not necessarily make the trial illegal, the test being, not what the prosecution has proved in the end, but what they alleged at the beginning in the charges. On the actual facts of this case it is not clear to me that all these charges were necessary, and, so far as I can judge, it might have been simpler perhaps to have charged all three with conspiracy, and perhaps with abetment in respect of the particular offence which the prosecution sought to prove against the appellant in respect of the counterfeit note fonnd originally on the person of Rajaram. But taking the charges as they are, the case for the prosecution was throughout clear that the three accused were engaged in collecting materials for counterfeiting notes, in counterfeiting

(1) [1901] 25 Mad. 61=28 I. A. 257=11 M. L. J. 233=8 Sar. 160 (P.C.).

them, and in uttering them. and that one of the transactions which was the result of this conspiracy and the common efforts of the three was this particular note, which was passed on to Rajaram. In fact it appears that Rajaram himself was prosecuted separately in respect of this note, but was acquitted. As Rajaram was not alleged to have taken part in the conspiracy, he was rightly not included in the present trial, but was separately tried. The question is whether, although the appellant was alleged to have been one of the conspirators, he was entitled to a separate trial on the last charge, or whether that charge could in law have been joined with the other charges, as it actually was. That question must be answered, whether prejudice has or has not been caused, on a consideration only of the question whether this last act was so connected with the subject-matter of the previous charges as to form a single transaction.

Difficult as the definition of "transaction" is, accepting it as laid down by Batty, J , in *Emperor* v. *Datto Hanmant Shahapurkar* (2), we are of opinion that this may reasonably be said to be a part of the same transaction in the sense that it was the working, the fruits and the result of the alleged conspiracy and if so, the separate act done by any of the conspirators in pursuance of that conspiracy could be joined in the same trial. See the remarks of Mookerji, J., in *Amrita Lal Hazra* v *Emperor* (3).

Therefore, the contention for the appellant in my opinion fails.

Strictly speaking, it is not, therefore, necessary to enter into the question of prejudice. Nevertheless I agree entirely with the remarks of Birdwood, J , in *Queen-Empress* v. *Fakirapa* (4), that such prejudice is, as far as possible, to be avoided. That a large part of the evidence turned out not very material is possible. But in regard to the main pieces of evidence, I am of opinion that though they might have been more directly relevant to the charge perhaps of preparing counterfeit notes rather than of uttering this particular note even had this charge been tried by itself, on the question of intention most of that evidence would have been admissible under Ss. 13 and 14, Evidence Act. The fact, for instance, that a genuine note for Rs. 100 bearing the same number as the counterfeit note found on the person of Rajaram, the subject-matter of the charge, or that the honey-comb picture, Ex. H3, was found in the house of the appellant would be admissible. The question whether the note Z3, found on the person of Shankar and traced to Yeola but not to the appellant, would be admissible is perhaps more doubtful. Taking the evidence as a whole, we are not convinced there has been such serious prejudice to the appellant as to necessitate a retrial if his guilt is proved. On the question whether his guilt is proved, I agree with the judgment of my learned brother dealing with the material facts of the case. I am of opinion, therefore, that the appeal fails, and must be dismissed, and the conviction and sentence confirmed.

Baker, J.—So far as regards the point of law raised by the learned counsel for the appellant is concerned, namely, that this accused has been prejudiced by his trial along with accused 2 and 3 who were originally charged with conspiracy along with him, I am of the same opinion as my learned brother. Under S 239, Cl. (d), Criminal P. C., persons accused of different offences committed in the course of the same transaction may be charged and tried together The main question would be whether the proceeding with which we are concerned in the present case formed one and the same transaction. Now, the original case for the prosecution was that the accused 1, 2 and 3 had together entered into a conspiracy for the purpose of forging currency notes and uttering them when so forged. The prosecution failed to establish any conspiracy in this case. There was no evidence against accused 2 and 3 from which any conspiracy could be held proved, and, therefore, the charge of conspiracy as regards accused 1 failed also, for as the Judge says, he could not conspire with himself. The question then would arise whether the accused could have been tried along with accused 2 and 3 on a separate charge for the offence of uttering a forged currency note, with which accused 2 and 3 had nothing directly to do, except in so far as conspirators or members of the con-

(2) [1905] 30 Bom. 49=7 Bom. L. R. 633.
(3) [1915] 42 Cal. 957=19 C. W. N. 676=29 I. C. 513=21 C. L. J. 331.
(4) [1890] 15 Bom. 491.

spiracy they might be held to be guilty of that offence under S. 120-B. The real question involved in this case is what is meant by the same transaction. The learned counsel for the appellant has referred to several cases in the course of his argument, but these cases are not quite on all fours with the present case. In *Emperor* v. *Datto Hanmant Shahapurkar* (2) we have a definition of the word " transaction " (p. 55) :

" A series of acts separated by intervals of time are not ... excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal this suffices to justify the joint trial, even if incidentally one of those jointly tried has done an act for which the other may not be responsible,"

and " transaction " means

" carrying through, and suggests, we think, not necessarily proximity in time so much as continuity of action and purpose (p. 54)."

The case on which the learned counsel has relied, *Queen-Empress* v. *Fakirapa* (4) is a case of a very extreme character in which four accused persons were all charged with an offence against one person only on one date, against the same person on another date, and various of the accused were charged with offences against other persons on different dates, and they were ultimately all tried together although there were in all seven charges against some or all of the accused relating to seven offences committed against three persons on different dates. It is obvious that the joinder of so many charges relating to different dates and different persons would tend to prejudice the defence of the accused and to cause confusion in the mind of the Court. In *Subrahmania Ayyar* v. *King-Emperor* (1) the accused, who were two in number, were jointly tried for a large number of offences, more than were allowed to be tried together by the provisions of the Code of Criminal Procedure. The appellant, as the Lord Chancellor pointed out, was tried on an indictment in which he was charged with no less than forty-one acts extending over a period of two years, and the facts of the present case have no relation to a charge open to such an objection as that. Under S. 239, as it stood before amendment, the illustrations show that if *A* and *B* are accused of robbery in the course of which *A* commits a murder with which B has nothing to do, *A* and *B* may be tried together on a charge charging both of them with robbery, and *A* with murder. If the charge of conspiracy has been brought home to accused 2 and 3, then it would have been open to the Court to charge and convict the present appellant of the offence under S. 489-B, viz , uttering a forged note, and the fact that the evidence fell short of bringing home the charge of conspiracy does not, in my opinion, make the joint trial of the accused illegal. So long as the accusation against all the accused persons is that they carried out a single scheme by successive acts, the necessary ingredients of a charge regarding the one transaction would be fulfilled, and the fact that the conspiracy was not established would not vitiate the trial as regards those acts for which the evidence was sufficient for proof. The question of prejudice does not really arise in the present case, because we are not here dealing with evidence which would only be relevant in a charge of conspiracy. It would be a different matter if the bulk of the evidence in the case consisted of words spoken by or actions done by accused 2 and 3 which was sought to be used against accused 1. It may be argued that even though his trial was not illegal, prejudice has been caused to him by the joint trial, but that, however, is not the case in the present case.

Turning to the facts, the prosecution case is that accused 1 purchased certain cloth in the shop of Rajaram, who was a trader at Yeola, and paid for it with a forged currency note of Rs 100 which is before the Court. The fact that this note was forged does not appear to have attracted the attention of Rajaram and his gumasta Narayan until they offered it in change to a Marwadi who refused it. On the following morning at half-past nine, the Sub-Inspector, who had received information that Rajaram was in possession of a forged currency note, came to the shop of Rajaram and took possession of the note from him. Although it is not on record, it seems to me very probable that the information received by the Inspector came from the Marawadi, as Narayan admits that the Marwadi after examining the note refused to accept it. Up to this point the name of the accused had not been mentioned at all. But the Sub-Inspector says, and there is no reason to disbelieve him, that

Narayan informed him that the note had been received from accused 1, and in consequence of that information the Sub-Inspector proceeded immediately to the house of accused 1, and held a search. The story of Narayan that he informed the Sub-Inspector that the note had been received from the accused is supported by the fact that there was no previous suspicion against the accused, and his house was searched on the following morning. In the search of the house certain chemicals and photographic articles were found, but the learned Sessions Judge has given his opinion that these articles are not sufficient to show that the accused was making any preparation for counterfeiting currency notes There are, however, two important articles which were found in his house. One of these is a genuine currency note, Ex. A, which bears the same number as the forged note, and the other is a piece of paper on which some person has made a tracing of a honey-comb pattern similar to that which appears on the forged note in green ink. Another fact which has come out in this case is that another forged note of Rs 100, Exhibit Z3, has been traced to Yeola, but not to the possession of the appellant, who is not shown to have had anything to do with it. That note also bears the same number as the genuine note, and the forged notes which were found in the house of the accused.

In order that there should be a conviction under S. 489-B, it must be proved, first, that the accused sold or otherwise trafficked in or used as genuine a forged or counterfeit currency note, and, secondly, that he knew or had reason to believe that it was forged.

As regards the first point, we have the evidence of Narayan, the gumasta of Rajaram. Rajaram himself lives over the shop, but was not present at the time when the accused purchased the articles. We have also the evidence of Gangaram, Ex. 7, p. 16, Bala Bapu, Ex. 8, p. 18, and Yemaji Shivram, Ex. 14, p. 24, as to the note in question having been given by the accused to Narayan, the gumasta of Rajaram, in payment for cloth purchased by him The learned Sessions Judge has believed these witnesses, who are not shown to have any animus against the accused, and there is no reason why their evidence should not be accepted. I may point out that their evidence is supported by circumstantial evidence. As I have already said, it was on the information given by Narayan that the Sub-Inspector proceeded immediately to the house of accused 1 and searched it although there was no previous suspicion against accused 1 Further, the goods, which were sold by Narayan to the accused were found, some of them, in the house of accused 1 They were identified by Narayan as bearing the mark of his shop. A pair of Dhotars were found in the house of accused 2, to whom they were given by Shankar, Ex. 47, who says he received them from the accused 1's father in payment of work done. There does not, therefore, appear to be any reason for holding that Narayan did not receive this forged currency note from the accused It has been contended that Rajaram's conduct is not that of a person acting bona fide, for although this note had been in his possession about a week, he had not made any complaint to the accused about its not being a genuine note. The evidence of Narayan, however, is that the note was put in the cash box and was not utilized until the date when it was refused by the Marwadi after he had handled it and inspected it This happened in the afternoon. On the following morning the shop was searched by the police so that Rajaram and Narayan had not much time to make up their minds as to what they should do in connexion with this note. The other point that Rajaram denied the possession of the forged currency note or at any rate that he was reluctant in presenting it to the police is not surprising or in itself indicative of a guilty conscience as he must have known that the consequences to himself would undoubtedly be unpleasant. As a matter of fact he was prosecuted and tried for possession of a counterfeit note, though he was ultimately acquitted.

Another argument which has been raised is that Ex. 18, which is a cash memo from the shop of one Garge in Nasik, indicates that the accused 1 was at Nasik on 7th February 1928, that is, the day of the delivery of the false note to Rajaram and therefore he could not have gone to Rajaram's shop on that day. This point does not deserve much consideration for two reasons. In the

first place if it was the case of the accused that he was at Nasik on that day, we would expect it would have been put forward very much more clearly in the lower Court, in fact as his principal defence. But we find a mere hint of that in the accused's statement before the Sessions Court. The second point is that on examining the date on Ex. 18 through a microscope, I am of opinion that no reliance can be placed upon it as it appears to have been altered. I see no reason, therefore, to differ from the view which has been taken by the lower Court as to the actual uttering of the note by accused 1.

We now proceed to the second part of the section, that is, to the knowledge of the accused ; and here we have a very important circumstance which leaves a strong impression on my mind. That is this, that the genuine note bearing the same number was found in the house of this accused. Now it is true that the other forged note also bearing the same number, viz., Ex. Z3, was traced to Yeola, but there is no evidence that it was ever in the possession of accused, the appellant in this case. But from this fact we come to the very curious position that about the same time in a comparatively small town there were three notes all bearing the same number, one genuine, and two forged. And it is a reasonable inference that the forged notes must have been copied from the genuine note. This would appear from the evidence of the Deputy Master of the Security Press at Nasik, Ex. 51, that the forgeries were prepared by some photographic process from the original, and even if there were no evidence to that effect, it would naturally occur to anybody that in forging a note the original must necessarily be before the eyes of the forger in order to avoid any difference, however slight, between the original figures or the number and those on the counterfeit. Now it has been argued that it is not shown that the accused was in possession either of this forged note or of the genuine note. I hold it proved on the evidence of Narayan and the other witnesses already referred to that the accused was in possession of the counterfeit note in this case. The genuine note was found in his house, Now the accused is not a boy. His father and his brothers live in his house. He is himself a man of 40 years old and he was a sanitary supervisor or something of the kind in the Municipality of Yeola. I have referred above to the fact of Art. H 3, a piece of paper containing a honey-comb pattern in green ink, also being found in his house. A comparison of this piece of paper with the forged note will show that it resembles the patten on the note, and it has obviously been drawn by somebody who was practising the art of sketching a honey-comb pattern similar to that which was found on the forged note There is no evidence that the accused made this pattern, but it was found in the house in which he lives with his father and brothers and it is a very fair inference that this pattern must have been made by somebody in that house and that the forged note was copied from the original note, No 44111, which was also in the same house When, therefore, we find an inmate of the house of mature age bringing from the house in which the genuine note is, a copy of that genuine note, and disposing of it to a shop-keeper I do not think any inference is possible, but that it was done with the knowledge that the note was forged. Knowledge is a state of mind which cannot always be proved by direct evidence, but must be inferred from the surrounding circumstances. In the present case the circumstances are strongly against the innocence of the accused, and I entirely agree with the view which the learned Sessions Judge and two of the assessors have taken that he is guilty of an offence under S 489-B, I P. C. I would, therefore, confirm the conviction and sentence and dismiss the appeal.

There is, however, one slight alteration which requires to be made In the final order the learned Sessions Judge has ordered Ex. A which is the genuine currency note, to be confiscated and sent to the Collector of Nasik for cancellation That order, I suppose, is made under S. 517. There is, however, no direct evidence that any offence has been committed in respect of this note S. 517 sub-S. (1), Criminal P. C., runs:

"When an inquiry or a trial in any criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have

been committed ; or which has been used for the commission of any offence."

Most probably the learned Sessions Judge regarded this note as being the original from which counterfeits were prepared, and, therefore, as having been used for the commission of an offence. I think, on the whole, that this order should be modified by directing the restoration of Ex. A to accused No. 1 the appellant in the present case.

There also appears to be a mistake in the judgment as regards articles Z, Z1, Z2, Z5, Z6, Z7, Z8, Z9, Z18 which are ordered to be returned to accused 2. These were attached in the house of accused 1, and should be returned to him. "Accused 2" appears to be a mistake for "Accused 1 "

The above order regarding the restoration of the property to be carried out by giving it to the father of the appellant, Raghunath Narayan, as the appellant himself will be in jail for a lengthy period.

R.K. *Appeal dismissed.*

A. I. R. 1929 Bombay 134

MADGAVKAR AND BAKER, JJ.

Emperor—Petitioner.

v.

Amanat Kadar—Opposite Party.

Criminal Reference No. 155 of 1928, Decided on 5th November 1928, on reference by Dist. Magistrate, East Kandesh.

Criminal P. C., S, 403—Accused discharged for complainant's default—Second complaint on same facts is competent.

Where an order of discharge is passed merely because the complainant and his pleader were absent at the appointed hour, the same Magistrate can take cognizance of second complaint by the same complainant on same facts for the same offence. (1887) *Rat. Un. Cr. C.* 350; *A. I. R.* 1925 *Bom.* 258; 29 *Cal.* 726 (*F. B.*); 29 *Mad.* 126 (*F. B.*) and 36 *All.* 129, *Foll.* [P 134 C 2]

Madgavkar, J.—This is a reference by the District Magistrate, East Khandesh, inviting us to set aside the proceedings in a second complaint of which the Magistrate took cognizance after he had discharged the same accused in the first complaint by the same complainant on the same facts and in respect of the same alleged offence. The District Magistrate thought that by this action of the Magistrate in taking cognizance of the second complaint, he had arrogated to himself the functions of the District Magistrate or Sessions Judge, and though there was no express prohibition in the Criminal Procedure Code against a Magistrate accepting a second complaint after he had passed an order of discharge the whole intention of the law must be held to be against such a procedure, and that there were no decisions of the Bombay High Court on the point.

The learned District Magistrate is mistaken. The defence of *autrefois acquit* has no application to the case of a discharge, and it has been held by this Court in *Queen-Empress* v. *Bapuda* (1) that a discharge not operating as an acquittal leaves the matter at large for all purposes of judicial inquiry, and there is jurisdiction still vested in all Magistrates including the one who made the previous inquiry. And while the Magistrate must exercise due judicial discretion, there is nothing in law to prevent him from inquiring again into the case. To the same effect is the decision in *In re Mahadev Laxman* (2). The same view is taken by the other High Courts: *Mir Ahmad Hossein* v. *Mahomed Askori* (3), *Emperor* v. *Chinna Kaliappa Gounden* (4) and *Ram Bharos* v. *Baban* (5).

On the facts of this particular case, it appears that in the first complaint the order of discharge was passed merely because the complainant and his pleader were absent at the appointed hour. The second complaint was filed on the following day The learned Magistrate, therefore exercised due discretion in proceeding to inquire into the merits after presentation of the second complaint.

For these reasons we reject the reference and decline to interfere. The record and proceedings should be returned to the trying Magistrate to proceed in accordance with the law.

R.K. *Reference rejected.*

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(1) [1887] Rat. Un. Cr. C. 350.
(2) A. I. R. 1925 Bom. 258.
(3) [1902] 29 Cal. 726=6 C. W. N. 693 (F.B.).
(4) [1905] 29 Mad. 126=16 M. L. J. 79=3 Cr. L. J. 274 (F.B.).
(5) [1914] 36 All. 129=22 I. C. 734=12 A. L. J. 106.

A. I. R. 1929 Bombay 135

PATKAR AND MURPHY, JJ.

Mahomed Roshan Sheikh Alli Kaskar —Appellant.

v.

Gulam Mohiddin—Respondent.

First Appeal No. 258 of 1927, Decided on 7th November 1928, against an order of 1st Class Sub-Judge. Ratnagiri.

(a) Provincial Insolvency Act (5 of 1920), Ss. 28 and 31—Undischarged insolvent can be arrested under civil warrant in absence of protection order — Civil P. C., O. 21, R. 37.

As S. 28 of the new Provincial Insolvency Act of 1920 does no longer protect the insolvent from arrest, an adjudged insolvent has to apply for protection from arrest or detention under S. 31 of the Act and in absence of a protection order, he can be arrested in execution of a decree against him: *A. I. R.* 1927 *All.* 418, *Rel. on.* [P 135 C 2]

(b) Provincial Insolvency Act. (1920), S. 31—Protection order is discretionary— Discretion to be exercised having regard to the character and circumstances of the insolvent.

The protection-order is a privilege to be granted or withheld as the Court, in its discretion, may determine and in exercising that discretion it is relevant and proper for the Court to have regard to the character and circumstances of the insolvent. [P 135 C 2]

G B. Chitale—for Appellant.

K. H. Kelkar—for Respondent.

Patkar, J.—In this case the decree-holder made an application for the arrest and imprisonment of the judgment-debtor No. 5. The learned First Class Subordinate Judge refused the prayer on the ground that the judgment-debtor No. 5 had been adjudged an insolvent and could not, therefore, be arrested. Under the old S. 16, Act 3 of 1907, no creditor to whom the insolvent is indebted in respect of any debt provable under the Act shall, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt Under S. 28 (2) of the present Act of 1920 the creditor shall not have any remedy during the insolvency proceedings against the property of the insolvent and a new S. 31 has been enacted under which the insolvent, in respect of whom an order of adjudication has been made, has to apply to the Court for protection, and the Court may, on such application, make an order for the protection of the insolvent from arrest or detention. The provision under the old Act gave an undue protection to dishonest debtors. Under the present Act, it is for the insolvent to apply for a protection order under S. 31. The protection order is a privilege to be granted or withheld as ths Court, in its discretion may determine, and in exercising that discretion it is relevant and proper for the Court to have regard to the character and circumstances of the insolvent.

In the present case no order for protection under S. 31 was produced before the Subordinate Judge, nor is it produced before us. Under S. 28 of the Provincial Insolvency Act, the effect of an order of adjudication is described, and protection from arrest and execution of a decree is not provided. If it had been the intention of the legislature to protect the insolvents, the provisions of S. 31, which permit an insolvent to apply to the insolvency Court for a protection order would have been superfluous: see *Hari Ram* v. *Sri Krishna Ram* (1). We think, therefore, that the view of the First Class Subordinate Judge is erroneous We would, therefore, reverse the order of the lower Court and remand the case to the First Class Subordinate Judge for disposal of the application on the merits. Respondents to pay the costs of the appellant.

Murphy, J.—The decree-holder has applied for execution against the respondent by his arrest and the learned Subordinate Judge, who dealt with the application, held that the respondent being an undischarged insolvent could not be arrested. The decree-holder has appealed. It seems clear that the learned Judge was mistaken. S. 28 (2), Provineial Insolvency Act. no longer protects an insolvent from arrest, and S. 31 provides for a protectton order. It appears that no such order was obtained in this case. As pointed out in *Maharaj Hari Ram* v. *Sri Krishan Ram* (1), S. 31 would be superfluous were not an insolvent liable to be arrested. In this case the learned District Judge has granted an order of discharge, but he has suspended its operation for five years because of the insolvent's fraudulent conduct in respect of an item of his property, which conduct in the Judge's opinion fell within S. 43, Cl. (1) (e) and (i). I agree that

(1) A. I. R. 1927 All. 418=49 All. 201.

the learned First Class Subordinate Judge's order refusing execution by arrest against the respondent must be set aside, and that he should dispose of the application according to law.

DD. *Order set aside.*

A. I. R. 1929 Bombay 136

MADGAVKAR AND BAKER, JJ.

Ganpat Devaji Patil—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No.266 of 1928, Decided on 1st November 1928, against the decision of Magistrate First Class, Jalgaon.

(a) Oaths Act, S. 13—S. 13 does not cure authority to administer oath.

Section 13 cures the form of the oath and even an entire omission to take the oath, but does not cure the absence of authority in the officer administering the oath. [P 136 C 2]

(b) Penal Code, S. 199—Nazir has no authority to administer oath for affidavit to be filed in criminal Court—Criminal P. C., S. 539-A.

A nazir of civil Court has no authority to administer oath for the purposes of an affidavit or statement to be used in a criminal Court and a person making such statement cannot be convicted under S. 199. 14 *Cal.* 653 35 *All.* 58 ; and *A. I.R.* 1926 *Pat.* 214, *Rel. on.* [P 136 C 2]

H B Gumaste—for Applicant.

P. B. Shingne—for the Crown.

Madgavkar, J—This is an application in revision by Ganpat Devaji Patil who was convicted by the First Class Magistrate, Jalgaon, under S. 199 I. P C. and sentenced to one month's rigorous imprisonment and a fine of Rs 50, in default further rigorous imprisonment for one month. His conviction was upheld by the Sessions Judge, East Khandesh.

The only argument urged for the applicant is that the false statement which forms the subject matter of the charge was sworn to before the Nazir of the Subordinate Court of Yaval, who had in law no authority to administer an oath for the purposes of any affidavit or statement to be used before the District Magistrate, as it was in this case, and that the proper person before whom the affidavit should have been made was a Magistrate, as laid down by S. 539-A, Criminal P. C.

The learned Government Pleader has not been able to find authority for the Nazir other than this Court's Civil Circular 39. That, however, applies to civil suits As the statement was not to be used before the High Court, this Court's Criminal Circular 128 has no application. There can be no question that the declaration or statement made upon oath must be so made before an officer competent to administer the oath. S 13, Oaths Act (10 of 1873), to which reference is made for the Crown cures the form of the oath and even an entire omission to take the oath, but does not cure the absence of authority in the officer administering the oath. It does not. therefore, assist the Crown. It is well settled that a statement made before an officer without authority is not sufficient to sustain a conviction under S. 199, I. P. C. *In the matter of the petition of Iswar Chunder Guho* (1); *Emperor* v. *Ram Prasad* (2); *Ramchandra Modak* v. *Emperor* (3) The Nazir in the present case had no authority. The application must be allowed, the conviction and sentence set aside, the petitioner if in custody set at liberty, and the fine if paid refunded.

Baker, J—I agree S 539-A, Cl. (2), prescribes the manner in which an affidavit to be used before any Court other than a High Court under that section can be sworn or affirmed. It may be sworn or affirmed in the manner prescribed by S 539, or before any Magistrate. Neither of these sections authorizes the swearing of such an affidavit before the Nazir of a Subordinate Court. It follows, therefore, that the Nazir had no authority to administer an oath to the applicant, and the applicant cannot be convicted under S, 199, which is the section under which he should not have been charged on the facts on which the prosecution relied in the present case. I agree, therefore, in the order proposed.

R.K. *Conviction set aside.*

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(1) [1887] 14 Cal. 653.

(2) [1912] 35 All. 58=17 I. C. 401—10 A. L. J. 462.

(3) A. I. R. 1926 Pat. 214=5 Pat. 110.

A. I. R. 1929 Bombay 137

MIRZA AND BAKER, JJ.

Lalji Dayal—Defendant — Appellant.

v.

Vishvanath Prabhuram Vaidya and *others*—Plaintiffs—Respondents.

Second Appeal No. 376 of 1926, Decided on 28th September 1928, from decision of 1st Cl. Sub-Judge, Nasik, in Appeal No. 261 of 1924.

Specific Relief Act, S. 55—Erecting gallery overhanging other's open land—Notice after completion of gallery—Roof put up after notice—No dishonest motive or intentional trespass—Mandatory injunction was refused as money compensation was found sufficient.

In the absence of direct evidence in the case which would justify the assumption that the defendant had before the notice knowingly committed trespass on plaintiffs' land, the Court would be reluctant to order a structure which has already been completed at some considerable cost to be pulled down, unless it can be shown that its existence would cause such damage to the owner of the land encroached upon as would not be compensated by money. [P 138 C 2]

L added a gallery to his house which overhang *V*'s open land. When gallery was complete *V* served a notice on *L* objecting to the encroachment, but *L* put roof over the gallery. In a suit by *V* for mandatory injunction,

Held: in the absence of dishonesty of purpose or knowledge of trespass, the case did not call for a mandatory injunction, but was one where substantial monetary compensation would suffice: 6 *Bom. L. R.* 41 and 16 *Bom.* 533, *Rel. on.* [P 138 C 2]

H. C. Coyajee and *D. R. Manerikar*—for Appellant.

R. W. Desai—for Respondents 1 and 3 to 5.

Mirza, J.—The finding of both Courts is that the defendant has encroached upon the plaintiffs' land by putting up the gallery on the second floor of his house. The trial Judge was of opinion that this was not a matter for compensation, but was not willing at the same time to grant a mandatory injunction unless the plaintiffs built on their land within twelve years. The trial Court gave a declaration that the plaintiffs would be entitled to have a certain portion of the defendant's gallery and roof removed if and when they erected a building over their plaint land, provided that they built within 12 years from the date of the decree. For this form of the decree, there is, so far as I am aware, no precedent. The appeal Court substituted for this conditional order an order granting the relief by way of mandatory injunction claimed by the plaintiffs.

Mr. Coyajee, on behalf of the appellant, has urged that this is a case for compensation and not for a mandatory injunction. The matter of granting a mandatory injunction is a matter which is in the discretion of the Court. That discretion, however, has to be exercised with due regard to certain principles which have been laid down, and accepted as authoritative in matters relating to the granting of a mandatory injunction in such cases. In *Rewa* v. *Vrijvalabh* (1) Jenkins, C. J., enunciated that principle as follows (p. 42):

"Now it is well-established as a rule by which Courts are guided in reference to the granting of mandatory injunction that though it is within the power of a Court to grant a mandatory injunction even if the building complained of has been completed, still the Court is reluctant to make an order for the removal of a building already finished at some considerable cost and trouble unless it be clear that material damage would otherwise ensue. It is by reference to this rule that the point before us should be decided, and we are under the impression that these considerations were not closely present in the minds of the lower Courts when they dealt with this part of the case."

The facts of the case were similar to the case with which we are here dealing. The defendant had encroached upon a part of the plaintiffs' strip of land by constructing his otla and thereafter, his mandvi (building) upon it, and the lower Courts had ordered the removal of the portions of the building which had encroached upon the plaintiffs' land. The Court after formulating certain issues remanded the case to the lower Court to find on those issues. One of the issues so sent down was:

"What is the amount of damage, if any, suffered by the plaintiffs by reason of the erection of the superstructure?

In *Nasarbhai Ahmedbhai* v. *Munshi Badrudin* (2) the plaintiff's eaves had projected over the defendant's roof which had rested on a wall common between the parties for more than 30 years, and the plaintiff had thus acquired a right to have the water carried from his roof on to the defendants' roof, and the defendants had raised the common wall and removed the plaintiff's eaves. Sargent,

(1) [1903] 6 Bom. L. R. 41.
(2) [1891] 16 Bom. 533.

C. J., in remanding the case to the lower Court, remarked (p. 535):

"... the defendants having raised the common wall and removed the plaintiff's eaves, the plaintiff is entitled to relief, either by damages, or mandatory injunction. To determine which, it will be necessary, in the state of the authorities, for the Judge to find on the following issues :

1. Has the plaintiff acquiesced in the defendants' building, or warned the defendants to desist from such building ; and at what stage of the building operations was such warning given ?
2. How soon, after the plaintiff's eaves were removed, did the plaintiff take legal proceedings against the defendants ?
3. Can the injury caused to the plaintiff by the removal of his eaves be adequately compensated by damages, and, if so, what damages should be awarded ?"

In the present case the lower appellate Court has held that the defendant is not entitled to rely on an absence of notice unless there was a ground for him to be honestly ignorant of the plaintiffs owning the site to the west or unless the plaintiffs by their silence had induced the defendants to spend money for building his structure on the plaintiffs' site. The lower appellate Court has held that the defendant's work was incomplete when the plaintiffs put up an obstruction, and that the defendant had paid no heed to the obstruction. The lower appellate Court is of opinion that the defendant had knowingly trespassed on the plaintiff's land. Issue 3 framed in the lower appellate Court was:

"Does the question of plaintiffs' notice of obstruction to defendant at all arise ? If so, was the work in dispute wholly or partly finished before the notice ? If so, what is the effect."

The learned Judge answered the issue as follows:

"No. Even if it does, I find that the work was partly done and was progressing when the notice was given. Removal must be ordered."

This part of the learned Judge's finding can be better elucidated by reference to the finding of the trial Court on the same point. Issue 3 before the trial Court was:

"Was the work of the gallery and chhappar finished before the defendant got the plaintiffs' notice ?

The trial Court answered it as follows: "Gallery was completed but not the chhappar " In my opinion, as the finding seems to be that the gallery was completed by the defendant before he received any notice of the plaintiffs' objection to the erection of the gallery, and as there does not appear to be any direct evidence in the case which would justify the assumption that the defendant had before the notice knowingly committed trespass on plaintiffs' land, the Court would be reluctant to order a structure which has already been completed at some considerable cost to be pulled down, unless it can be shown that its existence would cause such damage to the owner of the land encroached upon as would not be compensated by money. The finding of the lower appellate Court that 'the trespass was knowingly committed by the defendant has reference to the fact found by the Court that the defendant had left the plaintiff's obstruction unheeded, and had thus acted dishonestly. The conduct of the defendant after the completion of the gallery is not, in my opinion, very material unless it can be inferred from it that he knew before he completed the gallery that he would trespass on plaintiffs' land by constructing it. If the dishonesty of purpose or knowledge of trespass could be brought home to the defendant before he completed the gallery, it would certainly be a case for a mandatory injunction and not for compensation. As the finding of the lower appellate Court does not go so far, we feel that the case does not call for a mandatory injunction, but is one where substantial monetary compensation would suffice. The decree of the lower appellate Court will be varied by striking out from it the words:

"Defendant do remove within three months from to-day the encroachments of the gallery and roof of his building so far as they project beyond, i. e., to the west of the stone ota, with railings on, on the ground floor. In case of default, plaintiffs do get these removed through Court in execution at costs which shall be defrayed by plaintiffs in the first instance but recovered from defendant as costs in execution."

And substituting for them;

This case be remanded to the trial Court to ascertain and decree a proper sum to the plaintiffs as and by way of compensation for the encroachment."

The appellant must pay the costs of this appeal.

Baker, J.—I agree.

R.K. *Decree varied.*

A. I. R. 1929 Bombay 139

BAKER, J.

Shankar Mahadev Jadhav—Plaintiff—Appellant.

v.

Bhikaji Ramchandra Ghanekar and *others*—Defendants—Respondents.

Second Appeal No. 820 of 1925, Decided on 7th November 1928, from decision of Dist Judge, Ratnagiri, in Appeal No. 47 of 1923.

(a) Transfer of Property Act, S. 95—Purchaser from some co-mortgagors paying mortgagee—He is charge-holder not mortgagee—Other co mortgagors cannot ask for accounts under Bombay Dekkan Agriculturists Relief Act, S. 15-D—Bombay Deccan agriculturists Relief Act, S. 15-D.

In all cases where the mortgage money is paid off by a person who is interested in the equity of redemption (purchaser from some co-mortgagors), there can be no question of his acquiring the rights of the mortgagee and being liable to be redeemed by the other co-mortgagors. The mortgage can only be redeemed once. A suit for accounts by such co-mortgagors under S. 15-D. of the Dekkan agriculturist Relief Act will not lie. Their remedy would be a suit for partition and possession of share on paying their quota of the redemption money: 40 *Bom.* 646; *A.I.R.* 1926 *Bom.* 493, *Dist.*; 26 *Bom.* 500, *Rel. on.*

[P 140 P 2]

(b) Transfer of Property Act, S. 91—Co-mortgagor should redeem whole.

Under S. 91, a part owner of the equity of redemption is not only fully justified by law in redeeming the whole mortgage but it is doubtful whether he can do otherwise than redeem the whole: 27 *All.* 178, *Rel. on.*

[P 141 C 1]

P. B. Shingne—for Appellant.

A. G. Desai, H. C. Coyajee and *P. V. Kane*—for Respondents.

Judgment.—This appeal, which comes from the Ratnagiri District, involves questions of some difficulty. There were 138 defendants, but fortunately we are not concerned with all of them in appeal. The facts are that defendant 4's father originally owned eight annas' share in the khoti village of Panhale, the other eight annas belonging to the family of Jadhav. In 1861 defendant 4's father sold that share to certain members of the plaintiff's family, the Jadhavs, and on the same day by a reconveyance he purchased back four annas out of it, the net result being the sale of a four annas, or half his share, to the Jadhavs. In 1894 certain members of the Jadhav family mortgaged this four annas share in the khoti to one Ghanekar by Ex. 144. The khoti share was undivided—I use that expression in preference to the word joint because the plaintiff and his family are Hindus, Marathas probably, and defendant 4 is a Mussulman—but the respective shares were not divided between the parties. In 1895 defendant 4 sued for partition and possession of his four annas' share out of the whole village, the defendants being the Jadhavs, who were the owners of a 12 annas' share in the village, and their mortgagee, Ghanekar. A decree for partition and seperate possession of his four annas' share was passed in favour of defendant 4, Abdul Ajij. The mortgagee Ghanekar appealed. The Jadhavs did not appeal. During the pendency of the appeal in 1897 defendant 4 purchased the equity of redemption of three of the five original mortgagors by Ex. 168. The plaintiff was not a party to this document, but it is now admitted that he is a sharer in the khoti. To add a further complication to the case, the sale-deed passed by these three cosharers expressly excludes the share of one Amruta Lokhande which is valued at Rs. 6-1-6. This appears to be the assessment leviable on the land. After this there was a compromise between defendant 4 and Ghanekar, the mortgagee, and this compromise was incorporated in a decree. The present appeal turns principally on the question of what was the position of defendant 4 after this compromise with Ghanekar, whether after paying off Ghanekar's mortgage, as he did under the compromise he becomes a co-mortgagor who has redeemed the mortgage and is therefore entitled to a charge on the property under S. 95, T P. Act, or whether he acquired the mortgagee's rights of Ghanekar and thereby stands in the shoes of the mortgagee and is liable to be redeemed. The plaintiff, on the basis that defendant 4 stands in the shoes of the mortgagee Ghanekar, brought the present suit for accounts of the mortgage under S. 15-D, Dekkhan Agriculturists' Relief Act. Defendant 4 contended that he was not liable to be redeemed, that the mortgage was extinguished, and he had a charge on the shares of the other co-mortgagors in the property for his proportion of the mortgage money. Both the Courts below have found in the defendant's favour, and have dismissed the plaintiff's suit, and the plaintiff makes this second appeal.

The learned pleader for the appellant has contended that on the plain construction of the documents in this case, viz., the compromise application and the decree and the sale-deed, that is to say, the documents evidencing the arrangements between defendant 4 and Ghanekar, the mortgagee, the position of defendant 4 is that of a mortgagee who is liable to be redeemed. The compromise application which is Ex. 162, is at p. 29 of the Record, and reference is made to p. 30 where it is stated:

"The plaintiff-respondent (i. e., the present defendant 4) having purchased the equity of redemption from the sharers who have mortgaged the thikans to the appellant by a mortgage-deed the plaintiff-respondent is entitled to redeem the mortgage after the expiration of the mortgage period, that is to say, the appellant Ghanekar is not entitled to the ownership of the property but he is entitled to the mortgage right only. Therefore the appellant has sold to the plaintiff-respondent his mortgage right for Rs. 1,500."

The terms of this compromise are embodied in the decree, and it is contended that by this defendant 4 stands in the place of the mortgagee. A sum of rupees 1,500 which was the amount due on the mortgage was paid by defendant 4 to the mortgagee, and the question arises whether by this payment defendant 4 became a transferee of the mortgagee's rights or merely a charge-holder. Both the Courts below have held that he merely became a charge-holder. The first Court relied on *Vasudev* v. *Balaji* (1), which merely enunciates the principle laid down in S. 95, T. P. Act. It is also an extremely simple case where one of two co-mortgagors pays off the whole of the mortgage. In the absence of a formal document setting forth the intentions of the parties it appears to me to be extremely difficult to decide whether the payment to the mortgagee of the mortgage amount would amount to a transfer of the mortgagee rights or a redemption of the mortgage, unless we are governed by some general principles, and it seems to me that in such a case we must be governed by the consideration whether the person making the payment is himself a person entitled to redeem or a stranger. Now it is manifest that a person who is a stranger to the mortgage and has no right to any part of the equity of redemption cannot redeem, and, therefore, any payment made by him to the mortgagee of the mortgage money would prima facie amount to a transfer of the mortgagee rights, and, as has been laid down in *Tangya* v. *Trimbak* (2), being a stranger, he would be entitled to be subrogated to the position of the mortgagee. That is not the position of defendant 4. By his purchase of the shares of three out of the five mortgagors, defendant 4 became interested in the equity of redemption. Any interest, however small, in the mortgaged property would entitle the person holding it to redeem under S. 91, T. P. Act, and hence the payment made by defendant 4 to the mortgagee Ghanekar must, in my opinion, be considered as a redemption of the mortgage. Otherwise the rights of the mortgagor and the mortgagee would be vested in the same person, which would have the effect of extinguishing the mortgage. In any case, therefore, there would not now be any question of redemption of a mortgage, and the position of defendant 4 would be that of a charge-holder under S. 95, T. P. Act, and it seems to me that in all cases where the mortgage money is paid off by a person who is interested in the equity of redemption, there can be no question of his acquiring the rights of the mortgagee and being liable to be redeemed by the other co-mortgagors. The mortgage can only be redeemed once. In the present case it has been so redeemed, and, therefore, the present suit for accounts under S. 15-D, Dekkhan Agriculturists' Relief Act, will not lie. The remedy of the plaintiff, as is conceded by the respondent, would be a suit for partition and possession of his share on paying his quota of the redemption money.

But we are not yet quite finished with the matter. The learned pleader for the appellant has based certain arguments on a fact which I have already referred to earlier in this judgment, viz., that the share of Amruta, that is, the portion of the property included in the khata of Amruta, is expressly excluded in the sale-deed passed by three out of the co-sharers to defendant 4 and it is contended that so far as regards this portion of the mortgaged property is concerned, defendant 4 has no interest in the equity of redemption. This contention, however, in my opinion, is untenable. Under S. 91, T. P. Act the smallest interest in the

(1) [1902] 26 Bom. 500=4 Bom. L.R. 178.

(2) [1916] 40 Bom. 646=35 I.C. 794=18 Bom. L.R. 700.

equity of redemption will entitle a person to redeem and it is impossible to hold that he would be entitled to redeem part of the property and not the other part. A mortgage cannot be split into two parts or redeemed piecemeal. It is impossible to say that defendant 4 was a holder of part of the equity of redemption, and entitled to redeem such portion of the mortgage as is covered by the shares of the three cosharers who have sold to him, but that he holds a different position as regards the mortgage so far as it is concerned with the khata of Amruta. It has been argued by the learned counsel for the respondent that this point was not taken in the Courts below, and the Courts below do not seem to have gone into it. However I am quite clear that the mortgage must be treated as a whole and the mortgage property must be treated as a whole, and it is quite impossible to draw any distinction between the khata of Amruta and the rest of the property which is covered by the mortgage-deed. Either defendant 4 has redeemed the whole of it, or he has redeemed none of it. I need hardly quote any authority, but as this point has been raised, I may refer to *Rugad Singh* v. *Sat Narain Singh* (3), where it is stated (p. 182):

"The plaintiff as a part owner of the equity of redemption was fully justified by law in redeeming the whole mortgage; in fact it is doubtful whether he could have done otherwise than redeem the whole."

And further on it is stated (p. 182):

"As to that property he will of course hold as absolute proprietor, whatever may have been his fractional interest in the equity of redemption, and as to the rest he will hold, as laid down by this Court, as lienor, liable to be paid off in respect of it by anyone entitled to the equity of redemption on payment of an amount of the mortgage money proportionate to the share of that person and of the expenses properly incurred by the plaintiff in redeeming and obtaining possession, as is provided by S. 95, T. P. Act."

Sections 91 and 95, T. P. Act would, in my opinion, be quite unworkable if any other view were taken. So long as the plaintiff, in this case, defendant 4, has a fractional interest in the equity of redemption, it is quite immaterial that a portion of the property covered by the mortgage is property in which he has no interest.

I do not think there is any other point to which I need refer. The learned counsel for the respondent, quoting *Gordhandas* v. *Dhirajlal* (4), argued that the findings of the lower Court were findings of fact. I am afraid that ruling does not apply to the present case, which not only involves questions of fact, but involves rather complicated questions of law. I, therefore, confirm the decree of the lower appellate Court, and dismiss the appeal with costs.

The cross-objections have not been pressed except as regards costs. But as the contending respondent had disputed certain questions of fact which have now been found against him, I do not think it necessary to make any alteration in the decree of the lower appellate Court as regards costs. Cross-objections dismissed with costs.

R K. *Appeal dismissed.*

(3) [1904] 27 All. 178=1 A.L.J. 579=1904 A.W.N. 208.

(4) A.I.R. 1926 Bom. 493.

A. I. R. 1929 Bombay 141

PATKAR AND MURPHY, JJ.

Bai Jivi and *others*—Defendants—Appellants.

v.

Bai Bibanboo and *others*—Plaintiffs—Respondents.

Appeal No. 60 of 1927, Decided on 31st October 1928, from order of Dist. Judge, Ahmedabad, in Appeal No. 334 of 1926.

(a) Limitation Act, Art. 123 — Suit by Mahomedan to recover his share is governed not by Art. 123 but by Art. 144, Limitation Act.

The word "distribution" has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. Art. 144 and not Art. 123 therefore applies to a suit to recover a share by a Mahomedan heir from a person in management of the property: *A.I.R.* 1921 *Bom.* 56 *Foll.*; *A.I.R.* 1925 *P.C.* 105, *Dist.*; *A.I.R.* 1916 *P.C.* 145 and 43 *Bom.* 845, *Expl.* [P 142 C 2]

(b) Cosharer—Adverse possession—Clear evidence of exclusion is necessary.

In the absence of any open denial of title, the possession of one tenant-in-common is on behalf of all and unless there is clear evidence of exclusion or open denial of title, a cosharer's claim cannot be held to be barred by limitation: 35 *Cal.* 961, *Foll.* [P 143 C 1, 2]

G. N. Thakor and *M. K. Thakor*—for Appellants.

H. C. Coyajee and *H. V. Divatia*—for Respondents.

Patkar, J.—This is a suit brought by the plaintiffs, daughters of Joomabhai

who died in the year 1907 leaving a widow Fulbai who died on 6th February 1910, and a son Chhotubhai who died on 2nd November 1917. Chhotubhai died leaving defendant 1 his widow, two daughters, defendants 4 and 5, and a son Rasulbhai who died after Chhotubhai in the year 1917, leaving a son Hussein who died on 20th June 1924, and two widows, defendants 2 and 3. The plaintiff's claim 3/5th share in the properties belonging to Joomabhai. The extent of the share is not denied and the plaintiffs' suit is contested principally on the ground of limitation. The learned Subordinate Judge dismissed the plaintiffs' suit holding that the suit was barred by limitation. The learned District Judge reversed the decree of the lower Court and remanded the suit for disposal on the merits holding that the suit was not barred by limitation.

It is urged on behalf of the defendants, firstly, that Art. 123, Lim. Act, applies, and, secondly, that, if Art. 144 applies, the claim of the plaintiffs is beyond time.

On the first question as to whether Art. 123 applies, we think that Art. 123 is restricted to suits where a share is sought to be recovered as such from a person who legally represents the estate of the deceased either as executor, administrator or otherwise, and who is bound by law as such representative to pay or deliver the share. The appellants rely on the decision in the case of *Shirinbai* v. *Ratanbai* (1), and particularly on the remarks of Macleod, J., at pp. 860 and 861, and the ruling of the Privy Council in *Maung Tun Tha* v. *Ma Thit* (2), and the decision of the Madras High Court in *Parthasarathy Appa Rao* v. *Venkatadri Appa Rao* (3). In the subsequent decisions of this Court in *Kallangowda* v. *Bibishaya* (4) and *Nurdin* v. *Bu Umrao* (5), Sir Norman Macleod was of opinion that Art. 144 would apply where a suit is brought by a Mahomedan sharer to recover his share of the immovable property from the person in possession of such property. Fawcett, J., in *Nurdin* v. *Bu Umrao* (5) expressed the view that the decision of the Privy Council in *Maung Tun Tha* v. *Ma Thit* (2), which related to the right of succession of the eldest son under the Burmese Buddhist law to be asserted not within a certain limited period of time but within the period of limitation, did not really decide the point as to whether Art. 123, Lim. Act applied to a case of a Mahomedan suing to recover his share from a person in possession or management of the property, and preferred to follow the earlier Privy Council decision in *Mahomed Riasat Ali* v. *Hasin Banu* (6) and held that the word "distribution" has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. The Madras case of *Parthasarathy Appa Rao* v. *Venkatadri Appa Rao* (3) and *Venkatadri Appa Rao* v. *Parthasarathy Appa Rao* (7) refers to a suit to recover a legacy, and to such a suit Art. 123 would clearly apply. The view of the Madras High Court in the earlier Full Bench decision in *Khadersa Hajee Bappu* v. *Ayissa Ummah* (8), was followed by this Court in *Maktumawa* v. *Allama* (9), and is consistent with the decision of this Court in *Keshav Jagannath* v. *Narayan Sakharam* (10). The same view was taken by the Calcutta High Court in *Ahidannessa Bibi* v. *Isuf Ali Khan* (11). The decision in *Nurdin* v. *Bu Umrao* was followed by this Court in *Malek Fatemiya* v. *Malek Sardarkhan* (12). We think, therefore, that we should follow the decision in *Nurdin* v. *Bu Umrao* (5) and hold that Art. 123 would not apply to a suit such as the present to recover a share by a Mahomedan heir from a person in management of the property. It would, therefore, follow that Art. 144 would apply,

The plaintiffs are cosharers and their suit would not be barred unless it is proved that there was an ouster or adverse possession on the part of the defendants.

(1) [1918] 43 Bom. 845=51 I.C. 203=21 Bom. L.R. 384.
(2) A.I.R. 1916 P.C. 145=44 Cal. 879=44 I.A. 42=9 L.B.R. 56 (P.C.).
(3) A.I.R. 1922 Mad. 457=46 Mad. 190 (F.B.).
(4) [1920] 44 Bom. 943=58 I.C. 42=22 Bom. L.R. 986.
(5) A.I.R. 1921 Bom. 56=45 Bom. 519.
(6) [1893] 21 Cal. 157=20 I.A. 155=6 Sar. 374 (P.C.).
(7) A.I.R. 1925 P.C. 105=48 Mad. 312=52 I.A. 214 (P.C.).
(8) [1911] 34 Mad. 511=20 M.L.J. 288=6 I.C. 50=(1910) M.W.N. 447 (F.B.).
(9) S. A. No 108 of 1916 Decided on 25th February 1919 by Scott, C. J. and Hayward, J.
(10) [1889] 14 Bom. 236.
(11) A.I.R. 1924 Cal. 142=50 Cal. 610.
(12) Cross Appeal No. 276 of 1925 Decided on 31st January 1928 by Patkar and Baker, JJ.

In *Gobinda Chandra* v. *Nina Nath* (13) it was held that mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession; but such non-participation or non-possession may, in the circumstances of a particular case, amount to an adverse possession, and regard must be had to all the circumstances and a most important element is the length of time. A similar view was taken in *Gangadhar* v. *Parashram* (14), where length of possession and non-participation of profits extended to a period of 40 or 50 years, and it would be permissible for a Court of facts to draw an inference that there was an ouster from non-participation of profits for a period extending to 40 or 50 years. In the present case the period is 17 years, and the learned District Judge has considered the whole evidence in the case and has come to the conclusion that there was no ouster of the plaintiffs so far as their interest in the property was concerned. Plaintiff 1's son, Ex. 36, deposed that he was brought up in the family, and defendant 1, when examined, was not prepared to deny the right of the present plaintiffs. It has been found that plaintiff 2, who had lost her husband during the lifetime of her father, used to reside in the family house and the other plaintiffs occasionally went and resided in the family residence Small sums of money were paid to the plaintiffs from time to time by Chhotubhai and Jivi.

The plaintiffs never asserted their right to the share of the property or the income, nor was their right ever denied by the defendants. The explanation given by plaintiff 1's son that nothing was done because Jivi was managing the property was not held convincing by the learned District Judge. On considering the whole evidence, the learned District Judge has come to the conclusion that there was no ouster of the plaintiffs with regard to their share in the property. We think that, in the absence of any open denial of title, the possession of one tenant-in-common would be on behalf of all according to the ruling in *Jogendra Nath Rai* v. *Baladeo Das* (15), and unless there is clear evidence of exclusion or open denial of title, the plaintiffs' claim cannot be held to be barred by limitation.

On these grounds, we think the view off the lower appellate Court is correct. We would, therefore, dismiss the appeal with costs. The cross-objections are dismissed with costs.

Murphy, J.—The suit was brought by the three daughters of a deceased Mahomedan for their proper shares in his property, and against their deceased brother's widow and her children and daughter-in-law. Joomabhai, the original owner of the property sought to be divided, died in 1907, and the original Court held that since his death the plaintiffs' brother Chhotubhai, and after him his widow Jivi, had held the property adversely to the plaintiffs to their knowledge, and hence that the claim was barred by limitation under Art. 144, Lim. Act, the suit having been instituted in 1924. In the first appeal the learned District Judge took a different view. He thought that though the plaintiffs had not claimed or assumed possession of any part of the property, they had refrained from asserting their separate rights partly because the family was a united one in the sense of an absence of quarrels amongst its members, and perhaps also because there was a common impression that in some way their case was parallel to that of a joint Hindu family. But, in his opinion, there had not, in any case, been an exclusion of the plaintiffs to their knowledge from participating in the tenancy-in-common which arose on Joomabhai's death, among his heirs, and that consequently there had been no adverse possession running against them for the statutory period necessary to defeat their claims. The original Court's decree was reversed and the suit was remanded for disposal on the merits. This is the order which is challenged in appeal.

It has been argued that the finding that the plaintiffs refrained from an earlier assertion of their claims owing to ignorance of their rights is in the appellants' favour. But this is really a travesty of the learned District Judge's argument. To become adverse, the possession of a cosharer or of a tenant-in-common has to be asserted as being exclusive to the excluded cosharer's knowledge, and this was not the case here. In fact, what happened was that until the quarrel arose

(13) [1920] 47 Cal. 274=30 C.L.J. 512=56 I.C. 141=23 C.W.N. 977.
(14) [1905] 29 Bom. 300=7 Bom.L.R. 252.
(15) [1907] 35 Cal. 961=6 C.L.J. 735=12 C.W.N. 127.

in 1923 or 1924, the daughters of the family lived in amity with their brother, and, after his death, with his widow; and though actually living at their respective husband's residences, they frequently visited their brother's home and received gifts from him and from his widow. I agree with the learned District Judge that there was no exclusion of the plaintiffs to their knowledge, and if Art. 144, Lim. Act, applies to the facts, the suit is not barred.

But the order in question has been assailed on another ground. This is that it is not Art 144 but Art 123, Lim Act, which applies to the facts and the rullng in the Privy Council case of *Maung Tun Tha* v. *Ma Thit* (2) has been relied on in support of the argument. This ruling of their Lordships of the Privy Council was given in an appeal from Burma, and deals with the succession of a Burmese son to a portion of his father's estate The rule appears to be different to that of Mahomedan law, but there is a passage in their Lordships' judgment which states that Art. 123 applies generally to a case of contested succession to property. It has been argued that the suit not having been brought within 12 years of Joomabhai's death and being one to recover a distributive share of his estate, is time barred. This argument has been reinforced by reference to the expressions used in the judgment of Macleod, J., in *Shrinibai's* case (1) which was in connexion with a Parsi inheritance. The expression "distributive share" is foreign to Mahomedan law, and is found only, as far as I know, in the Indian Succession Act, a statute with which this has no connexion. We have also been referred to the case of *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao* (7), which, however, concerns a legacy, and to the case of *Nurdin Najbudin* v. *Bu Umrao* (5), in which the point now in question is discussed. Mr. Thakor has sought to distinguish this last case, on the ground that there was there an actual tenancy-in-common, while here the plaintiffs have never had possession. But I believe that this distinction is not material. Macleod, J., on whose expression in *Shirinibai's* case (1) Mr. Thakor relies, was a party to this later decision, and Fawcett, J., in his judgment has discussed the ratio decidendi of the case of *Maung Tun Tha* v. *Ma Thit* (2) and has explained and distinguished it, holding that Art. 123 does not apply to the case of the estate of a deceased Mahomedan. This precedent is in accordance with the current of decisions of this Court and is that of a Division Bench which binds us.

I think the learned District Judge's order is correct and I agree that it should be confirmed and that the appeal against it should be dismissed with costs.

R K. *Appeal dismissed.*

A. I R. 1929 Bombay 144

MIRZA AND BAKER, JJ.

Ramchandra Trimbak Joshi— Appellant.

v.

Hari Martand Joshi—Respondent.

Second Appeal No. 409 of 1926, Decided on 28th September 1928, against decree of Joint Judge, Thana.

(a) Easements Act, S. 15—Right of way—User to be 'open' must raise presumption of servient owner's knowledge and acquiescence.

The object of S. 15 in requiring that the user of a right of way should be open is that it must be of a nature from which a presumption would arise that the owner of the land had knowledge that his land was being used and that he had acquisced in it. [P 146 C 1]

(b) Easements Act, S. 15—Right of way—Consideration in deciding whether user was 'as of right.'

In questions regarding a right of way the Court should consider the character of the ground, the space for which the right is claimed, the relations between the parties and the circumstances under which the user took place to decide whether the user was "as of right' : *A. I. R.* 1922 *Mad.* 5 *Dist.* ; 13 *C. L. J.* 316; 8 *C. W. N.* 359, *Foll.* [P 147 C 2]

P. V. Kane—for Appellant.

K. H. Kelkar—for Respondent.

Mirza, J.— The facts leading up to this second appeal are briefly as follows : The plaintiff-appellant had sued the defendant for a declaration that he had an ancient right of way for his cattle and men to pass through the defendant's land, for a mandatory injunction to have the obstruction caused to the way removed and for the issue of a permansnt injunction restraining the defendant from obstructing the plaintiff's cattle and men in their use of the way from June to October during the year. The trial Court held that long or immemorial user, on which the suit was based, had not been established, but it came to the conclusion

that the plaintiff had satisfactorily proved that he had enjoyed this right of way as claimed by him for a period of over 20 years, and had thereby acquired a right of easement by prescription. The learned trial Judge was of opinion that although it had been shown that there were other ways by which the plaintiff's cattle could reach their pasture, yet the evidence showed that during the wet season those ways were blocked up for cattle although men could use them. The object of blocking up the way, which was a public foot-path. so that cattle may not use it was to prevent the cattle straying into adjoining fields owned for the most part by the plaintiff where the plaintiff grew hay and paddy, which would be damaged if the cattle strayed into the fields. The learned trial Judge put the case of the plaintiff almost on the footing of an easement of necessity, and came to the conclusion that as this was the most convenient route to take to send the plaintiff's cattle to their pasture, that route must have been followed. In appeal, the learned appellate Judge came to the conclusion that although the route had been used by the plaintiff's cattle for over twenty years, it must be held that it was a permissive use and not as of right The learned appellate Judge was of opinion that it was not a case of an easement of necessity and the right claimed by the plaintiff was not satisfactorily established. Hence he allowed the appeal and dismissed the plaintiff's suit The plaintiff has filed this second appeal from the judgment and decree of the lower appellate Court.

It is pointed out by Mr Kane on behalf of the appellant that the defendant had not relied upon a case of leave and license in either Court and it was not open to the learned Judge in the appeal Court to make out a new case for the defendant. In the written statement the defendant alleged that he had never seen the plaintiff's cattle using the way, and had never heard that they had been using the way. He denied the plaintiff's right to use the way and denied the plaintiff's allegation that he had been using the way from ancient times. The defendant having recently purchased the land from its previous owner, was not in a position to contradict the evidence on behalf of the plaintiff that his cattle had gone over the defendant's land in going to their pasture for a period of over twenty years. On the pleadings the learned trial Judge rightly remarked that it had never been suggested that the plaintiff had to ask anybody's permission in order to use the way. The learned Judge in the lower appellate Court has remarked that "the cattle used to be driven over the land by license merely and not as of right." He held that this was not an easement of necessity, that the appellant could have taken his cattle even during the wet season through another path, and it was no concern of the defendant that no damage should be done by the cattle to the appellant's paddy or hay and that it was for the appellant to make arrangements to prevent the damage by the cattle to his property.

The judgment of the lower appellate Court, in my opinion, cannot be sustained on the ground put by that Court that the cattle went over the defendant's land by license only. There is no evidence to that effect, and it is not open to the Court to conjecture that any express leave or license was granted by the owner of the land to the plaintiff to take his cattle over the land. It is necessary, however, that the plaintiff should establish his case as required by law before he can claim a right of easement over the land. S. 15, Easements Act, inter alia provides that where a right of way has been peaceably and openly enjoyed by any person claiming title thereto as an easement, and as of right, without interruption, and for twenty years, the right would be established. It is necessary for the plaintiff, therefore, to establish that he openly enjoyed this right and that he did so as of right. The case put forward by the plaintiff in his pleading was much higher than what he was prepared to support by his evidence. By his pleading he had claimed that his men were passing through this land By his evidence he restricted that user only to the cow-boy in charge of the cattle. In this deposition he admitted that his cattle used to roam about over the entire extent of the intermediate lands while passing on towards the pasture land He claimed a right of way not only against the land belonging to the defendant but also against certain entermediate lands belonging to other parties. His case was that his cattle started from the village, went along the margin of the village tank

then passed through Survey Nos. 226 and 227, and then entered the defendant's, land, which is Survey No. 225, hissa No. 4, and going through the defendant's land entered the plaintiff's land, Survey No. 225, hissa No. 1, for grazing purposes. After the defendant purchased the land and obstructed the plaintiff in taking his cattle through it during the wet season, the plaintiff adopted a somewhat different route for taking his cattle to their pasture without using the regular route which was being used during the dry weather. The owner of Survey No. 226 now objected to the plaintiff taking his cattle through his land. The owners of those intermediate lands over which the right of way is claimed are not parties to this action.

It is admitted that the defendant's land was for many years fallow land. It is nobody's case that the owner was in occupation of the land or that he had enclosed it or was deriving any income from the land. The only user established by the plaintiff in connexion with this land amounts to this, that his cattle went in charge of the cow-boy once during the day, and returned the same way in charge of the cow-boy the same day after grazing in the pasture land. From the point of view of the plaintiff, his user under these circumstances may be regarded as an open one. But in my opinion the object of the section in requiring that the user should be open is that it must be of a nature from which a presumption would arise that the owner of the land had knowledge that his land was being so used, and that he had acquiesced in it. The English law on the subject emphasises the necessity of the proof of such knowledge. Gale in his Law of Easements, Tenth Edition, p. 236, states that the enjoyment must be one of which the servient owner has knowledge either actual or constructive. Again at p 318 he states :

"The user which is relied on, as evidence of dedication must, moreover, have been so open and notorious as to lead to the presumption that the owner of the land over which it was enjoyed knew and acquiesced in it." See *Webb* v. *Baldwin* (1).

There is no direct evidence in this case that the owner of the land knew that the plaintiffs' cattle were passing over it twice a day during the rainy season. The evidence does not show that the cattle by using the defendant's land had formed any path on the land which would put the owner on inquiry as to how the path had been formed and to discover that the cattle were using it. The land was not being continuously used for the purpose throughout the year, but only during the wet season. The cattle were not using any particular path when they were on this land, but were straying over all parts of it. From such circumstances no presumption as to a constructive notice could arise.

The other requirement of the section is that the plaintiff should have used the defendant's land as of right The learned trial Judge has rightly remarked :

"It is a matter of common knowledge that in villages, grass lands belonging to others are frequently used by persons residing therein for taking tneir cattle over to their own pastures or grass lands, without any objection or obstruction from the owners of those lands."

Being aware of this custom, why should it not be assumed that the plaintiff took it for granted that if the owner discovered his cattle using the land for going to their pasture his permission could be obtained for letting them do so, as they would not cause any injury to a land which admittedly was fallow ? Further, the circumstance that when the defendant obstructed the plaintiff in his use of this land the plaintiff did not immediately assert his right by coming to Court, but took his cattle by another route so as to avoid the defendant's land, seems to indicate that he was not using the defendant's land as of right, but because he had found it convenient to do so in order to avoid damage to his own property

In a country like India where the lands are usually unenclosed, before a right of easement is declared to be established over them, the Courts, in my opinion, must require strict proof that the plaintiff has satisfied the requirement of the section. In *Khoda Buksh* v. *Tajuddin* (2), Banerjee, J. remarks (p. 360) :

"...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 legitimate 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. As has been observed in an unreported case referred to in Babu Upendra

(1) [1911] 75 J. P. 564.

(2) [1903] 8 C. W. N. 359.

Nath Mitter's book on the Law of Limitation and Prescription, third edition, p. 424 (footnote): "The nature and character of the servient land, the friendship or relationship between the servient and dominant owners, and the circumstances under which the user had taken place, may induce the Court to hold that the enjoyment was not "as of right" although there is no direct proof that the enjoyment was had with the permission of the servient owner."

In my opinion the plaintiff has failed to discharge the burden of proof which lay on him to show that his use of the defendant's land was openly enjoyed and as of right. The decision of the lower appellate Court may be upheld on this ground. The judgment of the lower appellate Court is affirmed, and this second appeal dismissed with costs.

Baker, J.—I agree. The circumstances in the present case are peculiar. This is not a case in which a right of way is claimed over a definite path, so that the owners of the land over which the right is claimed would have their attention drawn to the fact of the user by the plaintiff. We are dealing here with open lands in the vicinity of the village, which for a great part of the year, are fallow, and are not used by the owners, and the plaintiff's cattle, according to his own admission, did not pass over these lands in any definite track, but to use his own words :

" roamed about over the entire extent of the intermediate lands while passing on towards his land."

In these circumstances the question is whether an easement has been acquired under S. 15, Easements Act. The remarks which have been already quoted in the judgment of my learned brother from Mitter on Limitation that :

" the nature and character of the servient land, the friendship or relationship between the servient and dominant owners, and the circumstances under which the user had taken place may induce the Court to hold that the enjoyment was not "as of right" although there is no direct proof that the enjoyment was had with the permission of the servient owner"

will apply to the present case. It is quite true that in *Kunjammal* v. *Rathnam Pillai* (3), the Court did not draw a distinction between a right of way and a right to water. That case, however, was on very peculiar circumstances, where the right of way was claimed for the dominant owner to pass through the dwelling-house of the servient owner. But the present is a case of a very different character, and, as was held in *Meser Mullick* v. *Hafizuddi Mullick* (4), in questions regarding a right of way the Court should consider the character of the ground, the space for which the right is claimed, the relations between the parties and the circumstances under which the user took place. In the peculiar circumstances of the present case I am not satisfied that the plaintiff has established a right of way which he claims, and I, therefore, agree that the appeal should be dismissed with costs.

M.N /R.K. *Appeal dismissed.*

(3) A. I. R. 1922 Mad. 5=45 Mad. 633.

(4) [1888] 13 C. L. J. 316=9 I. C. 965.

* A I. R 1929 Bombay 147

MIRZA AND BAKER, JJ.

Bai Devmani—Appellant.

v

Ravishankar Oghadbhai—Respondent.

Second Appeal No. 93 of 1926, Decided on 21st September 1928, against decree of Dist. Judge, Ahmedabad

(a) Evidence Act, S. 21 — Admissions are not conclusive unless amounting to estoppel.

An admission made in a Court of law no doubt carries with it great weight but it is not conclusive and binding on the party making it, unless it operates as an estoppel. The burden of proof, however, rests heavily upon the party and after him his heirs to show that the admissions were untrue. [P 150 C 1]

(b) Transfer of Property Act, S. 54 — Consideration not paid—Vendor cannot set aside sale for failure of consideration unless transaction is collusive and nominal.

Once a sale is completed it cannot be rescinded for failure of consideration. All that the vendor can claim is damages for a breach of promise to pay the price : (23 *Bom.* 525, *Rel. on.*) But this rule does not apply if the transaction is collusive and nominal and therefore null and void. [P 150 C 1]

*** (c) Trusts Act, S. 84—Fraud contemplated a continuous one—Party perpetrating fraud can retract from it at any time.**

If the fraudulent object is accomplished or is accomplished even substantially though not in its entirety, the general rule of equity is that the transferee would not be disturbed. But if the fraud contemplated is in the nature of a continuous act it is open to the party perpetrating fraud to retract from his fraudulent purpose and revoke the authority he had given to his confederates for carrying on the fraud : 33 *Cal.* 967; 35 *Cal.* 551 (*P.C.*), *Cons.* [P 151 C 2]

H. V. Divatia—for Appellant.

P. B. Shingne—for Respondent.

Mirza, J.—This is a second appeal preferred by the original plaintiff's against the judgment of the District Judge at Ahmedabad, who reversed, so far as plaintiffs 2, 3 and 4 were concerned,

the decree of the Second Joint Subordinate Judge at Ahmedabad and dismissed their claim to redeem the property in suit from respondent 2.

The suit was brought by the plaintiffs against one Bai Ishwari and defendant 2 (respondent 1 herein) as the heir and legal representative of one Shuklal Oghad Dosabhai claiming to redeem from Bai Ishwari on payment to her of Rs. 599 the property in suit which was in her possession as mortgagee and for a declaration against respondent 1 that a certain sale deed obtained by his father Shuklal Oghad Dosabhai in respect of the property was nominal and null and void.

Bai Ishwari having died during the pendency of the suit respondent 2 and his father Govindlal were substituted as her heirs and legal representatives Govindlal having since died respondent 2 is now the sole representative of the interest of the original mortgagee in the property.

The property in suit was owned by one Bhupatrai Lallubhai The original defendant 1, Bai Ishwari, was Bhupatrai's full sister She was married to one Govindlal. Bhupatrai had two sons, Trikamlal and Jivanlal and a daughter Atilaxmi. Plaintiffs 2, 3 and 4 are the sons of Atilaxmi. Trikamlal died on 11th April 1911, leaving no issue but a widow Bai Devmani, plaintiff 1 By a registered rent note, dated 5th December 1910, Bhupatrai had leased the property in suit to Govindlal for five years. On 12th October 1911, Bhupatrai executed in favour of his sister Bai Ishwari a usufructuary mortgage of the property in suit for five years for Rs. 599. The deed was executed by Bhupatrai and his surviving son Jivanlal, and Bai Ishwari was put in possession under the deed. Jivanlal died early in 1912 unmarried and childless. On 23rd June 1912, Bhupatrai made a will whereby he appointed his grandsons, plaintiffs 2, 3 and 4 his heirs and universal legatees. The will was registered. In 1914 plaintiff 1 filed a suit against Bhupatrai, being suit No. 678 of 1914, claiming from him suitable provision for residence and maintenance In that suit a compromise was arrived at and the Court passed a decree on 6th January 1915, in terms of the compromise. The decree inter alia provided that Bhupatrai was to give to plaintiff 1 for her residence for her lifetime the property in suit on the expiry of the term of the mortgage—the remaining term of the mortgage was put down in the decree as being two years. The property was to become redeemable on and after 12th October 1916. Before the expiry of the mortgage period, Bhupatrai, by a sale deed dated 1st June 1916, conveyed the property to the father of respondent 1 for a consideration of Rs. 1,499 therein mentioned. The consideration was made up as follows :—Rs. 599 to be paid to the mortgagee in possession for redemption of the mortgage, Rs. 145 to be paid to the mortgagee for expenses she had incurred for repairs of the property, Rs 400 to be paid to the vendor or his heirs on the death of plaintiff 1 who had a right of residence in the property during her life and the balance of Rs 355 was acknowledged by Bhuputrai as having been received by him in cash from the vendee.

After the expiry of the mortgage period Bhupatrai having failed to put plaintiff 1 in possession of the property as provided by the terms of the compromise decree, plaintiff 1 applied for execution of the decree. Bhupatrai appeared and showed cause in the darkhast proceedings He alleged that the property consisted of two compartments under separate census numbers and that plaintiff 1 was entitled to reside in one compartment only. The vendee, according to Bhupatrai, had kept that compartment vacant and ready to be delivered over to plaintiff 1 and the other compartment was in possession of the vendee He contended the plaintiff 1's remedy in respect of the other compartment was not against him but against the vendee who was the owner of it. The execution Court decided that plaintiff 1 was entitled to residence in the whole house comprising both the census numbers and added :

"on the whole it appears that the just demand of the plaintiff (plaintiff 1) is sought to be thwarted by his (Bhupatrai's) ingenious device."

Bhupatrai appealed against the decision of the execution Court On 30th October 1918, Bhupatrai's appeal was dismissed, the appeal Court remarking :

"This is clearly an unfair attempt to thwart the respondent in executing her decree."

The execution proceedings being thereafter resumed plaintiff 1 was obstructed in obtaining possession of the property. She, therefore, on 30th January 1919, put in an application to have Bhupatrai

arrested and his property attached. Bhupatrai showed cause against the application and by his reply, dated 23rd June 1919, stated that he was unable to redeem the property, that he could not be forced to redeem the property in execution proceedings and that plaintiff 1 might be asked to file a suit if so advised to enforce her alleged right. By its order dated 27th September 1919, the execution Court held that plaintiff 1 could not get relief of the kind she sought in execution proceedings and dismissed the application. Bhupatrai died soon thereafter and plaintiff 1 in conjunction with plaintiffs 2, 3 and 4, who are the heirs and universal legatees under the will of Bhupatrai, filed this suit.

The trial Court held that the sale-deed dated 1st June 1916, was a nominal and collusive transaction between Bhupatrai, Bai Ishwari represented by her husband and agent Govindlal and the vendee, the object of the collusion being to keep plaintiff 1 out of her right under the compromise decree to reside during her lifetime in the property and to enable Bai Ishwari to remain in possession of the property during the lifetime of plaintiff 1.

From an examination of the evidence in the case the first Court came to the conclusion that the consideration of Rs. 355 acknowledged in the deed to have been received in cash by Bhupatrai was not paid to him The Court also came to the conclusion that the sum of Rs. 145 recited in the deed as being due to the mortgagee for repairs of the property was not so due and that the recital was false. With regard to the sum of Rs 400 to be paid to the vendor or his heirs after the death of plaintiff 1 the Court expressed an opinion that the excuse for not receiving the amount immediately was not a substantial one. The Court held that no consideration passed under the deed and that it was a sham and collusive transaction in which the vendor, the vendee and the mortgagee had participated.

The lower appellate Court came to the conclusion that the sale-deed was collusive but that it was not a nominal transaction. The lower appellate Court held that the defendants, meaning the mortgagee and the vendee, had colluded with each other and with Bhupatrai in order to defeat plaintiff 1's rights. For that reason the lower appellate Court awarded costs of both Courts to plaintiffs 2, 3 and 4 against the defendants although it dismissed their claim. The lower appellate Court agreed with the finding of the first Court that the sum of Rs. 145 recited in the sale-deed as due to the mortgagee was not due to her and added that had the amount for repairs been satisfactorily proved it would appear that the repairs were in the nature of ordinary current repairs for keeping the house in proper condition—the kind of repairs for which a mortgagee in possession is bound to spend money without being entitled to claim a refund from the mortgagor. The lower appellate Court thought it unnecessary to find whether the cash payment of Rs. 355 was or was not made. The learned Judge remarks :

> "Assuming for the sake of argument that the cash payment was not made the other items were real and the mortgagee at least could have, and can claim that money from the vendee."

The learned Judge seems to have lost sight of the fact found both by himself and by the first Court that the mortgagee herself was a party to the collusive arrangement.. If that finding is to be regarded as correct the mortgagee would not, by the arrangement arrived at between the parties, enforce any rights which might ostensibly be given to her on the face of the deed. One of the objects of the collusion, as found by the first Court, undoubtedly, was that the mortgagee may be enabled to remain in possession of the property during the lifetime of plaintiff 1 in order to thwart her right of residence. Where collusion and fraud have been established by evidence the Court would very strictly scrutinize the payment of any consideration that may be evidenced by the transaction. The first Court has very carefully gone into the matter of the alleged payment of Rs. 355. The vendee was a professional beggar and a man of no means. His son had received free education at Dholka on the recommendation of Govindlal and was a signaller employed on the railway on Rs. 35 per month. The vendee was a resident of Dholka. There was no occasion for a man of his means and position in life at Dholka to purchase a valuable property at Ahmedabad. The vendee has not been shown to have derived any benefit from the alleged payment in 1916. The property has not been transferred to the name of the vendee and the mort-

gagee and her heirs have continued in possession and enjoyment of it. The circumstances of the case make it clear that no consideration could have passed as alleged. Bai Ishwari and after her, her representatives have throughout these proceedings made common cause with respondent 1 and have strongly resisted the claim not only of plaintiffs 2. 3 and 4 but also, except in this Court, that of plaintiff 1 to redeem the property. The respondent 1 and his father the vendee before him never made any attempt to redeem the property nor has respondent 1 in these proceedings at any time offered to do so. It is apparent that the respondents are still in collusion with each other with the object of keeping out plaintiff 1 from the possession of the property in her lifetime and to enable respondent 2 to continue in possession with the help and connivance of respondent 1.

So far as the right to redeem of plaintiff 1 is concerned both the Courts have held in her favour and the respondents are not now questioning the right With regard to plaintiffs 2, 3 and 4 they were not members of any joint Hindu family consisting of themselves and Bhupatrai and they cannot be said to have any independent right to avoid the sale-deed passed by Bhupatrai. As heirs and universal legatees of Bhupatrai they stand in the shoes of Bhupatrai and can avoid the sale-deed only if Bhupatrai could have avoided it in his lifetime.

It is contended on behalf of the respondents that the sale-deed is for consideration and is valid as between the respondents and plaintiffs 2, 3 and 4 Reliance is placed upon the definition of "sale" in S. 54, T. P Act, where "sale" is described as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised Mr. Shingne urges that plaintiffs 2, 3 and 4 are debarred from contending that Bhupatrai did not receive the cash payment of Rs. 355. The fact is recited in the sale-deed and is confirmed by Bhupatrai in the subsequent execution proceedings between himself and plaintiff 1. The latter argument found weight with the lower appellate Court. The learned Judge remarks :

"The question, however, is not important as Bhupatrai in his lifetime admitted in a Court of law the validity of the sale and thus made it almost impossible for himself to resist the claim of the vendee for possession . . . The sale-deed was binding on Bhupatrai in his lifetime and the legatees under the will have no right to challenge it."

The last proposition in the above observations of the learned Judge does not seem to follow from the first. An admission made in a Court of law no doubt carries with it great weight but it is not conclusive and binding on the party making it, unless it operates as an estoppel. No case of estoppel has been pleaded or proved in the present case. Having regard to the recital in the deed and the admission in the Court proceedings the burden of proof would rest heavily upon Bhupatrai and after him his heirs to show that the admissions were untrue. Plaintiffs 2, 3 and 4, in my opinion, have discharged the onus probandi which lay on them regarding the non-payment of Rs 355 recited in the deed as paid by the vendee to Bhupatrai That is the finding of the first Court and there is no finding to the contrary on this point by the lower appellate Court.

Mr Shingne next contends that if no part of the consideration recited in the sale-deed has been paid by the vendee to Bhupatrai it would be open to Bhupatrai and his legal representatives to claim the amount from the vendee and that they would not be entitled on that ground to set aside the sale. No doubt, refusal by the vendee to pay the price to the vendor would not by itself be a reason for setting aside a sale. It is a well established proposition of law that once a sale is completed it cannot be rescinded for failure of consideration unless that right is expressly reserved, in which case an action would lie not in consequence of any general right vested in the vendor but on the express covenant made in the deed. In any other case all that the vendor could claim would be damages for the breach of promise to pay the price : see *Sagaji* v. *Namdev* (1). The argument would be valid if this were a genuine and not a nominal transaction. The heirs and universal legatees of Bhupatrai are seeking not to set aside the sale for failure of consideration, but they are asking for a declaration that the transaction was collusive and nominal and therefore, null and void.

(1) [1899] 23 Bom. 525=1 Bom. L. R. 5.

If the transaction was only nominal the vendee would be deemed to hold the property for the benefit of the transferrer as provided by S. 84, Trusts Act. The point for consideration is whether plaintiffs 2, 3 and 4 as heirs and universal legatees of Bhupatrai are entitled to the benefit of S. 84, Trusts Act, if the sale-deed was executed by Bhupatrai in pursuance of a fraud. The finding of both the Courts is that the sale-deed was a fraudulent transaction between the vendor, the vendee and the mortgagee If the fraudulent object is accomplished or is accomplished even substantially though not in its entirety, the general rule of equity is that the transferee would not be disturbed. The authorities were fully considered in *Jadu Nath Poddar* v. *Rup Lal Poddar* (2). In *Petherpermal Chetty* v. *Muniandi Servai* (3) their Lordships of the Privy Council held that the purpose of the fraud not having been effected there was nothing to prevent the plaintiff from repudiating the transaction as being benami, and recovering possession of the property. The plaintiff in that case had purported to execute a sale-deed in order to defeat the claim of an equitable mortgagee of the property and had thereafter brought a suit for a declaration that the deed was merely a benami transaction and to recover possession of the property It was held that the deed was benami and fraudulent. Their Lordships remarked (*p.* 102 *of* 35 *I. A.*) :

". . . . . it is contended on behalf of the appellant that so much confusion would be imported into the law if the maxim ' *In pari delicto potior est conditio possidentis*' were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced if debtors who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property into the possession of which he was so unrighteously and unwisely put.

"The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it ; and, despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers* (4) and the authorities upon which that decision is based clearly establish this. *Symes* v. *Hughes* (5) and *In re Great Steamboat Berlin Co.*, (8) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry L. J. in *Kearley* v. *Thomson* (7)."

On the facts found, no doubt, Bhupatrai in his lifetime had by means of this collusive transaction succeeded in delaying plaintiff 1 in realizing her right of residence in the property under the compromise decree. The fraud contemplated on plaintiff 1, however, was in the nature of a continuous act whereby she would be defrauded of her right to reside in the property during her lifetime. Had Bhupatrai lived it would have been open to him to retract from his fraudulent purpose and revoke the authority he had given to his confederates the vendee and the mortgagee for carrying on the fraud. Plaintiffs 2 to 4 who now stand in the shoes of Bhupatrai have by their pleadings repudiated the fraud perpetrated by Bhupatrai and propose to redeem the property from the mortgagee which would carry out the intention of the compromise decree and enable plaintiff 1 to enjoy the right of residence conferred on her by the decree. On the evidence in the case it appears that plaintiff 1 is still a young widow and it would be a matter of speculation to say how many more years she is likely to live and enjoy the right of residence given to her under the compromise decree. Bhupatrai by fraud kept plaintiff 1 out of that right from 12th October 1916, when the property should have been redeemed by him, until this suit was filed when Bhupatrai's heirs and universal legatees repudiated the fraud and offered to undo the wrong. In the circumstances, in my opinion, it cannot be said that the fraud

(2) [1906] 33 Cal. 967=4 C. L. J. 22=10 C. W. N. 650.

(3) [1908] 35 Cal. 551=35 I.A. 98=12 C.W.N. 562=4 L. B. R. 266=7 C. L. J. 528 (P.C.)

(4) [1876] 1 Q. B. D. 291=46 L. J. Q. B. 39=24 W. R. 499=34 L. T. 938.

(5) [1870] 9 Eq. 475=39 L. J. Ch. 304=22 L. T. 462.

(6) [1884] 26 Ch. D. 616=54 L. J. Ch. 68=51 L. T. 445.

(7) [1890] 24 Q. B. D. 742=59 L. J. Q. B. 288 =54 J. P. 804=63 L. T. 150=38 W. R. 614.

has been substantially accomplished. Further the position as between plaintiffs 2 to 4 on the one hand and the respondents on the other appears now to be this: that although plaintiffs 2 to 4 have resiled from the fraud as originally contemplated and are offering to act rightly and justly in respect of the property in suit, the respondents are endeavouring to benefit by the fraud to the detriment not only of the heirs and universal legatees of Bhupatrai but also of plaintiff 1. There is no offer even now by respondent 1 to undo the wrong done to plaintiff 1 by redeeming the property and putting her in possession of it as contemplated by the compromise decree. The right given by the lower appellate Court to plaintiff 1 to redeem the property is not as substantial as that which would accrue to her if the heirs and universal legatees of Bhupatrai were to redeem the property and let plaintiff 1 reside in it in terms of the compromise decree. By redeeming the property herself all that plaintiff 1 would get would be the right which the mortgagee in possession now enjoys. Her residence in the property would be in virtue of the right of the mortgagee in possession and not in virtue of the compromise decree. By giving her the right to redeem the property the lower appellate Court has not effectively undone the fraud which was practised on plaintiff 1 by means of the sale-deed, but has left that sale-deed intact and operative and has allowed plaintiff 1 to get possession of the property only if she chooses to redeem the mortgage. That must necessarily mean that a widow who admittedly has no independent means of her own must find a sum of Rs. 599 to redeem the property. Under the decree of the lower appellate Court it would not be to the interest of plaintiffs 2 to 4 to find the money for plaintiff 1 to redeem the property, for on her death the property would go to the vendee on payment by him of Rs. 599 to the heirs of plaintiff 1. In my opinion the equities seem to be in favour of the plaintiffs and it has not been shown that the defendants are entitled to benefit by a transaction which has been proved to be fraudulent and collusive.

I would reverse the decree of the lower appellate Court and restore the preliminary decree for redemption passed by the first Court with costs throughout. The sentence "Each party to bear his own costs" should be deleted from the decree of the first Court.

Baker, J.—I agree. The facts, which are rather complicated, are fully set out in the judgments of the Courts below. The principal contention in this appeal is as to the right of plaintiffs 2 to 4, who are the heirs of Bhupatrai under his will, to redeem the house in suit. It has been found by both Courts that the object of the sale by Bhupatrai to the father of defendant 2 was to defeat the claim of plaintiff 1, Bai Devmani, to residence in the house in suit although she had obtained a consent decree in her favour, and that the sale was a collusive transaction.

The first Court found that the sale was collusive and without consideration. The lower appellate Court agreed that the sale-deed was collusive, and was made with the intention of defeating Bai Devmani's claim but held that it was not nominal. He accepted the finding of the trial Court that the cash payment was not made, and the item for repairs was not proved. He, however, held that the mortgagee was entitled to claim Rs 599 from the vendee, and further the item of Rs. 400 equivalent to Bai Devmani's right of residence. This amount was admittedly kept by the vendee, and as the vendee never redeemed the mortgage, and his representative is not willing to do so, it will appear that as a matter of fact there was no actual payment of consideration at all. The sale, therefore, appears to be nominal, collusive and without consideration, a plea which is supported by the fact that the vendee was a person of no means, and made no actual attempt to get possession of the property, nor do his heirs wish to do so. The arguments of the learned pleader for the respondents founded on the question of sale and the vendor's lien for unpaid purchase money, do not, in my opinion, apply to a case like the present, where the transaction is altogether a sham. It is not shown that plaintiffs 2 to 4, the heirs of Bhupatrai, are estopped by reason of Bhupatrai's admission as to the validity of the sale.

There could be no estoppel when both parties are fully acquainted with the real state of facts, and the vendee, who was a party to a sham transaction, has not been led to change his position by

reason of any admission made by Bhupatrai. The admission of Bhupatrai made in proceedings between himself and plaintiff 1, his daughter-in-law, was apparently intended to defeat her claims, and in the circumstances found by the lower Courts the admission was untrue in so far as it affirmed the validity of a nominal and collusive transaction. Plaintiffs 2 to 4 are not members of a joint Hindu family with Bhupatrai, but are his heirs under a will, and the principal point argued in this appeal is whether they are entitled to challenge the validity of the sale and claim redemption of the mortgage. It is contended that as they stand in the shoes of Bhupatrai, and as he could not have challenged the transaction, they could not do so either. In view of the findings as to the nature of the transaction, the equities are clearly in favour of plaintiffs, and the point is whether any provision of law prevents those equities being enforced.

The law on the subject has been clearly laid down in the leading cases of *Jadu Nath Poddar* v. *Rup Lal Poddar* (2) and *Petherpermal Chetty* v *Muniandy Servai* (3), which is a decision of the Privy Council. The law is that when a transaction is entered into with a fraudulent object, if the fraud is successfully carried out, the transferrer cannot avoid it, both parties being in pari delicto. But it is otherwise when the fraud is not accomplished. The question then will be whether in this case the fraud was accomplished. The object of the fraud as found by both Courts was to defeat Devmani's right of residence in the house transferred. That right, however, was a continuing right to which she is entitled during her lifetime, and she is yet a young woman. That right has been delayed, but it has not yet been defeated, for, as pointed out by the learned pleader for the appellants, there is no decree of any Court by which her right of residence is negatived On the contrary there is a decree by which the right is expressly declared. It cannot, therefore, be said that the fraud has been carried out so long as Bai Devmani is not absolutely precluded by a final decree from enforcing her right of residence.

In view of the remarks of the Privy Council in *Petherpermal Chetty* v. *Muniandy Servai* (3), it would appear that it would have been open to Bhupatrai to repudiate the transaction, and consequently it is equally open to his heirs, plaintiffs 2 to 4 to do so I agree, therefore, that they should be allowed to redeem along with plaintiff 1, and I am also of opinion that when plaintiff 1, Bai Devmani, who was not a party to those transactions has a right of residence founded on a decree, it is inequitable that she should be compelled alone to redeem the mortgage, which she, a widow is probably not in a position to do. I, therefore, agree that the decree of the lower appellate Court should be reversed, and the appeal allowed with costs throughout.

R.K. *Appeal allowed.*

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PATKAR AND MURPHY, JJ.

Madhavrao Anandrao Raste—Defendant—Appellant.

v.

Shri Omkareshvar Ghat—Plaintiff—Respondent.

Appeal No. 46 of 1927, Decided on 30th October 1928, from order of Asst. Judge, Satara, in Appeal No 18 of 1926.

Civil P. C., S. 92—Suit by religious institution against trustees not of the institution but of different fund for recovering certain portion of the fund is not barred by S. 92.

Two conditions are necessary for the application of S. 92: first, there must be an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, and, secondly the direction of the Court is deemed necessary for the administration of such trust. A suit brought by a charitable institution to recover the amount due to itself by the defendant's family, who have constituted themselves trustees of the fund liable to pay certain portion of that fund to the institution for the observance of the several festivals in which the institution is interested, does not fall within the provisions of S. 92 because, as soon as the amount is paid by the defendant's family they have no further interest in the administration of the fund so far as the institution is concerned : *A. I. R.* 1923 *Bom.* 67; 21 *Mad.* 406, *Rel. on*; *A. I. R.* 1924 *Bom.* 518; 23 *Bom.* 659; *A. I. R.* 1922 *Mad.* 17 (*F.B.*) *Dist. A. I. R.* 1928 *P. C.* 16, *Appl.* [P 154 C 2, P 155 C 1]

Jayakar and *V. D Limaye*—for Appellant.

P. V. Kane—for Respondent.

Patkar, J.—This is a suit brought by the Shree Omkareshvar Ghat of Kondodant Nana Gadgil, through its vahivatdars, the plaintiffs, against the defendant

Sardar Madhavrao Anandrao Raste, for an account for the years 1880 to 1923 in respect of the amount due for 2/16th share payable to the plaintiff institution by the defendant and for the determination of the balance due from the defendant after deducting the amounts of village expenses, and for the recovery of the balance due from the defendant.

The principal contention on behalf of the defendant in the written statement was that the suit was bad for want of a certificate under S. 92, Civil P. C.

The learned Subordinate Judge held that the suit was barred by S. 92, and O. 1, R. 8, Civil P. C , and dismissed the plaintiff's suit. On appeal, the learned Assistant Judge reversed the decree of the lower Court and remanded the suit for decision on the merits, holding that the suit was not barred under S. 92 and O. 1, R. 8, Civil P. C.

The defendant, in this case, is described as a trustee in the plaint The ancestor of the defendant granted a Dharadatta Agrahar Inam in the year 1803 to several institutions, viz., the Shri Mahalaxmi of the Rastes, the seven Ghats of Wai and to seventeen specified Brahmin families. The plaintiff institution is one of the seven Ghats. The defendant's ancestor may be considered to have constituted himself and his family as trustee of the fund liable to the several institutions The learned Assistant Judge is of opinion that the present suit is brought by the plaintiff iustitution through its Vahivatdars for recovery of the arrears from a person who is the holder of the fund charged with the liability to pay for expenses of the festivals of the plaintiff institution.

The question, therefore, in this appeal, is whether S. 92, Civil P. C., bars the present suit for want of a certificate from the Collector, and whether the Subordinate Judge had jurisdiction to decide the suit as it was not a principal civil Court of original jurisdiction.

The scope of S. 92 has been discussed in a recent decision of the Privy Council in *Abdur Rahim* v. *Abu Mahomed* (1), where it was held that, under the Civil Procedure Code of 1877, as well as the Code of 1882, the question had arisen whether S. 539 was mandatory and, therefore, all suits claiming any relief mentioned in S. 539 should be brought as required by that section or whether the remedy provided by S. 539 corresponding to S. 92 of the present Code was in addition to any other remedy that existed under the law for redress of any wrongful action in connexion with a public trust of a charitable or religious nature. The view of the Bombay High Court, that the suit which prayed for any of the reliefs mentioned in S. 92 could only be instituted in accordance with the provisions of that section, was accepted by the Privy Council in the case of *Abdur Rahim* v. *Abu Mahomed* (1). The question therefore, in this case, is whether the present suit falls within the ambit of S. 92, Civil P. C. It has been argued on behalf of the appellant that the suit falls within the provisions of S. 92. Two conditions are necessary for the application of S. 92: first, there must be an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, and, secondly, the direction of the Court is deemed necessary for the administration of such trust. It is urged on behalf of the appellant that there is an allegation in the plaint of a breach of an express trust created for public purposes of a charitable or religious nature, and reliance is placed on paras 4 and 7 of the counter-written statement of the plaintiff. It is urged on behalf of the respondent that the statements in paras 4 and 7 in the counter-written statement were made in answer to the contention of the defendant in the written statement that he was not a trustee and was not liable to pay anything to the plaintiff institution It is further urged on behalf of the respondent that in the original plaint there is no express allegation of a breach of trust on the part of defendant In para. 4, it is said :

"Some amount is being received from the defendant from year to year for the Shrikrishnotsava of the plaintiff's Madhali Allicha Ghat (of Kondopant Nana). But it is not known whether the same is given in the proportion of the income received or in the porportion of the right.

And it is further stated in the same paragraph :

"So the whole matter should be made clear."

It is suggested on behalf of the appellant that these statements amount to an allegation of a breach of an express trust created for a public purpose. We do not.

(1) A. I. R. 1928 P. C. 16=55 Cal. 519=55 I. A. 96 (P.C.)

agree with the contention on behalf of the appellant that there is an alleged breach of any express or constructive trust created for public purposes in the plaint, and though such an allegation may by twisting of language be spelt out of the statements in the counter-written statement we think that for the purpose of S. 92 there must be a clear allegation of a breach of an express or constructive trust created for public purposes. It does not appear from the plaint that any direction of the Court is invoked for the administration of any such trust. In the present case there are two trusts, a trust which is to be performed by the defendant in respect of the fund of which the members of the defendant's family have constituted themselves trustees, and a second trust in respect of the plaintiff institution for the purpose of the several festivals which are to be performed during the year As soon as the amount payable by the defendant's family is made over to the plaintiff-institution the plaintiffs are interested in the administration of the trust relating to the plaintiff institution, and the defendant family is not interested in the administration of that trust. In the plaint no direction is invoked in regard to the administration of the trust relating to the fund in the possession of the defendant's family ; nor is there any direction invoked in regard to the administration of the trust relating to the plaintiff institution The suit is a simple suit of the plaintiff institution through its managers to recover the amount payable by the defendant In my opinion there being no express allegation of a breach of a constructive trust for public purposes and there being no prayer for direction to the Court for the administration of such trust, S. 92, Civil P. C , does not apply to the present suit What we have to see is the nature of the suit, not in its form but in its substance. Though an account is asked for and that relief may fall under S. 92 (d), the present suit is really a suit brought by the plaintiff institution to recover the amount due to the plaintiff institution by the defendant's family, who have constituted themselves trustees of the fund liable to pay certain portion of that fund to the plaintiff for the observance of the several festivals in which the plaintiff institution is interested.

On behalf of the appellant a reference is made to the case of *Narayan* v. *Vasudeo* (2). In that case the difficulty of deciding whether a particular case falls within the scope of S. 92 was recognized. The facts of that case are quite different from the facts of the present case. There the defendants trustees were in the actual management of the temple in respect of which the suit was brought and there was a prayer for a direction as to what should be done with the trust funds. The suit there was against the trustees of the temple in respect of which the suit was brought and there was a specific relief asking for a direction as to what should be done with the trust funds. In that case there was really a dispute between the parties as to who were or should be the trustees of a public trust. In the present case as soon as the amount was paid by the defendant's family they had no further interest in the administration of the fund so far as the plaintiff-institution was concerned.

In the case of *Jugalkishore* v. *Lakshmandas* (3), referred to on behalf of the appellant, it was held that the defendant, though he was not appointed as a trustee had made himself a constructive trustee, by purporting to manage it as temple property and was liable as such to the beneficiaries. That was a suit brought on behalf of a Hindu temple by the pujari and five other worshippers of the idol alleging a breach of a constructive trust and praying for the removal of the defendant from the management and for settlement of a scheme under the directions of the Court for the future management of the charity.

In *Nilkanth Devrao* v. *Ramkrishna Vithal* (4) it was held that S 92 applied only when two conditions were satisfied, first, either there must be an alleged breach of an express or constructive trust created for a public purpose of a charitable or religious nature, and, secondly, a direction of the Court must be deemed necessary for the administration of any such trust. It was further held that unless the suit fell within the scope of S. 92, Civil P. C., 1908, the mere fact that it resembles in certain respects a suit which may properly be brought under S. 92 can afford no good ground for holding that S. 92 could apply. In that case

(2) A. I. R. 1924 Bom. 518.
(3) [1899] 23 Bom. 659=1 Bom. L. R. 118.
(4) A. I. R. 1923 Bom. 67=46 Bom. 101.

the suit was brought by the hereditary muktesars (trustees) of a temple for a declaration that defendants 1 to 4 were not properly appointed trustees of the temple, and for an injunction restraining them from interfering with the plaintiffs in the management of the affairs of the temple, and it was held that the suit was outside the scope of that section as the plaintiffs were not suing on account of any breach of trust as contemplated by it, nor were they applying for any direction of the Court for the administration of the trust.

The case of *Appanna Poricha* v. *Narasinga Poricha* (5), which refers to a suit brought by one of the trustees against a co-trustee for accounts, does not directly apply to the facts of the present case where the defendants are not the trustees of the plaintiff-institution, but trustees of a different fund liable to pay a portion of the fund to the plaintiff-institution.

The case of *Nellaiyappa Pillai* v. *Thangama Nachiyar* (6) resembles the present case in its essential features. In that case the trustees of a temple sued to recover from the representatives of the trustees of a fund constituted for special purposes in connexion with the temple worship a sum of money misappropriated by him and to obtain the appointment in his place of himself or some other fit person, it was held that the suit was maintainable without the sanction of the Advocate-General or the Collector under S. 539, Civil P. C. In the present case, however, there is no prayer for removal of the defendant from his position of a trustee of the fund in his charge We think, therefore, the view of the lower appellate Court is correct that the suit is not barred by S. 92, Civil P. C.

Another point which was not taken in the lower Court is urged on behalf of the appellant, viz., that the present suit brought by the institution described as Shri Omkareshvar Ghat was not maintainable. On the other hand, it has been argued on behalf of the respondent that it is a religious institution and that the present suit is not brought on behalf of the public, but to enforce the individual right of the plaintiff-institution entitled to receive a portion of the income from the defendant. A temple is attached to each of the several Ghats. We agree with the contention of the respondent that the suit is maintainable by the present plaintiff-institution, the Shree Omkareshvar Ghat, a religious institution. The property can be said to belong to the plaintiff-institution in an ideal sense like other religious institutions and temples. The plaintiff-institution like a math or an idol is a juristic person capable of holding property and acquiring and vindicating legal rights though of necessity it can only act in relation to those rights through the medium of some human agency: see *Jodhi Rai* v *Basdeo Prasad* (7) and *Babajirao* v. *Laxmandas* (8). The plaintiff-institution can, therefore, bring a suit through its vahivatdars, the Panchas. The suit, therefore, brought by the present plaintiff is not a suit brought on behalf of the public for vindication of the rights of the general public as contemplated by S. 92, but was a suit by the plaintiff-institution to enforce the right to recover the amount due to the institution from the defendant. We think that the view of the lower Court is correct and, therefore, dismiss the appeal with costs

Murphy, J.—The facts have already been fully set out in my learned brother Patkar's judgment, and I need not recapitulate them The simple question before us is whether the plaintiff's suit is within one of the classes covered by S 92, Civil P C, and is consequently barred by the formalities required by that section not having been complied with, or is not covered by the section. I think that it is not a suit of the nature contemplated in S 92 It was actually brought by certain persons, who described themselves as the "Panchas" of a charity known as "Shree Omkareshvar Ghat," against the representative of the Raste family whose ancestor was the donor of an allowance of Rs. 100 to this "Ghat," apparently for the purposes of the annual "Utsava" and in support of its attached Brahmins. In fact, it is a claim by the Brahmins for what they believe to be a larger sum which has become available owing to an increase in the village revenue, out of which the allowance is to be paid. The class of cases included in S. 92 has been very clearly defined in

(5) A. I. R. 1921 Mad. 17=45 Mad. 113 (F.B.).

(6) [1897] 21 Mad. 406=8 M. L. J. 119.

(7) [1911] 33 All. 735=11 I. C. 47=8 A. L. J. 817.

(8) [1903] 28 Bom. 215=5 Bom. L. R. 932.

two cases on which I rely. The first of these is *Nilkanth Devrao* v. *Ramkrishna Vithal* (4), where the principle has been laid down that to be covered by the section there must either be an allegation in the plaint of a breach of trust, or a prayer for direction on some point in connexion with its management. Although it has been urged before us that an allegation of breach of trust has been made in this case, it certainly has not been made in clear terms, though it may possibly and with difficulty be spelled out from the plaintiff's counter written statement

The second case I rely on is *Appanna Poricha* v *Narasinga Poricha* (5). Kumaraswami Sastri, J , has at p. 127 of the same volume clearly defined the general classes of cases to which S. 92 was intended to apply. In his opinion the object was that it should govern suits by the public, or by the Advocate-General, or the vindication of the rights of the public in charitable trusts, and the relief asked for should be all or any of the reliefs specified in Cls (a) to (h) of sub-S (1) It appears to me that, looking at the section in the light of and with the aid of the opinions to be found in these rulings, it is not possible to say that the present suit, as framed, comes within any of the classes to which the section was intended to apply. I agree, therefore, that the learned Assistant Judge's judgment is correct, that his order of remand is proper, and that the appeal should be dismissed with costs.

R K. *Appeal dismissed.*

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MIRZA AND BAKER, JJ

Emperor

v

Thavarmal Rupchand —Accused.

Criminal Appeal No. 643 of 1927, Decided on 9th November 1928, against order of acquittal passed by Chief Presidency Magistrate, Bombay.

(a) Bombay Prevention of Gambling Act (1887), S. 6—Provisions should be strictly construed.

The powers given under S. 6 are very wide and are apt seriously to interfere with the liberty and property of the subject; the section therefore should be strictly construed and the conditions required for its coming into operation should be strictly complied with.

[P 159 C 2]

Where a warrant contained somewhat inaccurate description of the place to be searched but it was clear from the rest of the description contained in the warrant that the inaccuracy was not so material or substantial as to mislead a stranger if one were to go to the locality and attempt to find the place intended to be raided, with the help of the warrant,

Held: that the inaccuracy did not amount to more than a misdescription and was not of a nature to vitiate the warrant. *A. I. R.* 1926 *Bom.* 195, *Dist.* [P 160 C 2]

Per Baker, J.—The absence of numbers of buildings would not vitiate the warrant if the buildings to be searched are otherwise sufficiently described: 6 *Bom. L. R.* 52; *A. I. R.* 1926 *Sind* 254; (1905) *A. W. N.* 105, *Ref.*

[P 169 C 2]

(b) Bombay Prevention of Gambling Act, S. 6—Warrant comprising more than one tenement does not cease to be special.

The words "house, room or place" contained in S. 6 have no reference to a particular house, room or place, or to houses, rooms or places if they are owned by one and the same person and are used for a common purpose. The words should be taken broadly as meaning houses, rooms or places apart from the more restricted notion of a tenement. If the houses, rooms or places have substantially been utilized for the common purpose of gambling it would not matter if the houses, rooms or places comprised more than one tenement. The fact therefore that the warrant comprized more than one tenement would not make it a general warrant. The term "special warrant" has reference only to the limitation as regards the person or persons who would be competent to execute it:

[P 160 C 2]

(c) Criminal P. C., S. 98—Special warrant cannot be endorsed to another officer—Bombay Prevention of Gambling Act, S. 6.

The special warrant when issued authorizes the officer or officers named therein to do all the things that are detailed in the warrant. It cannot be endorsed over to any other police-officer of similar rank. The only person who can execute such a warrant is the officer who is named in the warrant. [P 160 C 2]

(d) Public Gambling Act (1867), S. 1—Books of record are instruments of gaming—Bombay Prevention of Gambling Act, S. 3.

Books used for the purpose of registering or recording any gaming transaction would fall within the definition of "instruments of gaming" 6 *Bom. L. R.* 249; 29 *Bom.* 264, and 40 *Bom.* 263, *Rel. on.* [P 161 C 1]

A register or record of transactions in American Futures was held to be an instrument of gaming 28 *Bom.* 616, *Dist.*, so also a book which contained a register or Kacha Khandi transaction and Teji Mandi transactions *A. I. R.* 1922 *bom.* 408 and 37 *Bom.* 264, *Ref.*; 24 *Bom.* 227, *Rel. on*; *Thacker* v. *Hardy*, (1878) 4 *Q. B. D*, 685, *Dist.* [P 165 C 1, 2]

(e) Contract Act, S. 30—Delivery not contemplated—Contract is wagering.

In order to decide whether a contract is of a wagering nature the Court must probe into

the real intention of the parties. If their intention was that there should be delivery there is no wager, but if neither party had any intention to give or take delivery it is otherwise: *Universal Stock Exchange* v. *Strachan*, (1896) *A.C.* 166; *In re Gieve*, (1899) 1 *Q.B.* 794 and 24 *Bom.* 227, *Rel. on.* [P 170 C 2]

P. B. Shingne—for the Crown.

H. C. Coyajee, *G. N. Thakor*, *Kapadia*, *M. N. Chhatrapati* and *V. N. Chhatrapati*—for accused.

Mirza, J.—This is an appeal by the Government of Bombay from an acquittal of the accused by the Chief Presidency Magistrate, Bombay, on a charge of keeping a common gaming house under S. 4 (a), Bombay Prevention of Gambling Act, 4 of 1887.

The main points for consideration in this appeal are: (1) Whether the warrant under which the accused was arrested was legal; (2) Whether the articles seized from the accused's room were instruments of gaming; and (3) Whether the business the accused was conducting in the place raided was gaming.

The learned Magistrate has found that the warrant of arrest was illegal and that the business in which the accused was engaged was not of a wagering nature. It can also be gathered from the judgment that the Magistrate was of opinion that the prosecution had failed to prove that any of the books or articles seized from the accused's room or person were instruments of gaming.

The objection taken on behalf of the accused to the warrant is that it is vague as regards the localization of the gaming, that there is no sketch or plan annexed to the warrant and that the municipal number of the accused's tenement is not inserted in the description of the place set out in the warrant. It is also contended on behalf of the accused that the three buildings to which the warrant refers are not properly described. The Magistrate is of opinion that there cannot be any doubt that the warrant does specify with sufficient details the open space referred to in the warrant, but holds that the warrant in this case is in the nature of a general warrant and hence bad in law. He holds that the warrant does not contain a proper description of the houses or the rooms which were to be raided. The description contained in the warrant according to the Magistrate is both erroneous and vague. The description in the warrant to which exception is taken is as follows:

"A certain place situate at New Satta Gully off Sheikh Memon Street in the open space partially covered by a tarpaulin which is bounded by the three chawls known as Motishaw, Narsidas Jeykisandas and Dwarkadas Jeykisandas chawls and also the otlas and rooms on the ground-floors of the said three chawls which open on to the said open space."

The evidence shows that the private gully by which the chawls in question are approached has acquired the name in the locality of "the New Satta Gully." It is in close proximity to what was known as "the Satta Gully" where business of a highly speculative, if not gambling, nature was originally being carried on. Since the new business came to be established in the present locality, the approach to those business premises has come popularly, to be known as "the New Satta Gully," to distinguish it from the original Satta Gully which is now known as "the Old Satta Gully." Although the public are using the New Satta Gully it is doubtful whether they have yet acquired a right of way over it by user. The Bombay Municipality does not claim it as a public road but the Municipal Officials for their own guidance have marked it in their private books as the "New Satta Gully." The evidence also establishes that the main approach to the New Satta Gully is from Sheikh Memon Street. The evidence also shows that at the time of the raid and sometime prior thereto there was a tarpaulin which partially covered a certain open space bounded by three chawls in this locality. According to Newland's plan the whole property is known as Motishaw's chawl. Motishaw apparently was the original owner of this property. The property has since passed through different hands and consists now of eleven chawls, five on one side of the open space or "New Satta Gully" and six on the other side. The whole property was recently owned by one Jeykisandas. Since his death, by a consent decree in 1915 in a suit in this Court, the property has been divided between his two sons Narsidas Jeykisandas and Dwarkadas Jeykisandas. The five chawls on one side of the open space or "New Satta Gully" are allotted to Narsidas and the six chawls on the other side to Dwarkadas. By the terms of the consent decree Narsidas and Dwarkdas

and their respective tenants are given the right to use the open space or Gully. The evidence, however, does not satisfactorily establish that the chawl described in the warrant as Motishaw's chawl refers to a chawl exclusively known by that name. According to the evidence that decription might very well apply to any of the eleven chawls situated in the locality. The evidence does not show that the other two chawls referred to in the warrant as Narsidas Jeykisandas chawl and Dwarkadas Jeykisandes chawl are known respectively by those names. According to the evidence these two chawls would each be known as Motishaw's chawl as much as any of the eleven chawls in the locality. The particular nomenclature adopted by the warrant in respect of the three chawls seems no doubt to be incorrect and may be said to amount to a misdescription. They are, however, in my opinion, sufficiently identified by reference to the further description that the otlas and rooms on the ground-floors of the said three chawls open on the said open space which is partially covered by a tarpaulin. This description can apply only to certain three chawls out of the eleven and not to any of the remaining eight. It is further clear from the evidence that since July 1925 the Shri Mahajan Association had established its office on the second floor of one of these three chawls and had enlisted a large number of members who were doing business under its auspices in what is known as Kacha Khandi. For the purposes of that business the Mahajan had utilized the otla on the ground-flooor of its office for keeping a board on which cotton rates were published from time to time. It also regarded the open space in front of its office as the building compound where it would be permissible, for its members to transact business in Kacha Khandi. Owing to these new activities a number of brokers and merchants had rented office-rooms on the ground-floors of three out of the eleven chawls and business in Kacha Khandi was being openly transacted in these rooms as well as in the open space roughly bounded by the three chawls.

It is clear from these circumstances that the tarpaulin was put up on the open space in order to protect from the sun and rain the brokers, merchants, and members of the public who resorted to the place to transact business. The learned Magistrate was of opinion that the partial covering of the open space by a tarpaulin was not of much importance as it had since been removed. I do not agree with that expression of opinion as in my judgment what we are primarily concerned with in this case is to ascertain how the property looked at the time of the raid and some time prior thereto and not what changes it has since undergone.

Mr. Coyajee has relied on this point upon an additional circumstance It appears that within the area covered by the warrant there are a pan or betelnut shop and an old cloth shop. The police-officers did not raid the pan shop but they raided the cloth shop and arrested certain persons and seized certain articles there. Later on they released these persons and returned the articles to them Mr. Coyajee contends that a warrant which is so general as to include in its purview the betelnut and cloth shops must be regarded as a general and vague warrant.

Section 6, Bombay Prevention of Gambling Act, empowers the Commissioner of Police in the City of Bombay on complying with certain conditions to give authority by special warrant under his hand to any Inspector or other superior officer of police of not less rank than a Chief Constable :

" (a) to enter, ... by night or by day, and by force, if necessary, and such house, room or place, [as described in the warrant], and

(b) to take into custody and bring before a Magistrate all persons whom he finds therein, whether they are then actually gaming or not, and

(c) to seize all instruments of gaming and all moneys and securities for money, and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein, and

(d) to search all parts of the house, room or place, which he shall have so entered, when he shall have reason to believe that any instruments of gaming are concealed therein, and also the persons of those whom he shall so find therein or take into custody, and to seize and to take possession of all instruments of gaming found upon such search."

The powers given under this section are very wide and are apt seriously to interfere with the liberty and property of the subject This section should be strictly construed and the conditions required for coming into operation should be strictly complied with. In describing he place in the warrant it is necessary

that there should be great accuracy and freedom from ambiguity. In *Emperor* v. *Abashhai* (1) a Division Bench of this Court has held that the question of the legality of the warrant issued under the provision of S 6, Gambling Act, is in the nature of a preliminary objection. In that case the warrant referred only to house No 486 Budhwar Peth, Poona City, when the house actually searched was not 486, but 484, and on that description the Court held the warrant to be illegal. That case, however, in my opinion, can be distinguished from the present.

The warrant in that case gave no other description of the property as there was in *Emperor* v *Krishna Rutna Dalvi* (2) or in *Emperor* v *Jhunni* (3). In the case before us the warrant does not give a description of the place which would identify it with some place other than the place which was actually raided.

In considering whether the place mentioned in the warrant is sufficiently identified we cannot overlook the fact that the place was being put to a particular use, namely, of carrying on the business of Kacha Khandi. Halsbury in his Laws of England, Vol. 15, in the article on 'Gaming and Wagering,' para 599, states :

"The 'place' and the 'use' to which it is put are conceptions very closely connected, for the localization of the business of betting underlies them both. Once it is established that a business of betting is carried on, if then it is found that the business is localized so that people may fairly be said to resort to the place where it is carried on, the place is sufficiently defined. [See *Powell* v. *Kempton Park Racecourse Co.* (4).] And as the 'localization' is brought by the kind of use to which the place is put, its presence is a question of fact". [See *Brown* v. *Potch* (5).]

It is clear from the evidence that this place comprising the open space partially covered with a tarpaulin, the otlas and the rooms on the ground-floors of the three chawls opening out into the open space were all being used substantiallly as one place for the purpose of Kacha Khandi business. The cloth shop and pan shop included in the area would not, in my opinion, materially alter the general character of the place as one where Kacha Khandi business was being carried on. Although the description of the three chawls appears to be inaccurate in some particulars, it is clear from the rest of the description contained in the warrant that the inaccuracy is not so material or substantial as to mislead a stranger if one were to go to the locality and attempt to find the place intended to be raided, with the help of the warrant. The inaccuracy does not, in my opinion, amount to more than a misdescription and is not of a nature to vitiate the warrant.

The learned Magistrate is of opinion that the 'special warrant' referred to in S. 6, Gambling Act, has reference, in addition to its being addressed to a particular officer or officers to a particular house or particular owner or occupier of that house The words 'house, room or place' contained in S. 6, in his opinion have reference to a particular house, room or place, or to houses, rooms or places if they are owned by one and the same person and are used for a common purpose There is nothing in the section which, in my judgment, would restrict its operation to the class of cases set out by the Magistrate. Houses, rooms or places, in my opinion, should be taken broadly as meaning houses, room or places apart from the more restricted notion of a tenement. If the houses, rooms or places have substantially been utilized for the common purpose of gambling it would not matter, in my judgment, if the houses, rooms or places comprised more than one tenement. I am unable to agree with the learned Magistrate's opinion that if the warrant comprised more than one tenement it would be a general and not a special warrant unless all the tenements were held by one and the same person who used them for the common purpose of gaming The term "special warrant," in my opinion, has reference only to the limitation as regards the person or persons who would be competent to execute it. The special warrant when issued authorizes the officer or officers named therein to do all the things that are detailed in the warrant The warrant issued under S. 98, Criminal P. C. is not a special warant as it can be endorsed over to any other police officer of similar rank. In the case of a special warrant the only person who can execute the warrant is the officer who is named in the warrant. The warrant in this case, in

(1) A. I. R. 1926 Bom. 195=50 Bom. 344.
(2) [1904] 6 Bom. L. R. 52.
(3) [1905] A. W. N 105=2 Cr. L. J. 243.
(4) [1899] A. C. 143=68 L. J. Q. B. 392=15 T. L. R. 266=63 J. P. 260=47 W. R. 585 =80 L. T. 538.
(5) [1899] 1 Q. B. 892=68 L. J. Q. B. 588=15 T. L. R. 312=47 W. R. 623.

my judgment, did not cease to be a special warrant because it applied at the same time to a large number of the tenements and persons. The common purpose for which the tenements were held was to transact Kacha Khandi business in them within a particular area, and as the warrant applies substantially to this area which for practical purposes may be regarded as a market for Kacha Khandi transactions, it does not, in my opinion, suffer from the infirmity of being general, indefinite or vague

Disagreeing with the learned Magistrate's view, I hold that the warrant issued by the Deputy Commissioner of Police and executed by the officers mentioned therein was a legal warrant under S. 6, Gambling Act

With regard to the second point, whether the articles found in the accused's room were instruments of gaming, the point is not free from difficulty. Reliance is placed by the prosecution in this connexion, on the three account books seized from the accused's room: (1) a book containing apparently a record of transaction in American Futures; (2) a book containing a record of transactions in Kacha Khandi; and (3) a book containing a record of Teji Mandi transactions entered into by the witness Akbarbhai. By the Gambling Act as since amended "instruments of gaming" include "any document used as a register or record or evidence of any gaming." If it can be shown, therefore, that any of the above books was used for the purpose of registering or recording any gaming transaction it would fall within the definition of "instruments of gaming" This would appear to imply that the transactions recorded in the books must be shown to be gaming transactions before the books can be relied upon as "instruments of gaming." In *Emperor* v *Chaganlal* (6), a Division Bench of this Court has held that a person keeping for his profit a place where brokers and others carry on Jota business i. e, wagering from day to day on the total sale of cotton bales in Liverpool, and where the wagering books are kept or used, was guilty of keeping a common gaming house. To the same effect is the ruling in *Emperor* v. *Lakhamsi* (7), where it was held that a single page of paper used for registering wagers is an instrument of gaming within the meaning of S. 3, Bombay Prevention of Gambling Act, 1887. In *Emperor* v *Manilal* (8), a Division Bench of this Court has held that a book used for recording entries of the bets made by those frequenting a place is an instrument of gaming

The first book relied on by the prosecution appears from its contents to be a register or record of transactions in American Futures. According to the witness Dady Mehta, a transaction in American Futures is a gamble in the rise or fall of the price of American cotton in New York. This, he says, is determined every day on the receipt of the closing rate of American cotton which is generally received in Bombay at about 2 a. m. The business according to him is closed for the day and is not carried over. The transaction is also known according to this witness as Jotta Patia which is a place where they do this class of wagering business. The unit in his gambling is 100 pice. A man can take any number of units Mr. Dady Mehta gave it as his opinion that the entries shown to him from this book were a register of transactions in American Futures. In cross-examination Mr. Dady Mehta was unable to explain how certain items in this book were arrived at. The Government Pleader took us through several of the entries which are exhibited from this book including those which Mr. Mehta was unable to explain in the lower Court and showed that the items could be explained by the application of the rules relating to American Futures as deposed to by Mr. Dady Mehta.

The matter of these entries was particularly within the knowledge of the accused. S. 106, Evidence Act, requires that when any fact is especially within the knowledge of any person, the burden of proving that fact should be upon him. The accused has given no explanation of the entries appearing in this book either in his written statement or in the evidence of the witnesses he called. Mr Coyajee, on his behalf, has not been able to show in what particular the explanation given by the Government Pleader can be said to be erroneous. He contends that it was for the prosecution expert witness Dady Mehta to have given such explanation and as he has failed to do so,

(6) [1904] 6 Bom. L. R. 249.
(7) [1904] 29 Bom. 264=6 Bom. L. R. 1071.
(8) [1915] 40 Bom. 263=31 I. C. 1003=17 Bom. L. R. 1080.

his evidence on the subject should be totally disregarded. The entries having been exhibited and the evidence of the expert having shown that a certain general rule is applicable to transactions in American Futures, it is open, in my opinion, for the Court to consider whether the exhibit on the face of it bears out what the witness has stated about it in his evidence. I am satisfied from the internal evidence afforded by this book that it contains a register of transactions in American Futures. Inspector Wagle in his evidence has stated that when he raided the accused's room he saw the accused transacting business in American Futures and in Kacha Khandi. The witness has not favourably impressed the Magistrate who calls him overzealous and with regard to some of his answers that he talks sheer nonsense and naturally does not understand what he says. Supported as his evidence on this point is by the finding of a book which prima facie contains a record of transactions in American Futures, I would not be inclined to disbelieve his evidence that when he raided the accused's room he found accused engaged in transacting business in American Futures. The business in American Futures has come to have a well-known meaning in business circles.

According to Mr. Dady Mehta there are two ways of dealing in American Futures. The first is known as business in Kacha American which is to buy or sell American Futures. This business, when it was being done in Bombay in the past, used to commence on a Saturday and was automatically cut on the Saturday following on the basis of the last closing rates wired from New York. No delivery of cotton was given, taken, or contemplated In 1918 or 1919 the operators in this business put a stop to it. That was due to delay in getting out cables from America owing presumably to war conditions. According to Mr. Mehta this Kacha American Futures was precursor of the Kacha Khandi transactions taken up by Shri Mahajan Association in 1925. The second form of business in American Futures, according to Mr. Dady Mehta, consisted in gambling on the prices of American cotton in New York cabled out from day to day. The business was closed or cut every day and was not carried over.

The learned Magistrate has referred to the case of *Sassoon* v. *Takersey* (9), as laying down that dealings in American Futures are not necessarily agreements by way of wager. The facts in that case show that instructions were given to Sassoon & Co. to purchase American cotton which they did in pursuance of their instructions. At all material times Sassoon & Co. were carrying on business in partnership as merchants and bankers in Bombay, Liverpool and elsewhere. The evidence showed also that the contracts were in the ordinary form, that under such contracts delivery was ordinarily demanded and given, that the purchases made were ordinary purchases for future delivery, and that they were made under contracts in the ordinary form for future delivery in the form in which cotton is ordinarily bought and sold for future delivery and in the form in which delivery is demanded and given. Under the contracts in that case no delivery was made to the defendant, but that was because the cotton was sold by reason of the defendant's failure to deposit cover for the deficiency in price. The transactions to which that case refers are, in my opinion, very different from the transactions commonly known in this country as American Futures which are as described by the witness Dady Mehta and as they appear in the accused's book I do not agree with the learned Magistrate that the decision in *Sasoon* v. *Takersey* (9) would cover transactions of the kind disclosed by the accused's account book. The burden of proof to show that the account book did not bear the interpretation which, on the face of it, it seems to invite was clearly on the accused, and, in the absence of any explanation from him or on his behalf to rebut the presumption which naturally arises, I must hold that this book falls within the definition of an instrument of gaming.

With regard to the book containing a register of Kacha Khandi transactions, the explanation given by the accused is that Kacha Khandi transactions constitute a legitimate business and are practically on the same footing as the transactions carried on by the East India Cotton Association by means of forward contracts commonly known as "Hedge" contracts. The differences between the

(9) [1904] 28 Bom. 616=6 Bom. L. R. 521.

two forms of transactions according to the accused are : (1) a difference in the unit for business and (2) a difference in the amount and manner of brokerage. In a forward contract of the East India Cotton Association the minimum unit for business is one-hundred bales ; under the rules of the Mahajan Association the minimum is five bales. Under the East India Cotton Association Rules, brokers are permitted to charge maximum brokerage at the rate of annas eight per cent on the total price realised by the bales. This brokerage once charged covers the transaction until it is finally closed on the due date or by means of a cross-contract before due date. No fresh brokerage, becomes claimable if the contract is carried forward from one settlement day to another until the due date of delivery. Under the rules of the Mahajan Association the maximum brokerage allowed is two annas per each bale and has no reference to the value realized. According to the accused the contracts are capable of being carried forward from week to week, but each time such forward transaction takes place the constituent has to pay fresh brokerage as if it were a new transaction. The accused relies upon certain resolutions of the Mahajan Association passed both before and subsequent to the date of the raid, and certain deliveries given and taken subsequent to the date of the raid. In my opinion what happened after the raid would be irrelevant except in so far as it might throw light on the situation as it existed at the time of the raid and prior thereto

The Mahajan Association was formed on 25th June 1925. Its memorandum of association is dated 17th July 1925, and it commenced work on 22nd July 1925. From the exhibits put in, it appears that they quoted from day to day the rates for Broach Old Cotton of July-August 1925 delivery. They were unable, however, to produce evidence from their market of any delivery given or taken of Broach Old Cotton of July-August delivery. On 15th August 1925, the Mahajan Association purported to open an Arbitration Committee to decide disputes arising from Souda transactions. This would seem to indicate that they at this date contemplated that there might be genuine transactions with regard to which a committee of arbitrators might be required to arbitrate. On 24th October 1925, a Defaulting Committee was appointed and on 27th October 1925, a Parakh Committee or Surveying Committee was appointed. This again would seem to indicate that the intention of the Mahajan Association was to do genuine business. But they have not adduced evidence of any genuine business dispute which these committees were at any time called upon to adjust. On 27th November 1925, it is alleged that a muccadam was appointed. The evidence on the point, however, does not appear to be of convincing nature and the letter relied upon is one about which some doubt may be entertained.

The term Kachi appearing in Kachi Khandi is in contrast with the term Pakki appearing in Pakki Khandi. According to the learned Magistrate the only difference between the two is that in Kachi Khandi the minimum unit for forward business is five bales and in Pakki Khandi it is one-hundred bales. This, however, does not seem to be the essential difference between the two. The fixing of the minimum unit is a matter of convention and may be changed from time to time although there is no evidence that it has been so changed in the past, by the rules of the East India Cotton Association as by the rules of the Mahajan Association. If the purpose were to gamble, i. e., receive or pay differences only without contemplating delivery of cotton under any circumstances, a system which places the minimum of the transaction at five bales would appeal to a larger class of individuals, particularly the lower middle and poorer classes, than a system which puts its minimum at a hundred bales. The differences to be paid or received would naturally be greater if the number of bales is larger. The literal meaning of the term Pakki or Pakka is ripe or fully developed, and that of Kachi or Kacha unripe or imperfect. Generally speaking when dealing with certain measurements we find that a Pakka Seer is fuller than a Kacha Seer. The distinction, in my opinion, seems to turn on the fact that a Kacha Khandi consists of one bale and a pakka Khandi of two bales. When the object is only to gamble it would facilitate calculation if the unit resorted to were of a Kacha Khandi which is equivalent to one bale and not a Pakka Khandi

which is equivalent to two bales. The rules of the Mahajan Association and the evidence in the case abundantly establish that what was contemplated in the Kacha Khandi transaction was the cutting of the transaction itself every Saturday and paying or receiving differences as the case might be. No provision was made in the rules of the Mahajan Association as they stood prior to 21st January 1926 for the carrying forward of any of the transactions from one settlement day to another. The analogy between the "Hedge" forward contract of the East India Cotton Association and the Kacha Khandi transaction, though at first sight it may seem to apply, is as a matter of fact illusory. In a "Hedge" contract, no doubt, sometimes there need not be a written contract or kabala ; in the Kacha Khandi transactions, as they were being carried on, there never was a written contract or kabala There was a memorandum or entry only in the books of the broker or merchant Such a mode of transacting business might be permissible when the business is between a broker and a broker, or as in the case of the East India Cotton Association's "Hedge" contracts when they are entered into as a cover for already pending business, but in dealing with members of the public in respect of business which in no sense could be regarded as a cover for pending business one would under normal conditions expect a written contract or kabala.

Under the East India Cotton Association Rules, Badla or transactions which are carried forward from settlement day to settlement day until the vaida date are provided for, and even in "Hedge" contracts the liability to give or take delivery is not altogether eliminated The settlement days of the East India Cotton Association are less frequent than those of the Mahajan Association. Broadly speaking, they are on two days in a month. The settlement is intended to be for the protection of the brokers and intermediate parties and for regulating and controlling the transactions periodically before the due date. It does not follow from that system that a transaction which has been entered into is cut or closed according to the prevailing rate in the market on the settlement day next following. In case of default in payment of difference the transactions may be so closed. But what seems to be in contemplation is that under normal conditions the transaction would be carried forward from one settlement day to another until the due date of delivery, and in the meanwhile the account would be kept clear by paying or receiving differences on the intervening settlement days according to the then prevailing rates. Under the rules of the Mahajan Association, the transaction itself would be automatically closed according to the rate prevailing on the Saturday following the transaction. Such a mode of doing business in cotton lends support to the statement made by Mr. Dady Mehta that the Kacha Khandi business done under the auspices of the Mahajan Association was only a revival of the old mode of gambling in American Futures There appears to be a close analogy between Kacha Khandi and Kacha Americans. The old business of American Futures popularly known as Kacha Americans commenced on a Saturday and was automatically closed on the following Saturday. So is the Mahajan's business of Kacha Khandi. No delivery was given, taken or contemplated, in Kacha Americans. So it seems is the case in Kacha Khandi. There is force in Mr. Mehta's contention that in Kacha Khandi business there is only a contract as to rate but no contract as to commodity. The very term Kacha as applied to Kacha Khandi seems popularly to stand for a transaction in which no delivery is given, taken or contemplated, as was the notion in Kacha Americans. Kacha Americans were not carried forward nor it would seem are Kacha Khandi transactions, at any rate, as they were entered into up to 21st January 1926.

The term Kacha as applied to cotton Soudas, as the evidence in this case shows, has come to acquire a special significance in the bazaar as meaning cotton Soudas in which no delivery is given, taken or contemplated. The business of Kacha Americans had made the public familiar with that notion : when gambling in Kacha Americans ceased in 1918 or 1919 it was immediately transferred to Kacha Khandi. When the Mahajan took up in 1925 the business of Kacha Khandi they knew very well that they were continuing the gambling business under its familiar name. The Mahajan's repeated profession that the busi-

ness in Kacha Khandi which they had taken in hand was genuine and intended to benefit the producers and consumers of cotton was, as the evidence in the case shows, a mere pretence and camouflage at least up to the date of the raid.

Begraj Gupta states that the kinds of business done in Bombay in cotton are (1) Pakka Souda, and (2) Kacha Souda. By Pakka Souda business he means a business where delivery is to be taken and given and the transactions are according to law. Pakka business, in his opinion, is done only in the Marwadi Bazaar and at Sewri. By Kacha Souda he means Soudas where the rates are cut and no delivery is given, taken or contemplated. This business, in his opinion, is done in Motishaw's chawl. He further states that in Kacha Khandi the unit is five Khandis. In Pakka business, he says, by Khandi they mean two bales, and in Kacha business, by Khandi they mean one bale. The accused's witness Ratilal admits that the business in Kacha Khandi was originally cut on every Saturday. The Mahajan Association rented a godown from 3rd February 1926, after the raid. According to the accused's witness Mohanlal, bye-laws for delivery were made on 13th March 1926. The accused' witness Bishamberlal admits that the rate was fixed every Saturday and the transaction would be closed every Saturday. He also admits that if the transaction was to be closed every Saturday there would be no question of taking or giving delivery. He says :

"this was the nature of the business up to a little time before the police raid."

Mohanlal further admits that before 21st January 1926, the date of the raid, the Mahajan Association had no contract forms, and no resolution had been passed that they were to deal in Broach Cotton or for forward delivery only.

The transactions entered in the Kacha Khandi book of the accused show on the face of them that they are settlements of balances in accordance with the rules and practice of the Mahajan Association prior to 21st January 1926, of cutting transactions every Saturday and paying or receiving differences only. It is clear that the transactions of Kacha Khandi as they were being put through up to the date of the raid were gaming or wagering. A book which contains a register of such transactions, as the accused's book does, would necessarily be an instrument of gaming.

With regard to Akbarbhai's Teji Mandi transactions, the entries show that Rs. 4 per bale were charged for Teji Mandi on 40 bales and the rate of cotton was Rs. 60-8-0 leaving out the figure of hundreds to the left as it is the practice in these books to do. According to Akbarbhai's evidence he was charged Rs. 5 for brokerage which works out at annas two per bale. He paid Rs. 80 for Teji Mandi and was asked by the accused to see him on the following Monday in order to ascertain and take away any profits that might have accrued to him from the transaction. It is clear from the language used by the accused that he must have been aware at the time that Akbarbhai was not entering into any genuine transaction to cover him against any possible loss to be incurred by fluctuations in the rates of cotton pending the date of settlement or the date of delivery, but that his object was to gamble in the rise and fall of the cotton market and either to lose his deposit entirely if the market remained firm and unchanged, to make a profit if the fluctuation exceeded the margin of two for a rise and two for a fall, or to minimise his loss if the fluctuations remained within the prescribed limit.

In *Manilal* v. *Allibhai* (10), a Division Bench of this Court, on a reference from the Small Cause Court, has held that Teji Mandi contracts should not be held to be wagers on account of their apparent nature and characteristics, and that it is necessary in such contracts, as in any other contracts, to prove the common intention of the parties as a question of fact A Teji Mandi contract, although it is of a highly speculative nature, may, under certain circumstances, be regarded as a legitimate business and may act as an insurance against the fluctuations of a constantly changing market like the market in Broach Cotton. In *Jessiram* v. *Tulsidas* (11), Beaman, J., described a Teji Mandi contract as follows (pp. 623, 624) *of* 14 *Bom. L. R.* :

"The party selling the double option is really doing no more than backing the stability of the market against its possible fluctuation. The party buying the double option is backing the fluctuations of the market against its stability and it is pretty obvious that where these are the only or the principal contracts

(10) A.I.R. 1922 Bom. 408.

(11) [1912] 37 Bom. 264=16 I.C. 576=14 Bom. L.R. 617.

between the parties, there can be no real intention or desire to do genuine business. Thus the seller of a double option for a future vaida takes a unit such as a bale of cotton or a bar of silver or a bag of rice at the price of the day, say Rs. 100, and sells the double option at say Rs. 20 per unit. This means, as I understand teji mandi, that if by the settling day the market has either gone up or down more than ten points, the purchaser of the double option by electing to be buyer or seller according as the market has risen or fallen at due date will make profit to that extent out of the seller of the double option If, for instance, on settling day the selling price of the unit is Rs. 88 or Rs. 112, the purchaser of the teji mandi by declaring himself a seller or a buyer would make a profit of Rs. 2 per unit ; while if the market neither rises nor falls more than ten points either way, the purchaser of the teji mandi is a loser to the extent of the difference .... Where, however, the Court is not concerned with the simple teji mandi but teji mandi 'applied' to the ordinary forward contracts current, ... the true nature of the double transaction becomes more difficult to analyze and understand. I expect, however, the real explanation is that teji mandi is not in reality applied at all to the subject matter of a particular forward contract but is merely entered into by way of a side contract and hedge upon a part or whole of it."

The teji mandi transaction of Akbarbhai had no reference to any forward previous transaction which he had entered into through the accused or any other broker. According to the evidence, the accused made no inquiry as to the position in life of Akbarbhai and whether he would be able to fulfil his engagement in case he exercised his option to sell or purchase the forty bales of cotton at the current rate of the Saturday settlement date. The evidence leads to one inference only that the accused clearly understood that Akbarbhai was staking Rs. 80, his loss being restricted to that amount and his profit depending upon the possible fluctuations in the Broach Cotton market between the date of his purchase and the settlement date It is clear from the evidence that the transaction was purely a wager, and the book registering the transaction would, therefore, come within the definition of an instrument of gaming.

It is contended by Mr. Coyajee that the accused acted as a broker, and whatever may have been the intention of his constituent it cannot be said that he participated in any common intention of gaming or wagering. From the accused's account book, Ex. 18 in the case, it appears that the accused did not act as an ordinary broker. To a large extent he acted as a principal. He seems to have acted as a stake-holder for his constituents and was interested in the transaction to the extent of making good either party's default to the other. In many of the transactions where he has not been able to find a constituent to enter into a cross-transaction in order to balance his liability he has appropriated the transactions to himself. The position the accused has occupied in these transactions, in my opinion, amounts to that of a stake-holder or a book-maker who after having received the stake or bet secures himself as far as possible by taking a counter-bet from another person. The main consideration for such cross-transactions would be that the accused would make his commission and be immune from liability if the constituents with whom he is dealing are on both sides solvent parties.

In *Doshi Talakshi* v. *Shah Ujamsi Velsi* (12), a Division Bench of our Court has held that where the course of dealings was such that none of the contracts were ever completed except by payment of differences between the contract price and the market price on the vaida day, the transaction would be a mere gambling for differences and the broker would not be entitled to maintain a suit for his brokerage and any losses sustained by him.

Mr. Coyajee has relied upon the case of *Thacker* v. *Hardy* (13) where the plaintiff who was a broker was employed by the defendant to speculate for him upon the stock exchange: to the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences should be payable by him. The plaintiff accordingly entered into contracts on behalf of the defendant, upon which the plaintiff became personally liable ; and he sued the defendant for indemnity against the liability incurred by him and for commission as broker. The Court held that the plaintiff was entitled to recover ;for the employment of the plaintiff by the defendant was not against public policy, and was not illegal at

(12) [1899] 24=Bom. 227=1 Bom. L. R. 786.
(13) [1878] 4 Q. B. D. 685=48 L. J. Q. B. 289 =27 W. R. 158=39 L. T. 595.

common law, and, further, was not in the nature of a gaming and wagering contract against the provisions of 8 & 9 Vic. c. 109, S. 18. That case, in my opinion, turned upon the common law of England as modified up to that time by the statute 8 & 9 Vic. c. 109 to which different considerations would apply.

Having regard to the opinion I have formed on the two main points in this case with reference to the legality of the warrant and the seizing of the instruments of gaming, the accused would be rightly convicted on the presumption that arises under the Gambling Act. It is not necessary, therefore, to labour the remaining point, viz., whether the accused was actually gambling. So far as the Kacha Khandi business was concerned the accused observed no secrecy about it, and from the conduct of the Mahajan Association and its members it appears that they openly challenged the police to prove that what they were doing under the guise of the rules of their Association was illegal. If the evidence of Inspector Wagle is to be believed, the accused was also doing business in American Futures and in Ank Farak both of which are ordinarily gambling transactions. The evidence would seem abundantly to justify a finding that the accused was gambling in Kacha Khandi The acquittal of the accused by the Magistrate, in my opinion, is erroneous and should be set aside. As this is the first case of its kind in Bombay and gambling transactions in Kacha Khandi were tolerated for a long time before this test case was brought, the punishment, in my opinion should not be too severe. We set aside the Magistrate's order of acquittal, convict the accused under S. 4 (a), Bombay Prevention of Gambling Act 4 of 1887, and sentence him to pay a fine of Rs. 50 or in default undergo three weeks' simple imprisonment.

Baker, J. — This is an appeal by Government against the acquittal of the accused Thavarmal Rupchand on a charge under S. 4 (a), Bombay Prevention of Gambling Act 4 of 1887. The accused was charged with keeping a common gaming house and was acquitted by the Chief Presidency Magistrate. This case known as the Kacha Khandi case, arose as follows:

In July 1925 an Association called the Mahajan Association having its offices at Motishaw's chawl in the city of Bombay was formed with the ostensible object of trading in cotton.

The formation of this Association was viewed with disfavour by the East India Cotton Association, which has been recognized by Goverrnment as the official body controlling the cotton trade. The Chairman of the East India Cotton Association, Sir Purshottamdas Thakurdas, wrote to Government that the Mahajan Association was merely an association for gambling in cotton, and was not carrying on any legitimate business.

Ultimately on 21st January 1926, Motishaw's chawl was raided by the police under a special warrant, and 327 persons, including the present accused, were arrested for gambling. The accused Thavarmal and his Mehta were tried by the Chief Presidency Magistrate and acquitted, and Government have preferred this appeal against the acquittal.

The present case is a test case and has been argued for several days.

Two points arise for consideration:

1. Whether the warrant is legal ?

2. Whether the transactions carried on by the accused fall within the purview of the Bombay Prevention of Gambling Act ?

The accused is a member of the Mahajan Association. Although the second point gives rise to many questions of law and fact, the real point is only whether the accused who is a broker was carrying on genuine business ultimately leading to actual delivery of cotton, or whether he was merely gambling in differences, no delivery being in contemplation.

The learned Chief Presidency Magistrate was of opinion that the warrant was bad because it gave an erroneous and vague description of the place to be searched and consequently no presumption could arise under S 7 of the Act.

There are two plans on the record. The place in question consists of a number of chawls with an open space between them, which at the material time was covered or partly covered with tarpaulins situated in New Satta Gully off Sheikh Memon Street. Entering from Sheikh Memon Street five chawls on the right belong to Narsidas and six chawls on the left to Dwarkadas, the passage between being used in common by the owners. They are brothers and there was a partition between them in a High Court suit.

It is now admitted that the whole of these chawls are known as Motishaw's chawl. The offices of the Mahajan Association are situated on the first floor of one of the chawls belonging to Dwarkadas. The open space between the two blocks appears to have been used as a market The ground-floors of the chawls are let out separately as shops and offices, and are separately numbered. The room of the present accused is No. 14 of one of the blocks belonging to Narsidas. The warrant which is at p 56 of the print defines the place to be searched as follows :

" A certain place situate at New Satta Gully off Sheikh Memon Street in the open space partially covered by a tarpaulin which is bounded by the three chawls known as Motishaw, Narsidas Jeykisandas and Dwarkadas Jeykisandas chawls and also the otlas and rooms on the ground-floors of the said three chawls which open on to the said open space."

It is in evidence and is not disputed that the whole block of buildings is known as Motishaw's chawl. There is no single chawl known as Motishaw's chawl, or as Narsidas Jeykisandas and Dwarkadas chawl On the other hand the learned Magistrate has found in his judgment (p. 43 of the print) that at the same time there cannot be any doubt that the warrant does specify with sufficient details to identify or locate the open space in question.

He, however, holds that :

" The open space in question is not in the occupation of any one individual or firm. It is a common passage belonging to the two brothers Dwarkadas and Narsidas kept open for the benefit of all those who live in the surrounding chawls and to which the public have free and unhindered access at any time in the day. It is not in the occupation of any single individual or firm. The covering of a part of it by tarpaulin was only accidental. It is not in existence now. It was put up probably to shield the public from rain and sun. There is nothing to show that it was ever in the use and occupation of any one."

He, therefore, holds that it is a public street or thoroughfare within the meaning of S. 12 of the Act.

Now, in the present case, we are not concerned with the open space because the accused was arrested and the alleged instruments of gaming were found in his room which is No. 14 on the ground-floor of a chawl belonging to Narsidas on the western side of the open space, nor is there any charge against him of gaming in this open space. But though the learned Magistrate is correct, strictly speaking, in saying that this space is open to the public (and the plan shows that access to old Satta Gully is obtained through this open space) I have not the slightest doubt that this open space which is immediately in front of the premises of the Mahajan Association is used as a market where cotton business is carried on. It is not uncommon in Bombay and indeed in other cities also for business to be carried on in the open air. It is highly improbable that a tarpaulin would be put up to protect mere passers-by from sun and rain. We have the evidence of several police-officers, which is referred to in detail in the judgment of the learned Magistrate, that cotton dealings are crrried on to a large extent in this open space which is immediately in front of the rooms or offices of the various dealers and in addition to this we have a reference to it at p 72 of the print in Ex 22, which is an extract from the minutes of the Managing Committee of the Mahajan Association for 21st July 1925, which refers to the passing of a resolution prohibiting the doing of any other business except business in cotton in the compound of the Association while the bazaar is working.

The offices of the Association are in the first floor of a house fronting on this open space It is not suggested that the Association owns any compound elsewhere or that there is any other open place which could be described as the compound of the Association I have not the least doubt that this open space is the compound referred to and that business in cotton is carried on there by the members of the association including those who occupy offices adjacent to the open space

There has been a great deal of argument with regard to the warrant and various cases have been quoted, but each case must be decided on its own facts. The simple test which I propose to apply is whether the description in the warrant is sufficient to enable a stranger to find the place to which the warrant was intended to apply

No doubt a warrant which mentioned a wrong street or a wrong number of a house in the correct street would be misleading, because a stranger would go to a place other than that to which the warrant was intended to apply.

There is no doubt that the warrant in this case was intended to apply to the place where the members of the Maha-

jan Association carry on business. New Satta Gully off Sheikh Memon Street is mentioned and it is admitted by the learned Chief Presidency Magistrate that the open space partly covered by a tarpaulin is sufficiently identified. The mistake is as to the three chawls which are said to bound it and are described as Motishaw's Narsidas' and Jeykisandas' whereas there are no chawls known by these names. The whole of the place is known as Motishaw's chawl. There are six chawls on the one side of the open space and five on the other.

On the other hand the warrant describes the open space as bounded by three chawls and refers to the otlas and rooms on the ground-floors of the said three chawls which open on to the said open space, and it is contended by the Government Pleader that if, as is admitted, the open space is sufficiently described, the chawls opening on to it are also sufficiently described The plan shows that the room occupied by the accused is on the ground-floor of one of the chawls opening on to the open space in question and as the warrant gives authority to search the otlas and the rooms of the three chawls which open on to the open space the police had authority to search it.

I do not attach any importance to the names of the chawls if they are sufficiently described. It is a fact that the buildings on the right belong to Narsidas and those on the left to Dwarkadas and that the whole locality is known as Motishaw's chawl. The number of the buildings also appears to be uncertain. According to witness Bapubhai Desai (p. 25) called for the defence who made the plan Ex. 14 there are seven buildings and a small shed. He made a survey in February 1926 and states that entering from Sheikh Memon Street there are in the right two four-storeyed buildings and further on there is another building separate from the two. This makes three on the right. On the left there are four buildings and a separate shed. There is also another shed attached to the second building. If the sheds are counted as buildings this makes six on the left. In all nine, or omitting the sheds, seven. The plan, Ex. 14, put in for the defence shows three blocks of buildings on the right and one on the left.

The Managers of Narsidas and Dwarkadas property have been called.

Harilal (p 26), Manager of Narsidas, says :

"There are in all about eleven buildings. My Seth owns five of them and his brother owns the remainder."

Narotamdas (p. 25), manager of Dwarkadas, does not give the number of buildings

But it is not shown that there are more than three chawls opening on to the open space or that this description applies to any other three chawls in this locality.

The learned counsel for the accused has argued that as all the chawls are known as Motishaw's chawl and no particular building is known as such, it would have been open to the police to search any of the eleven chawls But the warrant specifies the chawls which bound the open space and the otlas and rooms of the said three chawls which open on to the said open space.

Supposing the warrant had merely mentioned the buildings as Motishaw's chawl opening on to the open space there would have been no misdescription. Though there may be a number of chawls in the oart known as Motishaw's chawl it is not shown that there are more than three which answer to the description in the warrant, i. e., which bound the open space, and the open space being sufficiently identified I am of opinion that a person given this warrant would be able to find the chawls intended by the warrant.

It is in evidence that the rooms in the chawls are separately numbered, but the absence of numbers would not vitiate the warrant if the buildings to be searched are otherwise sufficiently described : cf *Emperor* v *Krishna Rutna Dalvi* (2) ; *Bhanji* v. *Emperor* (14) and *Emperor* v *Jhunni* (3). I am of opinion that the warrant is not bad for misdescription.

Turning to the other part of the case, this presents a good deal of difficulty. In the accused's room were found books of account which, it is contended, were used for recording gambling transactions and are, therefore, instruments of gaming under the rulings in *Emperor* v. *Tribhovandas* (15); *Emperor* v. *Chaganlal* (6) ; *Emperor* v. *Lakhamsi* (7) and

(14) A. I. R. 1926 Sind. 254=20 S. L. R. 10.
(15) [1902] 26 Bom. 533=4 Bom. L. R. 271.

Emperor v. *Manilal* (8). But, in order that the presumption under S. 7 of the Act should arise, it is necessary to prove that these books record gaming transactions, and as the books themselves are not easy to understand, and the accused has not explained the transactions, the case is one of some difficulty. A marked currency note for Rs. 100 given by the Deputy Commissioner of Police to the witness Akbarbhai was also found at the date of the raid which is 21st January 1926. The evidence is voluminous and the arguments have lasted nearly a week. The prosecution in this case are instructed by the East India Cotton Association which is the body recognized by Government as controlling the cotton trade of Bombay: vide Bombay Cotton Contracts Act 14 of 1922. The present case is really a fight between the East Indian Cotton Association and the Mahajan Association of which the accused Thavarmal is a member. Stated broadly, the case for the prosecution is, that the object of the Mahajan Association was not to do genuine business in cotton but to gamble in the differences in cotton prices, no delivery of actual cotton being contemplated, and all contracts being finally closed every Saturday at the prices ruling at Sewri, the East India Cotton Association's market

The case for the defence is that the Mahajan Association is doing genuine business in forward contracts in Broach cotton only, and that the only difference between it and the East India Cotton Association is that its minimum is five bales, while the East India Cotton Association's minimum is a hundred bales, and that it has a weekly settlement every Saturday while the East India Cotton Association has a fortnightly settlement. The East India Cotton Association does business in other varieties of cotton besides Broach.

The raid in question occurred on 21st January 1926, and we are only concerned with the method of doing business up to that date. Presumably, as a result of that raid, the Mahajan Association subsequently passed a number of resolutions relating to the hiring of godowns, etc., and have put in a delivery book relating to deliveries of cotton in April 1926. It is in evidence that there is only one crop of Broach cotton in the year which comes in about March or April, and it is the case for the defence that as the Mahajan Association started business in July 1925 there could be no question of delivery of Broach cotton which was not due till March or April of the following year. It is in evidence that business is some times done in the old crop, but it is not the case of the Mahajan Association that their members dealt in that.

The case-law on the subject of wagering contracts is voluminous, but the general result of all the numerous cases quoted which are nearly all civil cases, is the same, viz., that the Court must probe into the real intention of the parties If their intention was that there should be delivery there is no wager, but if neither party had any intention to give or take delivery it is otherwise : cf. *Universal Stock Exchange* v. *Strachan* (16), *In re Gieve* (17) and *Doshi Talakshi* v. *Shah Ujamsi Velsi* (12).

It is the contention of the prosecution that the operations of the Mahajan Association and of the accused as a member of that association were pure and simple gambling in differences in cotton parties, and as all transactions were closed, or as the witnesses say " cut " every Saturday, there was originally no question of carrying over any contract to a subsequent settlement day. Consequently, there could be no question of delivery of cotton, none being available in the market, and the whole object of each and every transaction was simply that the parties should pay or receive the difference between the price at which they had contracted to buy or sell and the closing price at Sewri on Saturdays. No contract could be more than a few days in existence, consequently it was impossible for any party to get ready cotton even if it was available (which at that time of the year it could not be) nor were there any facilities for storing it. The whole business consisted simply of paper transactions with no connexion whatever with the actual commodity, the only controlling factor being the closing price of cotton at Sewri every Saturday.

(16) [1896] A. C. 166=65 L. J. Q. B. 429=60 J. P. 468=44 W. R. 497=74 L. T. 468.
(17) [1899] 1 Q. B. 794=68 L. J. Q. B. 503=15 T. L. R. 251=6 Manson. 136=47 W. R. 441=80 L. T. 438.

The case is further complicated by the introduction of Teji Mandi transactions, but I do not think I need go into details as regards them, because whatever was the form of the dealings between the parties, the essential point in this case is whether the common intention of the contracting parties was to deal only in differences.

Assuming that the accused dealt in Teji Mandi transactions, the observations of Beaman, J. in several cases of this Court as to the essentially wagering character of such transactions have been disapproved of in later cases : cf. *Manilal* v. *Allibhai* (10), where it was held by Shah, Ag. C. J. and Crump J. that no general proposition can be laid down that there is no legal presumption that a Teji or Mandi contract is a wagering contract and the usual test must be applied, viz., where it is shown that the common intention of the parties was that in no case delivery was to be taken or given but that in all cases differences should be paid, then the parties are wagering

The only question in this case, therefore, is whether the transactions with which we are concerned represent genuine business transactions or are only paper transactions with no references to genuine purchases and sales

In order to decide this point it will be necessary to give a brief history of the Mahajan Association before coming to the actual dealings of the accused.

But I will first refer to an argument which has been raised by the learned counsel for the defence, based on the English case of *Thacker* v. *Hardy* (13). It is argued that the accused acted merely as a broker and that there can be no presumption of gambling when a broker intervenes between two principals who are unknown to each other, nor can the broker who was merely to carry out the instructions of his clients be held responsible for their intentions even they may have no intention of giving or taking delivery, and that he derived no gain from the transaction, except the commission he was to receive, whatever might be the result of the transaction, The position of the accused, however, does not seem to be that merely of a broker.

Exhibit 1-3-C at p. 63 of the print is a translation of an account in accused's books for 6th February 1926. It contains a large number of credit and debit entries which balance each other, amounting altogether to Rs. 2,845. Each credit item has a corresponding debit item. These entries are in the names of various constituents but in several instances the entry is credited or debited to the account of accused himself.

There are no serial numbers and I have had to count the entries.

On p. 63, item 8, on the credit side is 200 credited to Seth Khata (i. e. the owner of the business—the accused). The corresponding entry on the debit side is in three items, 100 to Vardo Magan, 75 to Japan (presumably some Japanese operator) and 25 to Bhimraji. As there is an entry of 57-0-0 against item 8 the 200 does not represent money but units, whether bales of cotton or what are called according to the prosecution, Dediyas.

Again on p. 64 the last item but one on the debit side is 50 debited to the account of Shah (i. e. proprietor).

The first item on p. 65 is 150 credited to Shah Khata followed by a number of figures, and on the debit side 50 debited to Shah.

Similarly, the last two items on the debit side are 50 and 100 debited to the account of Shah. This makes 150 which is balanced by four items of 50, 65, 15, 20 debited to four different constituents.

The accused has not explained to what these entries refer. I will deal hereafter with the explanation put forward by the prosecution, but the point I am on now is that it appears from the entries, of which there are eighty on the credit side and eightyone on the debit side, that the accused as far as possible covered each credit transaction by a corresponding debit transaction with another customer, but when he could not do so, he took on the transaction himself' the entry in such cases being credited to the Shah or Sheth Khata, meaning himself. The result would be that he himself would take the profit or pay the loss resulting at the closing of the transaction.

In order to do this he must have been perfectly conversant with the nature of the transactions, which are all entered in one running account, and the argument that he acted merely as a broker and was ignorant of the nature of the transactions

entered into by his clients appears to me to be untenable.

As I have already said the case of the prosecution is that the sole object of the Mahajan Association was to deal in differences, no delivery of actual cotton being contemplated, and all contracts being closed every Saturday at the rate prevailing in the Sewri market. The Mahajan Association carried on business quite openly, and freely placed their books at the disposal of the police. Their contention is that they were doing genuine business in forward contracts in Broach cotton.

I do not propose to go in detail into the objects of the Association as set forth at great length in the record. The prosecution contend that these objects as put forward in the books of the Association are all camouflage designed to conceal the real object which was gambling pure and simple.

The material dates are :

The Mahajan Association was formed on 25th June 1925 (p. 69).

It was registered with the Registrar of Companies on 18th July 1925.

It commenced business on 22nd July 1925.

On 29th July 1925, Sir Purushottamdas Thakurdas, the Chairman of the East India Cotton Association, addressed a letter (p. 116) to Government in which he described the business carried on by the Association as Kacha Khandi transactions, which are purely gaming and wagering transactions in which delivery of the cotton is not given or taken or contemplated and is in fact impossible in that particular form of transaction

The Mahajan Association appointed an Arbitration Committee on 15th August 1925 (p. 73), to settle disputes with regard to Soudas (transactions).

It was decided that four members should be sent to Sewri every Saturday to ascertain the closing rates.

On 27th August 1925, articles were adopted, Ex. 24, pp. 74-97.

On 15th October 1925, a meeting was held at which reference was made to the neccessity of hiring godowns for the purpose of storing the goods of those members who desire to take or give delivery when the "vaida" arrives.

This would seem to indicate that delivery was not contemplated in all cases.

On 27th October 1925, a Parakh (testing) Committee was appointed.

On 28th October 1925, Sir Purshottamdas Thakurdas sent a second letter to Government adverting to a resolution of the Mahajan Association, dated 15th October 1925, referring to delivery, p. 124. On 4th 1926, there was an extraordinary meeting of the Association at which several resolutions were passed (p. 100). One (No. 2 at p. 101) is of importance and may be given full It runs as follows :

"The rates in respect of the settlement of whatever transactions may be standing during the current week shall be paid on every Saturday at 2 30 half past two o'clock (B. T.) in the noon, at which time each broker shall carry forward every transaction of purchase or sale that has remained standing, whatever there may be on his account or his customer's account, to the transactions of the next week so that the said transaction may continue further."

The following resolution provides that transactions up to the closing of the bazaar on Friday shall be included in the Saturday settlement, but an exception is made in the case of Teji Mandi transactions entered into on Friday which, with transactions entered into on Saturday, are considered as new transactions, i. e , go over to the following week.

Payment of differences at the settlement is to be made on Monday afternoon.

I shall again refer to this resolution later on.

On 21st January 1926, the police raid took place.

On 30th January 1926, the Association entered into a lease for godowns.

According to the delivery book deliveries commenced in April 1926.

This case deals with a highly technical subject. But the only point at issue is whether there was any delivery in contemplation. and the question is whether the proceedings of the Association are consistent with any intention to give or take delivery.

In view of the fact that the defence case is that the Association only dealt in forward transactions in Broach cotton (new crop), which was not available till May 1926, the fact that there were no deliveries before that date and no godown accommodation is not inconsistent with genuine business. It is argued that the appointment of the Parakh (Survey) Committee in October is camouflage as there was then no cotton which could be

surveyed and tested. It is further argued that none of the contracts on which delivery was given is prior to the raid, and that no merchant has been called to prove that he actually gave or took delivery. In fact though they have not actually said so the prosecution seem to imply that the delivery book, Ex. 34, p. 226, is also camouflage or forgery.

This is, however, a matter of inference and I do not think that it is proved that the dealings of the Mahajan Association after the raid were not consistent with the intention to give or take delivery.

But, in my opinion, the strongest argument which the prosecution put forward is that all transactions were closed every Saturday. If that is proved there could be no delivery in contemplation and the transactions would be purely wagering The fact that the rates at which settlements were made were obtained from Sewri every Saturaday is not conclusive, as the settlement has to be fixed at some rate. The East India Cotton Association also has settlements though at longer intervals. But, if a transaction entered into at the earliest on a Saturday is finally closed on the following Saturaday it seems to be entirely inconsistent with any intention to give or take delivery as no cotton could be received within such a short period at that time of the year.

In this connexion I may refer to the evidence of defence witness Bishamberlal at p 32. (The judgment then discussed this and other evidence and concluded) It follows that as the persons engaging in such contracts had no intention of giving and taking delivery their only intention was to take and receive differences, that is, their common intention was to wager, and the contracts are wagering contracts and the persons taking part in them fall under the definition in S. 3, Bombay Prevention of Gambling Act. It has been urged by the learned counsel for the defence that the East India Cotton Association witnesses have admitted that in their market Hedge contracts are settled by setting off one against the other and not by delivery and that a large number of Hedge contracts are settled from day to day. This may be so, but the difference, as I understand it, is that in legitimate business Hedge or cover contracts are ancillary or subsidiary to the main contract and are merely designed to protect the operator against loss. There may be many settling days between the making of the original contract and the date of delivery, but the original contract continues to subsist and ultimately ends when delivery is given or taken The subsidiary Hedge or cover contracts may be settled in various ways but that does not affect the ultimate obligation to deliver or take delivery of the actual cotton itself This is a different matter to a contract which ends automatically in a maximum period of a week and in which the parties have no intention to deliver.

I am, therefore, of opinion that the description of these operations of the Kacha Khandi market by Sir Purshottamdas Thakurdas in his letter at p. 116 was correct

I must, however, say that from the date of the resolution regarding carrying over contracts coming into force (23rd January 1926), the matter bears a different aspect, and from that date the operations of the Association would be prima facie legitimate, unless it were shown that the resolution was mere camouflage and not intended to be acted upon. That, however, is not a question in this case As a matter of fact we find that a godown was hired, a mukkadam (for delivery) was appointed, and as far as appears from the record actual deliveries given in April and May, so that I do not say that the Association is not now carrying on legitimate business.

But the resolution regarding the carrying over contracts came into force on 23rd January 1926, two days later than the police raid on 21st. This brings me to the business carried on by the accused

In view of the conclusion at which I have arrived after a careful study of the record, that the transactions carried on by the Association up to 23rd January 1926, were such that no delivery was contemplated or indeed possible, the remainder of the case, that is, the nature of the transactions carried on by the accused, presents little difficulty. It is not the case of the accused that he carried on business otherwise than according to the rules and practice of the Association. His written statement (Ex. 13, p. 38) is to the effect that he does business under the constituted rules and bye-laws of the Association Para. 7 refers to the carrying forward of contracts at the settlement rates, which I have already dealt with at length.

It follows that if no delivery was given or taken up to the date of the police raid the accused is in the same position as the rest of the Association.

But in this case we have also the instance of Akbarbhai, a pan-seller (p. 14), who was given a marked Rs. 100 note by the police for the purpose of betting on Teji Mandi. The accused admits this contract and the marked note was found in his shop. The entry appears in accused's books at p. 63, 40 (credited) to Akbarbhai, 60-8. Owing to the polics raid this transaction was not carried through.

Akbar is a pan-seller and not a dealer in cotton. He says himself he knows nothing of cotton dealings. No enquiry was made as to his solvency. He went there on 21st January (Friday) and was told to come on Monday to see if he had made any profits. The learned Magistrate admits at p. 48 of his judgment that Akbar who, it is evident, entered into a transaction in Kacha Khandi for forty bales neither contemplated giving nor taking delivery, but he holds that accused is a broker and placed the transaction with his other constituents.

I have already referred to the fact that the accused himself took up the responsibility of some of the transactions himself and that he was perfectly aware of the nature of these, viz., that no delivery was ever contemplated. I hold that Akbar's transaction was gambling pure and simple.

It is quite immaterial for the purposes of this case as to the manner in which the transactions were settled. The accused has not explained the entries in his books, and though the prosecution have attempted to explain this they have not been very successful in so doing.

Once it is held that the transactions simply represent payment of differences it matters little how the differences are calculated, and whether the units are bales of cotton or what are called, according to the prosecution, Dediyas. It is unnecessary to go into details of Teji Mandi. It matters little whether the accused was dealing in American Futures or not. His accounts are unintelligible and he is the only person who could explain them, which he has not done. I am satisfied that the accounts represent transactions in differences only and have no relation to genuine transactions leading to actual delivery. They are, therefore, wagering contracts and as such within the definition of wagering in the Act. I disagree with the view taken by the learned Magistrate, and I am of opinion that the accused is guilty and should be convicted.

This being a test case, and as far as I know the first case in which dealings in cotton have been held to be amenable to the criminal law, for the numerous cases on the point are all civil cases, I do not think it necessary to inflict more than a nominal punishment, and I, therefore, agree in the order proposed by my learned brother.

D.D. *Acquittal set aside.*

A. I. R. 1929 Bombay 174

MADGAVKAR, J.

Narhar Narayan Deshpande—Appellant.

v.

Ganpati Hari Shinde—Respondent.

Second Appeal No. 1 of 1926, Decided on 2nd November 1928, against decision of Asst. Judge, Satara, in Appeal No. 20 of 1925.

Land Tenure—Mirasi tenure—Permanent lease by vatandar—His successor accepting rent without objection for more than twelve years—Tenant cannot be ejected at least for the successor's lifetime.

A kulkarni vatandar passed in 1886 a miraspatra or permanent lease in favour of *G*. The lessor died in 1895 and was succeeded by his son *N*. From 1895 to 1919 *N* who was admittedly aware of the permanent lease and its entry in the Record-of-Rights took no steps to set it aside but on the contrary took the rent recited in tne permanent lease from *G*. In 1923 *N* sued *G* for ejectment :

Held: that as *N* continued the permanent tenancy granted by the father at least during *N*'s lifetime *G* could not be evicted.

[P 175 C 1]

K. N. Koyajee—for Appellant.

P. V. Kane—for Respondent.

Judgment.—The question in this appeal is, whether the plaintiff-appellant is entitled to eject the defendants-respondents. Both the lower Courts held against the plaintiff, who appeals.

The lands were part of the kulkarni vatan lands of the appellant's family. The appellant's father, who was a kulkarni vatandar, passed in 1886 a miraspatra or permanent lease in favour of the father of defendant-respondent 1. The lessor died in 1895 and was succeed-

ed by the appellant. From 1895 to 1919 the appellant who was admittedly aware of the permanent lease and its entry in the Record-of-Rights took no steps to set it aside but on the contrary took the rent recited in the permanent lease from the respondents from year to year until he brought the present suit in 1923 The trial Court held that the appellant was estopped from bringing the present suit and that it was barred by limitation, not having been brought within twelve years of his father's death and his own succession as vatandar in 1895.

The appeal turns on two questions: one of fact, and the other of law. The question of fact is, whether, after the father's death in 1895, the appellant ratified and continued the lease at least for his own lifetime. The question of law is, whether the present suit is barred by limitation.

On the first point, the appellant's admission quoted at pages 6 and 7 in the judgment of the trial Court is clear. It is as follows :

" The permanent tenancy of the time of my father was continued even after his death till 1919."

Such an inference would have been permissible even from the appellant's own conduct from 1895 to 1919 in continuing the arrangement during his father's time undisturbed even though he knew of it and knew of its entry, being himself kulkarni. This express admission places the matter beyond doubt. The respondents are, in my opinion, entitled to succeed on this admission and finding that the appellant continued the permanent tenancy granted by the father. It follows that at least during the appellant's lifetime, the respondents cannot be evicted.

Strictly speaking, therefore, it is not necessary to decide the second question. In view of the authorities quoted in the judgments of the lower Courts and the arguments, and without expressing any opinion on the rights of vatandars who might succeed on the appellant's death, I am of opinion that the present suit by the appellant is barred by limitation. Whatever the effect of the decision of their Lordships of the Privy Council in *Madhavrao Waman* v. *Raghunath Venkatesh* (1), on the authority of the Full Bench decision of this Court in *Radhabai* v. *Anantrav* (2) as noticed in *Vishnu* v. *Tukaram* (3) and *Anna* v. *Gojra* (4), it has been held that " a landlord allowing the tenant to assert the validity of an invalid lease for the statutory period of more than twelve years may be debarred from subsequently questioning the right of the tenant to hold under its terms *Buadesab* v. *Hanmanta* (5)."

Similarly, where in an ejectment suit by an inamdar it was shown that the defendants for more than twelve years before the suit openly asserted their claim to hold as permanent mirasi tenants, it was held that the defendants had acquired a title to the limited interest claimed by them and could not be ejected : *Trimbak Ramchandra* v. *Gulam Zilani* (6). The same view is taken in cases such as *Bhagu* v. *Byramji Jijibhoy* (7), and is not inconsistent with the view in *Manohar Vaman* v. *Moro Raghunath* (8). I have abstained from expressing and opinion as to the right of the appellant's successors-in-title as it is, in my opinion, difficult to do so without considering the full effect of the judgment of their Lordships of the Privy Council in *Madhavrao Waman* v *Raghunath*. For the purposes of the present appeal the plaintiff-appellant fails both in fact and in law.

The appeal is dismissed with costs.

P.D./R.K. *Appeal dismissed.*

(1) A. I. R. 1923 P. C. 205=47 Bom. 798=50 I. A. 255 (P. C.).

(2) [1885] 9 Bom. 198 (F.B.).
(3) A. I. R. 1925 Bom. 375=49 Bom. 526.
(4) A. I. R. 1928 Bom. 333.
(5) [1896] 21 Bom. 509.
(6) [1909] 34 Bom. 320=5 I. C. 965=12 Bom. L. R. 208.
(7) [1892] P. J. 39.
(8) [1896] P. J. 518.

A. I. R. 1929 Bombay 175

MARTEN, C. J., AND MURPHY, J.

Annaji Ramchandra—Appellant.

v.

Thakubai Dattatraya Deshpande—Respondent.

Appeal No. 10 of 1926, Dated 28th September 1928, from the order of Dist. Judge, Sholapur, in Appeal No. 56 of 1924

Civil P. C., O. 41, R. 25—Order of remand for adducing further evidence and disposal and also setting aside trial Court's decree dismissing suit is illegal—Civil P. C., S. 41, R. 23.

Under the provisions of O. 41, when the appellate Court is of opinion that certain find-

ings of fact are necessary for the proper disposal of an appeal, and that evidence should be led on these points the proper procedure is under R. 25, by which the appellate Court may frame issues and refer them for trial to the Court whose decree is appealed from. It cannot act partly under R. 23, which only applies to the case of a suit which has been decided on a preliminary point, and partly under R. 25 by calling for further findings. An order remanding a case for giving parties an opportunity to adduce evidence on a certain point and disposal and at the same time setting aside the trial Court's decree dismissing the suit is technically wrong. [P 176 C 1, 2]

P V. Kane—for Appellant

G. B Chitale— for Respondent 1.

Murphy, J.—In this matter the District Judge of Sholapur when dealing with an appeal from the decree of the Joint Subordinate Judge's Court of that place has passed an order which, we think, cannot be sustained under the provisions of O 41, Civil P. C. His findings on issues 1 and 2 were, that plaintiff and defendant 4 were not estopped from showing that they had been minors at the date of execution of Ex 44 He then went on to say that an issue must next be raised on the question of fact whether they were actually minors or not and that evidence must be taken on this point because though the trial Court had recorded a finding that these ladies had then been majors, no issue had so far been raised on this point and the parties had not had a proper opportunity of adducing all their evidence. He next found on issue No 4 that the consent of the husbands of plaintiff and defendant 4 was in law necessary to give validity to the sale which the plaintiff was impugning ; and also found on the latter part of this issue that there should have been a definite finding whether the husbands' consent had been given or not. He therefore thought that the parties must be given an opportunity of adducing evidence on this point as well as on issues 3, 5 and 8. As a result of these conclusions he remanded the suit to the lower Court for diposal in accordance with these directions and at the same time set aside the original Court's decree dismissing the suit.

Under the provisions of O. 41, Civil P. C , when the Court is of opinion, as in this case, that certain findings of fact are necessary for the proper disposal of an appeal, and that evidence should be led on these points the proper procedure is under R. 25; by which the appellate Court may frame issues and refer them for trial to the Court whose decree is appealed from, Findings should then be returned to the appellate Court which must rehear the appeal so far as is necessary, and so dispose of it In this case the learned Judge seems to have acted partly under R. 23, which only applies to the case of a suit which has been decided on a preliminary point, and so reversed the decree given on the strength of that point, and also, partly under R. 25, by calling for further findings I think that this cannot be done. In substance, what the order amounts to is, in my opinion, that he found on the preliminary points which were points of law and then discovered that further evidence was necessary on issues of facts and, therefore remanded the case for findings after reversing the original decree. This order is technically wrong, and must be amended in this Court

We must, therefore, vary the appellate Court's decree by directing that the findings which the original Court is asked to give on the issues specified in the order should be tried and decided in the Subordinate Judge's Court, and the findings on those issues should then be returned to the District Court which will rehear the appeal and pass an order in accordance with law.

Both sides may adduce evidence on the issues which have been remanded by the District Judge, and findings should be returned to the District Court within a reasonable time, to be fixed by the Court.

Marten, C. J.—I agree We vary the order of 10th December 1925 by discharging the direction to set aside the decree of the first Court and for a remand of the suit to the lower Court and by ordering instead, under O 41 R. 25, Civil P. C. that the issues in question referred to in the judgment of the lower appellate Court be tried by the first Court and that the findings and the evidence be returned to the lower appellate Court.

Each party to bear his own costs of the appeal to us.

P.D./R K. *Order varied.*

A. I. R. 1929 Bombay 177

FAWCETT AND MURPHY, JJ.

Kapurji Magniram— Plaintiffs— Appellants.

v.

Pannaji Devichand — Defendants — Respondents.

First Appeal No. 246 of 1925, Decided on 7th August 1928, against decree of First Class Sub-Judge, Dharwar, in Civil Suit No. 419 of 1921.

(a) Partnership — Suit — One partner can sue for a debt due to firm.

There is no absolute rule of law that one partner of a firm cannot sue for a debt that is due to the firm. A partner with whom a contract has been personally made is entitled to sue upon that contract in his own name without joining the co-partners as plaintiffs, although the benefit of the contract would result to the partnership firm : that is really an illustration of the rule that an agent, having an interest in the contract which he has entered into on behalf of his principal is entitled to sue in his own name : 14 *Moore P. C.* 160; 24 *Mad.* 130 and *A. I. R.* 1925 *Bom.* 547, *Foll.* [P 177 C 2, P 178 C 2]

(b) Contract Act S. 230 — Knowledge about principal, not from himself but from another source, is no disclosure.

A principal cannot be said to disclose himself if the other party gets knowledge about him not from the principal himself but from some other source : 5 *Bom.* 584 *Diss. from.*; 32 *Bom.* 356, *Rel. on.* [P 178 C 2]

H. C. Coyajee and *A. G. Desai*—for Appellants.

G. N. Thakor and *R. A. Jahagirdar*— for Respondents.

Fawcett, J.—The first point that I shall deal with is the legal point, because if it is decided in favour of the defendant's contentions then clearly it would be unnecessary to go into the dispute between the parties as to the accounts. It is conceded that there was an arrangement come to between the two firms, viz., plaintiffs' firm by name Kapurji Magniram and the other firm Devaji Narsingji, and that the joint concern was known as Devaji Kapurji. But it is denied by the plaintiffs that the business in suit was business of that joint concern; and in the plaintiffs' counter-statement (Ex. 37) it is stated that the connexion between the two firms was merely a sort of pooling arrangement, under which the two shops were each to transact business and to render an account of that business to the other firm, so that the profits and losses resulting from such business would be divided between the two. Very little evidence has been given as to the exact arrangement between the two firms. In cross-examination the plaintiff's manager was only asked a few questions about it, and it was elicited that the joint concern had no capital. There was also a dispute as to whether this joint concern kept any separate accounts or whether there was merely a khata of the transactions, in which the two concerns were interested, kept in the plaintiff's account books. The actual document, if it exists, under which this concern was established is not before us. Therefore, it is rather difficult to decide exactly what the arrangement is, but so far as the probabilities go, it seems to me that the statements that the plaintiff made in Ex. 37 as to its nature are probably true, and that it was in fact a sort of pooling arrangement very similar to the one that was entered into between the defendants and Devichand Amirchand and some other people under the document, Ex. 79. It may be noted in this connexion that when the defendants were suing some other people in Bellary, there was an objection raised of the same kind, namely that the plaintiffs in that case were not entitled to bring the suit as they had other partners, and the defendant's answer was that the four partners in the shop called Pannaji Devichand were the partners responsible for the transaction in suit and that the others were not concerned. It seems to me that this objection is one that is merely raised in order to delay or hinder the plaintiffs' rights, if any, and that it is not one raised on a substantial basis.

Even supposing that the agreement between the two firms amounted to an actual partnership, there is no absolute rule of law that one partner of a firm cannot sue for a debt that is due to the firm. As long ago as 1861 it was laid down by the Privy Council in *Agacis* v. *Forbes* (1), that a partner with whom a contract had been personally made was entitled to sue upon that contract in his own name without joining the co-partners as plaintiffs, although the benefit of the contract would result to the partnership firm : and that is really an illustration of the well-recognized rule that an agent having an interest in the contract which he has entered into on behalf of his prin-

(1) [1861] 14 Moore P. C. 160=9 W. R. 503= 4 L. T. 155.

cipal is entitled to sue in his own name. The cases that establish that proposition will be found in Pollock and Mulla's Indian Contract Act, 5th Edn, p. 722; and among other cases where it has been recognized may be cited: *Subrahmania Pattar* v *Narayanan Nayar* (2) and *Coorla Mills* v. *Vallabhdas* (3) In the present case, it is admitted that the defendants in fact entered these transactions in their accounts as being transactions with the plaintiff's firm Kapurji Magniram. The excuse given is that the plaintiffs' manager asked him to do this but that is an explanation which is obviously open to suspicion. In the plaintiffs' accounts too they are entered as transactions of Kapurji Magniram. I quite agree with Mr. Thakor that there is a considerable amount of evidence which points to these transactions being transactions which came within the scope of the joint concern known as Devaji Kapurji. But that does not prevent the principle that I have already mentioned from applying. The firm Kapurji Magniram was, so to speak, the managing partners or agents in regard to these particular transactions. They were the people who directly entered into the business transactions with the defendants and both parties treated he transactions accordingly. The fact hat on some occasions the manager of the other firm Devaji Narsingji was present and made entries in plaintiffs' account-books is not sufficient to show the contrary In my opinion, therefore, the case is one which falls under the rule that an agent having an interest in the contract can sue in his own name.

The case also, in my opinion, falls under the rule laid down in S. 230, Contract Act that, where the agent does not disclose the name of his principal, there shall be presumed a contract by which he can personally enforce the contract entered into by him on behalf of the principal There is no reliable evidence that defendant 4 did actually disclose the name of the firm Devaji Kapurji as being the principal in the business transactions. I think the evidence of defendant 4 that the plaintiff's manager asked him to enter it in the name of Kapurji Magniram, though the other firm was concerned, is clearly untrustworthy, and there is no other evidence of such disclosure. It may be true that defendant 4 knew from other sources that there was this joint concern and that the transactions in suit were of a kind that would fall within the scope of that joint concern, but that does not suffice to bring the case outside the words "where the agent does not disclose the name of his principal." It is true that in *Mackinnon, Mackenzie & Co.* v. *Lang, Moir & Co.* (4), West, J., sitting as a single Judge, and dealing with this presumption, held that the knowledge, and not the source of it, was the main thing and that the presumption would not operate when such knowledge was obtained from other sources as well as when it was derived from the mouth of the agent. But that decision was made without any reference to the terms of S. 230, Contract Act. It is not referred to by West, J., and the authority of that decision has been considerably weakened by the subsequent case of *Lakshmandas* v *Anna* (5), where Sir Lawrence Jenkins, C. J, and Batchelor, J held in regard to the next S. 231 that a principal could not be said to disclose himself within the meaning of that section, if the other party got knowledge about him not from the principal himself but from some other source The language of Batchelor, J, at p 362 about the section using the words "discloses himself" and not any such words as "is disclosed" or "appears upon the scene" is appropriate to the similar words in S 230 that I am considering

Therefore, in my opinion, there was no absolute obligation upon the plaintiffs to join the other firm Devaji Narsingji as a party in this suit. It was of course open to the Court under O 1, R. 10, Civil P C, to say that though it is not an absolutely necessary party, it is desirable that they should be joined, having regard to the circumstances of the case. But, in the present case, I do not think that there are any adequate grounds for this Court taking up that attitude. There is nothing to indicate that there is any dispute between the two firms, or that the plaintiffs are suing the defendants without their knowledge and consent, so far as this other firm has an interest in the result of these transactions. As I have already said this is merely a plea set up in order to try to delay and hinder the

(2) [1900] 24 Mad. 130.
(3) A. I. R. 1925 Bom. 547.
(4) [1881] 5 Bom. 584.
(5) [1904] 32 Bom. 356=6 Bom. L. R. 731.

plaintiffs' right, just as similar contentions appear to have been raised against the defendants in the Bellary litigation. (His Lordship held that the plaintiffs alone had a right to sue and after dealing with other points, not material for the report, varied the decree).

Murphy, J. — (His Lordship, after dealing with the facts of the case, proceeded.) The only remaining question agitated in the appeal is the plaintiff firm's right to sue in the form it has adopted. The defendant firm's contention was that the transactions in question were not with the firm Magniram Kapurchand, but with that of Devaji Kapurji; the firm composed of Magniram Kapurchand and Devaji Narsingji, and that the firm of Devaji Kapurji alone could sue, or was at least a necessary party This contention has been accepted by the learned Subordinate Judge, who states that plaintiff being one of the partners of the joint firm, cannot be allowed to sue alone No separate accounts of the joint firm are available though they are alleged to exist. The explanation is that it was a mere arrangement to pool the profits and losses of the two firms composing it, and that it had no capital and no separate transactions of its own: and that this was the reason that it was represented by a "khata" in Magniram Kapurchand's accounts. The defendant firm, and the firm Ex. 79, seem to have had a very similar arrangement and that joint firm traded in the name of the defendant firm I am not satisfied that the plaintiff firm had no right to bring the suit as framed. Though defendant Dhuraji has stated that he knew he was trading with the composite firm, his own books show the transactions as having been with Magniram Kapurchand—vide Ex. 90, item 1 of Rs. 8,775-2-0. On the same page is an entry in the name of the other member of the composite firm, Devaji Narsingji of Rs. 19,242-6-0 and both entries are in respect of differences.

I think that on the facts the transactions were essentially with the firm of Magniram Kapurji and not with the joint firm Devaji Kapurji, and from these facts, and also the reasons given and on the strength of the authorities quoted by my learned brother Fawcett, J., in his judgthese amounts. As a result, my findings are that it has not been proved that the payment of the sum of Rs. 18,000 was made to Amichand on behalf of the defendant firm and that plaintiff is not entitled to have this sum taken into account; but that the defendant firm have not shown that nothing is due from them for the payment of Rs. 28,000 on the grounds pleaded, and that the plaintiff firm is consequently entitled to have this amount taken into account. I, therefore, think that the original Court's order should be varied and I concur in the one proposed to be made.

S L./R K. *Appeal allowed.*

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* A. I. R. 1929 Bombay 179

MARTEN, C. J., AND MURPHY, J.

Rabia Mahomed Tahir—Applicant.

v.

G I P. Railway—Opposite Party.

Civil Ref. No. 11 of 1928, Decided on 1st October 1928, made by the Acting Commissioner for Workmen's Compensation.

***(a) Workmen's Compensation Act (1923), S. 12 (1)—Railway granting contract to another company to erect towers to conduct electric line for supplying power to engines—Workman serving the contractor company and dying due to knocking by train—Construction of works was not "ordinary" work of railway and railway was not liable.**

The G. I. P. Railway, in connexion with the electrification of their line were building a Power Station near Kalyan and constructing a transmission line to carry electric power to various sub-stations on the railway. The work of constructing this transmission line had been entrusted on a contract to Messrs. Henley's and the deceased was employed by Messrs. Henley's as a fitter. His work was to assist in the erection of the steel towers which was to carry the overhead cable.

These towers were not erected on the railway track but on land adjacent thereto, the distance from the railway lines varying from 400 to 700 feet. While carrying material from the store near Kalyan Station to the site of the work he was knocked down by a train and killed. These steel towers were to be used for carrying the overhead cable from the Kalyan Power Station to various sub stations on the railway, and the cable line was to be used for supplying sub-stations and not for supplying electric current direct to the train as it proceeded along the running track.

Held: that the construction of the original

that power to the locomotives, was not part of the ordinary trade or business of the G. I. P. Railway within S. 12. (*English cases discussed.*) [P 180 C 2]

(b) Workmen's Compensation Act, S. 12—"Ordinarily" applies to Government department also.

The word "ordinarily" in S. 12 applies just as much to a Government department as it does to any other principal. [P181 C 2, P 182 C 2]

(c) Workmen's Compensation Act., S. 2 (2)—S. 2 (2) does not impose on Government any duty other than that imposed on private traders.

Section 2 (2) was intended to include Government departments which are engaged in work with a commercial object, but it does not impose on such a Government department a duty other than that imposed on private traders or corporations, so as to deprive such a department of the saving contained in S. 12 (1). [P 183 C 1]

A. A. Adarkar and *K R. Bhende*—for Applicant.

Binning—for Opposite Party.

Marten, C. J.—In this reference the question whether the G. I. P. Railway are liable to the representatives of the deceased workman depends on the word "ordinarily" in S. 12 (1), Workmen's Compensation Act, 1923. The G. I. P. Railway gave out certain work to a contractor, and the question arises whether the execution of that work was "ordinarily part of the trade or business of the principal," namely, the G. I, P. Railway.

The work in question was the erection of steel towers to carry overhead cables in connexion with the electrification of of the G. I. P. Railway line beyond Kalyan. Hitherto the motive epower beyond Kalyan has been steam, or oil, and the line is now to be electrified. The precise facts, as found by the Commissioner, are:

"The G. I. P. Railway, in connexion with the electrification of their line are building a Power Station near Kalyan and are constructing a transmission line to carry electric power to various sub-stations on the railway. The work of constructing this transmission line has been entrusted on a contract to Messrs. W. T. Henley's Telegraph Works and the deceased was employed by Messrs. Henley's as a fitter. His work was to assist in the erection of the steel towers which will carry the overhead cable. These towers are not erected on the railway track but on land adjacent thereto, the distance from the railway lines varying from 400 to 700 feet. While carrying material from the store near Kalyan Station to the site of the work he was knocked down by a train and killed."

It may be noted that these particular steel towers are not on the railway track itself, but are 400 to 700 feet therefrom. Further, they are for the purpose of carrying the overhead cable from the Kalyan Power Station to various sub-stations on the railway, and though it is not so specifically stated it may be taken that this particular cable line will be used for supplying sub-stations and not for supplying electric current direct to the train as it proceeds along the running track For the latter purpose there will be a separate system either overhead or by means of a third rail.

Was then the erection of these steel towers near the railway line part of the ordinary trade or business of the G. I. P. Railway? In my judgment it was not The ordinary business of this Railway is the public carriage of passengers and goods by means of locomotives and carriages or trucks over the railway line. The supply of motive power to these locomotives I agree is necessary. But I think that the construction of the original works which will be necessary to convey that power is not part of the ordinary trade or business of the G. I. P. Railway. In other words, their ordinary business is that of public carriers of passengers and goods, and not that of electrical engineers or of contractors for power stations or towers or cables or the general electrification of a railway line.

Some assistance on this point is obtained from the English authorities, but it must be borne in mind that the English Workmen's Compensation Act, 1897, contained a particular proviso which was repealed by the Act of 1906, and which is different from the words "ordinarily part of the trade or business," that we have in the Indian Act. Under S. 4 of the Act of 1897 dealing with contracting, this proviso was as follows:

"This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively."

Consequently, in *Pearce* v. *L. & S. W. Ry.* (1) it was held that alterations. repairs and paintings of a suburban railway station was work:

"which was merely ancillary or incidental to, and was no part of, or process in, the trade or business"

(1) [1900] 2 Q. B. 100.

of the railway company within the meaning of S. 4 of the 1897 Act. Accordingly, it was held that the railway company were not liable to pay compensation to the workman of a contractor, who had contracted with them to do such work, in respect of an injury occasioned to the workman in the execution of it. Collins L. J. there said (p. 102):

"The primary business of a railway company is to carry passengers and goods. The erection of stations does not appear to me to be any part of, or process in that business. I am not aware of any legal obligation upon railyway companies apart from any special obligations imposed by particular Acts, to erect railway stations at intermediate places. It is a matter in their discretion."

Lord Justice Vaughan Williams said (p. 103):

"I will assume for the case that, as suggested by him, (appellant's counsel) this station is an essential part of the railway, and also that there was an obligation on the company to construct the station. On that hypothesis it still seems to me clear that the work of consructing it is merely ancillary or incidental to and is not a part of or process in the business which the company carry on within the meaning of S. 4, Workmen's Compensation Act, 1897."

Another case is *Wrigley* v. *Bagley & Wright* (2), where the head-note runs thus:

"A firm of engineers contracted with the owners of a cotton-spinning factory to put a new driving wheel into the steam-engine belonging to the factory. While engaged in the work of fixing the new wheel, workman employed by the engineers met with an accident which caused his death:

Held, that the work being merely ancillary or incidental to, and no part of, or process in, the business of the owners of the cotton-spinning factory, the case did not come within S. 4, Workmen's Compensation Act, 1897; and therefore that a dependant of the deceased workman was not entitled to compensation under the Act against the owners of the cotton-spinning factory."

Lord Justice Collins there said (p. 783):

"The reason of such a provision (namely, S. 4) obviously is that, if a person substitutes another for himself to do that which is his own business, he ought not to escape the liability which would have been imposed upon him, if he had done it himself, towards the workmen employed in that business. The concluding part of the section is inserted to shew clearly that it is not intended to apply to a case where a contractor is employed by a person to do that which forms no part of, or process in, that person's business."

And the judgment ends (p. 784):

"Putting a new driving wheel into an engine used in a cotton-spinning factory cannot, I think, be described as part of, or a process in, the business of cotton spinning."

Romer L. J. in agreeing says (p. 784):

"Putting a new driving wheel into an engine cannot be said to be part of, or a process in, the business of cotton spinners any more than building the factory in which they intend to carry on their business can be said to be a part of, or process in, that business."

In the present case, we have the process of building, namely, the erection of the steel towers, and if the analogy of this last mentioned case is to be followed then the erection of these towers as opposed to their use when built is not part of the ordinary trade or business of the railway any more than the putting of a new driving wheel into the engine was part of the business of the owners of the cotton-spinning factory. Therefore, so far as the English authorities go, although the wording of the English Acts differs from the Indian Act, yet they do tend to show that there is a clear distinction between the erection of a building or machinery and its use when erected, and that such erection may form no part of the primary business of the principal concerned. This, indeed, was the conclusion which the learned Commissioner found on this part of the case, namely, that the setting up an overhead electric cable for the purpose of transmitting electrical power to the railway was not ordinarily part of the trade or business of the principal in question, viz. the G. I. P. Railway.

The Commissioner, however, eventually decided in favour of the representatives of the workman on a totally different point. It was based on this that the G. I. P. Railway is now a State Railway, and that consequently under the definition in S. 2 (2)

"the exercise and performance of the powers and duties of a local authority or of any department of the Government shall, for the purpose of this Act, unless a contrary intention appears, be deemed to be the trade or business of such authority or department."

Stopping there, that is quite clear and no argument to the contrary has been presented to us. The object of this definition, however, was to prevent any contention to the effect that a Government department does not carry on a trade or business. But I am quite unable to accept the deduction which the Commissioner draws from those premises. In my judgment the word "ordinarily" in

(2) [1900] 1 K. B. 780.

S. 12 applies just as much to a Government department as it does to any other principal. Consequently, assuming that the running of the G. I P. Railway and the construction of these steel towers are part of the trade or business of the Government department in question, yet it still remains to be considered whether the particular work contracted out to these contractors is ordinarily part of the trade or business of the principal. For the reasons already given, in my judgment, it is not ordinarily part of their trade or business Consequently, in this respect, the decision of the Commissioner cannot, I think, be upheld. It follows that, in my judgment, the appeal must be allowed and that the issues submitted to us should be answered as follows;

(a) No, as regards the G. I. P. Railway.

(b) Yes, as regards the G I. P. Railway.

(c) Yes, as regards the G I. P. Railway.

I make this qualification because we are not concerned with any other railway company except the G. I P. Railway, and accordingly I do not propose to answer the questions in the general form in which they have been submitted to us.

It is not necessary for us nor is it part of our duty to inquire why the applicants sued the G I. P. Railway instead of the contractors, Messrs. W T Henley's, but we may express the hope that as this case is regarded—so we understand—as a test case, the parties concerned may see their way to give a reasonable compensation to the dependents of this unfortunate deceased workman, although, so far as the present case goes, it appears to us that there is no legal liability on the G. I P. Railway, whether or not there is on the contractors Messrs Henley's who are not before us.

Murphy, J.—This is a reference made by the Commissioner under S. 27, Workmen's Compensation Act (8 of 1923) Three points have been submitted for decision by this Court. They are detailed at the end of the learned Commissioner's judgment.

The main point in the reference is as to the meaning which we should assign to the word "ordinarily" used in S. 12 (1) of the Act. The claimant's son was admittedly killed by being run over by a passing train, when in the employ of Messrs. W.T- Henley's Telegraph Works, who were contractors working for the railway administration, in erecting steel towers intended to carry the current required for electrifying the line between Kalyan and Karjat. The point is, whether the carrying out of this work can be said to be included in the expression "ordinarily part of the trade or business" of the railway administration. I agree with the view just expressed in the judgment delivered by the learned Chief Justice that this meaning cannot be assigned to the expression in question. The ordinary trade or business of the railway administration is the carriage of passengers and goods, and the maintenance of the line necessary for this purpose

Mr. Binning has insisted that, though possibly when the railway administration takes over these particular towers their maintenance will be part of its trade or business, the distinction really lies in the fact that the work has not yet been completed, or handed over, but is actually in the hands of the contractors. In other words, the contractors were carrying out this work as part of their ordinary trade or business. The position of the railway administration is, that when the work is ultimately completed it will take it over They are in really much the same position, as against the contractors, as they would be against other contractors who might supply them with railway sleepers or similar material. In other words, the stage at which they can use these towers has not yet been reached, and until it has been, the railway administration cannot be said to have been connected with this work as part of their trade or business. This is the view which has been taken in the English cases which have been cited in the learned Chief Justice's judgment. Under the old English Act, which has since been amended, there was a saving clause in the words "ancillary or incidental to the trade or business" and the cases which have been cited by the learned Commissioner really bear on the interpretation of these words. I think that the effect of the word "ordinarily" used in S. 12 (1) of the Indian Act is very similar.

On the other two points I also agree with the judgment just delivered by the learned Chief Justice, S. 2 (2) was is

tended to include Government departments which are engaged in work with a commercial object, but I do not think it imposes on such a Government department a duty other than that imposed on private traders on corporations, so as to deprive such a department of the saving contained in S. 12 (1). I concur in the answers which have been given to the reference in the judgment of his Lordship the learned Chief Justice.

D.D. *Appeal allowed.*

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* A. I. R. 1929 Bombay 183

PATKAR AND MURPHY, JJ.

Shidramappa Revanshidappa Umbarje—Appellant

v.

Gurushantappa Shankrappa and *others*—Respondents.

Appeals Nos. 35 and 65 of 1926, Decided on 29th October 1928, against orders of 1st Class Sub-Judge, Bijapur, in Civil Suit No 214 of 1923.

(a) Civil P. C., O. 47, R. 7—Order granting review for clear error on face of record —No appeal lies.

Appeal from an order granting a review is governed by the provision of O. 47, R. 7, as Cl. (w), R. 1, O. 43, is deleted by a rule under S. 122 made by the Bombay High Court and, therefore, no appeal lies from an order of review granted on the ground of a clear error on the face of the record : *A. I. R.* 1927 *Bom.* 599, *Rel. on.* [P 184 C 1]

*** (b) Civil P. C., O. 47, R. 1—Review granted pending appeal—Appeal cannot be heard.**

Where during pendency of an appeal the order for review supersedes the original decree, the original decree under appeal ceases to exist and the appeal cannot be heard. (*Case law discussed.*) [P 184 C 2]

Jayakar and *P. V. Kane*—for Appellant.

G. N. Thakor, *B. G. Rao*, *H. C. Coyajee*, *H. B. Gumaste* and *G. B. Chitale*—for Respondents.

Patkar, J.—Plaintiffs 1 and 2 are father and son who represent one branch of the family. Defendants 1 and 2 represent another branch of the family and defendant 3 represents the third branch of the family. The three branches agreed, on 22nd June 1918, that they should be separate from 14th November 1917. On 14th August 1918, they referred their dispute for arbitration to the spiritual head the Belur Swami, who was appointed as an arbitrator. In the rajinama they agreed to divide the joint family properties and asked the arbitrator to effect a fair and equitable partition of the properties and to settle the disputes between the parties On 6th November 1919, certain yadis were prepared and the finding of the lower Court is that the arbitrator divided the properties between the three branches. Nothing was done from 6th November 1919 till 3rd September 1923, on which date the arbitrator sent a wire to the parties. None appeared before him. The Swami, therefore, on 5th September, passed an award Ex 158 and delivered it to plaintiff 1. The plaintiffs then applied to the Court to have the award dated 5th September 1923, filed and prayed for a decree awarding the plaintiffs their separate shares on partition according to the said award The learned 1st Class Subordinate Judge, on 14th December 1925, accepted the award in part and rejected it with regard to certain paragraphs which he held to be outside the scope of the reference, and passed a decree that the portion of the award after deleting the whole of paras 17 to 21, whole of para. 22 except Cls. (i) and (ii), the whole of para. 23 except Cls. (i) and (ii), the whole of paras. 24 to 28, and the clause relating to sums declared as payable by parties to each in para. 29 and Cls (f), (g), (h) and (k) of para 32 and with the sums specified in paras. 14 to 16 being added to the Cls (a), (b) and (c) appertaining to them, be filed in Court and a decree in terms be drawn

On 6th March 1926, defendant 3 applied for a review of the decree of the 1st Class Subordinate Judge dated 14th December 1925. On 6th April 1926 defendant 2 filed an appeal to this Court, No. 35 of 1926. On 15th July 1926, the learned 1st Class Subordinate Judge allowed the review application so far as it related to the omission to take into account two items of Rs 5,000 and Rs 10,000 and made substantial alterations in the decree in respect of the two items though certain verbal alterations were made with respect to the sum of Rs. 348-14-0 and the sum specified in para 14 of the award being added to the Cls. (a), (b) and (c) in para. 32. As against the order granting review Appeal No. 65 of 1926 was filed by defendants 1 and 2.

Defendant 3 has raised preliminary objections to the maintainability of both these appeals. With regard to Appeal No. 65 of 1926, it is urged on behalf of defendant 3 that the appeal of defendants 1 and 2 was against the order granting a review of a decree already made, and an appeal could only lie under O. 47, R. 7, Civil P. C. Cl (w), R. 1, O. 43 has been deleted by a rule of this Court under S 122, Civil P. C, According to the ruling in *Kunversi* v. *Pitamberdas* (1), appeal from an order granting a review is governed by the provision of O. 47, R. 7, Civil P. C., as Cl. (w), R. 1, O. 43 is deleted by a rule made by the High Court, in exercise of the powers conferred by S. 122, Civil P. C We have, therefore, to fall back on O. 47, R. 7. R. 7 of the order lays down three cases in which an appeal is allowed. The first deals with contravention of the provisions of R. 2 which lays down to whom applications for review are to be made. The present case does not fall under R. 2, O. 47. The second case is where there has been contravention of R. 4 which requires previous notice to the opposite party and also requires strict proof that the new or important matter which was discovered was not or could not be within the power or knowledge of the parties who sought to rely upon it. R. 4, therefore, has no application to the present case. The third case is where the application for review is granted after the expiry of the period of limitation. The present review application was filed within time. In the present case, the review was granted on the ground of a clear error on the face of the record within R. 1, O. 47. We think, therefore, that the preliminary objection succeeds and Appeal No 65 of 1926 must be dismissed with costs.

With regard to Appeal No. 35 of 1926 also a preliminary objection is taken on behalf of the respondent defendant 3 that the appeal was filed against the decree dated 14th December 1925. The decree was subsequently amended by the order in review on 15th July 1916. The decree dated 14th December 1925 was modified in respect of two items of Rs 5,000 and Rs. 10,000. The original decree, therefore, does not stand, and the appeal as filed against that decree cannot be allowed to proceed. Reliance is placed on the decisions in *Kanhaiya Lal* v. *Baldeo Prasad* (2), *Brijbasi Lal* v. *Salig Ram* (3) and *Pyari Mohan Kundu* v. *Kalu Khan* (4).

In *Kanhiya Lal* v. *Baldeo Prasad* (2) it was held that, where an application for review of judgment is granted, the result is a new decree superseding the original decree, and not merely some amendment thereof. In that case the appeal was filed pending an application for review of judgment in the Court below, the review was granted, and an order passed which purported to amend the decree under appeal. It was held that the order for review superseded the original decree, and the original decree under appeal had ceased to exist and the appeal could not be heard It is urged on behalf of the appellant that the order passed by the first Class Subordinate Judge on 15th July 1926 was not an order on an application for review but was an order on an application under S 152, Civil P. C , to correct a clerical error. We do not agree with the contention of the appellant on this point. There is a substantial variation of the decree in respect of 2 items of Rs 5,000 and Rs 10,000, and defendants 1 and 2 are directly concerned with the modification of the decree in respect of those amounts. Though the appeal is not filed by defendant 1 but by defendant 2, he is equally interested in the variation of the decree with respect to 2 items of Rs 5,000 and Rs. 10,000. In *Brijbasi Lal* v. *Salig Ram* (3), the decision in the case of *Kanhaiya Lal* v. *Baldeo Prasad* (2) was followed and it was held that the effect of granting an application for review was to supersede the decree which was the subject of such an application, and no appeal, therefore, could be maintained under the decree anterior to the review but an appeal lay only against the subsequent decree The appeal in that case was filed after the application for review was finally decided, but that, in our opinion, makes no difference. In *Pyari Mohan Kundu* v. *Kalu Khan* (4), where an application for review of judgment was filed, and later during the pendency of the same, an appeal was preferred, it was held that the Court had power and

(1) A. I. R. 1927 Bom. 599.

(2) [1905] 28 All. 240=(1905) A. W. N. 265.

(3) [1912] 34 All. 282=14 I. C. 472=9 A. L. J. 183.

(4) [1917] 44 Cal. 1011=41 I. C. 497.

in fact was bound to proceed with the application for review of judgment notwithstanding the fact that an appeal had been subsequently filed. The point under discussion did not really arise in *Pyari Mohan Kundu* v. *Kalu Khan* (4), but the judgment expresses its approval of the decision in *Kanhaiya Lal* v. *Baldeo Prasad* (2), that, if an application for review is successful, the appeal cannot proceed. In *Vadilal* v. *Fulchand* (5) Sir Lawrence Jenkins has defined the three stages of an application for review. When the application is successful, there is a fresh decree which is binding between the parties The grant of a rule for review holds the judgment in suspense until the case has been reheard : see *Achyut* v. *Tapibai* (6). The moment a review is granted the case is reopened for consideration and the decree passed by the Court modifying the previous decree is a fresh and final decree binding between the parties. The present case resembles the case decided by the Punjab Chief Court in *Basheshar Nath* v. *Ram Kishen Das* (7), which accepted the view of the Allahabad High Court in the case referred to above The same view was adopted by the Calcutta High Court in *Gour Krishna Sarkar* v. *Nilmadhab Saha* (8). We think, therefore, that in this case defendant 2's appeal filed against the order of the First Class Subordinate Judge dated 14th December 1925 cannot proceed. The remedy of defendant 2 was to withdraw the appeal and file a fresh appeal against the final decree.

We think, therefore, that Appeal No. 35 of 1926 must also be dismissed with costs

With regard to the cross-objections of defendant 3, he could not file cross-objections if he could not appeal. The logical result of the contention of defendant 3 in support of the preliminary objection to the main appeal would be that he could not have appealed against the decree dated 14th December 1925. It would, therefore, follow that he could not file cross-objections to the decree dated 14th December 1925. The cross-objections must, therefore, be dismissed with costs.

There will be separate sets of costs with regard to the appeals and the cross-objections As regards the cross-objections, though they are valued at Rs. 130 for the purposes of Court-fees, the office should decide the valuation as to the pleader's fees, and if the parties do not agree the matter can be brought before the Court

Murphy, J.—I also agree that the preliminary objections must be upheld, in the case of each of these appeals and that they are not now competent.

Appeal No 65 of 1926 is made against an order granting a review of judgment on the ground of an error or defect on the face of the record O. 43, R 1, Cl (w), Civil P. C., has been deleted by a rule made by this High Court under S. 122, and if an appeal lies against the order granting a review, it must do so under R 7, O. 47 But it does not seem to me that the order now appealed against comes within the purview of that rule. I do not think, though it has been urged, that it is in contravention of the provisions of R 2 of the Order, neither admittedly does it come within those of R. 4 ; and there is no question of limitation. These are the only possible grounds of appeal now remaining against an order of this nature, and since this particular one does not come within them, it is clear that no appeal lies, and that it must be dismissed.

In the case of Appeal No. 35 of 1926, which has been filed by defendant 2 alone, the facts are slightly different. The Court's original decree was made on 14th December 1925, and it is against this decree that the appeal has been made. As already stated in connexion with the companion appeal, the decree was modified by the Court on 15th July 1926 in consequence of the review application. The general principle applicable to such cases has been stated broadly by Sir Lawrence Jenkins, C. J., in the case of *Vadilal* v. *Fulchand* (5), and it is to the effect that when a review is granted, the original decree is modified, and actually what happens is that a fresh one is passed. It has been held in the case of *Kanhaiya Lal* v. *Baldeo Prasad* (2) that where there has been a modification of the decree on a review, no appeal against the original decree remains competent, and this view has been followed in the case of the same Court, *Brijbasi Lal* v. *Salig Ram* (3), and in that of *Pyari Mohan Kundu* v. *Kalu Khan* (4), where it has been held that, if a review is

(5) [1905] 30 Bom. 56=7 Bom. L. R. 664.
(6) A. I. R. 1924 Bom. 310=48 Bom. 210.
(7) [1919] P. R. No. 140 of 1919.
(8) A. I. R. 1923 Cal. 113.

successful, the appeal against the original decree cannot proceed.

Mr. Jayakar, for the appellant, has urged that a distinction has been made in the case of *Kanhaiya Lal* v. *Baldeo Prasad* (2), where there is a sentence to the following effect (p. 241) :

"It is admitted that the application for review and the order passed thereon could not be treated as having been made under S. 206, (that is of the old Code) inasmuch as it was not an application to bring the decree into conformity with the judgment or to amend a clerical error."

He has urged that we should make a distinction that, where the application for review is substantially one under S 152, involving some minor modification or correction, and not going to the merits of the original decree, these cases have no application ; but I agree with my learned brother Patkar, J., that on the facts of the present case, even if we held that the Allahabad High Court really meant to lay down a principle apart from the obvious extent of S. 152, we would not be warranted in making such a distinction. What happened in the lower Court was a substantial amendment of the original decree such as could only have been made on a review of the judgment. I think the cases quoted apply, and that on this ground this appeal also must be held to be incompetent and must be dismissed, and that for a similar reason the cross-objections must also fail.

R K *Appeal dismissed.*

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BAKER, J.

Parashram Yeshvantshet Alwe—Appellant.

v.

Lakshmibai Babaji Samant—Respondent

Second Appeal No. 739 of 1926, Decided on 7th November 1928, against the decision of the First Class Sub-Judge, Ratnagiri in Appeal No. 52 of 1925.

*** (a) Transfer of Property Act, S. 60 — Subsequent permanent lease though covering part of mortgaged property is clog.**

Permanent lease made by mortgagor subsequent to the mortgage, will constitute a clog on the equity of redemption, although it does not cover the whole of the mortgaged property: 16 *Bom.* 705 ; and 5 *P. L. J.*, 423, *Foll.*; 34 *All.* 620 (*P. C.*) ; 27 *Bom.* 237 ; and *A. I. R.* 1922 *Bom.* 277, *Dist.* [P 187 C 1]

*** (b) Limitation Act, Art. 44—Suit to set aside leases as clog on redemption does not come within Art. 44.**

Article 44 refers to suits brought by a minor to set aside the unauthorized acts of his guardian, and does not apply to a case where the plaintiff tries to set aside the leases as void as clog on the equity of redemption. [P 188 C 2]

H. C Coyajee and *A. G. Desai*—for Appellant

G. N Thakor and *T. N. Walavalkar*—for Respondent

Judgment.—The facts of this appeal are set out at length in the judgments of the Courts below, and since the appeal turns entirely on two points of law, I do not think it is necessary to repeat them at length. The plaintiff Lakshmibai sues as the heir of her brother Tukaram to redeem the property described in the plaint from the mortgage of the defendants. The property originally belonged to her father Govind, who mortgaged it in 1897 with the father of defendants 1 to 3. After her father's death his heir was Tukaram, who was of unsound mind, and his mother Annapurnabai managed his affairs. On his behalf she executed a second mortgage in 1902 in favour of defendant 1, and in 1907 she executed two permanent leases of a part of the property mortgaged in favour of the defendants. The defendants contended that both the mortgages must be redeemed, that the suit was bad for misjoinder of causes of action, that the rent notes were executed for the improvement of the property and for legal necessity, and that by reason of them they are in adverse possession for more than twelve years. They also claimed a certain sum on account of improvements. The first Court, the Subordinate Judge of Deogad, held that the rent notes were not binding on the plaintiff, and that she was entitled to possession without having them set aside He held that the plaintiff was entitled to possession on redeeming both the mortgages and after allowing the defendants certain sums of money for costs of improvement and costs of litigation, he declared that the sum due on the mortgages was Rs. 4,606. Defendant 2 appealed, and the First Class Subordinate Judge of Ratnagiri found that the leases, Exs. 55 and 56, were not legal and valid, and that the plaintiff's right to question the validity of these leases as being clogs on the equity of redemption was not lost by reason of the

law of limitation. He, therefore, dismissed the appeal after modifying the lower Court's decree by reducing the amount payable on the mortgages from Rs. 4,606 to Rs. 3,381 odd Defendant 2 makes this second appeal, but the appeal is confined to issues 1 and 2 in the lower appellate Court, viz., whether the leases, Exs. 55 and 56, are legal and valid, and whether the plaintiff's right to question the validity of these leases as being clogs on the equity of redemption is barred by the law of limitation.

Now there can be no doubt that these leases, although they do not cover the whole of the mortgaged property will constitute a clog on the equity of redemption inasmuch as the plaintiff, the representative of the mortgagor, could not by paying the mortgage amount obtain possession of the whole mortgaged property during the continuance of these leases. It is also settled law that no clog can be placed upon the equity of redemption by any arrangement contemporaneous with the mortgage, but it has been contended by the learned counsel for the appellant that this principle does not apply to an arrangement entered into by the mortgagor and the mortgagee not at the time of the mortgage, but subsequent to it. There is direct authority upon the point in *Subrao Mangeshaya* v. *Manjapa Shetti* (1) In that case the mortgage was of 1854, and a portion of the lands mortgaged had already been leased to the mortgagee by a permanent lease in 1853. In 1857 a fresh lease of the mortgaged property was passed by the mortgagor to the mortgagee A suit to redeem by the mortgagor was contested by the mortgagee on the ground of the existence of these leases, and it was held by this Court that the plaintiff was not bound by the lease. The ruling is based on the English decision of *Hickes* v *Cooke* (2), where it was held that no agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises (such as a lease) where the mortgage continues, ought to stand, if impeached within reasonable time, from the great advantage which the mortgagee has over the other party in such a transaction. It was relying on this case that the lower appellate Court held against the appellant-defendant on this point. This case of *Subrao* v. *Manjapa* (1) has never been overruled, and has recently been followed with approval by the Patna High Court in *Ram Narain* v. *Surathnath* (3). Ordinarily speaking, this decision by a Bench of this Court would be binding on me, but it has been contended by the learned counsel for the appellant that there are more recent decisions of the Privy Council and of this Court which are inconsistent with the principles laid down in *Subrao* v. *Manjapa* (1) and the first case he has quoted is *Shankar Din* v. *Gokul Prasad* (4), a decision of the Privy Council, and in particular he has relied on the remarks at p 1105, in which it is stated that there is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem, and where the right to redeem is so qualified, a suit for redemption based on the mortgage cannot be maintained. That was a case which came within the purview of the Oudh Estates Act (1 of 1869), and it was held that whatever may have been the mortgagor's right under the deed of 1846, the parties deliberately came to a settlement in 1870 by which his representatives, for certain additional benefit reserved to them under the razinamahs, agreed to subject their right of redemption to certain conditions The question of the transaction operating as a clog on the equity of redemption did not arise. The remarks at p 1105 must be read in the light of the facts of that case. The effect of that arrangement was to qualify the right to redeem.

In the present case, as I have already said, the mortgagor would not be able to recover possession of that portion of the mortgaged property which is covered by the leases even though he obtained a decree for redemption. Another case quoted by the learned counsel for the appellant is *Kanhayalal* v. *Narhar* (5), in which it was held that it is open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee, but it must not be part and

(1) [1892] 16 Bom. 705.
(2) [1816] 4 Dow. 16.
(3) [1920] 5 Pat. L. J. 423=57 I. C. 337=(1920) P. H C. C. 351.
(4) [1912] 34 All. 620=16 I. C. 78=15 O. C. 285 (P. C.).
(5) [1903] 27 Bom. 297=5 Bom. L. R. 140.

parcel of the original loan or mortgage bargain. This is a different point to the point which arises in the present case. Where the mortgagor sells his equity of redemption to the mortgagee, no question of a clog on the equity of redemption can arise since the equity of redemption no longer remains. Then the learned counsel for the appellant has relied on the case in *Bhimrao* v. *Sakharam* (6) The point in that case was whether the lease and the mortgage were contemporaneous or not, and the finding of the Court was that the two documents were parts of the same transaction, and, therefore, the contract constituted a clog on the equity of redemption. The question of the legal validity of a lease subsequent to the mortgage as constituting a clog on the equity of redemption was not considered at all. In his reply the learned counsel for the appellant has stated that he also relies on this case as showing that there is a very little difference between a contract by the mortgagee for sale and a contract to take the premises on a permanent tenure at a fixed rent, but in this case it was laid down that if the mortgagee had got a contract for the sale of the land, undoubtedly a Court of equity would not allow him to take advantage of that contract, and reference is made to the case of *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (7). Then the learned counsel referred to Halsbury's Laws of England, Vol. 21, paras. 274, 275, etc., with regard to restrictions on the right to redeem, where at p 144, para. 276, it is stated that the rule against clogging the equity of redemption does not invalidate subsequent and independent transactions between the mortgagor and mortgagee relating to the mortgaged property. The transactions referred to in the following sentence are, an option to purchase the property, and a sale or release of the equity of redemption :

"Such a sale or release is, however, liable to be set aside if there has been any oppression or unfairness on the part of the mortgagee."

But the concluding words of that paragraph are :

"As regards leases by a mortgagor to his mortgagee, a lease for a long period at an inadequate rent will not be upheld,"

and reference is made to the case I have already quoted, *Hickes* v. *Cooke* (2), along with other cases. In the present case the lower appellate Court has found that as a matter of fact the terms of the leases were unfair. It does not, therefore, appear to me that any support to the appellant's contentions can be derived from Halsbury.

In these circumstances, having regard to the authorities which I have set out at some length, and in particular to the ruling in *Subrao* v. *Manjapa* (1), which stands at present and has not been dissented from, I am of opinion that the view of the lower appellate Court that these leases are invalid as creating a clog on the equity of redemption is correct.

The only remaining point which has been taken is that the claim of the plaintiff to set aside these leases is barred by limitation under Art. 44, Lim Act. Now the point of limitation could only arise if these leases are not a clog on the equity of redemption. The finding on issue I that they are a clog on the equity of redemption, and, therefore, invalid, is sufficient answer to the point of limitation The leases are void, in my opinion, and not voidable and, therefore, no action is necessary for their being set aside. Art. 44, Lim. Act refers to suits brought by a minor to set aside the unauthorized acts of his guardian, and does not seem to me to apply to the present case. The plaintiff attacks the leases on the ground that they were void in law and not that they were beyond the authority of the guardian of Tukaram. It is only in a suit for redemption by the mortgagor that the question of the validity of these leases would arise, since there could be no object in seeking to set aside the leases so long as the mortgage itself subsisted and the defendants were entitled to possession under that.

For these reasons I am of opinion that the view of the lower appellate Court is correct, and should be confirmed, and the appeal dismissed with costs, the remaining points not having been argued.

P D /R K. *Appeal dismissed.*

(6) A. I. R. 1922 Bom. 277=46 Bom. 409.
(7) [1904] A. C. 323=73 L. J. Ch. 526=20 T. L. R. 536=11 Manson. 276=52 W. R. 673 =90 L. T. 731.

A. I. R. 1929 Bombay 189

PATKAR AND MURPHY, JJ.

Mahadu Tukaram Satav—Applicant.

v.

Patlu Sadu Satav—Opposite Party.

Civil Revn. Appln. No. 305 of 1927, Decided on 5th November 1928, against order of Sub-Judge, Poona.

Civil P. C., O. 21, Rr. 89 and 91 (A)—Application to mamlatdar for not sanctioning auction, though expressing applicant's desire to make separate application to Court is valid application under R. 89.

An application that auction should not be sanctioned, made to the mamlatdar and accompanied by deposit, is a valid application under O. 21, R. 89 although the application mentions the applicant's desire to make a separate application to the Court. [P 190 C 1]

G. S. Rao—for Applicant.

G. N. Thakor and *K. A. Padhye*—for Opposite Party.

Patkar, J.—In execution of a decree obtained by opponent 3 against opponents 1 and 2, the property in suit was sold by the Collector on 16th January 1926, to the applicant. The judgment-debtor on 25th January deposited into Court the decretal amount with five per cent of the purchase money under O. 21, R. 89, and on the same day an application, Ex. 22, was made to the mamlatdar stating that the amount of Rs. 519-12-0 was deposited into Court and praying that the auction should not be sanctioned. On 22nd March 1926, the judgment-debtor applied to the Court to set aside the sale. The learned Subordinate Judge held that the application made to the mamlatdar was really an application for setting aside the sale which ought to have been sent for disposal to the Court, and that the application made to the Court was a continuation of Ex. 22 before the mamlatdar.

On appeal, the learned District Judge held that, in view of the deposit of the decretal amount on 25th January the application to the mamlatdar was practically an application for setting aside the sale and the application to the Court of 22nd March might be treated as a continuation of the application to the mamlatdar.

On behalf of the auction-purchaser it is contended in this revisional application that the conditions prescribed by O. 21, R. 89, were not satisfied, that an application to set aside the sale was, in fact, not made to the Court and, therefore, under O. 21, R. 92, the Court ought to have made the order confirming the sale and ought to have held that the sale was absolute.

In *Raoji* v. *Bansilal Narayan* (1), no application was made to the mamlatdar or Collector, or to the Court to set aside the sale, though a deposit was made in Court of the amount of the decree together with interest on the purchase-money within thirty days of the date of the sale. It was held that the Civil Procedure Code, with the Indian Limitation Act, provides a short period within which applications specifying their object should be made to set aside sales, and the shortness of time allowed may be taken as indicative of the policy of the legislature that titles arising from judicial sales should be settled as soon as possible. In the present case, however, there was a deposit made in Court within ten days of the sale and an application was made to the mamlatdar on the same day that the sale should not be sanctioned.

In *Tipangavda* v. *Ramangavda* (2), an application was made to the revenue officer conducting the sale, but no application under O. 21, R. 89, was made to the civil Court. It was held that the application being made to a wrong person in the first instance, and not made to the Court, was not a good application. R. 17 which was then in force was as follows :

"If any application to set aside the sale be made within the time limited by law to the Collector or other officer aforesaid, he shall refer the applicant to the civil Court."

Under R. 17 the Collector or other officer conducting the sale had no power to accept the application to set aside the sale, and it was necessary to make an application to the civil Court. In *Tipangavda* v. *Ramangavda* (2) the party was referred by the officer conducting the sale to the civil Court, but no application was made within time.

In *Gadigappa* v. *Shidappa* (3) reference was made to the hardship and inconvenience which arose in consequence of the wording of the rule and an opinion was expressed that the rule should be amended. R. 17 was changed into R 16 which was in the same terms. But by a

(1) [1919] 43 Bom. 735=53 I. C. 135=21 Bom. L. R. 835.

(2) [1920] 44 Bom. 50=54 I. C. 670=22 Bom. L. R. 35.

(3) A. I. R. 1924 Bom. 495=48 Bom. 638.

Notification in the Government Gazette, Part I, p. 917, for 1925, R. 16 was amended as follows :

"If any application to set aside the sale under O. 21, Rr. 89, 90 or 91, Civil P. C., and in the case of an application under R. 89, the deposit, as required by that rule, be made within the time limited by law to the Collector or other officer aforesaid, he shall accept such application and deposit, and forward such application and the deposit, if any, to the civil Court, and inform the applicant accordingly.'

An application and a deposit, therefore, made to the Collector or other officer conducting the sale must be accepted by such officer and forwarded to the civil Court for disposal A new rule, O. 21, R. 91 (A), has been made by the High Court under S. 122, Civil P. C., which runs as follows :

" Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector, an application under Rr. 89, 90 or 91, and in the case of an application under, R. 89, the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the Local Government under S. 70 of the Code, shall be deemed to have been made to or in the Court within the meaning of Rr. 89, 90 and 91."

It, therefore, follows that an application under R 89 and a deposit required by that rule, if made to the Collector or other officer to whom the decree is referred for execution, shall be deemed to have been made to or in Court within the meaning of R 89, O 21

In the present case the deposit was made on 25th January and an application was made to the mamlatdar that the auction should not be sanctioned. Both the lower Courts have considered this application as an application to set aside the sale, though it referred to the applicant's desire to make a separate application to the Court. We think, however, that a reasonable interpretation must be put on Ex. 22 and hold that both the lower Courts were right in their construction of Ex. 22 that it was an application made to set aside the sale As the deposit was made in Court on 25th January and an application was made to the mamlatdar on the same date, we think that under the new R. 91 (A), O. 21 the conditions necessary under O. 21, R 89, are satisfied. We think, therefore, that both the lower Courts were right in setting aside the sale. On these grounds we would discharge the rule with costs.

Murphy, J.—The facts and the material dates have been stated in the judgment delivered by my learned brother Patkar, J. I think it is clear that the conditions requisite for setting aside the sale were fulfilled in this matter. The deposit of the necessary amount was made within time and the application (Ex. 22) is substantially one to set aside the sale, though unfortunately it is not accurately drafted. This was also made within time Under R. 91 (A) made by the High Court in 1925, an application under O. 21, R 89, made to the Collector, or to an officer subordinate to the Collector, is deemed to be one made to or into Court within the meaning of R 89. Though it is true there was here a subsequent application made to the Court, which was made out of time, and though both the Courts below have held that it was really a continuation of the original one contained in Ex 22, I think it is not actually necessary so to hold, and that all the conditions required for the cancellation of the sale had already been fulfilled. I, therefore, agree that the rule should be discharged

P D/R.K *Rule discharged.*

A. I. R 1929 Bombay 190

PATKAR AND MURPHY, JJ.

Sadeck Abdulla—Applicant.

v.

Mahomed Abdulla Hasanalli—Opponent.

Civil Revn. Appln. No. 43 of 1928, Decided on 6th November 1928, against order of Political Resident, Aden, in Civil Suit No. 31 of 1927.

(a) Civil P. C., S. 115—Revision lies from order by Resident declining reference under Aden Courts Act (2 of 1834), S. 8.

With regard to the questions arising in reference to cases to be stated by the Resident for the decision of the High Court under S. 8, Aden Courts Act (2 of 1864), the Resident's Court is subordinate to the High Court, and the application for revision under S. 115 would lie against the order of the Resident declining to make a reference under that section: 34 *Bom.* 267, *Fol.*, *A. I. R.* 1926 *Bom.* 139, *Expl. and Dist.* 30 *Bom.* 246 (*P.C.*) and 27 *Bom.* 575, *Rel. on.* [P 191 C 2]

(b) Civil P. C., O. 38, R. 3—Surety enabling judgment-debtor to escape processes—Only way for his discharge is application under R. 3.

Where the judgment-debtor has been enabled to go out of the jurisdiction of the Court and evade its processes by virtue of the execution of the surety bond, the only way for the discharge of the surety is an application under

O. 38, R. 3. Otherwise he shall be liable on his surety bond. [P 192 C 1]

K. N. Koyajee—for Applicant.

G. N. Thakor and *Alreja & Co.*—for Opponent.

Patkar, J.—This is an application in revision against the order of the Resident at Aden, declining to make a reference to this Court under S. 8, Aden Courts Act 2 of 1864. The petitioner in this case filed suit No 31 of 1927, in the Court of the Resident at Aden for a declaration that the surety bond executed by him in suit No. 318 of 1923, should be set aside and for a declaration that the decree in that suit should not .be executed against him as a surety. The learned Assistant Resident and Judge at Aden dismissed the suit holding that as no order had been passed under O. 38, R 3, Civil P C, the plaintiff's suit ought to fail. On appeal, the Resident refused to make a reference on the ground that the suit did not lie and therefore an appeal did not lie, and on the merits also he held that the present suit did not lie as an appeal lay from an order under O 38, R 3, and the suit was barred under S. 47, Civil P C.

A preliminary objection is taken on behalf of the opponents that this Court cannot interfere in revision under S. 115, Civil P. C. and it is urged that the Resident at Aden is not a Court subordinate to the High Court within the meaning of S. 115, nor is the High Court a Court of appellate jurisdiction within the meaning of S. 107, Government of India Act. It has been held in *Abdul Karim* v. *Municipal Officer, Aden* (1) that, for the purposes of Cl. 13, Letters Patent, the Court of the Resident at Aden is a Court under the superintendence of the High Court and the High Court has power to remove a suit from the Court of the Resident and to try and determine the same. A reference was made in that case to the opinion of Phear and Mitter, JJ., in *In the matter of, John Thomson* (2), where it was held that a reference was " a modified form of appeal," and also to the case of *Bhagwandas* v. *Jedu* (3), where it was held that the term " appellate jurisdiction " in S 15, Charter Act should be construed to include the power of revision. Having regard to the preamble to Act 2 of 1864 and to S. 31 of the said Act, it is clear that the Court at Aden is subject to the superintendence of this Court: see the decision of the Privy Council in *Municipal Officer, Aden* v *Ismail Hajee* (4). The point, however, for consideration in this case has been concluded by the decision in the case of *Rhimbai Jamalbhoy* v. *Mariam Abdul Rasul* (5), where it was held under similar circumstances that an application for revision under S. 115, Civil P. C. was maintainable, and that with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Court under the provisions of S. 8, Aden Courts Act (2 of 1864), the Resident's Court was subordinate to the High Court. A doubt was thrown on that decision in a subsequent ruling of this Court in *Moses* v *Meyer* (6). The point, however, decided in that case was that the Court was not competent to entertain an application under S 115 as the judgment or order complained of was appealable to the Privy Council. The effect, however, of the decision in *Khimbai Jamalbhoy* v. *Marim Abdul Rasul* (5) was stated in wide terms. We prefer to follow the decision in *Rhimbai Jamalbhoy* case (5) and hold that with regard to the questions arising in reference to cases to be stated by the Resident for the decision of the High Court under S 8, Aden Act, the Resident's Court is subordinate to the High Court, and the application for revision under S 115 would lie against the order of the Resident declining to make a reference under that section.

The next question is whether, under the circumstances of the present case, we should interfere under S 115, Civil P C. The surety in this case made four ineffective applications to the trial Judge. The first application was made on 1st March 1924, the second on 9th February 1926, the third on 11th May 1926, and the fourth on 21st July 1926. There were no orders passed except on the second application to the effect that it was dismissed. The learned Assistant Resident and Judge held that as the defendant was not before the Court, the surety bond could not be discharged. He further held that the surety was never discharged and could not be discharged be-

(1) [1903] 27 Bom. 575=5 Bom. L. R. 562.
(2) [1870] 6 Beng. L.R. 180=14 W. R. 257.
(3) [1902] 4 Bom. L. R. 970.
(4) [1905] 30 Bom. 246=33 I. A. 38=8 Bom. L. R. 4=8 Sar. 901 (P.C.).
(5) [1909] 34 Bom. 267=5 I. C. 867=12 Bom. L. R. 149.
(6) A. I. R. 1926 Bom. 139=50 Bom. 32.

cause the defendant never appeared in pursuance of any summons or warrant. The learnad Judge failed to understand why the plaintiff did not ask for his discharge when Aref Kharsa was actually before the Court on 27th February 1926. As he did not do so, he had only himself to blame for not having been discharged. It appears clear, therefore, that the remedy of the surety was under O. 38, R. 3, to get himself discharged from his obligation flowing from the execution of the surety bond. If the order on the application of 9th February 1926, be considered as an order refusing his application to be discharged the remedy of the surety was by an appeal against that order. If there was no order for his discharge on any of these four applications, it is clear that the surety did not take any effective steps to get himself discharged from his obligation, and the only way recognized under the Code by which he could get himself discharged was by an application under O. 38, R. 3. The judgment-debtor has been enabled to go out of the jurisdiction of the Court and evade its processes by virtue of the execution of the surety bond by the plaintiff. We do not think that in this case the decree-holder has taken any undue advantage, or that there was any fraud on the surety. On the other hand, the surety has himself to blame for not taking legal and effective measures for being discharged. We do not think that any injustice has occurred, and the surety is wrongly made liable on his surety bond. There are not, therefore, sufficient grounds, in our opinion, to interfere in the excercise of our revisional powers.

On these grounds. we would discharge the rule with costs.

Murphy, J.—The facts of the two suits out of which this revision application arises have already been stated in my learned brother's judgment just delivered. At the outset, Mr. Thakor has objected that this Court has no jurisdiction to entertain the application, as the Act governing the Aden Civil Courts did not confer any on the High Court. The authorities on the point are contained in the cases of *Municipal Officer, Aden* v. *Ismail Hajee* (4); *Rhimbai Jamalbhoy* v. *Mariam Abdul Rasul* (5) and *Moses* v. *Meyer* (6). The first of these authorities lays down that looking to the Act as a whole and to the word "superintendence" used in the preamble where in the same connexion the word "revision" is also used, the High Court of Bombay has power of transfer over the Aden Courts. In the second ruling it was also held that the jurisdiction under S. 115 existed, but in the last ruling I have quoted Sir Norman Macleod, C. J., cast a doubt on the point, though in fact his decision turned on another aspect of the case then before him, and did not involve a finding on the question of the High Court's jurisdiction. I believe that looking to these cases and to the frame of the Act, including its preamble, we have jurisdiction to entertain an application against the order of the Resident made under S. 8, Aden Act of 1864 and refusing to allow a reference to this Court.

The remaining question, therefore, is whether we should interfere in this case or not. It is clear from the record that though the applicant made several attempts to be discharged from his bond of suretyship, he did not actually prosecute them as he should have done, and most of his effort was directed to obtain a return of what is called his "grant" meaning the title-deeds of some of his property. Also, it is evident that the conditions for the regular cancellation of his bond never existed, and that it was never actually cancelled. It also appears as noted by the learned Resident in his judgment, that the only party really aggrieved can be the plaintiff in the first suit, for the applicant voluntarily entered into the bond and his principal has since left the jurisdiction of the Aden Court. The decree has actually, we are told, been executed against the applicant. But, whether the suit, such as the applicant filed and which met with dismissal both in the original Court and in the first appeal, is competent or not is, I think, not a point we can now decide. This is a revision application and the Resident's Court has a discretion to refuse to make a reference under S. 8 on the ground it did, which was that no question affecting the merits arose in the case, and it appears to me that there is no valid reason for interference and that the rule should be discharged.

P.D./R.K. *Rule discharged.*

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BAKER, J.

Kashinath Mahadev and *others*—Defendants 1 and 2—Appellants.

v.

Gangubai Keshav—Plaintiff—Respondent.

Second Appeal No. 17 of 1927, Decided on 5th December 1928, against decision of Asst. Judge, Poona, in Civil Suit No. 419 of 1922.

(a) Trusts Act, S. 73—No provision by founder to appoint fresh trustee—Legal representatives of founder have right of being trustee.

In the case of a trust the heirs of the founder or his legal representatives have a right to be appointed trustees where no trustees are in existence or where no provision has been made by the founder by the appointment of fresh trustees after the death of those originally appointed : 17 *Cal.* 3 (*P.C.*); 32 *Cal.* 129 (*P.C.*); *A.I.R.* 1923 *Cal.* 142, *Rel. on.*

[P 193 C 2, P 194 C 1]

(b) Civil P. C., S. 92—Suit by person in private capacity is not barred.

A suit brought by the plaintiff in his private capacity to recover possession of the trust property from the persons who, he alleges, are trespassers, is not barred by S. 92 : *A. I. R.* 1924 *Bom.* 518 and *A. I. R.* 1921 *Bom.* 297, *Dist.* (*Case law discussed.*) [P 194 C 1]

(c) Civil P. C., Sch. 2, Para. 20—Award can be split.

An award filed without the intervention of the Court can be split and need not be filed as a whole: *A. I. R.* 1914 *P. C.* 105, *Rel. on.*

[P 195 C 2]

G. N. Thakor and *S. Y. Abhyankar*—for Appellants.

P. B. Shingne and *V. D. Limaye*—for Respondent.

Facts.—One Ganga Bai sued to recover possession of the property in suit as the heir of her father Gopal. Gopal died leaving a will in favour of his wife, Radha Bai whereby he left the property to her for her life. He also gave a direction to make an adoption and that if she did not adopt she was to employ the property for establishing a deity of Muralidhar. Radha Bai died in 1898 leaving a will by which she appointed one Vinayak and Ganga Bai as executors, for installing the idol of Shri Murlidhar and for devoting the property for the upkeep of the same. In 1902 Ganga Bai, the plaintiff, had filed a suit which was ultimately withdrawn. In 1910 Ganga Bai's sister had filed a suit but it was dismissed as the trust in suit was held to be a charitable trust. In the suit by Ganga Bai filed in 1902 an award decree was passed between the plaintiffs and the trustee by which a house in possession of the plaintiff was exchanged for another house in Shukrawarpeth, Poona Plaintiff, however, continued in posessessin of both the houses. In 1922 the executors Vinayak and Ganga Bai having died a suit was brought for the recovery of the property as heir of her father against the brother of Vinayak who was alleged to have been appointed a trustee by the deceased's trustee Vinayak.

Judgment.—(After stating facts, the judgment proceeded). Now, so far as concerns the allegation that defendant 1 was appointed a trustee by the last surviving trustee Vinayak previous to his death, that is a finding of fact, and the point has not been raised by the learned pleader for the appellant, nor indeed could it be raised in the face of the finding on it based on evidence. The position, therefore, in this case is this: There is no living trustee who can administer the property in respect of which the trust was created by the will of Radhabai. The plaintiff is the heir of the founder of the trust. It has been argued by the learned counsel for the appellants that nobody can be appointed a trustee whose interests are adverse to those of the trust, and that the conduct of the plaintiff, as disclosed by the previous litigations in which she has denied the execution of the will by her mother Radhabai and the validity of the will, is such that she cannot be appointed a trustee, nor under Hindu law can she succeed to the trust property. The law, however, which has been dealt with by the learned Assistant Judge, is quite clear on the point. In the case of a trust the heirs of the founder or his legal representatives have a right to be appointed trustees and where as in the present case, no trustees are in existence, (nor indeed does the will of Radhabai which has been translated by the lower appellate Court give the trustees the power of appointing successors), it is obvious that somebody must be in existence to administer the property, and represent the trust and under the authorities the plaintiff is the only person who can do so. In this connexion I may refer to *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (1), where it is laid down that according

(1) [1889] 17 Cal. 3=16 I. A. 137=5 Sar. 350 (P.C).

to Hindu law, when the worship of a Thakur has been founded the office of a shebait is held to be vested in the heir or heirs of the founder, in default of evidence thathe has disposed of it otherwise, provided that there has not been some usage, course of dealing, or circumstance, showing a different mode of devoluton. To the same effect in *Jagadindira Nath Roy* v. *Hementa Kamari Debi* (2), where there was no reliable evidence as to the foundation of a religious endowment, or as to its terms or conditions, and it was held that the legal inference was that title to the property or to its management and control followed the line of inheritance from the founder The latest case on the point is the one on which the learned Judge of the lower appellate Court has relied, namely, *Anand Chandra* v. *Broja Lal* (3), where it was laid down that where a shebait appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment, the office reverts to the founder and his representatives even though the endowment has assumed a public character. And the same principle will apply to a case where no provision has been made by the founder, as in this case, for the appointment of fresh trustees after the death of those originally appointed.

It was next contended that the present suit will not lie, and that the proper course was to bring a suit with the permission of the Collector under S. 92, Civil P. C S. 92 refers to breaches of any express or constructive trust or suits where the direction of the Court is deemed necessary for the administration of any such trust, and the reliefs which are set out in that section are not the prime reliefs which the plaintiff is seeking in the present suit. The present suit is one prought by the plaintiff in her private capacity to recover possession of the property from the persons who, she alleges, are trespassers. S. 92 refers to a suit by some members of the public, of whom there must not be less than two, in order to remove trustees, appoint trustees, have accounts and inquiries taken and getting a scheme settled or generally arranging for the management of the trust. There are a very large number of rulings on this point as to what suits will fall under S. 92, and what will not. The learned pleader for the respondent has relied on *Muhammad Abdul Majid Khan* v. *Ahmad Said Khan* (4), *Ayatunnessa Bibi* v. *Kulper Khalifa* (5), *Appanna Poricha* v. *Narasinga Poricha* (6), *Miya Vali Ulla* v. *Bava Santi Miya* (7), *Navroji* v. *Kharshedji* (8) and *Nilkant* v. *Ramkrishna* (9). There are many other cases, and the general principle laid down by these cases is that a distinction is drawn between a suit brought by a person in his private capacity and as a member of the public. In order to make the point clear, however, it may be as well to refer very briefly to the cases in order to show what cases have been held not to lie within the four corners of S 92.

In *Muhammad Abdul Majid Khan* v. *Ahmed Said Khan* (4), a suit by a plaintiff alleging that he was the rightful mutawalli of a waqf and that the defendant had taken wrongful possession of the property was held not to lie within the purview of S. 92, Civil P. C. Similarly, in *Ayatunnessa Bibi* v. *Kulper Khalifa* (5) it was held that a suit for the removal of a trespasser in possession of trust property is not a suit of the kind contemplated by S. 92, Civil P. P. C, aad therefore, for the institution of such a suit no consent of the Advocate General is necessary. In *Appanna Poricha* v. *Narasinga Poricha* (6) it was held that a suit by a trustee of a charitable or religious trust against a co-trustee for accounts does not fall within S. 92, Civil P. C, and may be brought without the sanction of the Advocate General. In *Miya Vali Ulla* v *Sayed Bava Santi Miya* (7) the suit was by a plaintiff who claimed to be a co-trustee of certain dargas and entitled to a share in the management and in the profits thereof. It was held that it did not fall within the purview of S. 539 (that is, the present S. 92), Civil P. C. I may also refer to *Nilkanth* v. *Ramkrishna* (9), which is a late case, where it was held that a suit for a declaration that defendants were not properly

(2) [1904] 32 Cal. 123=31 I. A. 203=8 Sar. 698 (P.C.).
(3) A. I. R. 1923 Cal. 142=50 Cal. 292.
(4) [1913] 35 All. 459=20 I. C. 37=11 A. L. J. 673.
(5) [1914] 41 Cal. 749=22 I. C. 677=19 C. W. N. 234.
(6) A.I.R. 1922 Mad. 17=45 Mad. 113 (F.B.).
(7) [1896] 22 Bom. 496.
(8) [1909] 28 Bom. 20=5 Bom. L. R. 745.
(9) A. I. R. 1923 Bom. 67=46 Bom. 101.

appointed trustees of a temple, and for an injunction appropriate to that declaration, did not fall within the purview of S. 92, Civil P. C. I think this is sufficient authority on the point. The learned counsel for appellant has referred to one case of this Court in *Narayan* v. *Vasudeo* (10), where S. 92, was held to apply, and also to *Sakharam* v. *Ganu* (11). In *Sakharam* v. *Ganu* (11) it was held that a suit by a hereditary pujari of a temple to recover his share in the offerings to the deity falls within the purview of S. 92, but in that case a scheme had been framed, and a dispute had arisen which invited the direction of the Court to the administration of the trust property and, therefore, the section was held to apply. In *Narayan* v. *Vasudeo* (10) the suit was held to fall within the scope of S. 92, Civil P. C., since the prayers in the plaint showed that accounts of the trust property were to be taken, inquiries made and directions given. This does not at all apply to the facts of the present case, where the plaintiff merely seeks to recover possession of the property from persons whom she alleges to be trespassers. I am, therefore, of opinion that the lower appellate Court was correct in finding that the present suit was maintainable, and in view of the finding that the plaintiff, as the heir of the founder of the trust, is entitled to the trusteeship and possession of the property in the absence of any trustees, the finding of the lower appellate Court is correct, and must be upheld

The learned pleader for the respondent has put in cross-objections, but as a matter of fact he has only supported the decree on some of the grounds decided against him. He does not want any alteration in the decree. He has objected to the finding of the lower appellate Court that the award decree passed between the trustees and the present plaintiff in 1904 was void as being passed without jurisdiction. The reasons are given on the last page of the judgment. As the appeal will have to be dismissed on the other points which have already been decided against the appellants, this point is not of great importance. The learned District Judge found the only objection to the award was that the arbitrator had no right to appoint the successor trustee after the death of the executors when the trust was admittedly of a public character. The fraud which was argued had not been distinctly pleaded in the lower Court, and on that point the learned Assistant Judge has rightly found that the award is not void on account of any fraud. As a matter of fact any appointment made by the award of the plaintiff as a trustee after the death of the surviving trustees would be without authority as the arbitrators had no power to appoint her. On the other hand by operation of law, as has actually happened in this case, on their deaths she would became a trustee under the principles which have been already referred to. It is argued that the learned Assistant Judge was wrong in holding that an award filed without the intervention of the Court cannot be split, and must be filed as a whole, and reference is made to the cases in *Buta* v. *Municipal Committee of Lahore* (12) and *Amir Begam* v. *Budr-ud-din Husain* (13). The learned pleader for the appellants has endeavoured to distinguish the first of these cases as not falling under para. 20, Sch. 2, Civil P. C., but the case of *Amir Begam* v. *Badr-ud-din Husain* (13) is under that paragraph, and that no such distinction as he seeks to argue exists is shown by the notes at p. 1104 of Mulla's Code of Civil Procedure, 8th Edn., where it is pointed out that para. 21 refers to para 14, Sch. 2, where the principle of separation is recognized.

However, as I have already said, this point is of comparatively small importance in view of the finding on the other parts of the case. The only comment I have to make on the decree of the lower Court is that it is not very happily worded. It states that the plaintiff must make a declaration that she has no right over the trust property, namely, the house in Shukrawar Peth, and that she thereby makes it over to the trust. But as she herself is at present the only trustee, there is nobody to whom she can make it over, and it would have been better perhaps to have stated in the decree of the lower Court that the plaintiff should state that this house in Shukrawar Peth is the property of the trust and that she holds it only as a trustee.

(10) A. I. R. 1924 Bom. 518.
(11) A. I. R. 1921 Bom. 297=45 Bom. 683.
(12) [1902] 29 Cal. 854=29 I. A. 168=7 C. W. N. 62=8 Sar. 327 (P.C.).
(13) A. I. R. 1914 P. C. 105=36 All. 336=17 O. C. 120 (P.C.).

However, I do not think it is necessary to amend the decree by inserting these words, which is merely a question of phraseology.

The result is that the decree of the lower appellate Court will be confirmed, and the appeal dismissed with costs.

R.K. *Appeal dismissed.*

A. I. R. 1929 Bombay 196

MARTEN, C. J., AND MURPHY, J.

Hasan Hassan Saheb—Applicant.

v.

Ramchandra Appaya Shanbhog—Opponent.

Civil Revn. Appln. No. 366 of 1927, Decided on 17th December 1928, against order of Sub-Judge, Honavar, in Darkhast No 154 of 1926.

Civil P. C., O. 21, R. 11 (2)—Application signed and verified by pleader in suit is valid.

An application for execution though not duly signed and verified by the decree-holder, but if it is actually signed and verified by the pleader in the original suit is in accordance with O. 21, R. 11 (2). [I' 196 C 2]

S. R. Parulekar—for Applicant.

Murphy, J.—In this case the learned Subordinate Judge has found that the application for execution is not in time because the immediately preceding one on which it depends to come within limitation was not made in accordance with law.

The decree under execution was passed on 7th January 1922 and the first application for execution was presented on 7th January 1925, that is, exactly on the last day of the period within which it would be within limitation. The present "darkhast" was filed on 19th October 1926, and it was contended that it was in time, because it had been made within time of the previous one.

As against this, the other side has contended that the previous application for execution had not been made in accordance with law, on two grounds, one being that a copy of the decree and an inventory of the property had not been annexed to it: and the second that it had not been duly signed and verified by the decree-holder as required by O. 21, R. 11 (2) of the Code. As to the first of these objections we agree with the view taken by the learned Subordinate Judge and hold that it is untenable. Coming to the second, the application in question was actually signed and verified by Mr. Sawkar, who was the decree-holder's pleader in the suit. The learned Subordinate Judge's view was that the darkhast proceedings being original proceedings the application has to be signed by the decree-helder, though it is not necessary for his pleader to file a fresh vakalat when presenting it in Court and that as this one was not so signed by an authorized person, the application was not in accordance with law.

We think, however, that the learned Subordinate Judge was in error on this point. The applications are made under O. 21, R. 11 (2), which says:

"Save as otherwise provided by sub-R. (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars"

which follow in the section. The requirement; therefore, is, that the person signing the application must satisfy the Court that he was acquainted with the facts of the case. In this case, the application was made by the pleader who had conducted the original proceedings and who must necessarily have been acquainted with all the facts in connexion with the application, and it has not been shown that he failed to satisfy the Court that he was not so acquainted. The presumption is the other way. We think that the application was made in accordanee with law as it was sufficient for it to be signed and verified by the decree-holder's pleader, and, therefore, that the ground on which this application has been dismissed, that is, that it was not within limitation, fails.

Rule made absolute, Order discharged. We direct the learned Subordinate Judge to hear and determine the application according to law. Respondent to pay the costs of this Court. The costs of the original hearing of the darkhast to be costs in the proceedings.

R.K. *Rule made absolute.*

A. I. R. 1929 Bombay 197

MADGAVKAR, J.

Shaikh Alli and *others*—Defendants—Appellants.

v.

Khot Saheb and *others* — Plaintiffs—Respondents.

Second Appeal No. 86 of 1926, Decided on 23rd November 1928, against decision of Dist. Judge, Ratnagiri, in Appeal No. 40 of 1924.

Landlord and Tenant—Khoti—Tenant replying to notice of ejectment denying annual tenancy—Appraised rent continued to be paid — Tenant does not get permanent tenancy rights.

Where a khoti tenant in reply to a notice of ejectment by the khot merely replies that he was not the annual tenant but does nothing more and continues to pay rent on the basis of appraisement, he does not acquire the title to permanent tenancy by adverse possession.

[P 197 C 2]

K. N. Koyajee—for Appellants.

G. B. Chitale—for Respondents.

Judgment.—The question in this appeal is whether the claim of the plaintiffs-respondents to evict the defendants-appellants is barred by limitation. The land in suit is a khoti village. Both the lower Courts have held that the appellants are not the occupancy but khoti tenants liable to eviction. The trial Court held that the plaintiffs-respondents' suit to evict was barred by limitation by reason of the reply, Ex. 70 dated 31st March 1909, by the appellants denying that they were annual tenants of the respondents. The lower appellate Court thought that a mere reply was not sufficient without further action on the appellants' part and decreed possession to the respondents. Defendant 1, deceased, by his heirs, appellants 1 to 4 appeals.

It is argued for the appellants that the clear denial that they were the annual tenants in the reply, Ex. 70, to the notice of the respondent was a sufficiently clear assertion of their own right to be occupancy-tenants so as to bring the case within the ruling, *Budesab* v *Hanmanta* (1) and to bar the present suit for possession. For the respondents it is argued that occupancy-tenants can only so become by the procedure laid down under S. 6, Khoti Act, and not by adverse possession. The authority of *Budesab* v. *Hanmanta* (1) must be held to be at least seriously shaken by the decision of their Lordships of the Privy Council in *Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (2), as pointed out by Fawcett, J., in *Juvansingji* v. *Dola Chhala* (3). The respondents also rely upon the appellant's admission in his evidence, Ex. 48 :

"I have given vasul to plaintiffs even after my notice to plaintiffs as per Ex. 34/14. I have given it according to appraisement."

Apart from the reply to the notice they had done nothing in pursuance of their claim as occupancy tenants.

The question in this appeal is when their possession became adverse and whether it so continued for 12 years. It is true that an occupancy tenant does not always pay fixed assessment but that his assessment may be appraised. In the written statement the defendants claimed to be permanent tenants on a fixed rent. From the appellants' own case it was necessary for him to prove that he paid the fixed assessment of a permanent tenancy. It appears on the contrary that he has not done so. Therefore even if his possession became adverse on the date of the reply to the notice, after he paid the rent of the khoti tenant every year, he ceased so to become. It is not necessary in law that the respondents notwithstanding such payment should file a suit merely because of his reply to their notice. I am of opinion therefore that the trial Court was wrong and the lower appellate Court right in holding that the appellant has not shown continuous adverse possession for 12 years merely because of their notice in 1909. In this view it is not necessary to consider the point referred to as to how far some of the observations in *Budesab* v. *Hanmanta* (1) can be reconciled with the observations in the decision of their Lordships of the Privy Council in *Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (2).

The point that the origin of the appellant's tenancy was lost in antiquity so that they cannot avail themselves of S. 83, Land Revenue Code, has not been seriously pressed. The findings of the lower Courts are against the appellants and with those findings I agree.

The two cases, *Babusing Ramchandra* v. *Pandu* (4) and *Gitabai* v *Krishna Mal-*

(1) [1896] 21 Bom. 509.

(2) A.I.R. 1923 P.C. 118=45 All. 419=26 C. C. 231=50 I.A. 202 (P.C.).

(3) A.I.R. 1925 Bom. 390.

(4) A.I.R. 1921 Bom. 227=45 Bom. 508.

hari (5) have no direct bearing on the point. The former merely lays down that notice is necessary before possession can become adverse. In this case a notice by reply was given. The latter is concerned with the question of mortgagor and mortgagee which does not here arise.

The appeal fails and is dismissed with costs.

R.K. *Appeal dismissed.*

(5) A.I.R. 1921 Bom. 295=45 Bom. 661.

A. I. R. 1929 Bombay 198

BAKER, J.

Krishna Parsharam Chambhar—Applicant.

v.

Bhau Piraji Phalle and *another*—Opponents.

Civil Revn. Appln. No. 342 of 1927, Decided on 20th November 1928, against order of Asst. Judge, Satara, in Misc. A. No. 25 of 1926.

Civil P. C., S. 115 — Court taking one view out of conflicting authorities—Revision does not lie.

Merely because the view taken by the lower Court is based on one set of authorities rather than the view taken by the other it is impossible to say that it thereby acted illegally or irregularly and the High Court will not intefere with it in revision : 11 *Cal.* 6, *P.C.*) and *A.I.R.* 1917 *P.C.* 71 (*P.C.*), *Rel. on.* [P 199 C 1,2]

N. L. Petkar and *K. V. Joshi*—for Applicant.

K. N. Koyajee and *P. V. Kane* — for Opponents.

Judgment.—The facts of this case are simple. Opponent 2 Anandibai obtained a decree against applicant 1 and in execution proceedings the property of applicant 1 was sold and purchased by opponent 1. Subsequently the judgment-debtor presented an application under O. 21, R. 90, to the effect that the notice was not properly served upon him, he had no notice of the sale, and that he had sustained substantial injury by reason of this. The Subordinate Judge of Karad found that the decree-holder had got notice fraudulently served in an irregular and improper manner, that it was impossible for the judgment-debtor to know of the sale and that the sale was on that account vitiated by a material irregularity in publishing it and also by the fact that the correct assessment of the land was not shown in the proclamation of sale and the property was sold at a grossly inadequate price and the judgment-debtor had suffered substantial injury on that account. He, therefore, set aside the sale under O. 21, R. 90. On appeal by the auction purchaser, the Assistant Judge, Satara, came to the same conclusion as the Subordinate Judge as to the irregularity and the substantial injury suffered by the judgment-debtor but relying on the observations of the Privy Council in the case of *Lalla Bunaseedhur* v. *Koonwar Bindeseree Dutt Singh* (1), and also on the observations of Sir Lawrence Jenkins in *Paresh Nath Mallick* v. *Hari Charan Dey* (2) he held that the auction-purchaser not being a party to the fraud committed by the decree-holder was entitled to the protection of the Court. He, therefore, held that no fraud being alleged or proved as against the purchaser his position is that of an innocent man, and between two innocent men he ought to be protected and the Judge while recognizing the hardship caused to the judgment-debtor set aside the order of the trial Court and directed the application to be dismissed. The judgment-debtor thereupon under that section appealed to this Court and also presents this civil revision application. The second appeal is barred under S. 104, Cl. (2), Civil P. C, and must, therefore, be dismissed with costs as no second appeal lies from an order of the kind referred to in S. 104. The civil revision application has been heard on the point of law as well as on the merits. It is an application under S. 115, Civil P. C. And the first and most important point in it is whether this Court has jurisdiction to interfere in view of the rulings of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (3) and *Balakrishna Udayar* v. *Vasudeva Ayyar* (4).

The learned pleader for the applicant has argued at length to show that this is a case in which the lower appellate Court has in the exercise of its jurisdiction acted illegally or with material irregularity. In my opinion it is nothing of the kind. The lower appellate Court

(1) [1866] 10 M. I. A. 454=2 Sar. 167 (P.C.)
(2) [1911] 38 Cal. 622 = 14 C. L. J. 300 = 10 I. C. 361=15 C. W. N. 875.
(3) [1884] 11 Cal. 6=11 I. A. 237 (P.C.).
(4) A. I. R. 1917 P. C. 71 = 40 Mad. 793= 44 I. A. 261 (P.C.).

had jurisdiction to hear the appeal and if on the law as the lower appellate Court understood it, it came to a decision which does not commend itself to the applicant and as a matter of fact does cause him some hardship, that is not, in my opinion, either illegal or a material irregularity.

It has been laid down in plain terms by the Privy Council in the two cases which I have quoted above that in order to give the Court jurisdiction under S. 115 the point at issue must be one of jurisdiction. It has been held that provided a Court has jurisdiction to entertain a case, even if it decides it wrongly, it is not a ground for interference under S. 115. In the present case it cannot even definitely be said that the lower Court's decision is wrong in law. There are rulings on both sides. The lower appellate Court has relied as I have said on the observations of the Privy Council in *Lalla Bunseedhur* v. *Koonwar Bindeseree Dutt Singh* (1) and *Paresh Nath Mallick* v. *Hari Charan Dey* (2), as to the necessity of protecting an innocent purchaser in order to give confidence in the sales carried out by the Court. The learned pleader for the applicant has referred to the case of *Bireswar Ghose* v. *Panchkouri Ghose* (5), where the authorities have been reviewed at great length including those to which I have referred above and the Court came to a contrary conclusion to that arrived at in *Paresh Nath's* case (2), viz, that there is a long and uniform series of decisions of the Calcutta High Court to the effect that an execution sale which has been brought about by fraud of the decree-holder is liable to be set aside on that ground even though it is not established that the auction purchaser has participated in or has been cognizant of the fraud. On the other hand this Court has held in *Chitambar* v. *Krishnappa* (6) that where property is sold in auction under a decree fraudulently obtained, mere inadequacy of price apart from participation in or knowledge of the fraud is not in itself a circumstance sufficient to justify the setting aside of the sale.

I have quoted decisions on each side from which it will be seen that at different times various Courts have taken different views of the liability of an innocent purchaser to have his sale set aside on account of fraud committed by the decree-holder or irregularities in the sale. I do not propose to decide this question one way or the other. I am merely using this for the purpose of showing that the view taken by the lower appellate Court is based on a set of authorities, and that because the Court followed the view taken by one set of authorities rather than the view taken by the other it is impossible to say that it thereby acted illegally or irregularly and my view would have been precisely the same if the Court had decided the other way.

It has been attempted to be shown that the provisions of O. 21, R. 90, have been violated because the lower appellate Court has not set aside the sale. O. 21, R. 90, provides :

> "Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets...may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it."

The rule does not deprive the Court of its discretion in deciding each particular case according to the circumstances which appear therein I do not think it necessary to refer in any detail to the cases which have been quoted by the learned pleader for the applicant in which the various High Courts have interfered in revision under S. 115, with the orders of the lower Courts which were held to have been passed in the exercise of their jurisdiction illegally or with material irregularity. Each case must be decided on its own facts and I have not the slightest hesitation in holding that in the present case the lower appellate Court has not acted either illegally or with material irregularity and the matter being clearly one within its jurisdiction there can be interference by this Court in revision under S 115, Civil P. C. It may be that the judgment-debtor has been put to loss on account of the fraud of the decree-holder That would be no justification for interference by this Court or for me to assume jurisdiction which in the circumstances of the case I do not possess. The result, therefore, is that the application fails and must be dismissed with costs.

R.K. *Application dismissed.*

(5) A. I. R. 1923 Cal. 538.
(6) [1902] 26 Bom. 543=4 Bom. L. R. 249.

A. I. R. 1929 Bombay 200

MADGAVKAR, J.

Narayan Kondaji Temkar—Appellant.

v.

Govind Krishna Abhyankar—Respondent.

Second Appeal No. 61 of 1927, Decided on 30th November 1928, against decision of Dist. Judge, Ratnagiri.

(a) Criminal P. C., S. 88—Title passes to Government only from date of attachment.

The words in S. 88, Cl. 7, "at the disposal of Government" do not imply that from the moment the absconder fails to appear on the date ordered, all his right, title and interest in the property immediately pass over to Government, It has that effect only from the date of attachment : 9 *Cal.* 861 and 6 *L. B. R.* 57, *Rel. on.* [P 200 C 2]

(b) Civil P. C., O. 21, R. 54—Scope.

An attachment confers no title but merely prevents alienation : 25 *Cal.* 179 (*P. C.*), *Foll.*]P 201 C 1]

(c) Transfer of Property Act, S. 52—Doctrine applies to sales under Criminal P. C., S. 88.

The doctrine of lis pendens applies not merely to sales by private parties but also to sales through civil Courts or by Government including revenue sales and sales under S. 88, Criminal P. C. [P 201 C 1]

A. G. Desai —for Appellant.

G. B. Chitale—for Respondent.

Judgment.—This question in this appeal is whether defendant 5-appellant, by reason of his vendors' purchase of the interest of Kanoji at the sale in 1920 held under Ss. 88 and 89, Criminal P C., is entitled to the property as against the plaintiff-respondent who is a decree-holder in a suit for specific performance against the same Kanoji instituted on 24th August 1927. Both the lower Courts decided that the attachment by the civil suit by the plaintiff-respondent being prior, the doctrine of lis pendens applied to the sale by the criminal Court to the appellant. and decreed the claim. Defendant 5 appeals.

The relevant facts are shortly as follows : There was an agreement by Kanoji to sell the plaint property to the plaintiff-respondent dated 2nd August 1916 The respondent's suit 164 of 1917 was filed on 24th August 1917, was decreed on 30th November 1920, in favour of the plaintiff-respondent and directed Kanoji and his sons to execute the sale-deed and the respondent to take possession. During the pendency of the suit Kanoji, who was being criminally prosecuted, absconded. The Magistrate issued a proclamation on 19th January 1917, and ordered him to appear by 25th February 1917. Kanoji failed to appear and the plaint property was attached by the Magistrate on 8th December 1917, and was sold on 29th July 1920. The suit was decreed on 30th November 1920.

Four points are taken for the appellant. It is urged, firstly, that the words in S. 88, Cl. 7, Criminal P. C., "at the disposal of Government" imply that from the moment the absconder fails to appear on the date ordered, in this case, 25th February 1917, all his right, title and interest in the property immediately passed over to Government. Secondly, and therefore, there was no title of Kanoji left to sue on 24th August 1917, when the plaintiff instituted the suit. Thirdly, S. 52, T. P. Act, whatever application it might have to parties to the suit or to the civil Court which acts for the parties has no application to Magistrates or criminal Courts acting on behalf of Government. Fourthly, the suit should have been filed within a year of the date of the sale by the criminal Court and is barred by limitation under Art 14, Lim. Act.

On the first point the only authority quoted is *Golam Abed* v. *Toolseeram* (1) There the conflict was between the prior attachment by the Magistrate as against the subsequent attachment by the civil Court. The former being prior prevailed. In the present case the attachment of the civil Court was prior and not that of the Magistrate. Further, on the very wording of S. 88, Cl. 7, "property under attachment shall be at the disposal of Government," the argument is, in my opinion, untenable. In other words, while the right and power of Government to attach begin from the time for appearance specified in the proclamation, the exercise of the power must begin with the attachment. To the same effect is the view taken by a single Judge in *Subramonian* v *Emperor* (2), where Government, though they had possessed power prior to the attachment by the civil Court, did not actually exercise it until afterwards. That point, therefore, fails.

(1) [1883] 9 Cal. 861.
(2) [1912] 6 L. B. R. 57=15 I. C. 984=13 Cr. L. J 568.

On the second point, it suffices to observe that an attachment confers no title but merely prevents alienation. If authority is needed for this proposition, I may refer to the decision of the Privy Council in *Moti Lal* v *Karrabuddin* (3).

On the third point, it has been held by all the High Courts that the doctrine of lis pendens applies not merely to sales by private parties but also to sales through civil Courts or by Government including revenue sales: *Har Shankar Prasad Singh* v. *Shew Gobind Shaw* (4), *Sukhdeo Prasad* v. *Jamna* (5), *Bhaskar* v. *Shankar* (6) and *Mathura Prasad Sahu* v. *Desai Sahu* (7). But if the doctrine applies to revenue sales which are held for and by Government through revenue Courts under powers analogous to those exercised by the criminal Courts, there appears no reason for the exception of criminal Courts and attachment by them under S. 88, Criminal P. C., from the purview of 52, T. P. Act, and the doctrine of lis pendens. Without express enactment, it would hardly be logical to hold that the Crown executing civil or fiscal laws is governed by a law other than that applicable to it when executing criminal laws.

The only point which remains is the point of limitation. This point was not taken in the lower appellate Court and is not mentioned in the memo of appeal It appears that the plaintiff was actually in possession before the suit. The suit is not therefore, barred by limitation.

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

R.K. *Appeal dismissed.*

(3) [1898] 25 Cal. 179=24 I. A. 170=7 Sar. 222 (P. C.)
(4) [1899] 26 Cal. 966=4 C. W. N. 317.
(5) [1900] 23 All. 60=(1900) A.W.N. 193.
(6) A. I. R. 1924 Bom. 467.
(7) A. I. R. 1927 Pat. 542=1 Pat. 287.

A I. R. 1929 Bombay 201

MADGAVKAR, J.

Balangowda Bhimangowda — Appellant.

v.

Gadigeppa Bhimappa and others — Respondents.

Second Appeal No. 250 of 1925, Decided on 9th November 1923, against decision of Dist. Judge, Bijapur, in Appeal No. 84 of 1923.

Evidence Act, S. 115—Minor representing major —Still he is not estopped.

When a contract has been entered into by a minor, representing himself to be a major the contract is void as against him and he is not estopped from pleading minority: *A. I. R. 1928 P. C. 152, Foll.*; 21 *Bom.* 193; 41 *Bom.* 480; 46 *Bom.* 137; *A. I. R.* 1923 *Bom.* 169=64 *I. C.* 457, *deemed overruled.* [P 202 C 1]

G. S. Rao—for Appellant.

G. P. Murdeshwar and *G. S. Mulgaonkar*—for Respondents.

Judgment.—The question in this appeal is whether the plaintiffs-respondents can set up estoppel against the minor Bhimappa on the ground that he had represented himself to them as a major when he with the widow Adiveva passed the sale-deed in their favour. The plaintiff-respondent claimed on the strength of this sale-deed and the defendants-appellants on the strength of an award filed as a decree passed subsequently, when Bhimappa was admittedly a major. Both the lower Courts found that on the date of the sale-deed in favour of the plaintiff-respondent Bhimappa was a minor, but agreed that he was estopped from questioning the sale, and, therefore, decreed the claim. Defendant 1 appeals.

It is argued on behalf of the appellant that the view of this Court, differing from the other High Courts, that an estoppel can be pleaded by a minor must now be held to be overruled on the strength of the observations of their Lordships of the Privy Council in the very recent case of *Sadiq Ali* v. *Jai Kishori* (1). For the plaintiffs-respondents it is argued that the question was expressly reserved by their Lordships of the Privy Council as early as *Mohori Bibee* v. *Dharmodas Ghose* (2) and the consistent decisions of this Court from *Ganesh Lala* v. *Babu* (3), *Dadasaheb Dasrathrao* v. *Bai Nahani* (4), *Jasraj Bastimal* v. *Sadashiv Mahadev* (5) cannot be held to be overruled by the observations in the recent Privy Council case, *Sadiq Ali Khan* v. *Jai Kishori* (1), particularly as similar observations of their Lordships of the Privy Council are to be found in *Mahomed Syedol* v. *Yeoh Ooi* (6).

(1) A. I. R. 1928 P. C. 152.
(2) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441=8 Sar. 374 (P.C.).
(3) [1895] 21 Bom. 198.
(4) [1917] 41 Bom. 480=41 I. C. 180=19 Bom. L. R. 561.
(5) A. I. R. 1923 Bom. 169=46 Bom. 137.
(6) A. I. R. 1916 P.C. 242=43 I.A. 256 (P.C.).

This last, however, was a case from the Straits Settlement and their Lordships observed (p. 163 *of* 19 *Bom. L. R*):

"A case of fraud by the appellant on the subject of his age was set up, but it cannot be doubted that the principle recently given effect to in the case of *R. Leslie Limited* v. *Sheill* would apply, and such a case would fail."

In that case it was held by Lord Sumner and the other Judges that where a minor by fraudulently representing that he was of full age, induced the plaintiffs to lend him money, such an action by the plaintiffs to recover the amount of the advance on the ground that he had obtained it by fraudulent misrepresentation must fail, even though fraud was proved against the minor. On the present question, the other High Courts have differed from this Court: *Dhurmo Dass Ghose* v. *Brahmo Dutt* (7), *Khan Gul* v. *Lakha Singh*, *A. I. R.* 1928 *Lah.* 609; *Vaikuntarama Pillai* v. *Authimoolam Chettiar* (8), *Jagan Nath Singh* v. *Lalta Prasad* (9) and *Ganganand Singh* v. *Rameshwar Singh* (10).

As for the observations of the Privy Council in the recent case of *Sadiq Ali* v. *Jai Kishori* (1) cited for the appellant, the arguments are not reported, but the question was one of minority on which the two lower Courts differed. Their Lordships of the Privy Council agreeing with the trial Court held that the mortgagors were proved to be minors and the mortgage-deed executed by them was a nullity. They proceeded to observe as follows (p. 1352):

"The fact of minority being established at the date of the execution by the mortgagors of the deed founded on is sufficient for the decision of the case; such a deed executed by minors being admittedly a nullity according to Indian law, and incapable of founding a plea of estoppel."

I am unable to interpret this decision otherwise than as overruling the view of this Court and as agreeing with the view of the other High Courts. By no ingenuity of argument can the view of this Court be reconciled with the judgment that a deed executed by minors is incapable of founding a plea of estoppel. Accordingly, in this view of the law, even if in S. 115, Evidence Act, the word "person" includes minors, the general intention of adjective law of the legislature as to the rule of evidence in this section must give way to the particular intention of substantive law in S. 11, Contract Act: per Best, C. J. in *Churchill* v. *Crease* (11).

The appeal must be allowed, the decree of the lower Courts set aside, and the plaintiff's suit dismissed with costs.

R.K. *Appeal allowed.*

(7) [1898] 25 Cal. 616=2 C. W. N. 330 on appeal 26 Cal. 381.
(8) [1914] 38 Mad. 1071=23 I. C. 799=26 M. L. J. 612.
(9) [1909] 31 All. 21=5 A. L. J. 674=1 I. C. 562=(1908) A. W. N. 267.
(10) A. I. R. 1927 Pat. 271=6 Pat. 383.
(11) [1828] 5 Bing. 177=2 M. & P. 415=7 L. J. (o.s.) C. P. 63.

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* A. I. R. 1929 Bombay 202

PATKAR AND MURPHY, JJ.

Ramchandra Genuji Thosar—Appellant.

v.

Shripati Sukaji Gade and *others*—Respondents.

Appeal No. 43 of 1927, Decided on 14th November 1928, from order of Asst. Judge, Poona, in Appeal No. 262 of 1925.

(a) Presidency Towns Insolvency Act, (1909), S. 17—Insolvent can continue appeal after annulment—Provincial Insolvency Act (1920), S. 28—Civil P. C., O. 22, Rr. 8 and 10.

If during the pendency of a suit a party is adjudicated an insolvent, he is not disqualified by reason of his insolvency from appealing. After the annulment of the order of adjudication he is entitled to continue the appeal. *A. I. R.* 1921 *Mad.* 402 *Rel on.* [P 204 C 1, 2]

***(b) Civil P. C., O. 41, R. 23—Suit in Court of Second Class Sub-Judge returned for proper presentation—First Class Sub-Judge rejecting plaint—Appeal from order returning plaint—Rejection not brought to notice—Case remanded to Second Class Sub-Judge—No plaint being in existence remand was void.**

A suit filed in Second Class Sub-Judge's Court was returned to be presented to proper Court. The same was dismissed by First Class Sub-Judge, the deficit Court-fees not having been paid. In appeal from order returning the plaint, the attention of the District Judge was not drawn to the fact of the rejection of the plaint and the suit was remanded for trial to the Second Class Sub-Judge, the latter Court holding that order of remand being obtained by fraud was void.

Held; that the plaint having been presented in the First Class Subordinate Judge's Court and having been rejected with costs, the Subordinate Judge, on remand, was justified in holding that there was no plaint in existence which could be proceeded with. The remedy of the plaintiff was to appeal against the order

of the First Class Subordinate Judge rejecting the plaint which amounted to a decree.
[P 204 C 2]

G. S. Rao—for Appellant.
K. A. Padhye—for Respondents.

Patkar, J.—In this case the plaintiff sued for specific performance of a contract of sale or in the alternative to recover Rs 1,550 as damages. The learned Subordinate Judge, on 22nd December 1923, held that the contract sued upon was for a sum of Rs. 7,000, and, therefore, he had no jurisdiction to try the suit, and ordered the plaint to be returned to the plaintiff. The plaintiff presented the plaint in the Court of the First Class Subordinate Judge on 3rd January 1924. The First Class Subordinate Judge called upon the plaintiff to pay the deficit Court-fees and granted time till 10th January 1924, and on that day the plaint was rejected with costs as the deficit Court-fees were not paid. On 23rd January 1924, the plaintiff, through the same pleader who had filed the plaint in the First Class Subordinate Judge's Court, filed Miscellaneous Civil Appeal No. 5 of 1924 against the order dated 23nd December 1923, returning the plaint for presentation to the proper Court. The District Court was not informed of the fact that the plaint was returned to the plaintiff and was, as a matter of fact, filed in the First Class Subordinate Judge's Court, and was rejected for non-payment of the deficit Court-fees. The defendant was also ignorant of the fact that the plaint was rejected by the First Class Subordinate Judge. In the District Court the plaintiff confined his claim to the alternative relief of refund of Rs 1,550. On 10th July 1924, the learned District Judge held that the alternative relief was within the precuniary jurisdiction of the Second Class Subordinate Judge, and remanded the case for decision on the alternative claim. On remand the learned Second Class Subordinate Judge held that, if the District Judge had been informed that the plaint was rejected by the First Class Subordinate Judge's Court on 10th January 1924, the order of remand would not have been passed, that it was on account of the fraud practised upon the District Court that the order had been obtained from that Court, that the plaint having been rejected by a Court having jurisdiction to entertain it, could not be proceeded with, and that the remedy of the plaintiff was to appeal against the order rejecting the plaint, which amounted to a decree passed by the First Class Subordinate Judge. On appeal, the learned Assistant Judge held that the order of the appellate Court not having been appealed against must be considered to be final, and the Subordinate Judge could not go behind the order of the superior appellate Court, and was bound to proceed with the alternative claim. Against the order of remand an appeal has been filed in this Court.

A preliminary objection is taken on behalf of the respondent that the appeal filed by the defendant is a nullity as the appellant, who was adjudged an insolvent in October 1926, was not competent to file an appeal on 17th June 1927, against the order of the Assistant Judge dated 19th January 1927. On 8th October 1928, by an interlocutory judgment of this Court notice was served on the official Assignee to ascertain whether he elected to be added as a party to this appeal. It appears from the communication of the Official Assignee that the order of adjudication was annulled on 3rd July 1928. It is urged on behalf of the appellant that there is no objection to his proceeding with the appeal as the adjudication order has been annulled The adjudication order was passed by the Bombay Insolvency Court and a reference is made to S. 18, Presidency Towns Insolvency Act, under which power is given to stay proceeding against an insolvent by sub-S. (3). The appellant in this case was the defendant in the original suit and was the respondent in the lower appellate Court. By reason of the adjudication of the defendant as an insolvent, the plaintiff ought to have made an application under O. 22, R. 10, Civil P. C.,: see *Puninthavelu Mudaliar* v. *Bhashyam Ayyangar* (1). No provision has been pointed out to us which would prevent a person who has been adjudged an insolvent from filing an appeal against a decree passed against him. Under S. 17, Presidency Towns Insolvency Act, 3 of 1909, corresponding to S. 28, Cl. (2), Provincial Insolvency Act, 5 of 1920, the property of the insolvent vests in the Official Assignee on the making of the order of adjudication. It was, therefore, held in *Sayad Daud* v. *Mulna Mahomed* (2) that nothing is left in the insolvent to give him

(1) [1901] 25 Mad. 406=12 M. L. J. 282.
(2) A. I. R. 1926 Bom. 366.

a cause of action and that a suit by an insolvent in his own name after his adjudication is not maintainable. The law with regard to the actions pending by or against an insolvent has been stated in Halsbury's Laws of England Vol 2, pp. 135-136.

Under O. 22, R 8, Civil P. C, the insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct; and on the neglect or refusal of the assignee or receiver to continue the suit or to give such security the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate. O. 22, R. 8, corresponding to S. 370 of the old Code, would apply to the case where there is actual bankruptcy or insolvency and in which an assignee or a receiver is appointed, and would not apply to a case where there has been an application for a declaration of insolvency and a vesting order is made but the proceedings are subsequently annulled and the plaintiff is not declared either a bankrupt or an insolvent: see *Amrita Lal Mukerjee* v. *Rakhali Dassi Debi* (3). Where, however, the plaintiff's name is struck off and the Official Assignee is substituted for the insolvent plaintiff and the adjudication is thereafter annulled, it was held in *Khunni Lal* v. *Rameshar* (4), that there being no limitation provided for the Official Assignee to appear and apply for substitution or for the debtor to appear and apply for the restoration of his name on the record after the adjudication is annulled, the proceedings cannot abate and must be deemed to continue. We think, therefore, that the appellant in this case after the annulment of the order of adjudication is entitled to continue the appeal. When an appellant after filing an appeal becomes insolvent, the receiver may prosecute the appeal under O. 22, R. 8, read with O. 22, R. 11. An insolvent may proceed with an appeal if it involves a personal question as to his status, or if the order appealed from prevents him from earning his living: see *G.* v. *M* (5). It, has, however, been held in *Tatireddy* v. *Ramchandra Row* (6) that if during the pendency of a suit a party is adjudicated an insolvent, he is not disqualified by reason of his insolvency from appealing.

The insolvent was resisting in this appeal the alternative claim of Rs. 1,500. It was, therefore, for the benefit of his creditors that he was prosecuting the appeal in case there was a completed insolvency in which an assignee or a receiver was appointed. In the present case, the adjudication of insolvency was annulled We think, therefore, that the appellant is entitled to prosecute the appeal.

On the merits, we think that the plaint having been presented in the First Class Subordinate Judge's Court and having been rejected with costs, the Subordinate Judge, on remand, was justified in holding that there was no plaint in existence which could be proceeded with. The remedy of the plaintiff was to appeal against the order of the First class Subordinate Judge rejecting the plaint which amounted to a decree. It is no doubt true that the District Judge remanded the case to the Subordinate Judge for disposal on the alternative claim with regard to the damages of Rs. 1,550. The plaintiff or his pleader ought to have informed the District Court of the rejection of the plaint by the First Class Subordinate Judge, and the District Court passed the order in appeal in ignorance of this fact. Though the Subordinate Judge was bound to carry out the order of the District Judge, there was no plaint which could be proceeded with as it had already been rejected by the First Class Subordinate Judge on 10th January 1924 We think, therefore, that the view of the Subordinate Judge, after remand, was correct.

We would, therefore, reverse the order of remand of the learned Assistant Judge and restore the decree of the Subordinate Judge with costs of this appeal and of the lower appellate Court on the respondent-plaintiff.

(3) [1899] 27 Cal. 217=4 C. W. N. 294.
(4) A. I. R. 1922 All. 361=43 All. 621.
(5) [1885] 10 A. C. 171.
(6) A. I. R. 1921 Mad. 402.

Murphy, J.—Plaintiff's suit was for specific performance of a contract to sell him some property for Rs. 7,000 and in the alternative, for the return of his earnest money of Rs. 1,500 and the plaint was presented to the Court of a Second Class Subordinate Judge It was returned for presentation to the proper Court, and on this being done, the plaintiff was given time to make up the requisite Court-fee, and on his failure to do this, his suit was dismissed.

Plaintiff next appealed from the order of the Second Class Subordinate Judge, not disclosing the fact that his plaint had been dismissed by the First Class Subordinate Judge, to the District Judge. He was successful in obtaining a remand to the Second Class Subordinate Judge's Court, which it was held had jurisdiction to try his claim in the alternative, for return of the Rs. 1,500 earnest money.

On the papers coming to the Second Class Subordinate Judge's Court, that Court held that, since plaintiff's claim as a whole had been dismissed by the First Class Subordinate Judge, and a fraud had been perpetrated on the District Judge by suppression of this fact, the order of remand was void and the plaintiff's remedy was to appeal from the First Class Subordinate Judge's order. There was another appeal to the District Court, which held that the Subordinate Judge was not empowered to enquire behind that Court's order. This is the finding now before us in appeal

There is, however, a further complication. The defendant, now the appellant, was adjudged an insolvent in October 1926. Notice was served on the Official Assignee, who has since informed this Court that the adjudication order was annulled on 3rd July 1928. It has been objected to the appeal that it does not lie, as when he made it the appellant was incompetent.

A preliminary question as to the competency of the appeal, therefore, arises. The proper course was to file an application under O. 22, R. 10, Civil P, C., but this was not done

The relevant sections are Sub-S. (3) S. 18, Presidency Towns Insolvency Act and S 17 and S. 28, Cl (2), Prov. Ins. Act. There is power under the former Act to stay civil proceedings against an insolvent and under the latter his property vests in the Official Assignee, and it has been held in the case of *Sayad Daud* v. v. *Mulna Mahomed* (2), that an undischarged insolvent is not legally competent to file a plaint. The other cases on the point, such as *Khunni Lal* v. *Rameshar* (4) and *Amrita Lal Mukerjee* v. *Rakhali Dassi Debi* (3), involve other points and are not exactly adjacent. But since a receiver may prosecute an appeal, where an appellant is adjudged an insolvent after filing one, it would seem that a person adjudged an insolvent may also himself file an appeal. This has been held to be so in the Madras case of *Tatireddy* v. *Ramchandra Row* (6). It was there held by Spencer, J. that there is no authority for the assertion that an insolvent cannot file an appeal, and though there are words in S. 16, Prov. Ins. Act, which may be read as making insolvency the equivalent to civil death, it does not follow that an insolvent has no locus standi in civil proceedings. Ramesam, J., who concurred, based his decision on the fact that a person who is a party to proceedings in his own right, does not become disentitled to continue them, merely because his right has devolved on another a principle which he considered was recognized in O. 22, R. 10, of the Code, the only exception being in R. 8 of the same order, which is limited to suits: (see rule 12), when the events there mentioned happen. Though this case has not been authoritatively reported, the reasoning above set out appears to me to be correct and I agree that the appeal has been properly made.

On the main point, it seems clear that the plaint as a whole having been finally dismissed for non-compliance with the First Class Court's order, there was no further possibility of proceeding with it, and that the District Court's order was for this reason of no effect, having been made in ignorance of this fact. I, therefore, agree that the learned Assistant Judge's order be reversed, and with the order as to costs.

R.K. *Order reversed.*

* A. I. R. 1929 Bombay 206

PATKAR AND MURPHY, JJ.

Hamedmiya Badamiya Saheb—Plaintiff—Appellant.

v.

Joseph Benjamin — Defendant—Respondent.

Second Appeal No. 503 of 1926, Decided on 22nd November 1928, against decision of Dist. Judge, Ahmedabad, in Appeal No. 244 of 1924.

*** (a) Mahomedan Law — Pre-emption — The right is not incident of property but a personal right.**

The right of pre-emption is not a right which attaches to the land but is a personal right. It arises only out of a valid, complete and bona fide sale, and in the case of no other alienation. It is not an incident of property. 4 *B. L. R.* 134 (*F.B.*), *Foll.*; 7 *All.* 775 (*F.B.*), *not Foll.* [P 208 C 2, P 209 C 1]

(b) Mahomedan Law—Pre-emption —Law is not applicable to non-Mahomedans except by custom.

The Mahomedan law of pre-emption cannot be accepted in the case of non-Mahomedans on the ground of justice, equity and good conscience in its entirety except on the ground of custom: 7 *All.* 775 (*F.B.*), *not Foll.*; 6 *M. H. C.* 26; 4 *B. L. R.* 134 (*F.B.*) and 40 *Bom.* 859, *Foll.*

*** (c) Mahomedan Law — Pre-emption — Bene Israel vendee in Ahmedabad, is not bound in absence of custom.**

In the absence of custom a non-Mahomedan Bene Israel vendee cannot be bound by the law of pre-emption even though the law of pre-emption may have been established as customary law applicable to Hindus and Mahomedans in Ahmedabad: 39 *Cal.* 915 (*P.C.*), *Expl.*; 8 *W. R.* 446, *Ref.*

H. C. Coyajee and *R. J. Thakor*—for Appellant

G. N. Thakor and *M. K. Thakore*—for Respondent.

Patkar, J.—In this case the plaintiff, a Mahomedan, sues to enforce his right of pre-emption against the defendant, a Bene Israel. The vendors are also Mahomedans being the brothers of the plaintiff himself. The question, therefore, in this case is whether the general Mahomedan law of pre-emption can be enforced against a non-Mahomedan Israel, the defendant vendee, in Ahmedabad. Both the lower Courts held that the plaintiff has not proved the right to pre-empt.

The property in suit is an open land about 30 feet by 45 feet adjoining the plaintiff's land. It is urged on behalf of the appellant that the right of the plaintiff to pre-empt is an incident which the custom of pre-emption attaches to the property in Ahmedabad, and the purchaser, even though a non-Mahomedan is bound by the Mahomedan law in the matter, and cannot be permitted to evade the conditions and obligations under which the property is held, and reliance is placed on the Full Bench ruling of the Allahabad High Court in *Gobind Dayal* v. *Inayatullah* (1). It is further urged that the custom of pre-emption is established as prevailing in Ahmedabad since 1823 and reliance is placed on the cases of *Gordhandas Girdharbhai* v. *Prankor* (2), *Rewa* v. *Dulabhdas* (3) and *Motilal Dayabhai* v. *Harilal Maganlal* (4) and that the right of pre-emption is enforceable irrespective of the persuasion of the parties concerned according to the ruling of the Privy Council in *Jadu Lal Sahu* v. *Janki Koer* (5). On the other hand, it is contended that the law of pre-emption applies to Mahomedans and by custom to Hindus in Surat and Broach, and even if it be held as applicable to the city of Ahmedabad, it can affect only the Hindus and Mahomedans and would not apply to the defendant, a Bene Israel, unless it was proved that the defendant was bound by the law of pre-emption by custom, that no custom affecting defendant Bene Israel has been alleged in the plaint, much less proved in the case, and that the law of pre-emption is not an incident relating to the property, and reliance is placed on the Full Bench decision of the Calcutta High Court in *Sheikh Kudratulla* v *Mohan Shaha* (6).

In *Digambar Singh* v. *Ahmed Said Khan* (7) their Lordships of the Privy Council, having described the genesis of the Mahomedan law of pre-emption, have observed (*p.* 18 *of* 42 *I. A.*):

"A custom of pre-emption was doubtless in all cases the result of agreemen amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the

(1) [1885] 7 All. 775=(1885) A. W. N. 182 (F.B.).
(2) [1869] 6 B. H. C. R. 263.
(3) [1902] 4 Bom. L. R. 811.
(4) [1920] 44 Bom. 696=57 I.C. 590=22 Bom. L. R. 806.
(5) [1912] 39 Cal. 915=15 I. C. 659=39 I. A. 101 (P.C.).
(6) [1869] 4 B. L. R. 134=13 W. R. 21 (F.B.).
(7) A. I. R. 1914 P. C. 11=37 All. 129=42 I. A. 10 (P.C.).

Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is as far as possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must if disputed, be proved."

According to the strict Mahomedan law, the law of pre-emption is not confined to Mahomedans. It is also allowed to zummees or infidels, that is, to Christians and Hindus and the like, for Christians and Hindus are considered infidels by Mahomedans: see Baillie 473; III Hedaya 595. So long as the country was under the Mahomedan Government, the right of pre-emption was extended to all classes of persons without any distinction of creed, colour or birth. The right of pre-emption is given first to a partner in the land sold, secondly, to the partner in the immunities or appendages of the land such as the right to water and to roads, and, thirdly, to a neighbour. The Mahomedan law is not the law of British India and can be enforced so far as the laws of British India have directed it to be observed. When the Mahomedan law has ceased to be the law of the country, the question arises whether the Mahomedan law of pre-emption should be enforced against a non-Mahomedan Bene Israel without giving him the benefit of that law in other cases in which he would stand in the position of a pre-emptor. That question was answered in the negative by Mitter, J , in *Kudratulla* v. *Mohan Shaha* (6). Mahmood, J., in *Gobind Dayal* v. *Inayatullah* (1) entirely agrees with a great deal of the reasoning of Mitter, J., in this respect. He, however, differs from Mitter, J , on the ground that the right of pre-emption is an incident of the property and differs from the view of Mitter, J., that the right of pre-emption is nothing more than merely the right of re-purchase not from the vendor but from the vendee who is treated for all intents and purposes as the full owner of the property which is the subject-matter of the right, and holds that it is not a right of re-purchase either from the vendor or from the vendee involving any new contract of sale but is simply a right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject to stand in the shoes of the vendee in respect of all rights and obligations arising from the sale. It was held by the Full Bench of the Allahabad High Court in *Gobind Dayal* v. *Inayatullah* (1) that where the pre-emptor and vendor are Mahomedans and the vendee a non-Mahomedan, the Mahomedan law is to be applied in the matter. A contrary view was held by the Calcutta High Court in *Kudratulla* v. *Mohan Shaha* (6). The view of the Allahabad High Court has been followed by the Patna High Court in *Achutananda Pasait* v. *Biki Bibi* (8). The Madras High Court in *Ibrahim Saib* v. *Muni Mir Udin Saib* (9) held that the Mahomedan doctrine of pre-emption was not law in the Madras Presidency. So far as the Bombay Presidency is concerned, it was held by Batchelor, J., in *Mahomed Beg Amin* v. *Narayan Meghaji* (10) that the reasoning of the decision of the Madras High Court in *Ibrahim Saib* v. *Muni Mir Udin Saib* (9) is applicable generally to the Bombay Presidency with the exception of Gujarat.

The rule of pre-emption is recognized by custom among Hindus who are either natives or domciled in Bihar and certain parts of Gujarat, such as Surat, Broach, Godhra and Ahmedabad, but the danger of extending the customary law to the whole of Gujarat, as laid dowu in *Gordhandas Girdharbhai* v. *Prankor* (2) and *Rewa* v. *Dullabhdas* (3), has been referred to by Beaman, J., in *Dayabhai Motiram* v. *Chunilal Keshordas* (11), where it was held that where a custom of this kind is alleged as a foundation of the claim and is denied by the defendant, the trial Judge would insist upon a strict proof of it and would not be misled by the general dicta to be found in the two cases referred to. Batchelor J., in *Mahomed Beg Amin* v. *Narayan Meghaji* (10), refers to the dissenting view of Beaman, J., in *Dayabhai Motiram* v. *Chunilal Keshordas* (11), and expresses his view that the judicial recognition of pre-emption in Gujarat particularly amongst Hindus always appeared to be anomalous and artificial. With regard to Ahmedabad, it was held by Macleod, C. J., in *Motilal Dayabhai* v. *Harilal Maganlal*

(8) A. I. R. 1922 Pat. 601=1 Pat. 578.
(9) [1870] 6 M. H. C. R. 26.
(10) [1915] 40 Bom. 358=32 I.C. 933=18 Bom. L. R. 81.
(11) [1913] 38 Bom. 183=22 I. C. 289=15 Bom. L. R. 1136.

(4), referring to the case of *Umbaram Mukundas* v. *Rughoonath Laldas* (12), that in Ahmedabad the custom of pre-emption exists among the Hindus. The right of pre-emption is a right to acquire by compulsory purchase, in certain cases immovable property in preference to all other persons. It is not one of the matters in suits respecting which the Mahomedan law is expressly declared to be the rule of decision when the parties are Mahomedans. But some of the Courts of British India have, on grounds of justice, equity and good conscience, generally administered the law as between Mahomedans in claims for pre-emption. In the Madras Presidency the right of pre-emption is not recognized even between Mahomedans unless by local custom, as in Malabar. A right or custom of pre-emption is recognized as prevailing among Hindus in Bihar and certain parts of Gujarat, such as Surat, Broach, Godhra .and Ahmedabad: see Wilson's Anglo-Mahomedan Law, paras. 350 and 321.

The defendant in this case is a Bene Israel. It has not been alleged that Bene Israels are bound by this custom. The question, therefore, whether the defendant, a Bene Israel, is bound by the law of pre-emption when the vendor and the pre-emptor are Mahomedans governed by the custom of pre-emption in Ahmedabad, will have to be determined by the view we take as to the correctness of the decision in *Gobind Dayal* v. *Inayatullah* (1). The view of the Calcutta High Court in *Kudratulla* v. *Mohan Shaha* (6) is opposed to the view of the Allahabad High Court. The cases dealt with by the Full Bench in the Allahabad High Court and Calcutta High Court proceeded on a consideration of the Regulations then in force. The Regulations in force at the decision of the Calcutta High Court were Bengal Regn. 4 of 1793, S. 15, and Regn. 7 of 1832, S. 9. The Allahabad decision turns on the construction to be placed on S. 24, Bengal Civil Courts Act, 6 of 1871, which came into force after the the Full Bench ruling of the Calcutta High Court. It is not clear how the Bengal Civil Courts Act was binding on the Allahabad High Court and fell to be considered by the Full Bench ruling in *Gobind Dayal* v. *Inayatullah* (1). In Bombay the governing Regulation is Regn. 4 of 1827, Cl. 26, which is as follows:

"The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations the usage of the country in which the suit arose: if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone."

The language of the Regulations considered by the Calcutta and Allahabad High Courts is somewhat different. Mahmood, J., in *Gobind Dayal* v. *Inayatullah* (1) went to the length of holding that the law of pre-emption is a religious usage or institution within the meaning of S. 24, Bengal Civil Courts Act, 6 of 1871. Sir Roland Wilson in his Anglo-Mahomedan law (S. 350), after referring to the view of Mahmood, J., observes that this reasoning proves too much, for if it were so, the whole of the Mahomedan Shariat would be enforced including the law of property and contract. The other Judges, Oldfield, J., and Petheram, C. J., have not expressed their concurrence with the view of Mahmood, J., on this point, and held that the Court was not bound to administer Mahomedan law in claims of pre-emption but came to the conclusion that the right of pre-emption was an incident of the property and it was equitable to apply the rule to cases where the purchaser was a Hindu on the ground of equity, justice and good conscience With regard to the question whether the right of pre-emption is an incident of the property, I agree with the view of the Calcutta Full Bench in *Kudratulla* v. *Mohan Shaha* (6) that the right of pre-emption is nothing more than a right of re-purchase from the purchaser who is recognized for all intents and purposes as the full legal owner of the property and that it is a right which arises not from any antecedent defect of title in the vendor, but comes into existence after the right to the property has completely passed to the purchaser However, the right of pre emption is a weak right inasmuch as if the Shaffadar died before the decree for possession his shaffa becomes absolutely extinct. This indicates that the right is not a right which attaches to the land but is a personal right. The right of pre-emption arises only out of

(12) (1823) 2 Borr. 402.

a valid complete and bona fide sale. It does not arise out of a gift, sadak (gift made with the object of acquiring religious merit), wakaf, inheritance, bequest (Baillie, p. 471), or lease even though in perpetuity : see *Dewantulla* v. *Kazem Molla* (13) or a mortgage even though it may be by way of conditional sale : see *Gurdial Mundar* v. *Teknarayan Sing* (14) : see Mulla's Mahomedan Law, para. 182. It, therefore, follows that the right of pre-emption can only arise when there is a valid, complete and bona fide sale and in the case of no other alienation If the right of pre-emption is an incident of property, it ought to affect alienations other than that of a valid, complete and bona fide sale. Further the Mahomedan law itself has sanctioned artifices for the purpose of defeating the right of pre-emption : see Baillie's Digest of Mahomedan Law, pp. 512 and 513. A vendor wishing to evade the law has to reserve the breadth of one cubit extending along the house of the shaffa to defeat his right. One of the artifices to evade the law of pre-emption is to sell for one thousand derhans even though it is intended to sell for one hundred derhans, or the purchaser may give to the seller a piece of cloth of the value of nine hundred rupees in lieu of the price.

The law of pre-emption, therefore, can be evaded by stating a very high ostensible price with the nominal agreement to return most of it in some shape or other. Further, if the seller and purchaser declare that it was a mere fiction or tuljeea, the Court must hold that they have a right to declare it to be invalid notwithstanding the evidence to the contrary showing that it was a sale intended to take effect. Even assuming that these are rules of evidence and procedure which have been abrogated by the law of evidence and procedure in British India, still it is clear that the right of pre-emption cannot be exercised after the death of ths pre-emptor or in case of any alienation other than a complete, valid and bona fide sale. It follows, therefore that it is not an incident relating to the property, but is an option which is to be exercised by a Mahomedan owner after the sale of the property of his neighbour when the title of a third person has become complete. In the case of a joint Hindu family the Hindu law is held binding even as against a non-Hindu alienee, if a sharer unauthorizedly alienates property to a non-Hindu. In all kinds of alienations e. g , sale, mortgage, lease or gift where the vendor purports to exercise his right of alienation in excess of his strict legal right, the non-Hindu alienee is bound by the Hindu law on account of the defect of title in his vendor. I think, therefore, that in the case of the exercise of the right of pre-emption, there is no defect of title in the vendor The right of pre-emption comes into existence after a valid, complete and bona fide sale, that is, after the title has passed to the purchaser, and cannot be exercised in the case of any other alienation.

Coming to the Regulation (4 of 1827, Cl. 26) which governs the mofussil in the Bombay Presidency, the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case which would include the Indian Acts of legislature. It was held by Batchelor, J. in *Mahomed Beg Amin* v. *Narayan Meghaji* (10) that the rules of pre-emption place a clog or fetter on the freedom of sale for which the Transfer of Property Act and the Indian Contract Act provide. Shah, J., however, has hesitated to accept the contention on the ground, first that pre-emption according to the Mahomedan law has been enforced in other parts of India and even in some parts of Gujarat in the Bombay Presidency and that Ch. 3, T. P. Act which relates to sale of immovable property does not purport to deal with the right of the vendor to sell, but only provides the mode of effecting sales and contains provisions as to the rights and obligations of the seller and buyer in the absence of a contract to the contrary, but both the learned Judges have come to the conclusion that pre-emption is opposed to justice, equity and good conscience. Batchelor, J. held that the view of the Madras High Court in *Ibrahim Saib* v. *Muni Mir Udin Saib* (9) was applicable generally to the Bombay Presidency with the exception of certain parts of Gujarat. The Mahomedan law of pre-emption, therefore, cannot be accepted in its entirety except on the ground of custom. In the Full Bench case of *Gobind Dayal* v. *Inayat*

(13) [1887] 15 Cal. 184.
(14) [1865] B. L. R. Sup. Vol. 166=2 W. R. 215.

ullah (1) all the Judges agreed that in the case of a non-Mahomedan vendee the rule a Mahomedan law of pre-emption could be applied on the ground of equity, justice and good conscience. That view is not accepted by the Madras High Court in *Ibrahim Saib* v. *Muni Mir Udin Saib* (9), and the Calcutta High Court in *Kudratulla* v. *Mohan Shaha* (6) and by the Bombay High Court in *Mahomed Beg Amin* v. *Narayan Meghaji* (10). The right of pre-emption, in my opinion, not being an incident of the property for the reasons I have stated, and not being applicable on the ground of justice, equity and good conscience according to Regn. 4 of 1827, Cl. 26, and it being not a law of the defendant who is a Bene Israel, under Cl. 26, Reg. of 1827, I think in the absence of custom a non-Mahomedan Bene Israel vendee cannot be bound by the law of pre-emption even though the law of pre-emption may have been established as customary law applicable to Hindus and Mahomedans in Ahmedabad. In *Nursut Reza* v. *Umbul Khyr Bibee* (15) Phear, observes (p. 310):

"The right to pre-emption is very special in its character. It is founded on the supposed necessities of a Mahomedan family, arising out of their minute sub-division and inter-division of ancestral property; and as the result of its exercise is generally adverse to public interest, it certainly will not be recognized by this Court beyond the limits to which those necessities have been judicially decided to extend."

The remark of Privy Council in *Jadu Lal Sahu* v. *Janki Koer* (5) that the right of pre-emption was enforceable irrespective of the persuasion of the parties concerned is not to be taken in a very wide sense, but must be taken as referring to the persuasion of the parties to the litigation who were Hindus of Bihar with reference to whom the custom of pre-emption was recognized. In the case of a Christian vendee it was held by the Calcutta High Court in *Baboo Mohesh Lall* v. *John Christian & Co.* (16) that the right of pre-emption is not a matter of title to property but is rather a right to the benefit of a contract and when a claim is advanced on such a right, it must be shown that the defendant is bound to concede the claim either by law or by some custom to which the class of which he is a member is subject on grounds of justice, equity and good conscience

I think it would be manifestly unjust and inequitable that the Mahomedan law of pre-emption should be enforced against a Bene Israel purchasee without giving him the benefit of that law in other cases in which he would like to stand in the position of a pre-emptor. There is no allegation in the plaint that the law of pre-emption is binding on the class to which the defendant belongs, namely, the Bene Israel community. If such an allegation had been made, it would have been necessary in this case to send down issues to the lower Court, first whether there is a custom among the Bene Israels recognizing the law of pre-emption; secondly, whether the defendant is domiciled in or a native of Ahmedabad: see *Parsashth Nath Tewari* v. *Dhanai Ojha* (17); and thirdly, whether the law of pre-emption applies to an alienation of a small open piece of land in the city: see *Jagjivan Haribhai* v. *Kalidas Mulji* (18) and *Ram Chand Khanna* v. *Goswami Ram Puri* (19).

The general Mahomedan law of pre-emption is not applicable by legislation but can only be enforced in the city of Ahmedabad as a customary law so far as the Mahomedan and Hindus are concerned, and it must be confined to the strict limits within which that law has been recognized by judicial decisions and may on evidence be proved to exist. It may also apply when there is a special contract as in the case from North Kolaba in the Bombay Presidency, *Sitaram Bhaurao* v. *Sirajul Khan* (20).

In the present case there is no allegation in the plaint that there is a custom binding on the Bene Israel defendant. or that the defendant was bound by notice of any contract with the vendor.

On these grounds I think that the view of both the lower Courts that the Mahomedan law of pre-emption is not enforceable against a non-Mahomeden vendee, a Bene Israel, is correct. I would, therefore, confirm the decree of the lower appellate Court and dismiss the appeal with costs.

(15) [1867] 8 W. R. 309.
(16) [1867] 8 W. R. 446.
(17) [1905] 32 Cal, 988=9 C. W. N. 874.
(18) A. I. R. 1921 Bom. 188=45 Bom. 604.
(19) A. I. R. 1923 All. 513=45 All. 501.
(20) [1917] 41 Bom. 636=42 I. C. 32=19 Bom. L. R. 549 on appeal to Privy Council A. I. R. 1923 P. C. 41=45 Bom. 1056=48 I. A. 475 (P.C.).

Murphy, J.—The facts preceding this litigation are, that plaintiff and his brothers owned some immovable property in Ahmedabad City, which was partitioned between them by decree in Suit No. 409 of 1909. The land in question, an open plot, fell to the other brothers' share.

On 2nd June 1922, plaintiff sold some part of the land which had fallen to his share to the present defendant, and about a month later, he alleges, he heard that defendant had bought the open site in question from his two brothers for Rs. 4,700. On this, according to the plaint, he made the two demands which are obligatory on a neighbour wishing to exercise the right of pre-emption, and on their being refused, he brought this suit to enforce his rights.

The subaltern points in issue have not been decided by the Courts below, as they have both found that it was not necessary to decide them as the plaintiff has no right of pre-emption which he can exercise on the facts, and have dismissed his suit.

The second appeal raises the question whether a Mahomedan owner of property can claim to pre-empt on the ground of vicinage, an adjacent property sold by its owners, who here happen to be the pre-emptor's separated brothers, to a member of the Bene Israel community. The original Court was of opinion that the general law of pre-emption is part of the personal law of Mahomedans, and that it does not attach to the land. Though this is true in a sense, as pre-emption is a peculiar feature of Mahomedan law, it is not generally true, for in certain areas in India, in the Punjab and the United Provinces, it is the statute law of the land, for example, in the British District of Ajmer Merwara, where by the regulation in force it is deemed to prevail in all village communities and to extend to agricultural land as well as to land in the village site, while in suburban areas it is deemed not to prevail in the absence of a custom or usage to the contrary. It may thus be either a personal, or a local law.

In this Presidency, however, there is no statute law governing the point, and where the rules of pre-emption are enforced, it is by the force of custom. By Regn. 4 of 1827, the law to be applied in this Presidency is, firstly, the statute law, then the usage of the country, and if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience.

Now it has been held by this Court (Batchelor and Shah, JJ.) in the case of *Mhomed Beg Amin* v. *Narayan Meghaji* (10) that in this Presidency, the rule of pre-emption cannot apply on the last of these grounds, and that it is not part of natural justice, equity and good conscience to enforce it. It is not here the law of the defendant.

The plaintiff can, therefore, only succeed if he can show that it is the usage of the country, that is of Ahmedabad City—and if he can prove a "custom" amounting to a rule of law.

So far no evidence has been led in the case, and both the Courts below have relied on the reported cases, to which object the argument before us has also largely been directed. After citing the cases reported in Mr. Mulla's Mahomedan Law, at p. 151, and the authorities contained in *Motilal* v. *Harilal* (4) aud *Jagjivan* v. *Kalidas* (18) the learned Subordinate Judge was of opinion that there is not a single case to show that the right of pre-emption was ever judicially recognized on the ground of custom or usage, in respect of houses or house sites in Ahmedabad, in favour of a Mahomedan pre-emptor and against a non-Mahomedan Israelite vendee from Mahomedan vendors. Finding further, that no custom or usage was pleaded in the plaint, the suit was dismissed.

In first appeal, the learned District Judge remarked that, as noted by the original Court, no authority on which the right of pre emption was claimed had been stated in the plaint, and that the respondent's contention that there was no right of pre-emption was a sufficient answer.

On the merits, however, the learned District Judge also held that there was no case in point in support of the appellants' alleged right, and he dismissed the appeal.

It is evident that we are in a Presidency in which the general law of pre-emption does not apply, dealing with a particular locality, and that authorities from other parts of India cannot be of high value except by analogy and on very general points. We have been referred to the ruling in *Gobind Dayal* v. *Inayat-*

ullah (1), where the late Mahmood, J., has discussed the law of pre-emption at some length, and to several authorities from Calcutta and Allahabad, but the point before us, as I have said, is a very narrow and specific one.

The earliest reported case which appears to me to be of importance is the one of *Gordhandas Girdharbhai* v. *Prankor* (2). It was held in that case, in 1869, that the custom of pre-emption prevailed among the Hindus of Broach and Surat ; but the judgment is a very short one, and it has been critically examined, and its authority has been doubted by Beaman, J. in the case of *Hari Balu* v. *Ganpatrao Lakhurjirao* (21).

The case of *Mahomed Beg Amin* v. *Narayan Meghaji* (10) was from the Khandesh District, and it was held that the rule of pre-emption did not there apply ; as also in the cases of *Sitaram Bhaurao* v. *Khan Sirajul* (20) and *Sitaram Bhaurao* v. *Jiaul Hasan Sirajul Khan* (22), these two rulings relate to the same case which was from the Kolaba District and in which the right enforced, as between a Mahomedan and a Hindu, was one depending on a contract. In *Jagjivan* v. *Kalidas* (18), the right was enforced as between Hindus in respect of a house and some land in Surat : while it was also enforced among Jains in Ahmedabad in the case of *Motilal Dayabhai* v. *Harilal Maganlal* (4), while it failed of being enforced among Hindus in Jambusar, because the proper demands had not been made. Again, in the case of *Vithaldas Kahandas* v. *Jametram* (23) the rule was assumed to prevail among Hindus in the towns of Surat and Broach. In the very early case of *Umbaram Mukundas* v. *Raghoonath Laldas* (12) the rule was held to apply to Hindus, on the ground that the Mahomedan law was paramount. The result of all these rulings appears to me to be as follows : In the earliest case of 1823, it was assumed that the rule of pre-emption was valid in Gujarat on grounds which could not perhaps today be held to be sound ; and in 1869, on the grounds which have been examined, and found not to be very firm, by the late Sir Frank Beaman, in respect of property in Surat and Broach. In the other cases in which such rights have been enforced, or have been tacitly assumed to have existed it was among Jains and Hindus in Broach, Surat, Godhra and Ahmedabad and the decisions all appear to me to be, if I may say so with great respect, somewhat reluctant and hesitating.

Assuming, however, without deciding, that the general question, whether the rule of pre-emption may be enforced among Mahomedans in Ahmedabad and among Hindus in that place, must, on the strength of these rulings, be answered in the affirmative, there remains the particular issue in this case, which is, whether such a right can be enforced by a Mahomedan neighbour against an Israelite or, speaking more generally, against a purchaser who is neither a Mahomedan nor a Hindu ?

As I have already said, if such a right can be enforced at all, it must in this Presidency be on the strength of usage or custom, under the Regulation of 1827 ; and also on the more general ground that, because the law of pre-emption is part of the personal law of Mahomedans, and may have been adopted as their own custom by certain Hindus. But these facts cannot bind members of other communities : cf *Parashth Nath Tewari* v. *Dhanai Ojha* (17). It is clear that there is no course of decisions, or even a single authoritative decision, in favour of the prevalence of any such custom as would enable the plaintiff to enforce his right against the present defendant, and, in my opinion, if he can succeed at all, he must prove the custom by evidence. None has been taken in the case, and we have to decide whether we should remand the suit for this to be done, or not ? Against doing so is the plaintiff's conduct in assuming the existence of the right to pre-empt, and failing to plead the custom, as has been noted by the Courts below.

I think that in the circumstances it is not necessary to send down an issue for a finding whether a custom imposing the rule of pre-emption on persons of defendant's persuasion exists in Ahmedabad or not.

I agree that the lower appellate Court's decree should be confirmed and that the appeal should be dismissed with costs.

R.K. *Appeal dismissed.*

(21) [1913] 38 Bom. 190=21 I.C. 832=15 Bom. L.R. 1036.
(22) A.I.R. 1923 P.C. 41=45 Bom. 1056=48 I. A. 475 (P.C.).
(23) [1920] 44 Bom. 887=58 I.C. 279=22 Bom. L.R. 698 (F.B.).

* A. I. R. 1929 Bombay 213

BAKER, J.

Madhusudan Pandurang and *others*—Plaintiffs—Appellants.

v.

Bhagwan Atmaram and *others*—Respondents.

Second Appeal No 924 of 1926, Decided on 30th November 1928, against decision of Dist. Judge, Thana, in Appeal No. 20 of 1926.

*** Civil P. C, S. 11 — Mortgage decree against Hindu father—Minor sons not parties—Decree is still binding on sons and acts as res judicata—Hindu Law—Alienation.**

A Hindu father fully represents his minor sons in a mortgage suit brought against him and the decree obtained in such suit against the father is binding on the sons, though not made parties to the suit, and acts as res judicata : *A. I. R.* 1914 *P.C.* 136 ; 34 *Bom.* 354 *Rel. on* ; 40 *Bom.* 248 and 41 *Cal.* 727; *Dist.* [P 214 C 2]

B. G. Rao—for Appellants.

P. V. Kane—for Respondents.

Facts.—One *N* the grandfather of the plaintiffs mortgaged his property to *B*. *B* in 1910 brought a suit No. 116 of 1910 against *N* and his sons, the fathers of the plaintiffs, and obtained a decree which was confirmed in second appeal by the High Court (44 *Bom.* 341). Plaintiffs in 1923 brought a suit against *B* the then mortgagee for a declaration that their interest in the mortgaged property was not liable to be sold in execution of the decree in Suit No 116 of 1910 and for an injunction restraining *B* from selling their right, title and interest and in the alternative praying for an account under Deccan Agriculturists' Relief Act. The trial Court held that the suit was not barred by res judicata but dismissed the suit as not maintainable. The District Judge dismissed the suit holding that it was barred by res judicata.

Judgment.—(After stating the facts as above his Lordship proceeded). The first question is, whether the suit is barred by res judicata by reason of suit No. 116 of 1910, in which all questions relating to the mortgage were decided as between the fathers of the plaintiffs and the mortgagees, the defendants. We are now only concerned with plaintiffs 1 and 2, sons of Pandurang ; the other plaintiffs not being born at the date of the suit in 1910. The property is ancestral property and the trying Judge decided that the suit was not barred by res judicata, on the short ground that the present plaintiffs were not parties to the suit of 1910, and they claim not through their fathers but in their own right and that the grandsons take an inherent interest in the ancestral property as such.

The learned District Judge was of opinion that the defendant in the former suit (the fathers of the present plaintiffs) were held to be litigating in respect of a private right claimed in common for themselves and their children, and the present suit is, therefore, barred by S. 11, Expl. 6, Civil P. C It is contended on behalf of the appellants that S 11, Expl 6, has no reference to the facts of the present litigation, that all coparceners are necessary parties to a mortgage suit and that the present plaintiffs were not represented by their fathers. I have already pointed out that plaintiffs 1 and 2, the sons of Pandurang, who was defendant 1 in 1910, were alone born in 1910 and the question whether they were bound by the decree was considered in that suit. Ex. 33 is the judgment of the appellate Court (District Court of Thana). In that suit, issue 3 was, whether the share of defendant 1's (Pandurang's) sons is responsible for the debt. The finding was in the affirmative. The learned Judge said that though the minors were no parties, the Hindu joint family is represented in all its transactions by its karta and the sons by their father. O. 34, R. 1, does not interfere with the rule of Hindu law that the Hindu father can represent his sons. Having regard to the late stage when such an objection was raised for the first time, this contention cannot be allowed. The minor sons of defendant 1 are sufficiently represented by their father defendant 1 : cf. *Ramkrishna* v. *Vinayak Narayan* (1). In that case the minor was not a party to the suit but he was represented by the adult members of the family and it was held that they represented him : cf. *Govind* v. *Sakharam* (2), which, however, is not the case of "a suit on a mortgage." So far as appears from the report of the case in the High Court (*Pandurang Narayan* v. *Bhag-*

(1) [1910] 34 Bom. 354 = 5 I. C. 967 = 12 Bom. L. R. 219.

(2) [1904] 28 Bom. 383=6 Bom. L. R. 344.

wandas Atmaramshet (3)), this point was not taken in the second appeal. It is argued on behalf of the appellants that *Ramkrishna* v. *Vinayak Narayan* (1) rests on *Ramasamayyan* v. *Virasami Ayyar* (4) and *Lala Surja Prosad* v. *Gulab Chand* (5), and that this latter case was upset in *Lala Suraj Prosad* v. *Golab Chand* (6). *Ramkrishna* v. *Vinayak* (1), however, has never been dissented from and is still good law and binding on me Reference is also made to *Ramchandra Narayan* v. *Shripatrao* (7), where it was held that the abatement of a suit by one member of an undivided Hindu family did not deprive his coparceners of the right to use for redemption there being no indication that the suit was brought in any representative capacity. That, however, was the case of an adult coparcener, a brother, and not of the father and a minor son.

The appellants further relied on *Debi Prosad Sahi* v. *Dharamjit Narayan Singh* (8), where it was held that the karta of a joint Hindu family was bound in a suit on a mortgage to join as a party —one of the members of the family who had a joint interest with him in the mortgage That also is the case of a major and the objection as regards parties was taken in the suit itself The appellants also rely on *Padmakar Vinayak Joshi* v *Mahadev Krishna Joshi* (9), where the major brother of the plaintiffs during their minority had brought a suit to redeem the property in suit, which had been dismissed. It was held that the second redemption suit by plaintiffs was not barred as they were not sufficiently represented in the previous suit.

The respondents rely on *Sheo Shankar Ram* v. *Jaddo Kunwar* (10), where it was held by the Privy Council that the plaintiffs who sued to redeem a mortgage after foreclosure, on the plea that they had not been parties to the mortgage suit, were properly and effectively represented in the suit by the managing members of the joint Hindu family of which the plaintiffs were also members. Their Lordships saw no reason to dissent from the Indian decisions which showed that there were occasions including foreclosure actions when the manager of the joint Hindu family so effectively represented all the other members,—that the family as a whole was bound, and were of opinion that it was clear on the facts of this case, on the findings of their Lordships, that it was a case where that principle ought to be applied. There was not the slightest ground for suggesting that the managers of the joint family did not act in any way in the interest of the family itself.

It is contended that this case was one where a foreclosure decree had been passed, which distinguishes it from the present case. But the remarks of their Lordships of the Privy Council appear to be of general application. In the present case the father of the minor plaintiffs 1 and 2 was the principal contesting defendant and took every possible objection to the suit which he could have taken—including the objection that his minor sons should be made parties, though this seems to have been taken at a late stage of the case—as appears from the judgment of the first appellate Court, Ex. 33. If the minor plaintiffs had been brought on the record they would have been represented by their father Pandurang and the result of the suit would have been the same In these circumstances, in view of the rulings in *Sheo Shankar Ram* v. *Jaddo Kunwar* (10) and *Ramkrishna* v. *Vinayak Narayan* (1), I am of opinion that the plaintiffs must be held to have been represented by their father Pandurang in the previous litigation and, therefore, the matter is res judicata and cannot be re-opened. I am of this opinion apart from S. 11, Expln. 6, Civil P. C, the applicability of which is perhaps doubtful. This is sufficient for the disposal of the appeal, but as the other question, namely, the maintainability of the suit has been argued at some length I will deal briefly with that also

As to the maintainability of the present suit both the Courts below are of opinion that it is not maintainable, as the mortgage was for an antecedent debt and binding on the plaintiffs. The point has been argued at great length. The

(3) [1919] 44 Bom. 341 = 55 I. C. 544 = 22 Bom. L. R. 120.
(4) [1898] 21 Mad. 222=8 M. L. J. 126.
(5) [1900] 27 Cal. 724=4 C. W. N. 701.
(6) [1901] 28 Cal. 517=5 C. W. N. 640.
(7) [1915] 40 Bom. 248 = 33 I. C. 771 = 18 Bom. L. R. 33.
(8) [1914] 41 Cal. 727 = 22 I. C. 570 = 19 C. L. J. 437.
(9) [1885] 10 Bom. 21.
(10) A. I. R. 1914 P. C. 136 = 36 All. 383= 41 I. A. 216 (P.C.).

consideration of the mortgage in question was admitted and it was held by the High Court in *Pandurang* v. *Bhagwandas* (3) that the object of this alienation by way of mortgage was to pay off the antecedent debts incurred by the father (Narayan) prior to the mortgage. These debts were partly due to the mortgagee himself and partly to others. This finding would appear to be a finding which concludes the matter, but the gist of the argument of the learned pleader for the appellants is that the observations of Shah, J., in *Pandurang* v. *Bhagwandas* (3) must be held to be incorrect in view of the rules laid down by the Privy Council in the subsequent case of *Brij Narain* v. *Mangla Prasad* (11).

In spite, however, of the lengthy and elaborate arguments advanced by the learned pleader for the appellants I am unable to see that *Brij Narain's* case (11) overrules or dissents from any opinion expressed in *Pandurang* v. *Bhagwandas* (3), on the contrary, it supports the view expressed by Shah, J. Five propositions were laid down by the Privy Council in *Brij Narain's* case (11). They are as follows (p 139 *of* 51 *I. A.*) :

"(1). The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity ; but

(2). If he is the father and the other members are the 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.

(3). If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

(4). Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

(5). There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

We are not concerned with the first and the fifth propositions. As it was not contended by the father of the present plaintiffs that the debt was for an immoral purpose the second proposition will apply. The consideration was admitted as is shown by the report in *Pandurang* v. *Bhagwandas* (3) and it consisted of Rs. 700 due to the mortgagee and Rs 799 borrowed to pay off debts due to others. It was held by this Court that the object of this alienation by way of mortgage was to pay off the antecedent debts incurred by the father prior to the mortgage. These debts were partly due to the mortgagee and partly to others. I see no reason to suppose that the view of this Court that these were antecedent debts in fact as well as in time is not in accordance with the fourth proposition laid down by the Privy Council in *Brij Narain's* case (11).

The learned pleader for the appellants has relied on a Full Bench case of the Allahabad High Court in *Jagdish Prasad* v. *Hoshyar Singh A. I. R.* 1928 *All.* 596 (*F. B*). in which it is laid down that the word 'debt in proposition No. 2 in *Brij Narain's* case (11) does not include mortgage debt. In that case, however, it was held that there was no antecedent debt, whereas in the present case there is a finding of this Court that there was an antecedent debt, and the present case is distinctly covered by proposition No. 3 in *Brij Narain's* case (11), which lays down that if the father purports to burden the estate by a mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate. The mortgage in the present case being to discharge an antecedent debt, will bind the estate In these circumstances I am of opinion that the case is distinctly within the ruling in *Brij Narain's* case (11). The mortgage debt is, therefore, binding on the minor plaintiffs, and the suit is consequently not maintainable. The appeal will, therefore, be dismissed with costs.

R.K. *Appeal dismissed.*

(11) A. I. R. 1924 P. C. 50 = 46 All. 95 = 51 I. A. 129 (P.C.).

* A. I. R. 1929 Bombay 215

MARTEN, C. J., AND MURPHY, J.

Dattatraya Krishna—Applicant.

v.

Jagannath Shamrao—Opponent.

Civil Revn. Appln. No. 19 of 1928, Decided on 17th December 1928, against the order of Dist. Judge, Satara, in Appeal No 62 of 1927.

*** Civil P. C., O. 21, R. 89—Judgment-debtor depositing sale price and 5% but not price in proclamation — Decree-holder also applying to set aside sale and not intending to proceed with execution—R. 89 is not complied with.**

After the judgment-debtor's property was put up for sale for Rs. 1,334 and was sold, the

judgment-debtor made an application under O. 21, R. 89 and deposited Rs. 1,076 in Court, (Rs. 1,035 equalling the amount realized at the auction sale, Rs. 55 representing the five per cent of the purchase money, required to be paid to the purchaser. and Rs. 16 being poundage). The decree-holder also applied that he did not wish to claim the sum remaining due on the darkhast, and that the debt, so for as th is darkhast ent had been satisfied, and prayed that the sale which had taken place should be set aside.

Held : that the requirement of R. 89 was a statutory one and was not satisfied and that sale could not be set aside : *A. I. R.* 1922 *Bom.* 193, *Expl. & Foll.* [P 216 C 2 ; P 217 C 1]

A. G. Desai—for Applicant.

P. B. Gajendragadkar—for Opponent.

Murphy, J.—This is a revision application against the judgment of the learned District Judge of Satara, in the matter of the execution of a decree.

The facts were, that the judgment-debtor's property was put up for sale, and was sold. After this had been done the judgment-debtor made an application under O. 21, R 89, Civil P. C , and deposited Rs. 1,076, in Court ; Rs. 1,005 equalling the amount realized at the auction sale, Rs. 55 representing the five per cent of the purchase money, required to be paid to the purchaser, and Rs. 16 being poundage The sum specified in the proclamation of sale had been Rs. 1,334.

The question now before us is, whether this payment by the judgment-debtor was sufficient to comply with the provisons of R. 89, O. 21. It appears that when these proceedings were taken in the Subordinate Judge's Court, the plaintiff had made an application stating that :

"In the above mentioned matter the property has been sold by auction and the amount has come into the Court. Plaintiff and defendant are negotiating for a compromise for the remaining sum which is due. Plaintiff does not want to claim that sum for the present. It is prayed that this darkhast should be disposed of."

The judgment-debtor also made an application to the same purpose, stating that he had deposited the amount of Rs. 1,076 in Court, that the plaintiff had applied to the effect that she did not wish to claim the sum remaining due on the darkhast, and that the debt, so far as this darkhast went, had been satisfied. He, therefore, prayed that the sale which had taken place should be set aside.

In dealing with this application, the learned Subordinate Judge held that the rule had not been complied with, and he refused to set aside the sale. But, on appeal to the District Court, the learned District Judge was of opinion that there had been a substantial compliance with the rule, and he, therefore, set aside the lower Court's order, and directed that :

"If the appellant pays into this Court within ten days the sum of Rs. 1,076-8-0 for payment to the auction purchaser, the sale shall be set aside. If the money is not paid within ten days, the sale shall be made absolute."

This is the order with which we have to deal. The reasons which actuated the learned District Judge in coming to the decision which he reached were that the provisions of sub-clause (*a*) of the rule had been complied with by the payment of Rs. 55 being five per cent of the highest bid to be paid to the purchaser, and that clause (*b*), being intended to guard the interests of the decree-holder and to ensure the judgment-debtor a locus penitentiæ and an opportunity to recover his property, had been virtually complied with ; since what had happened was that the judgment-creditor had in effect waived the claim for the balance, and had received satisfaction. He thought that the case was not on exactly the same footing as that of *Manaji Kuverji* v *Aramita* (1), which he distinguished, and passed the order in question.

I think, however, that no real distinction can be drawn between that case and the present one In the reported case Sir Norman Macleod, C J. held that (*p.* 175 *of* 46 *Bom.*) :

"...an undertaking to pay a certain amount is not payment, and, as has been laid down in previous decisions, the provisions of R. 89 are a concession allowed to judgment-debtors, and they must be strictly complied with in order to enable the judgment-debtor, to obtain the advantage of the concession. If part payment coupled with an undertaking to pay the balance were to be considered as payment in full, then the provisions of the rule would not be complied with. So the decision of the trial Judge was correct and the appeal must be dismissed..."

In the present case also I think that the provisions of the rule have not been complied with. What is required to be deposited for payment to the decree-holder is :

"the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder."

(1) A. I. R. 1922 Bom. 193=46 Bom. 171.

Admittedly, that has not been done in the present case. The amount mentioned in the proclamation of sale was Rs. 1,334 and nothing is admitted to have been received by the decree-holder since the date of the proclamation. In fact, what we are asked to hold is that the difference between the two sums; that paid in and that mentioned in the proclamation of sale, was received by the decree-holder; while all that she admitted was that she did not wish to proceed any further with this particular darkhast to recover it. The requirement of R. 89 is a statutory one, and we think that it cannot be satisfied in the manner in which it has been held to have been done in this case by the learned District Judge.

We must, therefore, set aside the order of the District Court, and restore that of the Subordinate Judge, and make the rule absolute. Respondent to pay all the costs in this Court and in the District Court.

R K. *Rule made absolute.*

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* A. I. R. 1929 Bombay 217

PATKAR AND MURPHY, JJ.

Lakshmibai Anant— Plaintiff— Appellant.

v.

Ravji Bhikaji— Defendant 1 — Respondent.

First Appeal No. 10 of 1926, Decided on 21st November 1928, against the order of First Class Sub-Judge, Thana, in Darkhast No. 40 of 1925.

*** (a) Civil P C., O. 20, R. 12—Court ordering profits to be ascertained in execution—Order though irregular is not without jurisdiction—Executing Court cannot go behind it but must ascertain the mesne profits—Execution—Decree binding.**

No doubt under O. 20, R. 12, the amount of the mesne profits must be determined during the course of the suit and an enquiry as to mesne profits under this rule is not a proceeding in execution, but a proceeding in continuation of the original suit. But if the Court instead of passing an order under O. 20. R. 12, orders the mesne profits to be recovered in execution then the decree though irregular is binding between the parties. In such a case there is not any want of jurisdiction in the Court passing an order in contravention of O. 20, R. 12, but it is merely an erroneous or irregular exercise of jurisdiction. Executing Court has no jurisdiction to go into the question whether the Court passing the decree committed any error in the exercise of its jurisdiction. It is incumbent on the executing Court to ascertain the mesne profits : 38 *Bom.* 194: 43 *Mad.* 675, (*F.B.*); *Foll.*; *A. I. R.* 1925 *Cal.* 907 (*F.B.*), *Dist.* and *not Foll.*

[P 218 C 1, 2 P 219 C 1]

*** (b) Civil P. C., S. 11 — Execution disposed of in default — Decision is not res judicata.**

A darkhast disposed of for default of appearance as the plaintiff's pleader was absent cannot be said to have been heard and decided on merits. The decision in the previous darkhast passed without hearing the plaintiff or his pleader cannot be challenged except in a subsequent darkhast and it does not operate as res judicata. [P 219 C 1]

(c) Civil P. C., O. 9, R. 8—Execution.

Order 9, R. 8 does not apply to execution proceedings. [P 219 C 1]

P. B. Shingne—for Appellant.

H. C. Coyajee and *T. N. Walavalkar*—for Respondent.

Patkar, J.—This is an appeal in execution of a decree obtained by the plaintiff for partition of the property described in Schs. A and B and for taking accounts and one half share in the assets of the company and moveable property in the possession of defendant 1 and for mesne profits of the properties A and B. In the darkhast he mentioned that the partition of the property in Sch A was made and plaintiff and defendant had taken possession. It appears from the receipts Exs. 35 and 36 that in October 1920 the plaintiff obtained possession of the property in Sch. A. We are not, therefore, concerned with the immovable property in Sch. A. The second prayer is that the plaintiff should be given half share after taking accounts of plaintiff's half share in defendant's share in the property of the company, moveables, outstandings and immovable property in Sch. B. With regard to the plaintiff's share in the immovable property, the learned First Class Subordinate Judge has not dealt with the point. It appears that the prayer with regard to the possession of half share in the immovable property in Sch. B has escaped the attention of the learned Judge. With regard to the taking of accounts of the property, moveables and outstandings, it appears that the decree directed that the assets and liabilities of the company, so also the assets and liabilities of defendant 1 should be ascertained at the time of the execution. It is quite clear that the executing Court ought to have gone into the question of the assets and liabilities of the company, and also the assets and liabilities of defendant 1, which were

directed by the decree to be ascertained at the time of the execution.

The third prayer with regard to the mesne profits of the property in Subs. A and B has been disallowed by the learned Subordinate Judge on the ground that the mesne profits could not be determined in execution proceedings, but ought to have been ascertained by an application in the suit itself under O. 20, R. 12, and therefore he had no jurisdiction to go into the question of the ascertainment of the mesne profits. It appears that in the decretal portion of the judgment delivered by the Subordinate Judge it is ordered that the plaintiff should recover one-third share of the mesne profits from defendant 1 to be ascertained in execution proceedings till the plaintiff gets possession of the property after the actual division thereof. This direction as to the ascertainment of the mesne profits in execution does not find its place in the decree as drafted, but we must take it that the learned Judge ordered the mesne profits to be ascertained during the process of execution. It is urged on behalf of the respondent that the learned Subordinate Judge had no jurisdiction to order the ascertainment of the mesne profits in execution, and the executing Court properly declined to execute a decree which was passed without jurisdiction in contravention of the provisions of O. 20, R. 12, and reliance has been placed on the cases of *Md. Ishaq Khan* v *Md. Rustom Ali Khan* (1): *Rudra Pratab Singh* v *Sarda Mahesh Prasad Singh* (2) and *Gora Chand Haldar* v. *Prafulla Kumar Roy* (3). Under O. 20, R. 12, the amount of the mesne profits must be determined during course of the suit and an enquiry as to mesne profits under this rule is not a proceeding in execution, but a proceeding in continuation of the original suit: see *Rudra Pratap Singh* v *Sarda Mahesh Prasad Singh* (2) and *Shankar* v. *Gangaram* (4) But the Subordinate Judge, instead of passing an order under O. 20, R. 12, ordered the mesne profits to be recovered in execution and the decree though irregular is binding between the parties. The question, therefore, now for decision is whether an executing Court can go behind the decree and refuse to execute the decree on the ground that the order of the Court was without jurisdiction, in so far as it contravened O. 20, R. 12. On account of the omission of the words "or of the jurisdiction of the Court that passed it," appearing in S. 225, old Civil P. C. in O. 21, R. 7, of the present Code, there has been a conflict of judicial opinion on the point as to whether an executing Court can go into the question whether the Court, which passed the decree, had any jurisdiction to pass it. The view of the Calcutta High Court in *Gora Chand Haldar* v. *Prafulla Kumar Roy* (3) that where a decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction, is not accepted by this Court in *Hari Govind* v. *Narsingrao Konherrao* (5) and the Madras High Court in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (6). In *Gora Chand Haldar* v. *Prafulla Kumar Roy* (3) their Lordships, however, observed (p 173 *of Cal.* 73):

> "We have to start by accepting the proposition that the Court that made the decree had no jurisdiction to make it, and by that expression is meant that the Court had not such territorial jurisdiction as would authorize it to make the decree, and not that having jurisdiction it exercised it erroneously."

In the present case, we do not think that there was any want of jurisdiction in the Court passing an order in contrvention of O. 20, R. 12, but that it was merely an erroneous or irregular exercise of jurisdiction: see *Malkarjun* v. *Narhari* (7). The distinction between an irregularity and nullity has been pointed out by Mookerjee, J., in *Ashutosh Sikdar* v. *Behari Lal Kirtania* (8). An irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding or apply to its whole operation, whereas a nullity is a proceeding taken without any foundation for it and is so essentially defective

(1) [1918] 40 All. 292=44 I. C. 88=16 A. L.J. 182.
(2) A. I. R. 1925 All. 588=47 All. 543.
(3) A. I. R. 1925 Cal. 907=53 Cal. 166 (F.B.).
(4) A. I. R. 1928 Bom. 236=52 Bom. 360.
(5) [1913] 38 Bom. 194=23 I.C. 123=16 Bom. L. R. 26.
(6) [1920] 43 Mad. 675=39 M. L. J. 203=12 L. W. 217=58 I. C. 871=(1920) M. W. N. 400 (F.B.).
(7) [1900] 25 Bom. 337=27 I. A. 216=2 Bom. L. R. 927=7 Sar. 739 (P. C.).
(8) [1908] 35 Cal. 61=6 C. L. J. 320=11 C.W. N. 1011 (F. B.).

as to be of no avail or effect whatever, or is void or incapable of being validated. We think, therefore, that the executing Court had no jurisdiction to go into the question whether the Court which passed the decree committed any error in the exercise of its jurisdiction. The First Class Subordinate Judge, Thana, ordered that the mesne profits should be ascertained in execution, and it was incumbent on the executing Court to ascertain the mesne profits and it was not open to the executing Court to go behind the decree and go into the question, whether there was an irregular or erroneous exercise of jurisdiction by the Court which passed the decree.

It is urged on behalf of the respondent that the present question is barred by res judicata on the ground that in darkhast No. 80 of 1916, disposed of on 19th July 1922, the learned Subordinate Judge expressed the view now taken by the First Class Subordinate Judge in the present darkhast, and reliance has been placed on the decision in *Ram Kirpal Shukul* v. *Mt. Rup Kuare* (9). It appears, however, that on 19th July 1922, the plaintiff's pleader was absent It cannot, therefore, be said that this point was heard and decided by the Court on 19th July 1922. The darkhast was disposed of for default of appearance as the plaintiff's pleader was absent, and O. 9. R. 8, would not apply to execution proceedings. The plaintiff could not have applied for the restoration of the darkhast under O. 9, R, 8, nor could he have appealed against that order: see *Hajrat Akramnissa Begam* v. *Valiulnissa Begam* (10), and *Bharat Indu* v. *Asghar Ali Khan* (11). We think, therefore, that the decision in the previous darkhast No. 80 of 1916, which was passed without hearing the plaintiff or his pleader, and which could not be challenged except in a subsequent darkhast, does not operate as res judicata We think, therefore, that the lower Court erred in not going into the questions which were reserved by the First Class Subordinate Judge to be determined in execution.

Similarly, with regard to the fourth clause regarding the half share in the moveables, outstandings, &c, which may be in the defendant's possession, we think the view of the lower Court declining to go into the question on the ground that the moveable property ought to have been divided in the suit itself: vide O 26, Rr. 13 and 14, is not correct as the final decree was passed by the Court and the executing Court was bound to execute it. We would, therefore, reverse the order of the lower Court and remand the darkhast for disposal according to law. Costs of this appeal will be costs in the darkhast.

Murphy, J. — I agree. There were several reliefs asked for in the application for execution, but the learned Subordinate Judge held that the prayer for mesne profits was unsustainable, because under O. 20, R. 12, this should have been provided for in a proceeding in the suit; and similarly, as to moveable property under O. 26, Rr. 13 and 14, such a partition can only be carried out in the suit. The learned Subordinate Judge is technically right in his view that such questions must be decided in the suit as laid down in the rules and orders quoted. But the truth of the matter is, that the original Court made an anomalous decree which is partly preliminary and partly final whereas it should have first made a preliminary decree, and after disposing of the matters provided for under it, passed final orders. But the decree stands unchallenged and where the original Court's decision is irregular, I think, the executing Court cannot now examine and go into this question and refuse to execute on this account. The leading case on the point in Bombay is that of *Hari Gobind* v. *Narsingrao Konherrao* (6), and the rule there laid down is that the executing Court cannot question the jurisdiction of the Court which originally made the decree. Here it is not a question of jurisdiction, but rather one of irregularity and, I think, it was not for the executing Court to hold that it should not inquire into the question, which was ordered to be investigated in execution, viz., the question of mesne profits.

It has also been urged that in a former darkhast the same Court had held that it could not execute the decree at all because it was not a final one. This was in 1922 when the papers had been returned by the Collector, and the order was made in the absence of the plaintiff's pleader.

Therefore, for the reasons just given by my learned brother Patkar, J., I agree that this order does not bar the present

(9) [1883] 6 All. 269=11 I.A. 27=(1886) A.W. N. 286.
(10) [1893] 18 Bom. 429.
(11) A. I. R. 1923 All. 460=45 All. 148.

proceedings, and that the First Class Court's order must be reversed and the darkhast remanded to it for disposal according to law.

R.K. *Case remanded.*

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PATKAR AND BAKER, JJ.

Gopalji Umersey—Applicant.

v.

Devji Naranji Thakkar—Opponent.

Civil Revn. Appln. No. 292 of 1927, Decided on 22nd November 1928, against the order of Sm. C. C. Judge, Bombay, in Suit No. 17126 of 1927.

(a) Bombay Rent Act (7 of 1918), S. 17—Premises at monthly rent of Rs. 17—Controller's certificate not in existence—Suit for ejectment—Plaintiff must apply and annex a certificate under S. 4 (1) (a) and (b).

In a suit for ejectment from premises having monthly rent not exceeding Rs. 30 the plaintiff must annex to the plaint a copy of the order after making an application to the Controller to determine whether the premises are or are not small premises or to fix their standard rent, under S. 4 (1) (a) and (b). It is no valid defence that there was no order of the Controller in existence. [P 221 C 1]

(b) Bombay Rent Act (7 of 1918) S. 17—Objection under S. 17 amounts to material irregularity though not want of jurisdiction.

The objection based on S. 17 not affixing to the plaint a certificate under S. 4 (1) (a) and (b)] though does not amount to want of jurisdiction in the Small Cause Court it amounts to material irregularity in the exercise of its jurisdiction. [P 222 C 1]

(c) Bombay Rent Act (2 of 1918) S. 2 (1) (b) (ii)—Premises changed to lose identity are new.

Where the whole house including the second floor is entirely changed so as to lose its identity the house becomes new premises within S. 2 (1) (b) (ii). *A. I. R.* 1921 *Bom.* 224 and *A. I. R.* 1927 *Bom.* 648, *Rel. on.* [P 222 C 2]

K. N. Koyajee and *R. B. Paymaster*—for Applicant.

H. C. Coyajee and *S. E. Bamji*—for Opponent.

Patkar J.—In this case the plaintiff landlord brought a suit against the defendant for ejectment in the Court of Small Causes. The defendant was occupying a room on the second floor the rent of which was Rs. 7 which was subsequently raised to Rs. 17. The defendant contended that the suit could not be proceeded with as the plaintiff had not annexed to the plaint a copy of the order in force determining that the premises were not small premises or fixing their standard rent under S. 17 of Bombay Act 7 of 1918. The plaintiff contended that structural alterations had been effected in the building in 1926 and 1927 with the result that the identity of the building was changed and the premises became new premises exempt from the operation of the Rent Act. The trial Judge was of opinion that the Controller under S 4 had no power to determine whether the premises were old or new though he may have to do so incidentally. The question as to whether the premises were old or new was referred by consent to Mr. B. S Sanjana as commissioner. The commissioner visited the premises, took evidence and held that the premises in question were new. The Small Cause Court Judge, who tried the case, accepted the report and ordered the defendant to vacate by 31st October.

It is urged on behalf of the defendant that the lower Court had no jurisdiction to decide the case but ought to have rejected the plaint under S. 17, Cl (2), on the ground that the plaintiff had not annexed to the plaint a copy of the order in force determining that the premises were not small premises or fixing their standard rent. It is urged on the other hand that the defendant consented to the appointment of Mr. Sanjana as commissioner to decide the question whether the premises were old or new, that the Small Cause Court had jurisdiction to entertain the suit for ejectment, and that as there was no order passed by the Controller under S. 4 there was no order in force a copy of which could be produced with the plaint under S. 17.

Under S. 4, Rent Act 7 of 1918, the controller has the power after such enquiry as he may think fit: (a) to determine whether any premises are or are not small premises, and (b) from time to time to fix the standard rent of the premises. "Small premises" have been defined by S. 2, Cl. (b), as any premises the standard rent of which does not exceed twenty rupees a month. Under S. 17, Bombay Rent Act 7 of 1918, in every suit for rent or ejectment in respect of any premises of which the monthly rent does not exceed thirty rupees, the plaintiff shall annex to the plaint a copy of the order in force determining that the premises are not small premises or fixing

their standard rent, and under sub-S. (2) if the plaintiff fails to comply with the terms of sub-S. (1) the plaint shall be rejected. The monthly rent in sub-S. (1) (a), S. 17 does not mean standard rent: see *Krishnarao* v. *Virji* (1). If the premises in suit were governed by the Rent Act, the monthly rent of the premises being Rs 17 it would be necessary for the plaintiff to annex to the plaint a copy of the order in force determining that the premises were not small premises or fixing their standard rent.

It is urged, however, that there is no order of the Controller in existence, and therefore, the plaintiff could not annex to the plaint a copy of the order in force. An order in force means an order which has not been set aside in appeal under S. 6, Bombay Rent Act 7 of 1918. If an order is not in existence, the plaintiff ought to have applied to the Controller for a certificate under S. 4 (1) (a), Bombay Rent Act, 7 of 1918. Under the rules relating to the subsidiary Rent Act, 7 of 1918, made under S. 13 and published in the "Bombay Government Gazette" 1923 Part I, pp. 368-370, dated 22nd February 1923, provision is made for fees to be paid on an application for fixing or altering the standard rent under S. 4 (1) (b) and also for fees on an application for a certificate of the Controller under S. 4 (1) (a) The rules, therefore, contemplate an application to be made to the Controller to make an enquiry under S. 4. The plaintiff, therefore, must annex to the plaint a copy of the order after making an application to the Controller to determine whether the premises are or are not small premises or to fix their standard rent under S. 4 (1) (a) and (b).

The next question is whether the failure to annex to the plaint a copy of the order under S.4 (1) (a) deprives the Small Cause Court of the jurisdiction to decide the suit or is an irregularity which can be waived by the defendant. It is urged on behalf of the plaintiff that the Small Cause Court had jurisdiction to decide the suit for ejectment, and that the defendant had consented to the appointment of the commissioner to decide the question whether the premises were old or new, and therefore, must be considered to have waived the objection based on the failure to annex to the plaint a copy of the order under S. 4 (1) (a).

Under S. 41, Presidency Small Cause Courts Act, the suit for ejectment was cognizable by the Small Cause Court as the annual rent did not exceed Rs. 2,000. In a similar case, *Krishnarao* v. *Virji* (1) where the defendant was occupying the premises but they were not the same premises but different as they were let for the first time in October 1925, it was held that the point with regard to S 17, Bombay Act 7 of 1918, did not make it one of jurisdiction, and that even if the lower Court arrived at a wrong conclusion of fact or law, there would be no ground to interfere in revision under S. 115, Civil P. C. It might amount to an irregularity in procedure in the exercise of its jurisdiction, The lower Court had jurisdiction over the subject matter, but in the exercise of the jurisdiction a particular rule of procedure had to be followed, e. g., obtaining leave of the Collector in a suit to which Ss 4 and 6, Pensions Act 23 of 1861, are applicable: see *Nawab Muhammad Azmat Ali Khan* v. *Mt. Lalli Begum* (2) or leave under S. 17, Civil P. C., 1882: see *Narayan Shankar* v. *Secretary of State* (3), or consent of the Governor General in Council for the institution of a suit against a ruling chief under S. 433 Civil P. C., 1882: see *Chandulal* v. *Awad* (4). The question whether in such a case the objection can be waived by the party has been considered by the Privy Council in *Ledgard* v. *Bull* (5), where it was held as follows (*p.* 145 *of* 13 *I. A*):

"When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time would have led to the dismissal of the suit. The present case does not come strictly within these authorities, because the defendant's plea was

(1) A. I. R. 1927 Bom. 431.

(2) [1881] 8 Cal. 422=9 I. A. 8=4 Sar. 310 (P.C.).
(3) [1906] 30 Bom. 570=8 Bom. L. R. 543.
(4) [1896] 21 Bom. 351.
(5) [1896] 9 All. 191=13 I. A. 134=4 Sar. 741 (P.C.).

stated before issue was joined on the merits, and, in reliance of that plea, he objected to the case being tried, and withheld his objections to the validity of the patent. It is therefore, necessary to consider the facts from which their Lordships are asked to infer that the defendant did, in point of fact, waive all objection to the competency of the suit and engage that the cause should be tried on its merits by the District Judge."

In the present case, the objection based on S. 17, Bombay Rent Act 7 of 1918, was taken at the outset by the defendant, and though he consented to the appointment of Mr. Sanjana as a commissioner to try the question whether the premises were new or old, he cannot be said to have waived the objection based on S. 17. I think that if the premises in suit were governed by the Rent Act, the lower Court ought to have insisted upon the production of an order in force under S. 17, Bombay Rent Act 7 of 1918. If there was no order in existence, the plaintiff ought to have applied to the Controller and got an order and annexed it to the plaint, and though the objection based on S. 17, Rent Act may not amount to want of jurisdiction in the Small Cause Court it would in my opinion amount to material irregularity in the exercise of its jurisdiction.

The principal question, however, in the case is whether the premises in suit are governed by the Rent Act. The word "premises" occurring in S. 17 (1) (a), though not defined in Bombay Act 7 of 1918, is defined in the principal Act, Bombay Act 2 of 1918, and has the meaning assigned to it in that Act. Under S. 2 (1) (b) (ii), principal Act, Bombay Act 2 of 1918, the word "premises" does not include any building or part of a building or land which has not been at any time let as aforesaid before the 1st day of October 1922. It has been found by the Court that these premises were altered in 1926, and the report of the commissioner is that the buildings have lost their identity and that they are new premises. In *Chapsey Umersey* v *Keshavji Damji* (6) it was held that the godown, which was reconstructed, was for all practical purposes a new godown and the standard rent for the same was the rent at which it was "first let" after 1st January 1916. In *Ibrahim* v. *Jan Mahomed* (7) it was held by Madgavkar, J., following the decisions in *Chapsey Umersey* v. *Keshevji Damji* and *Stockham* v. *Easton* (8), that where a landlord entirely reconstructs a wall which has fallen down and makes extensive structural alterations in the house at considerable cost, the premises so renewed are new premises which fall within S. 2, Cl. (a) (ii), Bombay Rent (War Restrictions) Act, 1918, and he is at liberty to charge any rent for letting out the premises. The reasoning underlying the above decisions would apply to S. 2, Cl. (b) (ii), of Bombay Rent Act 2 of 1918.

The lower Court having accepted the report of the commissioner and found that the premises were new premises as they were reconstructed in 1926, they are not governed by the Bombay rent Act. The word "premises" in S. 17, Bombay rent Act 7 of 1918, would not include the premises in suit, as in their present condition they were first let after 1st October 1922. In the present case, the whole house including the second floor was entirely changed and lost its identity. The finding of the lower Court based on the evidence and the report of the commissioner, that the premises in suit were new premises must be accepted in revision. We think, therefore, that S. 17, Bombay rent Act, does not apply to the premises in suit.

We, therefore, discharge the rule with costs.

The defendant should vacate on or before 22nd December 1928.

Murphy, J. — The Court of Small Causes in Bombay passed an order of eviction against the applicant on 2nd September 1927, in suit No. 17126 of 1927 : and applicant challenges its correctness in revision.

He alleges that he has been occupying, from time to time, a room on the second floor of house No. 55 in Guncarriage Street, Colaba, formerly at a rent of Rs. 7 per mensem and latterly at Rs. 17 per mensem. The opponent, who farms the rents of this building, served applicant with a notice to vacate, and in due course filed the suit which ended in the order to vacate against the applicant.

At the trial, the applicant pleaded that there being no order annexed to the plaint in the terms of S. 17, Bombay rent Act (7 of 1918), determining that the premises were not "small premises"

(6) A. I. R. 1921 Bom. 224=45 Bom. 744.
(7) A. I. R. 1927 Bom. 648.
(8) [1924] 1 K. B. 52.

and fixing a standard rent, the suit could not be proceeded with. The opponent pleaded that extensive structural alterations having been effected in 1926, the premises were thereby converted into "new" ones and consequently that the Rent Act did not apply.

On these allegations the Court appointed a commissioner to determine whether the premises were old or new, and adopting the commissioner's report passed the order which aggrieves the applicant.

The applicant's point is that since the monthly rent of the premises does not exceed Rs. 30 the Court had no jurisdiction to entertain the plaint, which it should have rejected, under S. 17, Cl. 2, of the Act.

At the outset, the learned Judge of the Small Cause Court recorded an opinion that the Controller, under S. 4 had no power to determine whether the premises were old or new, and then by consent appointed Mr. B. S. Sanjana, commissioner, to inquire into this point.

It was on his report that an order was passed to the effect that it was confirmed, and the applicant was to vacate by 31st October 1927.

Looking to the frame of Act 7 of 1918, it appears to me that the intention, broadly speaking, was to have the rents of all "small premises," within the defined meaning of that expression, and where there was a dispute, fixed by the Controller on the application of either party: see S 2 (d), for the definition, and S. 4 (1) (a) and (b), for the determination of the two points, whether the premises are, or are not, "small premises," and if they are, for determining the standard rent.

The sections of the Act following S. 4 provide for a certain case (S. 5), for determining objections (S. 6), for a penalty for receiving rent in excess of the standard rent (S. 7), for excluded premises (S. 7A), for a penalty for disturbance of easements (S. 8), for the recovery of excess payments (S. 9), and for the accrual of rent (S. 10). Ss. 11 and 12 then confer certain legal powers on the Controller, S. 13 gives power to make rules, and S. 14 lays down that the Controller is not a Court, while S. 15 bars legal proceedings in certain matters. Ss. 16 and 17 appear to be connected. S. 16 forbids the issue of distress warrant, unless the person applying for it produces a copy of an order in force, either determining that the premises are not small premises, or that the standard rent has been fixed. In such cases the production of the order is a condition precedent. Similarly, S. 17 (1), with which we are concerned, prescribes that, in certain cases, including that of a suit for ejectment out of premises rented at less than Rs 30 there shall be annexed to the plaint a similar order.

Sub-S. 2 provides that if the plaintiff fails to comply with the terms of the sub-S. (1) the plaint shall be rejected.

On these facts, what is the effect when no order from the Controller has been applied for?

I think the intention clearly was that the production of an order from the Controller should be a condition precedent in this case also, and that failure to fulfil it invites the penalty provided in sub-S. (2) and consequently that the suit should have been dismissed, unless it could be shown that the "premises" were new, and so did not come within these provisions of the Act, and this view is confirmed by the provision in sub-S. (3) as to the effect of a rejection of the plaint under sub-S (2). The next question is whether these premises are "new," or not. It is not absolutely clear from the report that the applicant's own room has been altered, but there is no doubt that the whole building has been remodelled and modernized and provided with better amenities, in which the applicant must be participating, and in the circumstances it can, I think, reasonably be argued that the reconstruction amounts practically to a rebuilding of the whole house. This being so, it does not appear to me that there is any case for revision, and I agree that the application must be dismissed with costs.

R.K. *Application dismissed.*

A. I. R. 1929 Bombay 223

MARTEN, C. J., AND MURPHY, J.

Lokappa Chamirappa—Plaintiff—Applicant.

v.

Hiramani Khushaldas and *others*—Defendants—Opponents.

Civil Revn. Appln. No. 124 of 1928, Decided on 20th December 1928, against order of First Class Sub-J., Dharwar, in Suit No. 24 of 1927.

(a) Bombay Pleader's Act (1920), Sch. 3, Rr. 1 and 2—Altering amount in plaint in defendant's favour—Notice to plaintiff is necessary.

A Court is not entitled to alter the amount for the pleader's fees stated in the plaint in favour of the defendants without giving notice to the plaintiff. [P 224 C 1]

(b) Bombay Pleader's Act (1920), Sch. 3, Rr. 1 and 2—Suit dismissed for default—Costs should be awarded under R. 2 (c) and not R. 1 (a).

Where a suit has been dismissed for default of appearance it does not decide on the merits the real dispute between the parties within the meaning of R. 1 (a) and costs should therefore be awarded not under R. 1 (a) but under R. 2 (c). [P 224 C 2]

Nilkanth Atmaram—for Applicant.

R. A. Jahagirdar—for Opponents.

Marten, C. J.—There are two points here. The first is, whether the learned Judge was entitled to alter the amount for the pleader's fees stated in the plaint in favour of the defendants without giving notice to the plaintiff. What happened was that the suit was dismissed for want of appearance by the plaintiff, and at a later date the defendants applied ex parte to alter the amount of the pleader's fee, and that application was granted. We think, however, the learned Judge was bound to give notice to the plaintiff before any such amendment or alteration in the plaint was made Consequently, there must be a remand to the lower Court, and on that remand the learned Judge will decide whether the original valuation for the pleader's fee on the plaint can stand, notwithstanding that for certain other purposes, the suit was valued at a much higher figure.

For present purposes I will call the figure the learned Judge will eventually arrive at on remand as Rs. 10. Then comes another question altogether, and that is whether the defendants will be entitled to recover their pleader's fee computed on the whole of Rs. 10 under R. 1, Sch.3, Bombay Pleaders Act 1920, or whether they will only be entitled to a quarter of Rs. 10 under R. 2 (c). That depends on whether within the meaning of R. 1 (a) the suit was one of those " suits which decide on the merits the real dispute between the parties." If it was such a suit, then R. 1 would apply. If not, R. 2 would govern the computation of the fee, and reduce it to one-fourth of Rs. 10.

Where then a suit has been dismissed for default of appearance, has it decided on the merits the real dispute between the parties within the meaning of R. 1 (a)? In my judgment in such a case there has been no decision on the merits of the real dispute. The decision has rested on the technical ground that one of the parties has absented himself If R. 1 had been intended to apply to all suits in which there was a final decision, then the insertion of these words " which decide on the merits the real dispute between the parties " would have been quite unnecessary. Even if the words had been " which decide the real dispute between the parties " it would have been an easier case for the defendants. But the addition of the words " on the merits" to my mind makes the matter quite clear.

I recognize that in some cases this may work a hardship on a defendant, because he may have come to the trial prepared with all his witnesses and having paid his own pleader full fees to fight the matter out, and yet on this construction of the rule he may only succeed in getting one-fourth of his costs. But if there is any real grievance in that respect, that is a matter for amending the rules. We have merely to decide on the rules as they stand today.

Under these circumstances, we think the learned Judge was wrong in awarding costs on the full amount of the pleader's fees, and that as the case does not fall within R. 1 the defendant should have been awarded one-fourth of the costs only under R. 2 (c) as being a case " not otherwise provided for."

Accordingly on the remand the learned Judge will award costs to the defendant on the basis that R. 2 (c) applies and not R. 1. The rule granted must therefore be made absolute, the order of the learned Judge discharged, and the defendant's application re. costs remitted to the lower Court to be determined according to law. The respondent must pay the applicant's costs of this application in any event.

Murphy, J.—I agree that we have power to interfere in revision in this matter on the ground complained of, and also on the construction of Sch. 3, Rr. 1 and 2 which has been explained by the learned Chief Justice.

R.K. *Rule made absolute.*

* A. I. R. 1929 Bombay 225

MADGAVKAR, J.

Hari Ganu Bhandirge—Applicant.

v.

Hari Ganu Shinde and *another*—Opponents.

Civil Appln. No. 137 of 1928, Decided on 19th December 1928, for review of decision of Crump, J., in Second Appeal No. 459 of 1927.

*** (a) Civil P. C., O. 47, R. 1—New evidence of fact is no ground of review of second appellate decree.**

Discovery of new and important evidence on a question of fact though a good ground for review of the decree of the first appellate Court is no ground for review of the decree of the second appellate Court, the finding of fact of the lower Court being final and binding on second appellate Court (*Case law referred*). [P 226 C 1]

(b) Civil P. C., O. 47, R. 1—Appeal preferred and dismissed—Appellant cannot be said to have not preferred appeal.

When an appeal has not only been preferred but has also been disposed of, whether it has been dismissed or allowed, the appellant cannot be placed in the position as though "no appeal has been preferred" and no application for review of an order summarily dismissing an appeal lies : 9 *B. H. C.* 238, *Dist.*; 9 *B. H. C.* 89 and *A. I. R.* 1922 *Bom.* 130; 30 *Bom.* 625, *Rel. on.* [P 225 C 2]

J G. Rele—for Applicant.

P. B. Gajendragadkar—for Opponents.

Judgment. — This is an application for review of the order of dismissal under O. 41, R. 11, Civil P C. by Crump, J. of Second Appeal 459 of 1927, on 17th September 1927 preferred by the petitioner, original defendant 4, Hari Ganu Bhandirge.

The contest in the original suit was as regards the property of one Mukundji. The petitioner claimed to be the daughter's son and heir of Mukundji. Plaintiffs 1 and 2 opponents claimed to to be the nearest reversioners The plaintiffs succeeded in both the lower Courts. Each party set up a different genealogy. The plaintiffs' genealogy was accepted in both the lower Courts and they succeeded. The defendants' appeal to this Court was dismissed under O. 41, R. 11, Civil P. C. The present application purports to be made under O. 47, R. 1, Civil P. C., on the ground stated in para. 7 of the petition that one Raghunath Moreshwar Kulkarni handed over about 16th December 1927, a third genealogy, which was a new and important matter, which he could not, by the exercise of ordinary diligence, have produced in proper time. Accordingly, I am asked to review the order of Crump, J.

A preliminary objection is taken for the plaintiffs-opponents that such an application ior review does not lie. It is argued for the opponents that on the consistent practice of this Court as enunciated by this High Court from 1872 in *Nanabhai Vallabhdas* v. *Nathabhai Haribhai* (1) down to *Shivappa* v. *Ramchandra* (2), and the decision of Fawcett, J. in *Narhar Venkaji* v. *Raghunath Ramchandra* (3) no such application can be entertained. For the petitioner reliance is placed on the observations of Shah. J. in *Shivappa* v. *Ramchandra* (2), and on the indulgence granted to the petitioner in cases such as *Narayan* v. *Davudbhai* (4) where although his appeal in this Court had been admitted, he was allowed to withdraw it in order to prefer an application for review in the District Court.

The objection for the opponents must, in my opinion, succeed. The only section under which such an application for review would lie, is O. 47, R. 1, Civil P. C. and that section can only apply if "no appeal has been preferred." It may be that when the appeal has been preferred and even if it has been admitted and is allowed to be withdrawn as in *Narayan* v. *Davudbhai* (4) the applicant may be in the same legal position as though no appeal has been preferred. Even so, this view can only be sustained on an exceedingly liberal interpretation of the words of the enactment But I am unable to see, when an appeal has not only been preferred but has also been disposed of, whether it has been dismissed or allowed, how the appellant, by any procedure known to law, can be placed in the position as though "no appeal has been preferred." The difficulty, in fact, has been pointed out by Sir Lawrence Jenkins, C. J., in *Ramappa* v. *Bharma* (5). This initial difficulty in the petitioner's case would of itself, I think, suffice.

(1) [1872] 9 B. H. C. R. 89.
(2) A. I. R. 1922 Bom. 130=46 Bom. 1.
(3) Civil Appln. No. 630 of 1924. decided on 28th February 1927 by Fawcett, J.
(4) [1872] 9 B. H. C. 238.
(5) [1906] 30 Bom. 625=8 Bom. L. R. 842.

Moreover, there is the difficulty created by S. 100, Civil P. C. The decision of the District Court on a question of fact is final and the alleged evidence would clearly affect the issue of fact. Such a discovery, whatever ground it might furnish for review of the decree of the District Court. cannot be a ground for review of the decree of this Court. It is on this ground that all the High Courts have declined to entertain an application for review of this character. I have already referred to the Bombay decisions. The other decisions are to be found in *Jackammal* v. *Palneappa Chetti* (6), *Ravu Kutti* v. *Mamad* (7); *Secy. of State for India* v. *Manjeshwar Krishnaya* (8), *In the matter of the petition of Nand Kishore* (9); *Mariam-un-nissa Bibi* v. *Babu Ram* (10); *Rajani Kanta Das* v. *Kali Prasanna Mukherjee* (11) In regard to the observations of Shah J. in *Shivappa* v. *Ramchandra* (2), the decision itself shows that the learned Judge did not differ from the conclusion of Macleod, C J. following the cases cited above, and declined to grant the review applied for.

Thirdly, and lastly, I might add that on the petitioner's own showing it appears that this evidence existed in his own village of Jamb with the Kulkarni and was as easily available during the suit as it now purports to be It does not, therefore, comply with the requirements even of O. 47, R. 1.

For all these reasons the application fails and must be dismissed with costs.

R.K. *Application dismissed.*

(6) [1870] 5 M. H C 464.
(7) [1895] 18 Mad. 480.
(8) [1908] 31 Mad. 415.
(9) [1909] 32 All. 71=4 I. C. 809=3 A. L. J. 979.
(10) A. I. R. 1923 All. 541=45 All 458.
(11) [1914] 41 Cal. 809=26 I. C. 281.

A. I. R. 1929 Bombay 226

MADGAVKAR, J.

Raoji Vasudeo Girap and *others*—Defendants—Appellants.

v.

Tukaram Vishnu Kurla and *others*—Plaintiffs—Respondents.

Second Appeal No. 566 of 1926, Decided on 22nd November 1928, from decision of Dist. Judge, Ratnagiri, in Appeal No. 92 of 925.

Adverse possession—Right of fishing in open sea used exclusively and continuously for 28 years—Still no right to exclude can be obtained by prescription—Fishery.

The right of the public to fish in the sea is common and is not the subject of property and members of the public exercising the common right to fish in the sea are bound to exercise that right in a fair and reasonable manner and not so as to impede others from doing the same : 2 *Bom.* 19, *Foll.* [P 226 C 2]

A person, therefore, although exclusively and continually using a portion of the sea over 23 years, cannot claim it as the basis of the legal right to exclude any others and to confine the use of that portion of the sea for fishing for himself: 2 *Bom.* 19 and 39 *Cal.* 53, *Rel. on.* [P 227 C 1]

G B. Chitale—for Appellants.

A G. Desai—for Respondents.

Judgment—The question in this appeal is, whether the defendants-appellants are entitled to exclude the plaintiffs respondents from fishing at a certain spot on the shore at Vengurla and from using the foreshore within their limits. The defendants claimed this exclusive right by prescription and usage for over 28 years. The plaintiffs denied the prescription and claimed that in any case the open sea could not be the subject-matter of any exclusive right. Both the lower Courts upheld this contention of the plaintiffs-respondents and made a declaration accordingly. The defendants appeal.

Whatever the possibility of private rights to the exclusion of others in tidal navigable creeks and rivers, as laid down, for instance, by their Lordships of the Privy Council in *Srinath Roy* v. *Dinabandhu Sen* (1) or *Metha Jethalal* v. *Jamiatram Lalubhai* (2) and *Viresa* v. *Tatayya* (3) as regards the open sea, the view enunciated by Sir Michael Westropp since 1876 in *Baban Mayacha* v *Nagu Shravusha* (4) is in accordance with the English view and has been accepted by other Courts as in *Abhoy Charan* v. *Dwarka Nath* (5). It is as follows: The right of the public to fish in the sea is common and is not the subject of property, and members of the public exercising the common right to fish in the sea are bound to exercise that right in a fair and reasonable manner and not so as to impede others from doing the same.

(1) A I. R 1914 P.C. 48=42 Cal. 489=41 I.A. 221 (P.C.).
(2) [1887] 12 Bom. 225.
(3) [1885] 8 Mad. 467.
(4) [1876] 2 Bom. 19.
(5) [1911] 39 Cal. 53=11 I.C. 180=15 C.W.N. 972.

Whether, therefore, or no, the appellants have been exclusively and continually using this portion of the sea over 28 years, a point which is, in my opinion, doubtful, it cannot furnish the basis of the legal right they now claim, to exclude the plaintiffs or any others and to confine the use of that portion of the sea for fishing for themselves. The appeal is, therefore, dismissed with costs.

But as the words "by turn" in the decree of the trial Court might give rise to misunderstanding and perhaps fresh litigation, the decree will be amended by a declaration as follows:

The plaintiffs like the defendants and other members of the public have the right of fishing by rapan and by boats in the place in dispute and to perform any other acts incidental to such fishing. No party can claim an exclusive right there to fish.

The plaintiffs will obtain an injunction to enable them to dry and spread their nets by the foreshore and an injunction to restrain the defendants from obstructing the plaintiffs from fishing.

R.K. *Order accordingly.*

A. I. R. 1929 Bombay 227

PATKAR AND MURPHY, JJ.

Shankar Kondappa—Defendant—Appellant.

v.

Ganpat Shankarshet—Plaintiff—Respondent.

Second Appeal No. 411 of 1927, Decided on 4th December 1928, against decision of Asst. Judge, Poona, in Appeal No 197 of 1926.

(a) Civil P. C., O. 34, R. 5—R. 5 does not apply to compromise or award decree—Decree declaring charge on certain property of defendant—Property can be sold in execution—No separate suit is necessary for sale—Civil P. C., S. 47.

Where a money decree imposing a liability on the defendant to pay a sum of money to the plaintiffs declares that the plaintiffs have a first charge and a lien on certain immovable property of the defendant and the plintiff applies in execution proceedings for sale of the property charged, the plaintiff has a right to bring the property charged to sale in execution proceedings, and it is not necessary to bring a separate suit for the sale of the property : *A. I. R.* 1925 *Mad.* 1101 and 43 *Bom.* 631, *Foll.* [P 227 C 2]

In such a case it is not necessary that a final decree should be passed for O. 34, R. 5 does not apply to an award decree or to a compromise decree if it is clear from the decree that t he sale was ordered and it was in itself a final decree : *A. I. R.* 1924 *Pat.* 263; *A. I. R.* 1923 *Cal.* 626 and *A. I. R.* 1922 *All.* 389, *Foll.* [P 228 C 1]

(b) Evidence Act, S. 115—Decree creating charge—Party to decree cannot say he could not create charge.

A party to a decree creating a charge on his property is estopped from saying that he is not entitled to create the charge or mortgage on the property : 10 *Bom.* 342 and *A. I. R.* 1923 *Bom.* 276, *Dist.* [P 228 C 2]

S. R. Bakhale—for Appellant.

G. R. Madbhavi and *V. N. Vedak*—for Respondent.

Patkar, J.—The plaintiff in this case brought a suit for specific performance of an agreement to obtain a mortgage bond. The suit ended in a compromise decree under which the plaintiff was to recover the amount from the defendant within six months by sale of the property which was intended to have been mortgaged. The plaintiff in execution sought to recover the amount by sale of the property.

It is urged in this second appeal, first, that the charge was created under the compromise decree and the plaintiff ought to bring a separate suit to enforce the charge, and that the decree in the form in which it was passed could not be executed. Secondly, it is argued that the judgment-debtor had no disposing power as was held in the case of *Gyanoba Govindshet* v. *Shankar Kondappa* (1), and therefore, the property could not be attached under S. 60, Civil P. C., and sold in execution of the decree

With regard to the first point, it was held in *Ambalal* v. *Narayan* (2) that where a money decree imposing a liability on the defendant to pay a sum of money to the plaintiffs, declared that the plaintiffs had a first charge and a lien on certain immovable property of the defendant and the plaintiff applied in execution proceedings for sale of the property charged, the plaintiff had a right to bring the property charged to sale in execution proceedings, and that it was not necessary to bring a separate suit for the sale of the property. A similar view was taken in *Ramaswami Naidu* v. *Subbaraya Tevar* (3). In such a case

(1) Second appeal No. 632 of 1917, decided on 17th October 1918 by Shah, J.

(2) [1919] 43 Bom. 631=51 I. C. 929=21 Bom. L. R. 698.

(3) A. I. R. 1925 Mad. 1101.

it is not necessary that a final decree should be passed, for O. 34, R. 5, Civil P C. does not apply to an award decree or to a compromise decree if it is clear from the decree that the sale was ordered and it was in itself a final decree : see *Nripendranath Chattarji* v. *Jhumak Mandar* (4) ; *Hemendra Lal* v. *Fakir Chandra* (5); and *Sital Singh* v. *Baijnath Prasad* (6).

With regard to the second point, the defendant was a party to the decree and it must be considered that the defendant agreed to create a charge on the property. A person creating a charge or a mortgage is estopped from saying that he is not entitled to create the charge or mortgage on the property. On behalf of the appellant reliance is placed on two cases, *Diwali* v. *Apaji Ganesh* and *Basangowda* v. *Irgowdatti* (8). The facts of those cases were quite different from those in the present one where a person creating the charge is a party to the decree. The defendant having agreed to create a charge by the decree, cannot turn round and in execution deny that the property was not liable to be sold in execution of the decree to which he consented.

It is not necessary at this stage to consider the extent of the right, title and interest of the judgment-debtor. If the property is sold in execution, the executing Court should not sell the property, but only the right, title and interest of the judgment-debtor, so that the auction-purchaser may consider his position before purchasing the property.

On these grounds we think that the view of the lower appellate Court is correct and this appeal must be dismissed with costs.

Murphy, J.—I agree. On the first objection clearly nothing solid can be urged. The point is concluded by the decisions in *Ambalal* v. *Narayan* (2) ; *Hemendra Lal Singh Deo* v. *Fakir Chandra Datta* (5) and *Nripendranath Chattarji* v. *Jhumak Mandar* (4).

The second contention is that since the appellant inherited the property under a will which has been judicially interpreted by this Court as restricting his interest in it to his lifetime, he had no attachable and saleable interest in it within the meaning of S. 60, Civil P. C. Mr. Bakhale has relied upon the decisions in *Diwali* v. *Apaji Ganesh* (7) and *Basangowda* v. *Irgowdatti* (8). Both those cases related to the property held by Hindu widows whose tenure was very restricted, and it was sought to be attached and sold in execution of independent money decrees obtained against them. Here the defendant himself created a charge on his interest in this property, and I agree that he cannot now be heard to contend thet he has no attachable interest in it. The facts are clearly quite different from those dealt with in the two cases I have just referred to, and I agree that the decree appealed against must be confirmed and the appeal dismissed with costs.

R.K. *Appeal dismissed.*

(4) A. I. R. 1924 Pat. 263=3 Pat. 221.
(5) A. I. R. 1923 Cal 626=50 Cal. 650.
(6) A. I. R. 1922 All. 383=44 All. 668.
(7) [1886] 10 Bom. 342.
(8) A. I. R. 1923 Bom. 276=47 Bom. 597.

A. I. R. 1929 Bombay 228

MARTEN, C. J., AND MURPHY, J.

Anandsing Suratsing—Applicant.

v.

Lakhesing Pratapsing—Opponent.

Civil Revn. Appln. No. 236 of 1927, Decided on 12th December 1928, against order of 1st Class Sub-Judge, Dhulia, in Suit No. 495 of 1926.

Provincial Small Cause Courts Act, Art. 11—Suit for rent—Defendant claiming property as his own and alleging rent note as fraudulent—Question of title is only incidental—Court ought to allow to make the plea of ownership.

Although a Small Cause Court has no jurisdiction to decide questions involving a right to immovable property it is not bound to refuse to consider any question of title which is raised before it. If the question of title is only incidental and not the main relief, it can be gone into. [P 229 C 1]

L sued to recover a certain amount as rent under a rent-note passed in his favour by *A* in the Small Cause Court. The defendant *A* pleaded that the lands demised were of his ownership and that the rent-note sued upon was taken from him under a fraud practised upon him.

Held : that refusal to consider the question of title, even incidentally, prejudiced the defendant, who has not been allowed to make out the plea on which his defence depended, and consequently the decree must be set aside : 15 *Bom.* 400 and 37 *Bom.* 675, *Rel. on.* [P 229 C 2]

A. G Desai—for Applicant.

H. B. Gumaste—for Opponent.

Murphy, J.—The plaintiff sued to recover Rs. 279 as rent due on a lease

executed by the defendant on 29th April 1921. The defendant contended that, though he had executed the lease, it had been obtained from him fraudulently and that he was not liable for the amount claimed by the plaintiff.

The learned Subordinate Judge held that the plaintiff had proved the lease, and ordered the defendant to pay the plaintiff the amount claimed and costs, and further interest at six per cent. per annum on Rs. 225 from the date of the suit until payment, by annual instalments of Rs. 75 each, to be paid from January 1928. The point taken in this revision application is that the defendant in the suit had, in fact, pleaded that he had been induced to execute the lease by fraud, and the principal piece of evidence he relied on to prove the fraud was that the two survey numbers which he is said to have leased were actually his own property, and it was argued that if he had been allowed to show that this was so, it would prove the fact of fraud, for no sane person is likely to execute a lease of his own land in favour of another person.

The learned Subordinate Judge had held on the point that the issue sought to be raised by the defendant involved questions of title and that as the suit before him was being tried as a Small Cause Court one, he had no jurisdiction to go into such questions. He, therefore, refused to consider the defendant's plea as to the ownership of the land, and holding that the lease had been duly executed, and that the defendant had failed to prove any fraud practised on him, passed the decree in question. We think, however, that in so thinking the learned Subordinate Judge was wrong. It does not necessarily follow that because a Small Cause Court has no jurisdiction to decide questions involving a right to immovable property, it is bound to refuse to consider any question of title which is raised before it. It has been held, in the case of *Bapuji Raghunath* v. *Kuvarji Edulji* (1), that when a suit is brought in a form cognizable by a Court of Small Causes, that Court cannot decline jurisdiction, because a question of title to immovable property is incidentally raised. It is true that that case is not quite on all fours with this one, but there is another case of *Pullangowda* v. *Nilkanth* (2), where the plaintiff sued to recover Rs. 12 being the price of trees felled by the defendant on land which was claimed by the plaintiff. The defendant contended that he was the owner of the land and that the trees belonged to him. The Subordinate Judge held that the land was plaintiff's and decreed his claim On appeal, the District Judge decided that the land belonged to the defendant and, therefore, the plaintiff's claim for the value of the trees failed The plaintiff applied to the High Court contending that the suit being of a small cause nature, the District Judge had no jurisdiction to entertain an appeal. On a reference being made to the Full Bench, to decide the question whether the suit was cognizable by a Court of Small Causes or not it was held that in the circumstances of the case the suit was one cognizable by a Court of Small Causes A Court of Small Causes, the head-note states, can entertain a suit, the principal purpose of which is to determine a right to immovable property, provided the suit in form does not ask for this relief, but for payment of a sum of money.

In the case, with which we are now concerned, the question of title was incidental, for the defendant wished to go into it merely in order to prove that he had been induced to sign the lease by means of fraud, and not to prove his actual title to the land We think that the learned Subordinate Judge's refusal to consider the question of title, even incidentally, has prejudiced the defendant, who has not been allowed to make out the plea on which his defence depended, and consequently that the learned Subordinate Judge's decree must be set aside

The revision application is, therefore, allowed, the rule is made absolute, the original Court's decree is discharged, and the case is remanded to the lower Court to be decided according to law, with liberty to the applicant to adduce evidence in support of his alleged title to the land and for the plaintiff to call rebutting evidence The Subordinate Judge will decide on the whole evidence in the case new and old. Costs of the suit up to the original trial will be costs in the

(1) [1890] 15 Bom. 400.

(2) [1913] 37 Bom. 675=20 I. C. 974 = 15 Bom. L. R. 773.

cause. The opponent to pay the costs of this application.

R.K. *Revision allowed.*

A. I. R 1929 Bombay 230(1)

MARTEN, C, J. AND MURPHY, J.

Sidramappa Baswantrao — Defendant 2—Appellant.

v.

Shidappa Virappa — Plaintiff—Respondent.

First Appeal No. 65 of 1925, Decided on 3rd September 1928, against decision of First Class Sub-Judge, Sholapur, in Civil Suit No 741 of 1922.

Transfer of Property Act, S. 51—Staircase put to an old house—Alienee cannot recover its cost.

Putting up a staircase in an old house is a repair more in the nature of an ordinary repair than an improvement which would raise the value of the property permanently. The alienee is not therefore entitled to a refund of the cost of the stair-case. [P 230 C 2]

A. C. Desai—for Appellant.

G. S. Mulgaonkar—for Respondents.

Marten, C. J.—This is an appeal heard along with the First Appeal No. 64 of 1925 in which we have already given judgment. Our previons judgment in that case disposes of all the main points in the present appeal with two exceptions. A point of law is raised in this appeal which is not raised in the Court below or in the memorandum of appeal to the effect that the plaintiff being an assignee of the original adopted son is not in a position to sue. We think there is no substance in that objection even if it can be now raised. It is clear that by the sale deed to the assignee the adopted son elected to treat the alienation of the widow as invalid. He accordingly transferred the property and his assignee has the right to bring any necessary suit for possession. In this connexion the case in the Privy Council of *Bijoy Gopal* v. *Srimati* (1) may be referred to in connexion with the election of the reversioner to treat an alienation by the widow as void. In our opinion the alienee is not precluded from bringing the present suit.

Then as regards the question of improvements, it is entirely different from the other appeal. Here we are only concerned with a small sum of Rs. 175 being the value of a new staircase put into the suit house. The learned Judge thought the evidence insufficient to prove the amount of the claim and we notice the Panchnama does not specify what the value of the new staircase is. But, even if the other evidence is sufficient to establish this, we think it would be stretching our previous decision too far to include this particular amount. As far as we can see, the house was an old one, and this repair was more in the nature of an ordinary repair than an improvement, which would raise the value of the property permanently, and fairly entitle the alienee to a refund of the cost. In the other case an uninhabitable house was very largely rebuilt; and probably this was within the knowledge of the adopted son. The present is a mere repair to the staircase and upper floor which might very well escape the notice of the adopted son

Under the circumstances we cannot allow the claim of the alienee for improvements The result will be the appeal will be dismissed with costs. The stay application is dismissed.

Murphy, J.—I agree with the judgment just delivered by the learned Chief Justice.

R.K. *Application dismissed.*

(1) [1907] 34 Cal. 329=34 I. A. 87=11 C. W. N. 424 (P.C.).

A. I R. 1929 Bombay 230(2)

DAVAR, J.

Nurmahomed & Bros.—Creditors.

v.

Ismail Karim—Insolvent.

Insolvency No. 690 of 1927, Decided on 4th December 1928.

Presidency Towns Insolvency Act (3 of 1909, as amended in 1927) S. 36—S. 36 is not to be used for fishy cross-examination to prepare future litigation—Since amendment, scope is restricted.

Orders made under S. 36 are purely discretionary. They are intended to be made for the benefit of the general body of creditors and to enable the Official Assignee to establish his rights against the creditors, or the creditors in the insolvency who are brought upon the scene by means of fraudulent preferences or fraudulent tactics resorted to, who usually are the relatives and friends of the insolvent prior to the insolvency. The law never contemplated that the provisions of S. 36 should be used for the purposes of a fishy cross-examination in order to prepare for future litigation. The scope and utility of S. 36 by the amendment has been considerably restricted. Under the present amended section, under S. 36, one could get a deponent to admit posses-

sion of property, or one could find that the deponent was indebted to the insolvent but no summary methods exist now of getting hold of the property by the Official Assignee unless and until the deponent admits that the property belongs to the insolvent. Therefore, in every case if the claim is contested, the Official Assignee is driven to a suit.

[P 231 C 2 P 232 C 1]

Jinnah—for Creditors.

K. M. Talyarkhan—for Insolvent.

Judgment—This is a notice of motion dated 28th November 1928 taken out by the applicant, calling upon the opposing creditors Haji Dada Nur Mahomed & Bros. to show cause why the order dated 31st October 1928, made under S. 36, Presidency Towns Insolvency Act obtained by the Official Assignee from the Commissioner in Insolvency at the instance of the opposing creditors in so far as it directs the applicant to appear before the learned Chief Clerk on 6th December 1928, for being examined and to produce at that time all his books of account, papers, vouchers, etc in any way relating to the insolvent's dealings and transactions and property in his possession or subject to his control, should not be vacated and for costs.

In this instance the Official Assignee applied to me in chambers for an order under S. 36, Cl. (1), for the examination of the applicant. Following general directions given to the Official Assignee, the Official Assignee is careful, when presenting these applications to me, to satisfy himself that the order asked for is not intended for the purposes of annoyance to the insolvent or to the deponents under S. 36, or with a view to extract information in a pending suit or in a suit intended to be filed. In every one of these applications, I have it on oath from the deponent, as it also appears in the present affidavit, that the application is not made with the object of harassing the insolvent or unnecessarily delaying the insolvency proceedings, or annoying any other party. The Official Assignee in this case wishes that this order should not be vacated as the present application requires it to be done.

I have on more occasions than one, pointed out, in a large number of cases in which I have made or refused these orders, the principles upon which these orders have to be made. The first of these judgments was delivered by me on 20th March 1928, in the insolvency of Husseinbhai Ahmedbhai, No. 136 of 1927. Before that judgment was delivered, I had occasion to deliver a judgment in chambers in the matter of Suit No. 2730 of 1919 and in the matter of References Nos. 52 and 53 of 1922: *Damodar Raghoba* v *Mantri and Co* (1). In delivering that judgment, I reviewed the authorities as they existed in India and England for the last sixty years, and I do not wish to go over the same ground. In another judgment, delivered by me on 6th November 1928, in the matter of Ebrahim Khanbhai and another, insolvents, I have again alluded to the principles to be followed by the Insolvency Judge in granting orders under S. 36 I have in that judgment, p. 240 of the file of judgments, pointed out what or what should not be a proper order under S 36 of the Presidency Towns Insolvency Act and the construction of the section, to my mind, presents no difficulty. Orders made under S. 36, in my opinion are purely discretionary In the first instance they are intended to be made for the benefit of the general body of creditors and secondly to enable the Official Assignee to establish his rights against the creditors, or the creditors in the insolvency who are brought upon the scene by means of fraudulent preferences or fraudulent tactics resorted to, who usually are the relatives and friends of the insolvent prior to the insolvency. At the same time it is clear that the law never contemplated that the provisions of S. 36 should be used for the purposes of a fishy cross examination in order to prepare for future litigation.

The dicta of the learned Judges in England are, by the provisions of S. 36, Presidency Towns Insolvency Act of 1909 as amended by the Act of 1927, now brought in a line with the English authorities, but before the amendment the English cases had no application to S. 36. The cases cited and collected in the decision in *Re Haripada Rakshit* (2) and *Jeffris* v. *Tomlinson* (3), *Irwell* v. *Eden* (4). *Hood*

(1) O. C J. Suit No. 2730 of 1919 and Refs. Nos. 52 and 53 of 1922 decided on 6th February 1928 by Davar, J.

(2) [1916] 44 Cal. 374=40 I. C. 94.

(3) [1886] 3 T L. R 193.

(4) [1887] 18 Q. B. D. 588=56 L. J. Q. B. 446=35 W. R. 511=56 L. T. 620.

Barrs v *Heriot* (5) and the authorities collected in Baldwin on Bankruptcy illustrate the principle, and all point to one conclusion, viz., that the provisions of this section are not to be used as an instrument of torture and annoyance in preparing for litigation, or for extracting information from a genuine claimant who in law is not bound to give that information. The scope and utility of S. 36 by the amendment has been considerably restricted. Prior to the amendment in 1927, by Cl. (4) of S 36, if on the examination of any person the Court was satisfied that the person examined was indebted to the insolvent, the Court could on the application of the Official Assignee, or on its own motion, order the person examined to pay to the Official Assignee, at such time and in such manner as the Court may direct, any amount by which he was found indebted. Similarly under Cl. (5) if, on the examination under S. 36, the Court was of opinion that the property belonging to the insolvent was in the possession of the person examined, an order could be made by the Court vesting that property in the Official Assignee, without further litigation.

Those provisions were found to be arbitrary, and led to a great deal of hardship, till the amendment was agitated in 1927, and was eventually granted Under the present amended section, under S. 36 one could get a deponent to admit possession of property, or one could find that the deponent was indebted to the insolvent, but no summary methods exist now of getting hold of the property by the Official Assignee unless and until the deponent admits that the property belongs to the insolvent. Therefore in every case, if the claim is contested, the Official Assignee is driven to a suit. But following the principles of cases decided in the past creditors should not be put to that annoyance if the object of the examination is to extract information in anticipation of preparation for filing a suit and in granting these applications made by the Official Assignee, I exercise a great deal of caution in order to ascertain whether the applications are genuine or otherwise. The matter may be a subject of comment, if behind the back of the Official Assignee or without his knowledge and consent, any creditor applies to examine another person under S. 36. Such orders I refuse to grant unless I am satisfied with the bona fides of the application. But when the matter rests on different contentions, then the Official Assignee applies

In the present case the Official Assignee has applied for this order after the public examination of the insolvent was concluded The insolvent in his public examination states facts which show that he wishes to keep the Official Assignee at arm's length. He is a man, who has done large business in different places, and owned immovable properties. He declines to give any information about the mortgages of these properties. One method in which the Official Assignee could have ascertained whether there was consideration for these mortgages or not, was the production of the insolvent's books where entries would be found showing what the insolvent received. In this case the insolvent, although he carried on extensive business and mortgaged his properties, both in Bombay and outside, refuses to disclose a single book on the plea that his partner took the books to be completed, and there is no explanation where the partner is, or what has happened to the books. I can well understand an insolvent doing this, because if he has not received consideration and his books are produced, that might give the show away in the absence of entries of actual payments. There should be no difficulty so far as the applicant in this case is concerned if his mortgage is genuine, to place his books before the Official Assignee to show what consideration passed ; but as there is nothing said in the insolvent's examination before the Official Assignee or in his public examination later, as to the disposal of his property and his books, I am inclined to think that in this instance the deponent, who is a cousin of the insolvent, is very probably the custodian of his property until the clouds disperse.

Under these circumstances the notice of motion will be dismissed, and the order made by me, as asked for by the Official Assignee, under S. 36, Cl. (1), on 31st October 1928, will stand.

R.K. *Notice of motion dismissed.*

(5) [1896] 2 Q. B. 333=65 L. J. Q. B. 622=45 W. R. 1=75 L. T. 15.

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PATKAR AND MURPHY, JJ.

Anant Govind Jog—Appellant.

v.

Tukaram Kushaba Shinde—Respondent.

Second Appeal No. 148 of 1927, Decided on 12th December 1928, against the decision of Dist. Judge, Satara, in Appeal No. 94 of 1926

Civil P. C., S. 53—Decree against Hindu father—Although lands inherited by argiculturist son cannt be attached, the rents thereof are liable to attachment for satisfaction of the decree to extent of property inherited—Deccan Agriculturists Relief Act, S. 22—Bombay Hindu Heirs Relief Act (7 of 1866), S. 2.

The rents of the property inherited by the son as the representative of his father, though they did not come into his hands at the time of the death of the father, are liable for the satisfaction of the father's debt and can be attached in execution of a decree against the father to the extent of the property which is inherited by him and which has not been duly applied by him for the payment of the decretal amount, although the land belonging to the Hindu father is exempt from attachment in the hands of agriculturist son, under Deccan Agriculturists Relief Act, S. 22: 8 *Bom.* 220 ; 9 *B. H. C. R.* 116 and 2 *W.R.* 296, *Rel. on.* [P 235 C 1]

A. G. Desai—for Appellant.

P. S. Bakhale—for Respondent.

Patkar, J.—This is a second appeal in execution of a decree obtained against one Kushaba and his son Vishnu. The decree is sought to be executed against Tukaram, another son of Kushaba, who is brought on the record as the legal representative of his brother and father. Tukaram being an agriculturist and the property not being specifically mortgaged, it could not be sold under S. 22, Dekkhan Agriculturists' Relief Act, and the decree-holder sought to execute the decree by attachment of the rent of the land due from the tenant and from other moveable property of Tukaram.

The learned Subordinate Judge held that the debt incurred by defendant 3's father was not tainted with illegality or immorality, that the land, the rent of which was sought to be attached, was the self-acquired property of the father Kushaba, and that, though the decree could not be executed against the land as it was not specifically mortgaged, the decree-holder could proceed against the rent due from the tenant.

On appeal, the learned District Judge held that the rent of the property left by the deceased father which came into existence after the death of the father could not be considered to be the property of the deceased which came into the hands of Tukaram within the meaning of Ss 50 and 53, Civil P. C, and that the rent was the result of the crops obtained by the labour, seed and the soil of which only the last one was left by the father to his son, and therefore, disallowed the application, but allowed it to proceed as regards other moveable property liable to attachment.

The question, therefore, in this second appeal, is, whether the rent of the land belonging to the father, which could not be attached as it was not specifically mortgaged, under S. 22, Deccan Agriculturists' Relief Act, is not liable to be attached in execution of the decree against the father. Before the passing of the Hindu Heirs Relief Act 7 of 1866, a son or a grandson was liable to pay the debts of his father or grandfather even if no assets were inherited by him, and the son was liable to pay the debts of the deceased out of his own property provided the debts were not of an immoral or illegal character even though the father or grandfather left no property or left property insufficient to pay the debts : see Vyavahara Mayukha Ch. 5, S. 4, pl. 12, 16 and 17 ; Gharpure's Translation, pp. 154 to 156 ; Stokes' Hindu Law, pp. 122 and 123 ; and Mitakshara on Yajnyavalkya's verses 50 and 51: see Gharpure's Translation, pp 76, 80 and 81, where the words अनन्याश्रितद्रव्य: पुत्र: (son whose paternal estate has not gone to another) are commented on. By the Hindu Heirs Relief Act 7 of 1866, the liability of a son, grandson or an heir in respect of such debts is limited to paying the same out of and to the extent of the property of the deceased which such son, grandson or heir or any other person by his order or to his use has received or taken possession of and which remains unapplied. Under S 50, Civil P. C., where a decree is executed against a legal representative he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. Under S. 53, the property in the hands of a son or other descendant which is liable

under Hindu law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed shall be deemed to be the property of the deceased which has come to the hands of the son or other descendant as his legal representative. The property in suit belonged to the father and came to th hands of his son, but under S. 22, Deccan Agriculturists' Relief Act, it cannot be sold as it was not specifically mortgaged. Though the rent is the result of the crops obtained by the labour, the seed and the soil of which only the last one was left by the father to the son, the rent paid by the tenant to the son is paid on account of his ownership in the soil which was inherited by him. The land in the hands of the son could have been sold in execution of the decree against the father, and the accretion to the land and its rent cannot be considered to be exempt from the satisfaction of the decree against the father. It is true that the subsequent rents either recovered or recoverable by the son did not come into his hands at the time of the frthers's death. The liability of the son, as laid down by S. 2, Hindu Heirs Relief Act 7 of 1866, in respect of the debts as the representative of his father, is limited to paying the same out of and to the extent of the property of the deceased which he or any other person by his order or to his use has received, or taken possession of, and which remains unapplied. The land in suit was received, and taken possession of by the son as the representative of his father and has remained unapplied for the payment of the debts. The liability of the son extends to paying the same out of and to the extent of the property of the deceased which has come into his hands. If the land cannot be sold by virtue of S. 22, Deccan Agriculturists' Relief Act, the liability can be enforced out of and to the extent of the land inherited by the son and to the extent of "the rents arising out of the land." The proviso to S. 2 says that :

"if any part of such property so received or taken possession of as aforesaid shall not have been duly applied by such son, grandson or heir he shall be liable personally for such debts to the extent of the property being not duly applied by him."

In the present case, the property being not liable to sale under the special provisions of the Deccan Agriculturists' Relief Act has not been applied by the son for payment of the debts of the father. It would, therefore, follow that he shall be personally liable for such debts to the extent of the property not duly applied by him. It was held in *Unnopoorna Dassea* v. *Gunga Narain Paul* (1) and *Jamiyatram Ramchandra* v. *Prabhudas Hathi* (2) that a Hindu heir is competent to alienate property inherited by him from the deceased before the payment of the debts due by the deceased on the ground that the property of a deceased Hindu is not so hypothecated for his debts as to prevent his heirs from disposing of it to a third person. But in the case of such alienation the heir is personally liable to the creditors of the deceased to the extent of the value of the property. Mayne in his Hindu Law, 9th Edn., para. 304, p. 407, observes :

"...But as soon as the property is inherited a liability pro tanto arises, and is not removed by the subsequent loss or destruction of the property, and still less, of course, by the fact that the heir has not chosen to possess himself of it, or has alienated it after the death."

In the case of *Keval Bhagvan Gujar* v *Ganpati Narayan* (3) it was held that in this Presidency under the provisions of Bombay Act 7 of 1866, where a Hindu dies intestate leaving property, his son is liable to his (the father's) creditors to the extent of the value of the property although the property may not have come into the son's possession but remains in the hands of third persons In the present case, the land has not been applied for the payment of the debts of the father and cannot be sold in execution of the decree under S. 22, Deccan Agriculturists' Relief Act. He could have mortgaged the property to the decree-holder for the payment of the decretal amount and could have thus enabled the decree-holder to realize the debt, or could have mortgaged or sold the property and applied the proceeds for payment of the decretal amount. In so far as the son has failed to apply the property to the payment of the debts of the father he is, under the proviso to S. 2, of Act 7 of 1866, personally liable to the extent of the property not duly applied by him. Ths separate property of

(1) [1865] 2 W. R. 296.
(2) [1872] 9 B. H. C. R. 116.
(3) [1883] 8 Bom. 220.

the son could in such a case have been liable for the satisfaction of the debts of the father on account of his failure to apply the property inherited by him to the satisfaction of the debts of the father. In the present case, the rents of the very property which has been inherited from the father are sought to be attached. I think, therefore, that the rents of the property inherited by the son as the representative of his father, though they did not come into his hands at the time of the death of the father, are liable for the satisfaction of the father's debt to the extent of the property which is inherited by him and which has not been duly applied by him for the payment of the decretal amount.

Another point was discussed at the hearing of this appeal as to whether the Collector could not have acted under the Cl. 2, S. 22, Deccan Agriculturists' Relief Act on the authority of the decision in the case of *Hirachand* v. *Hansabai* (4). It is urged on behalf of the appellant that the absence of the words "or heir" after the word "judgment-debtor" in the second para of S 22 does not necessarily lead to the inference that the alternative remedy provided by the second clause of S. 22 could not be enforced against the heir of an agriculturist, and that the word "judgment-debtor" is used in reference to the agriculturist mentioned in the preceding words of the para. 2 of S. 22. It is, however, not necessary to go into the question as no application has been made under the para 2 of S. 22, Deccan Agriculturists' Relief Act.

I would, therefore, reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with costs of this Court and of the lower appellate Court on the respondent.

Murphy, J.—The facts are that respondent's father and brother, Kushaba and Vishnu, had executed a money bond in favour of one Prabhakar Govind, who ultimately became an insolvent. The Official Assignee sued Kushaba and Vishnu, and respondent Tukaram was added as a party, but ultimately his name was struck out. Kushaba and Vishnu have since died and Tukaram's name was brought on the record as the legal representative of his father and brother. These proceedings took place in the Sangli State Courts, and the decree was then transferred to the Islampur Court for execution.

It is sought to be executed against Survey No. 132/5 of Takari, which was originally acquired by Kushaba. As Tukaram is an agriculturist and the property was not specifically mortgaged, it cannot, owing to the prohibition in S. 22, Deccan Agriculturists' Relief Act, be brought to sale. But execution was obtained from the learned Subordinate Judge in the shape of an order prohibiting the tenant from paying rent to Tukaram and one direct to Tukaram and forbidding him to receive the rent. The difficulty is due to the facts stated above. On appeal the learned District Judge held that the rents as never having belonged to the original debtors, could not be diverted in this manner in favour of the decree-holder, and reversing the original Court's order, dismissed the application for execution.

Now it is clear that the son of a Hindu is liable to the full extent for his father's debts, though in this Presidency his liability has been limited to the extent of the assets coming into his possession, by the Hindu Heirs Relief Act, 7 of 1866 The land in question could, therefore, have been sold, for it was the father's self-acquired property, and it is not anyone's case that the debts in respect of which execution is sought were contracted for an immoral or illegal purpose. It is only the special provision of the Deccan Agriculturists' Relief Act which comes in the way of the sale of the land.

The learned District Judge's real reason for refusing execution was, that the rent now accruing could not be considered as having been the property of the deceased, which to be made liable, it was required to be, under S. 53, Civil P. C.

There are no authorities on the point, but it does not appear to me that the fine distinction drawn by the learned District Judge is a real one. The only value of the property, so long as it is let, is its rent, and it seems to me the right to enjoy the income is as much part of the property of Kushaba coming to the appellant's hands, as is the land itself. In fact, I think the distinction drawn by the learned District Judge is not tenable, and cannot avail to defeat the execution creditors.

(4) A. I. R. 1923 Bom. 190.

I agree that the District Court's decree must be reversed and the application for execution must be restored and be proceeded with according to law. Appellants to have their costs, both in this and in the District Court, from respondent who will bear his own in both these Courts.

R.K. *Decree reversed.*

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CRUMP, J.

Kaikhushru M. Talyarkhan—Plaintiff.

v.

Bai Gulab and *others*—Defendants.

Original Civil Jurisdiction Suit No. 2228 of 1926, Decided on 7th March 1928.

Presidency Towns Insolvency Act (3 of 1909), S. 52—*V* and *T* certified brokers of Share Broker's Association—*V* selling and purchasing some shares to and from *T* and making profit of a certain sum—*V* also selling some more shares to *T* and making profit —*V* being in embarrassed circumstances asking for Association's help—Association interfering and declaring *V* a defaulter — *V* subsequently declared insolvent—*T* paying all the sums due to *V* to the Association who distributed them to *V*'s inside creditors—Official Assignee can recover the same from the Association for the benefit of general creditors.

V and *T* were certified brokers of the Native Share and Stock Brokers Association. *V* sold to *T* 75 shares of the Century Mill for June delivery. He then bought from *T* 12 shares of the same Mill for the same delivery and he also bought five shares of the Fazul Mill for July delivery. Upon these transactions three sums became due from *T* to *V*. As regards the purchase and sale of 12 Century shares the amount was Rs. 1,976-4-0. As to the balance, 63 Century shares, the profit due was Rs. 12,231-4-0 and on the Fazul shares the amount was Rs. 1,458 12-0. *V* who was in embarrassed circumstances intimated to the Association that he was unable to meet his obligations to his creditors within the Association. The matter was put before the Defaulter Committee, and an attempt at settlement was made. The matter came before the Board on 23rd June and by a resolution of that date he was declared a defaulter. After that date he was adjudicated an insolvent on the petition of an outside creditor. The amounts were actually paid by *T* to the Defaulter Committee after the date on which *V* was adjudicated insolvent who distributed to the inside creditors of *V*. In a suit by Official Assignee for *V*:

Held: that the sum of Rs. 1,976-4-0 became due quite apart from any action taken by the Board with respect to *V*'s case, and was a case of ordinary differences. The Official Assignee was therefore entitled to recover;

[P 239 C 1]

Held further: that although the two sums of Rs. 12,231-4-0 due on the transaction of 63 Century shares, and Rs. 1,458-12-0 due on the transaction for five Fazul shares, were arrived at owing to the resolutions passed by the Board the sums were differences agreed to be due as between *T* and *V* and as such recoverable by *V* and therefore by the Official Assignee : *Tomkins* v. *Saffery*, (1877) 3 *A. C.* 213, *Foll.*; *Ex parte Grant* : *In re Plumbly* 13, *Ch. D.* 667, *Expl.* and *Dist.* [P 239 C 2]

Kemp, *Kanga* and *Mulla*—for Plaintiff.

B J Desai and *Taraporewala*—for Defendants.

Judgment.—The plaintiff in this suit is the Official Assignee, and he sues as the assignee of the estate and effects of one Virji Madhavji who was adjudicated an insolvent on 2nd July 1925. Defendant 1 is the widow and executrix of one Tulsidas Mohanji. and defendants 2 to 17 are the President and members of the Board of Directors of the Native Share and Stock Brokers Association. Defendants 18 to 22 are members of the Defaulter Committee of the said Association. The suit arises out of certain transactions between Virji and Tulsidas, who were both certified brokers of the said Association. The nature of those dealings is as follows: Virji sold to Tulsidas 75 shares of the Century Mill for June delivery. He then bought from Tulsidas 12 shares of the same Mill for the same delivery and he also bought 5 shares of the Fazul Mill for July delivery. Upon these transactions three sums are alleged to have become due from Tulsidas to Virji. As regards the purchase and sale of 12 Century shares the amount is Rs. 1976-4-0 As to the balance 63 Century shares, the profit alleged to be due is Rs. 12,231-4-0, and on the Fazul shares the amount is Rs. 1,458-12-0. The plaintiff, the Official Assignee, claims to be entitled to recover those three sums from Tulsidas And as Tulsidas has paid these three sums to defendants 2 to 17, the plaintiff claims that he is entitled to recover them from those defendants. The manner in which these liabilities arise, and in what way defendants 2 to 18 are concerned, will appear more particularly hereafter. For the moment it is enough to say that they recovered these sums by virtue of the rules of the Association. The amounts were actually paid by Tulsidas to the Defaulter Committee after the date on which Virji was adjudicated insolvent. Upon this statement of facts the question immediately

suggested itself to me whether the plaintiff had any cause of action at all against the defendants other than defendant 1, but it was explained to me that defendants 2 to 18 did not wish to take any objection on that score. The suit is one of a number of test suits, and the Association are desirous that their liability in this matter should be settled. Having recovered these sums from Tulsidas, they do not wish that his representatives should be held liable for amounts which he has already paid and in the event of it being found that Tulsidas would have been liable to pay these amounts, they are prepared to submit to a decree. It is unnecessary, therefore, to consider this point further. In order that there may be no misunderstanding about the matter I think it is well to record the statement made by defendants' counsel, Mr. B. J. Desai, upon this point. It was in the following words:

"Should the Court hold that as to any of of the three sums in issue one or more of them did not represent a fund exclusively distributable amongst Stock Exchange creditors, defendants 2 to 18 will submit to a decree as to such sum or sums with interest at the rate agreed upon."

The general nature of the suit is thus apparent, but it is unnecessary to set out the precise sequence of events in order to be able to decide the points that arise. Visji was acting as broker for one Manilal, an outsider, and Manilal speculated very heavily with the result that the market for the particular shares in which he was speculating became completely disorganized Virji had undertaken business for Manilal to the extent of about Rs 2,70,000. That was in the month of May. At the end of May, Manilal absconded, and on 8th June on the petition of Virji, Manilal was adjudicated insolvent. A composition was effected at annas eight in the rupee, which Virji among other creditors, accepted on 10th June, and on 15th June, Manilal's adjudication was annulled We are not directly concerned with Manilal's dealings except that they constitute the reason why the Board of the Association took certain action as regards fixing rates and also that they were the cause of Virji's insolvency. Inside the Association, Virji and Tulsidas dealt as principal and principal and I will now turn to the sequence of events so far as the Association is concerned. On 1st June, six brokers of whom Virji was one, wrote the Directors of the Association pointing out that a very serious position had arisen in respect of Dying and Century shares, and that certain merchants who had purchased these shares had disappeared from Bombay. The brokers were, therefore, liable for very heavy amounts, and they requested the Association to take such steps as they might think fit to deal with the position. On 2nd June, the President of the Association closed the market, and the Board at a meeting passed two resolutions with respect to the shares of Bombay Dying, Century, and Madhowji Mills. The first resolution put a stop to any further transaction in these shares, and directed that those members who wished to take delivery of these shares for the June settlement should, in the usual course, pass slips With this resolution we are not specially concerned. There was, however, a second resolution, which runs as follows:

"After the slips are circulated the Badla transactions of the said shares, that is to say of the remaining outstanding transactions, the June—July vaida shall be noted "party to party" by each party at the following rates . . ."

Then follow certain rates for inter alia Century shares:

"On Thursday 4th June, the bazaar shall remain open up to 2 o'clock (in the afternoon) during which time all the outstanding saudas in respect of all the remaining Company shares can be settled; and the members can effect badla (transactions) in respect of the same."

What the Board did in effect was to direct that these transactions for the June settlement which were not carried through in the ordinary way should be compulsorily carried over to the July settlement at certain fixed rates It will be seen that nothing is said here about shares in Fazul Mill, but on 13th June 1925, a further resolution was passed, which fixed a certain rate for Fazul shares also. It is unnecessary, I may say here, to go into any arithmetical calculations, for the effect of what was done by the Board is not disputed. The sums which I have already set out are the result of their action The resolution of 13th June mentioned certain brokers as being affected by that resolution, but did not refer to Virji. On the same date Virji addressed a letter to the Secretary of the Board in the following terms:

"I am unable to settle my differences for the vaida of June—July of the year 1925, and there are moneys due to me from Sheit Manilal Jugaldas, and the said Bhai is to give a sum of money to each of his creditors. As for the sum which may come to my share, I make over the whole thereof to our Association, and the said sum shall be distributed amongst my creditors. Moreover my own condition is not such that I can meet this liability which has cropped up. I, therefore, request my creditors that they will receive the said sum and make me free, and the Board will allow my card to remain, and along with this I have sent under cover a letter to recover the moneys of the trustees, that is, the moneys of Manilal Jugaldas."

This is an intimation by Virji that he was unable to meet his obligations to his creditors within the Association. It appears that the matter was put before the Defaulter Committee, and an attempt at settlement was made. It may be gathered from what took place subsequently that no satisfactory arrangement was arrived at. What the exact proposal made by Virji was, and what was the exact position taken by the Defaulter Committee are not really matters of any particular moment. Virji made a certain proposition and the Defaulter Committee found themselves unable to recommend it to the Board. On 17th June 1925, there was another resolution of the Board in which they say that 15 brokers including Virji had been unable to pay their dues, but that they had framed a scheme for settling with their creditors which the committee accepted, and they directed the settlement should be completed before 25th June, and in the meantime these brokers should be prohibited from taking up any new business. Virji was one of these 15 brokers, and that resolution must have been passed while the proposed settlement was under discussion. On 19th June Virji wrote again to the Directors, and in that letter he says :

"My case was put before the Committee in reply to which I was told as follows : My share is not sufficient at one-half and nearly Rs. 20,000 are found short. The sum should be paid up in full in cash within two days, i. e., before the 19th."

This is somewhat obscure, but it apparently means that what was due to Virji from his debtors was insufficient to pay his creditors at eight annas in the rupee, and therefore, he was called upon to find a sum of Rs. 20,000 by the 19th. The letter then goes on to say that Virji found it impossible to pay this amount for causes over which he had no control. On 20th June the Defaulter Committee made a report to the Board as regards the suggested settlement, and as regards Virji they say :

"And as regards the condition on which the last member, Bhai Virji Madhavji, applies to make a settlement, the committee is not able to recommend unanimously to effect a settlement on that condition. Therefore, the Board may act in such manner as might appear proper to them."

The matter of Virji's settlement was, therefore, still under consideration, and was referred to the Board, The matter came before the Board on 23rd June, and by a resolution of that date he was declared a defaulter. There is one further letter from Virji on 30th June 1925, in which he says :

"This is to write that you declared me a defaulter on the 23rd instant. Please, therefore, let me know how did brokers having dealings with me arrive at the settlement of my outstanding shares for July vaida, and at what rates, so that I may know the extent of my liability in respect of July vaida. I am of opinion that the shares should be purchased or sold on my own account at the opening rates on the day following the day on which I was declared defaulter. Please write to me immediately what the principal brokers have done."

I do not think that this last letter adds anything material to the case. The position is clear, and it is that Virji became a defaulter on 23rd June. After that date he was adjudicated an insolvent on the petition of an outside creditor.

The exact controversy arising upon these facts may be stated as follows : The Association claim that under their rules the amounts which were paid by Virji's debtors inside the Exchange to the Defaulter Committee are available for distribution pro rata among the inside creditors. The Official Assignee, on the other hand, claims that these amounts form part of the estate of Virji, and that they should be paid to him for distribution among the general body of creditors.

A word may be said as to the rules of the Association. The relevant rules are R. 18 and Rr 56 to 62. They are unfortunately somewhat obscurely drafted, but under R. 56 the Directors apparently have power to publish the name of a broker as a defaulter, and it was apparently under this rule that they took action in Virji's case. Upon such action the matter comes before the Defaulter Committee who corresponds to the Official Assignee or Assignees of the London

Stock Exchange. And the action which may be taken is defined in Rr. 60 and 61, which run as follows :

"60. On the very day a broker is found to be unable to meet his liabilities, those brokers who may have their transactions outstanding with him shall give in writing intimation in that behalf to a member of the above committee or to the Mehta of the Hall, and they shall close such outstanding transactions that very date at such rate as they may be, and then shall hand over to the member of the Committee or to the Mehta of the Hall a detailed statement in writing showing the amounts claimable and payable by him.

" 61. The Committee shall recover the amounts claimable by him, and shall distribute the same among his creditors in proportion to their claims."

Of the three sums which are in suit in the present case the defendants abandoned all claim to the sum of Rs. 1,976-4-0 which was due from Tulsidas to Virji on the purchase and sale of 12 of the 75 Century shares. And that is because that sum became due quite apart from any action taken by the Board with respect to Virji's case, and was a case of ordinary differences. As regards the two other sums the defence raised is that these are not amounts due by Tulsidas to Virji, but they form an artificial fund created by the rules of the Association, and therefore, are not available for distribution among the general creditors. The respective contentions of the parties will be clearly understood from a notice under O. 12, R. 4, to admit facts, and the answers given thereto by the defendants. We are concerned with answers 8 and 10. Answer 8, after setting out the difference due on the 63 Century shares and the difference due on the 12 Century shares, states as follows :

"The difference is not arrived at by reason of the insolvent being declared a defaulter and the insolvent would have been entitled to receive the said difference if he had not been declared a defaulter."

Mr. Desai for the defendants desired to qualify that answer and as no doubt it is a question of law or at least a mixed question of law and fact, it is open to him to do so. According to him the answer should have run as follows :

" The difference is not arrived at by reason of the insolvent being declared a defaulter, but by reason of the resolution of the Association of 2nd June 1925, being carried out. And the insolvent would have been entitled to receive the said difference if he had not been declared a defaulter and no stock exchange creditor had claimed the same for the satisfaction of his debt."

Similarly the defendants through their counsel qualified answer No. 10, and, with the qualification suggested, that answer runs as follows :

" It was in pursuance of the said resolutions of 18th, 17th and 23rd June 1925 that the transactions for the sale of the said 63 shares of the Century Mills which were carried over to July 1925 settlement in pursuance of the resolution of 2nd June 1925, were closed at Rs. 325 per share, and the transactions for the purchase of Fazul shares were closed at Rs. 740 per share."

And the 11th answer, similarly qualified, runs as follows :

" As regards the July 1925 settlement the sum of Rs. 1,458-12-0 found due by the said Tulsidas Mohanji Vora to the insolvent Virji Madhavji was ascertained by such closing as aforesaid, and if the insolvent had not been declared a defaulter and no Stock Exchange creditor had claimed the sum for the satisfaction of his debt, he would have been entitled to receive the said difference."

Virji was adjudicated insolvent on 2nd July 1925, on the petition of an outside creditor. The act of insolvency was on 13th June. Under S. 17, Presidency Towns Insolvency Act Virji's estate vested in the Official Assignee. Under S. 52 the Official Assignee is empowered to recover for the general body of creditors the debts due to Virji. If Virji could have recovered these sums then the Official Assignee can do so

The position between Virji and Tulsidas has to be considered. The two sums, which have to be considered, viz, Rs 12,231-4-0, due on the transaction of 63 Century shares, and Rs. 1458-12-0, due on the transaction for five Fazul shares, were arrived at owing to the resolutions passed by the Board That was on 18th June and before Virji was declared a defaulter Both Virji and Tulsidas were bound by these resolutions. The result is not in doubt Had Virji not been declared a defaulter he could have recovered these sums from Tulsidas. These facts appear from Virji's evidence and from Ex. 9 an extract from his contract book. In my judgment these sums became due in the course of business. It was not the ordinary course of business which was interrupted by the action taken by the Board in this emergency, but that action is merely an exceptional incident. These sums are differences agreed to be due as between Tulsidas and Virji, and as such recoverable by Virji and, therefore, by the Official Assignee.

Several decisions of the English Courts have been cited. The first of these is *Tomkins* v. *Saffery* (1). The debtor Cooke had a sum of £5,000 in the Bank of England, which was paid over by him to the Stock Exchange Officials after he was declared a defaulter. The House of Lords held that in the circumstances there was a " cessio bonorum " and thus an act of bankruptcy, and the Stock Exchange were in reality claiming an undue preference for the inside creditors. The next case, on which the defendants more especially rely, is *Ex parte Grant : In re Plumbly* (2). The facts were shortly as follows : Prior to his failure one Plumbly had various contracts for purchase and sale to be completed on 27th June. On 25th June Plumbly made a declaration to the Secretary of his inability to meet his engagements and was declared a defaulter. He filed a liquidation petition the same day. Under the rules of the Stock Exchange all his contracts were closed at the market prices at the date of default. Plumbly's debtors paid to the Official Assignee of the Stock Exchange £3,956-17-10 The Trustee in Bankruptcy sought to recover this sum from the Official Assignee of the Stock Exchange, and the Court decided that he could not do so. Lord Justice James based his decision on the proposition which is set out in his judgment (p. 679) :

" *B* and *C* each say to *A*., you owe me that £100. *A* pays it to one of the two, the other has no right to sue the one who received it."

I have already explained why that proposition cannot be applied to this case. Baggallay, L. J , apparently rested his decision on other grounds. He says (p. 680) :

" The Official Assignee holds no private assets of Plumbly ; the fund which he has collected is a fund collected by virtue of certain rules of the Stock Exchange, certain sums ascertained in a particular way being raised from particular members of the Stock Exchange to be applied in a particular manner. In the view which I take of the case, these funds can in no respect be regarded as funds belonging to Plumbly. If then they are voluntary contributions of the members of the Stock Exchange to be applied in satisfaction of the Stock Exchange creditors, or if they are to be regarded as moneys handed over by persons who had become sureties to meet the claims of the Stock Exchange creditors, I am unable to understand how in either view of the case they can be claimed by the trustee."

Cotton, L. J., puts the matter shortly thus (p. 681) :

" The fund is an artificial one, which never belonged to the bankrupt, but has been created by the rules of the Stock Exchange for a particular purpose, and only has an existence for the purpose of being dealt with in a particular way."

Some further light will be found from the statement set out at p. 674 of the report :

" Had Mr. Plumbly not become a defaulter, and not become a liquidating debtor, and had all the contracts matured and been duly performed by him, none of the differences created and received by the Official Assignee of the Stock Exchange in consequence of his default could have found their way into Mr. Plumbly's hands or possession."

Could this statement be made in this case as regards the sums due by Tulsidas to Virji ? In the light of the facts it is not possible. The doctrine of " an artificial fund " rests on the existence of something which would not have arisen had the course of business been uninterrupted. I see nothing " artificial " here, nor can I in principle distinguish between the sum of £ 5,000 which in *Tomkins* v. *Saffery* (1) was due to the insolvent Cooke from the Bank of England, and the two sums which in this case were due from Tulsidas to Virji.

I do not propose to discuss the other cases cited. They have no direct application to the facts before me.

Decree for plaintiff against defendants 2 to 22 for Rs. 15,666-4-0 with interest at four per cent. per annum on the sums which aggregate this amount from the date on which they were respectively received by defendants 2 to 22 or any of them.

Costs and interest on judgment at six per cent. per annum.

R.K. *Suit decreed.*

(1) [1877] 3 A. C. 213=47 L. J. B. K. 11=26 W. R. 62=37 L. T. 758.
(2) [1880] 13 Ch. D. 667=28 W. R. 755=42 L. T. 387.

A. I. R. 1929 Bombay 241

MARTEN, C. J.

Mathurbhai Garbadbhai Patel—Petitioner.

v.

Nadiad City Municipality—Opposite Party.

Civil Appln. No. 1342 of 1928, Decided on 29th January 1929.

Letters Patent (Bombay) (as amended in 1928), Cl. 15—Leave was and is necessary under amendment of 1927 and of 1928 respectively.

Up to 1st February 1929, leave was necessary under the Letters Patent of 1927 and thereafter it is also necessary under the new Letters Patent of 1928 for an appeal from judgment of a single Judge of the High Court in appeal : *A. I. R.* 1928 *Bom.* 371, *Ref.*

[P 241 C 2]

U. L. Shah—for Petitioner.

Marten, C. J.—When this S. A. No. 974 of 1928 came before me for admission, I held that the suit was barred under S. 206, Bombay City Municipal Act 1925, as had been held in both the Courts below. I thought that the present suit was in respect of something done or purporting to have been done under the existing Act, and that it could not be said that the suit was founded on something that took place prior to the 1925 Act. I also thought that certain arguments raised on the wording of the section did not avail the applicant, particularly having regard to the decision of the Privy Council in *Bhagchand* v. *Secy. of State* (1), reversing what had hitherto been the Bombay view that suits for an injunction were not within S. 80, Civil P. C.

Following on my decision Mr. Shah applied for leave to appeal and I asked him to put his grounds in writing. A formal application was accordingly put in, but before it came on for hearing the Letters Patent of 12th December 1928, were published in the Bombay Government Gazette on 24th January 1929, at p. 131. It is now claimed that having regard to those Letters Patent no leave is necessary. I am not satisfied by any means that that contention is correct. As I read these new Letters Patent of 1928 I think it clear that under Cl. 15, as now amended, leave will be necessary as regards all decisions in second appeals by a single High Court Judge on and after 1st February 1929.

But by Cl. 2 these new Letters Patent are only to come into operation on 1st February 1929. I say this because in my opinion it is clear that the words "these Letters Patent" in Cl. 2 are the same as the words "These Our Letters to be made Patent" in the testatum, which can only refer to the new Letters. I also think that the expression "these Letters Patent" is used in direct contrast to the expressions adopted for reference to the older Letters Patent as for instance in Cl. 1, where reference is made to "the said Letters Patent bearing date 28th December 1865," and also to "Cl. 15 of the said Letters Patent."

That being so I am of opinion that the new Letters Patent are not in actual operation to-day and that accordingly the parties are in the same position to-day as they were when this second appeal came on for admission. The present position then is this Cl. 15 has been amended by the Letters Patent of 9th December 1927. But on the other hand there is a difference of opinion between the Calcutta and Madras High Courts on the one hand and this High Court on the other, as to whether the amendment made by those Letters Patent of 1927 is in any way retrospective. Our Court has held that it is. Two other High Courts, viz., Calcutta and Madras have held the contrary. Technically, therefore, it may be that I as a single Judge would be bound by the decision given by Sir Charles Fawcett and Mirza, JJ., in *Badruddin* v. *Sitaram* (2) and that accordingly one would hold that up to 1st February 1929, leave is necessary under the Letters Patent of 1927 and thereafter under the new Letters Patent of 1928

But whether that is the correct view or not, I think the proper course in the present case, having regard to these new Letters Patent, is to give leave to the present applicant to appeal. That will remove his difficulties. If he is entitled to appeal without leave, then the appeal will lie. If on the other hand leave is necessary, it might result in some further argument despite *Badruddin* v *Sitaram* (2) if I did not grant leave to-day. Accordingly, I think, it will be proper for me to grant leave under these circumstances of doubt as to what is the true legal

(1) A. I. R. 1927 P. C. 176=51 Bom. 725=54 I. A. 388 (P. C.).

(2) A. I. R. 1923 Bom. 371=52 Bom. 753.

situation under the various Letters Patent to-day.

It will be understood that I am not doing this because I doubt the correctness of my previous decision on the points then raised. I am, however, influenced in part by another point which was never raised before me, and which I think was not taken in either of the Courts below. That is whether S. 206, Municipal Act, is in itself ultra vires the legislature. Now this Act was passed by the Bombay Legislature and not by the Central Legislature. Accordingly, it would not appear to be within the exception given by S. 44, Letters Patent of 1865. I do not want to prejudge what the eventual decision may be, but it may be argued that if the local legislature has power to direct that a suit shall not be brought for two months, it might also have power to direct that it should not be brought for two years, or possibly not at all. And if it has power also to direct that a plaintiff shall not recover more than a certain amount, or that he shall pay certain costs, it might have power also to give other directions as regards the suit and its procedure. I appreciate that in any matter concerning "the revenue" the jurisdiction of the Court is ousted by S. 106 (2), Government of India Act. But we are here dealing with a Municipality as opposed to Government : see S. 20.

Accordingly, in giving leave to appeal. I also (in so far as I have the power) give leave to the applicant to amend his memorandum of appeal by alleging that S. 205, Bombay City Municipalities Act 1925, is ultra vires and not binding on the plaintiff. A copy of this judgment to be shown to the Court hearing the Letters Patent appeal.

S.N./R.K. *Order accordingly.*

A I R. 1929 Bombay 242

KEMP, J.

A. E. G India Electric Co., Ltd.—Plaintiffs.

v.

General Electric Trading Co.—Defendants.

Original Civil Jurisdiction Suit No. 75 of 1929, Decided on 6th February 1929.

Arbitration Act, S. 19—Avoidance of contract arising from terms of contract—Arbitration clause would be enforced—But if avoidance is due to reasons "dehors" it cannot be enforced.

Where an arbitration clause is inserted in the contract the general rule is that the dispute is referable to arbitration in a case where the avoidance of the contract arises out of the terms of the contract itself. Where, however, a party seeks to avoid the contract for reasons "dehors", it, the arbitration clause cannot be resorted to as it, together with the other terms of the contract is set aside. In other words, a party cannot rely on a term of the contract to repudiate it and still say the arbitration clause should not apply. If he relies on the contract he must rely on it for all purposes. (*English cases relied on*).

[P 243 C 1]

Taraporewala—for Plaintiffs.

Coltman—for Defendants.

Facts.—The defendants were appointed by the plaintiffs as their sole distributing agents. The contract of agency was in writing Plaintiffs executed it in Bombay while defendants executed it in Karachi in the month of July 1927. The contract referred to supply electric goods to the defendants. The agreement though termed an agency agreement was as a matter of fact an agreement by the plaintiffs to sell the goods to the defendants at a price five per cent. lower than to any other dealer in Indian market. The agreement also contained a clause to refer all the matters in dispute between the parties to arbitration. The parties having fallen out the plaintiff brought a suit for the recovery of the price of goods supplied to the defendants. Whereupon the defendants took out a chamber summons for the stay of the suit.

Judgment.—(After stating facts the judgment proceeded) The relief under S. 19, Arbitration Act, is one within the discretion of the Court and it lies on the plaintiffs to show why the matter should not be referred to arbitration.

Mr. Taraporewala for the plaintiffs contends that there are no disputes which can be the subject-matter of a submission and that the suit is for the price. The answer to this is that the defendants, it may be perhaps not so early as they might have done, objected to the accounts submitted by the plaintiffs and alleged amongst other things that the plaintiffs had sold goods direct to other agents than themselves in contravention of the terms of the contract. I do not propose to discuss all the matters of which the defendants complain, but I am quite satisfied that in October 1928, they did raise a dispute and, so far as I know, a genuine

dispute, that the amount claimed by the plaintiffs was incorrect.

Mr. Taraporewala next contends that as his clients put an end to the contract on the ground, he says, that the defendants had broken it the arbitartion clause in the contract does not apply. In the first place, however, it is impossible for me to say now on these affidavits whether the plaintiff or the defendants have broken the contract and in the second place, the plaintiffs by putting an end to the contract do not also put an end to the arbitration clause. The only decision cited in the argument is the case of *Hodson* v. *Railway Passengers' Assurance Co.*, (1) which Mr. Taraporewala referred to. But there are other authorities which may properly be referred to in deciding this application. The guiding principle determining whether the clause as to arbitration applies or not in cases like the present has been laid down in the following cases from which I draw the general rule that the dispute is referable to arbitration in a case where the avoidance of the contract arises out of the terms of the contract itself. Where, however, a party seeks to avoid the contract for reasons "dehors" it, the arbitration clause cannot be resorted to, as it, together with the other terms of the contract, is set aside. In other words, a party cannot rely on a term of the contract to repudiate it and still say the arbitration clause should not apply. If he relies on the contract he must rely on it for all purposes. The present disputes clearly arise out of the agreement and the plaintiffs themselves are suing under it for the price. Thus, in *Jureidini* v *National British and Irish Millers Insurance Co. Ltd*, (2), the contract was repudiated and with it the arbitration clause. In the latter case of *Stebbing* v. *Liverpool and London and Globe Insurance Co., Ltd.*, (3), the company relied on a term in the contract to avoid liability and it was held the arbitration clause stood and the dispute was referable to arbitration. In *Woodall* v. *Pearl Assurance Co.* (4), the company also relied on a term in the policy rendering it invalid and did not thereby repudiate the policy as a binding contract. There also it was held that the dispute was referable to arbitration under the arbitration clause as the company had had to rely on a term of the policy itself. Lastly, there is the decision in *De La Garde* v. *Worsnop & Co.* (5) where Mr. Clauson, J., held that the agreement to refer to arbitration was binding and the action must be stayed where the plaintiffs' obligation under the contract came to an end in accordance with the terms expressed in the contract itself and not by reason of the occurrence of an event 'dehors" the consideration of the contracting parties. In the present case the plaintiffs sue to recover the price under the contract as a valid and binding contract. They cannot, therefore, repudiate one of the terms of the contract relating to arbitration whilst seeking to rely on the contract in support of their claim. I, therefore, hold that the fact that the plaintiffs put an end to the contract does not avoid the effect of Cl. 12 of the contract.

Then Mr. Taraporewala argues that as the plaintiffs are in Bombay and the defendant in Karachi the arbitrators might not agree on a place at which to hold the arbitration. I see, however, no reason why I should anticipate that the arbitrators are going to disagree on this point and, secondly the natural thing for the arbitrators to do, whether they are appointed from residents or traders in Bombay or Karachi, is to take the evidence obtainable at Karachi, at Karachi, and the evidence obtainable at Bombay, at Bombay.

I do not propose to discuss the decisions which show in what cases the Court should exercise its discretion by allowing the suit to proceed. The parties to this contract are both merchants and presumably included Cl. 12 in their agreement deliberately and with a full knowledge of the effect of it and must be assumed to have known that the arbitrators might have to take the evidence both at Karachi and Bombay. They have gone so far as to provide that an arbitration must first be resorted to before a suit may be filed. I see no reason why in the face of this solemn and deliberate agreement between the parties I should allow

(1) [1904] 2 K. B. 833=73 L. J. K. B. 1001=91 L. T. 648.
(2) [1915] A. C. 499=84 L J. K. B. 640=31 T. L. R. 132=59 S. J. 205=112 L. T. 531.
(3) [1917] 2 K. B. 433=86 L. J. K. B. 1155=33 T. L. R. 395=117 L. T. 247.
(4) [1919] 1 K. B. 593=88 L. J. K. B. 706=63 S. J. 352=83 J. P. 125=24 Com. Cas. 237=120 L. T. 556.
(5) [1928] 1 Ch. 17.

the plaintiffs to file their suit and give no effect to the clause as to arbitration. They must have contemplated the consequences when they inserted the clause in their agreement.

Suit stayed till further orders. Liberty to apply. The plaintiffs to pay the defendants' costs of this application and the costs of the suit up to date to be in the discretion of the arbitrators. Counsel certified.

R.K. *Order accordingly.*

A. I. R. 1929 Bombay 244

FAWCETT, AG. C. J. AND MIRZA, J.

Tuljaram Harkisondas—Appellant.

v.

Harkisan Jagjivan—Respondent.

Second Appeal No. 904 of 1925, Decided on 5th October 1928, against decision of Dist. Judge, Broach, in Appeal No. 35 of 1923.

Cosharer — One co-owner can sue trespasser—Other co-owners are desirable though not necessary parties.

One of the co owners is competent to sue a trespasser for ejectment and it is not necessary for the other co-owners to be parties to the action. It is, however, sometimes desirable that the other co-owners should be made parties to any final decree that may be passed: *A. I. R.* 1927 *Bom.* 192 ; 39 *Mad.* 501, *Rel. on.* [P 244 C 2]

M. H. Mehta—for Appellants.

M. T. Patel and *K. V. Patel*—for Respondent.

Fawcett, Ag. C.J.—11*th June* 1928—In this appeal, with regard to the cross-objections to the findings of the lower Court that the house was not proved to have been given by Brijbhukhandas to Motilal and that the possession of the defendant's mother Bai Prankore was permissive and never adverse, we see no sufficient reason to differ from the lower Court. The main question, therefore, is in regard to the nature of the relief that the plaintiff is entitled to get. The trial Court held that the suit should be dismissed as the plaintiff had not proved her title to the whole house, but only to half of it, and as it was objectionable to pass a decree in favour of the plaintiff for joint possession with the defendant, who is in the position of a trespasser. The District Judge held that in the circumstances of the case it was unduly harsh to deny the plaintiff any relief because she had only succeeded in proving her title to half of it and that a decree for joint possession with the defendant should be passed.

In appeal Mr. Mehta for the plaintiff-appellant has urged that, following the ruling of this Court in *Maganlal Dulabhdas* v. *Budhar Purshottam* (1), the plaintiff alone was competent to sue the defendant who was a trespasser and that he is entitled to a decree for possession against the defendant. On the other hand Mr. Patel for the respondent has drawn our attention to various rulings of this Court, which have emphasised the necessity of all co-owners ordinarily suing in ejectment, such as *Balkrishna Vithal* v. *Hari Shankar* (2); *Balaji Bhikaji Pinge* v. *Gopal* (3); and *Balkrishna Moreshwar* v. *Municipality of Mahad* (4). We think that in the present case, it might have saved a good deal of difficulty if the trial Court had, under O. 1, R. 10, Civil P. C., ordered the heirs of Bai Dhankore to have been joined as parties, so that they could have been present and heard. The plaintiff in his appeal to the lower Court also urged in the memorandum that, if it was thought necessary, such heirs should be joined. In *Maganlal* v. *Budhar* (1), it is to be noted that the other co-owner was a party to the suit ; and although in *Ahmad Sahib Shutari* v. *Magnesite Syndicate, Ltd.*, (5), it was held that it was not necessary for the other co-owners to be parties to the action, yet in circumstances like the present it is certainly desirable that the other co-owners should be parties to any final decree that is passed in this matter. It would be much more satisfactory for the Court to hear them even at this late stage. The present suit was brought in 1922 and a little more delay for this purpose may save a good deal of subsequent litigation. In *Muthu Ramakrishna Naicken* v. *Marimuthu Goundan* (6), where the litigation disclosed that the plaintiffs were only co-owners, the High Court set aside the decrees of both the lower Courts and directed the trial Court to restore the

(1) A. I. R. 1927 Bom. 192=51 Bom. 149.
(2) [1871] 8 B. H. C. R. 64.
(3) [1878] 3 Bom. 23.
(4) [1885] 10 Bom. 32.
(5) [1915] 39 Mad. 501=28 M. L. J. 598=29 I. C 69=2 M. L. W. 460.
(6) [1914] 38 Mad. 1036=24 I. C. 868=26 M. L. J. 582.

suit to its file and make the representatives of the other co-owner parties to the suit and to pass a decree according to law. We think, however, that it is preferable to have the heirs of Bai Dhankore joined before us rather than to take a step of that kind, which might result in further appeals before this litigation is finally settled. It may be that the heirs of Bai Dhankore do not wish to claim any part of the property. In that event there would be no objection to a decree being passed in favour of the plaintiff-appellant for exclusive possession; or the parties might arrive at some compromise with regard to Bai Bhuri's heirs being given a certain portion of this house of which Bai Bhuri was in occupation for many years. Therefore, before deciding the relief, if any, to be granted to the plaintiff-appellant, we direct that Narandas and Chunilal, sons of Khushaldas, be joined as respondents to this appeal at the expense of the plaintiff-appellant; that copies of the plaint and the appeal paper-book be served upon these two added parties and they be called upon to submit their written statements as to whether they claim to be joined with the plaintiff in obtaining possession of the property from the defendant, or whether they have no desire to obtain any relief in this suit, and, in general, what they have to say in regard to the matter in dispute. The respondents, upon such written statements being filed, to have an opportunity of filing any objections that are relevant. Costs reserved. The matter to be placed on board before this Bench within two months, and the necessary steps to be taken without delay. (When the case again came before the High Court the following judgment was delivered).

Fawcett, Ag C J.- *5th October* 1928— In our interlocutory judgment of 11th June 1928, we directed that Narandas and Chunilal, sons of Khushaldas, be joined as respondents to this appeal at the expense of the plaintiff-appellant. It appears, however, that Chunilal has died long ago and that he has now no male issue. Narandas claims to be the sole heir of his deceased brother Chunilal In the written statement that he has filed, he further claims to be the owner of the house in suit, as well as of all other property left by Nathabhai, the deceased husband of the original plaintiff Ujam, and he asks that a decree for possession of the house be passed in his favour in this suit, with mesne profits. In the alternative he submits that this Court should, in any case, allow him joint possession with the plaintiff of the suit house He states that he is willing to pay any necessary Court-fees with regard to such relief as may be granted to him.

Appellant 2 has put in a statement in answer to this written statement in which he entirely contests the claim of Narandas, and alleges that Bai Ujam became the absolute owner after Bai Dhankore's death under Nathabhai's will and that she had also a title by adverse possession. It is further pointed out that, although Narandas attended the Court at the trial and produced the will of Brijbhukandas, he made no application to the Court to be joined as a party to the suit. Mr. Divatia for Narandas has answered that there was no obligation on Narandas to apply to be joined as a party, and that it was the plaintiff's business really to have joined him and not to have concealed the fact that he had rights in the property. No doubt, it would perhaps end the litigation if we were to direct that the suit should be remanded for deciding this dispute between Narandas and the heirs of Bai Ujam; but, in our opinion, this would be turning the present suit into one of quite a different nature It is not, in our opinion, necessary to have this dispute decided before we can give the plaintiff any relief in the suit. We think that in the circumstances of the present case, where the plaintiff has borne the brunt of the litigation, presumably to the knowledge of Narandas, it would be unfair, after she has succeeded on the main dispute between herself and Bai Bhuri, that she should be exposed to this further contest before she is given any relief in the present suit. The circumstances under which the claim of Narandas is put forward at this late stage are not in our opinion, such as call for any indulgence towards him on our part; and we think the fairest course is to act upon the view taken by this Court in *Maganlal Du'abhdas* v. *Budhar Purshottam* (1), and the Madras cases which have been already cited in our previous interlocutory judgment, that the plaintiff alone was competent to sue the defendant who was a trespasser and that her heirs are entitled to a decree for possession against the defendant. But we make it clear that

this is on the assumption that she is either the exclusive owner of the house or a co-owner of it with Narandas. We leave that question entirely open, so that it cannot be res judicata in any subsequent litigation between Narandas and Bai Ujam, or rather her heirs the present appellants.

We accordingly set aside the decree of the lower appellate Court giving Bai Ujam joint possession of the house with the defendant Bai Bhuri, and instead of that pass a decree in favour of the appellants as heirs of Bai Ujam for the ejectment of the respondents, the heirs of Bai Bhuri, from the house in suit. We further allow the appellants a decree for mesne profits of the suit house from the time that the respondents came into possession of the house as heirs of Bai Bhuri up to the date of delivery of possession to the appellants. We direct an inquiry as to the amount of the mesne profits to be held by the Subordinate Judge in whose Court the suit was brought.

As regards costs, we think that the respondents should bear the costs of the appellants of this second appeal, except the costs of the added respondent 5 for appearing in this appeal We do not disturb the order as to costs given in the lower appellate Court's judgment ; but the respondents will of course only be liable in regard to costs of this litigation to the extent of any assets of Bai Bhuri that have come into their hands.

The costs of the added respondent 5 to be borne by the appellants.

The Court dismisses the cross-objections with costs

R.K. *Decree set aside.*

A. I. R. 1929 Bombay 246

MARTEN, C. J., AND MURPHY, J.

Gangadhar Tukaram Akul — Appellant.

v.

Rachappa Nagappa Kinage—Respondent.

First Appeal No. 64 of 1925, Decided on 30th August 1928, against decision of First Class Sub-Judge, Sholapur, in Civil Suit No. 798 of 1922.

(a) Evidence Act, S. 114—Marriage—Connexion admittedly illicit—Man's status lower than woman's—Presumption of marriage does not arise.

Where the status of the man is lower than the woman's and the intercourse between them is admittedly illicit for a large number of years no presumption of marriage arises merely because they lived as husband and wife and were regarded by their neighbours as such: 11 *M. I. A.* 194 (*P.C.*) and 32 *All.* 345, (*P.C.*), *Rel. on.*; 34 *Mad.* 277, *Ref.* [P 247 C 2]

(b) Transfer of Property Act, S. 51—Sale by Hindu widow in 1906—Adoption in 1910—Adopted son bringing suits to set aside other alienations—Purchaser's son in 1918 making improvements, property being uninhabitable and in tumbled condition—Suit by adopted son in 1922 to set aside sale—Purchaser's son was held entitled to claim improvements.

A Hindu widow sold in 1906 some property belonging to her husband to the mother of *G*, who was then a minor. In 1910 a son was adopted by the vendor-widow. The adopted son, who was major, subsequently brought a suit to set aside an alienation other than the sale to *G's* mother. In 1918 *G*, his mother having died, made improvements on the property at a cost of Rs. 4,000, the property having tumbled down and being in uninhabitable condition. In 1922 the adopted son brought a suit to set aside the sale.

Held: that in 1918 *G* believed in good faith that he was absolutely entitled to the property and he was thus entitled to claim Rs. 4,000 for improvements. [P 248 C 1]

H. C. Coyajee and *A G. Desai*—for Appellant.

P. V. Kane—for Respondent.

Marten, C J—This appeal requires determination on a very unusual state of facts. The suit was brought by the plaintiff as the adopted son of Nagappa, who died in 1894, to recover the property which was alienated by Nagappa's widow Nagawa in 1906 in favour of the defendants. Nagawa purported to adopt the plaintiff on 27th June 1910, but it is clear, although she has denied it, that she had formed an illicit intercourse with one Sharnappa after, if not before, the death of her husband Nagappa and that there were two or more children born of that union. The contention of the defendants is that Nagawa in fact married Sharnappa by Udki marriage in 1907. They further contend that the adoption of the plaintiff in June 1910 never took place or alternatively it was invalid because Nagawa had remarried, and in any event they claim that they were entitled to be allowed the value of certain improvements made by them in 1918.

Now, as regards the question whether Nagawa could in law adopt the plaintiff, it is conceded for the purpose of this case that by the law of this Presidency she could not adopt if prior to that date she had remarried. On the other hand it has been laid down by Sir Norman Macleod and Fawcett, J., in *Basvant Mushappa* v. *Mallappa Kallappa* (1), that in the Presidency of Bombay a Shudra widow though unchaste can make a valid adoption. The evidence goes to show that Nagawa was leading an unchaste life with Sharnappa right away down from 1894 to 1910, but on the above ruling this would not affect her power to adopt. (His Lordship discussed evidence and holding Udki marriage of Nagawa not proved proceeded). We were however, referred to several authorities on the question whether the Court ought not to presume a marriage from the fact that the parties have lived together for a large number of years as man and wife, and had been so regarded by their neighbours and friends. So far as the law of Scotland or England is concerned, I have no doubt that as a general proposition the contention of the appellant is sound in that respect. I may refer to *The Breadalbane Case*: *Campbell* v. *Campbell* (2), where the headnote runs:

"Cohabitation, with the required repute, as husband and wife, is proof that the parties between themselves have mutually contracted the matrimonial relation. It demonstrates that interchange of consent which alone constitute marriage in Scotland. The law of habit and repute, however, is not peculiar to Scotland; although in countries where the facilities of matrimony are less than in Scotland, the evidence to establish the marriage must be stronger. Marriage, technically, is not constituted, but evidenced, by habit and repute, which, for that purpose, must be uniform and positive. A connexion commencing in adultery may, on ceasing to be adulterous, become matrimonial by consent, and may be evidenced by habit and repute, the parties being at liberty to intermarry."

Chellammal v. *Ranganatham Pillai* (3), was also relied on to show that a similar presumption would arise in India though it might be rebutted by proof of facts which show that no marriage had taken place.

On the other hand, other cases exemplify that one has to consider all the facts, and that if, for instance, you find that the relations between a man and woman have started as those of man and concubine, then it may well be that no presumption of marriage ought to be made merely by the fact that the parties lived for a long time in that relationship. For instance, in *Mt. Jariut-oll Butool* v. *Mt Hoseinee Begum* (4), it is said (p. 209):

"If it were once conceded that a woman once a concubine could be converted by judicial presumptions into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, when and after what period of time should such presumption arise? The ordinary legal presumption is, that things remain in their original state."

So, too, in *Ghazanfar Ali Khan* v. *Kaniz Fatima* (5), it was held by the Judicial Committee that the presumption of marriage in that case which might have arisen from a prolonged cohabitation did not apply because the mother before she was brought to the father's house was admittedly a prostitute.

I think that at any rate the evidence relied on as proving that the parties were living as husband and wife by repute must be satisfactory and strong. The ordinary case which the English authorities had in mind was that of a man and woman living together as man and wife in the ordinary way, and regarded as such by their friends and neighbours. To my mind that is not the effect of the evidence in the present case. In my judgment there is not that evidence of habit and repute which is sufficient to bring the present case within the presumption referred to in those authorities. In my opinion a further reason for not applying that presumption here is that the status of the man was lower than the wife's, that the intercourse between them was admittedly illicit for a large number of years, and there was no satisfactory reason why we should presume that they entered into a marriage in 1907 any more than in any other year during their connexion. Further, if the evidence, standing by itself is insufficient to establish an Udki marriage, I do not think that the failure to establish the presumption I have alluded to could really assist the plaintiff or vice versa. In other words, in the present case I do not think that two unsuccessful points taken before

(1) A. I. R. 1921 Bom. 301=45 Bom. 453.
(2) [1867] 1 Sc. & D. Ap. 182.
(3) [1910] 34 Mad. 277=12 I. C. 247.
(4) [1867] 11 M. I. A. 194=10 W. R. 10=2 Suther 56=2 Sar. 248 (P.C.).
(5) [1910] 32 All. 345=6 I. C. 674=37 I. A. 105 (P.C.).

the Court should produce one good point or turn either of those two points individually into a good one.

The result is that in my judgment the learned Judge arrived at a correct conclusion in finding that the Udki marriage was not established. (The judgment then discussed evidence and holding adoption proved proceeded). That brings one to the last point in the case, and it is one of some difficulty, viz., whether the defendants are entitled to any sum for improvements made in 1918. The case here is a special one. The original purchaser in 1906 defendant 1 died during suit. Defendants 2 and 3 her sons are young men and cannot depose to what took place in 1906. Therefore the defendants are not in a position to prove that their mother made the necessary enquiries and took the necessary steps which would enable them to prove that the alienation in 1906 made by Nagawa was for family necessity. As regards their claim for improvements, prima facie it may be taken that defendant 1, who bought the property in 1906, thought that she was getting a good title to the property. People do not generally buy unless they will get a good title, and the fact that she remained in undisturbed possession of this land down to 1922 when the present suit was brought would tend to confirm the defendants in their belief that they had a good and valid title to the land. That would be strengthened by this fact that if the adoption of the plaintiff in 1910 was valid, as we have held it to be, then no steps were taken by the plaintiff for nearly twelve years after that date to challenge this alienation in 1906, although in 1912 he did bring a suit, though unsuccessful, to challenge another alienation that was made.

Further, the evidence shows that in 1918 or thereabouts when the improvements were made, the property was in a tumbled down and uninhabitable condition. Accordingly, the improvements then effected by defendants consisted in rebuilding the main doors and walls, and building two new rooms and a portion of the kitchen. This will be found in the commissioner's report, Ex. 81, where it was found by the Panch that in all the costs of this work would be about Rs. 4,000, and that the value of the premises, inclusive of the furniture, was about Rs. 10,000.

Now the value of these improvements is claimed under S 51, T. P. Act, or alternatively under general principles of equity. Take first S. 51. There the transferee of immovable property has to believe in good faith that he is absolutely entitled thereto when he makes an improvement on that property. In that event if he is subsequently evicted by a person having a better title, then he has certain rights in the nature of compensation We have therefore, to consider whether in 1918 the defendants believed in good faith that they were absolutely entitled to the property On the facts of this peculiar case we think that they did bona fide believe that they were absolutely entitled to the property.

We appreciate that in two cases, viz., in *Nanjappa Gounden* v. *Peruma Gounden* (6) and *Hans Raj* v. *Mt. Somni* (7), the alienees were held disentitled to compensation because they had not made proper enquiries as to the power of the widow herself to alienate, and consequently it was there held that they were not acting in good faith. But, as I have already indicated, the facts of the present case stand on a peculiar basis, particularly having regard to the inaction of the plaintiff after his adoption in 1910, notwithstanding that he was then a man of adult age

I may here refer to *Kidar Nath* v. *Mathu Mal* (8), a decision of tho Privy Council from the Punjab, where it had been argued in the Court below that there was no evidence whatever to show that the plaintiff knew or acquiesced in the making of the improvements, and that as the defendants had purchased from a widow, whose estate they must be taken to have known was of a limited nature, it was not unreasonable to hold that any improvements effected by them were done at their own risk. In that case the Punjab Chief Court allowed the alienees the sum of Rs. 1,400 and though the contest in the Privy Council turned on whether that sum should be increased and there was no proper appeal as to the Rs. 1,400, still there is nothing in their Lordships' judgment to indicate that the Punjab Court had been wrong in award-

(6) [1909] 32 Mad. 530=4 I.C. 18=19 M.L.J. 454.
(7) A. I. R. 1922 All. 194=44 All. 665.
(8) [1913] 40 Cal. 555=18 I. C. 946=15 Bom. L.R. 467 (P.C.).

ing any compensation at all to the alienee from Hindu widow whose alienation had been set aside.

Apart from S. 51, T. P. Act—for it has been held in this Court that the Transfer of Property Act is not exhaustive—we may refer to general principles of equity. Thus in Story's Equity Jurisprudence, Vol. I, p. 368, it is stated:

"If a man, supposing he has an absolute title to an estate, should build upon the land, with the knowledge of the real owner, who should stand by and suffer the erections to proceed, without giving any notice of his own claim, he would not be permitted to avail himself of such improvements, without paying a full compensation therefor; for, in conscience, he was bound to disclose the defect of title to the builder. Nay a Court of equity might, under circumstances, go further, and oblige the real owner to permit the person, making such improvements on the ground, to enjoy it quietly, and without disturbance."

So, too, in *Nijalingappa* v. *Chanbasawa* (9), this Court allowed compensation for improvement to the mortgagee, although no express provision to that effect was to be found in the Transfer of Property Act. And, indeed, in *Henderson* v. *Astwood* (10), which was a case between a mortgagor and mortgagee coming from Jamaica, Lord Macnaghten, speaking of the mortgagee, said (p. 163):

"It would be contrary to common justice to deprive Davies of the benefit of the money laid out by him on those improvements, so far as they enhanced the value of the premises."

I quite appreciate that the present is not a case between a mortgagor and mortgagee. It does not depend on a contract, and accordingly the two last mentioned decisions do not apply. But I am disposed to think that here the plaintiff did stand by, and that the reason why he did not bring the suit earlier was that the house in question was in a dilapidated and uninhabitable condition. He at any rate brought a suit as regards other family property. Further these improvements were of a nature which anybody seeing the property would naturally observe. Although, then, as not unfrequently happens in the mofussil Courts, all these points have not been brought out in evidence, or even cross-examination, as clealy as they might have been. I am disposed to think that that would be the proper inference to draw in the present case. However that may be, I prefer to base my judgment on this part of the case on the ground that the defendant has satisfied and brought himself within S. 51 of the Act.

That being so, then, as regards the quantum of compensation, the sum of Rs. 4,000. having regard to the commissioner's report, seems to us to be the proper amount to allow as compensation. We quite appreciate that in awarding such compensation, we must consider how far the property has been improved in market value by that sum, and not merely consider the amount expended. But that figure on the evidence before us appears to be the correct one to arrive at.

Accordingly, in this respect I would allow the appeal, and reverse the decision of the learned Judge, and direct that as a condition of obtaining possession the plaintiff should pay to the defendants the sum of Rs. 4,000 with interest at six per cent from the date of suit As regards the rest of the appeal, the appeal must be dismissed. We will hear parties as to cost after my learned brother has deliverered his judgment.

Murphy, J.—(After stating facts, the judgment proceeded.) The only remaining point is whether defendants should be allowed anything for the improvements they have effected in the property, These have been found by the Panch to be as follows: The main door and wall have been rebuilt, and two rooms to the rooms to the east and west have been added, the whole at an estimated cost of Rs. 4,000, including the newly built kitchen and wall. This valuation was not challenged by the other side. If defendants are to be given an allowance on this ground, it must either be under S. 51, T. P. Act, or on general principles of equity. The requirements of S. 51 are, that they should have effected these improvements in good faith, believing that they had a title to the property in suit In this case the property was purchased in 1908 by the defendants' mother, who was then a widow, the defendants' father having died in 1902. The house appears to have been in a dilapidated condition, and was rebuilt in 1918. Meanwhile, what had happened in connexion with the original owner of this property, was that she had carri-

(9) [1918] 43 Bom. 69=47 I. C. 751=20 Bom. L. R. 895.
(10) [1894] A. C. 150.

ed out the adoption of the plaintiff in 1910, and it may be that she was reputed in the town to have married her lover Sharnappa in 1907, and that the plaintiff in 1912 brought a suit to recover possession of another property similarly alienated by his adopted mother, against another alienee, and had failed to establish his claim in that suit and had abandoned its prosecution. Also, after 1916, the plaintiff had given up calling himself by the name of his adopted father. One of the defendants has been examined, and at the time he made the statement in 1924 was twenty-two years old. It seems to me on the facts, history of Nagawa's reputation, the failure of the plaintiff to establish his adoption in the other suit which he brought, and also in view of the age of the defendants, it is reasonable to assume that they bona fide believed that they had a title to this property. It is in fact very improbable that they would have spent so much money on repairs and improvements in 1918, had they had any serious doubt on this point. I agree therefore that the facts are covered by S. 51, T. P. Act, and to the order proposed to be made by the learned Chief Justice.

Per Curiam.—Appeal allowed re-compensation, but it is to be awarded at Rs. 4,000 plus six per cent interest thereon from the date of suit. The rest of the appeal dismissed. Appellant to get costs of appeal on Rs. 4,000 and the respondent to get costs of appeal on Rs. 6,000. Similar order as to costs in Court below. Cross-objections dismissed with costs. Order for possession to be conditional on payment of above compensation within three months from the record reaching the lower Court. In default suit to be dismissed with costs.

Stay application dismissed. No order as to costs.

R.K. *Appeal partly allowed.*

* A I. R 1929 Bombay 250

MARTEN, C. J., AND MURPHY, J.

Currimbhai Naboobhai Rangwalla—Applicant.

v.

N. H. Moos——Opponent.

Civil Revn. Appln. No. 111 of 1928, Decided on 18th December 1928, against order of Sm C C. Judge, Bombay, in Suit No. 4258 of 1928.

*** Civil P. C., O.9, R. 13—Defendant appearing on date of hearing though late is not entitled to set aside decree.**

A litigant is not entitled to have an ex parte decree set aside merely because he comes to the Court at some later time on the date of hearing and makes an application. It is purely a matter for the discretion of the Judge: *A. I. R.* 1925 *Bom.* 423 and *A. I. R.* 1924 *Bom.* 392, *Cons.* [P 251 C 1]

S. E. Bamji—for Applicant.

H. V. Divatia—for Opponent.

Marten, C. J.—This is an application in revision and not an appeal. The suit originally came before Mr. Chitre. The defendant was not there and an ex parte decree was passed. Thereupon an application was made to the learned Judge to restore the case to the list for hearing and to set aside the ex parte decree on certain grounds set forth in the affidavit in support of that application. The learned Judge in the exercise of his discretion refused the application.

In revision, it is said that the learned Judge thereby violated an established rule of law and practice by which any litigant is entitled to have an ex parte decree set aside, provided he comes to the Court at some later time on the date of hearing and makes an application. For that purpose two authorities were cited to us. One is *Chhotalal* v. *Ambalal* (1), where a party was late because of an accident to the train. An application was made to have the suit restored on board but the Judge exercised his discretion and rejected it. In revision Sir Norman Macleod observed (p. 687 of 27 *B. L. R.*):

"We have more than once laid down as a rule of practice to be observed in the subordinate Courts that when a party arrives late before the Judge, and finds that his suit or application has been dismissed before his arrival, he is entitled to have his suit or application restored on payment of such costs as may have been incurred by reason of his default by the opponents."

And then in *Sorabji* v. *Ramjilal* (2), Sir Norman Macleod stated (p. 323 of 26 *B. L. R.*):

"The mere fact that a party or his pleader has arrived in Court after the proper hour when the suit has been disposed of ex parte, is no reason whatever why the suit should not be restored to the board and the case heard on its merits, the Court imposing such conditions on the defaulting party as might meet the justice of the case. We must not be taken as in any way encouraging unpunctuality. But

(1) A.I.R. 1925 Bom. 423.
(2) A.I.R. 1924 Bom. 392.

in cases like this one the dismissal of the suit is a penalty, out of all proportion to the offence."

Then earlier on the same judgment says (p. 323 of 26 *B. L. R.*) :

"We have more than once laid down that even supposing a party is absent when the suit is called on for hearing, if he appears in Court before the Court has risen for the day, then the Court should listen to his application for having his suit restored."

Now, if these two cases are supposed to lay down the law of practice contended for the applicant, then with all deference to those decisions I am unable to agree with them. For instance, if such a rigid rule is laid down, it might mean this, that a defendant could successfully prevent his suit ever being heard. All that he would have to do would be to appear late on successive dates, and allow the suit to be heard ex parte and then to apply at the end of each day to have the suit restored for hearing. That obviously is a course which no Court would allow. Consequently, the alleged rule or practice involves reading something into the Code which not only is not there, but which is contrary to what the Code actually says.

What the Code does say is that if a defendant does not appear when the suit is called on for hearing, a decree may be passed against him. It also provides that in such an event he may afterwards apply to the Court and get the ex parte decree set aside, on good cause being shown. But that is a matter for the discretion of the Judge, and if we were to lay down the rule we are asked to lay down, it would mean practically that the Code would have to be substantially altered. Moreover, it would encourage unpunctuality, which is the very thing that Sir Norman stated in the second case that he did not intend to encourage. On the other hand, as far as this Court is concerned, in cases of real hardship like the case of *Chhotalal* v. *Ambalal* (1), where the Court had to deal with a man who was late because of an accident to his train, that would naturally be a matter to be taken into consideration in his favour.

Then counsel stated that the past practice in the Small Cause Courts was always to allow such applications But we have here the benefit of a decision of a learned Judge, who has a long experience of the Small Cause Courts, and who is perfectly familiar with any alleged practice of that Court.

Under these circumstances, we are not prepared to say in revision that the learned Judge exercised his discretion without regard to law or in any improper way, which would give us the right to revise it. Whether we would necessarily arrive at the same conclusion as he did if we were sitting as Judges of first instance is another matter altogether. Under the circumstances the rule will be discharged with costs.

Murphy, J.—I agree.

R.K. *Rule discharged.*

A. I. R. 1929 Bombay 251

PATKAR AND MURPHY, JJ.

Ragho Totaram — Plaintiff — Appellant.

v.

Zaga Ekoba and *others*—Defendants—Respondents.

Letters Patent Appeal No. 56 of 1926, Decided on 19th November 1928, against decision of Percival, J., in Second Appeal No. 283 of 1926.

Hindu Law—Alienation—Benefit to estate and necessity involve pressure from without—It must be of protective character—Mere better return involves speculative ventures and does not imply benefit to estate.

The benefit to the estate for supporting an alienation must be of a protective character. The necessity involves some notion of pressure from without. The benefit to the estate would not include an alienation of the property for the purpose of investing the proceeds so as to yield a better return, and would not imply vast powers of management which might amount to an authorization to embark on speculative ventures. (*Case law discussed.*) [P 253 C 2]

R and his father *T* formed a joint family. *R* (who was a minor) had inherited some lands from his maternal grandfather. The lands fetched an income of Rs. 40 a year and were situated at a distance of 30 miles from their village. *T* sold *R*'s lands for Rs. 1,500 and house belonging to him for Rs. 500. *T* then purchased lands at his village for Rs. 2,800 and paid the aforesaid Rs. 2,000 as part payment of the price. No sale-deed was passed, but the vendor placed *T* in possession of the lands, which yielded an income o Rs. 225 a year. *R* sued for a declaration that the sale of his lands by *T* was not binding on him.

Held : that the minor lost his absolute property immune from any liability to pay his father's debts, and instead did not even get any sale deed in his name, but a contract of sale passed in the name of the father. The

transaction effected by the father was not for the benefit of the minor, nor was it brought about by any necessity or any pressure on the estate. The alienation was detrimental to the real interest of the minor and was not binding on him. [P 255 C 1]

W. B. Pradhan—for Appellant.

V. D. Limaye—for Respondents.

Patkar, J.—In this case the plaintiff, a minor, brought a suit for a declaration that the sale deed, Ex. 31, passed by his father Totaram to defendant 1 for Rupees 1,500 on 22nd November 1918, was not binding on him and for possession of the property together with mesne profits.

The property in suit situate at Shelave in the Parola Taluka originally belonged to the plaintiff's maternal grandfather Daga Ekoba On his death his widow, the plaintiff's grandmother, inherited the property and subsequently it devolved on her daughter Vedibai the plaintiff's mother. On Vedibai's death in 1918, the plaintiff inherited it as her son. Totaram, the plaintiff's father, was managing the plaintiff's property which fetched a rent of Rs. 40 a year. The plaintiff and his father are residents of Datana in Shindkheda Taluka at some distance from Shelave. The plaintiff's father found it inconvenient to manage the property He, therefore, sold it for Rs. 1,500 to defendant 1, and his house for Rs 500 to defendant 2, and paid Rs. 2,000 to one Zipru who owned a land at Datana measuring 13 acres and yielding an annnal income of Rs. 225. No sale-deed was passed by Zipru in favour of the plaintiff's father, but as Rs. 2,000 were paid to him out of the total consideration of Rs. 2,800, the possession of the land at Datana was transferred to the plaintiff's father.

Both the lower Courts held that the sale in favour of defendant 1 by the plaintiff's father was for the benefit of the minor, and therefore, binding upon him, as the plaint lands were yielding an income of not more than Rs. 40 and by virtue of the arrangement made by the plaintiff's father an income of Rupees 225 from the field purchased from Zipru was secured for the minor plaintiff and his father. It was alleged on behalf of the plaintiff that the sale was effected by the plaintiff's father for meeting the expenses of his second marriage, but the allegation was held not proved by both the lower Courts.

It is urged on behalf of the appellant that the property belonged exclusively to the minor plaintiff, and his father had no right to alienate the propecty exeept for necessity. and that the lower Court erred in holding that the sale-deed was binding on the minor plaintiff on the ground that out of the proceeds of the sale of the land in suit and the proceeds of the property belonging to the father, anothsr property was purchased by the father and the transaction was beneficial to the minor.

The power of the manager of an infant heir in respect of an estate not his own, is a limited and qualified power, and the limits of this power have been laid down by the Privy Council in the case of *Hunoomanpersand Panday* v. *Mt. Babooee Munraj Koonweree* (1). It was held by Knight Bruce, L. J. (p. 423):

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

In that case money was borrowed for payment of arrears of land revenue, and it is clear that no greater benefit could accrue to an estate than to save it from extinction by sequestration. The principle applicable to the manager of an infant heir was extended by the Privy Council to alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Hindu law, alienates the ancestral family estate: see *Baboo Kamesvar Pershed* v. *Run Bahadoor Singh* (2), and also to the authority of the shebait of an idol's estate in *Prosunno Kumari Debya* v. *Golab Chand Baboo* (3), where it was held that the person so entrusted must of necessity be empowered to do what may be required for the service of an idol and for the benefit and preservation of its property, at least to as great a

(1) [1856] 6 M. I. A. 393=18 W. R. 81=2 Suther 29=1 Sar. 552 (P.C.).

(2) [1880] 6 Cal. 843=8 I. A. 8=8 C. L. R. 361=4 Sar. 210 (P.C.).

(3) [1875] 2 I. A. 145=4 B. L. R. 450=3 Suther, 102=3 Sar. 449 (P.C.).

degree as the manager of an infant heir. Their Lordships of the Privy Council have not stated in precise terms the meaning of the words "benefit to the estate." The point, however, arose in *Palaniappa Chetty* v. *Deivasikamony Pandara* (4), where their Lordships, after referring to these cases, observe (*p.* 576 *of* 19 *B. L. R.*):

"No indication is to be found in any of them as to what is, in this connexion, the precise nature of the things to be included under the description 'benefit to the estate.' It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connexion, to be taken as benefits and what not."

With reference to the argument in that case that the idol would be benefited by a transaction which put at the shebait's disposal a sum capable of being profitably used, their Lordships observe (p. 577):

"...attractive and lucrative as moneylending may be in India, it is needless to point out that a shebait would not be justified in selling debuttar land solely for the purpose of getting capital to embark in the money-lending business. And no authority has been cited giving any countenance to the action that a shebait is entitled to sell debuttar lands solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the debuttar land itself."

Mayne in his Hindu Law, (9th Edn.) at p. 476, observes:

"...The terms 'necessity' and 'benefit to the estate' have been used side by side. It is obvious that anything which is a necessity to the estate must be of benefit to it. But the term 'benefit' would seem to import something positive done to enlarge or improve the estate, not a merely negative act such as the discharge of debts or the averting of disaster. In fact, the decided cases all relate to acts which were clearly dictated by necessity, to secure the preservation of the estate."

In *Radha Pershad Singh* v. *Mt. Talook Raj Kooer* (5) it was held that a contract made by a guardian without authority did not bind the minor and that even if it was desirable that the minor should have any benefit such as increase to a very small income from some undertaking or enterprise, e. g., obtaining a lease of certain rents, that circumstance was not sufficient to constitute a necessity for the mother and guardian to mortgage the minor's ancestral property with a view to secure such benefit.

In *Ganap* v. *Subbi* (6) it was held that a permanent alienation of immovable property by a widow could only be justified on the ground of necessity which involved some notion of pressure from without and not merely a desire to better or to develop the estate, for this last implied vast powers of management which in practice would not be easily distinguishable from an authorization to embark upon speculative ventures. In *Vishna* v. *Ramchandra* (7) it was held that the manager of a joint Hindu family can justify the sale of joint family property only for necessity, that he cannot justify it merely on the ground that the sale at the time appeared to be advantageous, and that such a sale is not binding on the minor coparceners. In *Venkatraman* v. *Janardhan* (8) it was held that there was no general power in a Hindu father to alienate joint property in any way he liked for anything that might be of general benefit to the family, whether or no there was any necessity. To use the language of Pontifex, J. in *Pursid Narain Singh* v. *Honooman Sahay* (9) referred to in the case of *Doulut Ram* v. *Mehr Chand* (10), the touchstone of a manager's authority is necessity. It appears, therefore, from the decided cases that the benefit to the estate was to be of a protective character, and that necessity involved some notion of pressure from without, and that the benefit to the estate would not include an alienation of the property for the purpose of investing the proceeds so as to yield a better return, and would not imply vast powers of management which might amount to an authorization to embark on speculative ventures. In *Nagindas Maneklal* v. *Mahomed Yusuf* (11) it was held that the term "necessity" must not be strictly construed, and the benefit to the family may, under certain circum-

(4) A. I. R. 1917 P. C. 33=40 Mad. 709=44 I. A. 147 (P.C.).
(5) [1873] 20 W. R. 38.
(6) [1903] 32 Bom. 577=10 Bom. L. R. 927.
(7) A. I. R. 1923 Bom. 453.
(8) A. I. R. 1928 Bom. 8=52 Bom. 16.
(9) [1880] 5 Cal. 845=5 C. L. R. 576.
(10) [1887] 15 Cal. 70=14 I. A. 187=5 Sar. 84 (P.C.).
(11) A. I. R. 1922 Bom. 122=46 Bom. 312.

stances, mean a necessity for the transaction, and that regard must be had to the word कुटुंबार्थे used in Mitakshara, Ch. 1, S. 1, paras. 28 and 29, and the expression used must be interpreted with due regard to the conditions of modern life The case of *Pa'aniappa Chetty* v. *Deivasikamony Pandara* (4) is not considered in the case of *Nagindas Maneklal* v. *Mahomed Yusuf* (11), and the latter case is not considered in the subsequent decision in *Vishnu* v. *Ramchandra* (7) and *Venkatraman* v. *Janardhan* (8)

The general rule is derived from the text of Vyas referred to in Mitakshara, Ch. 1, S. 1, Cl. 27, incapacitating the father from alienating the property without the consent of the sons. An exception to it is laid down in the following placita 28 and 29 and the text attributed to Brihaspati by Vivad-Ratnakar:

"Even a single individual may conclude a donation, mortgage or sale, of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes."

The meaning of this text is explained thus: While the sons and grandsons are minors, and incapable of giving their consent or doing similar acts, or while the brothers are so and continue unseparated, even one person, who is capable, may conclude a gift, hypothecation, or sale, of immovable property, if the calamity affecting the whole family requires it, or for supporting the family, or for performing indispensable duties such as the obsequies of ancestors : see Stoke's Hindu Law, p. 376 and Gharpure's Translation, p. 180. The exceptional powers are to be exercised, according to the text, especially on three occasions: आपत्काले, that is, in the time of distress; कुटुंबार्थे, that is for the sake or benefit of the family; and thirdly, धर्मार्थे, that is, for pious purposes. The meaning of these terms is explained by Mitakshara. "Time of distress" is explained as referring to a distress which affects the whole family; "for the sake of the family" is explained as "for its maintenance"; and "pious purposes" are described as indispensable acts of duty such as the obsequies of the ancestors. The explanation of the text of Brihaspati by Mitakshara is by no means to be considered as exhaustive, and may be treated as illustrative and interpreted with due regard to the conditions of modern life. It is doubtful, however, if the text relating to the power of alienation of joint family property would apply except by analogy to the right of the father to alienate as guardian the separate property of his minor son. In the case of *Nagindas Maneklal* v. *Mahomed Yusuf* (11), the family house was in such a dilapidated condition that the municipality required it to be pulled down. Though the family was in fairly good circumstances and it was not necessary to sell the house, it was held that the agreement of sale by the adult co-parceners was binding on the minor co-parceners on the ground that they had wisely decided to get rid of property which was in such a state as to be a burden to the family. In *Shankar Sahai* v. *Bechu Ram* (12) it was held that any act for which the character of "legal necessity" or "benefit to the estate" can be claimed must be a defensive act, something undertaken for the protection of the estate already in possession, not an act done for the purpose of bringing fresh property in possession and which may or may not be successful under the chances attendant upon litigation.

A different view was, however, taken by the Allahabad High Court in *Jagmohan Agrahri* v. *Prag Ahir* (13), where the father of a joint Hindu family sold a portion of the family property which was inconveniently situated and was not sufficiently profitable, and employed the proceeds in the extension of the family business which was not of a speculative character, it was held that the transaction was legitimate and could not be upset. A similar view was also taken in another case, *Jado Singh* v. *Nathu Singh* (14), where it was held that it is impossible to give a precise definition of what is benefit to the estate. The term may be held to apply to such a transaction as the sale of an inconveniently situated, incumbered and unprofitable property, and the purchase in its stead of other property which was undeniably a sound investment. In a recent decision of the Allahabad High Court in the case of *Inspector Singh* v. *Kharak Singh* (15), the question was discussed fully and it was held that it was not open to a father to raise money

(12) A. I. R. 1925 All. 333=47 All. 381.
(13) A. I. R. 1925 All. 618=47 All. 452.
(14) A. I. R. 1926 All. 511=48 All. 592.
(15) A. I. R. 1928 All. 403=50 All. 776.

on the security of the family property in order to start a new business, even if the new business was likely to bring large profits to himself and through himself to his sons.

In the present case, the property belonging to the minor was situated at some distance from the village where the minor and the father were staying, and yielded an income of Rs. 40 a year. The property of the minor was sold for Rs. 1,500, and the father sold his own property for Rs. 500, and purchased another property for Rs. 2,800 situated at their own village and yielding an income of Rs. 225. The sale-deed was not passed in favour of the plaintiff's father but the consideration of Rs. 2,000 out of Rs. 2,800 was paid to Zipru who handed over possession of the newly purchased property to the father. The property belonging to the minor sold by the father did not belong to the joint family of the plaintiff and his father. It was the separate and absolute property of the minor who inherited it from his maternal grandfather. It would not have been liable to be attached and sold in execution of a decree for the debts of the father. The minor, therefore, loses his absolute property immune from any liability to pay his father's debts, and instead does not even get any sale-deed in his name, but a contract of sale is passed in the name of the father for property worth Rs. 2,800 and the possession is transferred to the father. The father, unless he pays the full amount, would not have complete title to the property, and on payment of the balance of the purchase money and execution of a sale-deed in his name, the father would be able to sell the property without the consent of the minor plaintiff. It would also be liable for the debts of the father.

We think, therefore, that the transaction which was effected by the father was not for the benefit of the minor, nor was it brought about by any necessity or any pressure on the estate. Even giving an extended meaning to the words "benefit to the estate," we do not think that the transaction in suit entered into by the father is really either for the benefit of the estate or for the benefit of the minor. On the contrary we think that the alienation was detrimental to the real interest of the minor plaintiff. We think, therefore, that the view taken by both the lower Courts is wrong.

We would, therefore, reverse the decrees of both the lower Courts, and send the case back for decision on the merits. The costs of this Court and of the lower Courts to abide the result.

Murphy, J.—The suit was brought on behalf of a minor plaintiff, by his next friend, for a declaration that a sale of some of the minor's property by the minor's father did not bind the minor, and for possession of the property and mesne-profits.

The property sold consists of a field, inherited by the minor as his separate property from his maternal grandfather through his mother, who has since died, and it was sold for Rs. 1,500 to defendant 1.

The relevant facts are that the minor plaintiff's father owned a house and the minor this field, in the village of Shelave, while they lived at a place called Datana some miles away. In the circumstances the minor's father, thinking to better his estate, sold his house for Rs. 500 and the minor's field for Rs. 1,500 and entered into a contract to buy another field at Datana, where he lives, for Rs. 2,800. Raising Rs. 2,000 by the two sales just mentioned, he agreed to pay Rs 2,800 for the new purchase and was given possession, the formal deed of sale being intended to be executed when the balance of the purchase money was forthcoming.

The contention that the sale was in order to raise money for the minor's father's second marriage has been found not to have been made out, and both the lower Courts have upheld the sale as having been effected for the benefit of the minor's estate. Whether it was actually for the minor's benefit, or not, is the question we have to answer in the appeal.

The facts on which the lower Courts' conclusions are based are, that the field at Shelave being far from the minor's father's residence, gave occasion for difficulties in cultivation. It could not be farmed directly, but had to be let to strangers at the low rental of Rs. 40 per annum, and being in possession of persons having no permanent interest in it, it was liable to be neglected, and to suffer in value in consequence.

As against this, it is pointed out that the transaction has enabled the minor's

father to carry out a profitable purchase of land in his residential village, yielding an annual income of Rs. 225 in which the minor plaintiff would have a proportionate share, giving him a larger income than Rs. 40; in addition to whatever further share he might have in it as his father's son. The argument is plausible, but I think all is not as fair as it sounds.

It must be remembered that these people are peasants, whose ideas of a trust are not those of a lawyer, or such as would be commonly recognized in a city such as Bombay. There is no likelihood of any separate accounts being kept for the benefit of the trust property, and once it has become inextricably mingled with the father's property, the probability that it will ever be separated from it and handed back to the minor, to whom it belongs, short of a suit for partition, is very remote.

Moreover, the transaction itself is not a very satisfactory one. There is no completed sale recognizing the minor's interest in the purchase, and though it is perhaps true that an agreement to sell coupled with the delivery of possession may be a good defence in a suit for possession by the vendor, it is not the best available.

The full price also has not been paid, and there is no security among people of this class, that it ever will be. In any case, I am not satisfied that the father has not undertaken to pay more than he can, and if this is so, the transaction will inevitably end in another suit in which the newly acquired land may be attached and sold, or probably mortgaged, and in the course of which the minor's interests are likely to be lost sight of.

Taking all the circumstances into consideration, I believe that, apart from the fact that there was no real necessity for the sale, the transaction is one which in all human probability is unlikely to eventuate to the minor's separate profit, and most probably will lead in some form or other to the ultimate loss of the inheritance from his mother.

This being so, it is clear that it is not a transaction which should be upheld by the Courts as it has been, on this ground.

The second point arising is one of law.

The main principle involved is that the guardian of the property of a minor has not an absolute but a limited power of disposal of the estate, under the Hindu law. The test is, that this power may only be exercised in cases of necessity, and where its exercise will be for the benefit of the estate. What is to be looked to is the danger to be averted, or the benefit to be conferred in the particular instance under consideration. This has been laid down by their Lordships of the Privy Council in the leading case of *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree* (1) and the principle has been followed in other analogous cases, such as *Baboo Kameswar Pershad* v. *Run Bahadoor Singh* (2) and *Prosunno Kumari Debya* v *Golab Chand Baboo* (3).

In the present appeal there is on the facts no question of any necessity for the sale, and if justified at all, this must be on the ground of "benefit to the estate." It is obvious on the one hand that one of the limits must be transactions of a speculative character, such as might possibly turn out profitably, but contain an appreciable element of risk On the other hand, where there is margin of income allowing of an improvement in the estate by the use of some of the surplus together with what might be raised by the sale of a small portion for the purpose of acquiring more property and extending the estate, a sale might possibly be justified. In saying this, I am not laying down a rule but merely indicating circumstances which might justify the sale of a minor's estate by the guardian of his property.

But as I have already stated in discussing them, the facts here are not of this character. The effect of the guardian's transaction has been, to amalgamate what was the minor's separate and distinct property with that of the father, in such a way as to make it difficult for the minor to obtain his separate share, should he ever wish to do so, and the probabilities are, as I have shown, that if this sale is allowed to stand, the minor will be involved in litigation and his property will thereby be jeopardized.

I agree that the sale was effected for no necessity, and that it is unlikely to result in any benefit to the minor's estate. It must, therefore, be set aside.

R.K. *Case remanded.*

* A. I. R. 1929 Bombay 257

MIRZA, J.

S N. Grama—Plaintiff.

v.

Bombay Steamships—Defendant.

Original Civil Jurisdiction Suit No. 2425 of 1927, Decided on 1st November 1928.

*** Civil P. C., O. 5, R. 17—Leaving duplicate on teapoy at defendant's residence is not sufficient.**

Under O. 5, R. 17, the duplicate summons must be affixed to the outer door or to some other conspicuous part of the house in which the defendant resides. Merely leaving the duplicate summons on the teapoy of the defendant's residence is not complying with requirements of O. 5, R. 17 as it cannot be said to be affixed to the teapoy : *A. I. R.* 1924 *Pat.* 446, *Dist.* [P 257 C 2]

Mehta—for Plaintiff

Mulla—for Defendant.

Judgment.— Defendants contended that the summons was not properly served. Shankar Ramkrishna Khopkar, the proprietor of the defendant firm, by his affidavit has stated that on 22nd December 1927, the plaintiff accompanied by another person, who presumably was the Sheriff's bailiff, attended at his place of residence where the bailiff showed him a summons. Mr. Khopkar told the bailiff that he was going out of Bombay and asked him to take the summons to the office of the company at Mandvi. Mr. Khopkar then left to perform certain morning ablutions. On his return he found that the plaintiff and the other person had left and the duplicate summons was lying on a teapoy in his room. He picked it up and sent it to the office of the limited company which has taken over the assets and liabilities of the defendant firm. The plaintiff in his affidavit has stated that on 21st December 1927, when he accompanied the special bailiff to the residence of Mr. S. R. Khopkar at Matunga for the service of summons, the bailiff gave Mr. Khopkar the duplicate writ of summons, showed him the original, and asked him to sign the acknowledgment on the summons, when Mr. Khopkar asked the bailiff to go to the company's office. Mr. Khopkar, according to the plaintiff, read the summons but refused to sign the acknowledgment. He threw away the summons and hurriedly went inside the house. The special bailiff thereupon affixed the duplicate writ of summons on the outer door of Mr. Khopkar's place of residence. The special bailiff Nathalal Ishwarlal Mankad is a clerk of the plaintiff's attorneys. In his affidavit of service of the writ of summons he has inter alia stated that he affixed the duplicate of the writ of summons on the outer door of Mr. Khopkar's residence. To the same effect is the endorsement on the summons made by the Sheriff presumably on information given to him by the special bailiff. The endorsement inter alia states that a duplicate copy of the summons was affixed on the outer door of the defendant's place of residence.

Looking at the duplicate copy of the summons which has been produced by the defendants from their file, I find that it bears no sign of having been affixed to the outer door of the residence of Mr. Khopkar or to any other part of his residence. The two holes it bears are the result of the file from which it has been produced. The appearance of the duplicate copy, in my opinion, is an important circumstance in the case which supports Mr. Khopkar's version of what occurred at his residence on the occasion of the bailiff's visit. Mr. Khopkar's affidavit is further supported by the correspondence which ensued between the limited company and the plaintiff's attorneys on the day following the alleged service of summons. I feel no hesitation in disbelieving the statement of the special bailiff and the plaintiff that the duplicate summons was affixed to the outer door of Mr. Khopkar's residence.

Mr. Mehta has argued that under O. 5, R. 17, of the Code, the duplicate summons need not be affixed to the outer door. It would suffice, it is affixed to some other conspicuous part of the house in which the defendant resides. He contends that leaving the duplicate summons on the teapoy of the defendant's residence would comply with the requirements of O. 5, R. 17. This contention seems to overlook the importance to be attached to the term "affixed" appearing in O. 5, R. 17. If a duplicate of the summons is merely left on a teapoy, it cannot, in my opinion, be said to be affixed to the teapoy.

Mr. Mehta has further relied upon the case of *Nageshwar Bux Rai* v. *Biseswar*

Dayal Singh (1). The ruling in that case is based on facts which are clearly distinguishable from the facts of the present case. In that case the defendant had accepted the duplicate summons and had thereby prevented the bailiff from affixing it to his outer door. He had refused to sign the original summons and had set up the plea that the summons had not been properly served. What the Court said in that case amounted to this, that the defendant would not be allowed to take advantage of his own wrong. On the materials before me it cannot be contended that Mr. Khopkar did anything to prevent the bailiff from affixing the duplicate summons to the outer door or some other conspicuous part of his residence. Indeed it is conceded that Mr. Khopkar threw away the duplicate summons and that the bailiff picked it up. (His Lordship concluded that the requirements of O. 5, R. 17, have not been complied with, and that the ex parte decree should be set aside.)

R.K. *Order accordingly.*

(1) A. I. R. 1924 Pat. 446=3 Pat. 236.

A. I. R. 1929 Bombay 258

MARTEN, C. J., AND MURPHY, J.

Union Bank of Bijapur—Applicant.

v.

Bhimrao Shrinivasrao Jorapur—Opponent.

Civil Revn. Appln. No. 328 of 1927. Decided on 14th December 1928, against decree of 1st Class Sub-Judge, Bijapur, in Sm. C. S. No. 126 of 1927.

(a) Provincial Insolvency Act (1920), S. 47—Secured creditor, courses open to, enunciated—Secured creditor proving whole debt and receiving dividend on whole debt was held to have relinquished security.

A secured creditor may adopt one of three alternatives. He can give proof for the whole debt and abandon his security; or he may value his security, and prove for the balance; or he may ignore the insolvency proceedings altogether and rely on his security. [P 259 C 1]

Where the secured creditor not only has given proof for the whole debt but has actually received a dividend on the whole debt, the correct view to take is that by his conduct the creditor must be taken to have relinquished his security, because, unless he did so, he had no right take the step, which he did, of proving, and still less had he any right whatever to receive the dividend, which he did receive. [P 260 C 1]

(b) Provincial Insolvency Act (1920), S. 47 (2)—"Relinquish" covers abandonment.

In the expression "relinquishes his security" in S. 47 (2) the word "relinquish" is sufficient to cover an abandonment by conduct [P 260 C 1]

R. A. Jahagirdar—for Applicant.

H. B. Gumaste—for Opponent.

Marten, C. J.—In this case, the applicant, the defendant bank, claimed to be secured creditors of one Nemchand Rayachand, now an insolvent, by reason of certain provisions in the articles of association of the bank. For instance, Art, 14 provides:

"The company shall have a first and paramount lien upon all the shares of any member for all moneys from time to time due or payable to the company from him alone or jointly with any other person or persons."

It was also given power to sell the shares to satisfy the lien. Then, there are other articles such as 141 and 142, which allowed the company to deduct any money due to it from the shareholder out of any dividend or bonus payable to the shareholder.

Stopping there for a moment, we think it clear that the lien given by Art. 14 is not confined to the corpus of the shares, but covers as well the produce of the shares, viz, the dividends. Therefore, to that extent, we cannot agree with the judgment of the learned Judge. For instance, a mortgage or charge of land covers the income or rents and profits without express mention.

Now it appears that this insolvent, Nemchand Rayachand, held some partly paid up shares in the bank, and that he became insolvent, so we are told, many years ago, viz., in 1922 The bank claimed that at that date he was indebted to them in a sum of approximately Rs. 874. We are told that their claim is in respect of a money bond. I should explain that we have to rely for the facts very much on the statements of counsel, because, unfortunately the detailed facts have not been set out in any clear documents that are at the present moment before us. It also appears, from what we are told, that the bank proceeded to put in a proof in the insolvency for the whole amount of their debt, notwithstanding the fact that they were secured creditors. Further than that, they received a dividend on their proof for the whole amount of the

debt. Subsequently the present proceedings have been initiated by the receiver in the insolvency claiming payment from the bank of the dividends due on these particular shares.

The learned Judge has held that, by their action, it must be taken that the bank relinquished their security and elected to prove their whole debt, and he has consequently passed judgment in favour of the receiver. I may here notice that it is a striking fact that, as far as we can see, the bank in the Court below never made the slightest attempt to amend their original proof, nor to refund the dividend they had already received, and that it was not until this Court asked their counsel whether the bank still proposed to retain the dividend that we were for the first time told that the bank was prepared to restore the dividend. Even then it was not until their counsel made his speech in final reply that we were, for the first time, told that the bank would now rely on their security merely and were prepared to abandon their proof in the insolvency and to restore the dividend with, I assume, interest.

Now, what is the correct legal position here. A secured creditor, as is well known, may adopt one of three alternatives. He can prove for the whole debt and abandon his security; or he may value his security, and prove for the balance; or he may ignore the insolvency proceedings altogether and rely on his security.

The question then to be considered here is, what is the proper inference to be drawn from the conduct of the bank? Here, I must point out that we are governed by the Provincial Insolvency Act, and that, unfortunately, that Act, with reference at any rate to the rights of secured creditors, is in a very attenuated form compared with either the English Bankruptcy Act or the Presidency Towns Insolvency Act. In particular, both the English Act, and the Presidency Towns Insolvency Act, contain express provisions to this effect, that if a creditor puts in a proof for his whole debt, then he is deemed to surrender his security, unless he can show that his action was due to inadvertence. The particular provision will be found in the English Bankruptcy Act of 1883, Sch. 1, R. 10, and in the corresponding Consolidation Bankruptcy Act of later years. Then, as far as the Indian Presidency Towns Insolvency Act is concerned, this particular provision will be found in Sch. 1, R. 11.

Further, the English authorities illustrate the cases where a creditor is deemed to have relinquished his security. One instance will be found in *In re Rowe: Ex parte West Coast Gold Fields, Ltd.* (1), a case somewhat resembling the present case and it was held in that particular case that there was no inadvertence, and accordingly, the company was refused liberty to amend its proof.

Then *In re Safety Explosives. Ltd.* (2) a decision of the Court of appeal, certain solicitors, who had a lien for costs, handed over their security to a purchaser, and they were refused leave to amend their proof. Another decision in point is by Lord Chelmsford in *Stammers* v. *Elliott* (3), which is under the old Bankruptcy law. There an executor proved a debt in the bankruptcy and received a dividend, and it was held that he had thereby abandoned his right of retainer.

On the other hand, *In re Henry Lister & Co. Ltd.: Ex parte Huddersfield Banking Co.* (4), North, J., allowed a creditor to amend his proof where he had made the mistake of thinking that a particular security was collateral and not a direct security. In *In re Maxson Ex parte Trustee* (5), Horridge, J., also allowed an amendment of the proof where he thought that the proof originally put in by the secured creditor had been put by inadvertence.

We have not been referred to any authority on the Indian Presidency Towns Insolvency Act, nor have we been referred to any authority on the Act we have to deal with. And here I must emphasise that the English authorities are based on special rules, whereas here we have no specific rules of the kind. On the other hand, the Act which we have to deal with, does lay down what a creditor is obliged to do. S. 47 deals with the duties of a secured creditor, and sub-S. (2) says:

(1) [1904] 2 K. B. 489=73 L. J. K. B. 852=11 Manson 272=52 W. R. 608=91 L. T. 101.
(2) [1904] 1 Ch. 226=73 L. J. Ch. 184=11 Manson 76=52 W. R. 470=90 L. T. 331.
(3) [1868] 3 Ch. 195=37 L. J. Ch. 353=16 W. R. 489=18 L. T. 1.
(4) [1892] 2 Ch. 417=61 L. J. Ch. 721=40 W. R. 589=67 L. T. 180.
(5) [1919] 2 K. B. 330=88 L. J. K. B. 854—121 L. T. 616.

"Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt."

and then, sub-S. (6) says:

"Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend."

As regards the expression "relinquishes his security," I think the word "relinquish" is sufficient to recover an abandonment by conduct.

Now here, not only, was there proof for the whole debt, but the bank has actually received a dividend on the whole debt. Under these circumstances, I think, the correct view to take is that by their conduct the bank must be taken to have relinquished their security, because, unless they did so, they had no right to take the step, which they did, of proving and still less had they any right whatever to receive the dividend, which they did receive. Indeed if the contrary course was the one adopted by the bank, viz., that they wished to retain their security, then they deliberately adopted a course of conduct, which would be something like obtaining money by false pretences. Therefore, weighing those two alternatives, I hesitatingly adopt the first as being consistent with honest conduct, and I would refer to S. 114, Evidence Act, as assisting the Court in arriving at that conclusion.

There is one further alternative which I have yet to consider, that is, the point of alleged inadvertence by the bank of their rights as secured creditors under the Articles of Association. Now as far as we can see there is not one word in this case from first to last of inadvertence by the bank until their pleader made mention of it to us. On the contrary, as I have already pointed out, the bank took this extraordinary course that even in the lower Court they never attempted to amend the proof, nor is there anything to show that they were ever willing to refund the money. In fact, therefore, the line that they took before the learned Judge was really carrying out the line of conduct which they first of all adopted, by which they intended to prove for the whole debt and intended to receive the dividend. In law, therefore, they could not also retain their security. Under these circumstances, there is really no question of inadvertence. Nobody has ever gone into the witness-box to set up or explain the alleged inadvertence. This present plea breaks down therefore on the facts, quite apart from the objection that a new case of this nature should not be allowed in revision.

In the result, I have come to the conclusion that there were here materials on which the learned Judge in law was entitled to arrive at a decision against the bank. Accordingly, I would direct this rule to be discharged with costs.

Murphy, J. — I agree. It seems looking at the conduct of the defendant bank, that the only inference we can draw is the one which has been arrived at by the learned Subordinate Judge, i. e., that the bank elected to act under the first part of S. 47, Prov. Ins. Act. The bank has never attempted to show that there was a mistake and has never applied for an amendment, or put forward the plea of inadvertence, and, on the facts of the case, I think that the learned Subordinate Judge's decree was correct and should not be interfered with in revision.

R.K. *Rule discharged.*

** A. I. R. 1929 Bombay 260

MARTEN, C. J., AND MURPHY, J.

Harilal Chimanlal—Applicants.

v.

Pehladrai and Co.—Opposite Party.

Civil Revn. Appln. No. 149 of 1928, Decided on 18th December 1928.

**** Principal and Agent — Commission agent personally liable for price — Property vests in agent — He has right to resale or to stop in transit.**

Where a commission agent, by contracting personally renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent, vests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends that it shall pass, and the agent has the same rights with regard to the disposal of the goods (resale), and with regard to stopping them in transit as he would have had if the relation between him and his principal had been that of seller and buyer. [P 261 C 2]

R. J. Thakor—for Applicant.

W. B. Pradhan—for Opposite Party.

Marten, C. J.—This is a contest between an Ahmedabad commission agent as plaintiffs and their Delhi principal as defendants, and the point is, whether the plaintiffs had any power to sell the goods

they purchased on behalf of the defendants, when the defendants failed to retire certain drafts in payment of the goods. I say commission agents because we accept the finding of the learned Judge that that was the true relationship between the parties at the outset of the transaction.

On the other hand, we have it here that the agents bought these goods personally and paid for them, and that as between themselves and their own vendors they were acting, in effect, for an undisclosed principal, and were accordingly personally liable to them. We further think that on the facts of this case when the goods were forwarded to Delhi, they were merely sent, in effect, to the plaintiffs' own agents, viz, their bankers, and that the property did not pass to the defendants. What the plaintiffs did was to send the railway receipt forward to their bankers with the drafts, and the railway receipt was only to be handed over by the bank, when the draft was retired by the defendants. This is borne out by the letter of the defendants of 13th September 1926, in which they requested the plaintiffs to instruct the bank to get the goods of the above draft cleared and stored in the bank's own godown, and that they would pay as early as possible. It was really, therefore, an ordinary case of payment against documents.

The defendants, however, failed to carry out their duty, viz., to indemnify their agent under S. 222, Contract Act. They, therefore, broke the terms of what was a purely business arrangement, viz., to pay for the goods and pay also the railway freight. Thereupon, after notice by telegram, the plaintiffs sold the goods. The exact date of the resale does not appear and no complaint was made as to that. The suit is brought to recover the difference between what the plaintiffs have paid for the goods (including expenses incurred) and the proceeds of the sale.

The learned Judge held that in law the suit would not lie as the commission agents had no power of sale but had only a lien and that their remedy was to sue to be indemnified. It does not, however, appear that the attention of the learned Judge was drawn to the following passage in Bowstead on Agency, 7th Edn., at p. 265 :

"Where an agent, by contracting personally, renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent, vests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends that it shall pass, and the agent has the same rights with regard to the disposal of the goods and with regard to stopping them in transitu as he would have had if the relation between him and his principal had been that of seller and buyer."

Many English authorities are referred to in support of this statement, and we see no adequate reason why this part of the law of principal and agent as it exists in England should not apply in India. It is true that this precise statement is not found in the Indian Contract Act, but the Indian Contract Act is not exhaustive, and, speaking for myself, this provision appears to me to be good sense. What the defendants really ask here is that their commission agents should be obliged to carry the burden of the whole of these goods for an indefinite period until it pleases the defendants to pay, or alternatively that the defendants should only pay when a suit is brought against them and a decree is obtained and executed. Knowing that one party is at Ahmedabad and the other at Delhi, and knowing the possibilities of delay in Indian litigation, great injury might be caused to a commission agent if it was to be laid down that there was no remedy open to him except a law suit to enforce his just rights.

Under these circumstances, with all respect to the learned Judge, I am unable to agree with his decision. I think the case must be dealt with on the basis that in law the plaintiffs were entitled to sell and that accordingly this action would lie. But as regards the details we are not in a position to give judgment to-day for the plaintiffs for the alleged balance without further evidence on the figures or else an account.

Accordingly, our order will be, rule absolute, decree set aside, remand to the trial Court to determine the quantum of damages suffered by the plaintiffs on the basis that the plaintiffs were entitled to sell the goods in question and that the present suit would lie in law.

With regard to the costs, the respondents must pay the costs of this application. The costs in the original Court will be costs in the cause and should be

dealt with by the learned Judge on the remand.

Murphy, J.—I agree with the judgment just delivered by the learned Chief Justice and I have nothing to add to what he has said on the point.

R.K. *Decree set aside.*

** A. I. R. 1929 Bombay 262

PATKAR AND MURPHY, JJ.

Pandarinath Kikalal—Appellant.

v.

Thakoredas Shankardas Vani—Respondents.

Letters Patent Appeal No. 45 of 1926, Decided on 5th December 1928, against order of Percival, J., in Appeal No. 37 of 1926.

**** (a) Civil P. C., O. 9, R. 9—Limitation Act, S. 5 made applicable by rule under S. 122 to application under O. 9, R. 9—Rule is intra vires and retrospective—Limitation Act, S. 5 and Art. 164.**

The extension of the provisions of S. 5, Lim. Act, to an application under Civil P. C., O. 9, R. 9, is not an enactment of a new period of limitation. S. 5 is not in any way amended or repealed. The change effected by the rule under Civil P. C., S. 122, relates to the procedure governing applications to restore suits, dismissed for default, to the file. The application was governed by Limitation Act, Art. 164, and it continued to be governed by the same article. The rule, therefore extending S. 5, Lim. Act, to O. 9, R. 9 is intra vires and is retrospective : *A. I. R.* 1925 *Mad.* 14 (*F.B.*); 35 *All.* 227 (*P.C.*), *Rel. on., (Case law discussed.)* [P 263 C 2]

(b) Interpretation of Statutes—Appeal — Right to.

A right of appeal is not a mere matter of procedure · *A. I. R.* 1927 *P. C.* 242 (*P. C.*), *Ref.* [P 264 C 1]

(c) Transfer of Property Act, S. 52—Appeal—Words—Suit.

A suit and all appeals made therein are to be regarded as one legal proceeding : 6 *B. H. C.* 166; 16 *Cal.* 267 (*F. B.*) and 3 *Bom.* 214, *Rel. on.* [P 264 C 2]

H. Coyajee and *J. R. Gharpure*—for Appellant.

W. B. Pradhan—for Respondents.

Patkar, J.—This is an appeal against the order of the Joint First Class Subordinate Judge of Dhulia rejecting an application to restore the suit to the file. The plaintiffs filed suit No. 197 of 1918 to recover possession of the properties in suit. It is alleged that their pleader, Mr. Dev, compromised the suit without their consent and a decree was passed in terms of the compromise. The plaintiffs filed suit No. 25 of 1922 to set aside the compromise decree on the ground that the pleader had no authority to compromise the suit, and, therefore, the decree was not binding on them. This suit was dismissed on 15th January 1923, as their pleader Mr. Shidore was absent, and on the advice of their pleader they filed an appeal against the order of dismissal. The appeal was dismissed on 30th June 1925, on the ground that the order was not appealable. The plaintiffs, therefore, made an application on 18th June 1925, to restore the suit to the file, under O. 9, R. 9, Civil P. C. The learned Subordinate Judge held that the application was beyond time under Art. 164, Lim. Act, and that under S. 5, Lim. Act, the delay could not be excused. An appeal is filed against the order rejecting the application to restore the suit to the file.

The provisions of S. 5, Lim. Act, 1908, were made applicable to applications under O. 9, R. 9, by a rule made by this High Court under S. 122, Civil P. C. and published in the Bombay Government Gazette on 21st December 1927.

It is urged on behalf of the respondents that the rule made by the High Court under S. 122, Civil P. C. was ultra vires, that the High Court had no power to frame a rule modifying expressly or by necessary implication a rule of limitation prescribed by the Limitation Act, and that the word "rule" in "by any enactment or rule" in S. 5, Lim. Act, has been dropped by the amending Act 10 of 1922. The present rule does not alter expressly or by implication the period of limitation. The rule framed by the High Court applies a section of the Limitation Act which itself provides for such an application. The existence of Cl. (3) in R. 9, O. 22, shows that the provision of extending S. 5, Lim. Act was deliberately placed in Sch. 1, Civil P. C. The High Court has power under S. 122, Civil P. C., to regulate the procedure of the civil Courts subject to their superintendence, and has power by such rules to annul, alter or add to all or any of the rules in Sch. 1. "Enactment," under S. 3, Cl. 17, General Clauses Act, would include any provision contained in any Act. The words "by any enactment or rule" have been

changed into "by or under any enactment." The words "by or under" are more extensive than the mere word "by." The words "under any enactment" would mean under any provision contained in any Act, and would not be covered by the words "by any enactment," and would cover the rule-making power under any provisions of the Act, e. g., S. 122, Civil P. C.: see *Manibhai* v. *Nadiad City Municipality* (1). Such rules are to be as effectual as if they were part of the statute itself: see *Institute of Patent Agents* v. *Lockwood* (2) and *Shankarlal* v. *Dakor Temple Committee* (3). Similar contentions were considered and overruled by the Madras High Court in the Full Bench decision in the case of *Krishnamachariar* v. *Srirangammal* (4), where it was held that the rule framed by the High Court applying S. 5, Lim. Act to applications under O. 9, R. 13, Civil P. C., is intra vires.

It is further urged on behalf of the respondents that suit No. 197 of 1918 having been dismissed, the change effected by the rule should not be given retrospective effect as it affected the rights of the defendants under the decree, and reliance is placed on the decisions in *Ramakrishna Chetty* v *Subbaraya Iyer* (5) and *Girish Chandra Basu* v. *Apurba Krishna Dass* (6). In *In re Joseph Suche & Co., Ltd.* (7). it was held by Jessel, M. R. (p. 50):

"It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. [But] there is an exception to that rule, namely, . . . where enactments merely affect procedure and do not extend to rights of action. . . ."

But there is no vested right in procedure or costs: see Craies on Statute law, p. 332. In *Gajanan* v. *Waman* (8) Beaman, J., expressed a doubt (p. 883):

"whether it is strictly accurate to say that the law of limitation is always a law of procedure, that is to say, a purely adjective law, for amongst its other consequences, it certainly has the creation of rights by prescription and if those rights have vested in individuals under one law of limitation," it cannot be "seriously argued that they can be divested by the introduction of a new law of limitation."

It was, however, held in *Gurupadapa Basapa* v. *Virbhadrapa Irsanagapa* (9) that the law of limitation applicable to proceedings in execution is not the law under which the suit was instituted but the law in force at the date of the application for execution, and that Acts of Limitation like other laws relating to procedure apply immediately to all steps taken after they have come into force except when some provision is made to the contrary. The same view was taken in *Shib Shankar Lal* v. *Soni Ram* (10), which went up to the Privy Council in *Soni Ram* v. *Kanhaiya Lal* (11), where it was held that the law of limitation applicable to a suit or proceeding is the law in force at the date when the suit or proceeding is instituted unless there is a distinct provision to the contrary. The extension of the provisions of S. 5, Lim. Act to an application under O. 9, R. 9, is not an enactment of a new period of limitation. If there had been an alteration in the law of limitation, different considerations would have prevailed. The change effected by the rule under S. 122, Civil P. C., related to the procedure governing applications to restore suits, dismissed for default, to the file The application was governed by Art. 164, Lim. Act, and it continued to be governed by the same article. The application filed beyond thirty days, as required by Art. 164, was beyond time. The new rule relaxes the rigour of the law by extending the provisions of S. 5, to applications under O. 9, R. 9. The application was beyond time, but the procedure of the Court was amended by enabling the Court to excuse the delay in such an application. S. 5, Lim. Act, was not in any way amended or repealed. It was extended by the rule under S. 122 Civil P. C., to an application under O. 9, R. 9.

In *Republic of Costa Rica* v. *Erlanger* (12) Mellish, L. J., held that (p. 69) "no suitor has any vested interest in the

(1) A. I. R. 1927 Bom. 55=51 Bom. 105.
(2) [1894] A. C. 347.
(3) A. I. R. 1926 Bom. 179.
(4) A.I.R. 1925 Mad. 14=47 Mad. 824 (F.B.).
(5) [1913] 38 Mad. 101=18 I. C. 64=(1913) M. W. N. 303.
(6) [1894] 21 Cal. 940 (F.B.).
(7) [1875] 1 Ch. D. 48.
(8) [1910] 12 Bom. L. R. 881=8 I. C. 189.
(9) [1883] 7 Bom. 459.
(10) [1909] 32 All. 38 = 3 I. C. 725 = 6 A. L. J. 931.
(11) [1913] 35 All. 227 = 19 I. C. 291 = 4 I. A. 74 (P.C.).
(12) [1876] 3 Ch. D. 62.

course of procedure." In *Warner* v. *Murdoch* (13) it was held by James, L.J. that (p. 752) "no one has a vested right in any particular form of procedure", and in *Wright* v. *Hale* (14) it was held by Pollock, C. B. that (p 231) :

"when an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending ..... it does apply to such actions."

The general principle seems to be that alterations in the procedure are always retrospective unless there be some good reason against it : see Maxwell's Interpretation of Statutes, p. 401. Acts which take away vested rights ought not to be construed as having retrospective operation, but the case is different with regard to Acts regulating practice and procedure. The cases relied on on behalf of the respondents affected vested rights. The case would be different where an amendment of the law takes away any vested rights or affects a right of appeal. A right of appeal is not a mere matter of procedure : see *Colonial Sugar Refining Co.* v. *Irving*'(15) and *Delhi Cloth & General Mills Co.* v. *Income-tax Commissioner* (16).

In *Hajrat Akramnissa Begam* v. *Valiulnissa Begam* (17), where in considering the question whether S. 4, Act 6 of 1892, which declared S. 647 of the old Civil P. C., corresponding to S. 141 of the present Code inapplicable to applications in execution, deprived a party of the remedy under S. 103 of the old Civil P. C., corresponding to O. 9, R. 9, for restoring to file an application for execution which has been dismissed for default, it was held that alterations in forms of procedure are retrospective in effect and apply to pending proceedings. A similar view was taken in *Fateh Chand* v. *Muhammad Bakhsh* (18). Further, under S. 122, Civil P. C., the rule was framed for regulating the procedure of the civil Courts subordinate to the superintendence of the High Court. Having regard to the object for which the rule was enacted, namely, to relieve the rigour of the law without affecting any period of limitation or interfering with vested rights, we think that the rule made by the High Court effected a change in procedure and should be given retrospective effect so as to apply to pending proceedings.

It follows, therefore, that the rule is intra vires and would apply to pending proceedings. The rule was made applicable during the pendency of an appeal. A suit and all appeals made therein are to be regarded as one legal proceeding : see *Ratanchand Shrichand* v. *Hanmantrav Shivbakas* (19) and *Deb Narain Dutt* v. *Narendra Krishna* (20). In *Chinto Joshi* v *Krishnaji Narayan* (21) West, J. observes that (p. 216) :

"The legal pursuit of a remedy, suit, appeal, and second appeal, are really but steps in a series of proceedings connected by an intrinsic unity."

The rule, therefore, framed by the High Court would apply to the application made by the plaintiffs to set aside the decree under O. 9, R. 9.

We would, therefore, reverse the order of the lower Court and remand the case for disposal on the merits. Costs costs in the application.

Murphy, J.—The applicants in this proceeding had sued to have set aside the decree in Special Regular Suit No. 197 of 1918 of the Dhulia Court, on the ground that the suit had unauthorizedly been compromised by the pleader representing them. This, applicants' second suit, was dismissed for default on 15th January 1923. They next appealed against the order of dismissal, but their appeal was rejected by the District Court as mistakenly undertaken. Their next step was to apply to have their suit restored to file.

The learned First Class Subordinate Judge decided that their application was not in time, and that the delay could not, in the circumstances, be excused. Their appeal to this Court, against this order was dismissed summarily, and hence the present appeal under the Letters Patent.

The learned Subordinate Judge held that S. 5, Lim. Act, did not apply to an

(13) [1877] 4 Ch. D. 750.
(14) [1860] 6 H. & N. 227 = 6 Jur. (n.s.) 1212=9 L. T. 444.
(15) [1905] A. C. 369 = 91 T. L. R. 513 = 92 L. T. 738=74 L. J. P. C. 77.
(16) A. I. R. 1927 P. C. 242=9 Lah. 284=54 I. A. 421 (P.C.).
(17) [1893] 18 Bom. 429.
(18) [1894] 16 All. 259 = (1894) A. W. N. 74 (F.B.).
(19) [1869] 6 B. H. C. 166.
(20) [1889] 16 Cal. 267 (F.B.).
(21) [1879] 3 Bom. 214.

application made under O. 9, R. 9, and that the delay could, therefore, not be excused, under that section. The real point is that at the hearing of the appeal under the Letters Patent on admission, the Bench of this Court which heard it held that in view of the ruling in *Mahadeo* v. *Lakshminarayan* (22), S. 5 Lim. Act, could not be held to apply to an application made under O. 9, R. 9, but suggested that a rule applying it should be made, and meanwhile admitted the appeal.

The rule has since been made by this Court on 21st December 1927, under the powers conferred on it by S. 122, Civil P. C. It has been objected at the hearing that :

(1) The new rule is ultra vires of the powers of this Court ; and (2) that it cannot in any case operate retrospectively.

On the first point, I think Mr. Pradhan's objection is not arguable. Under S. 122, Civil P. C, this Court has power to annul, alter or add to any of the rules in Sch. 1 of the Code ; and the amendment has been made after previous publication in accordance with that power. A similar amendment to O. 9, R. 13, made by the High Court at Madras, was challenged in the case of *Krishnamachariar* v. *Srirangammal* (4), and it was held not to be ultra vires of the power given by S. 122, Civil P. C. The additional proviso to the rule does not, in itself, purport to give retrospective effect to the change it makes, and the question consequently arises: whether as a mere alteration in a rule of procedure, it should be deemed to have retrospective effect; or if, as a substantial alteration of the law affecting existing rights, it should be confined in its operation to matters arising since it was made.

The general rule touching the point in question is, that every statute which takes away or impairs vested rights, acquired under the previously existing law, must be presumed to be intended not to have retrospective operation. But this presumption is not applicable to enactments affecting procedure, or practice; for no one has a vested right in procedure and practice. Alterations in procedure, therefore, are held to be retrospective, unless a good reason to the contrary is forthcoming. But the right of appeal is a vested right, and it is on this ground that S. 154 of the Code has been enacted.

Now, the present applicants have no vested right in any appeal. When their second suit was dismissed for default, they could either have applied in time to have the order set aside; or have prayed for a review. They adopted neither of these courses, but appealed to the District Court. No appeal lay to that tribunal, and the appeal necessarily, failed; and since by then the time within which the remedies opened to them could be prosecuted was past, the decree in their suit became final, and they are precluded from bringing a fresh suit on the same cause of action. The consequence is, that the decree in suit No 197 of 1918, and the compromise it effected, will stand, unless the new rule has a retrospective effect.

But from the point of view of the decree-holder in Suit No. 197 of 1918, the result is different. His decree was not appealed against and was final, subject to being set aside in a suit framed for the purpose. Such a suit was framed, and ended as already stated, and in a way it may be said that the effect of the new rule, if it is given retrospective effect to, will be to deprive his decree of the finality it would have had as not being susceptible of again being challenged in another suit.

This is more or less the situation envisaged in the remarks of Beaman, J., in *Gajanan* v. *Waman* (8), though it has been held in some reported cases that the law of limitation is adjective law.

The real test appears to me to be, whether the new rule is essentially an alteration of the procedure of the Court or one of a rule of limitation, or affecting a right of appeal

This alteration, though it may possibly have the effect of granting the applicants' prayer to have the order of dismissal sat aside, if they can show sufficient ground, does not appear to me to affect any vested right in the decree-holder on the other side. It does not alter the law of limitation, or that of appeal. All it does is to invoke the general exception contained in S. 5 in cases falling within O. 9, R. 4, enabling an order of dismissal to be set aside on sufficient cause being shown.

(22) A. I. R. 1925 Bom. 521=49 Bom. 889.

Even if looked at in its aspect of affecting the law of limitation, there is some authority for the view that alterations in it are matters of procedure. I refer to the cases reported in *Shib Shankar Lal* v. *Soni Ram* (10). Again, strictly speaking, the new rule is not an alteration in the law of limitation itself, but in the application of one of the general exceptions to be found in that law to it.

I think, looking at all the circumstances, the change really amounts to one of procedure, and if so, there can be no vested right in it.

I agree with my learned brother Patkar, J., that, in the first place, the rule made by this Court, applying S. 5, Lim. Act, to proceedings under O 9, R 9, is not ultra vires; and also in his view that, since these proceedings are still pending and that the new rule is one affecting practice and procedure only, it applies retrospectively to the application which this appeal is about, and to the order proposed by him that the lower Court's order be reversed and that the matter be remanded to the original Court for a decision on the merits, and that the costs should be costs in the application.

P.R./R.K *Case remanded.*

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* A. I. R. 1929 Bombay 266

MIRZA AND MURPHY, JJ.

Emperor—Applicant.

v.

Lalya Bapu Jadhav—Accused.

Criminal Revn. Appln. No. 374 of 1928, Decided on 18th January 1929, against conviction and sentence passed by the Presidency Mag., Bombay.

*** (a) Bombay Prevention of Prostitution Act (11 of 1923), S. 7—Mistress is not necessarily prostitute.**

The idea underlying prostitution is that a woman should surrender her body for a monetary consideration to some one who is not in law entitled to have sexual intercourse with her. The position of a mistress is not necessarily that of a prostitute. The relationship is of a more permanent nature than the casual relationship implied in prostitution. Having a stray paramour would not constitute a woman a prostitute. [P 266 C 2]

(b) Bombay Prevention of Prostitution Act (11 of 1923), S. 7—Scope.

The matter whether a woman is an ordinary or common prostitute rests more on degree than on kind. [P 266 C 2]

U. L. Shah and *D. S. Babrekar*—for Accused.

P. B Shingne—for the Crown.

Mirza, J.—The finding of the learned Magistrate is that the accused applicant along with the original two accused and one Fakirya brought down the girl Parvati alias Shivi from Thana to Bombay and took her to the brothel of one Bhagirthi. It is contended on behalf of of the applicant that Parvati was already a prostitute before she was brought down to Bombay and hence in law no offence was committed. The words in S. 7 of Bombay Act 11 of 1923 are "becoming a prostitute." A person who is already a prostitiute, it is contended, cannot be said to become one afterwards. The evidence of Parvati's prostitution on which reliance is placed is that whilst she was in Thana she was in the keep of a G. I. P. Railway porter for about four years and during that time she also had a paramour. Such facts, in our opinion, are not sufficient to constitute a woman a prostitute. The idea underlying prostitution is that a woman should surrender her body for a monetary consideration to some one who is not in law entitled to have sexual intercourse with her. The position of a mistress is not necessarily that of a prostitute. The relationship is of a more permanent nature than the casual relationship implied in prostitution. Having a stray paramour would not in our opinion constitute a woman a prostitute. Mr. Babrekar has also relied upon the distinction between a common prostitute and an ordinary prostitute According to his contention an ordinary prostitute is one who leads an unchaste life and a common prostitute is one who is available to any man who pays a price for her virtue. We do not agree that such a distinction is contemplated by Bombay Act 11 of 1923. The matter in our opinion, appears to rest more on degree than on kind. The evidence does not establish that Parvati was a prostitute before she was brought down to Bombay. In our opinion the Magistrate's judgment is correct and this application fails. The application is rejected and the conviction and sentence confirmed. The accused must surrender to his bail-bond and serve the remainder of the sentence.

Murphy J.—I agree.

R.K *Application rejected.*

A. I. R. 1929 Bombay 267

MARTEN, C J. AND MURPHY, J.

Sadashiv Lakshman Deo — Applicant.

v.

Radhabai Vishnu Sathe — Opposite Party.

Civil Revn. Appln. No. 94 of 1928 Decided on 17th December 1928, against decision of Asst. Judge, Thana, in Appeal No. 157 of 1926.

Bombay Revenue Jurisdiction Act (1876), S. 4 (c)—Buffalo attached in execution of decree in assistance suit—Attachment raised on pledgee's objection—Suit against pledgee for damages for fraudulently inducing mamlatdar to raise attachment and thus preventing realization of rent decree does not lie—Tort.

Mamlatdar passed a decree in *R's* favour in an assistance suit for rent. In the course of the execution proceedings under that decree *R* got attached a buffalo belonging to *G*. On this *S* applied to the mamlatdar to raise the attachment on the ground that the buffalo had been pledged to him, and the mamlatdar accepting his allegation did so. *R* sued for damages alleging that *S* fraudulently put forward a claim to the buffalo and thus prevented *R* from realizing his decree.

Held: (*per Marten, C. J.*)—No action in tort to obtain damages for *S's* fraud, in inducing the mamlatdar to decide the attachment question in his favour, would lie, the result of the suit substantially being to rehear the decision of the mamlatdar on the very point as to whether the buffalo was pledged to *S*. [P 268 C 1]

Held: (*per Murphy, J.*)—The case arose out of the execution proceedings in the assistance suit and was barred by S. 4 (c). [P 268 C 2]

K. V. Joshi—for Applicant.

P. V. Kane—for Opposite Party.

Marten, C. J.—This is a story about a buffalo. Many pages of judgment are before us. And even that does not exhaust the literature on the subject, because, prior to the two judgments before us, there were proceedings in the mamlatdar's Court in which the buffalo in question was attached in execution of the mamlatdar's decree. It appears, however, from a judgment in the case that the real dispute between the parties is not as to the buffalo, but arises over some faction dispute in connexion with rival schools. Under those circumstances it is perhaps not surprising that the parties have succeeded in raising a large number of technical points, and that their ingenuity has resulted in the bringing of the present curious form of action for which no precise precedent has been cited to us. The buffalo is said to be worth Rs. 150. There is some reference as to the buffalo's milk and its calf, but the present judgment is confined to the buffalo.

In so far as one can consider this case at all seriously, the main point of law seems to be this. The mamlatdar rightly or wrongly decided that the buffalo in question had been pledged by the judgment-debtor with the present applicant Accordingly, the attachment was raised. The legal question, therefore, is, can the attaching creditor subsequently bring in the civil Courts an action for that against the person who put forward this successful claim to be a pledgee of the buffalo? Apparently that point has not been considered in either of the lower Courts. I gather it was first suggested by my brother Baker when the case came up for admission.

Now this is a serious point of law and I may refer to what James, L. J., says in *Flower* v. *Lloyd* (1) (p. 333):

"Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately ad infinitum."

Then the learned Judge proceeds (p. 334):

"The Court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds."

It is only right to point out that though Thesiger, L. J., agreed with the

(1) [1878] 10 Ch. D. 327=27 W. R. 496=39 L. T. 613.

judgment of James, L. J., Baggally, L. J., reserved his opinion.

On the other hand, there is authority for the proposition that an action lies to set aside a judgment obtained by fraud. Thus, in *Wyatt* v. *Palmer* (2), Lord Lindley, Master of the Rolls, stated that there was jurisdiction to entertain an action to impeach a judgment on the ground of fraud. And in *Cole* v. *Langford* (3) that Court did set aside a judgment which had been obtained by fraud.

Here there is no question of setting aside the mamlatdar's order. Indeed, it is not suggested that an action would lie in this Court for that purpose. The present action is stated to lie in tort to obtain damages for the fraud of the applicant in inducing the mamlatdar to decide the attachment question in favour of the applicant. Now I am not prepared to say that in no event would any suit lie in damages for a fraud practised on the Court. One, for instance, has been cited to us in *Bank of Madras* v. *Multan Chand Kanyalal* (4), where by a fraud the seal of the Court was improperly put on a certain warehouse, and this induced the judgment-creditor not to seize certain articles which he was entitled to seize. In that case the Court entertained an action for damages.

But here what we are substantially asked to do is to re-hear the decision of the mamlatdar on this very point as to whether the buffalo was pledged to the applicant. It seems to me that if on a simple point of fact like that we were to allow this class of suit, then practically in every mamlatdar's suit it would be open to the defeated party to bring an action in the ordinary civil Courts for damages for fraud against his successful opponent, in inducing the mamlatdar to arrive at the decision which he did. In this connexion it must be remembered that in one sense every false claim put before the Court deliberately is in the nature of fraud. No precedent for such a suit has been cited to us, and, speaking for myself, I respectfully share the apprehension which James, L. J., expressed in *Flower* v. *Lloyd* (1), if we were to open the door to suits of that description. Still less ought we to do so if the real dispute between the parties in this case is not about the buffalo, but is due to rival factions connected with rival schools.

It seems to me, therefore, that on this ground alone the applicant is entitled to succeed. He has put forward a further point based on the Bombay Revenue Jurisdiction Act, 1876, S. 4 (c), that this is a claim

"connected with or arising out of . . . . the rendering of assistance by Government or any officer duly authorized in that behalf to superior holders or occupants for the recovery of their dues from inferior holders or tenants."

It is said that the suit in the mamlatdar's Court was a rent suit, and that accordingly the suit in the mamlatdar's Court was an assistance suit covered by that particular section, and that therefore the present proceedings that arise out of what happened there are caught by that particular act. But personally I prefer to express no opinion on that point. I prefer to base my judgment on the broad proposition which I have already stated.

Accordingly, I would make the rule absolute, dischange the orders in the Court below, and dismiss the suit.

Murphy, J.—The mamlatdar passed a decree in plaintiff's favour in an assistance suit for rent. In the course of the execution proceedings under that decree, the plaintiff got attached a buffalo belonging to defendant. On this, the petitioner applied to the Mamlatdar to raise the attachment on the ground that the buffalo had been pledged to him, and the mamlatdar accepting his allegation did so. Plaintiff's case was that the alleged pledge was a fraud, and she sued for damages. Both the lower Courts decreed the plaintiff's claim.

It has been objected in appeal that the suit was not maintainable owing to the bar of S. 4, Cl. (c), Bombay Reveuue Jurisdiction Act of 1876. It seems to me, on a consideration of the provisions of this section, which takes away the jurisdiction of the civil Court in certain matters, that the claim in this case does fall within sub-S. (c) of the Act. For sub-S. (c) reads as follows :

"Claims connected with or arising out of any proceedings for the realization of land revenue or the rendering of assistance by Government or any officer duly authorized in that behalf to superior holders or occupants for the recovery of their dues from inferior holders or tenants."

(2) [1899] 2 Q. B. 106=68 L. J. Q. B. 709=47 W. R. 549=80 L. T. 639.
(3) [1898] 2 Q. B. 86=67 L. J. Q. B. 698=14 T. L. R. 427.
(4) [1903] 27 Mad. 343.

The claim in this case certainly arises out of the execution proceedings in the assistance suit. The cause of action is based on fraud, and what the claimant seeks is to avoid what has happened in those proceedings. I think the claim does fall within the above clause, and since it is not within any of the exceptions in the provisos to Ss. 4 and 5, I think the suit is not maintainable on this ground also.

R K. *Suit dismissed.*

A. I. R. 1929 Bombay 269

MIRZA AND MURPHY, JJ.

Emperor

v.

Yellappa Durgaji Jadhav—Accused.

Criminal Revn. Applns. Nos. 434 of 1928 and 15 of 1929, Decided on 25th January 1929, against the order of Special Mag. First Class, Belgaum.

(a) Criminal P. C., S. 215—Test to determine whether there is illegality is to see Magistrate's findings on evidence and whether they sustain charge framed.

High Court under S. 215 would not ordinarily interfere with an order of committal unless it is satisfied from the record that there was an illegality in the order. The test in a matter of this nature is to see from the judgment of the Magistrate what his findings on the evidence are and whether those findings are capable prima facie of sustaining the charges he has framed and on which the committal to the Court of Session is made.

[P 269 C 2]

(b) Criminal P. C., S. 208 (3)—Mere recording reason does not oust appellate Court's jurisdiction—Reason must be valid and acceptable.

The jurisdiction of High Court is not ousted under S. 208 on the Magistrate recording a reason for his refusal. The reason recorded by the Magistrate should be one which the High Court would regard as valid and acceptable. The Court, however, would not interfere in the matter unless the reason recorded by the Magistrate appears on the face of it to be illegal, or untenable: *A. I. R.* 1927 *Pat.* 243, *Diss. from*: 36 *Mad.* 321 and 42 *Cal.* 608, *Ref.* [P 270 C 2, P 271 C 1]

G. P. Murdeshwar, *S. N. Karnad*, *O'Gorman*, and *S. K. Nabiullah*—for Accused 13.

Jamshed Kanga and *P. B. Shingne*—for the Crown.

Mirza, J.—These two applications have been heard together, and raise substantially the same points. Both applicants have been committed by the Special Magistrate, First Class, Belgaum, to take their trial before the Sessions Court, Belgaum, the first applicant on charges under Ss. 120-B, 161 or 213, I. P. C., and the second applicant under Ss. 120-B, 161 or 213 and 114 and 219, I. P. C The applications are made under the provisions of S. 215, Criminal P. C., to have the committal quashed on the ground of certain illegalities that are alleged. The grounds relied upon seem mainly to be the following:

(1) that there is a misjoinder of the accused persons, as well as a misjoinder of charges;

(2) that in the alternative if it is held that there is no misjoinder of the accused or of charges, the joint trial of the applicants, along with their co-accused in the committal order would seriously prejudice their trial and lead to a miscarriage of justice;

(3) that one of the charges against the first applicant being under S. 213, I. P. C the same is not maintainable in law as it has not been found that there was an offender whom the applicant attempted to screen; and

(4) that the learned Magistrate wrongly disallowed a certain prosecution witness being summoned and examined and certain documents produced on behalf of the first applicant and certain witnesses summoned and examined on behalf of the second applicant.

Under S. 215, Criminal P. C., we would not ordinarily interfere with an order of committal unless we were satisfied from the record that there was an illegality in the order. The test, in my opinion, in a matter of this nature is to see from the judgment of the learned Magistrate what his findings on the evidence are and whether those findings are capable prima facie of sustaining the charges he has framed and on which the committal to the Court of Session is made.

Mr. Murdeshwar on behalf of the first applicant has not been able to point to any part of the judgment of the learned Magistrate which would show that there is any illegality in his order of committal on the charges he has framed. With regard to the question of the wording of the charges and whether there is a mis-

joinder of the accused, it will be open to the applicants to urge their contentions before the Sessions Court. We have no desire to interfere in a matter, which the Sessions Court would be competent to determine.

With regard to the contention that a joint trial might prejudice the accused, that again is a contention, which, if the applicants are so advised, they might urge before the Sessions Court. Mr. Murdeshwar has urged that on the prosecution evidence the first accused is shown to have come on the scene of the alleged conspiracy at a late stage, and even granting that the charge of receiving illegal gratification can be proved against him, that, in itself, would not make him a member of the conspiracy. This is an argument which, in my opinion, might be urged if so advised before the Sessions Court. So also the further contention that the joint trial of the first accused with Messrs. Ring and Moghe who have already been tried and convicted in what is known as the Jugal bribery case might prejudice his trial before a jury.

Mr. O'Gorman on behalf of the second applicant supports the above contentions. He has taken us through the record in support of his contention that the evidence against the second applicant is not so full as against the other accused. He contends that the only alleged act from which certain inferences are drawn by the learned Magistrate turns upon an allegation that the second applicant received a sum of Rs. 500 as illegal gratification for delivering a judgment by which he discharged one Algouda who was being tried before him for an offence. This allegation, according to Mr. O'Gorman's contention, is based upon the evidence of an accomplice witness, which requires corroboration. There is some force in Mr. O'Gorman's contention that the joint trial of the second applicant in the company particularly of persons who have already been convicted on a similar charge in a previous trial might prejudice his case with the jury. We do not propose to express an opinion on the point whether such a joint trial is or is not likely to prejudice the case of either applicant with the jury. It is a contention, however, which, if urged before the Sessions Judge, will no doubt be taken into consideration by him.

With regard to the third point urged by Mr. Murdeswar, it appears that Algouda was discharged and not acquitted. Whether the charge is one which should stand or should be deleted, is again a matter which the Sessions Court will be competent to decide before the trial commences. It is not necessary in my opinion, that we should give any decision on the point at this stage.

The last point urged on behalf of both the applicants relates to the exclusion of certain evidence which they wanted to adduce before the learned Magistrate. In refusiug the application of the first applicant in this behalf the learned Magistrate has given his reasons as follows:

"(1) This application has been made very late almost at the last stage. (Witness was given up by the prosecution on 6th November and the defence could have made this application earlier);

and (2) even if he is summoned and examined it would be a question of appreciation of evidence and as there are sufficiently strong materials about a prima facie case against the applicant it will be for the higher Court e. g., Sessions Court, to decide whether the prosecution evidence should be believed or not."

This order was made on 26th November 1928. The application, it appears, was made towards the end of the trial. Under S. 208 (3), Criminal P. C., if an accused person applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so. The learned Magistrate has recorded his reasons for his refusal to accede to the application. The learned Advocate-General, on behalf of the opponent, relies on the ruling of the Patna High Court in *Saadat Mian* v. *Emperor* (1), which is to the effect that the Court is not concerned whether the reasons given by the Magistrate would have appealed to any other person or not but has only to see whether the Magistrate has complied with the provisions of S. 208. In the present case, in my judgment, it is not necessary for us to accept this ruling in its entirety. With great respect, I am not prepared to say that the jurisdiction of this Court would be ousted under

(1) A.I.R. 1927 Pat. 243=6 Pat. 329.

S. 208, Criminal P. C., on the Magistrate recording a reason for his refusal. The reason recorded by the Magistrate should be one which the Court would regard as valid and acceptable. The Court, however, would not interfere in the matter unless the reason recorded by the Magistrate appears on the face of it to be illegal, or untenable. The learned Advocate-General has relied on this point also on the ruling of the Madras High Court in *Sessions Judge of Coimbatore* v. *Kangaya Mantradiyar* (2) and of the Calcutta High Court in *Emperor* v. *Surath* (3). In the present case there is nothing in the reasons given by the learned Magistrate for refusing the application which could be regarded as illegal or unjust.

Mr. O'Gorman on behalf of the second applicant complains that the learned Magistrate disallowed his application for certain tippans and travelling allowance bills being produced, as well as certain witnesses being summoned. The learned Advocate General has called our attention to the evidence given in the case by the witness, Tukaram, Ex. 150, who stated that no yadis were kept. A yadi is the same as a tippan. With regard to the travelling allowance bills, it is shown that they were produced in Court. The reasons given by the Magistrate for refusing the second appellant's application were in my opinion, cogent and sound.

The rule is discharged.

Murphy, J.—The appellants who are accused 12 and 13 in a case which has been committed for trial to the Sessions Judge at Belgaum, challenge the legality of their commitment and seek to have it set aside. The case is one known as the Satti case of Belgaum, and the applicant, Yellappa Durgaji Jadhav, was the Sub-Inspector of Police employed at that place, and acting as reader to accused 10 in the case, who was the Deputy Superintendent of Police. The second applicant was a Mamlatdar and Magistrate, 1st Class, of the same District. The former is charged under Ss. 120-B, 161 and 213 and the latter under Ss. 120-B, 161 or 213, 114 and 219, I. P. C. The commitment has been characterised as illegal on four different grounds, but in the case of the first applicant, the first ground put forward is in reality one on the merits and appreciation of the evidence in the case, and I do not think it can be considered in an application under S. 215, Criminal P. C.

It is next argued in favour of this applicant that since all the offences alleged against him are triable by a Magistrate he should not have been committed to Sessions Court, but should have been tried by the Committing Magistrate himself. He is really charged with taking part in a conspiracy, with many other persons who are also accused in the case—a conspiracy which had for its object the taking of bribes from certain persons in connexion with a criminal complaint which had been lodged, and, I think, that on these facts, he has been rightly committed to the Sessions Court with the other accused. Though the offences charged against him are triable by Magistrate, some of them are also triable by the Sessions Court, and there is no illegality in so committing him to it.

The next point made in favour of this accused is that the charge under S. 213 was unsustainable, as it had not been actually proved that there really was an offender to be screened, and consequently, that the charges framed could not stand. But whether this is really the case or not, we are not at this stage prepared to say, and it will be a defence available to the applicant in the Sessions Court, and I think it cannot now be prejudged.

The last two grounds are grounds common to the cases of both the accused-applicants. It appears that in the case of both, applications were made on 20th November for a certain witness to be called for the defence—in the one case a man who had been summoned for the prosecution and had not been examined by the other side and had been discharged—and in the other, a witness required to contradict the evidence of a witness whose examination had already been concluded. The learned Magistrate rejected both these applications mainly on the ground that they were belated, and it is now contended that this refusal

(2) [1912 36 Mad 321=23 M. L. J. 368=17 I. C. 410=(1912) M. W. N. 1243.
(3) [1914] 42 Cal. 608=28 I. C. 799=19 C. W. N. 935.

to summon evidence for the defence was contrary to the provisions of S. 208 and an illegality vitiating the commitment. But Cls. (1) and (3), S. 208, Criminal P. C., are framed in different terms. By Cl. (1) all defence witnesses that may be produced on behalf of the accused must be examined, but where it is necessary to issue process to procure such a witness's attendance, a discretion is conferred by Cl. 3, on the Magistrate, to refuse such an application. if he sees fit to do so, and for reasons to be recorded in writing. Their Lordships of the Patna High Court have held in the case reported in *Saadat Mian* v. *Emperor* (1) that when the conditions of Cl. (3) are complied with, no illegality can be said to have been committed. In this case the reasons have been recorded in writing, and it has been argued that as these are insufficient, an illegality was committed. As I have already stated, the main reason for rejecting the applications was that they were belated. They were made on 20th November, and orders on them were passed on 26th November, on which day the proceedings went on, and the accused was committed on 1st December last. Though we have listened carefully to all that could be urged on this point, we are unable to find that the rejection here was unreasonable and improper, and I think the commitment cannot be set aside on this ground.

The last ground urged and which is also common to both the applications is that the applicants will be prejudiced if they are tried along with the other accused committed with them. I think it is not possible, nor would it be proper for us to say at this stage that such would be the case. The facts against accused 13, the Magistrate, have been disclosed and it has been urged strongly before us that he is not in exactly the same category as the other accused, but this is a matter well within the cognizance of the Sessions Judge, who has ample powers both to amend the charges, and if he considers it necessary in the intersest of justice, to try any accused person separately from other committed jointly with him, and I have no doubt that he will give the point his most careful consideration and that it is not necessary for us to give any direction on the point.

I think that both these applications should be dismissed and agree with the order proposed.

R.K. *Applications dismissed.*

A. I. R. 1929 Bombay 272

MIRZA AND PATKAR, JJ.

Emperor

v.

Gokuldas Haridas—Accused.

Criminal Revn. Appln. No. 399 of 1928, Decided on 19th February 1929, against the conviction and sentence passed by the City Magistrate, Ahmedabad.

Factories Act, S. 23 (a)—Child includes one of fourteen years.

Even in the case of a child of fourteen there is need for a certificate under S. 23, Cl. (a). [P 272 C 2]

G. S. Rao—for Accused.

P. B. Shingne—for the Crown.

Mirza, J.—It is found that the girls employed in the factory were aged fourteen years. They would, therefore, come under the definition of "child" in the Factories Act. S. 23, Cl. (a), requires that:

"No child shall be employed in any factory unless he is in possession of a certificate granted under S. 7 or S. 8 showing that he is not less than 12 years of age and is fit for employment in a factory and while at work carries either the certificate itself or a token giving reference to such certificate."

It is admitted that the girls were not in possession of any such certificate or token. The certificate required by S. 23 must state in the case of a child who has completed twelve years that he or she is fit for employment in a factory. Dewan Bahadur Rao has contended before us that even in the case of a child of fourteen there is no need for such a certificate. We do not agree with that contention.

The rules in these three cases are discharged.

R.K *Rules discharged*

A. I. R. 1929 Bombay 273

MIRZA AND PATKAR, JJ.

In re Nurmahomed Karamelahi—Applicant.

Criminal Revn. Appln. No. 414 of 1928, Decided on 13th February 1929, against order of Bench of Honorary Magistrates, Second Class, Andheri.

Bombay District Municipal Act (3 of 1901), S. 188—Notified Area Rules, R. 18 proviso 1.

Proviso to R. 18 contemplates that the occupier from whom the taxes are leviable should be a tenant of the property : 43 *Bom.* 864, *Ref.* [P 273 C 2]

S. R. Parulekar—for Applicant.

P. B. Shingne—for the Crown.

Mirza, J.—The applicant has applied in revision against an order of a Bench of Honorary Magistrates, Second Class, Andheri, ordering him to pay Rs. 226-2-0 being the arrears of house-tax and Halalkhor-tax in respect of the past seven years of a house at Ville Parle now in his occupation.

The evidence in the case showed that the applicant was employed twenty months ago as watchman for this house on Rs. 25 per month by the owner Lady Janbai Tharia Topan. The house is reputed to be haunted. Lady Janbai has been absent from India and is now said to be in South Africa. The applicant admits that he is staying in the bungalow and is occupying it to let the world know that it is not haunted. He also admits that he has been conducting a tea-shop in a portion of the house. He further admits that during the period of his twenty months' service he has received nothing from Lady Janbai for his wages. From these facts the Bench Magistrates have inferred that Lady Janbai let the premises to the applicant in lieu of his services as watchman. In that view of the case they held that the applicant would be liable for the arrears of taxes under the provisions of Rr. 18 and 20 of the rules framed by Government as Notified Area Rules under the power conferred on them by S. 188, Bombay District Municipal Act (Bom. 3 of 1901). S. 188, sub-S. (i) (a) of the Act provides that the Governor-in-Council may by notification apply or adapt to any notified area the provisions of any section of this Act, or part of any such section, or of any rules in force or which can be imposed in any municipal district under the provisions of this Act, subject to such restrictions and modifications, if any, as he may think fit. R. 18, Notified Area Rules seems to be taken and adapted from S. 68, Bombay District Municipal Act. Proviso to that rule is in the following terms :

"Provided that on failure to recover any sum due on account of such tax from the person primarily liable, such portion of the sum may be recovered from the occupier of any part of the buildings or lands in respect of which it is due, as bears to the whole amount due the same ratio, which the rent annually payable by such occupier bears to the aggregate amount of rent so payable in respect of the whole of the said buildings or lands, or to the aggregate amount of the letting value thereof, if any, stated in the authenticated assessment list whichever of those amounts is the greater."

This proviso, in our opinion, contemplates that the occupier from whom the taxes are leviable should be a tenant of the property. There is no evidence in the case that the applicant is a tenant of this property. The inference drawn by the Bench Magistrates can be regarded only as in the nature of a conjecture. The learned Government Pleader has argued that the rent need not necessarily be payment in money, but services may be accepted in lieu of such payment. This would be justified by the definition of rent under the Transfer of Property Act, but there is no evidence in this case that Lady Janbai entered into any agreement with the applicant whereby the applicant became her tenant in this sense of the term. In our opinion the case does not fall within R. 18, Notified Area Rules and the order made by the Bench Magistrates cannot be sustained.

Having regard to the conclusion we have come to, it is not necessary for us to express an opinion on the point whether the Governor-in-Council by omitting to incorporate in these rules the proviso to S. 87, Bombay District Municipal Act, which restricts such claims against an occupant, to the taxes that have accrued during the past one year only and have since remained unpaid, can be said to have modified the provisions of the Act so as to make the limitation period of one year prescribed by it inapplicable to claims against occupants of premises Prima facie the Governor-in-Council would have no power under S. 188, Bombay District Municipal Act, to frame rules

which would be contrary to or inconsistent with the main provisions of the Act.

Nor is it necessary for us to express an opinion on the Government Pleader's further contention that the Governor-in-Council may by these rules override the general provisions of the Limitation Act in that behalf and make the arrears of taxes beyond the period of limitation payable. No authority was cited for this contention.

That we have jurisdiction to entertain this application is covered by the ruling of this Court in *Dinbai Jijibhai, In re* (1).

The order of the Bench Magistrates is set aside and the rule made absolute. The applicant is allowed to withdraw the moneys he brought into Court.

R.K. *Rule made absolute.*

(1) [1919] 43 Bom. 864=52 I. C. 670=21 Bom. L. R. 775.

A. I. R. 1929 Bombay 274

MIRZA AND PATKAR, JJ.

Ratansi Hirji—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 433 of 1928, Decided on 26th February 1929, against the conviction and sentence passed by the Chief Presy. Magistrate Bombay.

(a) Bombay City Municipal Act (3 of 1888), S. 412-A (b)—Ghee does not come in "other milk products."

The words "other milk products" appearing in S. 412-A (b) should be construed ejusdem generis with reference to what precedes those words and the meaning to be given to them should be less comprehensive than they would otherwise be if they stood by themselves without the words "milk, butter" preceding them. They would include such products of milk as are the direct results of milk and would be liable to speedy decay, like butter, as for example, whey, curd, or cream, and would not include ghee which is not the direct result of milk and is not liable to speedy decay. [P 275 C 2, P 278 C 2]

(b) Interpretation of Statutes—Co-ordinate sections.

Where two co-ordinate sections are apparently inconsistent an effort must be made to reconcile them. [P 275 C 2]

(c) Interpretation of Statutes—Enactment not expressly modifying or repealing another—Each should be construed consistently with the other.

The language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal. [P 275 C 2]

(d) Interpretation of Statutes—Statement of Objects and Reasons.

In construing the provisions of a statute it is not open to the Court to consider the Statement of Objects and Reasons as they form no part of the statute. [P 276 C 2]

(e) Interpretation of Statutes—Ejusdem generis.

Where general words follow particular and specific words, they must be confined to things of the same kind as those specified. [P 278 C 2]

(f) Interpretation of Statutes—Fiscal enactment.

In the case of penal statutes and fiscal enactments a strict construction most favourable to the subject ought to be adopted. [P 278 C 2]

G.N. Thakor, and *V. N. Chhatrapati*—for Accused.

H. C. Coyajee—for Municipality.

Mirza, J.—This was a test case brought against the applicant at the instance of the Bombay Municipality for an offence under S. 412-A (b), City of Bombay Municipal Act (Bom. 3 of 1888). The Chief Presidency Magistrate, before whom the applicant was tried, convicted and sentenced him to pay a fine of Rs. 10. From the conviction and sentence the applicant has come before us in revision.

Section 412-A (b), City of Bombay Municipal Act, 1888, was inserted by Bombay Act 6 of 1916. As since modified it reads as follows:

412-A. No person shall without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf,

(b) use any place in the City for the sale of milk, butter or other milk products.

The words "butter or other milk products", appearing after the word "milk" in Cl. (b) of this section, were inserted by Bombay Act 6 of 1916, S. 8. It is admitted by the applicant that he uses a place in the Bombay city for sale inter alia of ghee, but he contends that he never keeps in that place a quantity of ghee for sale in excess of four cwts. He further admits that he has no license from the Bombay Municipality for the sale of ghee but contends that under the provisions of S. 394, Municipal Act, he is exempt from taking out a license for the sale of ghee which is not in excess of four cwts. S. 394, Municipal Act, inter alia provides:

"(1) Except under and in conformity with the terms and conditions of a license granted by the Commissioner no person shall (a) keep,

in or upon any premises, for any purpose whatever, (i) . . . or (ii) any article specified in Part 2 of Sch. M in excess of the quantity therein prescribed as the maximum quantity of such article which may at any one time be kept in or upon the same premises without a license."

Schedule M Part 2, mentions "Ghee kept for sale" and the "Maximum quantity which may be kept at any one time without a license is 4 cwts." The present S. 394, Municipal Act, was substituted for the original section by Bombay Act 2 of 1911, S. 15. The clause "Ghee kept for sale . . . 4 cwts." was inserted in Sch. M. Part 2, by Bombay Act 8 of 1918, S. 22 (a).

The learned Magistrate is of opinion that "ghee" falls under the description "other milk products" in S. 412-A (b). For the meaning to be given to the term "ghee" he relies upon S. 4 (ii), Expln.(1), Bombay Prevention of Adulteration Act (Bom. 5 of 1925) which states that ghee or butter which contains any substance not exclusively derived from milk shall be deemed to be an article of food not of the nature, substance or quality it purports to be.

It will not be disputed that "ghee" is derived from milk but can it be said of "ghee" as it can be said of cream, butter whey or curd that it is a direct product of milk? For one thing "ghee" is not subjects to the same speedy decay as these products of milk along with milk are. In this respect "ghee" does not resemble milk to the same extent as these products of milk do. "Ghee" is made from melted butter. Pure "ghee" no doubt is derived from milk, as it is made from butter which is a product of milk. "Ghee" however, is not the same as butter. It possesses certain qualities, e. g., durability, which make it distinct from butter. In many respects "ghee" and butter are put to different uses.

The contravention of S. 412-A is made penal under S. 471, Municipal Act The subject of contravention in S. 412-A (b) is mentioned in S. 471 as "milk, butter, etc., not to be sold without a license," the words "other milk products" are not mentioned.

Section 412-A (b) read with S. 471 being a penal section which affects the finances of the subject must, according to the recognized rules of interpretation be strictly construed. "Ghee" is a well-known article of food of which the legislature must be deemed to be aware. It is expressly set out in certain parts of the Municipal Act, e. g, in Ss. 414 and 415. The words "other milk products" appearing in S. 412-A (b) should, in my opinion, be construed ejusdem generis with reference to what precedes those words In that view "other milk products" would be of the same kind or nature as milk or butter. The meaning to be given to the words "other milk products" should be less comprehensive than they would otherwise be if they stood by themselves without the words "milk, butter" preceding them. Thus in *Clark* v. *Gaskarth* (1), in construing the words "or other product" in "corngrass, or other product" appearing in 11 Geo. 2, C. 19, it was held that young trees were not distrainable under these words. Similarly, the .Sunday Observance Act, 1677, 29 Car. 2, C. 7, enacts that no tradesman, artificer, workman, labourer, or other person whatsoever shall follow the ordinary calling on Sunday. In *Sandiman* v. *Breach* (2), the word "person" appearing in this section was construed as being confined to persons of callings of the same kind as those specified by the preceding words, so as not to include a farmer.

The construction for which the prosecution contends would bring S. 412-A into conflict with S. 394 (1) (a) (ii), read with Sch. M, Part 2, whereby the possession of "ghee" for sale without a license is permitted upto four cwts. Where two co-ordinate sections are apparently inconsistent an effort must be made to reconcile them: see *Ebbs* v. *Boulnois* (3). The language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal: see Maxwell on Interpretation of Statutes, 5th edn., p. 253. Repeal by implication is not favoured; see Maxwell, ibid 268

The learned Magistrate has attempted to reconcile his view of S. 412-A with S. 394 in this manner. He says the words "ghee kept for sale," appearing in S. 394, Sch. M, Part 2, must mean ghee kept in

(1) [1818] 8 Taunt. 431.
(2) [1827] 7 B & C. 96=5 L. J. (o. s.) K. B. 298=9 D. & R. 796.
(3) [1875] 10 Ch. 479=44 L. J. Ch. 691=23 W. R. 820=32 L. T. 842

such a place not for storing purposes, but for sale although that place itself is not a place for sale. Mr. Coyajee for the prosecution adopts this argument. He has urged before us that as long as a person keeps any quantity of ghee stored in his house or godown he is under no obligation to obtain a license for doing so; but if he stores "ghee" in excess of four cwts. without selling any part of it but intending eventually to sell he must obtain a license for such storage. Sch. M, Part 2, according to this argument, would govern such a case only. "Ghee" stored up to any quantity for private consumption or up to four cwts. for sale would require no license. But before any part of the "ghee" could be sold although the total quantity stored at the time may be under four cwts., a license would be required. S. 412-A (b) would, according to this argument, apply to such a case. Mr. Coyajee admits that the construction he is seeking to put on S. 394 read with S. 412-A would necessitate in some cases the obtaining of two separate licenses in respect of the same goods: one license for storing "ghee" in excess of four cwts. with the intention of selling the same and another license to enable the storer to sell any part of these goods. The legislature, in my opinion, could not have intended such a result.

I am unable to agree with this attempt to reconcile S. 412-A with S. 394. "Ghee" kept for sale, in my opinion, means that it may be sold where it is kept. S. 394, Sch. M, Part 2, relating to "ghee" is a later enactment than S. 412-A. Part 2, Sch. M relating to "ghee" must, in my opinion, be regarded as forming part of S 394. There is no apparent contradiction or inconsistency between S. 412-A and the provisions of Sch. M, Part 2, relating to "ghee" which would call for the application of the rule of construction that the provisions of this section should prevail against those of the schedule to the Act. S. 394 read with Sch. M, Part 2, relating to "ghee," forms one enactment of the legislature, and S. 412-A forms another enactment of the legislature although both are embodied in the Municipal Act which, for the sake of convenience and ready reference, is made to read as a whole. It does not follow that if a conflict or inconsistency is found to exist between two provisions appearing in the Municipal Act regard will not be had to the respective dates of their enactment in order to ascertain whether the later enactment cannot by implication be said to have repealed the earlier. If an attempt at reconciling S. 394, Sch. M, Part 2, with S. 412-A is impossible, then S. 394, Sch. M, Part 2, relating to "ghee" being the later enactment of the legislature must be deemed by implication to have repealed S. 412-A which is earlier: see *Wood* v. *Riley* (4).

Mr. Coyajee has relied upon the statement of objects and reasons in connexion with Bill No 6 of 1918 which became Bombay Act 8 of 1918 as a help towards construing the meaning to be given to the words "other milk products" in S. 412-A. He has called our attention to the Bombay Government Gazette, Part 5, 1918, p. 602, para. 22, which states :

"Ghee is as combustible as vegetable oils, particularly when kept in a large quantity. Under Part 4 a license is required for manufacturing ghee."

In construing the provisions of a statute it is not open to us to consider the statement of objects and reasons as they form no part of the statute. I am unable, however, to agree that the statement of objects and reasons to which Mr. Coyajee has referred supports his contenion. If on this argument the intention of the legislature was to embody in Sch. M, Part 2, the statement of objects and reasons here relied on, it would have made the provisions for the licensing of "ghee" in excess of four cwts. applicable to all cases and not restricted to cases where there is intention to sell.

Section 412-A in its present from was enacted as far back as 1916. This test case and its companion cases are the first attempt on the part of the municipality since then to apply its provisions to "ghee." The construction now sought to be put on S. 412-A by the prosecution cannot, in my opinion, be sustained in view of the express provisions of S. 394, Sch. M, Part 2, relating to "ghee" and the absence of any express mention of "ghee" in S. 412-A.

The conviction of the applicant is reversed, the sentence set aside and the fine, if paid is ordered to be refunded.

Patkar, J.—The accused in this case is charged under S.412-A, Cl. (b), City of Bombay Municipal Act 3 of 1888, for having used a place for the sale of ghee

(4) [1867] 3 C.P. 26=37 L. J. C. P. 24=16 W. R. 146=17 L. T. 216.

without a license from the Municipal Commissioner. On 24th July 1928, the municipality called upon the accused, who has a grocer's shop, to apply for a license. The accused refused to do so on the ground that he was selling a few tins of ghee a month and that it was not necessary to apply for a license. On 10th August three tins of ghee were found in his shop and as he had no license the present prosecution was launched against him. The defence of the accused was that he was entitled to keep four cwts., that is, about 12 tins, of ghee for sale in his shop under S. 394 (1) (a) (ii), City of Bombay Municipal Act. S 394 (1) (a) (ii) provides that

"except under and in conformity with the terms and conditions of a license granted by the Commissioner no person shall keep, in or upon any premises, for any purpose whatever, any article specified in Part 2, Sch. M, in excess of the quantity therein prescribed as the maximum quantity of such article which may at one time be kept in or upon the same premises without a license."

Schedule M, Part 2, enumerates the articles and the maximum quantities which may be kept at any one time without a license, and by Act 8 of 1918, S. 22, ghee kept for sale was enumerated as one of the articles and the maximum quantity which may be kept at any one time without a license was prescribed to be four cwts. It is clear, therefore, that the accused was entitled to keep in or upon his premises ghee for sale up to four cwts. The quantity found in his shop was about one cwt. S. 412-A (b) enacts that:

"no person shall without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf use any place in the City for the sale of milk, butter or other milk products."

It is urged on behalf of the prosecution that ghee is included in the words "other milk products," and, therefore, it was necessary for the accused to get a license from the Commissioner if he intended to use the shop for the sale of ghee in any quantity whatsoever. It is further urged that Ss. 394 and 412-A are enacted for two independent purposes, the former for the purpose of regulating the storage of certain specific inflammatory or combustible articles, and the latter for regulating the sale and preventing the adulteration of articles of human consumption, and that two separate licenses were necessary under the two different sections. It is urged on the other hand that ghee is not included in the words "other milk products," that ghee is not a direct product of milk though butter is a product of milk and ghee can be prepared from butter, that under S. 394 the accused was entitled to keep in the shop ghee for sale to the extent of four cwts., and that if ghee is included in the words "other milk products," the amendment of Sch M, Part 2, by Act 8 of 1918, S. 22, by inserting "ghee kept for sale" would be rendered nugatory.

These Ss. 394 and 412-A may have been enacted to secure two different objects, namely, the regulation of storage of inflammatory and combustible articles and the prevention of adulteration of articles of human consumption. It appears that by the insertion of "ghee kept for sale" in Sch. M, Part 2, with reference to S. 394, there arises an inconsistency between the provisions of S. 394 and S. 412-A. Under S. 394 the accused was entitled to keep in his shop ghee for sale to the extent of the quantity found in his shop, for it was less than four cwts. Though he could keep the ghee for sale in his shop, he could not, under S 412-A, use that shop as a place for sale if ghee is considered to be included in the words "other milk products."

The question that arises for consideration is whether ghee is included in the words "other milk products." Cl. (b), S. 412-A says that no person shall without a license use any place for the sale of milk, butter or other milk products. The Presidency Magistrate, 3rd Court in Case No. 864-M of 1928, held that milk products do not include ghee. In this case the acting Chief Presidency Magistrate held that the words "other milk products" must be read ejusdem generis with the words "milk" and "butter" but held that he saw no reason why ghee does not fall under the category of "other milk products."

Section 412-A was enacted by Bombay Act 6 of 1913, S. 7, and the words "other milk products" were inserted by S. 8, Bombay Act 6 of 1916. S. 394 was substituted for the original section by Bombay Act 2 of 1911, S. 15, and the insertion of ghee for sale in Sch. M, Part 2, referred to in S. 394 (1) (a) (ii), was made in 1918 by Act 8 of 1918, S. 22. It appears that the Municipal Act refers

to ghee specifically in S. 414. If ghee is included in "other milk products" in Cl. (b), S. 412-A, there appears to be an inconsistency in S. 412-A, Cl. (b), and S 394 read with Sch. M, Part 2. In Halsbury's Laws of England, Vol. 27, para. 246, it is stated :

"Where two co-ordinate sections are apparently inconsistent an effort must be made to reconcile them. If this is impossible the later will generally override the earlier."

Reference may also be made to Maxwell on the Interpretation of Statutes, 6th Edn., pp. 283, 281

The provision with regard to S. 394 (1) (a) (ii) relating to ghee for sale is of a later date, that is 1918, whereas the amendment of S. 412-A by inclusion of the words "other milk products" is of 1916. The later amendment of the Act which must, in my opinion, be considered to form part of S. 394 must prevail.

It is urged that the provision in the schedule cannot override the provisions of an enactment by a section, and reliance is placed on Maxwell, 6 Edn. p. 283, where it is stated :

"Where a passage in a schedule appended to a statute was repugnant to one in the body of the statute, the latter was held to prevail."

I think the provision with regard to ghee for sale incorporated in Sch. M, Part 2, would form part of S. 394 (1) (a) (ii) and in my opinion there is inconsistency between S. 394 (1) (a) (ii) and S. 412-A (b) if ghee is included in the words "other milk products." It is inconsistent, in my opinion, to authorize a subject to keep in his shop ghee for sale up to four cwts. and at the same time to penalise him for using his shop as a place for sale of ghee which is less than four cwts. If the above two inconsistent provisions be attempted to be reconciled, it would be in the direction of putting a strict construction on S. 412-A, Cl. (b). S. 412-A was enacted in 1916 and no attempt has been made for so many years since its enactment to apply it to ghee. Further, ghee is specifically referred to in the Municipal Act in other sections, and S. 414 makes ample provision for the constant and vigilant inspection of ghee. S. 412-A (b) refers to the sale of milk, butter or other milk products and if the words "other milk products" are to be used ejusdem generis with butter they would include such products of milk as are the direct results of milk, as butter, that is curd, whey, cream etc., but would not include ghee which is not a direct product of milk but is prepared out of butter which is a direct product of milk. Further "other milk products," if construed strictly, and ejusdem generis with milk and butter, would include such products of milk as are liable to speedy decay, like butter, as for example, whey, curd, or cream, and would not include ghee which is not liable to speedy decay. In *Clark* v. *Gaskarth* (1), where it was contended under Statute 11 Geo 2, Cl. 19, S. 8, which empowered the landlord to seize as a distress for rent

"corn, grass or other product whatsoever which shall be growing on any part of the estate demised."

that trees and shrubs came within that description and were also liable to be distrained for rent, it was held that the word "product" did not extend to trees and shrubs growing in a nursery-man's ground, but it was confined to products of a similar nature with those specified in that section, viz., corn or grass to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up, when ripe, was incidental. If, therefore, "other milk products" are read in the strict sense as being direct products or products which are liable to speedy decay like butter, ghee would not be included in the words "other milk products." Where general words follow particular and specific words, they must be confined to things of the same kind as those specified : see Craies on Statute Law pp. 162 and 163, and Maxwell's Interpretation of Statutes, 6th Edn. pp. 585 and 587. In the case of penal statutes and fiscal enactments a strict construction most favourable to the subject ought to be adopted: see *Mylapore Hindu Permanent Fund Ltd.* v. *Corporation of Madras* (5) ; *Manindra Chandra Nandi* v. *Secretary of State* (6) ; *Emperor* v. *Kadarbhai* (7), and Halsbury's Laws of England, Vol. 22, paras. 339 and 345

On these grounds I think that the accused is not guilty under S. 412-A read with S.471, Bombay Act3 of 1888 I would, therefore, set aside the conviction and sentence of the accused and order the fine, if paid, to be refunded to him.

R.K. *Conviction set aside.*

(5) [1908] 31 Mad. 408=18 M. L. J. 349.
(6) [1907] 34 Cal. 257=5 C. L. J. 148.
(7) A. I. R. 1927 Bom. 483.

A. I. R. 1929 Bombay 279

PATKAR AND MURPHY, JJ.

Nadirshaw Jamshedji Mody — Appellant.

v.

Purshottamdas Ganpatdas Gajjar— Respondent.

Appeal No. 11 of 1927, Decided on 8th November 1928, against order of First Class Sub-Judge, Poona, in Darkhast No. 1510 of 1925.

(a) Civil P. C., O. 40, R. 1—Receiver appointed on interlocutory application—Final judgment silent about his continuance—Silence does not operate to discharge receiver.

When a receiver has been appointed on an interlocutory application without any limit of time it is not necessary to provide for the continuance of the receiver in the final judgment. The silence of the judgment does not operate as a discharge of the receiver or determination of his powers.

Where a receiver was appointed to execute a mortgage decree under S. 51, Cl. (d), Civil P. C. and the order for the appointment of a receiver did not appear in the final decree making the order relating to sale of immovable property for the satisfaction of the mortgage debt absolute,

Held : it was not necessary to make the order for the appointment of the receiver absolute in the final decree and even if there was a failure to refer to the order of appointment of the receiver in the final decree, the right of the receiver to execute the decree is not thereby extinguished. [P 280, C 1 2]

(b) Civil P. C., S. 11—Execution proceedings—Rule of might and ought applies.

Where no point was taken in a previous darkhast that it was not maintainable by the decree-holder on the ground that a receiver was appointed in respect of the decree, that point cannot be raised in subsequent darkhast as it might and ought to have been taken in the previous one. [P 281 C 2]

(c) Civil P. C., S. 47—Receiver for execution of decree — Execution application by him dismissed—Appeal lies as he is representative of both parties.

The receiver appointed in respect of a decree is the representative of both the parties to the action and in so far as the lower Court disallowed an application for execution to proceed, it was an order against the receiver who was entitled to execute the decree, and the receiver is entitled to appeal against the order declining to execute the decree at his instance. [P 282 C 1, 2]

(d) Civil P. C., S. 48 —Execution applications by decree-holder subsequent to appointment of receiver for execution of the decree are valid for purposes of saving limitation.

Where a decree-holder made three applications subsequent to the date of the appointment of a receiver to execute the decree the fact that the receiver had been appointed would not invalidate his applications for the purpose of saving limitation. [P 283 C 1]

Dave and *B. D. Mehta*—for Appellant.

G. S. Rao, *S. B Jathar* and *Y. V. Bhandarkar*—for Respondent.

Facts.—One Nensukh obtained a decree against one Purshottamdas and another in C S. No. 481 of 1916 for Rs. 7, 000 on 23rd January 1918. Purushottamdas brought suit No. 1050 of 1918 against Nensukh, who had filed applications for execution of his decree. The first application, Ex. 5 filed on 25th January 1919 was disposed of on 4th March 1919. The second darkhast No. 207 of 1919—Ex. 23 filed on 10th March 1919 was disposed of on 10th April 1923 on account of an order of attachment in suit No. 1050 of 1918. The third, darkhast No. 1017 of 1922 was filed on 19th August 1922 for the arrest of Purshottam and was disposed of on 25th June 1923 for the same reason as the second. But on 27th September 1919 Nensukh executed a mortgage to the extent of Rs. 15,000 in favour of N. J. and J. E. Mody and the decree in the suit of 1916 was assigned by him in favour of the Modys on 4th June 1920. The Modys filed suit No. 2232 of 1921 on 7th June 1921 and preliminary decree Ex. 6 was passed on 19th July 1921 ordering sale of the mortgaged property and appointing N. J. Mody receiver in respect of the decree in suit No. 481 of 1916. The decree was made absolute in respect of immovable property on 2nd March 1922.

In suit No. 1050 of 1918 filed by Purshottam against Nensukh the decree of Nensukh against Purshottom was attached on 15th November 1922 before judgment and on 21st February 1923 a consent decree was passed. By this consent-decree Nensukh had to redeem the immovable property mortgaged to N. J. Mody and also the decree in suit No. 481 of 1916 and to hand over the same to Purshottam within six months in whose favour a second mortgage was to be effected for Rs. 6,000. In case of default Purshottam was entitled to recover Rs. 13,500 from Nensukh. By the consent-decree the attachment before judgment of 15th November 1922 was to continue. On 21st December 1923 the receiver filed his 1st darkhast No. 29 of

1924 in suit No. 481 of 1916 but it was dismissed for default on 28th February 1925. The second darkhast No. 691 of 1925 filed on 2nd June 1925 was also dismissed for default on 14th September 1925. Against the order of dismissal of the third darkhast No. 1510 of 1925 filed on 14th September 1925 the receiver N. J. Mody filed this appeal.

Patkar, J. —(After setting out the facts, His Lordship proceeded.) The lower Court held that the receiver had no right to present the present darkhast as the attachment before judgment in suit No. 1050 of 1918 was subsisting, and that the receiver as an officer of the Court was bound to take notice of this order for attachment. Secondly, the lower Court held that, if the receiver had a right to execute the decree, the application for execution would be barred by limitation as the darkhast No. 29 of 1924 was beyond time on the ground that the receiver could not take advantage of the applications filed by Nensukh in the years 1919 and 1922 as he had no right to apply on account of the appointment of the appellant as the receiver on 19th July 1921. On these grounds the lower Court dismissed the application for execution.

On appeal before us two additional points have been taken on behalf of the respondent first, that the receiver was appointed pendente lite in suit No. 2232 of 1921, but the appointment of the receiver was not referred to in the final decree and after the final decree the appointment of the receiver came to an end, therefore, the appellant Mody had no right to execute the decree. On the point of limitation it was argued that the applications made by Nensukh could not be taken advantage of by the receiver as there was the consent decree between Nensukh and Purshottam and the decree was attached by consent in suit No. 1050 of 1918.

Dealing with the additional points, we think that the effect of the order of the appointment of the receiver Mody in the preliminary decree was that in addition to his right as a mortgagee or assignee of the decree he was allowed to execute the decree in suit No. 481 of 1916. A receiver can be appointed to execute a decree under S. 51, Cl. (d), Civil P. C. The appellant as receiver was, therefore, entitled to execute that decree. With regard to the contention that the order for the appointment of a receiver does not appear in the final decree it appears that the decree was a mortgage-decree, and the decree so far as it related to sale of immovable property for the satisfaction of the mortgaged debt had to be made absolute. It was not necessary to make the order for the appointment of the receiver absolute in the final decree. But even if there was a failure to refer to the order of appointment of the receiver in the final decree we think that the right of the receiver to execute the decree is not thereby, extinguished. In Halsbury's Laws of England Vol. 24, para. 805, p. 415 it is laid down that when a receiver has been appointed on an interlocutory application without any limit of time it is not necessary to provide for the continuance of the receiver in the final judgment The silence of the judgment does not operate as a discharge of the receiver or determination of his powers.

With regard to the second additional point, namely, that these darkhasts were not applications in accordance with law on account of the order for attachment in suit No 1050 of 1918, it appears that the order of attachment before judgment was passed on 15th November 1922, and the applications by Nensukh were filed in 1919 and 1922 prior to the order of attachment before judgment on 15th November 1922, and though the second and third darkhasts were afterwards disposed of on the ground that there was then an existing attachment, it cannot be said that the applications made by Nensukh on 10th March 1919, and 19th August 1922, were not applications in accordance with law, for at the time when the applications were made, there was no order for attachment in existence.

Now, dealing with the points taken by the lower Court, the first point is whether the receiver has a right to execute the decree, and whether as an officer of the Court he was bound to take notice of the order of attachment before judgment passed by the High Court. On 15th November 1922, the order for attachment before judgment was passed by the High Court, but the appellant was appointed as receiver on 19th July 1921. He had also an asssignment of the decree on 4th June 1920, and was also a

mortgagee of Nensukh. His rights had come into existence before the order for attachment before judgment on 15th November 1922. Under O. 38, R. 10, attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit. The receiver was not a party to suit No. 1050 of 1918 and had antecedent rights prior to the passing of the order on 15th November 1922. No doubt, there was a consent decree between Nensukh and Purshottam on 21st February 1923, under which the attachment before judgment was to continue, but the effect of both the decrees was that Mody had a prior right as a mortgagee and was entitled to execute the decree as receiver, and the rights of the mortgagees were recognized in the consent decree, for Nensukh had to redeem the decree and hand it over to Purshottam within six months, and also to redeem the properties which were mortgaged to Mody, and then to effect a second mortgage in favour of Purshottam. The rights, therefore, of Mody as a mortgagee and as a receiver entitled to execute the decree in suit No. 481 of 1916 are neither affected by the order for attachment passed on 15th November 1922, nor by the consent decree dated 21st February 1923. The attachment would operate on Nensukh's equity of redemption. The rights of the receiver, in our opinion, are paramount and are not affected by any consent decree between Purshottam and Nensukh. We think, therefore, that the view taken by the lower Court that the receiver is not entitled to execute the decree is erroneous.

The second point is whether the applications for execution by Nensukh are applications in accordace with law, and whether the darkhast by the receiver is beyond time. The appointment of the receiver does not put an end to the rights of the person who is a party to the decree. The receiver represents both the parties to the suit. According to Halsbury's Laws of England, Vol. 24, para. 723, p. 384, the possession by the receiver, though it necessarily displaces the possession of the owner or occupier to some extent for the purposes of the appointment, does not interfere with the rights and liabilities of the parties to the action in relation to strangers. Nensukh's rights, therefore, as against Purshottam, who was not a party to the suit in which Mody was appointed receiver, are not affected. It was held in *Jasoda Deye* v. *Kirtibash Das* (1) that the person appearing on the face of the decree as the decree-holder is entitled to execution, unless it be shown by some other person nnder S. 232 corresponding to O. 21, R. 16, Civil P. C., that he has taken the decree-holder's place. In that case a widow in a joint Hindu family was held to be entitled to execute the decree though a receiver was appointed. However, in the present case, in Darkhast No. 1017 of 1922 Purshottam was arrested on an application in execution by Nensukh He filed an appeal to this Court, First Appeal No. 288 of 1922, and the order for his arrest was set aside on the ground that Purshottam had filed a suit in the High Court against Nensukh and got an order from the Court referring the matter to the commissioner for accounts and the commissioner had reported in Purshottam's favour for a sum larger than that for which he had been directed to be arrested.

The order for arrest was, therefore, set aside. No point was taken in the darkhast in which Purshottam was arrested that the darkhast was not maintainable by Nensukh on the ground that the receiver was appointed. We think, therefore, that if there is anything in the point which is now taken on behalf of the respondent that Nensukh had no right to execute the decree, that point might and ought to have been taken in the previous darkhast in which Purshottam was arrested. We think, therefore, that Nensukh had a right to apply for execution of the decree and that his Darkhast No. 1017 of 1922 filed on 19th August 1922, was an application in accordance with law. If that application is in accordance with law, the first application, Darkhast No. 29 of 1924, filed by the receiver on 21st December 1923, would be within time, and the several subsequent darkhasts are within three years of each other. We think, thereforo, that the application by the receiver is within time, and that the applications and darkhasts which were filed by Nensukh in 1919 and 1922 were applications in accordance with law. I have already stated that those applica-

(1) [1891] 18 Cal. 639.

tions were filed prior to the order of attachment before judgment on 15th November 1922, and although they were eventually disposed of on the ground that there was a compromise decree and the subsequent attachment in Suit No. 1050 of 1918, it cannot be said that those applications when they were filed were not applications in accordance with law.

It is urged on behalf of the appellant that the application to execute the decree was allowed to be proceeded with in the darkhast by the receiver, i. e., Darkhast No 29 of 1924, and that the application having been accepted by the Court, it should be considered as a starting point of limitation, and reliance is placed on the decisions in the cases of *Mungal Pershad Dichit* v. *Girja Kant Lahiri* (2) *Desaippa* v. *Dundappa* (3) *Prabhuling Appa* v. *Gurunath Balaji* (4) and *Gullappa* v. *Erava* (5). In that darkhast, though the application was allowed to proceed, the plaintiff did not appear on the subsequent date and the application was disposed of for default. The cases cited before us show that action was taken by the executing Court on the application of the judgment-debtor. In *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (2) an application for time was made by the judgment-debtor. In *Desaippa* v. *Dundappa* (3) the decree was ordered to be paid off by instalments. In the present case on the second day the plaintiff did not appear, and the application was struck off for default. It is not necessary in the circumstances of the present case to go into the question whether Darkhast No. 29 of 1924 affords a starting point of limitation.

It is argued on behalf of the respondent that this appeal is not maintainable as the receiver is not a representative of the judgment-debtor. The receiver is the representative of both the parties to the action, and in so far as the lower Court disallowed the application to proceed, it was an order against the receiver who was entitled to execute the decree, and the receiver, in our opinion, was entitled to appeal against the order declining to execute the decree at his instance. Under O. 21, R. 18, if there had not been the appointment of the receiver, and if Pushottam had to execute the decree against Nensukh, he would have been entitled to execute the decree for Rs. 6,000, for under O. 21, R. 18, Cl. (1) (b), he would have been entitled to execute the decree for the difference between the two cross-decrees. The effect of the order of the lower Court is that Purshottam is allowed to execute his decree for the whole amount of Rs. 13,500, whereas the receiver who comes in the place of Nensukh is prevented from executing his decree for Rs. 7,000. Mody, besides being a receiver appointed by the High Court, was also an assignee of the decree, and was a mortgagee of Nensukh. We think, therefore, that the receiver was in every way competent to execute the decree of Nensukh against Purshottam, and the lower Court, in our opinion, was wrong in refusing the application for execution.

We would, therefore, reverse the order of the lower Court and remand the case to the lower Court and direct it to proceed with the execution of the decree. The appellant to have the costs of this appeal. The rest of the costs to be dealt with by the lower Court at the final disposal of the darkhast.

Murphy, J.—We are concerned with three decrees in this case. The first one was for Rs. 7,000 and made in favour of a person called Nensukh against Purshottam, in Suit No. 481 of 1916. The second one was obtained by Purshottam against Neusukh in Suit No. 1050 of 1918. And the third one was for Rupees 15,000 in favour of one Mody against Nensukh, partly on a mortgage of decree No 1 of Nensukh, this being in Suit No. 2232 of 1921. The question is whether Mody, who in his suit was appointed a receiver to execute the decree obtained by Nensukh in Suit No. 481 of 1916, can proceed in execution. At the material times decree No 1 had been obtained and execution applications were being made, in the case of decree No. 2 an attachment before judgment had been obtained and the suit ended finally in a compromise decree, the attachment on decree No. 1 in Suit No. 481 of 1916 being ordered to continue. In the third proceeding Mody, as I have stated, was appointed a receiver, and it ended in a

(2) [1881] 8 Cal. 51=8 I. A. 123=11 C. L. R. 113=4 Sar. 248 (P.C.).
(3) [1920] 44 Bom. 227=55 I. C. 329=22 Bom. L. R. 76.
(4) A. I. R. 1921 Bom. 256=45 Bom. 453.
(5) A. I. R. 1922 Bom. 118=46 Bom. 327.

preliminary decree and a final mortgage-decree for sale The appellant is attempting to execute Nensukh's decree against Purshottamdas. The learned Subordinate Judge has held that he cannot succeed for two reasons, one being that the appellant could not proceed while the decree remained under attachment, and the second, that his right was time-barred.

I think it is simpler to take the point of limitation first. The decree in Suit No. 481 of 1916 was made on 23rd January 1918. Since then there have been eight separate applications for execution. Of these, the first two were made by Nensukh in 1919. In July 1921, Mody was appointed a receiver in the course of his own suit against Nensukh. Nensukh then made three more applications for execution, and finally the receiver as such made two, besides the present one. The argument is that the receiver, as such, could not take advantage of the applications for execution as steps in aid, which had been made by Nensukh. He was in effect appointed receiver for that special purpose. It is true that the appellant was appointed receiver in July 1921, and Nensukh himself made three applications subsequent to that date and if the earliest of these, at any rate, is not considered to be a step in aid of execution in accordance with law, then the receiver's earliest application would not be in time. Nensukh was admittedly the decree-holder and had the right to execute the decree, and I do not agree that the fact that the receiver had been appointed would invalidate his applications for the purpose of saving limitation. Moreover, as has been pointed out by my learned brother on the strength of the rulings in the cases of *Gadigappa* v. *Shidappa* (6), *Mungal Prasad Dichit* v. *Grija Kant Lahiri* (2), *Desaippa* v. *Dundappa* (3), *Prabhuling Appa* v. *Gurunath Balaji* (4) and *Gulappa* v. *Erava* (5), the present application cannot be held timebarred, being within limitation of the last one, where no such objection as that it was barred by limitation was taken. This being so, this objection cannot be taken in the course of the present application.

The other ground on which the application has been dismissed was that owing to the order of attachment at the preliminary stage of the suit between Nensukh and Purshottam, the applicant was not entitled to pursue execution in his character as receiver, and that this disqualification still exists, since the order of attachment was ordered to continue in the final decree obtained in that suit. But I do not agree that the order of attachment in that suit can have this effect. The applicant was the mortgagee and the decree sought to be executed had also been assigned to him. He had brought a suit on his mortgage, and was appointed a receiver in the course of that suit. These rights accrued to the applicant before the date of the attachment before judgment, and that attachment could only have the effect to apply to such interest as the defendant in that suit possessed, I think that, in all these circumstances, the attachment could not possibly operate to prevent all proceedings for execution. On the other two points, which were not discussed by the learned Subordinate Judge but which have been raised in appeal, I agree with the reasons stated and with the conclusions come to by my learned brother Patkar, J., and with the order proposed to be made by him.

M.N./R.K. *Order reversed.*

(6) A. I. R. 1924 Bom. 495=48 Bom. 688.

A. I. R. 1929 Bombay 283

MIRZA AND PATKAR, JJ.

Manjubhai Gordhandas—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 415 of 1928 Decided on 12th February 1929, against conviction and sentence recorded by the Resident Magistrate, First Class, Nadiad.

(a) Arms Act, S. 19 (e) — Going armed means carrying weapon intending to use it if necessary—Going need not be habitual.

Section 19 Cl. (e) does not include the word "habitually" and the words "goes armed" connote carrying a weapon with the intention of using it when the necessity arises. Even an isolated act of carrying a weapon in contravention of the license would amount to an offence under S. 19, Cl. (e). The words "goes armed," would imply a motion as well as the possession of the arms in contravention of the license, and mean nothing more than carrying a weapon with the intention of using it as a weapon when the necessity or opportunity arises for its use. The words do not necessarily connote a habitual course of conduct. Where, therefore, an accused gets himself

possessed of a sword with the intention of using it as a weapon for the purpose of attacking his opponents and uses it, while using that weapon he must have moved about and he would therefore be considered to have gone armed within the meaning of Cl. (e), S. 19 : *A. I. R.* 1923 *Bom.* 35; 24 *All.* 454, and 37 *Bom.* 181, *Rel. on.* [P 285 C 2, P 286 C 1]

(b) Criminal P. C., S. 403 (2) — Acquittal under S. 324, Penal Code, does not bar prosecution under S. 19 (e), Arms Act.

The offence under S. 19 (e) is distinct from offence under S. 324, I.P. C. and therefore a trial for an offence under S. 324, I. P. C., would not be a bar to the proceedings under S. 19 (e), Arms Act: 40 *Bom.* 97 and 23 *Cal.* 174 *Rel. on.* [P 285 C 2]

G. N. Thakor and *U. L. Shah*—for Accused.

P. B. Shingne—for the Crown.

Mirza, J.—The applicant has been convicted under S. 19 (e), Arms Act 11 of 1878 and sentenced to a fine of Rs. 50. The facts which gave rise to the prosecution were that in the course of a quarrel between himself and one Ranchhod, his neighbour, the applicant asked his brother Bhogilal, who was then present, to go to the house of Jivanlal, another brother of the applicant, and bring him Jivanlal's sword. Bhogilal fetched the sword, the accused took it from Bhogilal and inflicted with it several injuries on Ranchhod and some of Ranchhod's relations. Ranchhod prosecuted the accused under S. 324, I. P. C. for causing him hurt with a dangerous weapon. The trial Court convicted the applicant of that offence, but in appeal the parties compounded the offence and the appeal Court passed an order acquitting the applicant.

The present prosecution was instituted against the applicant at the instance of the police. The applicant was charged with going armed in contravention of the provisions of S. 13, Arms Act. S. 13, Arms Act, provides that no person shall go armed with any arms except under a license and to the extent and in the manner permitted thereby. The finding of the lower Court is that the applicant had no license under the Arms Act in respect of this sword. That finding is not disputed. It is also admitted on behalf of the applicant that his brother Jivanlal had no license for keeping the sword. The lower Court has also found that the accused went armed with the sword. It has been contended before us that the finding of the lower Court on this point is not justified by the facts on which it is based

It has been urged by Mr. Thakor that to go armed implies habitually going armed. Reliance is placed in this connexion on the meaning of the word "go" in Webster's New International Dictionary 1927, Edn. p. 924. The dictonary meaning is inter alia thus stated:

"To pass about or abroad (in a certain state); to be habitually; as to go armed;. . ."

The primary meaning given to the terms "go" is:

"is to move on a course; to pass, or be passing from point to point or station to station; to move onward; to proceed;. . ." "In contrast with the more neutral verb move, go carries primarily a notion of self-originated movement."

Section 13, Arms Act, does not use the word "habitually" before the word "go." If we were to accede to the contention of Mr. Thakor on this point, we would be introducing into the section a word which is not there. That even an isolated act of going armed would fall within the purview of the section was decided by a Divisional Bench of this Court in *Emperor* v. *Kalyanchand* (1). The accused in that case was not a licensee but his cousin, who held a license, had handed over the gun to him while proceeding in a marriage procession. The accused had fired some shots during the procession with the result that some persons were accidently injured. The Court held that the case rightly fell under S. 19, Arms Act. The only plea raised on behalf of the accused in that case was that the terms of the license covered the case of a marriage procession. That contention was overruled. There is nothing in the language of the Arms Act which would, in our opinion, justify the construction which Mr. Thakor asks us to put on Ss. 13 and 19 of that Act in respect of the words "go armed."

Mr. Thakor has next contended that the sword was sent for and used for a definite purpose The applicant himself had not brought it but on finding that his brother Bhogilal had brought it in compliance with his request, he had taken it and used it for inflicting injuries on Ranchhod and others. Mr Thakor has contended that the applicant's action in respect of the sword on this occasion would not amount to going armed within the meaning of the Arms Act. It is clear that the applicant was in possession of the sword with the definite in-

(1) A. I. R. 1923 Bom. 35.

tention of using it if necessary for committing an offence, and that he used it for inflicting injuries on Ranchhod and others puts the matter beyond any doubt. As was held in *Emperor* v. *Harpal Rai* (2) the mere temporary possession, without a license, of arms for purposes other than their use as such would not necessarily amount to the offence of "going armed" within the meaning of S. 19, Arms Act. The learned Judges stated in their judgment that the essential of the offence was the going armed, that is carrying a weapon with the intention of using it as a weapon when the necessity or opportunity arose. The facts of the present case before us are distinguishable from the facts in that case but the remarks of the learned Judges regarding what the essential of the offence of going armed is would apply to this case. In *Emperor* v. *Koya Hansji* (3) a Divisional Bench of this Court followed the ruling in *Emperor* v. *Harpal Rai* (2).

Reliance has been placed on behalf of the applicant on the decision in the case of *Emperor* v. *Babu Ram* (4). The facts of that case are distinguishable from the facts of the present case before us, and there is nothing in the judgment which would detract from the statement in the previous judgment of the same Courts as to what the essential in an offence of "going armed" under the Arms Act is.

Mr. Thakor has next contended that the applicant used the weapon in a private lane and has urged that the essential element in the offence of going armed is to move with arms in a public thoroughfare or place. We find no such restriction in the language of either S. 13 or S. 19, Arms Act.

Mr. Thakor has next contended that the accused has already been tried and acquitted for an offence arising out of the same facts and therefore the present prosecution is barred under the terms of S. 403, Criminal P. C. S. 403, by sub-S. (2) provides:

"A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, sub-S. (1).

Illustration (b), S. 403, makes the meaning of sub-S. (2) clear. The illustration is:

"*A* is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that *A* committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for robbery."

Section 235, sub-S. (1) provides:

"If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence."

The offence with which the applicant was charged was a distinct offence from the previous one, and in our opinion, this previous trial for an offence under S.324, I. P. C., would not be a bar to the present proceedings. The ruling of our Court in *Emperor* v. *Jivaram Dankarji* (5) and the ruling of the Calcutta High Court in *Queen Empress* v. *Croft* (6) support this view.

In the result we are of opinion that the conviction of the applicant is correct and that this application fails. The application is rejected and the rule discharged.

Patkar, J.—The first point urged in this application is that the words "goes armed" in S. 19, Cl. (e), Arms Act import a habit, and reliance is placed on the dictonary meaning of the word "go." S. 19, Cl. (e), does not include the word "habitually," and I think that the words "goes armed" connote carrying a weapon with the intention of using it when the necessity or opportunity arises. Even an isolated act of carrying a weapon in contravention of the license would amount to an offence under S. 19, Cl. (e), according to the decision in *Emperor* v. *Kalyanchand* (1). The words "goes armed" would imply a motion as well as the possession of the arms in contravention of the license, and mean nothing more than carrying a weapon with the intention of using it as a weapon when the necessity or opportunity arises for its use. That was the meaning put upon the words "going armed" in the decisions in *Emperor* v. *Harpal Rai* (2) and *Emperor* v. *Koya Hansji* (3). The words do not necessarily connote a habitual course of conduct. I think that the circumstances in the present case show that the accused got himself possessed of the sword with

(2) [1902] 24 All. 454=(1902) A. W. N. 123.
(3) [1912] 37 Bom. 181=17 I.C. 795=14 Bom. L. R. 964.
(4) A. I. R. 1925 All. 396=47 All. 606.
(5) [1915] 40 Bom. 97=31 I. C. 361=17 Bom. L. R. 881.
(6) [1895] 23 Cal. 174.

the intention of using it as a weapon for the purpose of attacking his opponents, and that while using that weapon he must have moved about. He would, therefore, on the evidence in this case be considered to have gone armed with in the meaning of Cl. (e), S 19.

The second point urged on behalf of the applicant is that the acquittal of the accused of the offence under S. 324, I. P. C. operates as a bar to the prosecution of the accused under S. 19 (e), Arms Act. S. 403, Sub-S. (2), says:

"A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, sub-S, (1)."

In the previous trial the charge under S. 324, I. P. C., in respect of the hurt caused with a dangerous weapon and the offence under S. 19 (e), Arms Act, could have been joined together as offences having been committed in the same transaction within the meaning of S 235, sub-S. (1), Criminal P. C., The offence under S 324, I. P. C. was compounded under S 345, Criminal P. C., and the composition has the effect of an acquittal under sub-S. (6), S. 345, Criminal P. C. The acquittal for the offence under S. 324, I. P. C. does not, in my opinion, operate as a bar to the trial of the accused for the offence under S 19 (e), Arms Act. The decisions in *Emperor* v. *Jivram Dankarji* (5) and *Queen-Empress* v. *Croft* (6) support this view.

I agree, therefore, that the rule should be discharged.

R.K. *Rule discharged.*

A. I. R. 1929 Bombay 286

PATKAR AND BAKER, JJ.

Emperor

v.

Gafur Daud Bohra—Accused.

Criminal Appeal No. 508 of 1928, Decided on 4th March 1929, against order of acquittal passed by the Third Class Mag., Anand.

Bombay District Municipal Act (3 of 1901), S. 113—House abutting private street—Height of the eaves cannot be regulated.

Section 113 which empowers the municipality to regulate the height of the eaves, does not apply to the eaves of a house which abuts on a private street : 44 *Bom.* 198 ; *A. I. R.* 1921 *Bom.* 130 and 27 *Bom.* 221, *Dist.*

[P 287 C 2]

P. B. Shingne—for the Crown

N. P. Desai—for Accused.

Patkar, J.—It is urged in support of this appeal that balconies and eaves form part of a building according to the decision in *Tribhovan* v. *Ahmedabad Municipality* (1), and that whether the street is a private street or a public street the municipality has power to act under S. 96, Bombay District Municipal Act, 1901, according to the ruling in *Viramgam Municipality* v *Bhaichand Damodar* (2). Further, reliance is placed on the judgment of Fawcett, J., in the case of *Ahmedabad Municipality* v. *Manilal* (3), where it was held that S. 113, Municipal Act, did not restrict the general powers conferred on a municipality by S. 96.

It is conceded on behalf of the accused that S. 96 would apply to balconies or eaves and other projections of a house which form part of a building and that notice is necessary under S. 96, but it is argued on behalf of the accused that the order passed by the municipality prescribing the height at which the eaves should be erected is not legal as it does not fall within Cl. (2), S. 96. In *Viramgam Municipality* v. *Bhaichand Damodar* (2), it was held that if an otla was constructed without permission under S. 96, Bombay District Municipal Act, 1901, the municipality could remove it even if it was on a private street land. In the present case the accused gave notice under S. 96, Bombay Act 3 of 1901. The only question is whether the order of the municipality fixing the height of the eaves at twelve feet is a legal order. The case of *Ahmedabad Municipality* v. *Manilal* (3) relates to a balcony (Dakhli) to the second storey of a house abutting on a public street and projecting to a greater extent than that prescribed by the permission given by the municipality under S. 33, Bombay Act 6 of 1873. In the present case the eaves do not project beyond the limit fixed by the permission granted under S. 96, Act 3 of 1901, but are built at a lower level than that prescribed by the permission granted under S. 96, Bombay Act 3 of 1901, and that the building abuts on a private street and not a public

(1) [1902] 27 Bom. 221=5 Bom. L.R. 48.
(2) [1919] 44 Bom. 198=55 I.C. 318=22 Bom. L.R. 61.
(3) A.I.R. 1921 Bom. 130.

street The case of *Tribhovan* v. *Ahmedabad Municipality* (1) relates to a balcony put by a person to his house abutting on a private street and constructed in defiance of the orders issued by the municipality under S. 33, Bombay Act 6 of 1873. The wording, however, of S. 33, Bombay Act 6 of 1873, is very wide. Under S. 33, Cl. (2), Bombay Act 6 of 1873, the municipality had power within one month from receiving the notice to issue such orders not inconsistent with the Act as they may think proper with reference to such building. Cl. (2), S. 96, of the present Act is restrictive in its terms. Under that clause the municipality have power to issue orders not inconsistent with the Act and (1) may give permission to erect or alter or add to the building according to the plan and information furnished ; or (2) may impose in writing such conditions as to level, drainage, sanitation, materials, or to dimension and cubical contents of rooms, doors, windows and apertures for ventilation, or with reference to the location of the building in relation to any street existing or projected, as they think proper or (3) may direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building and any such street have been decided to their satisfaction. It does not appear in this case that the height at which the eaves were to be erected was mentioned in the plan or in the information furnished.

It is suggested in support of this appeal that by the application discretion was entrusted to the municipality to prescribe the height, and that the report of the secretary and the permission fixed the height at twelve feet. It does not appear that the accused left the matter to the discretion of the municipality, nor does it appear that in the plan or in the information furnished the height was mentioned to be twelve feet. It is not suggested that the municipality entered in the plan the height at which the eaves were to be built. It would, therefore, follow that the municipality had no right to insist on having the eaves built at the height of twelve feet unless it was so mentioned in the plan or in the information furnished. The regulation of the height at which eaves should be erected does not fall within the wording of the second part of this clause, for the second part is restricted to level, drainage, sanitation, material or to the dimensions and cubical contents of rooms, doors, windows and apertures for ventilation or with reference to the location of the building and does not refer to the height at which eaves have to be erected. It is conceded that the order of the municipality does not fall under the second part of this clause. Assuming, therefore, that S. 113 does not control the wide wording of S. 96, we think that the second clause of S. 96 does not empower the municipality to prescribe the height at which eaves should be erected. Under S. 113 power is given to the municipality to prescribe the height at which the roofs or eaves may be erected, but such projections must, according to that section, be over public streets. It is found in the present case that the street on which the eaves project is a private street and we accept the finding of the lower Court that the street is a private street and not a public street. It would, therefore, follow that S. 113, which empowers the municipality to regulate the height of the eaves, does not apply to the eaves of the house in the present case as it abuts on a private street.

We think, therefore, that the orders of the municipality are not legal in prescribing the height of the eaves at twelve feet. We would, therefore, confirm the order of acquittal of the lower Court and dismiss this appeal.

Baker, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1929 Bombay 287

PATKAR AND BAKER, JJ.

In re Vali Mahomed.

Criminal Revn. Appln. No. 11 of 1929, Decided on 4th March 1929, against order of Dist. Magistrate, Broach.

Criminal P. C. (As amended in 1923), S. 250—Complainant present is not entitled to adjournment—Order under S. 250 can be passed on adjourned date.

Under the amended section, if the complainant is present in Court he is bound to show cause immediately. He cannot insist upon a grant of an adjournment for the purpose. If, however, an adjournment is granted or if the complainant is not present and a summons is issued to him, the Court can pass an order at the adjourned hearing after recor-

ding and considering the cause if any shown by the complainant or informant : *A. I. R.* 1926 *Bom.* 225, *Rel. on.* [P 288 C 2]

H. D. Thakor—for Applicant.

H. V. Divatia—for Opponent.

B. G. Rao for *P. B. Shingne*—for the Crown.

Judgment.—In this case the accused was charged under S. 447, I. P C. in the Court of the Third Class Magistrate Amod. The learned Magistrate acquitted the accused and finding that the complaint was false and vexatious called on the complainant who was present on the same day to show cause why compensation should not be awarded to the accused under S. 250, Criminal P. C. The complainant showed cause and the learned Magistrate adjourned the proceedings and subsequently passed an order after four days directing the complainant to pay Rs. 20 to the accused and in default to suffer simple imprisonment for ten days. The complainant appealed to the District Magistrate, and the learned District Magistrate, relying on the ruling in *In the matter of Sadu Husain* (1), set aside the order of the Third Class Magistrate on the ground that it was without jurisdiction as it was not passed on the same day along with the order of acquittal. The ruling in *In the matter of Sadur Husain* (1) is dissented from in the later ruling of the same Court in *Ghurbin Koeri* v. *Khalil Khan* (2), where it was held that an order under S. 250, Criminal P. C., passed by the Court after an adjournment was merely irregular and was not without jurisdiction There is besides difference in the language of S. 250, Criminal P. C. Under the old section :

" the Magistrate may, in his discretion, by his order of discharge or acquittal, direct the person upon whose complaint or information the accusation was made to pay to the accused or to each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit."

According to the decisions of this Court in *Emperor* v. *Punamchand* (3) and *In re Nagindas Chanusa* (4) the order subsequently passed by a Magistrate after issuing notice on the date of the order of discharge or acquittal would be legal. Under S. 250 as amended :

" the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused . . . . . or if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid,"

and after considering the cause which such complainant may show, and if he is satisfied that the accusation was false and either frivolous or vexatious may direct that compensation to such amount not exceeding one hundred rupees or, if the Magistrate is a Magistrate of the Third Class, not exceeding fifty rupees be paid by such complainant to such accused or to each of the accused or any of them. The Third Class Magistrate followed the proper procedure under S. 250 as amended. Under the old section the order to pay compensation was part of the order of discharge or acquittal but it was a sufficient compliance with the provisions of S. 250, Criminal P. C., if the order was passed after an adjournment as it would be a continuation of the order of acquittal and substantially part of the same proceedings. Under the amended section, if the complainant is present in Court he is bound to show cause immediately. He cannot insist upon a grant of an adjournment for the purpose : see *In re Ishvarlal Maneklal* (5). If, however, an adjournment is granted or if the complainant is not present and a summons is issued to him, the Court can pass an order at the ajourned hearing after recording and considering the cause if any shown by the complainant or informant. We think, therefore, that the view of the District Magistrate is erroneous.

We would, therefore, set aside the order of the District Magistrate and restore the order of the Third Class Magistrate ordering the complainant to pay compensation to the accused.

R.K. *Order set aside.*

(1) [1903] 25 All. 315=(1903) A. W. N. 57.
(2) [1914] 36 All. 132=22 I. C. 977=12 A. L. J. 143.
(3) [1906] 8 Bom. L. R. 847.
(4) [1919] 22 Bom. L. R. 184=55 I. C. 851=21 Cr. L. J. 371.
(5) A. I. R. 1926 Bom. 225.

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MARTEN, C. J., AND MURPHY, J.

Hormasji Shapurji Mistry—Applicant.

v.

Dhanbai Barjorji Cooper — Respondent.

Original Civil Jurisdiction Appeal No. 56 of 1928, Decided on 1st February 1929.

(a) Practice—In originating summons for the construction of will, trustees should not argue on behalf of beneficiaries or next-of-kin apart from exceptional cases.

In the case of an originating summons for the construction of a will, the trustees should not argue on behalf of the beneficiaries, or next-of-kin, apart from exceptional cases, e.g., if a class of unborn children are interested. And so if a person interested in contending for an intestacy asks for being added as a party, he should be so added. [P 289 C 2]

(b) Practice — Jurisdiction — Court has power to add person as representing estate of deceased provided he undertakes to take out probate or letters of administration before formal decree is drawn up, notwithstanding Succession Act (1925), S. 213.

In a case of an originating summons Court has jurisdiction, notwithstanding S. 213, Succession Act to add a person, who has not yet obtained probate or letters of administration, as representing the estate of the deceased, provided such person undertakes to take out probate or letters of administration prior to any formal decree being drawn up: *In Re. Richerson*: (1893) 3 *Ch.* 146, *Foll.*; 38 *Cal.* 327; *Tarn* v. *Commercial Bank of Sydney*, (1884) 12 *Q. B. D.* 294; *In re Oakes*, (1917) 1 *Ch.* 230; *In re. Wenge*, (1911) *W. N.* 129, *Ref.* [P 290 C 2]

Jamshed Kanga—for Applicant.

Taraporewala—for Appellants.

N. H. C. Coyajee—for Respondent.

Marten, C. J.—This is an application by one Bai Navajbai, the widow of Sorabji Hormusji Engineer, asking to be added as a party to this suit, which is now under appeal from the judgment of Mr. Rangnekar, J. on an originating summons. The learned Judge held that there was an intestacy under the will or part of the will of Edulji Shapurji Mistri, and the applicant claims that on that finding she, under certain other wills, takes a portion of the estate as on an intestacy. Consequently, she contends that she is interested in upholding the judgment of the learned Judge.

We are told that in the Court below there was nobody to represent the next-of-kin or those interested in arguing for an intestacy, and that the trustees of the will of the deceased Edulji represented their position. The proper procedure is that trustees should not argue on behalf of beneficiaries or next-of-kin apart from exceptional cases, e.g, if a class of unborn children are interested. Therefore, there are good grounds for asking that somebody beneficially interested in contending for an intestacy should be before the Court. On the merits, therefore, this is an application which should be granted.

We have, however, felt a difficulty by reason of the fact that the applicant has not taken out probate to her own husband's will, nor to the other will under which her deceased husband claims. The question, therefore, has arisen whether, having regard to S. 213, Succession Act, we should at the present juncture add the applicant as a party in the absence of probate or letters of administration.

When the case came before us in January 1928, we were referred to the decision of the Privy Council in *Chandra Kishore Roy* v. *Prasanna Kumari Dasi* (1), where their Lordships held that provided probate or letters of administration were taken out before the decree, the suit was in order. That case, however, does not show that it was in order to have the matter argued and decided at the trial provided the formal decree was not issued until after probate has been obtained. But, since the former hearing, the Bench has referred to certain English authorities which are in point, because our procedure in Bombay in originating summonses is taken directly from the Chancery Division. Thus in *In re Richerson*: *Scales* v. *Hayoe* (*No.* 2) (2), I find Mr. Chitty, J., saying (p. 149):

"The question is whether the plaintiff is bound by the order made on the summons. It is true that she had not at the date of the order on the summons clothed herself with her right as legal personal representative of her grandmother, Sarah Scales, the testator's sole next-of-kin; but it is the ordinary practice of the Court to allow the person entitled to take out representation to be added as a party; and in the event of its being shown that the deceased's estate is entitled to some interest, the order does not go till letters of administration have been taken out."

(1) [1910] 38 Cal. 327=9 I. C. 122=38 I. A. 7 (P.C.).

(2) [1893] 3 Ch. 146=62 L. J. Ch. 708=41 W. R. 583=69 L. T. 590.

That is a case on an originating summons, and it must be distinguished from cases of ordinary actions to enforce rights where a different procedure may be adopted. Thus, in Daniell's Chancery Practice, 7th Edn., Vol. 1, pp. 351, 352, it clearly appears that in the Chancery Division an action may proceed provided probate or letters of administration are produced at the hearing. And further on, it is stated that in actions against either an executor or administrator de son tort it is necessary to have a duly constituted legal personal representative before the Court. In *Tarn* v. *Commercial Bank of Sydney* (3) it was pointed out that in the King's Bench Division the Court may stay proceedings in an action by executors until they have obtained probate.

There is, however, another procedure available both in the Chancery Division and in the Probate Division as exemplified in *In re Oakes* : *Oakes* v. *Porcheron* (4), where the Court pending the appointment of a legal personal representative appointed a receiver of the deceased's estate until after a representative should be constituted. *In re Wenge* (5), is another instance of such an order. I may also refer to a rule of Court, which apparently we do not have here, but which I know, from my personal experience, was made use of in England. That is O. 16, R. 46 in the Rules of the Supreme Court, which provides that if in any matter it appears to the Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the matter or other proceeding, and the order so made shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the matter, or proceeding.

I mention the above authorities to show that we are not deciding that in all cases parties may proceed to the trial and defer taking out administration or probate, until after the result of the trial is known. The present is a case on an originating summons, and following *In re Richerson* (2), we think we have jurisdiction, notwithstanding S 213, Succession Act, to add the present applicant as representing the estate of these two deceased and as representing those interested in contending for an intestacy of the estate of Edulji. She will be added as a party at her own risk as to costs and on her undertaking to take out probate or letters of administration prior to any formal decree being drawn up after the hearing of the appeal. What we intend is, no formal decree of the appellate Court should be issued after any judgment in her favour until probate or administration has been taken out. The costs of the present application of all parties will be costs in the appeal.

S.N./R.K. *Application granted.*

(3) [1884] 12 Q. B. D. 294=32 W. R. 492=50 L. T. 365.
(4) [1917] 1 Ch. 230=86 L. J. Ch. 303=61 S. J. 202=115 L. T. 913.
(5) [1911] W. N. 129.

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PATKAR AND MURPHY, JJ.

Fakirji Ardeshir Lavri and *others*—Appellants.

v.

Bhagvatlal Tricamlal Dave and *others*—Respondents.

Appeal No. 6 of 1927, Decided on 12th December 1928, against the order of the Dist. Judge, Broach, in Appeal No. 29 of 1925.

Registration Act (1908), S. 17 (2) (v)—Purchaser executing in 1872 unregistered document to original owner agreeing to reconvey property to him if he paid certain sum of money within 51 years—Document was compulsorily registrable under Registration Act of 1871 in force at its execution but was not so registrable under Act of 1877 or later Act—Such document is entitled to benefit of mitigations of rigour of registration law embodied in S. 17 of new Acts and so was admissible if tendered in evidence after 1877 — Registration Act (1871), S. 17 (2) — Registration (1877), S. 17 (h).

The greater strictness of the requirements of Act 8 of 1871 and the earlier Registration Acts was mitigated by Act 3 of 1877, and the Act was framed, with a view to admit, to the benefit of such mitigations, documents executed before the date on which the Act came into force, and the practical result was that the provisions of Act 3 of 1877 applied to all documents tendered in evidence on or after 1st April 1877. [P 292 C 2]

Certain persons who purchased property executed an unregistered document in favour

of the original owner of the property in 1872, and agreed to reconvey the property to him, if the latter paid sum of Rs. 2,500 within a period of 51 years.

Held: that the document was compulsorily registrable under the Act of 1871 which was in force at the time of its execution, but such a document would not have been compulsorily registrable if it had been executed after the passing of the Act of 1877 as it did not in itself create any right, title, or interest, or limit the title, of the vendor. Such a document would be entitled to the benefit of the mitigations of the rigour of the law embodied in S. 17 of the new Acts of 1877 and 1908, and would be admissible though unregistered if tendered in evidence after 1877: 2 *Bom.* 273; 7 *Bom.* 310; *A. I. R.* 1922 *Bom.* 84; 14 *M. I. A.* 129 and 1 *Bom.* 190, *Foll.*

[P 293 C 2, P 294 C 1]

K. N. Koyajee—for Appellants.

Barot and *H. D. Thakor*—for Respondents.

Patkar, J.—The plaint property originally belonged to one Mahommad Isap who sold it to one Tribhovan Sakhidas for Rs. 5,600 on 9th April 1869. Tribhovan in his turn sold the property to one Ardeshar Nasarwanji, the father of defendant 1, on 17th July 1872, for Rs. 2,275, and on that very day Ardeshar passed a document, Ex. A, to the sons of the original owner Mahomad, agreeing to reconvey the property to them or their heirs, executors or representatives on payment of Rs. 2,200 within fifty-one years. Ardeshar Nasarwanji gifted the property to his son defendant 1 on 6th December 1899. The interest of the sons of Mahomad, the original owner, under the document Ex. A, was assigned to the plaintiff on 10th October 1921, who brought a suit to enforce the document, Ex. A. The heirs of Ali and Abhram, the sons of Mahomad, were joined as co-plaintiffs. Defendant 1 sold the property to defendant 3 on 7th May 1919. The plaintiff, finding that defendant 3 was a bona fide purchaser for value, gave up his claim for specific performance and possession of the property and restricted his claim for damages for breach of the agreement, Ex. A.

The learned Subordinate Judge held that the document, Ex. A, required registration under S. 17, Cl. (2), of Act 8 of 1871, and the exemption in favour of the documents embodied in S. 17, Cl. (h), was enacted by Act 3 of 1877. He, therefore, held that the document, Ex. A, was not admissible in evidence for want of registration, and dismissed the plaintiff's suit.

On appeal, the learned District Judge held that the document, Ex. A, operated to create an interest in immovable property and limited the vendor's interest to that extent, and was compulsorily registrable under the Act of 1871, that the question of admissibility being a matter of procedure was governed by the present law, and that though it was compulsorily registrable when it was executed, it did not require registration under the present law, and, therefore, held that the document, Ex. A, was admissible in evidence.

On behalf of the appellants it is urged that the document required registration under Act 8 of 1871 and that under S. 6, General Clauses Act, the provisions in S. 17, Cl. (2) (v) embodied in the later Registration Acts of 1877 and 1908 would not affect the previous operation of the Registration Act 8 of 1871, and that the document in itself created an interest in immovable property and limited the vendor's right to the value of Rs. 100 or more, and therefore, was inadmissible in evidence for want of registration. On the other hand, it is contended that the document did not require registration under Act 8 of 1871 as it did not create any interest in immovable property, that the document created a right in personam and did not create any right or interest in the property, and that though the document may not be admissible in evidence as affecting immovable property, it was admissible in a suit for specific performance or for damages for breach of a contract.

The document was executed on 17th July 1872, and was governed by Act 8 of 1871. S. 54, T. P. Act, was not enacted at the time of the execution of this document. The Transfer of Property Act was made applicable to the Bombay Presidency in the year 1893. According to the decision in *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (1), an agreement for the sale of immovable property worth more than Rs. 100 required registration on the ground that it created equitable interest in the property to be conveyed. In that case specific performance was sued for on the strength of

(1) [1871] 14 M. I. A. 129=16 W. R. 26=9 B. L. R. 433=2 Suther 457=2 Sar. 709 (P.C.).

an unregistered agreement for sale, and the plaintiff sought to have a conveyance executed in pursuance of it, and it was held that the agreement not having been registered could not be given in evidence in the suit. A similar view was taken in the case of *Valaji Isaji* v. *Thomas* (2). Apart from the special terms of the document which was the subject-matter in that case, it was held that in a suit for specific performance of an agreement to execute a deed of immovable property, the agreement was not admissible in evidence for want of registration. The case of *Jusah Haji Jafar* v. *Gul Muhammad* (3) was distinguished on the ground that the instrument in question had been executed not by the intending purchaser, and therefore could not create any right, title or interest to or in the property to be sold. The decisions in the case of *Jusab Haji Jafar* v. *Gul Muhammad* (3) and *Mark Ridded Currie* v. *S. V. Mutu Ramen Chetty* (4), relied on on behalf of the respondent, must be considered to have been overruled by the decision in the case of *Futteh Chund Sahoo* v. *Leelumber Sing Doss* (1); see note at p. 195 in the case of *Valaji Isaji* v. *Thomas* (2). It was held in *Dinkarrao* v. *Narayan* (5) that a contract which under English law created an equitable interest in land might also come within the description of the documents referred to in S. 17 (2) (v), Registration Act of 1877, and very possibly the legislature intended to exempt such contracts from registration, but the question whether they were compulsorily registrable or not was not definitely settled until the passing of the Transfer of Property Act. It follows, therefore, that the document, Ex. A, according to the registration law prevalent at the time of the execution of the document, required registration. Their Lordships of the Privy Council in *Futteh Chand Sahoo* v. *Leelumber Singh Doss* (1) observe (p. 131):

"The Registration Act, No. 20 of 1866, recently passed in India is extremely stringent. Their Lordships have in the first place, no doubt whatever, that the instrument in question is one which by Cl. 2, S. 17 of the Act, is required to be registered that it is an instrument acknowledging the payment of the consideration money for what was to be ultimately an absolute sale of the property in question and what in equity would operate as a sale of the property."

The last observation refers to the principle of English law according to which a contract for sale of land operates in equity as a transfer of ownership from the vendor to the purchaser. In order to mitigate the rigour of the Registration Act, Cl. (h), S 17, Act 3 of 1877, was enacted. Act 3 of 1877 came into force on 1st April 1877, and did not contain any provision exempting from its operation documents executed previous to the date of its coming into force. On the contrary registration of documents executed on or after the date on which the previous Acts 16 of 1864, 20 of 1866 and 8 of 1871 had come into force, is governed by S. 17, Act 3 of 1877. Act 16 of 1908 is to the same effect. It was held in *Raju Balu* v. *Krishnarav Ramchandra* (6) that the greater strictness of the requirements of Act 8 of 1871 and the earlier Registration Acts was mitigated by Act 3 of 1877, and the Act was framed, as it was, very probably with a view to admit, to the benefit of such mitigations, documents executed before the date on which the Act came into force and that the practical result was that the provisions of Act 3 of 1877 applied to all documents tendered in evidence on or after 1st April 1877. The view of Green, J. in *Raju Balu* v. *Krishnarav Ramchandra* (6) was accepted in *Chunilal Panalal* v. *Bomanji Mancherji Modi* (7) where the reasons for enactment of Cl (h), S. 17, Act 3 of 1877, have been stated by reference to the proceedings in Council. S. 6, General Clauses Act, which prevents repealing enactments affecting the operation of the previous Acts cannot apply in the present case. According to the view in *Raju Balu* v. *Krishnarao Ramchandra* (6) and *Chunilal Panalal* v. *Bomanji Mancherji Modi* (7), the object of the later Registration Act was to admit, to the benefit of the mitigations of the rigour of the law, documents which were executed prior to 1877 when the registration law was more stringent. I think therefore, that the document Ex. A, having been produced in evidence after

(2) [1876] 1 Bom. 190.
(3) [1875] 12 B. H. C. R. 175.
(4) [1869] 3 Beng. L. R. 126=11 W. R. 520.
(5) A. I. R. 1922 Bom. 84.
(6) [1877] 2 Bom. 273.
(7) [1893] 7 Bom. 310.

coming into force of Act 16 of 1908, would be governed by S. 17 of the Act, and would get the benefit of the mitigation of the rigour of the law embodied in S. 17, Cl. (2) (v). On the other hand documents which were not compulsorily registrable under the registration law previous to the Act of 1871, did not require registration under the provisions of the later Acts of 1877 and 1908. In *Desai Motilal Mangalji* v. *Desai Parashotam Nandlal* (8) after referring to the view of Green, J. in *Raju Balu* v. *Krisnnarav Ramchandra* (6) that the practical result was that the provisions of Act 3 of 1877 applied to all documents tendered in evidence on or after 1st April 1877, it was observed that the document which was the subject-matter in *Raju Balu's* case was one which ought to have been registered under Act 16 of 1864 but with regard to the documents which did not require registration under the previous registration law it was held that the subsequent Registration Act provided no means of registering the documents, and therefore, in the case of a document which did not require registration under the previous law the requirements of registration under the later law could not have retrospective effect of invalidating documents which when they were executed were free from defects according to the existing law. The absence of any provision requiring documents, which did not require registration under the previous law, to be registered within a certain time after coming into force of the new Registration Act would indicate that no change in the law was intended: see *Ram Coomar Singh* v. *Kishari* (9), *Intizam Fatima* v. *Ali Baksh* (10) and *Khuda Bakhsh* v. *Sheo Din* (11).

If the view of Green, J., in *Raju Balu* v. *Krishnarav Ramchandra* (6) approved in *Chunilal Panalal* v. *Bomanji Mancherji Modi* (7) and *Desai Motilal Mangalji* v. *Desai Parashotam Nandlal* (8) be accepted it would follow that the document Ex. A though executed before Act 3 of 1877 came into force would be entitled to the benefit of the mitigation of the rigour of the law as embodied in the later Registration Acts, e. g., S. 17, Cl. (h), of Act 3 of 1877, and S. 17, Cl. (2) (v) Act 16 of 1908. The question therefore arises whether the document, Ex. A, did by itself create, declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards, or it merely created a right to obtain another document which created, declared, assigned, limited or extinguished any such right, title or interest. It is urged on behalf of the appellant that the document in itself created a right or at least limited the vendor's right to that extent. The document, Ex. A, says as follows:

"Accordingly I pass this agreement to you that on receipt of Rs. 2,500 for that bhag, I will reconvey it to you or your heirs or your assigns. In case I fail to reconvey or in case I raise any sort of objection to such reconveyance, then you can, on the basis of this writing, file a suit against me according to law and obtain a decree and take it back through Court."

The title of Ardeshar, the father of defendant 1, created by the sale-deed in his favour by Tribhovan on 17th July 1872, is not in any way limited by this document. If he broke the agreement and sold to a third party, he laid himself open to an action for damages while the right of the third party to retain the property will depend upon whether or not he had notice of the agreement: see *Harkisandas* v. *Bai Dhanu* (12). The document, Ex. A, was simply an agreement that Ardershar would reconvey the property any time within fifty-one years on payment of Rs. 2,500 and on such payment the sons of Mahomad would be entitled to get a registered document from Ardeshar or would be entitled to enforce the agreement in a Court of law. I think, therefore, that the document, though it required registration under the law as it existed at the time of the execution of the document as being a conveyance of an equitable estate on the authority of the decision in *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (1) and *Valaji Isaji* v. *Thomas* (2), it can get the benefit of the mitigation of the rigour of the law by virtue of the enactments contained in S. 17, Cl. (h) Act 3 of 1877, and S. 17, Cl. (2) (v) Act 16 of 1908. The document, in my opinion, does not in itself create any

(8) [1893] 18 Bom. 92.
(9) [1882] 9 Bom. 68.
(10) [1911] 8 A. L. J. 609=10 I. C. 314.
(11) [1886] 8 All. 405=(1886) A. W. N. 170.
(12) A. I. R. 1926 Bom. 497=50 Bom 566 (F.B.).

right, title or interest or limit the title of the vendor so as to require compulsory registration under S. 17, and would be admissible in evidence in a suit for recovery of damages for breach of the agreement.

It is urged on behalf of the respondent that though the document required registration, it would not be inadmissible in evidence for want of registration in a suit for specific performance or in a suit to recover damages, and reliance is placed on the decisions in *Burjorji Cursetji* v. *Muncherji Kuverji* (13); *Adakkalam* v. *Theethan* (14); *Nagappa* v. *Devu* (15); and *Mangamma* v. *Ramamma* (16). The case of *Burjorji Cursetji* v. *Muncherji Kuverji* (13) has been criticized in *Ramling* v. *Bhagvant* (17). It is not necessary to go into this question as I think that the document, Ex. A, does not by itself create declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards, but merely creates a right to obtain another document which when executed would create, declare, assign, limit or extinguish any such right, title or interest. I think, therefore, that the document, Ex. A, is admissible in evidence. For these reasons I would confirm the order of the lower appellate Court and dismiss the appeal with costs.

Murphy, J.—Plaintiffs filed a suit praying that the defendants should execute a sale deed of the property in litigation in their favour, on their paying Rs. 2,500 the sum specified in the contract to sell and should also give them possession. But in the course of the suit the prayer for specific performance of the agreement to sell was given up, and plaintiffs only claimed damages for its breach, and the suit as against defendant 3, who is in actual possession of the property as a vendee, was dismissed on the plaintiffs' application, to the effect that he was a bona fide purchaser for value and without notice.

The original Court held that the suit was not maintainable, because the document on which the plaintiffs relied, marked as Ex. A in the case, was inadmissible in evidence as not having been registered. This document was executed on 17th July 1872, by one Nusserwanji, the then owner, in favour of Ali and Abhram, the sons of the original owner Mahomed Isaq, and contains an undertaking to reconvey the property for Rs. 2,500 on application made within fifty-one years of the date of its execution.

On appeal to the District Court, the original Court's order of dismissal was set aside, and the case was remanded for disposal on the merits, the learned District Judge's view being, that Ex. A was admissible in evidence, even though unregistered. This is the order now before us in appeal.

The principal questions to decide therefore are :

1. Whether, at the time of its execution, Ex A was compulsorily registrable, and, (2) if it was, whether the failure to register it now operates to forbid its being used as evidence.

There is no dispute about the facts. It has been argued that the contract contained in Ex. A is void for want of consideration, but this contention can hardly be sustained. Looked at broadly, it contains reciprocal promises which furnish enough consideration to support a contract, and I think it is essentially an ordinary agreement to sell the property, if required, for the sum fixed, within a certain time. In 1872 the Registration Act of 1871 was in force. S. 17 (2) of that Act made all instruments which purported, or operated, to create, declare, assign, limit or extinguish, whether in present or future any right, title or interest whether vested or contingent, of the value of Rs. 100 or upwards to or in immovable property compulsorily registrable.

The Registration Act of 1871 was repealed by the Registration Act of 1877, which in turn has given place to the present Act of 1908. The Act of 1871 was different in its provisions on this point to the later Acts and the change in the later Acts was actually made in order to mitigate the hardship of requiring such "bargain papers" to be registered. The subject has been fully discussed in the case of *Dinkarrao* v. *Narayan* (5) and I need not repeat its history in this judgment. I think that, in terms Ex. A was a document coming within

(13) [1880] 5 Bom. 148.
(14) [1888] 12 Mad. 505.
(15) [1890] 14 Mad. 55.
(16) [1912] 37 Mad. 480=16 I. C. 587=(1912) M. W. N. 917.
(17) A. I. R. 1926 Bom. 375=50 Bom. 334.

the class of documents which in 1872 were compulsorily registrable, though in fact had it been executed later than 1877 it would not have had to be registered to be admissible in evidence, and the short point therefore is whether on these facts it can now be admitted to prove the contract to sell which it contains.

The leading case is that of *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (1). The document in that case was an agreement to sell, and the registration law applicable was the Act of 1866 which, however, on this point had a provision similar to the one found in the Act of 1871. This case was followed in *Valaji Isaji* v. *Thomas* (2).

These cases have been discussed by the learned District Judge, who quite rightly and for the further reasons he gives in respect of the equitable doctrine then prevailing in India, before the coming into force of the Transfer of Property Act, which was, that a mere contract to sell conveys the equitable estate, held that Ex. A was compulsorily registrable when it was executed. The reason why he ultimately decided that it was admissible was that he considered on the strength of the decision in *Raju Balu* v. *Krishnarav Ramchandra* (6) that the question of admissibility being a matter of procedure, would be governed by the law in force when the document was tendered in evidence, and such a document not now requiring registration, it could on this ground be admitted. He also considered the effect of the decision in *Desai Motilal Mangalji* v. *Desai Parashotam Nandlal* (8), in which case it was held that a document which was not compulsorily registrable when it was executed but required that formality to legalize it at the date it was tendered in evidence was admissible though unregistered. The facts were the converse of those of this case, and he rightly observed that a converse case may be different, and that prohibitory and penal sections of the Registration Act must be construed strictly. But the ratio decidendi in the then decided case really had a different basis. The document dealt with in it had been in order when executed. Ex. A was not in order at the time of its execution. It would have been inequitable to penalize a document on the ground of a change in the law, but it does not seem to me to be equally so inequitable when the document was originally invalid for want of this formality, and can only be held to avoid that defect because of the change in the law. In fact, the proposed vendees under it acquired no right at the time, and had none for five years. Would it be equitable to enforce such rights against the other side, because of a change in the law, and as from 1877, I am not sure that it would be, but the determining argument in the present appeal must, in my opinion rest on a proper interpretation of the relevant enactments. In 1872 as well as in 1877 the General Clauses Act of 1868 was in force. S. 3 of that Act provided that in all Acts made by the Governor General in Council after this Act had come into operation (1) for the purpose of reviving either wholly or partially, a Statute, Act or Regulation repealed, it shall be necessary expressly to state such purpose. There was no provision similar to that in S. 6 (a) and (b) of the present Act providing that the repeal of any enactment shall not operate to revive anything not in force at the date of the repeal or to affect the operation of any enactment so repealed. This provision only came in the General Clauses Act now in force, which was long after the repeal of the Registration Act of 1871 in 1877. I think that neither of these enactments can be resorted to in order to solve the second question we have to decide and that recourse must be had to the case law on the point.

In the Act of 1877 (3 of 1877) there was a new S. 17 (b) by which the necessity for registering agreements such as the one contained in Ex A in this case was removed, and the Act contains no provision to the effect that it would not apply to documents which had been executed previous to the date of its coming into force.

There are two reported cases on this point. The first is that of *Raju Balu* v. *Krishnarav Ramchandra* (6), in which it was held that the Act of 1877 governed the admissibility of documents executed before, but offered in evidence after 1877, and the second is that of *Chunilal Panalal* v. *Bomanji Mancherji Modi* (7) in which the opinion of Green, J, in the former case was accepted and followed.

I think there is a difficulty in holding that Ex. A, though inadmissible in evidence at the time it was executed and for five years after that time, has now become admissible by reason of a change of the law without a provision for its retrospective effect. But in view of these two rulings of this Court, which bind us, I think I must find that Ex. A was admissible in evidence when tendered in the original Court.

There is yet another point of law in the case and it is, whether in view of the fact that the claim for specific performance was abandoned, and the suit as against the person in possession of the property in suit was given up, a claim for damages can now be persevered in. But this point, though referred to in argument before us, was not discussed in the Court below, and I think we need not find on it now, for there may be facts available to the parties which might affect the finding on it. I agree that the lower appellate Court's order must be confirmed and that this appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed*

A. I. R. 1929 Bombay 296

MIRZA AND MURPHY, JJ.

Emperor.

v.

C. E. Ring—Accused.

Criminal Appeals Nos. 487, 503, 504 and 518 of 1928, Decided on 31st January 1929, against decision of Sess. Judge, Belgaum.

(a) Criminal P. C., S. 239—Three police officers given separate bribes by complainant—Opposite party also giving bribe to one of the officers—Police officers alleged to have conspired and charged under Penal Code, Ss. 120-B, 161 and 163—Person of opposite party also alleged to have conspired and charged under Penal Code, Ss. 120-B, 161, 163 and 114—All tried jointly at one trial—Trial held justified and no misjoinder held to have occurred.

Accused 4 to 10 extorted from one *S* an agreement of sale. *S* then lodged a complaint in the matter with accused 3, a Police Inspector and gave him a bribe of Rs. 200 for creating interest to investigate this complaint. For the same purpose *S* also bribed accused 1 and 2 who were Deputy Superintendent of Police and Police Inspector. But in the meantime accused 4 to 10 approached accused 3, who was bribed by paying Rs. 1,000 to push up the matter. *S*'s complaint was accordingly reported to be false. On these facts accused 1 to 3 were charged under Penal Code, Ss. 120-B, 161 and 163 for having conspired to take bribes from *S* and accused 4 to 10 in the course of police investigation; while accused 4 to 10 were charged under Penal Code. Ss. 120-B, 161, 163 and 114 for conspiring to offer bribe to accused 1 to 3.

Held : that the law punished the giver as well as the taker of the bribe, and the transaction must be regarded as one although there were two parties to it and separate offences might be said to be committed in respect of it. The mere fact that the sums received were different and were received at different times and places would not split up the transaction into so many separate transactions so as to require separate trials in respect of each of them. The common object which all the accused had in view was that the police investigation which accused 3 had in hand should be conducted by him not on its merits in the discharge of his public duty but corruptly in accordance with the illegal gratification paid. The prosecution were therefore justified in combining the four charges in one trial. [P 299 C 1]

(b) Penal Code, S. 120-B—Agreement is to be inferred from circumstances—Evidence though separately not convincing, if conjointly establishing conspiracy, is enough.

To establish a charge of conspiracy, the agreement is very often to be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. It is unavoidable in such cases to have a large mass of evidence which taken separately may not appear to be relevant against every person accused of the offence, but taken in conjunction with the other evidence in the case may establish the conspiracy. [P 299 C 2]

(c) Criminal P. C., S. 297—Judge expressing his opinion about evidence but cautioning jury that they were not to accept his view—No misdirection takes place.

Where the Judge throughout his charge has several times cautioned the jury that they are not to accept his view of the evidence as they were the sole judges of facts the mere fact that the Judge gave expression to his opinion regarding certain evidence does not amount to misdirection. [P 300 C 1]

(d) Evidence Act, S. 30—Scope.

Self-exculpatory statement of accused should not be taken into consideration against his co-accused. [P 301 C 1]

(e) Penal Code, S. 161—Scope.

Mere knowledge that a bribe was to be given would not make a person who has the knowledge a participator in the giving of the bribe. [P 301 C 2]

(f) Criminal P. C., S. 307—Scope.

High Court will not as a rule interfere with the verdict of a jury except when it is shown to be clearly and manifestly wrong : 10 *Bom*, 497, *Rel. on.* [P 302 C 1]

(g) Evidence Act, S. 114, Ill. (b)—Police Officers conspiring to demand and receive bribe—Readiness to use their position for it—Accomplice victimized by them into

offering bribes—Much slighter corroboration is necessary—Evidence Act, S. 133.

Where police officers act in conspiracy with one another to demand and receive illegal gratification and are ready to make use of their official position to enforce such demand, the testimony of accomplices who are really victimised by them into offering them illegal gratification and have not willingly done so requires a much slighter degree of corroboration than would be the case if the accomplices were entirely voluntary accomplices ; 33 *Cal.* 649, *Ref.* [P 302 C 1]

(b) Criminal P. C., S. 239—"In course of same transaction" explained.

The expression "in the course of the same transaction" used in S. 239 must be understood as including both the immediate cause and effect of an act or event, and also its collocation, or relevant circumstances, the other necessary antecedents of its occurrence, connected with it, at a reasonable distance of time, space, and cause and effect. [P 303 C 1]

Velinker, Azad, S. K. Nabiullah, K.H. Kelkar, K. J. Kale and *Nilkant Atmaram*—for Accused 9.

Jamshed Kanga and *P. B. Shingne*—for the Crown.

Mirza, J.—The appellants-accused and the original accused 8 were tried jointly before the Sessions Court at Belgaum, 1, 2 and 3 on charges under Ss. 120-B, 161 and 163, I. P. C., and accused 4 to 10 on charges under Ss. 120-B, 161, 163 and 114, I. P. C. The jury unanimously found accused 1 and 2 guilty on all charges, and accused 3 guilty on charges under Ss. 120-B and 161. The jury by a majority of three to two found accused 3 guilty under S. 163, I. P. C.. and accused 4 to 7 and 9 and 10 guilty on all charges; the jury found accused 8 by a majority of four to one not guilty of any offence. The Sessions Judge accepted the verdict of the jury, acquitted accused 8, and sentenced the remaining accused to various terms of imprisonment and fines.

The appellants have urged that the trial was vitiated owing to (1) a misjoinder of charges and parties accused; (2) certain misdirections and non-directions amounting to misdirections to be found in the learned Judge's charge to the jury; (3) wrongful admission of certain matters in evidence; (4) refusal by the learned Judge to allow accused 1 to annex to his written statement at his trial a synopsis of his service record in the police force.

The charges framed at the trial were as follows:

"That between 28th August 1926 and 1st December 1926 at Belgaum and at Jugul

"(1) you accused 1 to 3 agreed together to receive a gratification other than legal remuneration from both the parties concerned in the complaint of Sanmalappa Narasappa Naick against accused 4 to 9 and Adiveppa Malgauda ;

"(2) that in pursuance of the said conspiracy, each of you accused 1 to 3, being public servants in the police department, accepted such illegal gratification in the shape of Rs. 500, Rs. 200 and Rs. 200 respectively from the said Sanmalappa, as a motive for yourself showing favour to him or for inducing the others among you by the exercise of personal influence to show favour to the said Sanmalappa in the exercise of official functions ;

"(3) that further in pursuance of the said conspiracy you accused 3 accepted for yourself and for accused 1 and 2 such illegal gratification in the shape of Rs. 1,000 in cash from accused 4 to 10 and Adiveppa Malgauda as a motive for showing favour in the exercise of official functions to accused 4 to 9 and Adiveppa in respect of the said complaint filed by the said Sanmalappa ;

"(4) that you accused 4 to 10 agreed together to offer gratification other than legal remuneration to accused 1 to 3 as a motive for showing in the exercise of official functions favour to accused 4 to 9 and Adiveppa in respect of the said complaint either personally or by inducing one another among these three accused by exercising personal influence and actually paid Rs. 1,000 to accused 3 in pursuance of the said conspiracy and that thereby, accused 1 to 3 committed offences punishable under Ss. 120-B, 161 and 163, I. P. C., and accused 4 to 10 committed offences punishable under Ss. 120-B, 161, 163 and 114, I. P. C., and within the cognizance of the Court of Session of Belgaum."

It is contended that a simultaneous trial on all these charges contravenes Ss. 233, 214 and 235 and does not fall under S. 239 (d), Criminal P. C. It is urged that the transactions set out in the charges cover a period between 28th August 1926 and 1st December 1926, and are alleged to have occurred some at Belgaum and some at Jugal. Some of the transactions, it is contended, were between the accomplice Sanmalappa on the one hand and accused 3 acting for himself on the other; that some transactions were between Sanmalappa and accused 1 acting for himself. Certain other transactions, it is contended, were between Sanmalappa and accused 2 acting for himself. Similarly, it is further contended that certain transactions were between accused 3 acting on his own behalf on the one hand and accused 4 to 10 acting on behalf of themselves on the other. It is contended that at least two different conspiracies are charged, the

common object of one conspiracy being subversive of the common object of the other. The charges it is urged, are tantamount to this that accused 1, 2 and 3 are charged with having conspired with one another to accept illegal gratification from Sanmalappa and are charged also with having conspired with one another to accept illegal gratification from accused 4 to 10. Accused 4 to 10, it is urged, are at the same time charged with having conspired with one another to offer illegal gratification to accused 1, 2 and 3 and aid and abet them in their conspiracy to receive illegal gratification. Thus it is contended there are several distinct conspiracies. It is also contended that the common object of the takers of illegal gratification is not the same as that of the givers. It is urged that accused 4 to 10 cannot be said in any sense to share in the common object and purpose of accused 1, 2 and 3 and vice versa.

Accused 1 was a Deputy Superintendent of Police and the Senior officer of accused 2 and 3 who were both Police Inspectors in the same District. Sanmalappa had made a complaint that accused 4 to 9 and one Adiveppa Malgauda had extorted from him a certain valuable document. It was his desire that accused 4 to 9 and Adiveppa should be prosecuted and punished in respect of the alleged act of extortion. Accused 4 to 9 were interested in refuting such charge and accused 10 and Adiveppa were helping them in the matter. It is urged therefore that the interests of the two parties were adverse to each other and there was no common object in which they could be said to have joined.

The objection to the trial on the ground of misjoinder of charges and parties if upheld would vitiate the trial. In *Subrahmania Ayyar* v. *Emperor* (1) their Lordships of the Privy Council have ruled that the disregard of an express provision of law as to the mode of trial is not a mere irregularity such as could be remedied by S. 537, Criminal P. C.

Section 233, Criminal P. C. provides that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in Ss. 234, 235, 236 and 239. The prosecution rely upon the exception contained in S. 239 (d), which provides that persons may be charged and tried together where they are accused of different offences committed in the course of the same transaction. What the Court has to determine, therefore, is as was laid down by a Divisional Bench of this Court in *Emperor* v. *Ganesh Narayan* (2), whether there was a complete unity of project, and the whole series of acts were so linked together by one motive and design as to constitute one transaction. In *Emperor* v. *Madhav Laxman* (3) another Divisional Bench of this Court has given a similar ruling to the effect that in offences committed in the same transaction within the meaning of S. 239, Criminal P. C. there should be clear proximity of time and space, clear continuity of action, and sufficiently specific community of purpose. In *Emperor* v. *Sejmal Poonamchand* (4) Crump, J., has made the following observations (pp. 325-26 *of* 51 *Bom.*) :

"Each case must (in my opinion) be considered on its merits, and, therefore, it is peculiarly true here that no case can be an authority except upon its own facts. The test, I take it, is whether the two persons concerned are engaged in one transaction, and to determine that it is necessary to regard the facts from the point of view of those two persons. If they are animated by a common purpose, and there is continuity in their action then surely there is one transaction so far as they are concerned. It may even be that community of purpose is not necessary, but I speak strictly with reference to the alleged facts of this case."

The four charges are capable, in the first instance, of being resolved into two separate groups. The first three charges have reference to the alleged conspiracy among accused 1, 2 and 3 to receive illegal gratification from Sanmalappa and from accused 4 to 10 and Adiveppa in the course of the investigation of the alleged offence of extortion. The fourth charge relates to abetment by accused 4 to 10 of offences under Ss. 120-B, 161, 163, I. P.C. as well as the commission by them of offences under those sections. So far as the first three charges are concerned, in my opinion, they present no difficulty and may be combined in the same trial under

(1) [1901] 25 Mad. 61=28 I. A. 257=11 M. L. J. 283=8 Sar. 160 (P.C.).

(2) [1912] 14 Bom. L. R. 972=17 I. C. 705=13 Cr. L. J. 833.

(3) [1918] 43 Bom. 147=48 I.C. 871=20 Bom. L. R. 607.

(4) A. I. R. 1927 Bom. 177=51 Bom. 310.

the provisions of S. 239 (b). The main ingredient of these three charges is that the three police-officers accused 1, 2 and 3, conspired together to receive illegal gratification from both the opposing parties in the police investigation, and in pursuance of such conspiracy they received illegal gratification from both parties in different sums and at different times and places. That the sums received were different and were received at different times and places would not, in my opinion, split up the transaction into so many separate transactions so as to require separate trials in respect of each of them. The fourth charge does not appear to be happily worded but clearly enough conveys the meaning that accused 4 to 10 conspired together to offer illegal gratification to accused 1 to 3 and in pursuance of that conspiracy paid to accused 3 Rs. 1,000. The law punishes the giver as well as the taker of the bribe, and the transaction must be regarded as one although there are two parties to it and separate offences may be said to be committed in respect of it The common object which all the accused had in view was that the police investigation which accused 3 had in hand should be conducted by him not on its merits in the discharge of his public duty but corruptly in accordance with the illegal gratification paid. The prosecution, in my opinion, were justified in combining the four charges in one trial.

It is contended on behalf of the appellants in the alternative that although there may be no illegality, the accused were prejudiced by having three charges combined in one trial as they necessitated the production of a mass of evidence directed to many different matters tending by its mere cumulative effect to creat an undue suspicion and prejudice against the accused. Reliance is placed in this connexion on the ruling in *Queen-Empress* v. *Fakirapa* (5), and it is claimed that in the exercise of our discretion we should set aside the conviction and order a retrial on certain modified lines. We have been taken in great detail over the record with a view to show that the joint trial of the accused must have prejudiced them owing to the mass of evidence led by the prosecution, parts of which were connected with some of the accused only and parts with others. I am satisfied from a perusal of the record that none of the accused has been materially prejudiced by this joint trial. When the main charge is one of conspiracy it is not possible always to have proof of direct meeting, of combination, or that the parties have been brought into each other's presence. To establish a charge of conspiracy, the agreement is very often to be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design: see *Barindra Kumar Ghose* v. *Emperor*. (6) It is unavoidable in such cases to have a large mass of evidence which taken separately may not appear to be relevant against every person accused of the offence, but taken in conjunction with the other evidence in the case may establish the conspiracy.

Taking a superficial view of the case, it would appear reasonable to hold that the dealings between accused 1, 2 and 3 on the one hand and Sanmalappa on the other stood in a different category from the dealings between accused 1, 2 and 3 on the one hand and accused 4 to 10 on the other and that the evidence of one set of such dealing might very well prejudice the case of the accused who are involved in the other set of dealings. It has been urged before us that the case of accused 4 to 10 could not but be prejudiced in this trial where the evidence of illegal gratification was gone into as between accused 1, 2 and 3 on the one hand and Sanmalpapa on the other. No doubt if there were a separate trial of accused 4 to 10 from that of accused 1 to 3, on a modified charge some portions of the evidence which have gone on the record as relevant against accused 1 to 3 might not be considered to be relevant as against accused 4 to 10. In such a trial accused 4 to 10 would probably be charged with the offence only of having given illegal gratification to accused 1, 2 and 3 and possibly also with the offence of having abetted them in the receipt of such illegal gratification. But if the charge against accused 4 to 10 were that of having in addition to giving illegal gratification to accused 1, 2 and 3 also abetted them in the conspiracy to receive illegal gratification both from them and accused 1, 2 and 3, as are the charges in this trial, I fail to see what difference a separate trial on such charges would make to

(5) [1890] 15 Bom. 491.

(6) [1909] 37 Cal. 467=7 I. C. 359=14 C. W. N. 1114.

the accused in respect of the evidence that could properly be placed before the Court and the jury against them. In my opinion all the evidence given in this case would be necessary and relevant in such a separate trial on the same charges. On the charges as framed I am of opinion that the admission of the various classes of evidence has not resulted in prejudice to any of the accused and there is no need for this Court to set aside the verdict and direct a new trial.

The misdirection complained of is that the learned Judge in his charge to the jury gave expression to his own opinion regarding certain parts of the evidence. It is admitted on behalf of the appellants that the Judge throughout his charge has several times cautioned the jury that they are not to accept his view of the evidence but should form their own appreciation of the evidence as they were the sole judges of facts. In view of the caution given by the learned Judge I do not see much force in this complaint. The complaint of non-direction to the jury relates to the various points which were urged in relation to the joinder of charges and parties. It is contended that the learned Judge should have directed the jury that the charges were multifarious and that the various transactions alleged had no connexion one with the others. That would not have been a proper charge for the Judge to give to the jury. The main charge here being one of conspiracy it was the province of the jury to ascertain from the facts proved before them whether the conspiracy alleged by the prosecution was established by evidence. I fail to see any error in the learned Judge's charge to the jury on the ground of non-direction.

The next ground of complaint is that the learned Judge erroneously admitted certain evidence to the prejudice of the accused. Apart from the argument that the joint trial has resulted in the admission of evidence not directly relevant to the case of each accused in several particulars, counsel for the appellants have not been able to point to any evidence which has been wrongly admitted during the trial.

The next complaint made is that the learned Judge refused counsel's request on behalf of accused 1 to be allowed to put in a synopsis of his services in the police force as an annexure to the written statement he was allowed to put in at the end of the case for the prosecution. The procedure on this point is governed by Ss. 289 and 342, Criminal P. C. S. 289 (1) provides that :

"when the examination of the witnesses for the prosecution and the examination, if any, of the accused are concluded, the accused shall be asked whether the means to adduce evidence."

Section 342 (1) provides that :

"for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, ... put such question to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

It is nowhere provided in the Criminal Procedure Code that the accused is entitled as a matter of right to put in a written statement in lieu of any answers he may give to question put to him under S. 342, Criminal P. C. Para. 43, of our High Court Circulur Orders (Criminal), is a follows :

43 "A practice seems to prevail in some districts of accepting a written statement from an accused instead of examining the accused orally under S. 342, Criminal P. C. This is clearly not contemplated by that section and such a practice is deprecated. The only case where the Code authorizes a written statement by an accused, is when he pleads to a charge in a 'warrant case' under S. 256 of the Code. Even if the Magistrate accepts a written statement, it does not relieve him of his obligation to put questions to the accused under S. 342. . . . . ."

This was evidently an attempt on the part of the first accused to place before the jury a synopsis of his service sheet with a view to base an argument on his behalf that he was a man of good character and not likely to have committed the offence with which he was charged. It was open to the accused to have relied on his good character in the main part of his written statement which he was allowed to put in. He could have relied on it in the oral answers he gave to the Court. He could have adduced evidence of good character at the close of the case for the prosecution. Mr. Kidd, the superior officer of the first accused, was examined as a prosecution witness, but no question was put to him on behalf of accused 1 with regard to his alleged good character in the service. The accused called no evidence. If he had called evidence to

prove his good character the prosecution would have had a right to rebut that evidence. It is not shown that by refusing leave to counsel for the first accused to put in this synopsis as an annexure to the accused's written statement the learned Judge has contravened any provision of the law. It is not shown that the refusal of the learned Judge has prejudiced accused 1 in the trial. Accused 1 could have thereafter adduced evidence to prove the synopsis.

The next complaint made on behalf of the appellants is that the learned Judge treated the written statement of accused 2 as a confession and directed the jury to take it into consideration against him as well as his co-accused. It is urged that for an admission to amount to a confession it must clearly be a confession of the guilt of the accused and not an admission of certain facts from which the guilt of the accused may be inferred. Reliance is placed in this connexion on the ruling of the Allahabad High Court in *Queen-Empress* v. *Jagrup* (7) and rulings of this Court in *Empress* v. *Daji Narsu* (8) and *Emperor* v. *Santya Bandu* (9). It is clear from accused 2's written statement that it is self-exculpatory and should not, therefore, be taken into consideration against his co-accused.

Although, in my opinion, there has been a misdirection to the jury on the interpretation of accused 2's written statement, the misdirection has not in my judgment in the light of the other evidence in the case, led to a miscarriage of justice or otherwise prejudiced accused 2 or his co-accused so as to vitiate the trial. The learned Judge warned the jury not to take the explanation of accused 2 into consideration against his co-accused unless it was corroborated by the other evidence in the case.

The next complaint made is that the learned Judge left it to the jury to consider whether the witness Mallappa was or was not an accomplice. He says in his charge to the jury :

"And although Adiveppa is clearly an accomplice. I am not at all sure whether you could look upon Mallappa Hanjgi as an accomplice. If therefore Chandorkar's story bears support from Mallappa, then this part of the case that accused 3 accepted bribe at Jugul for himself and accused 1 from accused 4 to 9 through the instrumentality of accused 10 is sufficiently borne out."

The first sentence taken by itself is capable of the construction placed upon it by counsel for the appellants ; but what follows makes it clear that the learned Judge gave it as his opinion that Mallappa Hanjgi was not an accomplice. In that view of the matter it is further contended that the learned Judge was in error when he considered that Mallappa Hanjgi was not an accomplice. The evidence shows that Mallappa Hanjgi was consulted by accused 4 to 10 after they had agreed among themselves to pay the bribe of Rs. 1,000 to accused 3. Mallappa's evidence on this point is as follows :

"Sometime after midnight Adiveppa came to me. He told me that it was agreed to pay Rs. 1,000 and the work would be done and asked me to say if it should be done in that way. I told him if they could get the matter finished they may get it done. Next day Adiveppa told me that the matter was finished after the payment of Rs. 1,000."

It is contended on this evidence that Mallappa himself was an instigator to the bribe and must, therefore, be regarded as an accomplice. Mere knowledge that a bribe was to be given would not, in my opinion, make a person who has the knowledge a participator in the giving of the bribe. The part Mallappa played in this transaction was that of a passive recipient of the information, and his acquiescence in what had already been decided upon by the parties themselves would not in the absence of an active instigation on his part make him, in my opinion, a participator in the offence. The learned Judge was right, in my judgment, in directing the jury to consider Mallappa's evidence as not being tainted by reason of his being an accomplice.

The result, in my judgment is that no substantial error of law is shown in the conduct of the trial. The Judge and jury having concurred in the verdict it is not open to the appellants to invite us to go through the record with a view to come to a different finding from what they have done. As we were taken through a greater part of the record on the law points relied on by the appellants, I may say that the evidence given by the accomplice witnesses Sanmalappa and others appears to be amply corroborated by independent evidence and the

(7) [1885] 7 All. 646=(1885) A. W. N. 131.
(8) [1882] 6 Bom. 288.
(9) [1909] 11 Bom. L. R. 633=3 I. C. 742.

guilt of the accused seems to be satisfactorily established. We will not as a rule interfere with the verdict of a jury except when it is shown to be clearly and manifestly wrong: see *Queen Empress* v. *Mania Dayul* (10). In the circumstances of the present case where on the one side there were three police-officers acting in conspiracy with one another to demand and receive illegal gratification and were ready to make use of their official position to enforce such demand, the testimony of accomplices who were really victimised by them into offering them illegal gratification and had not willingly done so would require a much slighter degree of corroboration than would be the case if the accomplices were entirely voluntary accomplices: see *Deo Nandan Pershad* v. *Emperor* (11). Sanmalappa, in my opinion, held such a position in relation to accused 1, 2 and 3.

So far as accused 1, 2 and 3 are concerned their appeals entirely fail and must be dismissed. The sentences passed on them by the learned Judge are lenient considering the betrayal of the trust reposed in them as public servants. Their convictions and sentences must be confirmed.

With regard to accused 4 to 7 and 9 and 10 they have been sentenced: accused 4 to 7 to six months' rigorous imprisonment and accused 10 to one year's rigorous imprisonment and a fine of Rs. 1,000 or in default further six months' rigorous imprisonment. There is evidence to show that on 22nd August 1926, when the document was alleged to have been extorted from Sanmalappa, accused 4 and Adiveppa borrowed Rs. 600 from Dhulappa for the purpose of bribing, if necessary, the police-officers in any investigation that the offence in connexion with the extortion of the document might necessitate. That would show preparation on the part of accused 4, and the co-accused on whose behalf he was acting, to bribe the police if and when it became necessary to do so. As against this consideration it must be remembered that the police-officers of this district, accused 1, 2 and 3, were known to the parties to be corrupt and amenable to receiving bribes. Further, it must be conceded in their favour that accused 4 to 9 have not yet been tried and convicted for having extorted the document from Sanmalappa as alleged by him. The Sub-Divisional Magistrate first dismissed the complaint on the report made to him by accused 3. He afterwards restored it to his file on an application made in that behalf by Sanmalappa but again dismissed it after taking some evidence. The accused 4 to 7 and 9 and 10 have paid accused 1, 2 and 3 Rs. 1,000; they have had to stand a long and expensive trial, and have already served part of their sentences. In their case, in my opinion, the ends of justice would be met if we remit the remainder of their sentences of imprisonment. Their convictions are confirmed but sentences of imprisonment are altered to what they have undergone. The sentence of fine of Rs. 1,000 or in default further six months' rigorous imprisonment on accused 10 to stand. The appeals of accused 1, 2 and 3 are dismissed and their convictions and sentences confirmed.

Murphy, J.—(After stating facts the judgment proceeded). As to the illegal plurality of accused, the argument is that there was no common meeting ground, for all their interests were opposed, and that the two groups were not really concerned in the commission of different offences in the course of the same transaction, and that the joint trial has prejudiced both groups of accused.

We have been referred to the following authorities; *Emperor* v. *Datto Hanmant* (12); *Emperor* v. *Sherufalli* (13); *Emperor* v. *Ganesh Narayan* (2); *Emperor* v. *Jethalal* (14); *Emperor* v. *Madhav Laxman* (3); *Emperor* v. *Sejmal Poonamchand* (4). Though these authorities have been of very great help, as illustrating the application of the general principles underlying the statutory rules as to the trial of accused persons jointly, and for several distinct offences at the same trial, it is clear that the facts must be properly apprehended before the principles can apply.

It is true that all acts and events are linked together in a series of causes and effects, and that each cause and its effect can be separated mentally from all others, but in reality there is no independent act or event, for every effect depends not

(10) [1886] 10 Bom. 497.
(11) [1906] 33 Cal. 649=10 C. W. N. 669.
(12) [1905] 30 Bom. 49=7 Bom. L. R. 633.
(13) [1902] 27 Bom. 135=4 Bom. L. R. 930.
(14) [1905] 29 Bom. 449=7 Bom. L. R. 527.

only on the immediate cause, but also on its collocation which includes all past and present acts and events.

But, on the other hand, there is a practical unity in men's actions, which enables us to draw a mental circle round an act, or event, or a series of them, and to call it, for practical purposes, a single transaction, though theoretically this may not be a true description.

I think that this is the idea underlying the expression "in the course of the same transaction" used in S. 239, Criminal P. C., and that the expression must be understood as including both the immediate cause and effect of an act or event, and also its collocation, or relevant circumstances, the other necessary antecedents of its occurrence, connected with it, at a reasonable distance of time, space, and cause and effect.

If I am correct in my analysis, the question here is, can it be said, as has been argued, that the facts I have set out and accepted as being true, though comprising many distinct acts and events, are so bound together in the way I have indicated, as to form a single transaction, within the meaning of the section? I think the answer must be in the affirmative. The complicated facts here are of course susceptible of almost indefinite analysis and resolution into separate acts, but what we have to see is whether all these acts and the persons doing them, are so connected together by some common ties in time, space and causation, that they in fact form a single transaction within the meaning I have given to the expression.

The case is one, as the charge stated, of conspiracy, not between Sanmalappa and the first three accused, but between these three accused between themselves to fleece the parties to a dispute, suitable for such a purpose, as not involving serious crime, but in reality a difference of a civil nature and one unlikely to attract the attention of the District Superintendent of Police, and a conspiracy by the remaining accused to stifle the investigation sought by Sanmalappa. Sanmalappa eagerly desired an investigation to be made while accused 4 to 9 as ardently wished to prevent one, while it was accused's duty to carry one out, and on the prosecution case, their desire to make as much money out of the quarrel as could be extracted from the parties to it, while they did nothing which, in effect, was siding with the other accused who have been tried with them. The central fact was clearly the question whether an investigation into the charge should be made or not, and with this question all the accused included in the trial, and Sanmalappa, were connected, and to its answer one way or another, all their actions in respect of this matter were directed. There is thus a clear connexion with a single transaction on the part of all the accused.

Coming to details, I think that the separate events of the bribing of accused 1 to 3 are also sufficiently connected. The argument that they were not so connected, rests on the assumption that accused 1 to 3 acted independently of each other. Three persons placed as were accused 1 to 3 may conceivably have done so, but on the evidence, it is extremely improbable that they did. They were all police-officers of the same district, accused 1 being the senior. The evidence is that accused 1 was first approached through Dr. James, and referred Sanmalappa to accused 3 after listening to his story. Accused 3 then, after a pretence at an investigation, extorted Rs. 200. Sanmalappa then went to the others and had to pay to each. In the circumstances, if as is alleged they were all dishonest, it is not possible to believe that they were not cognizant of each other's proceedings, and each bleeding Sanmalappa in turn with a common purpose. The organization of the police hierarchy of a district forbids the possibility that they were all acting independently and in ignorance of each other's doings, and the weight of the evidence, to all of which we have had our attention drawn in the very lengthy arguments addressed to us, also negatives any such possibility. I think there is no doubt that all three of the policemen accused were well aware of all the circumstances and of each other's actions, and that had this not been the case the business of bleeding Sanmalappa to the limits of his finances, and accused 4 to 9 to the extent of Rs. 1,000, could not have been carried through. There is no doubt that accused 1 to 3 acted in concert throughout, and that the charge against them is proper.

The facts in respect of the charge of conspiracy against accused 4 to 9 are, I think, very similar. A police investi-

gation was threatened against them and the charge is that they conspired together to prevent its being carried out by bribing accused 1 to 3 with a payment of Rs. 1,000. This sum is said to have been paid to accused 3, but it is not necessary to show that it was intended for all three policemen. If there was a conspiracy among the policemen, payment of a lump sum to one of them would be enough, and on the evidence and the probabilities I think it is clear that the contestants here knew exactly what was happening on the other side. I do not consider the charge of conspiracy against these accused is mistaken, or illegal.

The next question is, should they have been tried and charged with accused's 1, 2 and 3. The allegation is that they have been much prejudiced by a trial which involved the hearing of masses of evidence relevant as against their co-accused, but irrelevant to the charge against them, which is in reality that they abetted the policemen's offences under Ss. 161 and 163. I am doubtful if in fact they had been tried separately any evidence now on the record could have been excluded as irrelevant. Speaking broadly, the evidence which might be said not to be directly in point, is that relating to the bribes, paid by Sanmalappa. But the fact that Sanmalappa was bribing the police to start an investigation against them, would clearly have been provable by the prosecution as an explanation of the circumstances and of these accused's actions, and I do not accept the contention that the joint trial has affected them from this point of view, so as to invalidate the proceedings. The only plausible argument is that the evidence given in connexion with Sanmalappa's bribe may perhaps have convinced the jury of the policemen's guilt in that connexion, and so rendered its members too ready to accept the story that these accused also had bribed the policemen to secure, what did in fact happen, the report adverse to Sanmalappa and the dismissal of his complaint. But this is in fact the first allegation in another form, for if the evidence against accused 1, 2 and 3 in connexion with Sanmalappa's efforts was relevant in connexion with the charge against these accused, as I think it was, to show the circumstances of the charge made against them, it would have had to be led in a separate trial, and the fact that accused 1, 2 and 3 were tried at the same time cannot, I think, be said to have prejudiced these accused. The learned Sessions Judge has in fact, said that Sanmalappa's story mainly relates to the case against accused 1, 2 and 3 and has minimised this evidence against these particular accused at pp. 437-438 of the record. My conclusion is that the trial was neither invalidated by the plurality of offences charged, nor vitiated by the improper joinder and joint trial of the accused persons so charged.

I come now to the second line of criticism which consists of objections that the learned Judge misdirected the jury in his summing up of the case to them.

The first point here relates to the accused 1's service sheet. What happened was that when the trial reached the stage of the statements of accused 1 being taken Mr. Azad, his counsel, asked the Judge to be allowed to put in a synopsis of his client's past service, which was ruled out. Mr. Azad also states that accused 1 tendered his service sheet as a police officer in the shape of a certified copy from the records of the Inspector General of Police which was refused. It contains a summary of rewards and punishments earned and suffered, by this accused in the course of his service. I do not see how the synopsis of his career compiled by the accused was relevant to the charge, though there was nothing to prevent his putting in a written statement which he, in fact, did, and it is Ex. 96 on the record. The matter of the synopsis is not now pressed, but it has been urged that the record of service, which is an official document, should have been allowed to be read and recorded. The law does not however, provide for documents being tendered in this way. There was nothing to prevent accused 1 calling evidence of his good character, but none was called and if Mr. Azad wished to prove the statements in this document, I think he should have done so in the usual way. It, in fact, also contains statements adverse to accused 1.

Exhibits 17 to 20 were also objected to, but allowed to be read and recorded. These documents are accused 2's letter to accused 1 of 9th November 1926, and an envelope (Ex. 18), another

letter from accused 2 to accused 1 dated 1st December 1926 and a second envelope.

These letters were written in connexion with the conspiracy and are, I think, clearly relevant. The reference to them in the charge to the jury is at p. 442. When accused 2 was asked to make his statement he put in a written statement in which he admitted writing the two letters at the instance of his clerk, Shettu Patil, and that Shettu Patil had said that if the matter was successfully carried through, Mr. Ring would get a present of Rs. 100 which was the meaning of the expression, "I would make him dib up" in the second letter. The learned Sessions Judge has said in the charge to the jury that it is in the nature of a confession, being an admission that accused 2 would obtain an illegal gratification for accused 1 if he did his clerk's relative's work. He then warned the jury not to accept the statement unless they found it was corroborated against either the maker or the other accused. Accused 2's statement is in fact a very lame explanation of a very damning circumstance against him, and not really a confession but I do not think that the language in the charge referring to it is a serious misdirections though it was an unfortunate view to take of these facts. The passage is in the middle of the part of the charge discussing the case against accused 2 only and I think what was really emphasized was its importance against accused 2.

The claim that the jury was misdirected in that it was not told that the first payment of Rs. 200 to accused 3 was apart from the knowledge of accused 1 and 2, and that accused 3 had no shares in payments to accused 1 and 2 and that accused 1 and 2 had no part in the payment of Rs. 1000 to accused 3 by accused 4 to 9, is really an argument on the merits. These misdirections are supposed to be on pp. 434, 435 and 437 of the record. These passages contain a plain statement of the facts, and I believe there was no non-direction on these points.

The last one is as to the caution to be exercised in receiving accomplice evidence and directions as to the character in this respect of some of the witnesses. S. 133, Evidence Act, was explained at the head of the charge, and is again referred to at p. 438. Sanmalappa is here held to be an accomplice, and so is witness Chandorkar, and the necessity for corroboration of this evidence is insisted on. The grievance made is really as to witness Vithalsingh, who was considered not to be an accomplice and Mallappa Hangji. On p. 439, in a passage in the charge to the jury, the learned Sessions Judge has classed Vithalsingh among the non-accomplice witnesses. Vithalsingh is Ex. 58, and a police head-constable, and his story is that that person had come and complained to him of his difficulties and he introduced him to Shettu Patil, accused reader who according to the story thereafter acted as intermediary between Sanmalappa and accused 1 and 2. According to the witness, Sanmalappa told him of what happened in his subsequent dealings with accused 1 and 2 and finally the witness advised him to go to the District Superintendent of Police, and ultimately to Vaz to have a complaint drawn up. On the facts the witness took no real part in the offences, and mere cognizance of what was happening would not, I think, make him a real accomplice. Finally, I come to Mallappa Hangji who the learned Sessions Judge said he was not at all sure was an accomplice or not and proceeded to say that his evidence corroborated Chandorkar, who was an accomplice. Mallappa's evidence is Ex. 37. The passage alleged to show that he was an accomplice is on p. 336. It is to the effect that he was present at the discussion and cognizant of the arrangement to pay accused 3 Rs. 1,000 but he was not himself interested in the matter and was only told of the final arrangement, and I do not think he can really be said to have been an accomplice.

These are all the misdirections alleged. For the reasons given above I agree that the trial was regular and the convictions proper.

For accused. 1 2 and 3 nothing can be said in mitigation of punishment. The cases of the remaining accused are different. I agree with the order made by my learned brother, Mirza, J.

R.K. *Conviction confirmed.*

** A. I. R. 1929 Bombay 306

MIRZA AND PATKAR, JJ.

Emperor.

v.

Rameshwar Ramnath—Accused

Criminal Revn. Appln. No. 280 of 1928, Decided on 1st February 1929, against order of Sess. Judge, East Khandesh, in Appeal No. 42 of 1928

** **Criminal P. C., S. 439 (4)—High Court has no jurisdiction to convert acquittal into conviction—Even if it had jurisdiction it does not interfere unless justice urgently demands it.**

High Court has no jurisdiction under S. 439 (4) to convert an order of acquittal into one of conviction on an application in revision as it would not be an easy matter to interfere with an order of acquittal on revision without directly or indirectly contravening the spirit if not the letter of S. 439, sub-S. 4. High Court would be adverse to exercising the revisional jurisdiction in cases of acquittal in case such jurisdiction exists except perhaps when an interference is urgently demanded in the interest of justice : *A. I. R.* 1928 *P. C.* 254, *Rel. on.* (*Case law considered*).

[P 308 C 1]

G. S. Rao—for Applicant

K. A. Somji and *A. A. Adarkar*—for Opponents.

P. B. Shingne—for Crown

Mirza, J.—This is an application for the revision of an order of the Sessions Judge, East Khandesh, who reversed the conviction and sentence passed on the accused 1 to 12 by the 1st Class Magistrate, Jalgaon, and acquitted them. A preliminary objection has been taken on behalf of the accused that this Court has no jurisdiction to interfere with an order of acquittal on an application in revision.

The complainant in this case is not the Local Government, but a private individual. The complaint was for defamation under S. 500, I. P. C. Diwan Bahadur Rao, on behalf of the applicant-complainant, has urged that as the complaint relates to a private and personal matter concerning the applicant, the Local Government would not interfere with the order of acquittal by instituting an appeal under the provisions of S. 407, Criminal P. C. He has also urged that the past practice of this Court not to interfere in such matters has not been of such a uniform nature as to induce us to follow it on this occasion. He relies upon the case of *Mukund* v. *Ladu* (1) and *Ahmedabad Municpality* v. *Manganlal* (2), in both of which this Court interfered with an order of acquittal at the instance of a party other than the Local Government.

In the first of these cases this Court reversed the order of acquittal and ordered the Magistrate to re-hear the complaint, and in the second case it set aside the order of acquittal passed by the Magistrate, and directed him, after such further inquiry as may be necessary to dispose of the case in accordance with law. In both these cases the application was made on behalf of a municipality and not a private individual and related to a matter of public interest and importance. Both these rulings are clear authority on the subject of this Court having jurisdiction te interfere in revision with an order of acquittal irrespective of the applicant being the Local Government

In *In re Faredoon Cawasji* (3) a Divisional Bench of this Court held that this Court has power under S. 439, Criminal P. C. to interfere in revision with an order of acquittal, but by a uniform established practice of the Court, revisional applications against orders of acquittal are not entertained from private petitioners except it be on some very broad ground of the exceptional requirements of public justice. In *Joita* v. *Parshottam* (4) a Divisional Bench of this Court declined, on an application by a private complainant, to interefere with an order of acquittal. Sir Norman Macleod, the Chief Justice, remarked (p. 489 of 45 *B. L. R.*):

"Speaking for myself, if in such a case Government do not exercise their right of asking us to admit an appeal from the order of acquittal, I find it difficult to imagine any circumstances which would justify this Court in interfering in revision at the instance of the complainant."

Diwan Bahadur Rao has relied upon the ruling of the Calcutta High Court in *Faujdar Thakur* v. *Kasi Chowdhury* (5), which is to the effect that under S. 439, Criminal P C., the High Court has jurisdiction to set aside an order of acquittal, but it has now become a settled practice that it will not ordinarily interfere in revision in such cases at the instance of a private prosecutor. This ruling was followed by the same Court in

(1) [1901] 3 Bom. L. R. 584.

(2) [1906] 9 Bom. L. R. 156.

(3) [1917] 41 Bom. 560=40 I. C. 316=19 Bom. L. R. 354.

(4) A. I. R. 1923 Bom. 455.

(5) [1914] 42 Cal. 612=21 C. L. J. 53=27 I. C. 186=19 C. W. N. 184.

Asutosh Das Gupta v. *Purna Chandra Ghosh* (6). The facts of that case were somewhat different from the case before us. The accused in that case were convicted by the Magistrate. In an appeal which was preferred, the Sessions Court had allowed their plea that the trial was vitiated by a misjoinder of charges and had ordered a new trial on certain charges only omitting others. The complainant regarded the omission of charges on the new trial ordered as an order of acquittal on those charges and came in revision to the High Court against such order of acquittal. The High Court entertained the application following its previous rulings, but agreed with the view taken by the Sessions Judge and discharged the rule.

Our attention has also been called to the rulings of the Allahabad High Court in *Queen-Empress* v. *Ala Bakhsh* (7) and *Qayyum Ali* v. *Laiyaz Ati* (8), which are to the effect that although the High Court has the power to interfere in revision with an original or appellate judgment of acquittal it will ordinarily not do so. We have been referred also to the rulings of the Madras High Court in *Re Sinnu Goundan* (9) and *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (10). The first of these cases laid down that the High Court as a Court of revision could not, on the District Magistrate's report, set aside an order of acquittal where an appeal lay by Government against such an order. The Full Bench ruling in the second case laid down that the High Court will not ordinarily interfere in revision at the instance of private parties with a judgment of acquittal except when it is urgently demanded in the interests of public justice. Similarly, in *Gulli Bhagat* v. *Narain Singh* (11), the High Court of Patna has held that the High Court will not interfere in revision at the instance of a private party with an order of acquittal passed under S. 494, Criminal P. C.

The uniform rulings of our Court and the Calcutta, Madras, Allahabad and Patna High Courts are all in favour of the High Court's jurisdiction to entertain applications in revision against orders of acquittal although as a matter of practice and policy it would not interfere with an ordor of acquittal at the instance of a party other than the Local Government except on some very broad ground of the requirements of public justice.

A doubt has been cast upon the subject of the High Court's jurisdiction in such matters by the recent decision of their Lordships of the Privy Council in *Kishan Singh* v. *Emperor* (12). In that case the Government of Allahabad had filed an application in revision against a conviction of an accused person under S. 304, I. P. C., when he was tried in the Sessions Court on a charge of murder under S. 302. I.P.C. The Allahabad High Court had allowed the application, converted the conviction into one of murder under S. 302 and passed the sentence of death on the accused. Their Lordships of the Privy Council considered the case as one of acquittal under S. 302, I. P. C., and regarded the application in revision made by the Local Government to the High Court as falling under S. 439, sub-S. 4, Criminal P. C., which debars the High Court from exercising the powers conferred upon it under S. 439 so as to convert a finding of acquittal into one of conviction. The partinent remarks of their Lordships on this point are at p. 396 of the report. They say:

> "Their Lordships are of opinion that in view of the provision contained in S. 439, sub-S. 4, that nothing in that section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction—the learned Judges of the High Court, who were dealing only with the application for revision, had no jurisdiction to convert the learned trial Judge's finding of acquittal on the charge of murder into one of conviction of murder."

The present application prays for the reversal of the order of acquittal. It asks us to reverse the order of acquittal of the Sessions Court and restore the order of conviction of the trial Court. In other words we are asked to convert a finding of acquittal into one of conviction which under the provisions of S. 439, sub-S. 4. we are not authorized to do. The ruling of their Lordships of the Privy Council to which I have referred would, in my judgment, apply to

(6) A. I. R. 1923 Cal. 11=50 Cal. 159.
(7) [1884] 6 All. 484=(1884) A. W. N. 206.
(8) [1904] 27 All. 359=(1904) A. W. N. 278.
(9) [1914] 38 Mad. 1028=26 M. L. J. 160=23 I. C. 188=(1914) M. W. N. 273.
(10) A. I. R. 1922 Mad. 502=45 Mad. 913 (F.B.).
(11) A. I. R. 1924 Pat. 283=2 Pat. 708.
(12) A. I. R. 1928 P. C. 254=50 All. 722=55 I. A. 390 (P.C.).

such an application in revision as this. We have no jurisdiction to convert an order of acquittal into one of conviction on an application in revision and the application must fail.

It is not necessary for us on this application to express an opinion whether the judgment of their Lordships of the Privy Council in the case to which I have alluded overrules the previous rulings of this Court and the Calcutta, Madras, Allahabad and Patna High Courts regarding our jurisdiction to interfere in revision in cases of acquittal. Speaking for myself, with great respect I feel that it would not be an easy matter to interfere with an order of acquittal on revision without directly or indirectly contravening the spirit if not the letter of S. 439, sub-S. 4, Criminal P. C. For my part I would be averse to exercising the revisional jurisdiction of this Court in cases of acquittal —in case such jurisdiction exists—except perhaps when an interference is urgently demanded in the interest of justice. No such cause is shown to exist in the present case.

The application is rejected.

Patkar, J.—This is an application by the complainant to set aside an appellate order of acquittal passed by the learned Sessions Judge of East Khandesh. It is urged on behalf of the applicant that the High Court has the power to interfere in revision with an order of acquittal by the lower Court and reliance is placed on the decisions of this Court in *Mukund* v. *Ladu* (1) and *Ahmedabad Municipality* v. *Maganlal* (2). These cases relate to applications by the municipalities and not by a private complainant. On the other hand in *In re Faredoon Cawasji* (3) it was held that the High Court has power under S. 439, Criminal P. C. to interfere in revision with an order of acquittal, but by a uniform established practice of the Court, revisional applications against orders of acquittal are not entertained from private petitioners except it be on some very broad ground of the exceptional requirements of public justice. The case follows the decision of Sir Lawrence Jenkins, C. J., in *Faujdar Thakur* v. *Kasi Chowdhury* (5). To the same effect are the rulings of this Court in *Heerabai* v. *Framji Bhikaji* (13) and in *Joita* v. *Parshottam* (4). There is consensus of opinion of the different High Courts on this point as reflected in the decisions of the Madras High Court in *Re Sinnu Goundan* (9) and *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (10); of the Allahabad High Court in *Queen-Empress* v. *Ala Bakhsh* (7) and *Qayyum Ali* v. *Laiyaz Ali* (8); of the Calcutta High Court in *Faujdar Thakur* v. *Kasi Chowdhury* (5) and *Pramatha Nath Barat* v. *P. C. Lahiri* (14); and of the Patna High Court in *Gulli Bhagat* v. *Narain Singh* (11).

It is urged, however, on behalf of the opponent that the High Court has no power to interfere in revision with an order of acquittal and reliance is placed on the Privy Council decision in *Kishan Singh* v. *Emperor* (12) and on sub-S. 4, S. 439, Criminal P. C. In *Kishan Singh* v. *Emperor* (12) the Allahabad High Court interfered in revision at the instance of the Local Government on an application for enhancement of sentence passed on the accused who was tried on a charge under S. 302, Penal Code, but was convicted under S. 304, Penal Code. The High Court convicted the accused under S. 302, Penal Code, and sentenced him to death. Their Lordships of the Privy Council held that the High Court had no jurisdiction under sub-S. 4, S. 439, Criminal P. C., to convert the finding of acquittal under S. 302 into one of conviction under that charge and enhance the sentence. Their Lordships dissented from the view of the Madras High Court in *Re Bali Reddi* (15) and followed the view of the Bombay High Court and of the Allahabad High Court in *Emperor* v. *Shivputraya* (16) and *Emperor* v. *Sheo Darshan Singh* (17). The general question as to whether the High Court has power to interfere in revision with an order of acquittal according to the decisions of the several High Courts has not been considered by their Lordships of the Privy Council, though the reasons given in the judgment might suggest a contrary inference. In the present case the application is for setting aside the order of acquittal so as to convert the finding of acquittal into a finding of conviction. This power is exclu-

(13) [1890] 15 Bom. 349.

(14) [1920] 47 Cal. 818=59 I. C. 37=22 Cr. L. J. 5.

(15) [1918] 37 Mad. 119=22 I. C. 756=15 Cr. L. J. 180.

(16) A.I.R. 1924 Bom. 456=48 Bom. 510.

(17) A.I.R. 1922 All. 487=44 All. 382.

ded by sub-S. 4, S. 439, Criminal P. C., and is opposed to the ruling of the Privy Council in *Kishan Singh* v. *Emperor* (12). Under S. 439 the High Court in exercise of its powers of revision, can exercise any of the powers conferred on a Court of appeal by S. 423. Under S. 423, Cl. (1) (a), in a case of an acquittal the High Court can reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial as the case may be, or find him guilty and pass sentence on him according to law. Sub-section 4, S. 439, excludes the power of the High Court to convert a finding of acquittal into one of conviction. It does not interfere with the other powers conferred by Cl. (1) (a) S. 423, of directing further inquiry to be made or directing the accused to be re-tried as the case may be. I may refer in this connexion to the decision of the Full Bench of the Allahabad High Court in *Queen-Empress* v. *Balwant* (18). It is not necessary for the purpose of this case to go into the general question whether the High Court has the power to interfere with an order of acquittal in revision. In the present case the application is to set aside the order of acquittal and convict the accused. That cannot possibly be done under sub-S. 4 S. 439, and the ruling of the Privy Council in *Kishan Singh* v. *Emperor* (12). Besides the complainant in this case has other remedies. He could have applied to the Local Government to file an appeal against the order of acquittal; he has also another remedy by suit for damages in a civil Court. According to the established and uniform practice this Court would not interfere with an order of acquittal in revision unless it is urgently demanded in the interests of public justice. No such ground for interference exists in the present case. On these grounds I agree that this application must be dismissed.

R.K. *Rule discharged.*

(18) [1886] 9 All. 134=(1886) A. W. N. 322 (P. C.).

A. I. R. 1929 Bombay 309

MIRZA AND PATKAR, JJ.

Emperor

v.

Lakshman Ramshet Alwe—Accused.

Criminal Revn. Appln. No. 409 of 1928, Decided on 13th February 1929, against order of Sess. Judge, Ratnagiri.

(a) Criminal P. C., S. 256—There must be special reason, which a Magistrate must record in writing, if he calls upon accused, on the date charge is framed, to state whether he would cross-examine any prosecution witnesses.

Even on the date the charge is framed it is permissible for a Magistrate to call upon the accused to state whether they wish to cross-examine any of the prosecution witnesses, but if he adopts such procedure he has to record his reasons in writing. And as this procedure is exceptional there must be some special reason for a Magistrate to adopt it: 39 *Mad.* 503; 16 *Cr. L. J.* 786; 2 *Bom. L.R.* 542, *Rel. on.* [P 312 C 1]

(b) Criminal P. C., S. 428—Magistrate not observing provisions of S. 256, Criminal P. C.—Sessions Court remanding case for allowing accused to cross-examine prosecution witnesses and for recording further evidence — Order is not justified under S. 428.

The trying Magistrate committed an illegality in not observing the provisions of S. 256, Criminal P. C., and the Sessions Judge remanded the case directing the Magistrate to allow the accused to cross-examine prosecution witnesses and to record further evidence and to certify it to the Sessions Court.

Held: that the Sessions Court's order was not justified under S. 428. [P 311 C 1]

(c) Criminal P. C., S. 256—Magistrate, on the day when charge was framed, asking accused to state if he wished to cross-examine any prosecution witnesses—Accused applying for time but Magistrate refusing time on ground that his usual practice was to put that question forthwith—Magistrate's refusal amounted to illegality vitiating trial.

It would depend upon the facts of each case whether the contravention of S. 256 amounts to an irregularity of procedure or to an illegality vitiating the trial. [P 312 C 2]

On the very day the charge was framed the Magistrate called upon the accused to state whether he wished to cross-examine any of the prosecution witnesses. The accused applied for time but the Magistrate refused to allow time for the reason that it was his usual practice to put the question forthwith.

Held: that the Magistrate's reason was not adequate and that he committed an illegality vitiating trial: *A. I. R.* 1926 *Bom.* 226, *Ref.* [P 312 C 2]

(d) Criminal P. C., S. 423 (1) (d)—Sessions Judge cannot review his predecessor's order but can only refer case to High Court under Criminal P. C., S. 438.

Section 423 (1) (d) does not permit a Sessions Judge to review a wrong order by his predecessor, the only proper course for him, in such case being to refer the case to the High Court. [P 311 C 1]

(e) Criminal Trial—Magistrate committing illegality—Many witnesses examined after illegality happened—Magistrate expressing opinion on whole evidence—De novo

trial by other Magistrate is proper—Criminal P. C., S. 526.

The trial Magistrate committed an illegality vitiating the trial. Further many of the witnesses both of the prosecution as also of the accused were examined after the illegality happened. The Magistrate had considered all the evidence and expressed his opinion on it.

Held: that it would be proper to order a de novo trial by another Magistrate [P 311 C 2]

G. B. Chitale—for Accused.

P. B. Shingne—for the Crown.

Mirza, J.—The applicants were convicted by the First Class Magistrate, Malvan, of offences under Ss. 392 and 341, I. P. C., and sentenced to various terms of imprisonment and fines. From their convictions and sentences they preferred an appeal to the Sessions Judge, Ratnagiri. One of the grounds they urged against their convictions was that when the charges were framed by the Magistrate the applicants were not given a proper opportunity to cross-examine the two prosecution witnesses who were examined in the case. It appears that the case was tried before the learned Magistrate as a warrant case. When the charge was framed on 4th August 1928, the pleader of the applicants was absent from the Court as he was engaged in another Court. The Magistrate required the applicants to state forthwith whether they wished to cross-examine either of the two witnesses for the prosecution whose evidence had been taken. The applicants gave a written application to the Magistrate asking him to adjourn the hearing as their pleader was under the impression that the learned Magistrate would not proceed with the hearing of the case forthwith after the charge had been framed, but would adjourn the hearing to a subsequent date when the prosecution witnesses would be cross-examined. The Magistrate refused the application on the ground that it was his usual practice in warrant cases to proceed forthwith on the charge being framed with the cross-examination by the accused of the prosecution witnesses and that the applicants' pleader was well aware of that practice.

Section 256, Criminal P. C., provides that after a charge is framed and the accused 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 the prosecution witnesses whose evidence has been taken. It is permissible to a Magistrate to put the question forthwith on the framing of the charge and taking of the accused's plea thereto but if he follows that procedure he has to record his reasons in writing for doing so and those reasons must appear to be cogent and adequate. The reason given by the learned Magistrate for resorting to this procedure is simply that it is his usual practice and the accused's pleader should have foreseen that the cross-examination of the prosecution witnesses would be proceeded with on the day the charge was framed. That, in our opinion, is not a sufficiently cogent or adequate reason for adopting a procedure in this case which under the terms of S. 256 is regarded as an exception to the general rule which is to be followed unless there are special reasons in the case to be set out by the Magistrate in writing, which would justify him in making a departure from the usual procedure.

The learned Sessions Judge Mr. Patkar, was of opinion that the procedure indicated in S. 256, Criminal P. C., had not been followed by the Magistrate. He states that according to the wording of that section the stage for the application of that section was not reached on 4th August 1928, when the Magistrate called upon the accused to cross-examine the witnesses. Such interpretation of the section omits to take into consideration the proviso to the section which enables a Magistrate for reasons to be recorded by him in writing to follow the procedure which the Magistrate in this case did but for an inadequate reason. The learned Sessions Judge remanded the case to the trial Court with a direction that the applicant should be allowed to cross-examine the two prosecution witnesses and that the Magistrate should record the further evidence and certify it to the Sessions Court.

The learned Government Pleader has contended that the order made by the Sessions Judge is in accordance with the provisions of S. 428, Criminal P. C., which empowers an appellate Court in cases where it thinks additional evidence to be necessary on recording its reason for the same, either to take such evidence itself or to direct that it should

be taken by a Magistrate. In our opinion the case would not fall under the provisions of this section as the reason given by the learned Sessions Judge for remanding the case is that an illegality was committed in not observing the provisions of S. 256, and not that it was desirable for any other reason that further evidence in the case should be recorded. The learned Sessions Judge allowed the convictions and sentences to stand when he made his order remanding the case to the trial Court.

In compliance with the Sessions Judge's order the two witnesses were cross-examined before the Magistrate on behalf of the applicants and the additional evidence so taken was certified by him to the Sessions Court. The matter having come again before the Sessions Court on 20th November 1928, Mr. Patwardhan who had succeeded Mr Patkar as Sessions Judge, purported to review the order of his predecessor in office. He further remanded the case to the Magistrate directing him to write a judgment on the further evidence he had recorded. The learned Government Pleader has argued that Mr. Patwardhan made the order under the provisions of S. 423 (1) (d) whereby the appellate Court is inter alia empowered to make any amendment or any consequential or incidental order that may be just or proper. We are unable to agree with the learned Government Pleader that the order of Mr. Patwardhan would fall within S. 423. We are of opinion that Mr. Patwardhan had no power to review the order of his predecessor in office and in view of the opinion he held the proper course for him to have adopted was to make a reference to this Court. On such reference this Court could have passed such order as it thought to be necessary or proper Under Mr. Patwardhan's order too the convictions and sentences of the applicants are not set aside and the appeal is kept pending. The applicants have applied to us in revision to have their convictions and sentences quashed and a de novo trial ordered before another Magistrate.

The provisions of S. 256 appear to us to be peremptory. Where the accused say that they wish to cross-examine the prosecution witnesses at that stage, the witnesses named by them must be recalled for that purpose. In *Re Sobhanadri* (1). Kumaraswami Sastriyar, J held that a refusal by the Magistrate to allow the accused to recall and cross-examine the prosecution witnesses is illegal and it is for the prosecution to show that the accused are not prejudiced thereby. In setting aside the convictions and sentences the learned Judge ordered a re-trial and expressed the opinion that the same Magistrate should not re-try the case.

In *In re Rangasami Padayachi* (2) the same learned Judge held that where the charges framed are complicated and the accused are ignorant persons, a reasonable time should be given to the accused to get proper legal advice and assistance before they are called upon to cross-examine the prosecution witnesses. He further held that to ask such an accused person immediately after the charge was framed to cross-examine the prosecution witnesses would not be giving him a reasonable opportunity for the purpose.

As an illegality in the proceedings has been committed it is open to us to adopt one of two courses. We may either direct that the learned Magistrate should proceed with the trial from the point the illegality occurred or we may order a re-trial. It has been urged before us by the Government Pleader that the Sessions Judge, Mr. Patkar, was of opinion that the Magistrate is not prejudiced against the applicants and they need not entertain any apprehension that they would not get a fair trial. He has also contended that a good deal of evidence before him has already been gone into and it would be a waste of public time to have a de novo trial. It appears that after the illegality occurred the prosecution examined six additional witnesses and the defence ten witnesses. There would not be much saving of public time as all these witnesses examined after the illegality occurred will have to be examined de novo. In these circumstances we are of opinion that there should be a re-trial. Owing to the unfortunate errors in procedure which have occurred in this case it would be desirable, in our opinion, to have the re-trial before another Magistrate.

We set aside the convictions and sentences of the accused and order that they

(1) [1915] 39 Mad. 503=2 M. L. W. 574=29 I. C. 668=(1915) M. W. N. 546.
(2) [1915] 16 Cr. L. J. 786=31 I. C. 642.

be re-tried by the District Magistrate or any other Magistrate whom he may appoint other than the Magistrate who originally tried the case. The fines, if paid, must be refunded.

Patkar, J.—In this case the accused were convicted under Ss. 392 and 341, I. P. C. On appeal the learned acting Sessions Judge, Mr. Patkar, was of opinion that there was an illegality committed by the Magistrate in contravening the provisions of S. 256, Criminal P. C. He, therefore, remanded the case for allowing the accused an opportunity of cross-examining witnesses, Exs. 1 and 2, and for recording the evidence and certifying it to the Sessions Court.

On 4th August 1928, a charge was framed by the Magistrate and on framing the charge the Magistrate called upon the accused's pleader forthwith to cross-examine the witnesses, Exs. 1 and 2, who were examined before the framing of the charge .The pleader on behalf of the accused was absent as he was engaged in another case, and an application was made for adjournment of the case, but it was refused on the ground that the pleader was engaged some time previously and had ample time to take instructions for his client and that it was the practice of the Magistrate to call upon the accused to examine the prosecution witnesses forthwith. It appears that at the next hearing the accused's pleader again put in an application requesting the Court to allow him to cross-examine the two witnesses examined for the prosecution. That application was also rejected by the Court.

Under S. 256, Criminal P. C. after the charge is framed, and if the accused 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. The general rule laid down by S. 256 is to ask the accused to state whether he wishes to cross-examine any of the witnesses on behalf of the prosecution at the commencement of the next hearing; and in exceptional cases forthwith if the Magistrate for reasons to be so recorded in writing thinks fit. But it appears that the learned Magistrate has made it a rule of his Court to ask the accused in every case after the charge is framed to state forthwith whether he wishes to cross-examine any of the witnesses examined on behalf of the prosecution.

I think there must be special reasons which must be recorded in writing by the Magistrate to enable him to call upon the accused forthwith to state whether he wishes to cross-examine any of the prosecution witnesses. The learned acting Sessions Judge was of opinion that the stage for the application of S. 256 had not been reached on 4th August 1928 when the Magistrate called upon the accused's pleader to cross-examine the witnesses. It is permissible for a Magistrate even on the date when the charge is framed to call upon the accused to state whether he wishes to cross-examine any of the witnesses examined for the prosecution but he must record in writing his reasons for so doing, and if there are valid reasons the stage for the application of S 256 would even be reached on the day the charge is framed. I think in the present case the learned Magistrate ought to have at least allowed the application made on the next day of the hearing by the accused's pleader to allow him to cross-examine the two witnesses examined on behalf of the prosecution. I think, therefore, that there was contravention of the provisions of S. 256 in this case. In *Queen-Emperor* v. *Nasarvanji* (3), the conviction and sentence were set aside and the Magistrate was directed to complete the trial according to law on the ground of failure to comply with the terms of S. 256, Criminal P. C. It was held in *Emperor* v. *Umaji Krishnaji* (4), that in a summary trial the omission to follow the procedure laid down by S 256, Criminal P. C. is not an illegality vitiating the trial. It would depend on the facts of each case whether the contravention of S. 256, Criminal P. C. amounts to a mere irregularity of procedure or to an illegality vitiating the trial. I agree with the acting Sessions Judge that in this case the failure to comply with the provisions of S. 256 prejudiced the accused in his defence and amounted to an illegality.

The learned acting Sessions Judge had two courses open to him; either to set aside the conviction and sentence and order the Magistrate to commence from

(3) [1900] 2 Bom. L. R. 542.
(4) A. I. R. 1926 Bom. 226.

the point where the illegality occured or to order a de novo trial. The learned Acting Sessions Judge, however, directed the Magistrate to record the cross-examination of the two witnesses and to forward the record to him and he kept the appeal pending for decision on his file. There was, however, a change in the personnel of the Sessions Judge. Mr. Patwardhan on 28th November 1928, purported to review the order of his predecessor after the receipt of the record containing the cross-examination of witnesses Exs. 1 and 2. He was of opinion that S. 428, Criminal P. C., had no application to the facts of the case inasmuch as it provided additional evidence to be taken which the appeal Court could do even itself. In the present case the learned Acting Sessions Judge did not think that any additional evidence was necessary for the decision of the appeal, but he was of opinion that an illegality was committed by the Magistrate in not allowing the accused or his pleader an opportunity to cross-examine the witnesses examined on behalf of the prosecution in accordance with the terms of S. 256, Criminal P. C. Mr. Patwardhan, however, considered that the proper course was to send the papers to the Magistrate to record a judgment again after taking the evidence of the witnesses, who were cross-examined, into consideration. If the Magistrate had to bring an independent mind to bear on the fresh evidence which was taken by him in cross-examination, it would not have been possible for him to write a judgment of acquittal or to pass a lesser or higher sentence on the facts disclosed in the cross-examination of the witnesses, unless the conviction and sentence had been set aside by the appellate Court.

The procedure adopted by the learned Sessions Judge though permissible under the Civil Procedure Code is not warranted by any of the provisions of the Criminal Procedure Code. We think, therefore, that the proper course in this case for Mr. Patwardhan was to make a reference to the Court under S 438, Criminal P. C, invoking the revisional powers of this Court to correct the error which he thought was committed by his predecessor. The order of Mr. Patwardhan cannot be justified under S. 423 (1) (d) which enables the appellate Court to make any amendment or any consequent or any consequential or incidental order that may be just or proper after the decision of the appeal. It is clear that in the present case there was a contravention of the provisions of S. 256, Criminal P. C. Two courses are open to this Court: either to set aside the conviction and sentence and order the Magistrate to commence the proceedings from the point where the illegality occurred, or to order a de novo trial. The Magistrate in the present case has taken the whole evidence into consideration and expressed his opinion on the evidence, and I agree that it would be fair to the accused in the circumstances of the present case to order a de novo trial. I agree, therefore, with the order just proposed by my learned brother.

S.N./R.K. *Rule made absolute.*

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* A. I. R. 1929 Bombay 313

MIRZA AND PATKAR, JJ.

Krishnaji Prabhakar Khadilkar—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 61 of 1929, Decided on 26th February 1929.

*** Criminal P. C., Ss. 347 and 254—Offence under S. 124-A, I. P. C.—Accused, editor of widely circulated newspaper—Magistrate would have been justified in committing case to High Court Sessions.**

It is not open to a Magistrate to decline to commit a case to High Court Sessions on the ground that there is congestion of work in High Court Sessions. [P 319 C 1]

K, the Editor of a widely circulated vernacular paper in Bombay was charged with offence under S. 124-A, I. P. C.

Held : that having regard to the seriousness of the offence and large circulation the case was of public importance and the accused was entitled to be tried before the High Court Sessions. [P 319 C 2]

The offence with which the accused is charged is a serious offence punishable with transportation for life. The paper he edits enjoys large circulation. Having regard to the large circulation the case can be said to have assumed a public importance. If what is alleged against the accused's article is proved and results in his conviction the Court of Sessions would be in a better position than the Chief Presidency Magistrate to pass an adequate sentence. From the point of view of the accused too, it is important that he should have a fair and full trial. His desire to be tried before a Judge and jury cannot be considered to be unreasonable. The opinion of the jury as to whether the contents of the article complained of are or are not of a seditious nature is entitled

to much weight. However competent a Magistrate may be in interpreting the effect of an article on the public mind, a jury which will be chosen from the lay public is likely to be more representative of the general public mind. This does not lay down a general proposition that in every case where a person is charged under S. 124-A, he would be entitled on his application in that behalf as a matter of course to be tried before a Court of Session. Each case in this respect must necessarily depend upon its particular facts and circumstances.: *A. I. R.* 1925 *Rang.* 207 ; 42 *Mad.* 83 ; 42 *Bom.* 172 ; *A. I. R.* 1926 *Bom.* 251, *Foll.*; 4 *Bom. L. R.* 84 ; 24 *Cal.* 429, *Ref.*; 41 *All.* 454, *Doubted.* [P 316 C 2]

B. J. Desai, *Manilal*, *Kher* and *Sequeira*—for Accused.

P. B. Shingne—for the Crown.

Mirza, J.—The applicant is the editor of a Marathi daily called the Nava Kal which has a circulation of about 10 to 12,000 copies per day amongst the Marathi speaking public. He is being tried before the Chief Presidency Magistrate, Bombay, for an offence under S. 124-A, I. P. C., in respect of an article which appeared in the issue of the Nava Kal of 9th February 1929.

The offence is triable, as would appear from Sch. 2, Criminal P. C., either by a Court of Session or by the Chief Presidency Magistrate. The punishment which may be imposed on conviction is transportation for life or for any term and fine, or imprisonment of either description for three years and fine, or fine The applicant was arrested on 14th February 1929, on process issued by the Chief Presidency Magistrate. On 15th February 1929, this Court on an application made in that behalf released the applicant on his furnishing bail. On 16th February 1929, when the trial commenced before the Chief Presidency Magistrate, the applicant applied that his case may be inquired into on the footing of its eventual committal by the Magistrate to the High Court Criminal Sessions. The Crown having objected, the application was refused. The Magistrate gave a two-fold reason for disallowing the application : (1) that there was congestion of work in High Court Criminal Sessions ; and (2) the Magistrate himself was competent adequately to deal with the case.

The applicant applies for a review of the Magistrate's order and as an alternative invokes our jurisdiction under S. 561, Criminal P. C., on the ground that it would be expedient for the ends of justice to have this case tried before the Sessions Court.

It has been urged before us by Mr. Desai on behalf of the applicant that the article complained of does not constitute an offence under S. 124-A, I. P. C., and that a jury of nine persons as directed on points of law by a Judge of this Court would be the best judges of its meaning and effect. The applicant is willing to incur the risk of having a more substantial punishment meted out to him should he be convicted by the Court of Sessions and to forgo an advantage a trial before the Chief Presidency Magistrate gives him of coming on conviction to this Court in appeal or revision. The maximum punishment which the Chief Presidency Magistrate is competent by law to impose is two years' rigorous imprisonment and Rs. 1,000 fine.

The Government Pleader on behalf of the Crown has opposed the application. His main contention is that it is a matter of discretion for the Chief Presidency Magistrate to decide whether he should try the case himself or commit it to the Court of Session and this Court should not interfere with the discretion unless it is shown that the discretion has been wrongly exercised. The decision of the Magistrate to try the case himself, it is contended, is not final as, under S. 347, Criminal P. C., it is open to him, at any stage of the proceedings before signing the judgment, to commit the case to the Court of Session and that there are no materials before the Court which would justify the apprehension that the learned Magistrate will not do so during some further stage of the proceedings.

The Government Pleader has called our attention to various rulings of this and other Courts which lay down that a Magistrate competent under the law to try a case himself should not commit it for trial to the Court of Session unless he is of opinion that the sentence he is empowered to pass would not be an adequate punishment for the offence.

The ruling in *King-Emperor* v. *Pema* (1), on which reliance has been placed by the Government Pleader in this connexion, is based upon facts which are materially different from those disclosed by the present application. There the Magistrate had committed the case of an offence under S. 323, I. P. C., for

(1) [1902] 4 Bom. L. R. 85.

trial to the Sessions Court. The maximum punishment provided for that offence is imprisonment of either description for one year, or fine of Rs. 1000, or both all which the Magistrate himself was competent to impose. In dealing with these facts the Court observed that a case which ought to be tried by a Court of Session is one which the Magistrate is not competent to try or for which in his opinion adequate punishment cannot be inflicted by him. Neither condition which would have justified the Magistrate in committing the case to the Court of Session was found to exist in that case. The case was exclusively triable by the Magistrate and the procedure laid down in S. 254, Criminal P. C., clearly applied to it. There was no question there of the Court of Session having an alternative jurisdiction to try the case.

The Government Pleader has relied also on the ruling in *Queen-Empress* v. *Kayemullah Mandal* (2) which lays down that there is nothing in S. 254, Criminal P. C., which would prevent a Magistrate from committing a case under S. 257, I. P. C., to the Court of Session provided he finds that the accused has committed an offence which in his opinion cannot be adequately punished by him. The accused in that case were charged with an offence under S. 147, I. P. C., the maximum punishment for which is imprisonment of either description for two years, or fine or both. The offence is triable in the first instance exclusively by a Magistrate. The limit of the Magistrate's power in respect of the sentence of fine is Rs. 1,000. The sentence of fine for an offence under S. 147, I. P. C., is not limited to that amount but may exceed it to any extent provided it is not excessive. The Magistrate would be justified in committing the case for trial to the Court of Session if he is of opinion that the sentence he is empowered by law to pass would be inadequate. There was no question in this case of the alternative jurisdiction of the Court of Session to try the case. The committal to the Court of Session was quashed merely on the ground as stated in the judgment, that the Magistrate's reason for the committal was not based on the inadequacy of the sentence of fine he was empowered to impose. The Government Pleader has relied also on the ruling in *Emperor* v. *Bindeshri Goshain* (3). That is a ruling of a single Judge of that High Court. It was given on a reference by the Sessions Judge of Gorakhpur. The parties were not represented. The offence for which the accused was committed for trial before the Sessions Court was an offence under S. 222 (iii), I. P. C. The maximum punishment for that offence is imprisonment of either description for three years, or fine, or both. It is triable by a Court of Session, a Presidency Magistrate or a Magistrate of the First Class. The learned referring Judge in recommending the quashing of the committal relied upon the ruling in *Queen-Empress* v. *Kayemullah Mandal* (2). The view of the referring Judge is referred to and accepted in the High Court judgment. The essential difference between this case and *Queen-Empress* v. *Kayemullah Mandal* (2) which it followed has not been noted in the judgment. *Queen-Empress* v. *Kayemullah Mandal* (2) was exclusively triable by the Magistrate. That seems to have been lost sight of in applying it to a case which in the alternative could be tried by the Court of Session. With great respect this case does not appear to me to be a conclusive authority on the point. The learned Government Pleader has relied also upon two rulings of the Sind and Nagpur Judicial Commissioner's Courts. Under the practice of our Court I regret it is not permissible for me to consider the rulings of these Courts.

Mr. Desai has relied upon the observations of Heaton, J. in *Emperor* v. *Bhimaji Venkaji* (4) which are as follows (p. 178):

"It appears to me that when a Magistrate comes to consider whether he shall or shall not commit a case, he has to consider the gravity of the offence the punishment with which in his opinion it ought to be met and the section under which he charges the accused person. He may no doubt properly consider any special difficulties in the case or that it is a matter of some peculiar public importance, and no doubt other matters also might enter into his consideration, such as the wish of the parties."

(2) [1897] 24 Cal. 429=1 C. W. N. 414.

(3) [1919] 41 All. 454=50 I. C. 161=17 A. L. J. 456.

(4) [1917] 42 Bom. 172=44 I. C. 454=20 Bom. L. R. 89.

Mr. Desai has relied also on the case of *Emperor* v. *Achaldas Jethamal* (5) where Marten, J. (now Chief Justice) cites with approval the following observations of Batchelor, J. in *Emperor* v. *Asha Bhathi* (6) (p. 999):

"It is for many reasons undesirable in practice that our already overburdened Courts of Session should be still further burdened with the weight of cases committed to them by Magistrates where such Magistrates are themselves competent to decide the cases and no overriding reasons exist for committal to the higher Court."

Mr Desai has contended that an overriding reason exists in the present case for making a departure from what may be regarded as a general rule and that overriding reason is the gravity of the offence having regard to the wide circulation of the applicant's paper.

Mr Desai has relied also on the observations of Sadasiva Ayyar, J. in *The Crown Prosecutor* v. *Bhagvathi* (7) which are as follows (p. 85):

"...Section ...347 gives very wide powers to a Magistrate. In any trial or proceeding before him and at any stage he can, even, just before signing judgment, commit a case before him to a Court of Session or the High Court (provided of course, he is empowered to commit cases to that Court), if it appears to him that the case is one which ought to be tried by a Court of Session or the High Court. It does not restrict the grounds on which he should arrive at his opinion to want jurisdiction himself or to his inability in his own opinion to sentence the accused adequately. If he considers for instance, that a complicated question of law arises or that some connected matter is already before the Court of Session or that the facts are such that trial with the aid of a jury or with the aid of assessors (who may be chosen from experts in the particular matters involved in the case) would be a more satisfactory procedure, I see nothing in S. 347, to prevent a Magistrate from committing the case to a Court of Session."

Mr. Desai has relied also on the recent ruling of the Rangoon High Court in *King-Emperor* v. *Ishahat* (8), which lays down that S. 347, Criminal P. C., gives a Magistrate very wide powers of commitment, and there is no suggestion that the only possible reason for a competent Magistrate to commit a case to Sessions is that he will not be able to pass a sufficiently severe sentence. The discretion vested in him, it is there stated, cannot clearly be limited by the provisions of S. 254, Criminal P. C.

Following these later rulings of our Court and the Madras and Rangoon High Courts I am of opinion that an overriding reason has been made out in this case which makes it desirable that it should be tried before the Sessions Court and not before the Chief Presidency Magistrate, although he would be competent to try it. The offence with which the applicant is charged is a serious offence punishable with transportation for life. The paper he edits enjoys a large circulation. Having regard to this large circulation the case can be said in my opinion to have assumed a public importance. If what is alleged against the accused's articles is proved and results in his conviction the Court of Session would be in a better position than the Chief Presidency Magistrate to pass an adequate sentence. From the point of view of the accused too, it is important that he should have a fair and full trial. His desire to be tried before a Judge and jury cannot, in my opinion be considered to be unreasonable. The opinion of a jury as to whether the contents of the article complained of are or are not of a seditious nature is entitled to much weight. However competent a Magistrate may be in interpreting the effect of an article on the public mind a jury which will be chosen from the lay public is likely to be more representative of the general public mind. We must not be understood to lay down a general proposition that in every case where a person is charged under S. 124-A he would be entitled on his application in that behalf as a matter of course to be tried before a Court of Session. Each case in this respect must necessarily depend upon its own particular facts and circumstances.

We direct that the Chief Presidency Magistrate do conduct the proceedings before him in this case on the footing that he will at the end of the proceedings commit the case to take its trial before the High Court Criminal Sessions and that he do at the end of the proceedings before him commit the applicant to take his trial before the High Court Criminal Sessions.

Patkar, J.—This is an application to revise the order of the Chief Presidency

(5) A. I. R. 1926 Bom. 251.
(6) [1913] 15 Bom. L. R. 998=21 I. C. 897=14 Cr. L. J. 657.
(7) [1918] 42 Mad. 83=35 M. L. J. 559=9 M. L. W. 14=48 I. C. 337=(1918) M. W.N. 870.
(8) A. I. R. 1925 Rang. 207=3 Rang. 42.

Magistrate declining to commit the case against the accused under S. 124-A I. P. C., to the Court of Session. It is urged on behalf of the applicant that the learned Magistrate declined to commit the case to the Court of Session on two grounds: (1) that there is congestion of work in the High Court, and (2) that the Magistrate was of opinion that he could pass an adequate sentence. With regard to the first ground it is urged that it is an extra-judicial ground and not a legal and valid ground for rejecting the application of the accused to commit him to the Court of Session. With regard to the second ground it is urged that though the Magistrate has a large discretion in trying the case himself on the ground that he could pass an adequate sentence, it is not the sole criterion in the decision of the question and that the gravity of the offence, the punishment, the effect of the article, the subject of the charge, on the public mind and the public importance of the case are also matters for consideration in coming to a decision on the question. In the alternative it is suggested that the case should be ordered to be committed to the Court of Session on the ground that it is expedient in the ends of justice under Cl. (e), S. 526, Criminal P. C.

It is contended on behalf of the Crown that under S. 207, Criminal P. C., in the case of offences which are not exclusively triable by a Court of Session the Magistrate can commit to the Court of Session any case if in the opinion of the Magistrate it ought to be tried by a Sessions Court, and that if the Magistrate is of opinion that the offence can be adequately punished by him, it is incumbent upon him to frame a charge under S. 254, and he cannot commit the case to the Court of Session. If, however, after the framing of the charge it appears to the Magistrate at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or the High Court, he has power to commit the case under S. 347, and that S. 207 and S. 347, are controlled by S. 254. It is further urged that it is a matter solely within the discretion of the Chief Presidency Magistrate to decide whether he can adequately punish the accused and, therefore, he should try the case himself, or not commit it to the Court of Session, and that there are no special circumstances in this case to interfere with the discretion of the Magistrate.

In *Queen-Empress* v. *Kayemullah Mandal* (2) it was held that, although the case was shown to be triable only by a Magistrate under Sch. 2, Criminal P. C., there was nothing in S. 254, Criminal P. C. which prevented the Magistrate in committing the case under S. 147, I. P. C., to the Court of Session provided he was of opinion that the accused committed an offence which in his opinion could not be adequately punished by him. In that case, the offence under S. 147, I. P. C., was triable by a Magistrate and was punishable with imprisonment for two years or with fine. The Magistrate passed an order of committal to the Court of Session on the strength of a certain circular. The learned Sessions Judge, to whom the case was committed, made a reference for quashing the commitment on the ground that the commitment of the case under S. 147, I. P. C. was illegal as the offence was one triable by a Magistrate. It was held that under S. 207 a Magistrate has the power to commit cases triable exclusively by the Court of Session and cases which in the opinion of the Magistrate ought to be tried by that Court, and, therefore, the commitment was not illegal. It was held that the Magistrate was himself competent to pass the maximum sentence of imprisonment for the offence under S. 147, but might have committed the case to the Court of Session if he had considered that the fine which he could impose would not be an adequate punishment, but the Magistrate did not commit the case to the Court of Session for that reason, and therefore, the commitment was quashed. In *King-Emperor* v. *Pema* (1) the decision in *Queen-Empress* v. *Kayemullah Mandal* (2) was followed by this Court. The offence in that case was one under S. 323, I. P. C. which was punishable with the maximum punishment of imprisonment for one year and a fine of Rs. 1,000 which was within the competence of the First Class Magistrate trying the case to impose on the accused. It was, however, held in that case that the words "ought to be tried" (by the Court of Session) in Ss. 207 and 347, Criminal P. C. must be read with S. 254 of the Code; and a case which ought to be tried by a

Cout of Session is one which the Magistrate is not competent to try or in which, in his opinion, adequate punishment cannot be inflicted by him. In both the cases referred to above the Magistrate was competent to pass the maximum sentence of imprisonment prescribed for the offence. S. 124-A is punishable with transportation for life or for any shorter term and fine or imprisonment of either description for three years and fine or only fine. In *Emperor* v. *Bindeshri Goshain* (3) it was held that it is not competent for a Magistrate to commit a case which is within his jurisdiction to try unless he is of opinion that the accused, if guilty, cannot be adequately punished by him. The offence in that case was under S. 222 (iii) and was punishable with imprisonment of either description for three years or fine or both. The reasons in support of the conclusion have not been set forth in the judgment but the reasons given by the Sessions Judge in his order of reference were accepted and the commitment of the accused to the Court of Session was set aside.

The reasoning, however, of the cases referred to above proceeds on the somewhat broad ground that Ss. 207 and 347 are controlled by S. 254, Criminal P. C. and that it is a matter largely within the discretion of the Magistrate to decide whether he should commit a case to the Court of Session, and in coming to that conclusion he is to be guided solely by the question whether he could pass an adequate sentence. On the other hand, in the case of *Emperor* v. *Bhimaji Venkaji* (4), Heaton, J., observed as follows (p. 178):

"It appears to me that when a Magistrate comes to consider whether he shall or shall not commit a case, he has to consider the gravity of the offence; the punishment with which in his opinion it ought to be met and the section under which he charges the accused person. He may no doubt properly consider any special difficulties in the case or that it is a matter of some peculiar public importance, and no doubt other matters also might enter into his cosideration, such as the wish of the parties. But a Magistrate must not determine this important matter whether he is to commit the case or to try it himself solely by the wish of the parties and the terms of a Government Resolution."

There is thus a conflict between the decision in *Emperor* v. *Bhimaji Venkaji* (4) and the decision in *King-Emperor* v. *Pema* (1) as to whether a Magistrate's powers of committal are confined to cases where he considers that he cannot give adequate punishment or whether he may take into consideration other grounds such as the gravity of the offence, the punishment, the section under which the accused is charged, the special difficulties in the case, the peculiar public importance of the case and other matters. This conflict is emphasised by Mr. Justice (now Chief Justice) Marten in his judgment in *Emperor* v. *Achaldas Jethamal* (5).

In *The Crown Prosecutor* v. *Bhagavathi* (7), it was held that the terms of S. 347, Criminal P. C., are general and give a Magistrate, who is empowered to commit, a discretion in committing cases for trial which is not limited by S. 254 so as to make it obligatory on him to try every case which he can adequately punish. Sadasiva Ayyar, J,, observes (p. 85):

"[Section 347] does not restrict the grounds on which he should arrive at his opinion to want of jurisdiction himself or to his inability in his own opinion to sentence the accused adequately. If he considers, for instance, that a complicated question of law arises or that some connected matter is already before the Court of Session or that the facts are such that trial with the aid of a jury or with the aid of assessors (who may be chosen from experts in the particular matters involved in the case) would be a more satisfactory procedure, I see nothing in S. 347 to prevent a Magistrate from committing the case to a Court of Session."

Napier, J., observes (p. 87):

"A more reasonable hypothesis seems to me to be that this allocation of this offence to the Court of Session as well as Magistrates of the First Class is an indication that in some circumstances a Court of Session would be the proper tribunal to try the case."

In *King-Emperor* v. *Ishahat* (8) it was held that S. 347, Criminal P. C., gives the Magistrate very wide powers of commitment, and there is no suggestion that the only possible reason for a competent Magistrate to commit a case to Sessions is that he will not be able to pass a sufficiently severe sentence, and the discretion vested in him cannot clearly be limited by the provisions of S. 254 of the Code.

There appears, therefore, a conflict of judicial opinion on the question as to whether inability to pass an adequate sentence is the sole criterion in deciding the question as to whether the case should be committed to a Court of Session or whether the Magistrate should not

consider the other circumstances such as the gravity of the offence, the punishment prescribed for the offence, the special difficulties in the case and other matters including the wish of the parties. The trend of opinion as disclosed in the later decisions is in the direction of not unduly restricting the discretion of the Magistrate in committing a case to the Court of Session. Each case, however, is to be decided on its own merits. Ground 1, namely, that there is congestion of work in the High Court, is clearly not a legal ground on which the Magistrate can decline to commit a case to the Court of Session. The ability to impose an adequate punishment is no doubt a legal ground for refusing to commit the case to the Court of Session. But, in my opinion, according to the view of Heaton, J., in *Emperor* v. *Bhimaji Venkaji* (4) that would not be the sole ground for coming to a decision on the question. In *Queen Empress* v. *Abdul Rahiman* (9), the accused was tried by a Presidency Magistrate on a charge of voluntarily causing grievous hurt with a cutting instrument under S. 326, I. P. C. Not only a charge was framed under S. 254, Criminal P. C., on the ground that the Magistrate thought that he could pass an adequate sentence, but he convicted and sentenced the accused to rigorous imprisonment for two years, and on an application by the Crown it was held that the offence of which the prisoner was convicted being one punishable under S. 326, I. P. C., with transportation for life or rigorous imprisonment for ten years and fine, the Presidency Magistrate ought to have committed the accused for trial to the High Court. Parsons, J., observed (p. 585) :

"It is only a qualified jurisdiction which is conferred by S. 28 on a Magistrate to try an offence which is shown in Col. 8, Sch. 2, to be triable by him. S. 207 lays down the procedure to be adopted, not only where the case is triable exclusively by a Court of Session or High Court, but also where the case, in the opinion of the Magistrate, ought to be tried by such Court. S. 254 is still more restrictive, for it provides that the Magistrate shall try an accused person only for an offence which, in his opinion, can be adequately punished by him. These two sections show that a Magistrate has to exercise a discretion in the matter of every case that is brought before him, and his proceedings in the exercise of this discretion are clearly subject to examination and review by a superior Court, either on appeal or in revision."

It would, therefore, follow that even on the question as to the adequacy of punishment a Magistrate's discretion is subject to examination by this Court in revision. Ordinarily the High Court would not interfere in revision with the discretion exercised by the Magistrate. The accused in this case states in his application that his paper has a circulation of about ten or 12 thousand copies among the Marathi speaking public. That statement is not controverted on behalf of the Crown. The offence, therefore, under S. 124-A. I. P. C., committed by an editor of a newspaper of such a large circulation would be a grave offence and the gravity of the offence would, therefore, be a ground for commitment to the Court of Session according to the view taken in *Queen-Empress* v. *Abdul Rahiman* (9) and *Emperor* v. *Bhimaji Venkaji* (4). Other arguments have been advanced before us in support of a trial of this case before a Court of Session. On the whole I think that this is a fit case which ought to be tried by a Court of Session.

We are not laying down a general proposition that every offence under S. 124-A or any offence in which the punishment exceeds the maximum sentence which a Magistrate is competent to inflict must be committed to the Court of Session. On the other hand it is the duty of the Magistrate to try cases which, in his opinion, could be adequately punished by him and not shirk his responsibility by committing them to the Court of Session in the absence of any overriding reason justifying the departure from the ordinary rule. Having regard to the large circulation of this paper, the gravity of the offence and the other circumstances which have been brought to our notice in the arguments before us, we think that the accused in the present case ought to be tried by the Court of Session.

I agree, therefore, with the order just proposed directing that the Magistrate should conduct the inquiry with a view to commit the accused to the High Court Sessions.

V.B/R.K. *Rule made absolute.*

(9) [1891] 16 Bom. 580.

A. I. R. 1929 Bombay 320

MARTEN, C. J. AND MURPHY, J.

Bhikaji Raghunath Varerkar and *others*—Defendants—Applicants.

v.

Anant Laxman Khandalekar—Plaintiff—Opponent.

Civil Revn. Appln. No. 182 of 1928, Decided on 18th December 1928, against order of First Class Sub-Judge, Ratnagiri, in Civil Suit No. 79 of 1927.

Civil P. C., O. 23, R. 1—Permission to withdraw cannot be granted after conclusion of evidence on ground of scanty evidence either under R. 1 or S. 151.

A suit was heard in the trial Court and the evidence was concluded and the case fixed for final argument. The plaintiff produced some documents which were then disallowed. The Court allowed the application at that stage to withdraw the suit with permission to file a fresh suit on the ground that the plaintiff's evidence was scanty and the suit was likely to fail unless the documents disallowed were admitted.

Held: that the application at that late stage of the trial to withdraw ought to have been refused. Even S. 151 would not help the Court to allow to withdraw. [P 320 C 2]

P. V. Kane—for Applicants.

G. R. Madbhavi—for Opponent.

Marten, C. J.—In permitting the plaintiff to withdraw this suit with liberty to bring a fresh one, notwithstanding that the trial had been going on for several days, and the evidence concluded and the case fixed for final argument, I would hold that the learned Judge misdirected himself as to the principles which should have guided him in exercising his discretion. Para. 4 of his judgment sets out the principle which he thinks should be adopted. It is in effect that if a plaintiff finds at the trial that he may fail because his evidence is scanty, he should be given another chance of bringing another suit to supplement his scanty evidence. That principle is not the law of this land. If it were, it would doubtless lead to a great deal of perjury and to a vast increase of litigation and hardship on innocent litigants. That being so, it is open to us to revise the discretion which the learned Judge exercised.

Doing that, it appears that the only ground on which the trial application was based is that certain documents in the possession of the plaintiff which he deliberately suppressed until the trial of the suit and which were consequently disallowed by the learned Judge ought now to be put in evidence and an opportunity given for that purpose. There again the plaintiff has deliberately violated another wholesome principle, viz., that parties should disclose their relevant documents in dispute, and not keep them back until the trial is in progress.

Under these circumstances, we think the application at that late stage of the trial to withdraw the suit with liberty to bring a fresh one ought to have been refused.

The result is that the rule must be made absolute, the order of the Court below discharged, and the case remanded to be determined according to law, and to proceed from the stage at which it left off, the evidence having been closed on both sides and the case set down for argument.

The respondent to pay the applicants' costs of this application in any event.

Murphy, J.—I agree. I think this is essentially not a case in which permission to bring a fresh suit should have been given. The documents in question were in the plaintiff's possession and apparently they were deliberately withheld at the proper time, so as to surprise the other side with them in cross-examination. Ultimately they were tendered at a very late stage in the case, when both the parties had closed their evidence and it had been fixed for arguments. The learned Subordinate Judge has endeavoured to justify his action under S. 151, Civil P. C., but it is admitted in this Court that it cannot be made good under that section. Under O. 23, R. 1, the only grounds on which permission to institute a fresh suit can be granted are where the Court is satisfied that a suit must fail by reason of some formal defect or for other sufficient reasons. It does not seem to me that by any stretch of imagination we can say that the grounds which exist in this case, the plaintiff's failure to comply with the rules of procedure—a failure which appears to have been deliberate—can be a sufficient ground for allowing him to re-open the whole case and so to make good his scanty evidence.

I accordingly agree that the rule must be made absolute.

V.B./R.K. *Rule made absolute.*

* A. I. R. 1929 Bombay 321

BAKER, J.

Shriniwas Vithal Pai and *others*—Defendants—Appellants.

v.

Hari Sabaji Kamat—Plaintiff—Respondent.

Second Appeal No, 669 of 1926, Decided on 7th December 1928, from decision of Dist. Judge, Ratnagiri, in Appeal No. 19 of 1925.

*** Civil P. C., O. 38, R. 11—After judgment attachment before judgment becomes one in execution and O. 21, R. 57 applies when decree-holder's application for execution by sale of attached property is dismissed for default.**

The attachment before judgment is converted after decree into an attachment in execution and the provisions of O. 21, R. 57, will apply. But in order that the attachment before judgment should come to an end under O. 21, R. 57, it is necessary that the decree-holder should apply for execution by sale of the attached property and his application should be dismissed for default. [P 323 C 1]

Where the decree-holder endeavoured to execute the decree by sale of moveable property only and not of the immovable property attached, and though he asked for a share in the proceeds of the sale of the immovable property in execution of the decree got by another decree-holder, he had not himself asked for sale of the immovable property attached, and the applications were disposed of.

Held: that the facts did not satisfy the conditions laid down by O. 21. R. 57 as there had been no default on the part of the decree-holder so far as the execution in regard to the immovable property was concerned, and the decree-holder's request that he should share rateably in the proceeds of the sale of the property already under attachment could not be regarded as amounting to an application for sale of the property attached before judgment in his own suit: *A. I. R.* 1923 *Bom.* 30; *A.I.R.* 1924 *Mad.* 494 (*F B.*), *Dist.*; 26 *M. L. J.* 215; *A. I. R.* 1924 *All.* 860; 42 *Mad.* 1, *Ref.* [P 323 C 2]

Rege and *A. A. Adarkar*—for Appellants.

G. N. Thakor and *S. R. Parulekar*—for Respondent.

Judgment.—These are companion appeals arising out of two suits in which the point is the same and may be disposed of in one judgment. The plaintiff sued for a declaration that the property in suit was not liable to be sold in execution of the decree in Suit No. 250 of 1903 obtained by defendants against the heirs of one Govind Raghunath Pai. The facts are as follows: Suit No. 250 of 1903, was filed by the father of the present defendants against Govind Raghunath Pai. His immovable property was attached before judgment, and on 11th November 1904, a decree for Rs. 4,000 was passed against him, which was confirmed on appeal on 28th February 1906. In 1907, in execution of the decree in Suit No. 190 of 1905, another decree-holder attached and sold properties Nos. 1, 5, 6, 7, 8, 9 and 12, and they were purchased by one Kamat and sold to plaintiff on 1st January 1914. No objection is raised to this in appeal. The remaining properties Nos. 2, 3, 4, 10 and 11, were sold to plaintiff by the heir of Govind Pai, his daughter-in-law, in May 1914. The present defendants had filed two darkhasts in 1909 and 1913. In the first darkhast they asked for rateable distribution, and for attachment of moveables. Both the darkhasts were disposed of, the second one being dismissed. In 1916, defendants again sought to bring the property to sale, and this resulted in plaintiff's suit for a declaration that the property is not liable for sale. The first Court, the Subordinate Judge of Malvan, granted the plaintiff the declaration sought, and the decree was confirmed in appeal. Defendants make this second appeal.

The only point in appeal is whether the property purchased by plaintiff from the heir of the judgment-debtor is liable to sale in execution of the defendants' decree against Govind Raghunath Pai. The defendants' contention is that the alienation in favour of the plaintiff is invalid because the properties were still under attachment in Suit No. 250 of 1903. The point is one of importance. The question for decision is whether the attachment before judgment in Suit No. 250 of 1903 had come to an end by reason of the dismissal of the darkhasts in 1909 and 1913, that is, whether the provisions of O. 21, R. 57, are, or are not, applicable to the case. O. 21, R. 57, states that:

> "Where any property has been attached in execution of a decree, but by reason of the decree-holder's default the Court is unable to to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

The question is whether this rule applies to attachments before judgment. The plaintiff contends that the defendants having allowed their darkhasts,

No. 49 of 1909, to be disposed of, and having done nothing further, the property was freed from attachment under O. 21, R. 57, and that by the defendants' own conduct and negligence they had shown their intention not to proceed against the property, and hence the attachment came to an end in April 1913, when the darkhast was dismissed.

The reasoning of the learned District Judge is as follows: The facts of the present case are nearly on all fours with those in *Banaddin Sahib* v. *Arunachala Mudali* (1), where it was held that the provisions of O. 21, R. 57, have no application in the case of an attachment before judgment, even though in execution of the subsequent decree application may have been made for rateable distribution of the assets that might be realized by the sale of the properties attached. This was followed in *Venkatasubbiah* v. *Venkata Seshaiya* (2). The scope of the rule however, has been materially narrowed by the decision of the majority of the Full Bench in *Meyyappa Chettiar* v. *Chidambaram Chettiar* (3), where it was held that the provisions of O. 21, R. 57, would apply to the case of an attachment before judgment followed by an application after the decree for the purpose of of bringing the property to sale. In the present case, although the defendants had filed two applications for execution in 1909 and 1913 respectively, in neither of those applications had they specifically sought to bring to sale the immovable property which had been attached before judgment. Both these applications were against the moveable property of the judgment-debtor, though the application of 1909 went so far as to request rateable distribution of the assets of the immovable property which was being proceeded against in execution by other judgment-creditors. In *Meyyappa Chettiar* v. *Chidambaram Chettiar* (3), it was held that when after the decree application is made with a view to bringing to sale property attached before judgment, such attachment may be treated for the purpose of O. 21, R. 57, as attachment in execution It is true that in the present case there has been no application in execution to bring the attached property to sale which application has been dismissed, but the District Judge is of the opinion that there is no reason why a decree-holder, once he has applied for execution should be placed in a more advantageous position merely by reason of the fact that he has obtained attachment before judgment than a decree-holder who has not obtained attachment after judgment. If the provisions of O. 21, R. 57, are in no case to have effect in respect of an attachment before judgment, it becomes open to a decree-holder who has obtained attachment before judgment to maintain the attachment indefinitely or at any rate so long as the decree remains executable. He can save limitation by filing successive applications for execution and by abstaining from proceeding against the specific property attached and thus prevent the judgment-debtor from dealing with it. There is no reason why a higher degree of diligence should be required from a decree-holder who has obtained attachment after judgment than from one who has obtained attachment before judgment. By their application in 1909 the appellants requested that they should be allowed to share rateably in the proceeds of the sale of the property already under attachment and in process of being brought to sale by the other decree-holders. This amounts to acquiescence in the sale of the property which was already attached before judgment on their own application, and so *Meyyappa* v. *Chidambaram* (3), applies.

The learned counsel for the appellants contends that the attachment before judgment subsisted, and that the case in *Banuddin Sahib* v. *Arunachala Mudali* (1) covers the case. It is not overruled by *Meyyappa* v. *Chidambaram* (3) and this latter case does not apply because in the present case there has not been an application in execution to bring the attached property to sale, nor has such application been dismissed. He further relies on *Bohra Akhey Ram* v. *Basant Lal* (4). For the respondents it is contended that after Govind's death the attachment did not continue, and that the appellant's own conduct in allowing the same property to be attached by others and asking for rateable distribution of the proceeds of the sale shows that they did not regard the attachment as

(1) [1914] 26 M. L. J. 215=22 I. C. 351.
(2) [1918] 42 Mad. 1=35 M. L. J. 387=8 M. L. W. 369=48 I. C. 232=(1918) M. W. N. 606.
(3) A. I. R. 1924 Mad. 494=47 Mad. 483 (F.B.).
(4) A. I. R. 1924 All. 860=46 All. 894.

subsisting. Order 21, R. 57, was rightly applied, following *Meyyappa* v. *Chidambaram* (3). The original view was that O. 21, R. 57, only applies to attachments in execution as laid down in *Venkatasubbiah* v. *Venkata Seshaiya* (2), Reference is made to O. 38, R. 9, *Arunachalam Chetty* v. *Periasami Servai* (5); and the remarks at p. 505 in *Meyyappa* v *Chidambaram* (3). Order 38, R. 9, only refers to what takes place while the suit is pending. Order 38, R. 11, provides for what is to happen when the suit is disposed of. After the decree is passed, the attachment becomes one in execution, and ceases to be one before judgment although *Bohra Akhey Ram* v. *Basant Lal* (4) is against this view. The facts in *Banuddin Saheb* v. *Arunachala Mudali* (1) are obscure. The respondents' counsel further refers to *Ganpatibhatta* v. *Devappa* (6) which, however, does not refer to the case of an attachment before judgment. I am of opinion that O. 38, R. 9, applies only to what happens before decree. What happens after the decree is dealt with by O. 38, R. 11. Up to the date of the Full Bench decision in *Meyyappa* v. *Chidambaram* (3) it was held that O. 21, R. 57, did not apply to attachments before judgment: cf. *Banuddin Sahib* v. *Arunachala Mudali* (1); *Bohra Akhey Ram* v. *Basant Lal* (4); and *Venkatasubbiah* v. *Venkata Seshaiya* (2). Under the ruling in *Meyyappa* v. *Chidambaram* (3) the attachment before judgment is converted after decree into an attachment in execution, and the provisions of O. 21, R. 57, will apply. But, although O. 21, R. 57, will apply, *Meyyappa* v. *Chidambaram* (3) only goes so far as to show that, upon the dismissal of an application for execution by bringing the attached property to sale on account of the decree-holder's default, the attachment will cease. Therefore, even applying the provisions of O. 21, R. 57, in order that the attachment before judgment should come to an end, it is necessary that the decree-holder should apply for execution by sale of the attached property, and that his application should be dismissed for default. This condition has not been fulfilled in the present case. The decree-holder endeavoured to execute the decree by sale of movable property only and not of the immovable property attached, and though he asked for a share in the proceeds of the sale of the immovable property in execution of the decree got by another decree-holder, he has not himself asked for sale of the immovable property attached. The effect of the judgments of the lower Courts, therefore, is to still further extend the principle laid down in *Meyyappa* v. *Chidambaram* (3) and to hold that an attachment made before execution of immovable property ceases to exist on the dismissal of an application by the decree-holder for execution by sale not of the immovable property attached before decree, but of moveables. None of the reported cases has gone so far as this, and I am not prepared to accept this position as correct. The facts of the present case do not satisfy the conditions laid down by O. 21, R. 57. There has been no default on the part of the decree-holder so far as the execution in regard to the immovable property is concerned. I cannot regard the decree-holder's request that he should share rateably in the proceeds of the sale of the property already under attachment as amounting to an application for sale of the property attached before judgment in his own suit.

In these circumstances, I disagree with the view of the Courts below. I reverse the decree, so far as the properties purchased from the judgment-debtor's heir are concerned, and direct that the plaintiff's suit should be dismissed. As the appeal has not been pressed with regard to the properties sold at the auction sale each party will bear its own costs. The order in the other appeal will be that the plaintiff's suit is dismissed with costs.

M.N./R.K. *Decree reversed.*

(5) A. I. R. 1921 Mad. 163=44 Mad. 902 (F. B.).

(6) A. I. R. 1923 Bom. 30=46 Bom. 942.

A. I. R. 1929 Bombay 323

BAKER, J.

Malhari Vaman Kramavant and *others* —Defendants—Appellants.

v.

Vinayak Ravji Kramavant and *others* —Plaintiffs—Respondents.

Second Appeal No. 258 of 1927, Decided on 31st January 1929, against decision of Joint Judge, Thana, in Appeal No. 225 of 1925.

(a) Hindu Law — Partition—With regard to undivided property parties after partition are tenants-in-common.

Where there is partition between brothers and some property is left undivided the posi-

tion of parties after partition, is that of tenants-in-common as regards the property which is left undivided : *A. I. R.* 1916 *P. C.* 104; *A. I. R.* 1924 *Bom.* 31, *Foll.* [P 324 C 2]

(b) Civil P. C., S. 11 — Partition — Two lands kept undivided—Suit for partition of one—Another not included—Inclusion suggested but point not decided—Subsequent suit to recover share in other is not barred by res judicata.

Members of a joint family partitioned part of the property among themselves in 1875 and kept undivided two pieces of land which were left in the possession of defendants, one in that of defendants 1 to 4 and the other in that of 5 to 6. Defendants 1 to 4 sued plaintiffs and defendants 5 to 6 for partition of the piece of land in possession of defendants 5 and 6. The plaintiffs raised a plea of inclusion of the other piece of land. The point was left undecided. Then subsequently a suit was brought by the plaintiffs to recover their share in the land in possession of defendants 1 to 4. It was contended that the suit was barred by res judicata.

Held : that the suit was not barred by res judicata under S. 11 (4) for the plaintiffs could not be said to be compelled to bring the land in suit for partition in previous suit where the suit was brought by tenants-in-common to recover their share. 20 *Cal.* 79, (*P. C.*); 7 *Bom.* 182, *Dist.* [P 325 C 2]

(c) Adverse possession — Cosharer — Evidence—Ouster or denial of right is necessary.

In order that a cosharer or cotenant can be excluded from his share in the property it is necessary to show that some act has been done by the co-owner to the knowledge of the other which amounts to the denial of the latter's right. The onus lies on the defendant to prove his adverse possession. 23 *Bom.* 300, *Dist. A. I. R.* 1922 *Bom.* 150; 47 *Cal.* 274, *Foll.* [P 326 C 2]

C. H. Patwardhan—for Appellants.

P. V. Kane—for Respondents.

Judgment.—The plaintiffs sued the defendants for partition and possession of their one-fifth share in the lands in suit at Nagaon and Davale. The plaintiffs and the defendants are the descendants (sons) of three out of the five sons of Hari. In the first Court defendants 5 and 6 supported plaintiff's claim which was contested by defendants 1 to 4 almost entirely on the ground that the plaintiff's title was barred by time inasmuch as neither they nor their father had ever had possession of the land in suit. It was also contended that there was other joint family property which should be brought in suit. The first Court awarded plaintiff's claim, and on appeal its finding was confirmed by the Joint Judge of Thana. Defendants 1 to 4 make this second appeal. The only points taken in the appeal are, first that the suit is barred by res judicata under S. 11, sub-S 4, Civil P. C., and, secondly, that it is barred by adverse possession or by limitation, the plaintiffs having been excluded from any share in the property in suit. It is not disputed that the plaintiffs as one of the five sons of Hari would be entitled to one-fifth share in the property in dispute.

It seems that there was a partition between the brothers in 1875 which is evidenced by Ex. 21. At that partition some property including the property in suit was left undivided. I use the word undivided in preference to the word joint because in law the position of the parties is that of tenants-in-common and not joint tenants.

The question of res judicata arises in this way. In 1921 the present defendants 1 to 4 brought suit No 85 of 1921 against the heirs of Baja, that is defendants 5 and 6 and the present plaintiffs who are the sons of Ravji, for partition of their share of certain land, Survey No 14, Plot. 3. It is contended on behalf of the appellants that under S. 11, Cl. 4, Civil P. C, the present plaintiffs who are defendants in that suit should have as part of their defence put forward the present claim for the partition of the remainder of the family property and had it decided in that suit and not having done so they are now barred from bringing a separate suit to recover their share in this property. As a matter of fact in their written statement, which is Ex 26 at p. 25, defendant 2, who is present plaintiff 1, said that there was other property, namely, the property which is now in dispute in the present suit, which was kept joint and should be included in the suit and partition of the whole land should be made. It will, therefore, be seen that the present plaintiffs did raise this ground but there was no decision on this point and hence it is claimed that they cannot now raise the question again presumably on the ground that any relief which is not granted by the decree should be considered to have been refused, and in support of the proposition that the present suit is barred the learned advocate for the appellant has relied on *Kameshwar Pershad* v. *Rajkumari Rutan Koer* (1) and *Gangadhar* v. *Para-*

(1) [1892] 20 Cal. 79=19 I. A. 234=6 Sar. 241 (P.C.).

sharam (2). In *Kameshwar Pershad* v. *Rajkumari Ruttan Koer* (1) which is a Privy Council case, the plaintiff had brought two successive suits practically on the same cause of action to recover the same relief. In the first suit he sued the reversioner as being in possession of the property chargeable with the debt due by the widow. That suit was dismissed as against him but decreed against the widow. Subsequently he brought the present suit claiming to recover from the reversioner the balance of the widow's debt on the ground that he had agreed, on taking the surrender of the estate from her, to become responsible for her debts. It was held that this was an alternative ground which he might have alleged in the former suit. Hence the present suit would not lie.

The other case *Ukha* v. *Daga* (3) was one in which the plaintiffs had brought a suit for partition of certain debts and the second suit was brought for partition of certain lands which were alleged to have been left for subsequent division at the time of the former partition. It was held that the plaintiffs were bound in their former suit to demand the partition of the whole property which remained undivided; and having intentionally omitted to do that, they were barred under what is now O. 11, R. 2, Civil P. C.

The position of the parties in this case after the partition was that of tenants-in common as regards the property which was left undivided as is shown by the ruling in *Dagadu* v. *Sakubai* (4) which overrules the case in *Gavrishankar Parabhuram* v. *Atmaram Rajaram* (5) on which the appellant relies. Although in the case of a joint family a person suing for partition must sue for partition of all the property I am not aware that there is any law by which a tenant-in-common seeking to recover possession of property left undivided and in possession of other tenants-in-common is bound to include all these properties in one suit. Moreover in the present case it will be seen that by his written statement the present plaintiff 1 asked that the other properties might be included in that suit in partition. Thereafter the plaintiff in that suit that is, the present defendants 1 to 4, agreed to the addition of this property provided defendant 1, who was the father of defendants 5 and 6 in suit, was willing to allow the property in his possession to be partitioned. The defendants in that suit, that is, the present plaintiffs, agreed to these properties being joined by the plaintiffs but for some reason or other the plaintiffs did not do so and nothing was done in the matter.

It is further contended that S. 11, sub-S. 4, only refers to matters which should be made a ground for defence or attack in such former suit and as the defendants in that suit had no objection to the plaintiffs getting one-fifth share in the property it was not necessary to bring in the other properties into the suit. Even supposing the parties had been still members of the joint family, it is open to doubt whether this suit would have been barred by res judicata in view of the fact that the present plaintiffs did attempt to have the properties now in suit brought into that suit but for some reasons or other failed to do so. In my opinion the case is not that of a joint family nor is this a suit in which a member of a joint family seeks partition of property which is being left undivided by a former partition.

The rulings of the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj* (6) and *Dagadu* v. *Sakubai* (4) show that where the parties have agreed to sever, the joint family ceases then to exist. This is applicable to the present case, for in the partition deed which was executed between the fathers of the parties to this suit they stated that they are unable to pull on together and are therefore dividing the property but for some reason or other certain properties were not actually divided at that time. In view of this evidence of their intention to sever, the joint family ceased to exist and in respect of those properties which were not divided at the time they must be held to be as tenants-in-common. They were not compelled to ask that all the properties remaining undivided should be divided when a suit was brought by one tenant-in-common to recover his proportionate share of the property. I hold, therefore, that the suit is not barred by res judicata.

The second point, which has been

(2) [1905] 29 Bom. 300=7 Bom. L. R. 252.
(3) [1882] 7 Bom. 182.
(4) A. I. R. 1924 Bom. 31=47 Bom. 773.
(5) [1893] 18 Bom. 611.
(6) A. I. R. 1916 P. C. 104=43 Cal. 1031=43 I. A. 151 (P.C.).

raised, is that the suit is barred by limitation the defendants having excluded the plaintiffs from participation in the profits of this property. The property in question is very small, the income only being a few rupees. The first Court has held at paras. 14 and 15 of its judgment that the plaintiffs were not excluded. In para. 14 it says :

"I believe more in the plaintiffs' statement, though it is not corroborated by any evidence except that of defendants 5 and 6."

And in para. 15 it goes on to say that :

"In the case of cosharers when there is no partition between them, sole occupation by one of them of the joint property is not prima facie inconsistent with the rights of the others and mere non-participation in the profits by one and exclusive possession and enjoyment of the joint property by the other, is not adverse possession creating an exclusive title. There must be a disclaimer of the rights of others by an open assertion of a hostile title on the part of the co-owners claiming exclusive title by adverse possession and notice of disclaimer to the other sharers, either direct or by open acts and circumstances, is necessary. There is no evidence to prove that defendants 1 to 4 or their father ever openly claimed to be the exclusive owners of the lands."

The view of the Subordinate Judge appears to be based on the supposition that they continued to be cosharers as regards lands undivided at the partition. If by co-sharers is meant members of a joint family, it is not correct, but the position in law as regards exclusion is the same as in the case of tenants-in-common. The lower appellate Court correctly refers to the members of the family as tenants-in-common. Taking them to be tenants-in-common, as they are, the case quoted by the learned advocate for the appellant is *Gangadar* v. *Parasharam* (2) in which it is held that to constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster. Exclusive receipts of profits by one tenant-in-common continuously for a long period would be sufficient evidence to presume an actual ouster of the other tenants-in-common. And the period of exclusion there was about 50 years. But in the present case the lower appellate Court appears to have accepted the view of the first Court that the plaintiffs should be believed when they say that they have received profits of the land in question. The land in suit appears to have been in the possession of Waman, father of defendants who died in 1917, the suit being in 1924. And if the plaintiffs were given their share by Waman there would be no adverse possession under the statutory period counting from his death

In *Chandbhai Mahamadbhai* v. *Hasanbhai Rahimtoola* (7) it was held that the sole possession by one of two joint owners itself is no evidence of the denial of his right of the other joint owner, and time does run against the joint owner out of possession until the joint owner in possession has done some act to the knowledge of the other which amounts to denial of the latter's right. It may be mentioned that the joint owners referred to in this ruling are not members of a joint Hindu family : cf. also *Gobinda Chandra Bhattacharjee* v. *Upendra Chandra Bhattacharjee* (8).

In the present case there does not appear to be evidence of any act done by the defendants to the knowledge of the plaintiffs which amounts to a denial of their right. And the Courts below have believed that the plaintiffs have participated in the income of the land which, as I have said, is very small.

There is another point which has been referred to by the learned Judge in his judgment in appeal and that is that in the suit of 1921 which was only three years before the present suit no objection was raised by the present appellants-defendants, then plaintiffs in that suit, to the claim of the present plaintiffs to have the remaining property partitioned. It appears, therefore, that the question of setting up adverse possession did not suggest itself to them in 1921. It is only set up for the first time in the present suit in 1924.

In these circumstances I agree with the view of the Courts below that the defendants did not show that the claim of the plaintiffs is barred by exclusion for more than the statutory period. In view of the rulings I have just referred to in *Chandbhai Mahamadbhai* v. *Hasanbhai Rahimtoola* (7) and *Gobinda Chandra Bhattacharjee* v. *Upendra Chandra Bhattacharjee* (8), in order that a cosharer or tenant-in-common should be excluded from his share in the property, it is necessary to show that some act has been done by one co-owner to the knowledge of the other which

(7) A. I. R. 1922 Bom. 150=46 Bom. 213.
(8) [1919] 47 Cal. 274=30 C. L. J. 512=56 I. C. 141=23 C. W. N. 977.

amounts to a denial of the latter's right. I think the onus would lie on the defendants to prove their adverse possession. It is found that they have not discharged it and I must hold that the exclusion of the plaintiffs is not proved. The result is that the decree of the lower Court will be confirmed and the appeal dismissed with costs.

V.B./R K. *Appeal dismissed.*

A. I. R. 1929 Bombay 327

MIRZA AND PATKAR, JJ.

Rama Kariyappa Pichi and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 523, 524, 624 and 536 of 1928, Decided on 22nd February 1929, against convictions and sentences passed by Sess. Judge, Dharwar.

(a) Criminal P. C., S. 533—Magistrate failing to write questions and answers as required by S. 364—Defect is curable under S. 533—Confession itself is admissible in evidence—Criminal P C., S. 364.

Section 533 applies not only to omissions to comply with the provisions of law but also to infractions of the law. [P 328 C 2]

Where a Magistrate while recording a confession of the accused fails to reduce into writing the questions and answers as required by S. 364, the defect is curable under S. 533 by examining the Magistrate as a witness provided no injury is caused to the accused as to his defence on the merits. Further the confession recorded by the Magistrate is itself admissible because the expression "such statement" in S. 533 refers to statement regarding which the Magistrate is called to give evidence: 21 *Bom.* 495; 23 *Bom.* 221; 9 *Mad.* 224; *A. I. R.* 1923 *All.* 90; *A. I. R.* 1925 *Pat.* 191, *Rel. on.* [P 329 C 1]

(b) Criminal Trial—Confessions.

Per Mirza, J.—A confession in order to be relied upon need not make a clean breast of all the details in connexion with the crime, but if the Court is satisfied that it has been voluntarily made, it may take into consideration such parts of it as it may by itself or in the light of the other evidence in the case consider to be true. [P 329 C 1]

(c) Criminal Trial—Confession voluntarily made and subsequently retracted is sufficient by itself to justify Court to act upon it.

A retracted confession, if proved to be voluntarily made before a Magistrate, can be acted upon along with other evidence in the case, and there is no rule of law, that the retracted confession must be supported by independent evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law: 19 *Bom.* 728; 23 *Bom.* 316; 25 *Bom.* 168; 21 *Mad.* 83, *Rel. on.* 2 *U. P. L. R.* (*All.*) 218, *Dist.* [P 333 C 1]

(d) Evidence Act, S. 30—Confession of one co-accused is to be accepted against another with caution unless corroborated by independent evidence—Confession of one co-accused cannot be said to be corroborated by confession of another co-accused.

Although the weight of the confessions made by the accused may be regarded as great against the parties making them, they must be accepted with great caution against the co-accused whom they implicate unless there is corroboration forthcoming from an independent source which would make it safe to act upon the confessions. The confessions of one co-accused cannot be said to be corroborated by the confessions of another co-accused: *A. I. R.* 1921 *Pat.* 337; 43 *Bom.* 739, *Rel. on.* [P 330 C 1, 2]

G. N. Thakor and *S R. Parulekar*—for Accused 12

Nilkant Atmaram—for Accused 18

P. B. Shingne—for the Crown.

Facts.—In this case accused 1 to 19, 21 and 22 were tried on a charge of having conjointly committed dacoity early in the morning on 12th December 1927 and murdered Yamnurappa and Mandappa in the course of the dacoity and thus committed offences punishable under S. 396, I. P. C, or in the alternative under Ss. 402 and 399, I. P. C., and accused 20 was tried on a charge under S. 396 read with S. 114 or in the alternative under Ss. 399 and 402, I.P.C.

Mirza, J.—(After dealing with the case of accused 1 to 8 and 22 and coming to the conclusion that their conviction was correct, the judgment proceeded.) The convictions of accused 9 and 10 are mainly based upon their retracted confessions. It has been contended by Mr. Thakor before us that the confession of accused 9 and 10 were not recorded by the Magistrate in accordance with the requirements of Ss. 164 and 364, Criminal P. C., and of the High Court Criminal Circulars in that behalf, and are, therefore, inadmissible in evidence. In both these confessions the Magistrate has recorded the necessary certificate at the end to the effect that they were voluntarily made; but he has not recorded the questions he put and the answers given, the perusal of which would satisfy the Court that the confessions were voluntarily made, and there was no inducement held out by the police by which the confessions could be said to be prompted. In order to remedy the

defect the Magistrate was examined as a Court witness before the Sessions Court. It was contended by Mr. Thakor that the defect in recording the questions and answers amounts to an infraction of the law and is not a mere omission which can be cured under S. 533, Criminal P.C. S. 164 (3) Criminal P. C., inter alia provides that no Magistrate shall record a confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and when he records any confession, he shall make a memorandum at the foot of such record to the effect that the confession was voluntarily made. S. 364, Criminal P. C., inter alia provides that whenever an accused person is examined by a Magistrate, the whole of such examination including every question put to him and every answer given by him shall be recorded in full and such record shall be shown or read or interpreted to him and he shall be at liberty to explain or add to his answers. There are certain exceptions to this general rule, but they would not apply here. The High Court has by its Criminal Circulars issued certain instructions for the guidance of the Magistrates recording confessions and statements under S. 164, Criminal P. C. These are set out in para. 3 of Chap. 1 at p. 2, of the printed Criminal Circular Orders, 1925. Para. 3 (i) requires that the Magistrate should invariably question the accused person as to the length of time during which he has been in the custody of the police, and that it is not sufficient to note the date and hour recited in the police papers at which the accused person is said to have been formally arrested.

Section 533, Criminal P. C, provides that whenever the Court finds that any of the provisions of either S. 164 or S. 364 have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded and notwithstanding anything contained in S. 91, Evidence Act such statement shall be admitted if the error has not injured the accused as to his defence on the merits. In *Queen-Empress* v. *Visram Babaji* (1) Strachey, J. at p. 501 reviewed the earlier authorities and came to the conclusion that neither the language nor the object of S. 533 would justify a distinction between an "omission" which would be curable by S 533 and an "infraction" or "direct violation" which would not be curable by that section. The learned Judge lays down the test that as long as the irregularity does not injure the accused as to his defence on the merits it can be cured under the provisions of S. 533. This ruling was followed by a Divisional Bench of our Court in *Queen-Empress* v. *Raghu* (2). The learned Judges there observe that the true principles which should govern such cases are those which are laid down in *Queen-Empress* v. *Viran* (3), viz., that S. 533 merely gives legal sanction to the maximum omnia proesumuntur rite esse acta. The test laid down is that whenever no attempt has been made to comply with the provisions of the law, S. 533 would not render a confession admissible. S. 533 is intended, according to this ruling, to apply to all cases in which the directions of the law have not been fully complied with, and would apply to omissions to comply with the law as well as to infractions of the law. We are bound by this ruling. To the same effect are the rulings of the Allahabad High Court in *Emperor* v. *Deo Dat* (4), and of the Patna High Court in *Ramai Ho* v. *King-Emperor* (5).

The evidence of the Magistrate has satisfactorily proved that the confessions made by both accused 9 and 10 were voluntarily made and that he had as a matter of fact satisfied himself by putting questions and getting answers that the confessions were being voluntarily made by both accused. Mr. Thakor has contended in the alternative that the confessions would be inadmissible in evidence, but under the provisions of S. 533 the Magistrate's oral testimony as to the contents of the confessions would be admissible notwithstanding the provisions of S. 91, Evidence Act. He has urged that the language of S. 533 making the statement admissible, notwithstanding S. 91, Evidence Act, has reference to this that the evidence which is being made admissible is not the confession itself, but the evidence given by the Magistrate of its contents. The rulings to which I have referred above would

(1) [1896] 21 Bom. 495.

(2) [1898] 23 Bom. 221.
(3) [1886] 9 Mad. 224.
(4) A. I. R. 1923 All. 90=45 All. 166.
(5) A. I. R. 1925 Pat. 191=3 Pat. 872.

not, in my opinion, support such a contention. They seem clearly to lay down that the confession itself is admissible and the defect in it is curable under S. 533. The Magistrate's evidence would however meet the point raised by Mr. Thakor. The Magistrate has stated in his evidence that the contents of the two confessions were correctly recorded by him, and has thus made the contents of the confessions part of his evidence.

The next question we have to consider is what weight should be attached to these confessions against the accused making them Mr. Thakor has urged that there is internal evidence in the confessions that at any rate some of their contents are untrue. Both confessions refer to the pelting of stones at the scene of offence, but there is no evidence in the Panchnama of the scene of offonce that any stones were found lying there. I am not inclined to attach much importance to the absence of positive evidence to corroborate this part of the confessions. Mr. Thakor has further relied on the point that in the confession of accused 10 only accused 3, 18 and 20 of those convicted are implicated A confession, in my opinion, in order to be relied upon need not make a clean breast of all the details in connexion with the crime, but if the Court is satisfied that it has been voluntarily made, it may take into consideration such parts of it as it may by itself or in the light of the other evidence in the case consider to be true. Mr. Thakor has further relied upon the point that neither of the two confessing accused implicates himself in the commission of the murder of Mandappa and Yemanurappa, but implicates himself to the extent only of having taken part in the beating and the robbery which took place. If the accused took part in beating Mandeppa, Yemanurappa and Basawa they would be liable for the natural and probable consequences of such act. Whether the part they took in the comission of the crime would or would not amount to the offence of murder or grievous hurt would be a matter of law for the Court to determine in the light of the evidence and the surrounding circumstances as well as their confessions.

In *Queen-Empress* v. *Gharya* (6) our Court has held that a retracted confession, if proved to be voluntarily made, can be acted upon along with the other evidence in the case, and that there is no rule of law that the retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession, it is observed, is a matter of prudence rather than of law. In *Queen-Empress* v. *Gangia* (7), our Court, following the decision in *Queen-Empress* v. *Gharya* (6), again held that there is no rule of law that a retracted confession cannot be treated as evidence unless it is corroborated in material particulars by independent reliable evidence.

In *Queen-Empress* v. *Basvanta* (8), our Court has held that the law in India is not identical with the law in England on the relevancy and admissibility of confessions and that a mere subsequent retraction of a confession is not enough in all cases to make it appear to have been unlawfully induced. The earliest ruling of our Court on this point is to be found in *Queen-Empress* v *Balya Dagdu* (9), to which a reference is made in *Queen-Empress* v. *Basvanta* (8). According to that ruling a confession to be admitted at all in evidence must be proved to have been made voluntarily ; and when it is admitted in evidence it has to be dealt with like any other piece of evidence and acted on only if it is believed to be true. A confession, it is observed, though made voluntarily by an accused person before a Magistrate and subsequently retracted is sufficient by itself to justify a Sessions Court to act upon it. To the same effect is the ruling of the Madras High Court in *Queen-Empress* v. *Raman* (10).

Reliance is placed on behalf of the accused Nos. 9 and 10 on the case of *Emperor* v. *Azimuddin* (11), where a Divisional Bench of the Allahabad High Court held that a statement by an accused person not recorded in strict compliance with the rules for recording confessions, and without asking any incidental questions to test the vountariness and genuineness of the confession, and which was wanting in considerable details and only contained matters which could

(6) [1894] 19 Bom. 728.

(7) [1898] 23 Bom. 316.
(8) [1900] 25 Bom. 168=2 Bom. L. R. 761.
(9) [1898] Rat. Un. Cr. C. 952.
(10) [1837] 21 Mad. 83.
(11) [1920] 2 U. P. L. R. (All.) 218=57 I. C. 462=21 Cr. L. J. 638.

have been easily got from the investigation made by the police, and which was uncorroborated and withdrawn at the earliest opportunity, could not be regarded as a voluntary and genuine confession upon which to base a conviction. That case, in my opinion, governs its own facts which were materially different from those with which we have here to deal.

The confessions of accused 9 and 10 are corroborated in one material particular by the evidence of Hanma Fakirappa, namely, that they were among the persons who had assembled at the temple prior to the commission of the dacoity. The evidence of Hanma has been impeached on the ground that he is an omnibus witness who speaks to having seen all the accused except accused 6 at the temple on the evening of the offence. There is no sufficient reason shown why the evidence of Hanma should be doubted that he saw accused 9 and 10 among those who had assembled at the temple on this occasion. In my opinion the convictions of both accused 9 and 10 can be sustained on the strength of their own confessions and the corroboration those confessions have received in a material particular by the evidence of Hanma.

With regard to the conviction of the remaining accused they are based mainly upon the retracted confessions of accused 9 who implicates all of them and accused 10 who implicates accused 18 and 20 only. Although the weight of these confessions may be regarded as great against the parties making them, they must be accepted with great caution against the co-accused whom they implicate unless there is corroboration forthcoming from an independent source which would make it safe to act upon the confessions. In *Maksud Ali* v. *Emperor* (12), the High Court of Patna held that though, as a matter of law, a conviction may be based upon a retracted confession if the Court can come to the unhesitating conclusion that the confession is voluntary, yet, as a matter of prudence, no conviction should be based upon such confession unless it is corroborated in material particulars and that whatever value may be attached to the retracted confession of an accused person against himself, the value to be attached to such a confession as against a co-accused is exceedingly weak. In *Emperor* v. *Sabitkhan* (13), on a reference on difference of opinion between Heaton, J., and Shah, J., Scott, C J., concurring with Heaton, J., and differing from Shah, J., held that the confessions of the co-accused were evidence against the accused, inasmuch as there was testimony independent of the confessions which affected the accused by connecting or tending to connect him with the crime. Scott, C. J., remarked (pp. 469, 470) :

> " If the confession [of a co-accused] is corroborated by other evidence, ... it matters not whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes the confession ... As regards the confessions of co-accused the Indian Law has no counterpart in England, but it seems to me that for the purpose of admissibility such confessions stand on the same footing as accomplice evidence and that their weight must depend on the circumstances of each case."

On this point Scott, C. J.. differed from a dictum of Macleod, J., in *Emperor* v. *Gangappa Kardeppa* (14), where Macleod, J., had expressed the opinion that a confession of a co-accused would stand on a different footing to the testimony of an accomplice, and that the Indian Evidence Act treats it as having a higher probative value than similar evidence would have according to the English law According to the later ruling there is no difference between the law in England and the law in India on this point except with regard to the corroboration of accomplice evidence. Both decisions agree that the confession of one co-accused could not be said to be corroborated by the confession of other co-accused. In *Emperor* v. *Gangappa Kardeppa* (14) the Court observed that there was nothing in S. 30, Evidence Act of 1872 which prevented a Court from convicting after taking the confession of the co-accused into consideration ; but the High Courts in India had laid down a rule of practice which had all the reverence of law, that a conviction founded solely on the confession of the co-accused could not be sustained. (The judgment then considered the question of corroboration of the confessions of accused 9 and 10 and continued). Considering the evidence as a whole against the accused in this group there is room, in my opinion,

(12) A. I. R. 1921 Pat. 337.

(13) [1919] 43 Bom. 739 = 51 I. C. 65 = 21 Bom. L. R. 448.

(14) [1913] 38 Bom. 156 = 21 I. C. 673 = 15 Bom. L. R. 975.

for a reasonable doubt in their favour. All the assessors are agreed that these accused are not guilty. I would, therefore, give them the benefit of the doubt, reverse their convictions and sentences, and acquit and discharge them

With regard to the sentence on accused 1 to 10 and 22, the learned Judge has sentenced accused 2, 3, 4, 5, 6, 7 and 22 to transportation for life. The sentence would be justified on the ground that two persons were murdered in the course of the gang's operations. Under S. 396, I. P. C., a larger discretion is vested in us with regard to the sentence than would be the case if the offence charged were under S. 302 When a gang of forty or fifty persons took part in the dacoity it is difficult to ascertain which one out of them inflicted the fatal injuries on the deceased. A stick stained with human blood and a dhoti similarly stained were recovered respectively from the houses of accused 7 and 22. It is certain, therefore, that they were among those who took an active part in the beating of Mandeppa and Yemanurappa which caused their deaths. The sentence of transportation for life in the case of these two accused should, in my opinion, be confirmed. With regard to accused 2, 3, 4, 5, and 6 it is satisfactorily established that they were among those who beat the deceased Mandeppa, but as no blood stains have been discovered on their clothes or other possessions I am inclined to treat their case more leniently than, the case of accused 7 and 22. I would reduce their sentences from transportation for life to rigorous imprisonment for ten years each. The sentences on accused 1 and 8, in my opinion, are not excessive and should be confirmed. The sentences on accused 9 and 10 should in my opinion be reduced in each case to three years' rigorous imprisonment.

Patkar, J.—In this case accused 1 to 19, 21 and 22 were tried on a charge of having conjointly committed dacoity early in the morning on 12th December 1927, and murdered Yamnurappa and Mandappa in the course of the dacoity and thus committed offences punishable under S. 396, I. P. C., or in the alternative under Ss. 402 and 399, I. P. C, and accused 20 was tried on a charge under S. 396 read with S. 114, or in the alternative under Ss. 399 and 402, I.P.C. (His Lordship after dealing at length with the case of accused 1 to 8 and 22, and holding that the convictions of accused 1 to 8 and 22 are correct, proceeded). As regards accused 9 and 10, their convictions depend on their confessions, Exs. 97 and 100, made on 24th December 1927. It appears that the Magistrate did not follow the High Court Circulars and did not comply with the requirements of Ss. 164 and 364, Criminal P. C., when recording the confessions of accused 9 and 10. The Magistrate was examined as a witness, Ex. 126. He proves that accused 9 and 10 were brought to him on 21st and he examined the bodies of both the accused and found no marks of violence and transferred them to the magisterial custody. He is corroborated by the remarks on Ex. 127, the yadi sent by the Sub-Inspector of Police, that the accused had no injuries and that the warrant was sent to the jailor. On 22nd the Magistrate received the yadi from the Sub-Inspector of Police, Ex 71, intimating that accused 9 and 10 wished to make confessions. It is urged that the serial numbers on Exs. 71 and 127 do not coincide with the dates, and that the guard on duty on the magisterial lock-up is appointed by the Sub-Inspector. It is, therefore, suggested that the accused were either tutored or forced to make a confession. It appears, however, from the evidence of the Magistrate that when he examined the bodies of the accused he found no marks of violence and they stated that they were willing to confess.

On 23rd December, he sent for the accused and gave them time for reflection and their confessions were recorded on 24th. When they were again brought for confession, they were asked whether any inducement was given by any police officer, and they said that no inducement was given by any police officer and that they were going to make the confessions of their own free will. No marks of violence on the body were found on the day when the confessions were recorded. The learned Magistrate is an experienced Magistrate and swears that he satisfied himself that the accused were going to make voluntary confessions before he recorded them. The Magistrate asked his clerk to fill up column 5 of the confessions but the karkun omitted to record the details. The Magistrate was under

a wrong impression that every question and answer need not have been recorded in full. The Magistrate was examined before the Sessions Court. The Magistrate has recorded the necessary certificate at the end of the confessions, and though questions and answers necessary to satisfy the Magistrate that the confession was voluntary and was not induced either by torture, threat or inducement, were not reduced into writing, the Magistrate when examined before the Court has proved that he asked those questions and was satisfied that the confessions were voluntary and both the accused duly made the statement recorded in the confessions. It is urged that the failure of the Magistrate to reduce into writing the questions and answers on this point amounts to an infraction of the law and not to an omission and cannot be cured under S. 533, Criminal P. C. It is further argued that the statements themselves are inadmissible in evidence and the Magistrate has not proved the statements made by the accused. It appears clear from the evidence of the Magistrate that the accused duly made the statements recorded. He swore when he saw the forms that whatever was written on them was correctly written. He has, therefore, proved that the accused made the statement recorded in the confessions, Exs. 97 and 100. S. 533, Criminal P. C., according to the decisions of this Court, cures not only omissions but also infractions of the law.

In *Queen* v. *Visram Babaji* (1) the statements were in the forms prescribed by S. 364 except that the question was recorded in English and not in Marathi which was the language in which the accused was examined, and it was held that such statement or confession though not taken in the proper form was admissible in evidence against the accused. In *Queen-Empress* v. *Raghu* (2) it was held that S. 533, Criminal P. C., applies to omissions to comply with the law as well as to infractions of the law. To the same effect is the decision in the case of *Emperor* v. *Fernand* (15). It is urged that the record of the confession is not admissible owing to the failure to comply with the law and that parol evidence may be given of the terms of the confession, and those terms, if and when proved, may be admitted and used as evidence in the case but that the record of the confession was not admissible. Parole evidence of the terms of the confession would be admissible under S. 533 when the Magistrate is examined and proves the statement orally, but it is unnecessary to prove orally all the statements made by the accused when the record though formally incomplete is a true and full account of the confession. According to the evidence of the Magistrate, the statements made in the confessions were duly made by the accused and his evidence supplies the defect of recording questions and answers which would lead to an inference that the Magistrate was satisfied that the confessions were voluntary. Further it appears that the term "such statement" in S. 533 refers to the statement recorded regarding which the Magistrate gives evidence under S. 533 that such person duly made it. The evidence of the written confession can be given by the Magistrate under S. 533 if the record is proved to be an accurate and true statement made by the accused. It would follow that the statements recorded can be acted upon as statements duly made by accused to the Magistrate. In *Ramai Ho* v. *King-Emperor* (5) it was held by the Patna High Court that where the record of a confession did not show that the accused had been warned by the Magistrate or that the accused had been asked whether he made the statement voluntarily and the Magistrate was examined and proved that he had cautioned the accused and explained to the accused that he was not bound to make a statement and if he did so it might be used against him, the confession as recorded was admissible. In *Emperor* v. *Deo Dat* (4) it was held that the examination of the Magistrate under S. 533 that he was satisfied that the accused had not been tutored cured the defect in the recorded confession although the questions and answers were not taken down in writing. It is not shown that the error of the Magistrate has injured the accused as to his defence on the merits. I think, therefore, that the confessions, Exs. 97 and 100, are admissible in evidence against accused 9 and 10

It is further urged that the confessions being retracted cannot be acted upon unless corroborated by other evidence in

(15) [1902] 4 Bom. L. R. 785.

the case. It was held in *Queen-Empress* v. *Gharya* (6) that a retracted confession, if proved to be voluntarily made can be acted upon along with the other evidence in the case, and that there is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law. In *Queen-Empress* v. *Gangia* (7) it was held that there is no rule of law that a retracted confession cannot be treated as evidence unless it is corroborated in material particulars by independent reliable evidence. In *Queen-Empress* v. *Basvanta* (8) it was held dissenting from the view in *Queen-Empress* v. *Balya Dagdu* (9) that a mere subsequent retraction of a confession is not enough in all cases to make it appear to have been unlawfully induced and that a retracted confession could be made the basis of a conviction. When a confession is retracted, it is the duty of the Court especially in a case of murder to inquire into all the material points and surrounding circumstances and satisfy itself that the confessions cannot but be true : see *King-Emperor* v. *Durgaya* (16). The only question in this case is whether the confessions, Exs. 97 and 100, are true and can be acted upon. . . .The two assessors and the learned Sessions Judge have believed the confessions, and I think the convictions of accused 9 and 10 are correct

With regard to accused 12 to 14, 16 and 18, the only evidence against them is the confession of accused 9 who implicates accused 12 to 14, 16 and 18 and the confession of accused 10 who implicates accused 18. There is further the evidence of Hanma. The confession of a co-accused cannot be made the basis of conviction unless it is corroborated in material particulars by the other independent evidence proving the identity of the accused, and the confessions of one co-accused cannot be said to be corroborated by the confession of another co-accused : see *Emperor* v. *Gargappa Kardeppa* (14) and *Emperor* v. *Sabitkhan* (13). These accused have been convicted under S. 396, and the evidence of Hanma, even if believed, would show that they were present at the temple. Their presence at the scene of offence is not proved by any other reliable evidence. Their conviction, therefore, under S. 396 cannot be sustained. The evidence of Hanma cannot be relied upon implicitly. I do not think that the evidence of Hanma can be considered sufficient corroboration of the confessions of the co-accused 9 and 10 for the purpose of convicting accused 12 to 14, 15, 16 and 18. (His Lordship, therefore, set aside their convictions and ordered them to be acquitted and discharged.)

S.N./R K. *Order accordingly.*

(16) [1901] 3 Bom. L. R. 441.

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MIRZA AND MURPHY, JJ.

Anant Dattatraya and *others*—Defendants—Appellants.

v.

Mahadev Wasudeo—Plaintiff 1—Respondent.

Second Appeal No. 123 of 1927, Decided on 24th January 1929, from decision of 1st Class Sub-Judge, A. P. at Ratnagiri, in Appeal No. 309 of 1925.

(a) Hindu Law—Widow, as widow, acquiring title by adverse possession does not acquire it as stridhan.

Where a Hindu widow being in possession as widow possesses adversely to any one as to certain parcels she does not acquire the parcels as stridhan, but she makes them good to her husband's estate : *A. I. R.* 1924 *P. C.* 121, *Foll.*; *A. I. R.* 1925 *Bom.* 465, *Dist.* [P 334 C 1]

(b) Record-of-Rights—Entry in Botkhat is presumptive evidence of title.

An entry in a Botkhat is presumptive evidence of title and possession in favour of the person whose name appears in it. [P 334 C 2]

A. G Desai and *G. B. Chitale*—for Appellants.

H. C. Coyajee and *P. V. Kane*—for Respondent 1.

Mirza, J.—The appellants claimed to be in possession of an undivided half share in a khoti takshim in their right of purchase of the equity of redemption relating to that property from one Narmadabai, a Hindu widow, in 1911, and later from one Parvatibai an heir under the Hindu law of one Balkrishna, and in their right of having redeemed the property from the mortgagee. Both Courts have held that the property had become the property of one Gangabai by adverse possession and later of her daughter-in-law Narmadabai both by inheritance and by adverse possession ;

that the sale from Narmadabai was not justified on the ground of a legal necessity and was not binding upon her reversioners. Both Courts have also held that when Parvatibai sold the equity of redemption her right to it had long since been barred by limitation, and the equity of redemption had vested in Gangabai and Narmadabai by adverse possession. Hence they decreed the respondents' (original plaintiffs') claim to redeem the property from the appellants on payment of the amount which the appellants were held to have paid to the mortgagee.

In resisting the plaintiffs-respondents' claim to redeem the property, the appellants by their written statement set out the case that Gangabai was the owner of the equity of redemption in the property by adverse possession, that the property was her stridhan and had descended to her daughter-in-law, Narmadabai, as her heir and that as purchasers of the equity of redemption from Narmadabai and as redeemers of the mortgage they were now the owners. But they had to resile from that position owing to the ruling of their Lordships of the Privy Council in *Lajwanti* v. *Safa Chand* (1), viz., that a Hindu widow is not a life renter, but has a widow's estate, this is to say, a widow's estate in her deceased husband's estate and if possessing as a widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as Stridhan, but she makes them good to her husband's estate. In that view of the law the property acquired both by Gangabai and Narmadabai by adverse possession would belong to the estate of their respective husbands. The respondents are admittedly the reversionary heirs and they would be entitled to succeed to the property as such heirs.

Mr. Desai on behalf of the appellants has argued that the possession of this property was all along with the mortgagee and under the ruling in *Tarabai* v. *Dattaram* (2) neither Gangabai nor Narmadabai could acquire a title by adverse possession. The facts in that judgment in my opinion, can be distinguished from the case with which we have here to deal. The earliest mortgage in the case, Ex. 48, executed in 1857 shows that the property in suit along with three others was mortgaged to one Dhavale and purported to be a possessory mortgage; but the terms of the mortgage-deed make it clear that the mortgagors reserved to themselves the right to remain in possession and to manage the properties as long as they paid interest to the mortgagee regularly and gave proper security in advance for such payment. The last surviving coparcener of this joint family was Balkrishna. He died in 1878, leaving his daughter Bhimabai as his heir according to the Hindu law. Gangabai at that time was entitled only to a right of maintenance out of the estate and the owner according to law was Bhimabai, the ancestress of Parvatibai.

The findings are that after the death of Balkrishna, Gangabai continued in sole possession and management of all the properties that had belonged originally to the joint family. Ex. 34 is a further charge created in 1884 by Gangabai upon the properties belonging to this estate. Ex. 55 is yet another further charge created by Gangabai in 1884 upon these properties. On 13th August 1892, Gangabai purporting to be the owner of the property in suit executed a mortgage of the same to secure a sum of Rs. 2,350

It is contended by Mr. Desai that this mortgage deed was in the nature of a consolidation of the previous mortgages and charges, and a further amount was obtained by Gangabai in respect of this fresh mortgage. The mortgage, in my judgment, is very different from the original mortgage of 1857. The mortgage of 1857 comprised four properties, including the one in suit, and three of them, namely, residential houses, Khoti Khasgi Thikans and Deshmukhi allowances have been omitted from the mortgage-deed of 1892. The mortgagor Gangabai reserved to herself the right of vahivat to the property on terms similar to those which were set out in the original mortgage of 1857. After the death of Balkrishna, the name of Gangabai was substituted in the Botkhat in 1886. There are several rulings of this Court to the effect that an entry in a Botkhat is presumptive evidence of title and possession in favour of the person whose name appears in it. Gangabai died in 1902 and on her death the Khoti takshim was transferred from her name to that of Narmadabai, her daughter-in-law. Narmadabai would be entitled to

(1) A. I. R. 1924 P. C. 121=5 Lah. 192=51 I. A. 171 (P.C.).
(2) A. I. R. 1925=Bom. 465=49 Bom. 539.

succeed to Gangabai under the Privy Council ruling above referred to. She would be heir to Gangabai's deceased husband. Narmadabai's title to the property was never disputed by the heirs of Balkrishna. In my opinion, the judgments of the two Courts are correct and this second appeal should be dismissed with costs.

Murphy, J.—It has been found that Balkrishna was the last male owner and on his death in 1878-79 his proper heirs were in succession his daughter and in turn her daughter and grand-daughter. But in fact what actually happened was that Gangabai, who was never the widow but had been the sister-in-law of Balkrishna, the last male owner of the property, proceeded to deal with it as her widow's estate which had vested in her, and her daughter-in-law Narmadabai in turn acted in a similar manner, though actually all that the two women were entitled to, out of the family property, was maintenance ; and although half the share in the Khoti village in question was mortgaged to one Dhavale during the whole of this period. Both Courts below found that the two widows' possession was in terms adverse to those of the heirs of Balkrishna. Finally, in 1911, the defendants acquired the equity of redemption in the property from Parvatibai, the great granddaughter of Balkrishna, and also obtained a sale from Narmadabai, the second widow ; and their title is based on these two documents. Tha view of the Courts below has been that the sale-deed by Narmadabai was not for family necessity, and that the real amount paid was Rs. 1,550 for the purpose of paying off Dhavale's mortgage. They have also held that Gangabai's and Narmadabai's possession was adverse to that of the real heir of Balkrishna, the heirship having culminated in Parvatibai ; but on the strength of the Privy Council ruling in *Lajwanti* v. *Safa Chand* (1), the acquisition by these widows of an estate by prescription would cause it to revert to their deceased husbands' estate ; and since the alienation by Narmadabai has been shown to be for no legal necessity the reversioners would be entitled to this property on Narmadabai's death. Narmadabai died in 1917 ; but since during her lifetime the defendants had an interest entitling them to redeem and did redeem the mortgage, I think, the plaintiffs must pay the costs of the redemption before they can been entitled to possession of the Khotki as reversioners. For these reasons it seems to me that the judgmants recorded by both Courts below are correct and that this appeal must be dismisssd with costs.

S.N./R K. *Appeals dismissed.*

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MARTEN, C. J., AND MURPHY, J

Government Pleader—Applicant.

v.

S *A. Pleader*—Opponent.

Civil Appln. No. 1085 of 1928, Decided on 26th March 1929.

Bombay Pleaders Act (17 of 1920), S. 26—District Pleader sending circular post card giving his name, description and address is improper conduct—False statements in post-card that he is High Court pleader and authorized by Court to examine waqf accounts amounts to an offence—Legal Practitioner.

A pleader's sending a circular post card merely giving the address and the name and description of himself would amount to an advertisement on his part and therefore to improper conduct and if in addition he falsely stated that he had been authorized to examine the accounts of waqf properties and to issue certificates by the District Court rather aggravates the case than the reverse. Even if auditing is not strictly legal work, yet this very fact of advertising his readiness to take up that work, combined with his misleading statement that he is a High Court Pleader and seeing that this work is connected with the Courts and has to be supervised by the Courts would result in his getting an improper advantage in legal work over his fellow pleader, who did not descend to such devices. It was improper conduct on the part of the District pleader to issue such post cards and to canvass for this particular work in the way that he did, and accordingly he has committed an offence under S. 26. [P 336 C 2]

P. B. Shingne—Applicant in person.

H. M. Choksi—for Opponent.

Marten, C. J.—This is an application under the discipilnary jurisdiction against Mr. S a District Pleader holding a sanad for the Surat District. The charge against him is shortly that he had been guilty of improper conduct under S. 20, Bombay Pleaders Act, inasmuch as he sent various circular post cards to the public with reference to the examination of accounts of wakf properties. These post cards are signed by him as High Court Pleader. They are in the form Ex. C, and after stating his address and the date are as follows:

"Respected Sir,

Greetings. His Honour the District Judge of Surat has authorised me to examine the accounts of wakf properties and to issue certificates. Accounts in respect of wakf properties should be filed in the District Court before 30th June every year. Fee for examining the accounts is one per cent on the annual income.

S

High Court Pleader."

It will thus be seen that the pleader gives his address and description. So far as the description goes he is not entitled to call himself a High Court Pleader. He is only a District Court Pleader. But apart from that, it is important to observe that he refers to himself in this circular post card as a pleader.

Next, as regards his statement that he had been authorised to examine wakf properties and to issue certificates, this is inaccurate. The statement means, I think, that he had been given authority to audit the accounts of wakf properties generally by an order of the Court under S 6 (2), Mussalman Wakf Act of 1923. In fact, all that he had been authorized to do was to examine the accounts for certain specific wakf properties on this separate application in each case. No general permission had ever been given to him. He had asked for it. but it had been refused.

Next, in his affidavit of 25th March 1929, which has just been handed to us, he says in para. 4:

"He never meant to say or convey that he had general authority to audit the wakf accounts as distinguished from special authority."

We think, however, that the fair meaning of the post card is that he had this general authority. The main question, however, is, did this post card amount to advertising? The contention of the pleader, when called on for his explanation by the learned District Judge, was as follows: (I refer to his affidavit of 28th July 1928).

"Advertising by a pleader is nowhere specifically or impliedly prohibited under the Pleaders Act or rules thereunder. There is, I believe, customary prohibition. I have every respect for that custom but I believe such prohibition is with regard to legal work only. Audit work is not legal work. If it were so no non-lawyer should have been authorized to do such work."

As regards advertising, there is no doubt that that is unprofessional conduct on the part of a professional man such as a pleader or an advocate or a barrister. This indeed is a leading distinction between professional men on the one hand and those engaged in trade or business on the other hand, and it is of importance that that distinction should be maintained. Accordingly, if this circular post card had merely given the address and the name and description of this pleader, it would yet have amounted to an advertisement on his part and therefore to improper conduct. The fact that, in addition he stated that he had been authorised to examine the accounts of wakf properties and to issue certificates by the District Court rather aggravates the case than the reverse. Even if auditing is not strictly legal work, yet this very fact of advertising his readiness to take up that work, combined with his statement that he is a High Court Pleader and seeing that this work is connected with the Courts and has to be supervised by the Courts, would, I think, result in his getting an improper advantage in legal work over his fellow pleaders, who did not descend to such devices. Further, as I have already indicated, we think that his statements as to the authority given to him by the District Judge and also as to his being a High Court Pleader were inaccurate and misleading

We, therefore, hold that it was improper conduct on his part to issue these post cards and to canvass for this particular work in the way that he did, and that accordingly he has committed an offence under S 26, Bombay Pleaders Act. The next question is, what course we should take to signify our opinion of his improper conduct. We have considered whether it would be proper to suspend his sanad for a certain time, but as he is a comparatively junior practitioner we will not, on this occasion, take that particular course. We think it will be sufficient, under all the circumstances, to direct that he be severely reprimanded, and that as he is not present in Court today that that reprimand be conveyed to him personally in open Court by the learned District Judge. We further order that he do pay the Government Pleader's costs of this application.

M.N./R.K. *Order accordingly.*

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PATKAR AND MURPHY, JJ.

Krishnaji Vinayak Belapurkar—Appellant.

v.

Motilal Magandas Gujarati—Respondent.

Second Appeal No. 504 of 1924, Decided on 5th December 1928, against decision of the Dist. Judge, Poona, in Appeal No. 60 of 1923.

(a) Civil P. C., O. 34, R. 7—Mother as guardian of *B* her son, selling equity of redemption to *A*—*A* suing for redemption and Court finding that *B* was major when sale-deed passed—*B* then suing to set aside sale and compromise decree passed holding that both *A* and *B* were partially entitled to equity of redemption— Court passing redemption decree in *A's* suit both in favour of *A* and *B*—Decree is unobjectionable—Compromise, though effected after *A's* suit was brought, did not offend against Transfer of Property Act, S. 52.

The equity of redemption was sold to *A* by a mother acting as guardian of her son *B*. *A* then sued for redemption, and the Court found that *B* was major at the time when the sale-deed was passed. *B* then instituted another suit to set aside the sale effected by his mother acting as his guardian, and his suit ended in a compromise decree under which both *A* and *B* became partially entitled to the equity of redemption. *A's* suit was then decreed in favour of both *A* and *B*.

Held : that as under the circumstances it could not be said that *A* had no right to sue when he brought his suit and further as the Court is bound to take notice of events that happen since the institution of the suit and to mould its decree according to circumstances as they stand at the time of passing the decree, the decree passed in favour of both *A* and *B* was unobjectionable : 11 *All.* 438, *Dist.* ; 30 *Mad.* 419 and *Hughes* v. *Pump House Hotel Co.* (*No.* 2), 2 *K. B.* 485, *Ref.*; 44 *Cal.* 47, *Foll.* *A. I. R.* 1925 *Bom.* 122 ; 25 *Bom.* 606; 6 *Bom.* 113, *Ref.* 1 *I. A.* 157, *Rel. on.* [P 338 C 2]

Held further : that as the transfer in favour of *A* was anterior to the suit, and the compromise only recognized the partial right of *A* to redeem, which right already existed, the compromise did not offend against S. 52, Transfer of Property Act : 37 *Bom.* 427, *Dist.* [P 339 C 1, 2]

(b) Civil P. C., O. 1, R. 10—Party can be added even so late as the time of decree.

The power to add a party under O. 1, R. 10, can be exercised at any stage of the suit and the exercise of this power could not be restricted in cases when justice requires a joinder of parties even at such a late stage as the time of the decree. [P 339 C 1]

(c) Civil P. C., O. 34, R. 9—Scope.

Under O. 34, R. 9, the mortgagors are entitled not only to possession, but also to an account of the surplus profits from the date the mortgage amount was paid off : 25 *Bom.* 115, *Rel. on.* [P 339 C 2]

(d) Jurisdiction—Suit for accounts — In taking accounts sum exceeding Court's jurisdiction found due—Court has jurisdiction to pass decree for that amount.

The jurisdiction of the Court depends on the valuation of the claim as made in the plaint, and especially in a suit for accounts, the jurisdiction to pass a decree for more than its pecuniary limit is not excluded when it is found on taking accounts that a sum of more than such pecuniary limit is due : 10 *Bom.* 200; 14 *Bom.* 19 and *A. I. R.* 1927 *Bom.* 83, *Ref.* [P 339 C 2]

(e) Interest—Mortgagee in possession holding over—Interest on surplus profits is to be calculated from date of payment of mortgage amount and not only from date of suit.

Where a mortgagee in possession holds over after payment of everything due to him, interest on surplus profits is to be calculated not from the date of the suit but from the date when mortgage amount was paid : 7 *Bom.* 185, *not Foll.* 16 *Bom.* 141, *Ref.* *Ashworth* v. *Lord*, (1887) 36 *Ch. D.* 545, *Rel. on.* [P 340 C 1]

H. C. Coyajee and *D. A. Tuljapurkar*—for Appellants.

G. N. Thakor, *J. G. Rele* and *G. C. Bhat*—for Respondents.

Facts. — Mother, acting as guardian of her son, who was described as minor in the sale-deed, sold the equity of redemption to the plaintiff. The plaintiff then instituted his suit for redemption. The son thereafter brought another suit to set aside the sale effected by his mother in favour of the plaintiff, on the ground that he was major at the time the sale-deed was executed and consequently the sale was void. This latter suit was compromised and a decree was passed which recognized the partial right of both the plaintiff and the son to the equity of redemption. The son then applied for being joined as a co-plaintiff in *A's* suit for redemption but the Court refused his application. While passing the decree, however, the Court treated the son as plaintiff 2 and decreed redemption in favour of both the plaintiffs.

Patkar, J.—(After stating facts, the judgment proceeded.) The first contention on behalf of the defendants-appellants is that the plaintiff had no right to sue at the date of the institution of the suit, and that the learned Subordinate Judge having refused the application of defendant 9, Ex. 122, to be made a plaintiff, erred in making defendant 9 a plaintiff at the time when he passed the decree,

and reliance is place on the cases of *Parmanand Misr* v. *Sahib Ali* (1), *Bhanu* v. *Kashinath* (2), and *Sayad Abdul Hak* v. *Gulam Jilani* (3).

It was held in *Bhanu* v. *Kashinath* (2) that if the plaintiff at the time he brings his suit has no interest in the subject-matter thereof, the joinder of a person as co-plaintiff who has an interest cannot alter the plaintiff's position or confer on him any right of suit. A similar view was taken in *Sayad Ali Hak* v. *Gulam Jilani* (3). This view is not accepted by the Madras High Court in *Krishna Boi* v. *Collector and Government Agent, Tanjor* (4), and is opposed to the view taken of a similar rule, O. 16, R. 2 of the English Rules, in *Hughes* v. *Pump House Hotel Co. (No. 2)* (5). The case of *Parmanand Misr* v. *Sahib Ali* (1) does not bear on the question of the joinder of a party as an additional plaintiff. The facts, however, in the above two Bombay cases were quite different from the present case. It cannot be said that the plaintiff in this case had no right of action at the time the suit was brought. The sale-deed was passed in his favour by defendant 8 as guardian on behalf of her son, defendant 9, who was described as a minor in the sale-deed.

The learned Subordinate Judge, however, held that defendant 9 was major at the date of the sale-deed. There is no finding by the lower appellate Court on this point. It appears that, after the institution of the suit, defendant 9 filed a suit against the plaintiff to set aside the sale-deed on 7th February 1921, which ended in a compromise, Ex. 105, on 7th September 1922, under which the defendant admitted the plaintiff's right to the sale-deed passed by his guardian during his minority. One of the houses, No. 158, was to be retained by defendant 9 and the other house No. 174 was to be retained by the present plaintiff, and defendant 9 was to receive from the present plaintiff a sum of Rs. 2,000. Defendant 9 gave his consent to the sale-deed and had no grievance in connexion therewith. After this compromise defendant 9 made an application, Ex. 122, to be made a plaintiff. The learned Subordinate Judge, however, rejected his application, but ordered his name to be joined as a plaintiff when passing the decree in favour of the plaintiff and defendant 9. Apparently under the sale-deed the plaintiff had a right to sue for redemption of the mortgage. In *Nuri Mian* v. *Ambica Singh* (6) it was held that ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution, but where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. This Court has also accepted the view that the Court can even in appeal take into consideration events subsequent to the decree: see *Shankerbhai Manorbhai* v. *Motilal Ramdas* (7); *Rustomji* v. *Sheth Purshotamdas* (8) and *Sakharam Mahadev Dange* v. *Hari Krishna Dange* (9). The effect of the compromise decree between the plaintiff and defendant 9 is that the plaintiff and defendant 9 are both entitled to the equity of redemption and the decree passed by the Subordinate Judge allowing redemption in favour of the plaintiff and defendant 9 seems unobjectionable. It was held by the Privy Council in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (10) that the compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. It cannot, therefore, be said that the plaintiff had no right or title at the date of the institution of the suit. Defendant 9 was the only person interested in objecting to the sale-deed passed by his mother, and he entered into a compromise with the plaintiff and both of them have been

(1) [1889] 11 All. 489.
(2) [1895] 20 Bom. 537.
(3) [1895] 20 Bom. 677.
(4) [1907] 30 Mad. 419.
(5) [1902] 2 K. B. 485=71 L. J. K. B. 803=50 W. R. 677=87 L. T. 359.
(6) [1916] 44 Cal. 47=24 C.L.J. 140=34 I.C. 869=20 C.W.N. 1039.
(7) A.I.R. 1925 Bom. 122=49 Bom. 118.
(8) [1901] 25 Bom. 606=3 Bom.L.R. 227.
(9) [1881] 6 Bom. 113.
(10) [1874] 1 I.A. 157=13 B.L.R. 212=3 Sar. 314 (P.C.).

awarded the right to redeem the mortgage. The decree would, therefore, be binding not only as against the plaintiff but also against defendant 9. The power to add a party under O. 1, R. 10, can be exercised at any stage of the suit and the exercise of this power could not be restricted in cases when justice requires a joinder of parties, even at a late stage. The order of the Subordinate Judge joining defendant 9 as a plaintiff at the time of the decree is not, therefore, opposed to the provisions of O. 1, R. 10, though I think that the learned Subordinate Judge would have exercised a wise discretion if he had acceded to the application made by defendant 9 at an earlier stage.

The next point urged on behalf of the appellants is that by virtue of the compromise there was a transfer of property in favour of the plaintiff by defendant 9 during the pendency of the suit which was invalid under S. 52, T. P. Act, and reliance is placed on the decision in *Ishwar* v. *Dattu* (11) In that case there was a partition effected in the family of the mortgagee while the suit for redemption by the mortgagor was pending, and it was held that the right of redemption of the plaintiff-mortgagor could not be affected by the transfer made by the members of the mortgagee's family during the pendency of the suit for redemption. In the present case, there was no transfer during the pendency of the suit. The transfer in favour of the plaintiff was anterior to the suit but by virtue of the compromise the validity of the sale-deed was accepted by defendant 9, the person entitled to dispute its validity. The compromise recognized partially the title of the plaintiff to institute the suit for redemption. Assuming, however, that the compromise decree effected a transfer of property, it would not in any way affect the right of the defendants-mortgagees, for defendant 9 has been made a plaintiff in the case and the decree passed in the suit would be binding on both the plaintiff and defendant 9, and if any amount had been decreed as due on account of the mortgage, both the plaintiff and defendant 9 would have been bound to pay that amount. The rights established by the consent decree between the plaintiff and defendant 9 would in any event have been subservient to the rights of the defendants-mortgagees, and would not, in any way have affected their right to recover the money on the mortgage We think, therefore, that S. 52, T. P. Act does not apply to the facts of the present case. (After discussing evidence, His Lordship proceeded.) The last point urged on behalf of the appellants relates to the accounts taken by the lower Court The mortgagors were entitled not only to possession but also to an account of the surplus profits from the date the mortgage amount was paid off: see O. 34, R 9, Civil P. C., and *Kachu* v. *Lakshmansing* (12). It is urged, however, on behalf of the appellants that the learned Subordinate Judge had no jurisdiction to pass a decree for Rs. 6,920-8-0 in favour of the plaintiff and defendant 9 as it exceeded the pecuniary jurisdiction of the Subordinate Judge. The jurisdiction of the Subordinate Judge depends on the valuation of the claim as made in the plaint, and especially in a suit for accounts, the jurisdiction to pass a decree for more than five thousand rupees is not excluded when it is found on taking accounts that a sum of more than five thousand rupees is due: see *Shamrao Pandoji* v. *Niloji Ramji* (13), *Ramchandra Baba Sathe* v. *Janardan Apaji* (14) and *Ambadas* v. *Vishnu* (15).

It is further urged that on taking accounts interest on the surplus amount ought to have been awarded not from the date of the payment of the mortgage but from the date of the suit, and reliance is placed on the decision in the case of *Janoji* v *Janoji* (16). The case of *Janoji* v. *Janoji* (5) has been commented upon by Telang, J. in *Haji Abdul Rahman* v. *Haji Noor Mahomed* (17) where the learned Judge has referred to the change in the new edition of Seton on Decrees where it is said that

"a mortgagee in possession who holds over after he has been paid his debt and all arrears of interest will be charged with the excess received and interest at four per cent on the balance."

It is urged that in that case the mortgagee sold the mortgaged property under

(11) [1913] 37 Bom. 427=19 I.C. 885=15 Bom. L.R. 366.

(12) [1900] 25 Bom. 115=2 Bom. L. R. 781.
(13) [1885] 10 Bom. 200.
(14) [1883] 14 Bom. 19.
(15) A. I. R. 1927 Bom. 83=50 Bom. 839.
(16) [1882] 7 Bom. 185.
(17) [1891] 16 Bom. 141.

his power of sale and knew that the mortgage amount was paid, and that he was bound to refund the surplus money remaining in his hand, but in the present case, until the account was taken, it was not ascertained when the mortgage amount was paid off and that it would be equitable to charge interest only from the date of the suit. Fisher in his Law of Mortgage para. 1810, p. 911, lays down as follows :

"The mortgagee in possession who holds over after payment of everything due to him, will be charged with subsequent receipts and interest from the date at which the mortgage debt was paid, with annual rests." See *Ashworth* v. *Lord* (18).

The same viaw is expressed in Halsbury's Laws of England, Vol. 21, para. 402, pp. 220-221 ; and Coote on Mortgages, 9th Edn. p.1235. We think, therefore, that the interest was rightly calculated from the date when the mortgage amount was paid. It is further urged that four per cent. or at the most six per cent ought to have been awarded as the rate of interest. The lower Court has awarded interest at the rate of nine per cent which was provided for in the mortgage bond as interest on the mortgage amount. We do not think we should interfere with the discretion of the lower Court in awarding the rate of interest. On these grounds we think that the decree of the lower appellate Court is correct and this appeal must be dismissed with costs.

Murphy, J.—(His Lordship, after stating facts, proceeded) It is true that in the case of a plaintiff who has no title when he institutes the suit, even the addition as a co-plaintiff of one who has such title, confers no right on the plaintiff who lacks it. This view has been taken by this Court in the case of *Sayad Abdul Hak* v. *Gulam Jilani* (3), though the Madras High Court has not acceded to it. But it can hardly be said that in this suit the original plaintiff had no title—he had a clouded or disputed one, which he cleared in the course of the suit by means of the compromise decree, and this Court has held that, though in the ordinary way the decree should decide the parties' rights as they were at the institution of the suit, yet events occurring in the course of the litigation, where their recognition is in the interest of justice, or would avoid further litigation, should not be ignored : *Shankerbhai Manorbhai* v. *Motilal Ramdas* (7).

Since plaintiff's title has been cleared and there is no further dispute on the point between him and the original defendant 9, I agree that defendants 1-3, whose only interest is the repayment of their mortgage amount, cannot be allowed to defeat the claim on this ground. As to defendant 9's belated transfer to the plaintiff's side, it clearly would have been better to have made this change when it was applied for, but the power can, under O. 1, R. 9, be exercised at any stage of a case. The second main contention is that the compromise between plaintiff and defendant 9 effected during the pendency of the suit, offends against S. 52, T P. Act I think the question really turns on whether the other side's rights are effected by such a transfer. In the case relied on, *Ishwar* v. *Dattu* (11) the transfer was a partition in the mortgagee family. Here, if there was a transfer, it did not affect the mortgagees, for their only interest was to be redeemed. But as pointed out by my learned brother Patkar, J. it is doubtful if there really was a transfer. What occurred was an arrangement by which defendant 9 withdrew his objection to the validity of this sale-deed. do not think S. 52 affects this transaction. (After considering the evidence, His Lordship proceeded) : The last objection taken to the lower Court's decree is on the point of the amount found overpaid. The suit was tried by a Second Class Subordinate Judge and the decree made by the District Judge exceeds his jurisdiction of Rs. 5,000 ; but there are numerous authorities to the effect that, if in taking accounts the sum found due is greater than the maximum jurisdiction of the trying Court, its power to pass such a decree is not thereby affected. For these, and the further reasons given in the judgment just delivered by my learned brother Patkar, J., I agree that the decree does not need amendment on the point of interest, and that what is given is reasonable. The lower Court's decree must, therefore, be affirmed and the appeal be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(18) [1887] 36 Ch. D. 545=57 L. J. Ch. 230 =36 W. R. 446=53 L. T. 18.

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PATKAR AND BAKER, JJ.

Lallubhai Pragji—Applicant.

v.

Bhimbhai Dajibhai—Opponent.

Civil Appln. No. 727 of 1928, Decided on 25th January 1929, against judgment reported in *A. I. R.* 1928 *Bom.* 312.

(a) Civil P. C., S. 110—Value of easement and not of whole property is to be taken.

In case of easement to light and air, in considering whether the leave to appeal to His Majesty in Council under Cl. 2, S. 110, it is not the value of the whole property which is to be taken into consideration but the value of the easement : 6 *Bom. L. R.* 403, *Foll.* [P 342 C 2]

(b) Civil P. C., S. 110—Substantial question of law.

After institution of *B's* suit *L* brought a cross-suit or another suit to establish his right to an easement. At the time when *L* brought his suit, which was some months later than the institution of the opponent's suit, the period of 20 years had elapsed and it was held that it was not open to him to add on to the period which had expired at the time of the institution of the opponent's suit, subsequent period after the institution of that suit.

Held : that although there was a point of law it was not a substantial question of law. [P 343 C 1]

(c) Court-Fees Act, S. 7 (4) (c)—Plaintiff cannot be allowed to alter valuation for purposes of Civil P C., S. 110—Suits Valuation Act, S. 8.

Where it is open to the plaintiff to place his own valuation on the suit, and he elects to value it at an amount which is within the jurisdiction of a Subordinate Judge of the Second Class it is not open to him afterwards to say that it is of the value of Rs. 10,000 or upwards so as to fulfil the requirements of S. 110. [P 343 C 1]

(d) Civil P. C,, S. 109 (c)—Applicability.

A case which relates to the right to open two small windows in a loft or gallery in a house cannot be said to be a fit case to be certified under S. 109 (c) : 15 *Bom. L. R.* 1021, *Rel. on.* [P 343 C 2]

H. C. Coyajee and *Gharekhan* with *P. A. Dhruva*—for Applicant.

D. A. Tuljapurkar—for Opponent.

Baker, J.—These are applications for leave to appeal to the Privy Council against the decision of this Court in Second Appeals Nos. 864 and 914 of 1926. The appeals arose out of two cross suits in respect of an easement, i. e., the right to open two windows and an arch in the western party-wall of the defendant's house. The first question which will arise in this case is whether the property is Rs. 10,000 or upwards in value. The learned counsel for the appellant has argued that in a suit for an easement of light and air claimed by the owner of property A, against property B, it is the value of the property and not the value of the easement that determines the appealable value, and for that proposition he relies on the case of *Appaya* v. *Lakhamgowda* (1). Now the trend of decisions in this Court has always been the other way. In *De Silva* v. *De Silva* (2) the point was directly in issue, and it was held, to determine the value prescribed by S. 596, Civil P. C., the decree is to be looked at as it affects the interests of the party prejudiced by it, and where the detriment to the party seeking relief is estimated at less than Rs. 10,000, the value of the matter in dispute in appeal is not of the prescribed value, the decree itself does not involve any claim or question to or respecting property of the prescribed value, and the case does not fulfil the requirements of S 596 of the Code. Sir Lawrence Jenkins in deciding the case said (p. 406) :

"The argument has been that inasmuch as the whole property is valued at Rs. 12,000 there is a compliance with the terms of S. 596 (i. e., the present S. 110), though the loss to the defendant by reason of the decree is limited to one third of that property and profits. If we were to give effect to the contentions urged before us it would follow that if the sole subject-matter in dispute were an easement of trifling value, but affecting property worth Rs. 10,000 or upwards then a right to appeal to His Majesty in Council under the Civil P. C., would exist."

That ruling was followed in *Manilal* v. *Banubai* (3), in which in an application for leave to appeal to the Privy Council the respondent contended that though the value of the easement of light and air claimed by him in the suit was less than Rs 10,000, yet the suit involved a claim or question to or respecting property of the value of over Rs. 10,000 and he was, therefore, entitled to a certificate. It was held, rejecting the application, that in the case of an easement, the value of which fell much below Rs. 10,000, there was no right of appeal although it affected property worth over Rs. 10,000 and reference was made to the case of *De Silva* v *De Silva* (2). Now it appears that after leave to appeal in *Manilal* v. *Banubai* (3) had been refused by this Court special leave to appeal was granted by the Privy Council. But we

(1) A.I.R. 1923 Bom. 176.
(2) [1904] 6 Bom. L.R. 403.
(3) A.I.R. 1921 Bom. 266.

are not in possession of the judgment, and we do not know what were the reasons which led their Lordships to grant special leave to appeal, but that is referred to in the case of *Appaya* v. *Lakhamgowda* (1). This is a case on which the learned counsel for the applicant relies, and it is also the case which Mr. Mulla has quoted in the Civil Procedure Code, 8th Edition, at p. 299, in support of the proposition that in a suit for an easement of light and air claimed by the owner of property A, against the owner of property B, it is the value of property A and not the value of the easement that determines the appealable value.

With all respect, the case of *Appaya* v. *Lakhamgowda* (1) does not seem to support this proposition. In that case the dispute was between two persons as regards two properties in which the parties were held to be entitled to share equally, and it was found that the plaintiff's share was worth more than Rs. 5,000, and therefore the defendant's share was also worth more than Rs. 5,000, and so the total value of the property was over Rs. 10,000. The user referred to a well and to the open space in the compound adjoining the two houses. The property, therefore, in respect of which the easement was directly claimed and in respect of which the easement was exercised was worth more than Rs. 10,000. That is to say, the plaintiff claimed the right to use a well and compound the value of which was Rs. 10,000 and upwards, and this does not refer to the same thing as a dispute regarding two small windows in a particular room of a house, but as a matter of fact the judgment in *Appaya* v. *Lakhamgowda* (1) has not dissented from the rulings already quoted in *De Silva* v. *De Silva* (2) and *Manilal* v. *Banubai* (3) nor does it seem to have been followed in subsequent cases. In *Nariman Rustomji* v. *Hasham Ismayal* (4), which was decided two years later than *Appaya* v. *Lakhamgowda*(1) *De Silva* v. *De Silva* (2) was again followed, and the principle laid down in *Rustomji* v. *Hasham Ismayal* (4) is not the principle laid down in *Appaya* v. *Lakhamgowda* (1). It was held in that case that where in a partnership suit leave to appeal to His Majesty in Council was applied for, the petitioner contending that the decree involved a claim respecting property of the value of Rs. 10,000 within the meaning of the second paragraph of S. 110, Civil Procedure Code, 1908, it was the value of the appellant's share in the partnership that must be looked to and not the value of the whole partnership property.

It has just been pointed out that in *Appaya* v. *Lakhamgowda* (1) what was held was that it was the value of the whole property and not the value of the plaintiff's share which for this purpose must be taken to apply. So the principle laid down in *Nariman Rustomji* v. *Hasham Ismayal* (4) is the same principle as that laid down in *De Silva* v. *De Silva* (2) and *Manilal* v. *Banubai* (3) expressly follows *De Silva* v. *De Silva* (2), and makes no reference to *Appaya* v. *Lakhamgowda* (1). In these circumstances it appears that this Court has with this one exception, for which no reasons are given, always followed *De Silva* v. *De Silva* (2), which is still good law. In addition to this the Privy Council in *Abid Husain Khan* v. *Ahmad Husain* (5) has proceeded on much the same principle as *Nariman Rustomji* v. *Hasham Ismayal* (4) holding that S. 110, Civil P. C., applies to he value of the annuity which is sought to be recovered, and not to the value of the property upon which that annuity is charged. And that case distinguishes the case of *Radhakrishna Ayyar* v. *Sundaraswamier* (6), the case upon which the learned counsel for the applicant has relied, and in which it was laid down that the sum of money actually at stake represents the true value

In these circumstances I am of opinion that the case of *De Silva* v. *De Silva* (2) is still good law, which has been uniformly followed in this Court, and the principle which that decision lays down is that in the case of an easement it is not the value of the whole property which is to be taken into consideration. In addition to this the learned counsel for the respondent has quoted *Hirjibhai* v. *Jamshedji* (7), which lays down that the amount of value of the subject matter of the suit cannot be larger than what the Court in which the suit is brought has jurisdiction to try and decree, and where it is open to the plaintiff to place his own valuation on his suit, and he elects

(4) A.I.R. 1925 Bom. 187=49 Bom. 149.

(5) A.I.R. 1923 P.C. 102=26 O.C. 216 (P.C.).

(6) A.I.R. 1922 P.C. 257=45 Mad. 479=49 I. A. 211 (P.C.).

(7) [1913] 15 Bom. L.R. 1021=21 I.C. 783.

to value it at an amount which is within the jurisdiction of a Subordinate Judge of the Second Class, it is not open to him afterwards to say that it is of the value of Rs. 10,000 or upwards. In the present case the relief sought was valued at Rs. 5. The suit was valued at Rs. 5 for all purposes, and was brought in the Court of the Second Class Subordinate Judge. Hence it would not be open now for the applicant, who was plaintiff in one suit and defendant in the other, to contend that the suit related to property of the value of Rs. 10,000 or upwards, in which case the suit should have been brought in the First Class Subordinate Judge's Court. In these circumstances I am of opinion that the value of this appeal must be taken to be less than Rs. 10,000, and, therefore, it does not fulfil the requirements of S. 110, Civil P C., and that it does not involve any claim or question to or respecting property of the like amount or value. Secondly, in this case the decree which has been passed by this Court confirmed the decision of the Court immediately below, and, therefore in order that a certificate might issue that this is a fit case for appeal to the Privy Council the appeal must involve some substantial question of law. Now the point in this case was only this : that at the time the plaintiff brought a suit, by plaintiff I mean the servient owner, the defendant-applicant had not enjoyed the easement for 20 years, and that was found by all three Courts.

After the institution of the opponent's suit the applicant brought a cross suit or another suit to establish his right to the easement, and at the time when he brought that suit, which was some months later than the institution of the opponent's suit, the period of 20 years had elapsed, and it was held that it was not open to him to add on to the period which had expired at the time of the institution of the opponent's suit the subsequent period after the institution of that suit. Now there is a decision of the Court of Chancery to that effect, and although there is a point of law, as there must necessarily be in every case, I am not prepared to hold that it is a substantial point of law. Then it is contended that the appeal might at any rate fall under S. 109 (*c*), which provides for an appeal from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

The same ruling which I quoted just now, *Hirjibhai* v. *Jamshedji* (7), deals directly with this point, and says what is contemplated in Cl. (c), S. 109, Civil P. C., is a class of cases in which there may be involved questions of public importance or which may be important precedents governing numerous other cases or in which while the right in dispute is not exactly measurable in money it is of great public or private importance. A case was quoted in the course of the arguments in this case which referred to the right of management of a Parsi fire temple, which naturally would be a matter of great importance to the Parsi community, but I do not think it can for a moment be urged that the present case, which relates to the right to open two small windows in a loft or gallery in a house, is a case of great public importance. It can hardly be said to be an important precedent governing numerous other cases.

The circumstances of this case are, as I think I pointed out at the time of my judgment, very peculiar. It is very rare that such a question as two suits brought by two persons would involve questions such as arose in the present case. The point on which the Subordinate Judge felt some difficulty was that the applicant was entitled to a decree if the opponent had not brought a suit, and that is a point which I should think is hardly ever likely to arise again. Cases of easements of light and air are of daily occurrence in this Court, but they are not usually of great public or private importance. They may be important to the parties themselves, but not to the community as a whole. I do not think the case can be brought under S. 109, Cl. (c) and I think that argument was raised as a last resource in case the case did not fall under S. 110.

I do not wish to deal with the question of one of these two applications being barred. As a matter of fact there is only one judgment of this Court in the two cases, and the delay was excused by the Registrar. Apart from this, on the grounds which I have already given, I am of opinion that in this case the value of the property is not Rs. 10,000 or upwards, that no substantial question of law is involved, and that the certifi-

cate asked for should be refused, and the rule discharged with costs.

Patkar, J.—I agree. These are two applications for leave to appeal to the Privy Council. It is urged on behalf of the opponents that one of the applications is beyond time. The Registrar has excused the delay, and for the determination of the question involved in these applications I consider that both the applications are within time. The applications for leave to appeal in this case do not ask for a certificate under S. 109, Cl. (c), Civil P. C. Leave can be granted under S. 109, Cl. (c), in very special cases. It was held in *Benarsi Parshad* v *Kashi Krishna Narain* (8) that it is clearly intended to meet special cases such as for example those in which the point in dispute is not measurable by money though it may be of great public or private importance. I may also refer to the case of *Hirjibhai* v. *Jamshedji* (7). I do not think that this is a case which can be considered to be of great public or private importance. The case does not admittedly fall under the Cl. 1, S. 110, Civil P. C. It is urged that it falls under the Cl. 2, S. 110 on the ground that the decree involves indirectly some claim to or respecting property of Rs. 10,000 or more The earlier decisions of the Court in *De Silva* v. *De Silva* (2) and *Manilal* v. *Banubai* (3) are opposed to that contention. In *De Silva* v. *De Silva* (2) Sir Lawrence Jenkins observes (p. 406).

"If we were to give effect to the contention urged before us it would follow that if the sole subject-matter in dispute were an easement of trifling value, but affecting property worth Rs. 10,000 or upwards then a right to appeal to His Majesty in Council under the Civil P. C. would exist. It appears to me that this would be giving to the words of the section an operation that could not have been intended."

The same view taken by Macleod, C. J. in *Manilal* v. *Banubai* (3). Reliance, however, is placed on the later decision of Macleod, C. J., in *Appaya* v *Lakhamgowda* (1), where reference is made to leave given by their Lordships of the Privy Council in *Manilal* v. *Banubai* (3). The judgment of their Lordships of the Privy Council has not been reported, and the copy of the judgment has not been produced before as. The decision, however, in *Appaya* v. *Lakhamgowda* (1) is inconsistent with the later decision of this Court in *Nariman Rustomji* v. *Hasham Ismayal* (4), which follows the previous decision in *De Silva* v. *De Silva* (2) and cannot be reconciled with the decision of the Privy Council in *Mirza Abid Husain Khan* v. *Ahmad Husain* (5) explaining the case of *Radhakrishna Ayyar* v. *Sundaraswamier* (6). It was held by their Lordships of the Privy Council that S. 110, Civil P. C. applied to the value of the annuity which was sought to be recorded and not to the value of the property upon which the annuity was charged. The view of this Court in *De Silva* v. *De Silva* (2) is followed by the Patna High Court in *Gosain Bhaunath Gir* v. *Behari Lal* (9). Where the detriment to the party seeking relief is less than the prescribed value of Rs. 10,000, the value of the subject matter in dispute on appeal to His Majesty in Council is neither of the prescribed value, nor does the decree itself involve any claim or question to or respecting property of that value. The same view was taken by the Madras High Court in *Appala Raja* v. *Rangappa Naicker* (10), where it was held that in a suit framed as one for a declaration and injunction in respect of the right to take water from a pond and channel for the irrigation of lands, the real value of such a right could properly be ascertained only on the basis of the detriment or injury which the plaintiff would suffer if that right were negatived. It was held by Sadasiva Aiyar, J., that the word "property" in para. 2 which is an alternative, to the para. 1 means right to property inferior to full ownership where such inferior rights alone are the subject matter in dispute, and the para. 2 extended the privilege given by the para. 1 only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly though not directly. Spencer, J., was of opinion that the claim must be one to or respecting property of Rs. 10,000 in value, and not a claim merely affecting property of such value. In case a right of way or other easement is claimed by the owner of two adjacent houses one of the value

(8) [1900] 23 All. 227=28 I. A. 11=7 Sar. 825 (P.C.).

(9) [1919] 4 P. L. J. 415=12 I. C. 723=(1919) P. H. C. C. 257.

(10) [1917] 33 M. L. J. 481=6 M. L. W. 12=40 I. C. 680=(1919) M. W. N. 414.

of Rs. 10,000 and another of the value of Rs. 5,000 in two different suits over the land of a third person and is negatived by the decrees in the two suits. leave to appeal to the Privy Council will have to be granted in the one case and refused in the other if the contention of the applicant is accepted. I think, therefore, that the case does not fall under Cl. 2, S. 110.

If the contention on behalf of the appellant had been accepted, it would have been necessary to send down an issue to the lower Court under O. 45, R. 5, but in the present case the affidavit filed on behalf of the applicant shows that the value of the building is Rs. 10,892, to which is added the value of the front portion of the land and the rear portion of the land to the extent of Rs. 2,075 and Rs. 1,866. Assuming, however, that the value of the building was Rs. 10,892, it is difficult to accept the value of the depreciation at Rs. 345 only. If proper deduction on account of depreciation is made from the value of the building as given in the estimate of the Engineer on behalf of the applicant, the value of the building might come to less than Rs. 10,000. On the other hand the value of the property according to the affidavit of the Engineer on behalf of the opponent is Rs. 5,994 only. Even if the extended construction sought to be put upon Cl. 2, S. 110 be accepted, I doubt whether the value of the property would be Rs. 10,000 or more. It is, therefore, unnecesary to consider whether there is any substantial question of law involved in this case. I would, therefore, discharge the rules in both the applications with costs.

V.B./R.K. *Rule discharged.*

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* A. I. R. 1929 Bombay 345

BAKER, J.

Rayegavda Hanmantraya—Appellant.

v.

Ramlingappa Shidgavdappa — Respondent.

Second Appeal No. 300 of 1927, Decided on 23rd January 1929, against decision of Dist. Judge, Bijapur, in Appeal No. 45 of 1925.

*** (a) Limitation Act, Art. 141—One reversioner suing to recover possession from widow's alienee within 12 years from widow's death and impleading other reversioner as defendant—Latter submitting written statement after 12 years claiming his share — Latter's claim is not barred by Art. 144 read with Limitation Act, S. 28.**

Though a suit by one reversioner to recover possession of his share from the alienee from a Hindu widow would be barred under S. 28 read with Art. 141 as being beyond twelve years from the death of the widow, yet when a suit is brought within the proper period of limitation by another reversioner and the other reversioner is made defendant in it and he in his written statement claimed possession of his share, such a claim would not be barred by limitation in spite of the fact that the written statement itself was presented after the lapse of 12 years : 34 *Bom.* 91, *Foll.* ; 26 *M. L. J.* 494 ; *A. I. R.* 1921 *Bom.* 303 ; 21 *Bom.* 509, *Dist.* 35 *Cal.* 1065, *Ref.* [P 347 C 1,2]

(b) Practice — Partition suit — Defendant claiming share need not be made co-plaintiff.

It is not necessary in a partition suit that a defendant who claims a share in the property should be made a co-plaintiff. [P 346 C 2]

R. A. Jahagirdar—for Appellant.

H. B. Gumaste—for Respondent.

Judgment.—The facts of this case are that the plaintiff as purchaser of the rights of three out of the five reversioners of Amagowda sued to recover possession of his three-fifths share by partition from defendant 6 who was an alienee from Mahalingawa, the widow of Amagowda, and defendants 5 and 7 who are the reversioners as regards the remaining two-fifths share were added. Defendant 6 pleaded legal necessity for the sale. That was found against him. It was also found that he and not defendants 5 and 7 were in possession of the plaint property, and the first Court passed a decree in plaintiff's favour for possession by partition of his three-fifths share. Defendants 5 and 7 asked in their written statement that they might be given their two-thirds share in the property. It was held their share was two-fifths, but their claim was rejected on the ground that it was preferred for the first time more than twelve years from the death of the widow Mahalingawa, and, therefore, it was barred under Art. 141, Lim. Act. Defendant 6 did not appeal, and we are not concerned with the question of legal necessity. Defendants 5 and 7 appealed, and the District Judge held that as defendants 5 and 7 were reversioners and not coparceners, they must sue for possession within twelve years of the widow's death, and that their claim was put forward in their written statement, and that statement

was filed more than twelve years later, and that the claim for partition was, therefore, barred. Defendants 5 and 7 make this second appeal. The learned pleader for the appellants has relied on the case in *Narsinh* v. *Vaman Venkatrao* (1), in which this point was directly in issue. In that case certain watan lands belonging jointly to two brothers were let under a perpetual lease. After the death of the last owner his representatives brought a suit for the recovery of the lands let by him. The suit was against the heirs of the mortgagee of the lessee, the heirs of the lessee, and defendants 4 and 5 as the heirs of one of the two brothers to whom the property belonged. Defendants 4 and 5 did not contest the plaintiffs' claim. The plaintiffs in this case were the representatives of one of two joint owners having a half share in the property, and defendants 4 and 5 were the heirs of the other joint owner.

The first Court allowed the plaintiffs' claim to the extent of their share, viz., moiety, on the ground that their claim to this extent was not time-barred. Against this decree both the plaintiffs and defendants 4 and 5 appealed, the latter of whom in appeal claimed their share, viz., the other moiety, which was awarded to them. The heirs of the mortgagee appealed contending that the claim of defendants 4 and 5 was time barred. The High Court held that the claim of defendants 4 and 5, which was put forward for the first time in appeal, was within time, because they being parties to the suit instituted within the twelve years during which their right to share in the watan property could be determined, the Court must deal with the matter in controversy so far as regards the rights and interest of the parties actually before it by the institution of the suit, and it was further held that a party transferred from the side of the defendant to the side of the plaintiff was not a new plaintiff to whom the provisions of S. 22, Lim. Act would apply, following *Nagendrabala Debya* v. *Tarapada Acharjee* (2). This case, which does not appear to have been quoted before the lower appellate Court, is directly in point in the present case. The matter is discussed at p. 99 in the judgment of Scott, C. J., in *Narsinh* v. *Vaman Venkatrao* (1). It is pointed out that time began to run from the death of Venkatrao in 1893, and defendants 4 and 5 were upon the record of the suit as defendants at the date of its institution. It was held that though S. 28, Lim. Act would operate to extinguish the right of person who did not bring a suit within the period prescribed, it does not follow that his right would be extinguished if he were a party to a suit instituted by another within the prescribed period in which his right to the property could be effectually determined (p. 99):

> "The section does not say so, and we do not think that we ought to construe it as implying that this would be the case. Here the defendants were parties to the suit instituted within twelve years in which their rights to a share in this vatan property could be effectually determined as against defendants 1 to 3, and the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit; see S. 31, Civil P. C., of 1882 and O. 1, R. 9 of the Code of 1908. There can be no doubt that if the defendants had been plaintiffs in the first instance no such argument as we have been discussing could have been put forward. But it appears from the judgment of the learned Judge of the appellate Court that he, for the purposes of the suit, treated them as co-plaintiffs although he did not amend the record by placing them among the plaintiffs and striking them out from among the defendants."

The High Court, then, following the case of *Nagendrabala* v. *Tarapada* (2), held that a party transferred to the side of the plaintiff from the side of defendant is not a new plaintiff to whom the provisions of S. 22, Lim. Act would apply, and exercised their powers of amendment by putting the plaint in the shape in which the Judge of the lower appellate Court intended it to be at the time he delivered his judgment. It is not as a matter of fact necessary in a partition suit that a defendant who claims a share in the property should be made a co-plaintiff. On behalf of the respondents it is contended that the right of the defendants is barred by twelve years' adverse possession on the part of the alienee from the widow as they instituted no suit within that period, and, therefore, S. 28, Lim. Act would apply, and reference is made to *Valiappa Chetty* v. *Subra-*

(1) [1909] 34 Bom. 91=4 I. C. 249=11 Bom. L. R. 1102.
(2) [1908] 35 Cal. 1065=8 C. L. J. 286 = 13 C. W. N. 186.

manian Chetty (3) ; *Sakharam* v. *Trimbakrao* (4), and *Budesab* v. *Hanmanta* (5). So far as the case of *Valiappa Chetty* v. *Subramanian Chetty* (3) is concerned, I am of opinion that it has no application as it refers to a case in which one plaintiff was not represented by another, and he had not himself signed the plaint, and, therefore, there could not be considered to have been any presentation of a plaint by him. *Sakharam* v. *Trimbakrao* (4) is a case under S. 28, Lim. Act which held that where the right has been extinguished, that right cannot be pleaded as a defence in a suit brought by the plaintiff for a declaration that the land could be held free of assessment. So also *Budesab* v. *Hanmanta* (5) is a case showing that adverse possession for more than twelve years by one claiming to hold land as its full owner not only extinguishes the title of the true owner, but creates a title by negation in the occupant which he can actively assert, if he lost possession, against the true owner. But none of these cases expressly deal with the special and rather unusual point which arises in this case, viz., whether although a suit by defendants 5 and 7 themselves to recover possession of their two-fifths share in the land in dispute from the alienee from the widow would be barred under S. 28, Lim. Act read with Art. 141 as being beyond twelve years from the death of the widow, yet when a suit is brought within the proper period of limitation by another reversioner, which has happened in the present case, and the defendants are made parties to that suit, and in their written statement claimed possession of their two-fifths share, such a claim would be barred by limitation.

The case of *Narsinh* v. *Vaman Venkatrao* (1) deals directly with this point, and is a direct authority for the proposition that such a claim would not be barred provided the suit in which that written statement was put in was brought within limitation. Now it is not disputed that the suit of the plaintiff was within twelve years from the death of the widow, and this being so, and the defendants having been made parties from the day of the institution of the suit, the fact that their written statement itself was put in more than twelve years from the death of the death of the widow would not, in my opinion, on the construction of *Narsinh* v *Vaman* (1), be barred by limitation. The present is a suit in which the defendants' right to the property can be effectually determined, and in all essentials it fulfils the condition provided by the remarks on p. 99 of that case. In these circumstances, as *Narsinh* v. *Vaman* (1) has never been overruled or dissented from, I am bound to follow it, and to hold that the claim of defendants 5 and 7 to recover their two-fifths share in the property as reversioners of the widow is not barred by limitation. I do not think that in the circumstances it is necessary that they should be made co-plaintiffs along with the plaintiff as this suit, as the plaint shows, is a partition suit in which the share of all defendants can be determined and awarded to them on their payment of the necessary Court-fee. This, however, is a minor matter as on the Calcutta case which has already been quoted their claim would not be barred (I refer to *Nagendrabala* v. *Tarapada* (2) even if this alteration were made. The result will be that the decree of the lower Courts must be set aside and a decree passed entitling defendants 5 and 7 to possession of the remaining two-fifths share in the suit property with mesne profits from defendant 6 who is in possession, subject of course to the payment of the necessary Court-fee on the value of the property to be determined by the lower Court under O. 20, R. 12, Cl. (2), Civil P. C., together with costs in this Court and in the lower appellate Court to be paid by defendant 6.

S.N./R.K. *Decree set aside.*

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(3) [1914] 26 M. L. J. 494=23 I. C. 431 = 15 M. L. T. 342.
(4) A. I. R. 1921 Bom. 303=45 Bom. 694.
(5) [1896] 21 Bom. 609.

A. I. R. 1929 Bombay 348

BAKER, J.

Vatsalabai Vinayak and *another*—Appellants.

v.

Vasudev Vishnu—Respondent 1.

Second Appeal No. 458 of 1927, Decided on 29th January 1929, against decision of Dist. Judge, Ratnagiri in Appeal No. 312 of 1925.

Hindu Law—Widow's estate—Reversioner executing deed declaring widow to be absolute owner he having no interest therein —Property after widow's death passes to reversioner and not stridhan heirs.

A Hindu died separate leaving his widow and a brother. The brother executed a farkhat giving to widow the self-acquired estate belonging to the deceased in these terms. "We hereby declare that we have no right, title and interest whatsoever in the said property under any circumstances whether you adopt a son and give it to him or whether you give it to your daughter or whether you alienate to anybody in any way as full owner thereof." After widow's death the brother claimed as reversioner and the granddaughter of the widow brought a suit claiming as the stridhan heir.

Held : that the farkhat cannot be regarded as a family arrangement by which the brother gave these properties to the widow in gift, for the reason that he had no interest which he could transfer by way of gift or otherwise. The expressions in the farkhat are merely designed to show that the brother had no claim upon this property, and that the widow took this property which belonged to her husband as her husband's heir. Therefore it could not be her stridhan, as it would be property inherited by her from her husband. Under the ordinary Hindu Law she takes a widow's estate in it, and on her death it would revert to her husband's heirs : 23 *Mad.* 504, *Dist.*; 34 *All.* 234 (*P. C.*), *Expl.* and *Rel. on.*

[P 350 C 1, 2]

H. C. Coyajee and *K. A. Padhye* — for Appellants.

G. N. Thakor and *G. B. Chitale* — for Respondent 1.

Judgment. — This case involves a point of Hindu law. The facts are simple, and are set out in the judgments of the Courts below. The plaintiffs, who are the granddaughters of one Parvatibai, sued to recover possession of the plaint property, their case being that the property is the stridhan property of Parvati, that Parvati's daughter Dwarkabai died during the lifetime of Parvati leaving no male issue, and plaintiffs as her daughters are Parvatibai's heirs. The defendants who are respectively the brother of the husband of Parvati, and his son, contend that on the death of the widow, they as reversioners of the husband of Parvati, are entitled to the property. It is admitted that if the property is the stridhan property of Parvati, her granddaughters, the present plaintiffs, are the heirs, whereas if it was property of her husband, the defendants are the heirs. It seems that the husband of Parvati, and his brother, defendant 1, were separate, and after the death of Pandurang, the husband of Parvati, who died in 1894, a farkhat was passed between Parvati and defendant 1 and his son. This is Ex. 38, and the decision of this case will depend on the construction of that document. The first Court was of opinion that the language of the document was perfectly clear, and conferred an absolute estate on Parvati in the share allotted to her. He, therefore, awarded the plaintiffs' claim. On appeal the District Judge of Ratnagiri was of a contrary opinion, and he, therefore, ordered the suit to be dismissed. Plaintiffs make this second appeal.

Exhibit 38, which is a partition deed dated 20th January 1902, passed by the present defendants to Parvati, the widow of the deceased brother of defendant 1, Pandurang, recites that Pandurang was the sole owner of certain properties, and had become separated from the defendants 12 years before his death, his death having occurred seven years before. It then proceeds to allot certain property to Parvati subject to the payment of certain family debts. The important portion of the document is the concluding paragraph which states :

"We hereby declare that we have no right, title and interest whatsoever in the said property under any circumstances whether you adopt a son and give it to him or whether you give it to your daughter or whether you alienate to anybody in any way as full owner thereof."

The learned Judge of the first Court was of opinion that this conferred an absolute estate in the share allotted to her. The learned Judge of the appellate Court held that Ex. 38 could not be considered to alter the character of the property for intestate succession. He says :

"I grant that, in her lifetime, Ex. 38 gave Parvati an absolute right over the property. She could have alienated the same or given away the same to anyone. I also grant that as she was given an absolute power of disposal, she could have even made a will about

the property according to her pleasure. But in the absence of any alienation by her in her lifetime or any will made by her about its disposition, I think the property remained as the property held by Parvati as widow of Pandurang and inheritable by her husband's heirs and not her stridhan heirs, see *Kanni Ammal* v. *Ammakannu Ammal* (1) and *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2)."

"I can only read in Ex. 38 an intention to authorize Parvati to alienate or give away the property in her lifetime or to will it away, but no intention to alter the character of the property so as to make it descendible to her stridhan heirs in case of intestate succession."

Now of the two cases before the learned District Judge, *Kanni Ammal* v. *Ammakannu Ammal* (1) has not been referred to in arguments, and seems to have a very remote bearing, if any, on the point before the Court. It lays down that while one of two daughters cannot by any alienation alter the character of the daughter's estate so far as the right of survivorship or that of the reversioners is concerned, she may alienate her interest in the property or have that interest taken in execution of a decree against her. The bearing of this in the present case is not clear to me, and I need not further refer to this case. The other case, which is a Privy Council case, *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2), lays down the following proposition. According to the Mitakshara, there is no substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition It was held, therefore, reversing the decision of the Courts in India that the share which the mother in a joint Hindu family obtains after the death of the father on partition of the joint family property between the mother and the sons, is not her stridhan, but is given her for her maintenance, and on her death it devolves upon the heirs of her husband and not upon her own heirs. The Privy Council in this decision after referring to the cases by which it was held that property acquired by inheritance by a woman from her husband is of the same nature as property acquired on partition say (p. 242) :

"If the share given to a widow on partition is given to her as a substitute for that to which she would be entitled upon inheritance, then, according to the foregoing authorities, it would seem reasonable that it should follow the same rule of descent and revert on her death to her husband's heirs. If, on the other hand, it is given to her by way of provision for her maintenance, it seems equally reasonable that when the necessity for her maintenance has ceased the property should revert to the estate from which it was taken. Of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift, as part of her stridhan, so as to constitute a provision for her stridhan heirs ; but, in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow, on a partition of the joint estate, upon a footing different from that on which property coming to her by way of inheritance has been placed."

It follows, therefore, that the share acquired by a widow on partition does not become her stridhan, but should be regarded in the same light as property acquired by her as heir of her husband, unless there is an express intention to the contrary, and the learned counsel for the appellants has rested his case mainly on the passage of the judgment of the Privy Council that I have just read, which is at the bottom of p. 242. The present case is not precisely a case of inheritance or of partition. From the terms of Ex. 38 it would appear that the necessity of a partition or rather of a partition deed between the brother of Pandurang and the widow of Pandurang, arose in this way. Although Pandurang was separate, as the document recites, from his brother, and although the properties had been acquired by his exertions and were practically his self-acquisition, the documents relating to them, appear to have been in the names of other members of the family. This will be found in the earlier portion of the farkhat. It recites :

"While we were living jointly your husband the deceased Pandurang Vishnu acquired properties by his own exertions. The sale-deed as well as mortgage-deeds of the said properties were taken in the names of those who were present at home on various occasions but irrespective of these documents your husband Pandurang is the sole owner of the said property. We acquired nothing by our own exertions."

The effect, therefore, of this farkhat is to admit that these properties are the self acquisition of Pandurang, and although the deeds may be in the name of other members of the family, they as a matter of fact have no right to the property. Now this is not precisely, in my opinion, a partition of a joint estate, but rather a recognition by the members that these properties are the separate self-ac-

(1) [1899] 23 Mad. 50 =10 M.L.J. 253.
(2) [1911] 34 All. 234=14 I.C. 1000=39 I.A. 121 (P.C.).

quisitions of Pandurang, and as such would belong to him solely, and on his death, as he died separate from his brothers, his widow would succeed to them in the ordinary course under Hindu law, but she would under Hindu law succeed to them as the heir of her husband, and would only take a widow's estate in regard to them as laid down by the Privy Council in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2). The argument of the learned counsel based on the observations of the Privy Council at p. 242 is based on a partition by the members of a joint family agreeing that a portion of the property should be transferred to the widow by way of absolute gift.

It seems to me that in order that there should be a transfer by the other members of the family of any property to the widow by means of an absolute gift, we must presuppose that the other members of the family had an interest in the property which they could transfer. I can quite see that supposing certain properties were the joint property of the family, so that the persons executing the farkhat had an interest according to their shares in that property, they can very well transfer it to the widow in any way they chose by resigning all their rights in it, and thus making it her absolute property, and that it can be contended in such cases that such property would form her stridhan. But this is not quite a case of that character. As I read the farkhat, the admissions of the defendants would show that the properties which they were transferring to the widow were properties in which they never had any interest from the beginning, that is to say, these properties were the absolute property of Pandurang. They were his self-acquisitions, and the other members of the family even in the period of jointness had no interest in them as they have admitted. What then is the result? The result, as it seems to me, is that the last paragraph of the Ex. 38, which I have already given, cannot be regarded as a family arrangement by which these persons gave these properties to Parvati in gift, for this reason that they had no interest which they could transfer by way of gift or otherwise, for you cannot of course make a gift of that which does not belong to you. The expressions at the end of the farkhat are merely designed to show that they have no claim upon this property, and it seems to me that Parvati took this property which belonged to her husband as her husband's heir. If that is so, it could not be her stridhan, as it would be property inherited by her from her husband. Under the ordinary Hindu law she takes a widow's estate in it, and on her death it would revert to her husband's heirs.

For those reasons I am in agreement with the view taken by the learned District Judge, but not perhaps for precisely the same reasons. I admit that until a very short time ago I was prepared to hold that the concluding paragraph of Ex. 38 evidenced such a family arrangement as is referred to in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2) by the Privy Council (p. 242), but on reading Ex. 38 again, I am decidedly of opinion that the admissions made by the male executants of that document show that they did not assert any title at all in those properties which were handed over to Parvati, and as I have already said, there cannot be any question of a gift of property which does not belong to you. Therefore the property must be taken to be property inherited by her from her husband, and that being so, under the ruling of the Privy Council, the property at her death would descend in the ordinary course, and does not become her stridhan.

For these reasons I confirm the decree of the lower appellate Court and dismiss the appeal with costs.

M.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Bombay 350

MARTEN, C. J. AND MURPHY, J.

Chandulal Kanhayalal and *another* —Plaintiffs—Appellants.

v.

Nagindas Bapubhai and *others*—Defendants—Respondents.

First Appeal No. 454 of 1926, Decided on 26th February 1929, against decision of 1st Class Sub-Judge, Dhulia, in Civil Suit No. 402 of 1923.

*** (a) Civil P. C., O. 23, R. 3—Parties, some of whom were minors, arriving at compromise—Court asked to satisfy itself that compromise is for minor's benefit—Affidavit by next friend or guardian that he considers compromise to be for minor's benefit should be filed—In heavy cases coun-**

sel should state that in his opinion compromise is for minor's benefit.

Where the parties to a suit (some of whom are minors) arrive at a compromise, and present it to the Court for passing decree in terms of it, asking the Court to satisfy itself that the compromise is for the benefit of the minors, there should be an affidavit from the next friend of the minor plaintiff and the guardian of the minor defendants stating (if it be the fact) that he considers the proposed compromise to be for the benefit of the particular minor or minors and stating some grounds on which he bases his opinion. Further in heavy cases there should be an opinion of counsel or else a statement of counsel at the Bar that in his opinion the compromise is for the benefit of the minors. [P 351 C 2]

(b) Civil P. C., O. 23, R. 3—Court is not obliged to pass formal decree in exact terms of compromise.

Where parties to a suit arrive at a compromise and present it to the Court, it is entirely erroneous to suppose that the Court is obliged to pass a formal decree in the exact form which the parties propose. [P 352 C 1]

(c) Civil P. C., O. 23, R. 3—Court does not make declarations based on compromise arrived at by parties.

Where parties to suit arrive at a compromise, a Court does not make declarations based on such compromise, because the Court not having heard the case is not in a position to form its own opinion as to the merits of the case. [P 352 C 2]

R. W. Desai—for Appellants.

M. H. Mehta—for Respondents.

Marten, C. J.—This is an application to compromise this First Appeal No. 454 of 1926. All the parties to the original suit are, however, not before us. The parties to the appeal consist of plaintiffs 1 and 2 and defendants 2 and 11-16. Consequently we have not before us defendants 1 and 3 to 10 and 17 to 20. We are, however, informed that owing to the course this litigation has taken, these latter defendants are not necessary for the purposes of the present appeal and the proposed compromise. What we are asked to do is to sanction the compromise on behalf of the minors, viz., plaintiff 2 and defendants 14, 15 and 16. Their respective interests are in conflict. The litigation concerns the family property descending from one Murardas Rasikdas, who had four sons. The plaintiff's contention was that there was never any partition between these four sons of Murardas. In that contention however, they were defeated in the Court below. They have now accepted that decision, and it is on that basis that defendants 1 and 18 to 20, who are the descendants of a son Goverdhandas, are not concerned with, at any rate, that portion of the appeal. (Judgment then discussed evidence and turned to consider whether the compromise was for the benefit of the minors). We appreciate here that the minors in each case have adult relatives, who prima facie have the same interests as the minors, and that as the rival parties have agreed to this compromise, therefore prima facie grounds for assuming that it is in the interests of the minors as well as of the adults on either side that this compromise should be effected.

But the parties seem to be labouring under a misunderstanding as to the true position of the Court. This Court has to be satisfied that the particular compromise is for the benefit of the minors, and the practice that I have been accustomed to in England as well as on the original side of this Court is that there should be an affidavit by the guardian of the minors to that effect, and that in heavy cases there should be an opinion of counsel, or else a statement by counsel at the bar that in his opinion the compromise is for the benefit of the minors But we have no such affidavit here. There is no such opinion of counsel in writing and I am not aware that counsel are even prepared to give that opinion at the Bar. One reason apparently is that the precise grounds on which the compromise is for the benefit of the respective minors are by no means clear. For instance, one may infer that the debts of the business are such that it is to the pecuniary interests of the plaintiffs to abandon any interest in the business, and also to abandon any claim to a share in certain joint assests of the sub-branch of Bapubhai in order to escape the liability to pay the debts of the business. But that of course is a question of figures. We are told that the figures cannot be ascertained until the Commissioner has investigated the matter. I am not, however, referring to annas and pies. I am referring to an approximate statement of what the debts of the business are likely to be. For, until we know whether any debts at all have been incurred, and approximately what the shares of the infants are likely to be the Court is entirely in the dark. Speaking for myself, I object to sanction-

ing a compromise on behalf of infants with the material facts left in what I may describe as a fog.

Therefore in our opinion, there should in this case be an affidavit from the next friend of the plaintiffs and the guardian of the minor defendants stating (if it be the fact) that he considers the proposed compromise to be for the benefit of the particular minor or minors, and stating some grounds on which he bases his opinion. In particular it should be stated by one side or the other what approximately is the amount of the estimated loss in the particular business. So, too, one would like to know what would be the general pecuniary effect of this proposed compromise so far as regards the minor plaintiff and so far as regards the minor defendants. I say this because we are asked to alter the decision of the Judge in the Court below, and to say that there was a complete partition not only between the four main branches, but also as between the plaintiffs and Nagindas inter se.

Next I turn to the decree which we are asked to pass. There the parties seem to be under another misapprehension, and that is that this Court is obliged to pass a formal decree in the exact form which the parties propose. That, to my mind is entirely erroneous. The parties, for instance, may draft a decree which no self-respecting Court would dream of passing. Under those circumstances there is no legal obligation on the Court to put on its records a decree which would be a reflection on its competence. In this particular case the proposed decree is generally speaking, in very confused terms. For our guidence we would, in the first place, ask the parties to number in consecutive paragraps the preliminary decree of the learned Judge at p. 10 of the paper book, and then to show either by red ink alterations, or else by another full draft, exactly what will be the effect of the preliminary decree passed by the learned Judge as varied by the proposed consent order. I say this because this preliminary decree is an extremely long document. The proposed variations also run to a considerable length, and as at present advised I think it would give a great deal of unnecessary labour to anybody who wishes clearly to ascertain what is the effect of the joint orders, if he had to read first the preliminary decree, and then the document we have now before us.

Then another matter, which, so far as the form goes, I object to is this. Speaking generally, the practice on the Chancery Side is that the Court does not make declarations by consent. And that is for a very good reason, viz., that the Court not having heard the case is not in a position to form its own opinion as to the merits of the case. So, speaking generally, the Chancery Courts refuse to do that. Nor is there any real necessity to do it. It is easy to frame a decree by which in lieu of any declaration it is said that the parties agree to a particular legal situation, and then the operative part of the order, if anything substantial is to be done, can be framed in the ordinary way. Similarly, I do not like the expression that "this Court reverses the finding of the lower Court," when in fact we have not to decide whether the learned Judge is right or wrong. If, for instance, this case was argued out it might be that we should hold the learned Judge's decision to be perfectly right. That we cannot say at present. The parties may, however, substitute their agreement for the formal decision of the Court. Therefore, instead of using the word "reverses," it is quite simple to say that by consent that finding, or that particular part of the order, is discharged.

We will, therefore, direct the parties to re-draft this proposed decree so that it can be put in a form which satisfies the conditions I have mentioned. Very often in cases of this sort it is convenient to set out in a schedule the precise compromise the parties have agreed to, and then in the order itself merely to state what the parties actually want as an operative order, e. g, for payment of money. But as we are asked to vary a preliminary decree and some of the parties are not before us, that course may not be available here. On the other hand, we must get some document which clearly expresses the exact form of the final decree

Murphy, J.—I agree.

S.N./R.K. *Order accordingly.*

* A. I. R. 1929 Bombay 353

BAKER, J.

Monjiram Indrachandra—Applicant.

v.

Maneklal Mansukhbhai Seth — Opponent.

Civil Appln. No. 615 of 1928, Decided on 11th February 1929.

*** (a) Civil P. C., S. 107 — Even under S. 107, a person, who was not a party to original suit, cannot be added as respondent by appellate Court—Civil P. C., O. 41, R. 20.**

A person, who was not a party to the original suit, not only cannot be added as a respondent by the appellate Court under O. 41, R. 20, but he cannot be so added even under S. 107, as that section being expressly subject to such conditions and limitations as may be prescribed, is subject to the conditions of R. 20, O. 41 · 3 *P. L. J.* 409; 8 *C. W. N.* 404, *not Foll.*; *A. I. R.* 1925 *All.* 768; *A. I. R.* 1923 *Lah.* 490, *Foll.*; *A. I. R.* 1921 *Mad.* 172 (*F.B.*), *Expl.* and *Dist.* [P 354 C 1]

(b) Civil P. C., O. 1, R. 10—In suits for compelling registration third parties cannot be added as parties.

In a suit which is merely for compelling the registration of a certain document, it is not open to third parties to come in and say that the document should not be registered and so they cannot be added as parties to the suit. [P 354 C 2]

H. C. Coyajee with *Lakhia and Co.*—for Applicant.

G. N Thakor with *Madhavji and Co.*—for Opponent.

Judgment.—The facts of this application are a little unusual. It is an application by the firm of Monjiram Indrachandra at Calcutta to be added as respondents in First Appeal No. 514 of 1927 from the decree of the First Class Subordinate Judge at Ahmedabad. The firm is not a party to the original suit. The facts are that the applicant firm Monjiram Indrachandra obtained a decree in the Calcutta High Court for a large sum against the respondent in the appeal, Nagarsheth K. Manibhai. The decree was transferred for execution to Ahmedabad, and while proceedings in execution were going on, the Court ordered certain property to be attached, but a few days prior to the attachment the respondent sold the property to the appellant, Sheth Maneklal. For certain reasons which I need not go into now, there was delay in registering the sale-deed, and ultimately the Registrar refused to register it. Thereupon the vendee Sheth Maneklal brought Suit No. 44 of 1927 in the Court of the First Class Subordinate Judge at Ahmedabad against the vendor Nagarsheth under S. 77, Registration Act, for a decree directing the document to be registered. This suit was dismissed by the First Class Subordinate Judge. The defendant did not appear. The plaintiff appealed to this Court, First Appeal No. 514 of 1927, and the firm Monjiram, who are creditors of the respondent, apply to be added as respondents to the appeal on the ground that the transaction between their judgment-debtors Nagarsheth and the plaintiff-appellant Maneklal is collusive and intended to prevent them from realizing the amount of their decree. Under O. 41, R. 20, Civil P. C., the appellate Court has power to add as respondent to the appeal any person who was a party to the suit in the Court from whose decree the appeal is preferred and who has not been made a party to the appeal and is interested in the result of the appeal. It is obvious that the present applicants not having been parties to the suit in the present case, do not fulfil this condition, but the learned counsel for the applicants has referred to S. 107, Civil P. C., as giving this Court jurisdiction to add his clients as parties even though they may not have been parties in the original suit. S. 107, Cl. (2), says :

"Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

And it is argued that under this provision the Court has power to add as a respondent in the appeal a person who was not a party to the original suit. He has referred to the case in *Hemangini Debi* v. *Haridas Banerjee* (1) in which on a probate matter a party was added, and the Court held that both under S. 107, Civil P. C., 1908, and under its inherent powers, an appellate Court has power to add as parties to the suit persons who were not parties in the first Court, and reference is made to *Gyananda Asram* v. *Kristo Chandra Mukherji* (2). There is direct authority to the contrary in *Shiam Lal, Joti Prasad* v. *Dhanpat Rai* (3), which lays down that under O. 41, R. 20, Civil P. C., the

(1) [1918] 3 P. L. J. 409=5 Pat. L. W. 16=2 46 I. C. 398=(1918) P. H. C. C. 276.
(2) [1901] 8 C. W. N. 404.
(3) A. I. R. 1925 All. 768=47 All. 853.

appellate Court has power to implead in the appeal a person who was a party to the suit but who has not been made a party to the appeal, but under that rule a Court has no power to implead a person who was no party to the original suit at all. That case follows *Pachkauri Raut* v. *Ram Khilawan Chaube* (4). There is a reference in the judgment to S. 107, Civil P. C., but the Court held that gives an appellate Court the same powers, generally speaking, as the trial Court. The learned counsel for the applicants has referred in his reply to *Baluswami Aiyar* v. *Lakshmana Aiyar* (5), in which it was held that even if O. 41, R. 20, does not apply, O. 1, R 10, also applies to appeals by force of S. 107, Civil P. C. It is to be noticed, however, that the party so added had been a party to the original suit, but as he was a pro forma defendant it seems to have been argued that he was not a person interested within the meaning of O. 41, R. 20. The view of the High Courts, therefore, appears to differ as to whether a person who was not a party to the original suit can be added as a respondent in the appeal. The Lahore High Court has followed the same view as the Allahabad High Court. In *Haliman* v. *Nur Muhammad*, *A. I. R.* 1923 *Lah.* 490 it was held that an appellate Court has power to implead only such persons as were parties in the trial Court and were not made parties to the appeal but not those who were complete strangers to the suit.

I should be disposed to hold that as S. 107, Civil P. C., is expressly subject to such conditions and limitations as may be prescribed, it must be subject to O. 41, R. 20, and, therefore, in order to enable a party to be added in appeal it is necessary that he should satisfy the conditions of O 41, R. 20, i. e, he should be a party to the suit in the Court from whose decree the appeal is preferred and should be interested in the result of the appeal. It appears to me that very great complications would arise if third parties were added in appeals as they would necessarily, in a large number of cases, raise points of fact which have never been considered by the Court below. Assuming, however, that although the applicants do not fulfil the conditions prescribed by O. 41, R. 20, as they were not parties to the suit, it would be open to this Court to add them in second appeal on the merits I do not think this is a case in which they should be so added The suit from which the appeal is preferred is merely a suit to enforce registration of a document which has been passed by the respondent to the appellant in the appeal. There is no provision under the Registration Act by which a third party can intervene, and prevent a document passed by one person to another being registered. The applicant firm is not a party to the transaction between the appellant and the respondent, nor can the mere fact of registration make the document operative as against the applicant firm if he succeeds in showing in a suit or otherwise that it is a collusive transaction entered into with a view to prevent him obtaining satisfaction of his decree.

At the present stage we do not know anything about the merits of the case. On behalf of the appellant in this case it is contended that the sale-deed was passed in consequence of an equitable mortgage which had been created by the respondent in favour of the appellant on the property attached in pursuance of the Calcutta High Court's decree, this equitable mortgage being prior to the decree obtained by the applicants in this miscellaneous application. That, however, is a question to be determined elsewhere. It has been argued by the learned counsel for the applicant that nobody is prejudiced by his being added, and that inasmuch as the respondent did not appear in the first Court, where the suit was dismissed on a point of law he will not appear to contest the appeal, and it is possible that the decree of the lower Court may be reversed, there being no opposition by the respondent. There might be more in this argument if the appeal turned on a question of fact. It, however, turns on a question of law, and I am not prepared to suppose that a decision on a question of law would be upset, if it were correct, because there was no support to the judgment of the lower Court on behalf of the respondent. It is open to the applicant to bring a suit for a declaration that this sale-deed cannot affect any interest in the property which

(4) [1914] 37 All. 57=26 I. C. 25=12 A. L. J. 1277.

(5) A. I. R. 1921 Mad. 172=44 Mad. 605 (F.B.).

he may have. At present he is only in the position of an attaching creditor, and cannot be said to have any interest in the property. And apart from this, it has been stated by the learned counsel for the applicant that there is at the present time a suit pending on the original side of this High Court based on the equitable mortgage brought by the appellant in this appeal against the respondent to which the firm of the applicant is made a party, and in this suit no doubt the applicant will have the opportunity of saying again anything against the validity and genuineness of this equitable mortgage that he may have to say.

A technical point has been raised that the application has been made by a person who does not hold a power-of-attorney from the applicant. But I need not consider this. As a matter of fact there are two affidavits both of which apply for the addition of the firm as a respondent, but though they contain a prayer for this addition, they are really only affidavits, and the application is presented by the solicitors. But on the merits and on the law I am of opinion that this is not an application which should be granted, first because I do not think that under O. 41, R. 20, Civil P. C., which must be held to govern S. 107, following the rulings of the Allahabad and Lahore High Courts, that the applicants who were not parties to the original suit, can be added as respondents. And it is also open to doubt, although I do not wish to decide that question, which is a question for argument, whether they have an interest in the result of the appeal, and on the merits I do not think that in a case of this character, which is merely a suit for compelling the registration of a certain document, it is open to third parties to come in and say that the document should not be registered. For these reasons I discharge the rule with costs.

S.N./R.K. *Rule discharged.*

A. I. R. 1929 Bombay 355

MARTEN, C. J. AND MURPHY, J.

B. B. & C. I. Railway — Applicant.

v.

Mahmadbhai Rahimbhai and *another*—Opponents.

Civil Revn. Appln. No. 35 of 1928, Decided on 14th December 1928.

Railways Act, S. 72 — Goods consigned under risk-note H with additional rates for carriage by parcel or passenger train—Goods not forwarded by either — Company held liable for loss due to delay.

M consigned goods under risk-note *H* and paid special rates for carriage of goods by parcel or passenger train. After a certain distance consignment was forwarded by goods train. Consequently consignment arrived late causing deterioration of the goods.

Held: that the company was liable to pay damages for the breach of contract and goods were not covered by risk-note *H* as the conditions of contract as to the manner in which the goods were to be carried was not complied with : *Gunyon* v. *South Eastern and Chatham Railway Companies' Managing Committee*, (1915) 2 *K. B.* 370, *Foll.* ; *Foster* v. *Western Ry.*, (1904) 2 *K. B.* 306, *Dist.*

[P 356 C 2]

J. G. Mody—for Applicant.

H. D. Thakor and *Little & Co.*—for Opponents.

Marten, C. J.—The plaintiff trader in this case having to send certain oranges over the G. I. P., and B. B & C. I. Railways to Ahmedabad paid a special rate in order to ensure them being sent by a passenger or by a parcel train. The goods came over the G. I. P. Railway, and reached Surat on the B. B. and C. I. Railway. There the waggon containing the plaintiff's goods was detached, and was forwarded not by a parcel train, but by a goods train, and that goods train arrived at Ahmedabad, the final destination, some fourteen hours after the time at which the next parcel train would have arrived. Further, if the company had forwarded the goods from Surat by the next passenger train, then they would have arrived even earlier than by the next parcel train. The railway company rely in their defence on the risk-note in form "H" and say they are thereby protected because there was no wilful neglect on their part.

Now, the learned Judge has taken the view that in forwarding these goods by goods train the railway company broke their contract, and that it was a material term of the contract that the goods being perishable goods go by passenger or parcel train. In this finding, he is clearly supported by the English authority of *Gunyon* v. *South Eastern and Chatham Ry. Companies' Managing Committee* (1). There, there was a

(1) [1915] 2 K. B. 370=84 L. J. K. B. 1212 =91 T. L. R. 844=113 L. T. 282.

special contract to send cherries from Sittingbourne in Kent to Glasgow in Scotland by passenger train, for which a special rate was paid. The goods reached London by passenger train but in transit to Glasgow they were sent by goods train, owing it was said, to the loss of the consignment note. Deterioration resulted, and the Court held that the railway company were not protected by the risk-note in question as it was a breach of their contract to send the goods forward by goods train.

There the terms of the risk-note purported to protect the railway company except against wilful misconduct on their part. Here, the terms of the suit risk-note do not protect the company against wilful neglect. But, as in the English case, it is not necessary to determine whether there was wilful neglect because there was a breach of the contract in sending the goods on by goods train. If the railway company had shown that no damage resulted to the plaintiff by this breach of contract (for instance, that the goods train containing his goods was one which arrived before the next available passenger or parcel train would have arrived) then, it may be that the plaintiff would not be able to recover any damages. But the evidence as found by the learned Judge is to the contrary effect, viz., that the plaintiff's goods were damaged by arriving at least fourteen hours later than they otherwise would have done, if not more.

We have been referred to another case on the other side of the line in *Foster* v. *Great Western Railway* (2). There a consignment of fish was despatched from Brixham to Jersey via Southampton and by mistake, the goods were not taken out at Exeter, but were allowed to go on to Taunton, where the mistake was discovered. The railway company with a view to minimise the loss, sent the goods forward by the alternative route to Jersey, viz., via Weymouth instead of via Southampton. Accordingly, although the goods did not arrive as quickly as they would have done by the Southampton route, yet the Court held that the mistake at Exeter was not due to wilful misconduct on the part of the railway company. And one can understand that the mere omission to take out the goods at Exter would not necessarily amount to wilful misconduct within the terms of that particular risk-note.

But the case here is different, for the railway company broke its contract by sending the goods by goods train, when they contracted to send them by passenger train or parcel train.

Under those circumstances, we think that in law there was evidence on which the learned Judge could find in favour of the plaintiff, and that in revision we ought not to interfere with his decision. The result will be that the rule will be discharged with costs as against the plaintiff. We have already held that defendant 2 (G. I. P. Railway) was unnecessarily made a party to this application and that the rule must be discharged against defendant 2 with costs.

Murphy, J.—The railway administration rely on the argument that the risk-note, which was in form H, protects them; and on the contention that the sending of the goods, which had been booked by parcel or passenger train, by goods train from Surat to Ahmedabad with the good intention of saving time, is also a ground on which the suit should not have been decreed against them. Actually the goods arrived at Ahmedabad on the morning of 11th March 1924, while had the waggon been kept at Surat and sent by the next parcel train, they would have arrived at Ahmedabad on the evening of the 10th.

I think that since the conditions of the contract as to the manner in which the goods were to be carried were not complied with, the goods are not covered by the risk-note in form H and that this does not protect the railway administration. The delay was clearly due to the course adopted by the Station authorities at Surat, and, on the facts, it seems to me that the Small Cause Court's decree is correct, that we should not interfere with it, and that the rule must be discharged with costs.

V.B./R.K. *Rule discharged.*

(2) [1904] 2 K. B. 306=73 L. J. K. B. 811=20 T. L. R. 472=52 W. R. 685=19 L. T. 779.

* A. I. R. 1929 Bombay 357
Full Bench

MADGAVKAR, PATKAR AND WILD, JJ.

Gopaldas Sambhudas—Plaintiff—Appellant.

v.

Vithal Mohanji — Defendant — Respondent.

Second Appeal No. 30 of 1927, Decided on 10th June 1929, from decision of Dist. Judge, West Khandesh, in Appeal No. 66 of 1925.

*** Dekkhan Agriculturists' Relief Act (17 of 1879), Ss. 12 and 13—Mortgagor asking account—Mortgagor is liable to pay sum found due on account though larger than sum due in terms of mortgage : *A. I. R.* 1922 *Bom.* 289=46 *Bom.* 384 and 46 *Bom.* 764 = *A. I. R.* 1922 *Bom.* 201=67 *I. C.* 151, *Overruled.***

When an agriculturist mortgagor has asked for an account to be taken under Ss. 12 and 13 and an account is taken accordingly and it is found at the foot of the account that what is due is greater than the total sum which would be payable in the terms of the mortgage, such agriculturist debtor is liable to pay the larger sum found due on the account, and his liability is not limited to the sum due in the terms of the mortgage : **32 Bom. 516 ; Affirmed ; A. I. R. 1922 Bom. 289=46 Bom. 384 and 46 Bom. 764=A.I.R. 1922 Bom. 201=67 I. C. 151, Overruled.**

[P 359 C 2]

K. H. Kelkar—for Appellant.

Y. V. Dixit—for Respondent.

Order of Reference.

Patkar, J.—In this case, plaintiff sued to recover possession of certain property from the defendant. In the written statement, the defendant claimed that the accounts should be taken under the Dekkhan Agriculturists' Relief Act and that he should be allowed to redeem the mortgage. The suit was converted into a redemption suit, presumably, under S. 15 (c), Dekkhan Agriculturists' Relief Act. The learned Subordinate Judge on taking accounts found that the principal amount was Rs. 1,570-15-0 and held that Rs. 3,100-8-6 were due on taking accounts under the Dekkhan Agriculturists' Relief Act.

On appeal, the learned District Judge held that under the terms of the bond the plaintiff was entitled to recover only Rs. 2,600 and limited the decree to that amount and ordered that the amount should be payable by yearly instalments of Rs. 300 each.

The second appeal was heard by Baker, J., who was of opinion that there was a conflict in the decision in the case of *Dadabhai* v. *Dadabhai* (1) on the one hand, and the cases of *Vithaldas Bhagwandas* v. *Murtaja Hushein* (2) and *Raghunath* v. *Ramchandra* (3) on the other. It appears from the judgment of Baker, J., that there are several appeals on this very point pending at the present moment and he considered it desirable that the case should be heard by a Bench.

In the present case the amount of the mortgage bond was Rs. 3,400 payable in seventeen instalments of Rs. 200 each out of which four instalments were paid and thirteen remained due. The amount, therefore, due under the terms of the mortgage was Rs. 2,600. The learned Subordinate Judge on taking the accounts found that Rs. 3,100-8-7 were due at the foot of the accounts. The learned District Judge considered that he was bound to follow the case in *Vithaldas* v. *Murtaja* (2), and limited the decree to the amount of Rs. 2,600.

In *Dadabhai* v. *Dadabhai* (1) it was held that when an account has been taken under S. 13, Cl. (h), Dekkhan Agriculturists' Relief Act, the balance appearing due shall be deemed to be the amount payable at the date of the suit, and that S. 13, Dekkhan Agriculturists' Relief Act, is imperative, and the amount due in a suit, for redemption of a usufructuary mortgage, in which the provisions of S. 12 of the Act have been complied with, is the amount which is found to be due upon taking accounts in the manner provided by S. 13. In that case the mortgage was a usufructuary mortgage for Rs. 2,499 and on taking accounts under S. 13 the sum payable was found by the Commissioner to be in excess of Rs. 2,499, a result which was not expected by the agriculturist mortgagor, and the case was remanded to the lower Court in order that a decree should be passed in accordance with the result of the account taken under S. 13, Dekkhan Agriculturists' Relief Act. In *Raghunath* v. *Ramchandra* (3) it was held, distinguishing the case of *Dadabhai* v. *Dadabhai* (1), that when once a creditor has taken a bond, then in no possible case can he recover in a suit on the bond more than the principal amount with interest, because as a rule the object of

(1) [1908] 32 Bom. 651=10 Bom. L. R. 745.
(2) A. I. R. 1922 Bom. 201=46 Bom. 764.
(3) A. I. R. 1922 Bom. 289=46 Bom. 384.

directing accounts to be taken under the Dekkhan Agriculturists' Relief Act is to ascertain how much of the amount secured by the bond is principal and how much interest after going into the history of the transactions between the parties. In that case the mortgage was for Rs. 1,500 and on taking accounts under the Dekkhan Agriculturists Relief Act, the principal sum found due was Rupees 3,338-2-0 and a like amount for interest and it was held that a decree could not be passed for more than Rs. 1,500 as principal and a like amount for interest. In the present case the principal amount for the unpaid thirteen instalments is Rs. 2,600 and on taking accounts a lesser sum, i. e., Rs. 1,570-15-0 was found due as principal and about Rs. 1,530 was found due as interest, in all Rs. 3,100-8-6 were found due, but the learned District Judge held that a decree could not be passed for more than Rs. 2,600 due under the terms of the bond.

In *Vithaldas* v. *Murtaja* (2) it was held that although on the report of the commissioner there appeared payable, for principal and interest, the sum of Rs. 12,463 4-0, yet inasmuch as there remained only Rs 9,500 due on the bond itself, a decree for that amount only should be passed. In that case a suit was brought to recover Rs. 6,000, amount of twelve instalments due till 1916 on an instalment mortgage bond for Rs. 15,000. According to the terms of the bond eleven instalments were already paid and Rs. 9,500 was the balance due on nineteen unpaid instalments. On taking accounts the commissioner found that Rs. 6,231-10-0 were due for principal and a like amount for interest, in all Rs. 12,463-4-0. The learned Subordinate Judge held Rs. 3,200 were due for principal and passed a decree for Rs. 6,400 inclusive of interest. It was held that the Subordinate Judge erred in holding that only three bonds of Rs. 2,000, 400 and 800, in all Rs. 3,200 were for cash consideration, and that the account taken by the commissioner that Rs. 6,231-10-0 as principal and a like amount for interest was due, was correct, but a decree was passed for Rs. 9,500, the amount of nineteen unpaid instalments due under the terms of the bond. The decision thus arrived at is in conflict with the decision in the case of *Dadabhai* v. *Dadabhai* (1), where although Rs. 2,499 were due under the terms of the usufructuary mortgage, it was held that the mortgagee would be entitled to recover whatever would be found due on taking accounts under S. 13 of the Act even though it was in excess of the amount due under the terms of the mortgage. The decision is also in conflict with the decision reached in *Raghunath* v. *Ramchandra* (3), where it was held that on taking accounts a creditor could recover principal for sum not exceeding the amount mentioned in the bond and also interest. The amount due for principal on taking accounts was Rs. 6231-10 0 and was less than Rs. 9,500 balance of the principal mentioned in the bond, and a like amount was found due on interest, still a decree was passed for Rs. 9,500, the amount due under the terms of the bond disregarding the account taken under S. 13 of the Act which was found to be correct. It appears to us that there is in the decisions conflict in the cases of *Dadabhai* v. *Dadabhai* (1) and *Vithaldas* v. *Murtaja* (2) and *Raghunath* v. *Ramchandra* (3), on the point as to whether in a suit in which accounts have been taken under the Dekkhan Agriculturists' Relief Act more can be awarded than could be awarded under the terms of the bond itself if no accounts were taken under the Dekkhan Agriculturists' Relief Act. We think, therefore, that the matter should be decided authoritatively by a decision of the Full Bench. We would refer the following question for the decision of the Full Bench :

" Whether when an agriculturist mortgagor has asked for an account to be taken under Ss. 12 and 13, Dekkhan Agriculturists' Relief Act and an account is taken accordingly and it is found at the foot of the account that what is due is greater than the total sum which would be payable in the terms of the mortgage, such agriculturist debtor is liable to pay the larger sum found due on the account, or his liability is limited to the sum due in the terms of the mortgage ?"

Murphy. J.—I agree that a reference should be made to the Full Bench, for I do not find myself able to reconcile the ruling in *Dadabhai* v. *Dadabhai* (1) with the grounds of decision in the two later cases, *Vithaldas* v. *Murtaja* (2) and *Raghunath* v. *Ramchandra* (3).

Opinion.

Madgavkar, J.—The question referred to the Full Bench is as follows :

"Whether when an agriculturist mortgagor has asked for an account to be taken under Ss. 12 and 13, Dekkhan Agriculturists' Relief Act, and an account is taken accordingly and it is found at the foot of the account that what is due is greater than the total sum which would be payable in the terms of the mortgage, such agriculturist debtor is liable to pay the larger sum found due on the account, or his liability is limited to the sum due in the terms of the mortgage ?"

It is pointed out in the referring judgment that it was held by Scott, C. J., in *Dadabhai* v. *Dadabhai* (1) that the provisions of Ss. 12 and 13, Dekkhan Agriculturists' Relief Act, were imperative and the result of the account so taken must be embodied in the decree even if the amount found due was greater than the amount due under the terms of the original mortgage ; but subsequently it was held by Macleod, C. J , in two cases, *Raghunath* v. *Ramchandra* (3) and *Vithaldas Bhagwandas* v. *Murtaja Hushein* (2), that the legislature could not have meant that by reason of an Act admittedly meant to benefit the agriculturist a decree should be passed against him for an amount larger than what it would have been but for the Act and for accounts taken thereunder. It is pointed out by my learned brother Patkar that these two decisions of Macleod, C. J., are not themselves quite reconcilable, the one limiting the creditor to the principal amount and the other to the amount of principal with interest on the footing of the original mortgage.

That the terms of Ss. 12 and 13, Dekkhan Agriculturists' Relief Act, are imperative, there can be no question in view of the word "shall" used at the beginning of S. 13 as well as in Cl. (g). The only question, therefore, is whether merely by reason of the Act being meant generally for the relief of the agricultural class, it is nevertheless open to the Courts to imply a clause, that, notwithstanding the imperative language of the section, it is open to the Courts to set aside the accounts and the result, if the amount is found to be larger than the amount due on the original mortgage between the parties I am aware of no canon of interpretation by which the Courts can read such a clause into the section and arrogate these powers to themselves. It would have been simple for the legislature, had it desired to give the agriculturist the benefit of such a clause, to have said so, and to have directed that there should be a decree for such an amount on the account only where the amount so found was not greater than the amount on the original mortgage. Failing such a clause, mere general considerations of benefit to the agriculturist are, in my opinion, insufficient to support the view of Macleod, C. J., on which the two decisions, *Raghunath* v. *Ramchandra* (3) and *Vithaldas* v. *Murtaja* (2), are based. I prefer the reasoning of Scott, C. J., in *Dadabhai* v *Dadabhai* (1) It may be that in certain cases this may cause hardship to the agriculturist, but the proper answer is that it is perfectly open to the agriculturist to refrain from setting up such a status and asking for such accounts, if the result is likely not to be to his benefit. Further, with the large discretion allowed to the Courts in the matter of fixing the interest, such cases are few and far between. That presumably is the reason why the legislature did not think it necessary to contemplate such an alternative and give the Courts the explicit power without which the decisions in *Raghunath* v. *Ramchadra* (3) and *Vithaldas* v. *Murtaja* (2) respectively cannot, in my opinion, stand. In any case a few possible hard cases cannot be allowed to affect the plain terms of the Act and their clear meaning.

My answer to the question, therefore, is as follows :

When an agriculturist mortgagor has asked for an account to be taken under Ss. 12 and 13, Dekkhan Agriculturists' Relief Act, and an account is taken accordingly and it is found at the foot of the account that what is due is greater than the total sum which would be payable in the terms of the mortgage, such agriculturist debtor is liable to pay the larger sum found due on the account, and his liability is not limited to the sum due in the terms of the mortgage.

Patkar, J.—I agree.

Wild, J —I agree.

V.B./R.K. *Reference answered.*

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MARTEN, C. J., AND MURPHY, J.

Kapurji Magniram—Petitioner.

v.

Pannaji Debichand—Opposite Party.

Civil Appln No. 274 of 1929, Decided on 11th March 1929.

Civil P. C., S. 110—Leave to appeal—Decree of High Court partly affirming and partly varying decree of lower Court—Appeal against item of Rs. 18,000 for appeal on which leave was asked affirmed—No question of law—Leave could not be granted.

Court of the first instance decreed plaintiff's claim in part. On appeal the High Court modified the decree by finding a sum of Rs. 2,483 due by the defendants to the plaintiff. In both Courts an item of Rs. 18,000 referred to as a havala item was refused. Plaintiff moved the High Court for leave to appeal to the Privy Council as regards that item. There was no question of law involved.

Held: that under the circumstances on true construction of S. 110 it is necessary that as the decree appealed from affirmed the decision of the Court below, on this item, the appeal must involve some substantial question of law before it can be admitted: *A. I. R.* 1925 *P. C.* 60; *A. I. R.* 1921 *All.* 270, *Dist.*

[P 360 C 1]

A. G. Desai—for Petitioner.

Marten, C. J.—This is an application for leave to appeal to the Privy Council against the judgment, dated 7th August 1928, of Fawcett and Murphy, JJ. Fawcett, J., at the present time is on deputation, and accordingly he is unable to hear the present application.

As a result of that judgment, this appellate Court varied the decree of the lower Court to a certain extent in favour of the plaintiff and this resulted in the finding of a sum of Rs. 2,488 due by the defendants to the plaintiff at the date of the suit. The plaintiff, who is the appellant, is, however, dissatisfied with that decision. He wants to appeal to their Lordships against one item which was decided against him, viz., an havala item of Rs. 18,000 referred to in his memorandum of appeal.

Now as regards that item both the Courts below were in agreement, and accordingly it is clear that the appeal to the Privy Council, if allowed, would be merely, so far as the plaintiff is concerned, with reference to the havala item of Rs. 18,000. It would also be clear that as regards that item both Courts below were agreed. Under these circumstances, we think that on the true construction of S. 110, Civil P. C., it is necessary that as the decree appealed from affirmed the decision of the Court below on this item, the appeal must involve some substantial question of law before it can be admitted.

We have been referred by the appellant to two authorities for the proposition that whenever the appellate Court varies the decision of the lower Court on any point, then ipso facto S. 110 comes into operation, irrespective of the nature of the proposed appeal to the Privy Council. But the cases cited in our opinion establish no such proposition.

In *Annapurnabai* v. *Ruprao* (1), the appeal to the Privy Council was limited to the question of maintenance allowance. There the Court of first instance had decreed to the widow Rs. 800 per annum as maintenance; but the appellate Court increased it to Rs. 1,200 per annum. Consequently the argument of Sir George Lowndes at p. 320 is quite correct, viz.:

"The appellate Court did not affirm the decree of the first Court, but it varied it; consequently it is not material under S. 110 whether any substantial question of law is involved."

The other case cited to us is that of *Bhagwan Singh* v. *Allahabad Bank, Ltd.* (2). There it will been seen that the Court of first instance decreed the plaintiff's claim for about Rs. 41,000. On appeal the High Court modified the decree of the Court of first instance by nearly Rs. 8,000. It was there held that as the decree of the lower Court had been varied, there was no necessity for there to be a substantial question of law, provided the amount involved was over Rs 10,000.

Turning next to see whether any substantial question of law arises here, the dispute about the havala item of Rs. 18,000 appears to us to be a mere question of fact. It is alleged that a question of law arises, because the learned Judges drew attention to the fact that there was no chit and it is contended that in certain circumstances no chit would be likely on a havala transaction of that sort. In my opinion that is not a substantial question of law, even if it can be said to be a question of law at all, which I do not think it is.

Under these circumstances I would dismiss this present application.

Murphy, J.—I agree. I think there is no substantial question of law involved in the proposed appeal, and that otherwise the appeal does not come within the rule.

V.B./R.K. *Application dismissed.*

(1) A. I. R. 1925 P. C. 60=51 Cal. 969=51 I. A. 319 (P.C.).

(2) A. I. R. 1921 All. 270=43 All. 220.

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BAKER, J.

Bapu Shivaji Naik and *others*—Defendants—Appellants.

v.

Kashiram Hanmantrao Ghag—Plaintiff—Respondent.

Second Appeal No. 308 of 1927, Decided on 24th January 1929, against decision of the Dist. Judge, Ratnagiri, in Appeal No. 84 of 1926.

(a) Transfer of Property Act, S. 55 (2)—*A* sold property to *B* without giving possession —*B* sold it to *C*— *C* sued *A* for possession when *A* was found entitled to half only — *C* obtained possession of half and sued for damages from *A* in lieu of half—*C* held entitled to it—Cause of action arose on declaration of imperfect title of *A*.

A sold certain property to *B* without giving him possession. *B* sold it to *C* who obtained possession by suit against *A*. The cosharers of *A* objected and *C* retained possession of half the property to which *A* was entitled. *C* filed a suit for damages against *A*:

Held: that whatever may be the position of *B*, *C* having been declared entitled to the possession of the property in suit, and having been unable to get possession of that by reason of the infirmity of the title of the original vendor, will be entitled to recover not in this case the purchase money, but damages in lieu of possession under the covenant under S. 55, Cl. (2), and the cause of action to *C* arose when the imperfection of the defendants' title was first declared: 38 *Mad.* 887, *Rel. on.*; *A. I. R.* 1925 *Bom.* 440; *A. I. R.* 1921 *Bom.* 252, *Ref.* [P 364 C 2]

(b) Contract Act, S. 73—Damages—Extent of—*A* selling property to *B* who sold it to *C*—*C* unable to obtain possession of half owing to *A*'s defective title—*C* is entitled to damages against *A* to the extent of half price paid by *B*.

A sold property to *B* without giving possession for Rs. 1,500. *B* sold it to *C* for Rs. 900. *C* sued *A* for possession and obtained possession of half the property only owing to defect in *A*'s title. *C* sued for damages:

Held: that the amount of damages was the value of the one half share of which *C* has been deprived by the fault of *A* and it should be taken at half the value of the share estimated by him in his original transfer to *B*, i.e. Rs. 750: 21 *Bom.* 175, *Dist.* [P 365 C 2]

G. N. Thakor, *Y. V. Dixit*, and *G. B. Chitale*—for Appellants.

R. W. Desai and *A. G. Desai* — for Respondent.

Facts.—One Krishnaji owned a four annas share in the khoti rights. The defendants were related to Krishnaji as shown in the following genealogical tree:

(For Genealogical tree, see p. 362)

Shivaji's branch inherited one anna share out of Krishnaji's four annas; and they purchased from Baloji Gondji one anna and four pies share in the khoti rights.

In 1897, Shivaji's branch mortgaged one anna and four pies share in the khoti rights to Ketkars for Rs. 1,000.

In 1904, Bapu, Baji and Ragho sold one anna share in the khoti rights to Ketkars for Rs. 1,500. The deed contained a warranty of title and a covenant for quiet possession in the following terms:

"We have no sort of claim or right on the said takshim assigned (to you). You have become ownersljust like us and should do vahivat in whatever way you like. If there is any objection on our part or on the part of any of our coparceners we shall remove the same at our costs. If you suffer any damages in that connexion we shall make it good."

In 1915, Ketakars sold the share for Rs. 950 to Kashiram (plaintiff), who was a sharer in the khoti rights. The deed recited :

"If there is any obstruction by us or our coparceners or by the heirs or claimants of Shriram Kashinath Pokshe, to your enjoyment of the property conveyed to you, we shall cause the same to be removed at our expense.. . If there is any obstruction on the part of anyone except ourselves, our coparceners and Shriram Kashinath Pokshe or his heirs and claimants, we are not responsible. Profit (or) loss is (alike) yours."

No possession of the one anna share was given to Ketkars under the sale-deed of 1904. Accordingly they did not give any possession to Kashiram under the sale-deed of 1915.

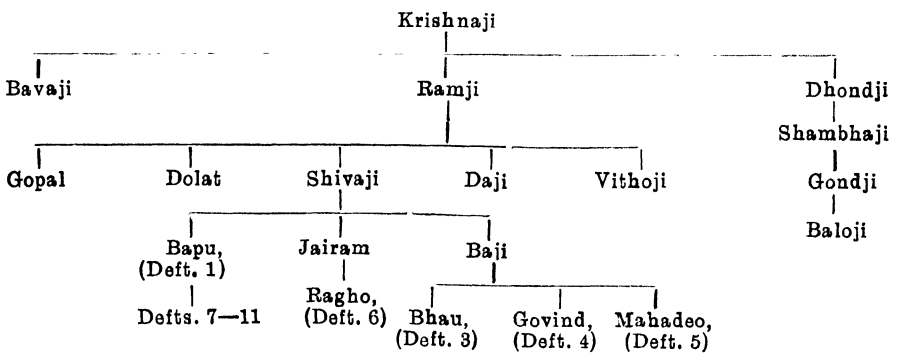
Afterwards, Kashiram filed a suit to recover possession from the descendants of Shivajee without making the other branches of the family parties to the suit. The litigation reached the High Court (S. A. No. 839 of 1918), where it was held, on 8th March 1920 that the plaintiff, Kashiram, was entitled to recover possession of the one anna takshim described as being in possession of the defendants and that that one anna takshim was distinct from the one anna four pies obtained by the defendants by purchase from Baloji. In execution of the decree the plaintiff was put in possession of the one anna share. The other branches of the family claimed a share in the one anna. In the proceedings that followed. it was held, on 25th September 1922, that the branches of Dolat and Vithoji were each entitled to a three pies share; and the plaintiff got what the branch of Shivaji owned, viz., a six pies share.

On 8th January 1925, the plaintiff sued the descendants of Shivaji to recover possession of six pies share in the khoti or in the alternative to recover damages, and also claimed to recover costs incurred by him in the earlier proceedings.

The Subordinate Judge awarded the plaintiff Rs 475 as damages, that is, half the purchase price which he had paid to Ketkars with interest, and Rs. 153-14-4 the costs incurred by the plaintiff in the earlier miscellaneous applications.

On appeal, the decree was varied by substituting Rs. 750, that is half the purchase amount paid by Ketkars, and Rs. 236 as costs. Hence this appeal by defendants to the High Court.

Judgment.— (After stating facts as above, the judgment proceeded) The position is that the plaintiff having been awarded possession by this Court of the one anna share which he purchased from the defendants as representatives of the branch of Shivajee, and having discovered that the actual share owned by these defendants out of the one anna is only three pies although he succeeded in establishing his title to six pies out of that, now seeks to recover either the remaining one half, i. e., six pies of this takshim, or damages in default. The first Court has held that actual possession cannot be given, as a it is with other persons who have successfully asserted it against the defendants and the plaintiff, and there is no appeal on that point. We are, therefore, only concerned whether the present suit for damages will lie, and if so, to what amount of damages is the plaintiff entitled. The learned counsel for the appellant has argued that no such suit as that brought by the plaintiff will lie, secondly, that the suit is barred by limitation, and, thirdly, that the damages have been incorrectly calculated by the lower appellate Court. So far as damages are concerned, it is argued that under the documents on which the plaintiff bases his title he is not entitled to damages; there is no privity of contract between the plaintiff and the defendants who are the original vendors—the contract was between the plaintiff and Ketkars who were the first purchasers Under the sale-deed passed by the Ketkars to the plaintiff no right to damages is transferred, nor could any such transfer be made under the Transfer of Property Act. Secondly, the plaintiff had purported to buy property of which his vendors were not in possession to his knowledge He had absolved his vendors from any liability for anything done by strangers like the defendants. The breach to his knowledge had already occurred, for no possession had been given by the defendants to the Ketkars. The Ketkars were not in possession themselves, and could not transfer any possession to the plaintiff. The only right that existed in the Ketkars at the time of the transfer to plaintiff eleven years after the original sale deed, during which time from their own documents they received no profits of the property, was a right to sue, which could not be transferred under the Transfer of Property Act.



It is further contended that he cannot take the assistance of S. 55, Cl. (2), T. P. Act, being a person who had bought after the breach with the knowledge of its having taken place, and hence he gets no rights against the original vendor. The Ketkars themselves did not sue the defendants and they did not, and could not have, assigned such a right to the plaintiff. Next it is contended that if the plaintiff has a right to sue, whatever

article of the Indian Limitation Act is applicable, that right is barred. The covenant was broken as long ago as 1904 and the present suit is brought in 1925. The plaintiff cannot place himself in a better position than his vendors, the Ketkars, would be. The view of the first Court that it is a continuing cause of action has not been approved of by the lower appellate Court. It is contended that the cause of action is the failure to give possession to Ketkars in 1904, and as Art. 97, Lim. Act, will apply, the suit is long ago time barred, and any subsequent proceedings taken by the plaintiff are of no avail. And lastly on the question of the amount of damages, it is argued that the plaintiff can only claim the damages which he has actually sustained, and as he only paid Rs. 950 to Ketkar, the measure of damages by reason of his failure to obtain possession of one half of the property purporting to be conveyed cannot exceed half of Rs. 950 as found by the first Court. On behalf of the respondent it is contended that the arguments of the appellants are based on a misappreciation of the real basis of the present suit. This is not a suit for possession based on the fact that the defendants failed to give possession to plaintiff's vendors, the Ketkars. It may be that Ketkar could have sued the defendants for damages for failure to give possession, but so far as plaintiff is concerned, his right to possession has been finally determined by the High Court litigation, which ended in Second Appeal No. 839 of 1918.

The basis of the present suit is that the defendants purported to transfer a one anna share in the family property consisting of a khoti takshim to Ketkar, who transferred it to the plaintiff. The plaintiff's right to possession of this one anna share from the defendants has been finally declared by this Court in the judgment in Second Appeal No. 839 of 1918, that judgment is dated 8th March 1920. But when the plaintiff was put in possession or went to take possession, it was discovered that the defendants had not as a matter of fact the one anna share which they purported to convey. The one anna share was owned jointly by the four branches of Dolat, Shivaji, Daji, and Vithoji, each possessing three pies so that all that the defendants had the power to transfer was their three pies. Hence there is a failure of the title which they purported to convey, and the plaintiff is entitled to damages by reason of this defect in their title, and as it so happens that in this present case by reasons which need not be given in detail here, but owing to the adverse possession enjoyed against one of the sharers, the defendants had a title to six pies, i.e., one half, in respect of the other half of the one anna share which they actually had mortgaged and sold as belonging to them they have no title, and therefore, they are liable to their vendees in damages by reason of their failure from their contract.

The present, it is argued, is not a case in which the vendor warrants possession to be handed over to the vendee and in which damages are to be claimed for failure to hand over possession, but a case in which after possession is handed over it is discovered that the vendor has not got the title which he professes himself to have. Now, so far as regards the right of the plaintiff to the possession of one anna share from the defendants is concerned, I am of opinion that he is concluded by the judgment in Second Appeal No. 839 of 1918. It is not necessary to go into the details of that judgment, but the decree was that the plaintiff is entitled to recover possession of the one anna takshim described as being in the possession of the defendants who were the same as in the present case, the takshim being decided to be the ancestral one anna and not the takshim which had been purchased from Baloji.

Under S. 55, Cl. (2), T. P. Act, the seller a shall be deemed .to contract with the buyer, that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same, and the benefit of the contract mentioned in this rule shall be annexed to and shall go with the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. Now, so far as the present case is concerned, Ketkars may be struck out altogether. The Ketkars have never had any possession, nor, for reasons best known to themselves, have they ever taken any steps to enforce their claim as against the present defendants. But, so far as regards the plaintiff, I cannot, in spite of the arguments of the learned counsel for the appellants, see any rea-

son why he should not be entitled to take advantage of S. 55. Cl. (2), T. P. Act, on account of the breach of warranty by the defendants. It must be supposed that when defendants purported first to mortgage and then to sell the one anna share in the khoti takshim of the village, they contracted with the buyer that that one anna takshim belonged to them exclusively, and that they had power to transfer it, and although the Katkars themselves may not have endeavoured to enforce the contract, I can see no reason why the subsequent transferee from the Ketkars should not take measures to enforce this contract.

The learned pleader for the respondent has referred to the case in *Arunachala* v. *Ramasami* (1) and *Subbaroya* v. *Rajagopala* (2). In one of these cases Art. 116, Lim Act, was applied, and in another Art. 97. That is a matter which does not make very much difference in the present case, as will be shown hereafter when I come to the question of limitation. The case *Sabbaroya* v. *Rajagopala* (2) is a case in point for several reasons. In that case *A*, who had a title to immovable property voidable at the option of *C*, sold it to *B*, and put *B* in possession thereafter. *C* then brought a suit against *A* and *B* got a decree, and obtained possession thereof in execution. Thereupon the plaintiffs brought that suit to recover the amount which they had paid to the original vendor on the ground that the consideration for the sale failed, and they were deprived of the possession of the property. It was held that such a suit would lie, and that the cause of action arose not on the date of the sale, but on the date of dispossession. It was contended that as there was no express covenant for title and as the plaintiffs took with full knowledge of the infirmities of title, the principle of caveat emptor applied, and there was no cause of action. Some portion of that argument has been raised in the present appeal as I have already said, i. e., that the plaintiff who was himself a member of the same family as the defendants was aware that the defendants were not the full owners of the one anna share, and was at any rate aware that no possession had been given or could be given to Ketkars and consequently to himself, the reason presumably being that the other branches were in possession of the remaining nine pies. But it was held in that case that in India there is a statutory guarantee for good title unless the same is excluded by the contract of parties, and that the question of the knowledge of the purchaser does not affect the right to be indemnified under the Indian Statute law. This case has been referred to and followed both in *Ganapa Putta* v. *Hammad Saiba* (3) and *Multanmal* v. *Budhumal* (4), in both of which cases Art. 116, Lim. Act was applied.

Whatever may be the position of Ketkars, the plaintiff has been declared entitled to the possession of the one anna in suit, and having been unable to get possession of that by reason of the infirmity of the title of the original vendor, will be entitled to recover not in this case the purchase money, but damages in lieu of possession under the covenant under S. 55, Cl. (2), T. P. Act, and the ruling in *Subbaroya* v. *Rajagopala* (2). As to the question of limitation it has been contended by the learned counsel for the appellants that limitation began to run when the covenant was first broken, i. e., when possession was not handed over to the Ketkars, as it should have been immediately on the execution of the sale deed by the defendants to them in 1904. The present case, however, is not a suit for possession. The suit in which the plaintiff sought possession was the suit of 1917, which ended in this Court in 1920, and in a case like the present the cause of action will, under the ruling I have already quoted, *Subbaroya* v. *Rajagopala* (2) arise when the imperfection of the defendants' title is first declared. It was only subsequent to the plaintiff getting a decree in his favour in this Court and going to take possession that the other cosharers came forward and resisted, and there were miscellaneous proceedings which ended in Ex. 43, which is an order in the miscellaneous proceedings declaring that the other sharers were entitled to three pies each out of the one anna given into the opponent's possession, the opponent being

(1) [1914] 38 Mad. 1171=27 M. L. J. 517=25 I. C. 618=1 M. L. W. 849.
(2) [1914] 38 Mad. 887=28 I. C. 570=(1914) M. W. N. 376.
(3) A. I. R. 1925 Bom. 440=48 Bom. 596.
(4) A. I. R. 1921 Bom. 252=45 Bom. 955.

the plaintiff in the present case. The date of that order is 25th September 1922. Whether Art. 97 applies or whether Art. 116 applies is of very minor importance as the suit was brought within three years of the date of that order. The date of the suit is 8th January 1925. Both the learned counsel for the appellants and the learned pleader for the respondent agree that the case is governed by Art 97, Lim. Act, which applies to a suit for money paid upon an existing consideration which afterwards fails, the period running from the date of the failure, and in this case the date of the failure must be taken to be when the plaintiff was dispossessed of the one anna share except so far as regards the three pies share which remained with the original vendors, the present defendants. The suit being brought very shortly after this, it is not necessary to consider whether Art 116 would apply, which gives a longer period. The suit is, therefore, not barred by limitation.

The sole remaining point is the question of damages. The learned counsel for the appellants does not press the question of costs. As regards the question of damages, I should like to hear further arguments before I give a final decision in the case, and these may be heard tomorrow. (After further arguments were heard, His Lordship delivered the following judgment).

Judgment.—I asked for further argument on the question of damages. The first Court awarded the plaintiffs as damages half the sum which he paid to Ketkar, and the appellate Court has awarded to the plaintiff half the sum which the Ketkars paid to defendants. There is no case exactly on all fours with the present case, because here the defendants are not the plaintiff's vendors, and it has been argued that the price which the plaintiff paid to Ketkar has nothing to do with the measure of damages. Although various cases have been quoted by the learned pleader for the appellants, I cannot say that any one throws much light on the subject. It is held in *Nagardas Saubhagyadas* v. *Ahmedkhan* (5) that a purchaser evicted from his holding is entitled to recover from a vendor who has guaranteed his title the value of the land at the date of eviction. That, however, is a case between a vendor and purchaser, which the present case is not. The learned pleader has further relied on a passage from Mayne on Damages at p. 203, which states that the measure of damages is the difference between the value of the thing as it is and its value as it was warranted to be. At p. 207 the learned author states the value of damages on eviction depends on the value of the estate to be calculated on the value of the property conveyed at the time of the eviction. And it is stated that although there is little authority upon this point in England, it has formed the subject of frequent discussion in America, where in the majority of cases the value at the time of the conveyance has been taken as the criterion. I have already stated in an earlier part of this judgment that the case is governed by S. 55, Cl. (2), T. P. Act, and the plaintiff as a subsequent transferee is entitled to take the benefit of the contract mentioned in the section. Now the contract was between the defendants and Ketkars, and was to the effect that they had a complete interest of one anna in the one anna share. The value of the one anna share according to them was Rs. 1,500. We now find that their interest extended only to one-third of that although by reason of the adverse possession against another sharer plaintiff has got possession of one half. In these circumstances I am of opinion that the view of the lower appellate Court is correct, and that the value of the one-half share of which plaintiff has been deprived by the fault of the defendants should be taken at half the value of the share estimated by them in their original transfer to Ketkar, i. e., Rs. 750. It is unnecessary to enter into the question of costs as it has not been pressed by the learned counsel for the appellants. In the result the appeal is dismissed with costs.

M.N./R.K. *Appeal dismissed.*

(5) [1895] 21 Bom. 175.

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* A. I. R. 1929 Bombay 365

MARTEN, C. J., AND MURPHY, J.

Maneklal Mansukhbhai—Appellant.

v.

Kasturbhai Manibhai—Respondent.

First Appeal No. 514 of 1927, Decided on 27th March 1929.

*** Registration Act, S, 77 — Suit is competent under S. 77 even where Sub-Registrar refuses to accept document for registration under S. 25, because there is no difference of meaning between " refusing to register " and " refusing to accept for registration " as used in Registration Act— Registration Act, S. 25.**

A suit lies under S. 77 whether the Sub-Registrar has refused to register a document or he has refused to accept it for registration because the two expressions as used in the Act are not intended to bear different meanings. Hence a suit is competent under that section where the Sub-Registrar makes an order under S. 25, refusing to accept a document for registration because such order also comes within the scope of S. 76 (a) although the actual expression used therein is " refusing " to "register ; " 21 *Bom.* 699, *Diss. from* ; *A. I. R.* 1925 *Bom.* 34 ; *A. I. R.* 1923 *Bom.* 187; 40 *Mad.* 759 ; 29 *All.* 284, *Rel. on.*

[P 368 C 2]

G. N. Thakor and *Madhavji & Co.*— for Appellant.

B. G. Rao—for Respondent.

Marten, C. J. — The sole point we are concerned with is on the preliminary issues as to whether this suit will lie. The suit is brought under S. 77, Registration Act, 1908, which provides that : " where the Registrar refuses to order the document to be registered, under S. 72 or S. 76, any person claiming under such document "

may institute a suit in effect to enforce registration. Then under S. 76 it is provided that :

" Every Registrar refusing (a) to register a document except on the ground that the property to which it relates is not situate within his district or that the document ought to be registered in the office of a Sub-Registrar . . . shall make an order of refusal and record the reason. "

Then sub-Cl. (b) provides for the case where the Registrar has refused to direct the registration of a document under S. 72 or S 75. S 72 relates to appeals from the order of the Sub-Registrar and S. 75 to orders by the Registrar for registration.

In the present case the document in question is a sale-deed in favour of the plaintiff which was executed on 24th January 1926, but was not presented for registration till 21st August 1926, owning it is said to obstruction by the vendors. On that day there was a penalty accepted by the Sub-Registrar and an acknowledgment of execution by one of the vendors. Subsequently there appears to have been a summons to another vendor to appear, which, in fact, he did not do. Later on the matter came before the District Registrar, and he refused to register the document and passed the following order on 14th December 1926 :

" I am bound by the words of S. 25. " Urgent necessity " or " unavoidable accident " has not been proved as a reason for the delay in registration. I cannot reconsider my previous order. "

Turning next to S. 25, that provides that " if, owing to urgent necessity or unavoidable accident " any document is not presented for registration till after the expiration of the proper time, the Registrar, in cases where the delay does not exceed four months may direct that on payment of a particular fine the document is to be accepted for registration.

The argument before us is that there is a distinction in the Act, between " acceptance for registration " and " registration, " and that here the Registrar did not " refuse to register " the document within the meaning of S. 76, but only refused to direct the document to be accepted, for registration. Consequently, it is said that no suit lies, under S. 77. In support of that argument the case of *Gangava* v. *Sayava* (1), decided by Jardine, J., and Ranade, J., is cited. There the judgment states (p. 700) :

" Under S. 24, the Sub-Registrar forwarded the application to the Registrar, who, under the words of that section, has a discretion to remedy the effect of delay caused by urgent necessity or unavoidable accident. The Registrar may direct that the document shall be accepted for registration. The acceptance for registration is not the same as admitting to Registration. . . . But the Act evidently means different things by the two phrases, 'refuse to register' found in Ss. 19 and 35, and 'refuse to accept for registration' found in Ss. 20 and 21. We are of opinion that the first thing to be done by the registering officer is to decide whether to accept or not accept. It is only after the acceptance for registration that he can consider the wider question which arises on admissions and denials and evidence whether he should refuse to register. We must hold, therefore, that what the Registrar did under S. 24 was not refusal to register. "

That case was under the Act of 1877. So the reference to the sections are not the same. S. 24 under the old Acts, is the same as S. 25 under the present Act. That decision, however, has been far from favourably received in subsequent cases, at any rate so far as the ratio decidendi is concerned. In *Hoosein*

(1) [1896] 21 Bom. 699.

Abdul Rehman & Co. v. *Lakhmichand* (2) Fawcett, J., sitting on the original side was confirmed in appeal by Sir Lallubhai Shah and Kincaid, J., in holding that where the Sub-Registrar had refused under S. 21 to register a certain document on the ground that it contained an insufficient description, a suit did lie under S. 77. They expressly dissented from the view stated in *Gangava* v. *Sayava* (1) to the effect that as regards S. 21 there was this alleged distinction between "refusal to accept for registration" and "refusal to register." But they left open the question whether the actual decision in *Gangava* v. *Sayava* as regards S. 25 was correct.

So, too, in *Fattechand Anandram* v. *Umaji* (3) the appellate Court held that a suit lay where the Sub-Registrar had refused to register a document on the ground that the Registrar had not given the necessary sanction under S. 34 of the Act. If one turns to S. 34, it will be found that much the same language is used there as in S. 25. The proviso to S. 34 provides that "if owing to urgent necessity or unavoidable accident" the persons executing the document do not appear, the Registrar may, in certain cases, where the delay does not exceed four months, direct that on payment of a fine, the document may be registered.

In *Gangadara* v. *Sambasiva* (4) a document was presented for registration on the last day of the four months allowed for presentation, but the Sub-Registrar declined to receive it, owing to pressure of other work. It was presented the next day with an application to the Registrar to excuse the delay. On the Registrar refusing to excuse the delay, the Sub-Registrar refused to register the document. It was held there that the order of the Registrar refusing to direct the Sub-Registrar to register the document was a "refusal to register." That was a case before the Madras Full Bench, and they expressly dissented from the decision in *Gangava* v. *Sayava* (1). Similarly, there is another decision in *Kanhaya Lal* v. *Sardar Singh* (5) which so far as it goes, is inconsistent with the decision in *Gangava* v. *Sayava* (1). After all we have to consider what is the plain meaning of the Act. Here, in ordinary language, the Registrar has refused to register this document. The document has been presented to him for registration, and on one ground or another he has declined to do it. Whether one says he refused to accept it for registration or says instead he refused to register it, is, I think, a distinction without a difference except that I prefer the briefer expression. The result is the same, viz., that the document is not on the register, because the Registrar has refused to allow it to be put there. That, to my mind, is a "refusal to register," using that expression in its ordinary meaning. And although we have been taken through all the relevant sections of the Act, I see no adequate reason to cut down that ordinary meaning

Then it was said that under S. 25 the Registrar has the sole discretion. In fact the words "in his discretion," which appear in S. 20 do not appear in S. 25. But however that may be, there is no such qualification in the right of suit given by S. 77 and S. 76. If any such qualifying words are desired to be introduced, that must be done, I think, by the legislature. Further, there appears to me to be some practical difficulty in stating when this alleged process of "accepting for registration," as distinct from refusing to register, begins and when it ends. According to counsel for the Crown, the period begins when you present a document for registration, and it ends when the parties who have to admit execution appear at the registry office under S. 34. On the other hand, if I understood counsel's arguments correctly, as soon as the parties do appear before the Sub-Registrar the period of acceptance for registration is at an end, and the subsequent acts of the registering officer in regard to the recording of admission and so on, form part of a different process altogether. In that view no suit lies under S. 77 up to the time when the parties appear, but it does lie after they have appeared. With all respect, these to my mind are fanciful distinctions which have been drawn from the Act merely because the draftsman has been unfortunate enough to use different expressions in different parts of the Act, thereby allowing an argument that he

(2) A. I. R. 1925 Bom. 34=49 Bom. 40.
(3) A. I, R. 1923 Bom. 187=47 Bom. 290.
(4) [1916] 40 Mad. 759=40 I. C. 192=33 M. L. J. 51.
(5) [1907] 29 All. 284=4 A. L. J. 171=(1907) A. W. N. 46.

meant one thing in one place, and something different in another. In the present case I am satisfied that the argument is incorrect, and that a suit will lie under S. 77. I would, therefore, reverse the order of the learned Judge, and direct him to hear and determine the remaining issues according to law.

Murphy, J.—The question before us is whether a suit is competent under S. 77, Registration Act, where the Registrar has made an order under S. 25, which in effect is a refusal to excuse delay in presentation for sufficient cause, called in the Indian Registration Act, "urgent necessity" or "unavoidable accident." Actually what happened was that on its presentation some three months beyond the four months allowed by the Act, the Sub-Registrar accepted an admission of execution by one of the executants and a penalty under S. 25, and reported the facts to the Registrar, and on the Registrar's instruction, refused to accept the document. There was also an appeal against the Sub-Registrar's order which was treated in a similar way by the Registrar. The lower Court has held, on the strength of *Gangava* v. *Sayava* (1), that there is a clear distinction between the act of "refusal to accept for registration" and "refusal to register," and that in the former case the order does not come within S. 76 of the Act, and that in consequence no suit can be brought under S. 77.

The ruling in this case does make the distinction in question between "accepting for registration," and "refusing to register," and the argument against the applicant's case, as put before us in appeal, is based on this ruling. As against it we have been referred to *Fattechand Anandram* v. *Umaji* (3); *Kanhaya Lal* v. *Sardar Singh* (5); *Gangadar* v. *Sambasiva* (4); and *Hoosein Abdul Rehman and Co.* v. *Lachmichand* (2), where the ruling in *Gangava* v. *Sayava* (1) has been distinguished, and its authority has been doubted. It seems to me that it is not possible, on the construction of the relevant sections of this Act, really to draw a sharp distinction between "refusal to accept for registration" and "a refusal to register." It is not clear at what stage of the processs of registration such a distinction can be drawn, and I think that in fact the expression " refusing to accept for registration" and "refusing to register" were not really intended to distinguish the orders in such a way as to exclude the remedy being had recourse to in the one case, where it is available in the other, which would be the result if we accepted these distinctions, and to exclude the former cases from the class mentioned in S. 76 (a) which refers to the original refusal to register by the Registrar as against the exercise of his appellate powers under S. 76 (b).

I think, therefore, that the learned Subordinate Judge's view as to this point is not correct, and that a suit can be brought to challenge the order made by the Registrar under S. 74. I agree, therefore, in the order proposed by the learned Chief Justice.

S.N./R.K. *Order reversed.*

A. I. R. 1929 Bombay 368
Full Bench

MADGAVKAR, PATKAR AND WILD, JJ.

Gangadhar Nathu and *others*—Defendants—Appellants.

v.

Vishnu Vithal — Plaintiff—Respondent.

Second Appeal No. 473 of 1925 Decided on 10th June 1929 against decision of Asst. Judge, Dhulia.

(a) Bombay Hereditary Offices Act (3 of 1874), Ss. 4 and 15 — Kulkarni Vatan — Services commuted—Cash allowance payable by treasury is exclusive property of the officiating Kulkarni—It does not become joint family property.

The kulkarni cash allowance, payable by the treasury and subject to the modification or withdrawal to a representative kulkarni vatandar does not cease to be exclusive property of the officiating, kulkarni by reason of the commutation of the kulkarni service and it does not become from the date thereof the property of the joint family and descendants of the original vatandars: 12 *B. H. C.* 224 per Westropp, C. J., *Foll.*; *A. I. R.* 1926 *Bom.* 364 *Diss. from*; 8 *Bom.* 426, *Expl.* and *Dist.* [P 371 C 1]

(b) Bombay Hereditary Offices Act (3 of 1874), S. 15—Services commuted—Collector can introduce devolution in a particular line.

Under S. 15 the Collector is competent to introduce a condition in the settlement deed laying down a particular line of devolution for the dirct descendants of the person who enjoyed the allowance first. [P 371 C 1]

W. B. Pradhan and *Ram Nath Shiv Lal*—for Appellants.

A. G. Desai—for Secy. of State.

R. W. Desai—for Respondent.

[Order of Reference

Marten, C. J.—This is an important case in the nature of a test case as to whether, when the cash allowance of a representative watandar under the Watan Act has been commuted under the provisions of that Act, the commuted allowance thenceforth becomes in effect joint Hindu family property, and consequently can no longer be claimed by the representative watandar to be his exclusive property, as would be the case with the cash allowance itself prior to the date of the commutation.

We have listened to an interesting argument from Mr. Kelkar, counsel for the defendant, who supports the view that, in the present case, the representative watandars are entitled exclusively to the commuted allowance just as they were to the original allowance. That argument has not been concluded, nor have we heard Mr. Shingne, counsel for the successful plaintiffs in the lower appellate Court. We have taken this course for two reasons: (1) because we consider that there are certain facts which should be found and which are or may be material, and (2) because this appears to be a case which may more properly be heard by a Full Bench, particularly having regard to what prima facie appears to be a conflict of authority between *Bhan* v. *Ramchandra rao* (1), a decision of Sir Charles Sargent and Candy, J. and *Vaman* v. *Jagannath* (2), a decision of Sir Norman Macleod and Crump, J.

As regards the first point, the question of fact which we want to be made clear is whether the original cash allowance was derived solely from the Government Treasury, or whether it was derived wholly or in part from the watan lands. Accordingly, on that point we will direct a remand to the lower appellate Court to determine: (1) whether the original cash allowance was derived (a) wholly or in part from the watan land. and or (b) wholly or in part from the Government Treasury; and (2) whether since the date of the commutation there has been any increase in the assessment of the watan land. The second question is suggested to us by counsel for the respondents, who points to condition 2 of the commutation, Ex. 24, which suggests that the assessment on the watan lands themselves might be increased by reason of the settlement arrived at. Consequently, the interests of other holders in the watan, apart from the representative watandars, may perhaps be affected by the settlement.

We will direct that this inquiry be answered within two months. On its return we propose to remand the case, when all the facts have thus been ascertained, to a Full Bench. The precise questions, which we will formulate for the Full Bench, will be settled by us when we get the further findings of the lower appellate Court

But, while the case is fresh in our minds, it may be convenient to indicate shortly how the point arises. Ex. 24, which is a typical document evidencing the commutation, shows that the representative watandars were two people, one named Damodar Anandrao and the other Gangadhar Nathu an infant acting by his mother Ambabai. The terms as to the rights of service between them were that each should take a ten years' turn. Then under S 15, Watan Act, Government relieved them of their liability for service on the conditions referred to in Ex 24, so far as the particular villages there mentioned are concerned Under those conditions, the watandars will get one-third of the cash allowance according to the Wingate scale. The lands themselves will remain in the possession of those who have got them according to the Watan Act. Then there is to be a sanad according to the Gordon settlement, but with these alterations, viz., that the first grantee of the cash allowance will have it continued to his direct descendants; that adoptions are to be made from the family only; and that cash allowances of Rs. 5 or less are liable to be redeemed by Government at twenty times the amount. Form of the Gordon settlement in somewhat different cases will be found in Phadnis's Watan Act at p. 541, Form 8.

This deed of commutation was effected in 1914 and some five years afterwards, the plaintiffs brought this suit No. 958 of 1919 claiming to be entitled to share in the commuted allowance. The Subordinate Judge dismissed their suit in 1920. But four years afterwards in 1924, the learned Assistant Judge reversed that decree, and in effect passed judg-

(1) [1895] 20 Bom. 423 (F.B.).
(2) A. I. R. 1926 Bom. 864.

ment in favour of the plaintiffs. The grounds on which the lower appellate Court mainly relied were these, viz., that although the original cash allowance was the exclusive property of the representative watandars and was impartible during the period when the representative watandars were liable to give service, still when those services were no longer required, the cash allowance thereby became ordinary joint Hindu family property which had never originally been partitioned, and which accordingly must be treated as being held in suspense, as it were, pending the performance of these hereditary duties. On the other hand, the defendants argue that the other members of the family are no more entitled to the commuted cash allowance than they were to the original cash allowance, and that neither the one nor the other has in any sense been or become joint family property. They in particular rely on various sections of the Watan Act, such as the definitions of assigned property in S. 4 and S. 5 (2) and the prohibition against assignment in S. 7.

As regards the authorities *Bhan* v. *Ramchandra rao* (1) was a case of a commutation of a Deshmukhi service watandar under the Gordon settlement, and there the Court held that S. 10, Watan Act, which enabled the Court in effect to set aside attachments, etc., in respect of unauthorized alienations under the Act, applied alike to these watandars, even though the liability to serve had been commuted. In particular Candy, J., in referring the point for the Full Bench, stated (p. 426):

"The settlements made by Gordon's Committee, unless it was otherwise specially provided by any particular settlement, were not intended by either party to those settlements to convert the watan lands into the private property of the watandars with the necessary incident of alienability, but to leave them attached to the hereditary offices, which although freed from the performance of service, remained intact, as shown by the definition of hereditary office in the declaratory Act 3 of 1874."

On the other hand, in *Vaman* v. *Jagannath* (2), it was held by Sir Norman Macleod and Crump, J., that

"a cash allowance granted by Government, in commutation of kulkarni watan services, belongs, like the watan, to the whole family. It cannot be claimed exclusively by the representative watandars and members of his family."

There, however, it appears from the report that the defendant remained absent throughout the trial, and no evidence was led on his behalf. Moreover, the original commutation order directting the payment of Rs. 111 a year was not before the Court.

We have not heard, as I have already said, Mr. Shingne, but it is pointed out by Mr. Kelkar that in *Desai Maneklal* v. *Desai Shivlal* (3) which was relied on by Sir Norman Macleod, the settlement there in question was effected before the date of the Watan Act.

I have only stated the above in order to indicate what is the general nature of the controversy between the parties in the present case. We have not heard counsel fully, and we in no way prejudge what eventually the findings may be. We may add that as at present advised, we do not propose to hear further arguments on this case, when the matter comes back from the lower appellate Court, but will merely proceed to settle the precise questions for the Full Bench with the aid of counsel and in the light of the reply to be given by the lower appellate Court. Costs of the present hearing will be costs in the appeal.

There was one further point which my brother Percival has suggested, viz., that notice might be given to Government of this remand to the lower appellate Court and also of the remand to the Full Bench when it is granted. The reason is this. We understand that this decision in this case is likely to affect a large number of cases where similar commutations have been arrived at by agreement between the representative watandars and Government. On the other hand, it would seem probable that, if the representative watandars had had any suspicion that the contention now taken by the plaintiffs was even arguable, they would never have arrived at the settlements which they in fact did come to with Government. In other words, the decision of the lower appellate Court will be likely to impose a substantial obstacle in the way of any future agreements of a similar nature as regards those holdings where the cash allowances have not so far been commuted. It may be, therefore, that Government as amicus curiæ or other-

(3) [1884] 8 Bom. 426.

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wise would like to have an opportunity of being heard on the points in dispute. Whether they wish to do so, it will be for them to decide. Similarly, it will be for the lower appellate Court or for this Court when the respective cases are before us to decide in what particular way we will allow the Government Pleader to address the Court. But that some such facility should be given to Government, to have the case presented to this Court on their behalf is, we think, only reasonable and fair, provided Government wishes to take that course.

Accordingly, so far as the lower appellate Court is concerned, we think that that Court should give notice to the Collector of the remand we have directed before the lower appellate Court. As regards this Court, there will be directions to the Registrar that, when the proposed remand to the Full Bench is made, notice of the fact is to be given to Government, and of the date for hearing of the Full Bench case.

The findings recorded by the lower Courts on the remanded issues were: (1) the original cash allowance was drawn wholly from Government treasury, no part of it being drawn from the watan land before commutation; (2) there had been an increase in the assessment of the watan in the second Revision Settlement of 1917-18 which, however, was not in consequence of or as a result of the commutation. On the findings being certified the following questions were referred to a Full Bench). The questions for the Full Bench will be:

(1) Whether the kulkarniki cash allowance in dispute ceased to be the exclusive property of the Hindu officiating kulkarni by reason of the commutation of the kulkarniki service and became from the date thereof the property of the joint family to which such officiator belonged ?

(2) Whether under S. 15, Bombay Hereditary Offices Act, the Collector is competent to introduce a condition in the settlement deed laying down a particular line of devolution of the commuted cash allowance ?

Opinion

Madgavkar, J.—The facts upon which this reference arises are stated in the referring judgment of the learned Chief Justice.

The genealogy of the watan family is given in the judgment of the trial Court. Venkaji had two sons, Bapu and Vithal. The plaintiffs-respondents are the sons of Vithal. The defendants-appellants are the grandsons and descendants of Bapu. Venkaji was the sole representative watandar and enjoyed the cash allowance from Government now in question. On his death that allowance was enjoyed in the first instance by his elder son's son Nathu and on Nathu's death by the present defendants-appellants. The plaintiffs-respondents and their father never enjoyed it at any time. For the purpose of this reference we accept the finding of the District Court that the plaintiffs are never proved to have expressly surrendered any claim they might have had. In the year 1914, this allowance was commuted by the Collector, presumbly under S. 15, Watan Act, to one-third of the original allowance, the services ceasing. The respondents filed this suit on the ground that the allowance appertained to the family of Venkaji and that when the services ceased, with them the appointment of the representative watandar ceased and the allowance reverted to the family, and they were entitled to one-half. The trial Court held that they had given up their right and dismissed the suit. The District Court held that they had not given up their right, and, accepting the view of Macleo, C. J., in *Vaman* v. *Jagannath* (2), held that as the services had ceased and the representative watandar no longer existed, the allowance reverted to the family of Venkaji and allowed the plaintiffs' claim to one-half.

The defendants have appealed, and the questions referred to us by the Appellate Bench are as follows :

(1) Whether the kulkarni cash allowance in dispute ceased to be the exclusive property of the Hindu officiating kulkarni by reason of the commutation of the kulkarni service and became from the date thereof the property of the joint family to which such officiator belonged ?

(2) Whether under S. 15, Bombay Hereditary Offices Act the Collector is competent introduce a condition in the settlement deed laying down a particular line of devolution of the commuted cash allowance ?

As regards the first question, all the learned pleaders, to whom we are indebted for a very complete argument, agree that there is no question of a joint Hindu family in the legal sense,, and that the first question is rather concerned with the "family" meaning thereby the descendants of Venkaji. Government is represented before us by

Mr. A. G. Desai, as amicus curiae and supports the appellants.

Shortly put, the argument for the appellants is that the cash allowance now in question falls under part 3, S, 4, Watan Act (Bom. Act 3 of 1874); it is made voluntarily by Government and is subject periodically to modification or withdrawal ; it is payable to the person chosen by the Collector as the officiating watandar and by reason of the commutation under S. 15 and cessation of the services the plaintiffs are not entitled to claim any share; and it was never in fact the family property of Venkaji personally, or property in which his descendants had ever a vested interest. The respondents rely on the decisions of this Court *Maneklal Amratlal* v. *Shivlal Bhogilal* (3) and *Vaman* v. *Jagannath* (2) and contend that the watan property belongs to the watandar family and as the respondents are members of that family being descendants of Venkaji, they are holders within the meaning of S. 15, and with the cessation of the service and of the representative watandar the appellants cannot claim the sole right to the commuted allowance.

It appears to us that the claim is really based on three assumptions, none of which is proved. These assumptions are as follows : Firstly, the cash allowance was the personal property of Venkaji in which his descendants had a vested interest from birth in the same manner as they would have had in the ancestral property of Venkaji governed by Hindu Law. Secondly, this interest ceased temporarily by reason of the selection by the Collector of one member of the family as representative watandar. Thirdly, but with the cessation of these services and of the representative watandar this vested interest revives and the respondents can claim a half share.

This property was never joint family property but was a cash allowance made voluntarily by Government based on certain calculations according to a scale framed by Government and subject to modification and withdrawal by Government. It was commuted under S. 15 and fell within the purview of S. 23 under which the Collector is entitled to fix the annual emoluments .of officiators. The mere fact that the choice of the Collector of the representative watandar was confined to a certain family does not mean that each and every member of that family, singly or collectively, had a vested interest in that property. To put it shortly, the legal limitation of selection on the part of the Collector is not equivalent to a vested interest in the members of the family. The second proposition therefore, equally fails, and the third cannot follow.

The history of the legislation has been stated in *Radhabai* v. *Anantrav Bhagvant* (4) and it is not necessary for the purpose of this reference to consider the main provisions of Regn. 16 of 1827 or Act 11 of 1843 or Act 3 of 1874 as now modified. It was not property belonging to the entire family of which the Collector reserved a part under S. 13, Act 11 of 1843 but was from the outset an allowance from Government payable at their option to the representative watandar. In this view it is not in our opinion necessary to consider the question of inalienability or even impartibility. The expression "joint family" is not to be found iu the Watan Act nor does it deal directly with impartibility. Inalienability is not in law synonymous with impartibility.

The commutation in question was made between the Collector as representing Government on the one side and Gangadhar, defendant 1, the son of Nathu, on the other. The respondents were not parties to it. For such a commutation to give the respondents a claim is only possible in one of two ways, either by the agreement or as a necessary legal consequence of the agreement. As regards the parties to the agreement appellant 1 did not desire or intend to benefit the respondents. He gave up his two-thirds share as Government gave up their services. The same was the case with Government as appears from the terms of the agreement (Ex. 77) that the cash allowance was to continue to the direct descendants of the person who got it first, in other words, excluding the respondents. No provision of the watan or other law has been shown whereby, as a legal consequence of the cessation of the service and the giving up of two-thirds, the plaintiffs-respondents have necessarily obtained a legal right to the other one-third.

(4) [1885] 9 Bom. 198 (F. B.).

There are, however, two decisions of this Court on which the respondents can fairly rely in support of the present claim. In *Maneklal* v. *Shivlal* (3) a certain amin sukhdi in addition to the desaigiri allowance in the Kaira District was held on commutation, to be partible amongst all the cosharers. That case, however, can be distinguished on three grounds. The commutation was made in 1873 before the passing of Act 3 of 1874. The sanad, as appears from p. 431 of the judgment, reserved in express terms the rights and interests of other parties. Thirdly, to the agreement of commutation not merely the representative watandar but all the others were parties.

The other case in favour of the respondents is *Vaman* v. *Jagannath* (2), in which it was held that

"a cash allowance granted by Government in commutation of kulkarni watan services belongs, like the watan, to the whole family. It cannot be claimed exclusively by the representative watandars and members of the family."

This decision purports to follow the decision in *Maneklal* v. *Shivlal* (3) referred to above and was further based on the ground that when the services ceased the watandar's family would continue as such, and any allowance paid by Government as compensation should be considered to belong to the whole family. This ground, if I may say so with respect, is a consideration more appropriate for the legislature than for the Courts. The absence of any enactment can hardly suffice as the foundation of a legal right such as the plaintiffs-respondents assert. Moreover, in that case except for the written statement the case was undefended, the sanad was not before the Court, nor the order directing commutation. For the reasons stated above, and confining our observations expressly to this cash allowance from Government and not necessarily to other species of watan property, we think that the inference of Macleod, C. J. does not follow. The allowance from its inception was a matter between two parties and two parties only—Government on the one hand and the representative watandar chosen by them on the other—and except that the selection was confined by law to the watandar family of which undoubtedly the plaintiffs-respondents are members, no other person in the family has a right, vested or other, to the allowance. If in 1914 Government on the one hand gave up their right to the service and the officiating kulkarni gave up two-thirds of that allowance, such an agreement was one which under S. 15 of the Act it was perfectly competent for them to make. It is not shown how such an agreement between these persons can found a cause of action for a suit such as the present. We do not think that there is any conflict between the case of *Bhan* v. *Ramchandrarao* (1), where the question was of alienation and attachment under S. 10 of the Act and the case of *Vaman* v. *Jagannath* (2). But we differ from the view of the Division Bench of this Court in *Vaman* v. *Jagannath* (2) and in respect of this species of watan property we agree rather with Westropp C. J. in *Savitriava* v. *Anandrav* (5) (p. 226):

"that there is not any authority for holding that a cessation of the performance of the duties of the office, even though sanctioned by Government, would alter the nature of the estates appendant to them."

We are of opinion that the argument for the respondents fails.

On the second question as regards the Collector's power, in effect the Collector agreed that the allowance should be divided between the direct descendants of the person who got it first. He has not departed from the rule of devolution of Hindu law, and such a clause, we think, was within his competence.

The answers to the questions referred to are, therefore, as follows:—

(1) The kulkarni cash allowance in dispute did not cease to be the exclusive property of the officiating kulkarni by reason of the commutation of the kulkarni service and did not become from the date thereof the property of the joint family and descendants of Venkaji.

(2) Under S. 15, Bombay Hereditary Offices Act, the Collector was competent to introduce a condition in the settlement deed laying down a particular line of devolution for the direct descendants of the person who enjoyed the allowance first.

Patkar, J.—I agree. I desire to add that we are concerned in this case with a watan which consists of a cash allowance paid from the treasury to the officiating kulkarni belonging to the watan family. It comes within the last clause

(5) [1875] 12 B. H. C. 224.

of the definition of the watan property under S. 4 :

"cash payment in addition to the original watan property made voluntarily by Government and subject periodically to modification or withdrawal."

We are not concerned in this case with watan property which consists of land from the income and profits of which the officiator is paid. In the latter case it might be contended that the lands being the ancestral property of the family, as soon as the services are dispensed with, the entire profits or the income of the property would be divisible among all the members of the family. In the present case we are concerned with a cash allowance payable by the treasury and subject to modification or withdrawal.

Several cases have been cited before us and the provisions of Regn. 16 of 1827, Acts 11 of 1843 and 3 of 1874 have been brought to our notice. The cases cited mostly refer to the power of alienation with regard to the property in respect of which there has been a commutation under S. 15, Watan Act. In *Radhabai* v. *Anantrav Bhagvant* (4) the settlement was made under Act 2 of 1863. In the present case we are concerned with the settlement under S. 15, Watan Act. The effect of the decisions in *Appaji Bapuji* v. *Keshav Shamrav* (6) and *Bhan* v. *Ramchandrarao* (1) is that in spite of the cessation of the service on account of any commutation or settlement under S. 15, Watan Act, the property continues to be watan and would, therefore, be inalienable outside the family of the watandar. The Gordon Settlement of 1864 was not intended by either party to the settlement to convert the watan lands into the private property of the watandar with the necessary incident of alienability.

According to the definition of "hereditary office" in S 4, Watan Act, the expression includes such office when the services originally appertaining to it have ceased to be demanded. The position is made clear by Cl. 2, S. 5, Watan Act. The question, however, of the inalienability of the watan property is quite different from the question which we have to consider, viz., whether, after the cessation of the services, the commutation allowance reverts to the family, and other members of the family not entitled to the privilege of being appointed as officiating kulkarnis are entitled to a share in the commuted allowance. The case of *Savitriava* v. *Anandrav* (5) lends some support to the appellants' contention. But it appears that it was proved in that case that there was a custom of impartibility in the family. The only cases in favour of the respondents are *Maneklal* v. *Shivlal Bhogilal* (3) and *Vaman* v. *Jagannath* (2).

In *Maneklal* v. *Shivlal* (3) the whole of the allowance was not appropriated for service, the rights of the other members of the family entitled to amin sukhdi were reserved in the sanad, and Government dealt with the whole family, and the commutation was before the passing of the Act 3 of 1874. In *Vaman* v. *Jagannath* (2) the sanad was not before the Court, and reliance was placed on the decision in *Maneklal* v. *Shivlal* (3). There is nothing in the Watan Act which would support the contention that cessation of the service would resuscitate the rights of the other members of the family who had no right to officiate as kulkarnis. The commutation in this case was the result of an agreement entered into between Government and Gangadhar belonging to the branch of Nathu. It was Gangadhar who was all along appointed as officiator. It is not contended on behalf of the plaintiffs that the commutation was illegal on the ground that it was arrived at behind their back. Gangadhar was a holder of the watan under Cl. 4, S. 15, Watan Act. The commutation, therefore, being presumably binding on the persons who entered into the contract, i. e., Government and the holder of the watan and his heirs and successors, it is not shown by the plaintiffs that they are entitled in this suit to disregard the terms of that contract.

It is not shown that the plaintiffs have any interest by birth in the cash allowance which was given by Government voluntarily for remuneration of the officiator and which was subject to modification or withdrawal No sanad or other evidence has been produced to show that the cash allowance was joint family property or was an appanage of the watan in which other members of the family were interested, and was not the remuneration of the officiator only. I, therefore, agree that the answer to the first question is that the kulkarni cash allowance does not cease to be the exclusive property of

(6) [1890] 15 Bom. 13.

the officiating kulkarni by reason of the commutation of the kulkarni service.

With regard to the second question, the condition in Ex. 77 is that the cash allowance is to be continued to the direct descendants of the watandar who was appointed to officiate in the kulkarni office, and there has been no introduction of a line of devolution of the estate inconsistent with or repugnant to Hindu law. I think, therefore, that the condition 4 (1) of the settlement (Ex. 77) in this case was one which the Collector was competent to introduce.

Wild, J.—I have nothing to add.

R.K. *Reference answered.*

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PATKAR AND BAKER, JJ.

Hanmant Shrinivas Kulkarni—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 377 of 1928, Decided on 18th March 1929.

(a) Criminal P. C., S. 345—Court must be satisfied of validity of composition before allowing it.

Before composition is allowed the Court must be satisfied that the composition is legal and valid in law: 21 *Cal.* 103, *Foll.* [P 376 C 1]

(b) Criminal P. C., S. 345—Composition at late stage—Some offences non-compoundable—Subsequent repudiation by party—Magistrate is not bound to allow composition.

A Magistrate is not bound to entertain an application for composition, preferred at a late stage of the case and subsequently retracted by party thereto and where some of the offences for which accused is charged are non-compoundable : 16 *Bom. L. R.* 939 ; 17 *C. W. N.* 948 ; *A. I. R.* 1923 *All.* 474; *A. I. R.* 1922 *Lah.* 138, *Dist.* [P 376 C 1]

(c) Criminal P. C., S. 197 (as amended)—Public servant—Acts illegal and without justification—Government sanction is not necessary before prosecution.

Where an act is done by a public servant which is illegal and there is no justification for it, it cannot be said to have been committed under colour or in excess of the duty or authority as public servant and the offence can be tried by a Magistrate without sanction of the Government under S. 197. *A. I. R.* 1928 *Bom.* 352 (*F.B.*), *Foll.*; *A. I. R.* 1927 *Bom.* 432, *Dist.*; 17 *Cr. L. J.* 394, *Ref.* [P 376 C 2]

(d) Criminal P. C., S. 197 (as amended)—Object.

The object of S. 197, is to guard against vexatious proceedings against public servants and to secure the well considered opinion of a superior authority before their prosecution. [P 376 C 2]

H. C. Coyajee and *S. B. Jathar*—for Accused.

A. G. Desai—for Complainant.

P. B. Shingne—for the Crown.

Patkar, J.—In this case the accused were charged with offences punishable under Ss. 147, 451, 342 and 426, I. P. C., on the ground that on 18th December 1925, they being members of an unlawful assembly pulled down the banka of the complainant Irappa Balappa, and in pursuance of the object of pulling down the banka wrongfully confined him by pushing him into the house and pulled down the banka with the intent to cause wrongful loss to the complainant. The learned Magistrate on consideration of the whole evidence held that the prosecution case was proved. It is not necessary to go into the question whether the application for revision to this Court is beyond time. The delay has been excused and the application has been admitted on 21st January 1929.

The first point argued in this application is that on 7th August 1926 an application was made under S. 345, Criminal P. C., for compounding the offences with which the accused were charged The application was signed by the complainant and by the accused and also by the pleaders of both the parties. The Magistrate, on 7th August 1926 forwarded the application to the Police Prosecutor for opinion On 31st August the date to which the case was adjourned no reply was received from the Police Prosecutor and it was again adjourned to 16th September and on 14th October 1926, the Magistrate ordered the case to proceed in effect holding that he was not satisfied that the compromise application was a lawful compromise under S. 345. On 20th October the Police Prosecutor declined to move the District Magistrate for withdrawal of the case. On 27th November 1926, the complainant made an application to the Collector of the District alleging that his signature on the compromise application was taken under threat and that permission should not be given to the compromise if the accused or their pleaders approached the Collector for granting the permission. It is urged before us that the learned Magistrate ought to have granted the compromise application and allowed the composition under S. 345, and reliance is placed on the rulings in *Emperor* v.

Gana Krishna (1), *Basiruddi* v. *Khairat Ali* (2), *Emperor* v. *J. John* (3); and *Sewa Singh* v. *Emperor* (4).

In *Emperor* v. *Gana Krishna* (1) there was no dispute as to the factum of the compromise. In the present case having regard to the subsequent conduct of the complainant it appears that his consent was obtained by threat and coercion by the accused. Before a composition can be allowed the Court must be satisfied according to the ruling in *Murray* v. *Queen Empress* (5), that the composition is legal and valid in law. In *Basiruddi* v. *Khairat Ali* (2) there was a second complaint after the complaint with regard to the offence under S. 325 had been already compounded, and it is with reference to the second complaint that it was held that the petitioners could not be again prosecuted either for grievous hurt or house trespass or being members of an unlawful assembly the common object being to commit offences which had been compounded. In *Emperor* v. *J. John* (3) the Court was satisfied that there was a legal and valid composition. In *Sewa Singh* v. *Emperor* (4) it was held that it is the duty of the Magistrate in each case which is compoundable with his leave, to decide whether he will or will not allow a compromise and the responsibility rests entirely with him, and that where the offence is not of a serious nature and a compromise is arrived at, at a very early stage, the Magistrate ought to allow the compromise. In the present case the compromise was at a late stage of the case and some of the offences were not compoundable, for the offence under S. 451 was compoundable only with the leave of the Court and the offence under S. 143 which was embodied in the charge or the offence under S. 147 of rioting which was mentioned in the complaint was not compoundable even with the permission of the Court. The learned Magistrate held that as a matter of fact the accused were guilty under S. 447 and not under S. 451. The point, however, remains that with regard to the offence under S. 143 the Magistrate had no jurisdiction to allow the composition. We are not satisfied in this case that there was a lawful composition between the parties, and it would, therefore, follow that the order of the Magistrate allowing the case to proceed is not erroneous.

The second point argued, but not specifically taken in the application, is that the offence could not be tried by the Magistrate without the sanction of the Government under S. 197, Criminal P. C., and reliance is placed on the ruling in *Emperor* v. *Kalu Mahadu* (6). S. 197 relates to an offence alleged to have been committed by a public servant while acting or purporting to act in the discharge of his official duties. The object of the section is to guard against vexatious proceedings against public servants and to secure the well considered opinion of a superior authority before their prosecution. It has been held in *Sankaralinga Tevan* v. *Avudai Ammal* (7) that (p. 395) :

> "the test is not whether the particular act is within his powers, but whether he acted in the capacity with which he is clothed. Of course, if he simply uses his position as public servant to commit an illegal act he will not be acting as such public servant."

Assuming that the defence of the accused is true namely, that they went to the scene of the offence in order to prevent an encroachment on Government land, they had no justification to take the law in their own hands by pulling down the banka and confining the complainant. Their obvious duty was to make a report of the proceedings to the higher authorities, and the action of the accused would not fall within their legitimate functions, and it cannot be said that the offences were committed by them while acting or purporting to act in the discharge of official duty. The illegal acts cannot be said to have been committed under colour or in excess of the duty or authority as public servants : see *Narayan* v. *Yeshwant* (8) The decision in the case of *Emperor* v *Kalu Mahadu* (6), relates to an embezzlement committed by a public servant in the discharge of his duty. We think, therefore, that the want of sanction under S. 197, Criminal P. C., does not operate as a bar to the prosecution of the accused in this case.

(1) [1914] 16 Bom. L. R. 939=26 I. C. 1000 =16 Cr. L. J. 88.
(2) [1913] 17 C. W. N. 948=20 I. C. 618=14 Cr. L. J. 458.
(3) A. I. R. 1923 All. 474=45 All. 145.
(4) A. I. R. 1922 Lah. 188.
(5) [1893] 21 Cal. 103.
(6) A. I. R. 1927 Bom. 432.
(7) [1916] 17 Cr. L. J. 394=35 I. C. 826.
(8) A. I. R. 1928 Bom. 352=52 Bom. 88 (F.B.).

The last point is with regard to the question whether the accused made a complaint to the Mamlatdar at about 12 O'clock on the day of the offence. It appears from the evidence of Mr. Badami that the accused went and gave an application to him at about 12 O'clock. It appears from the evidence that the accused had their own carts and accused 2 had a motor car and it is not improbable that the accused could have gone nine miles and presented themselves before Mr. Badami, the clerk, after the commission of the offence. It appears, however, that as a matter of fact the banka was demolished. The report which was given by the accused was returned to them on 21st December and the panchnama said to have been forwarded has not been produced before the Court. It further appears that the two accused applied for sanction to prosecute the complainant, and though they were clearly ordered to do so by the Mamlatdar they did nothing of the kind. The prosecution story is proved by the oral evidence in the case, particularly by the witnesses, Exs. 2, 3, 4 and 16, and we think that the accused are properly convicted in this case.

On these grounds we discharge the rule.

Baker, J.—I agree. So far as the question of composition is concerned, the accused are convicted under Ss. 143, 447, 342 and 426, I. P. C. The offence under S. 143 is not compoundable and in any case the trial under that section would have to go on. When we turn to S. 345 it shows that the offences which can be compounded are those in respect of which the prosecution is pending and not the offences of which the accused is found guilty. At the time of the proceedings of the application for leave to compound, which was in August 1926, the accused were charged with offences under Ss. 147, 451, 342 and 426, and the offence under S. 451 was only compoundable with the leave of the Court, the offence under S. 147 not being compoundable at all. When some offences are compoundable and some are not, it is obvious that there can be no compounding of offences which are not included in S. 345, Criminal P. C., and therefore, with regard to those charges, the case must at all events go on. Whatever, therefore, happens as regards the offences under Ss. 342 and 426, the case had to go on with regard to the charge of unlawful assembly or rioting under S. 143 or 147, and with regard to the offence under S. 451 the Magistrate had discretion either to allow to compound it or not. Then we have found, so far as regards the compromise application with respect to the other two charges, that there is no legal compounding.

The only remaining point which has been taken is as to the necessity of sanction for the prosecution of accused 1 and 2, who are respectively the kulkarni and the revenue patil of the village. S. 197 refers to a public servant, who is not removable from his office save by or with the sanction of a Local Government, charged in respect of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. That, however, would mean offences which could be committed by public servants only, and hence it has been held that sanction under this section is necessary in those cases only in which the offence charged is an offence which can be committed by a public servant only, and the offence charged must involve as one of its necessary elements that it can be committed only by a person filling that character : see *Municipal Commissioners for the City of Madras* v. *Major Bell* (9) and *Nando Lal Basak* v. *Mitter* (10).

Now the charge against accused 1 and 2 is that they came to the house of the complainant in order to remove his banka. It may be that accused 1 and 2, as village officers, may have been acting in their official capacity when they came to the house of the complainant, but the only power which they had, supposing an encroachment had been committed, was to make a report to their superior officers with the view to orders being issued for the removal of the encroachment, and it was no part of the duty of the kulkarni and the revenue patil to compel the person guilty of the alleged encroachment to remove the encroachment without the orders of higher authority, much less was it any part of their duty to assault him and to remove the encroachment supposing it to be an encroachment, by force. The moment, therefore, that accused 1 and 2 took the law in their own hands and used force towards the complainant, their actions cannot be held to be covered by their official position, and therefore,

(9) [1901] 25 Mad. 15.
(10) [1899] 26 Cal. 852=3 C. W. N. 539.

S. 197 has no application. So far as the facts are concerned, this is a revisional application and the Magistrate has considered the evidence at length and there are no reasons for us to take a contrary view. I agree, therefore, that the rule should be discharged.

V.B./R K. *Rule discharged.*

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FAWCETT, J.

Dharamsey Khetsey—Plaintiff.

v.

Balkrishna Pandurang Samant and *others*—Defendants.

Original Civil Jurisdiction Suit No. 2377 of 1927, D/- on 22nd August 1928.

(a) Dekkhan Agriculturists' Relief Act (17 of 1879), Ss. 2 and 11— Definition of "agriculturist" applies to firm only if firm by itself, tenants or servants earns livelihood wholly or principally by agriculture, and in that case alone it can only be sued at place where firm carries on business — Mere fact that partners are agriculturists does not make the firm an agricultural firm.

The definition of "agriculturist" in S. 2 of the Act can apply to a firm only if that firm by itself, or by its servants or by its tenants, earns its livelihood wholly or principally by agriculture, carried on within the limits of a district to which the Act extends. It is only in this sense that there can be an agriculturist firm and irrespective of the place where the cause of action may have arisen, the firm can only be sued where the firm resided in the sense of carrying on its business. Apart from that the fact that an individual parter of a firm or even all partners of the firm earning their livelihood principally from agricultural income cannot affect the right of a plaintiff to sue the firm at the place where it actually carries on business or where the cause of action has arisen: [P 379 C 1]

(b) Dekkhan Agriculturists' Relief Act (17 of 1879), S. 2—Definition of agriculturist—Person has limited meaning than under General Clauses Act. S. 3 (39).

The definition agriculturist is repugnant to the construction of the word 'person' as given in General Clauses Act, S. 3 (39) unless it is taken in a limited sense regarding agricultural firm. [P 379 C 2]

Munshi—for Plaintiff.

Lalji—for Defendants.

Judgment.—The question that has been argued before me is whether the defendant firm can set up the contention that all or any of its partners are agriculturists, as defined in the Dekkhan Agriculturists' Relief Act, and that therefore the suit cannot be tried by this Court but must be brought in a Court having jurisdiction at the place where the partners reside in accordance with the provisions of S. 11, Dekkhan Agriculturists' Relief Act.

Mr. Lalji's contention is that a firm is only a compendious mode of expressing the partners of which that firm is composed, and that a partner can therefore avail himself of the provisions of this Act relating to agriculturist. It is an important question because if it is held that such a contention may be set up, there will often be considerable difficulties in the way of suing parties who carry on business in Bombay. I quite agree that ordinarily a firm does, in law, only mean the partners of which it is composed but I do not think that it necessarily follows that a definition like that of "agriculturist" in the Dekkhan Agriculturists' Relief Act is, on that account applicable to any partner in that firm. It is recognized law that any partner can put in a pleading on behalf of the firm, but that pleading has to be confined to pleas that can be raised on behalf of the firm and he cannot put in a purely personal defence. That has, for instance, been laid down in *Ellis* v. *Wadeson* (1): and the main effect of the firm being sued is that, if a decree is obtained against it, the partnership assets become liable to satisfy that decree, as has, for instance, been laid down in *Adiveppa* v. *Pragji* (2). There are special provisions in O. 21, Rr. 49 and 50, as to the separate liability of any particular partner, so that there are distinctions made by the law between personal pleadings that can be set up by a partner in his purely individual capacity and the pleadings that can be set up by the firm, and also between the liability of a firm in regard to the partnership assets and the liability of each particular partner as to his separate property. Then also there is the further consideration that it has been held by this Court that the definition of 'agriculturist' under the Dekkhan Agriculturists' Relief Act and the other provisions in favour of the agriculturists in that Act are purely personal privileges. It has, for instance, been laid down in *Martand Trimbak* v. *Amritrao Ragohjirao* (3) that such privileges cannot be transferred by assignment or devolution. Again, it has been held in *Dagdu* v *Mirasaheb* (4) that a minor cannot ordinarily be an agriculturist as defi-

(1) [1899] 1 Q. B. 714=68 L. J. Q. B. 604=15 T. L. R. 274=80 L. T. 508=47 W. R. 420.
(2) A. I. R. 1924 Bom. 366.
(3) A. I. R. 1925 Bom. 501=49 Bom. 662.
(4) [1912] 36 Bom. 496=15 I. C. 827=14 Bom. L. R. 385.

ned in the Act, because he does not earn his livelihood by agriculture within the meaning of the definition, but is dependent on others, and though the latter may earn their livelihood by agriculture that in itself does not make him an agriculturist. A third consideration is that under O. 30, R. 1 the main essential in the right to sue or the liability to be sued in the name of a firm is the fact of

"two or more persons claiming or being liable as partners and carrying on business in British India."

I stress the words "carrying on business." That is what the legislature puts in the forefront instead of the actual residence of the partners, and the personal residence of a partner is ordinarily of no importance in determining the jurisdiction of a Court over a firm. Thus in *Angullia & Co.* v. *Sassoon & Co.* (5) it will be seen from p. 571 of the report that it was pleaded in defence that inasmuch as the proprietor of the defendant firm was residing outside British India, O. 30, Civil P. C, did not apply; but Harington, J., who tried the suit, held that the Court had jurisdiction to entertain it, and it will be seen from p. 577 that the objection as to jurisdiction was abandoned in the appellate Court.

Bearing in mind these considerations, it seems to me clear that the definition of "agriculturist" in S. 2 of the Act must be read as only applying to a firm at the utmost, if that firm by itself or by its servants or by its tenants earns its livelihood wholly or principally by agriculture carried on within the limits of a district to which the Act extends. There can, I think, in that view, be an agriculturist firm and it might be held that the firm could only be sued at the place where it resided in the sense of carrying on its business irrespective of the place where the cause of action may have arisen. Apart from that, I think the fact of an individual partner of a firm, or even all the partners of the firm, earning their livelihood principally from agricultural income cannot affect the right of a plaintiff to sue the firm at the place where it actually carries on business or where the cause of action has arisen.

This result is consistent also with another view that it is possible to take. It has been urged by Mr. Munshi that the word 'person' in the definition of "agriculturist" cannot by reason of the context be taken to cover a body of individuals, such as it would otherwise include under the definition of the word in Cl.39, S. 3, General Clauses Act 1897. That definition is subject to the opening proviso "unless there is anything repugnant in the subject or context," and there are in my opinion, good grounds for saying that the definition ordinarily contemplates the case of an individual, who actually earns his livelihood by agriculture or ordinarily engages personally in agricultural labour so that there is something in the context repugnant to its application to a body of individuals, unless it is limited in the particular way that I have mentioned about an agriculturist firm. Therefore, in my opinion, it is not open to the defendant firm to set up this contention in this suit.

Mr. Lalji admitted that he could find no authority in support of his contention and I imagine that is because it is so obviously absurd that it has not been raised before. The preliminary issue is, therefore, answered by my finding that this Court has jurisdiction to try the suit, and the case is adjourned to next week for evidence on the further points. Costs of this hearing to be borne by the defendants in any case.

V.B./R.K. *Order accordingly.*

(5) [1912] 39 Cal. 568=13 I. C. 705=16 C.W. N. 593.

A. I. R. 1929 Bombay 379

PATKAR AND BAKER, JJ.

Lakshman Ramjee—Plaintiff—Appellant.

v.

Dattatraya Ramkrishna and *others*—Defendants—Respondents.

Second Appeal No. 144 of 1927, Decided on 15th March 1929, against decree of Dist. Judge, Satara, in Appeal No. 45 of 1926.

Civil P. C., O. 21, R. 103 — Suit under R. 103 though brought on strength of title must be brought within one year—Limitation Act, Art. 11-A.

A suit contemplated by R. 103 is not confined to a suit for possession. It may be brought either on account of his right to possession or on account of his title. A suit under R. 103 therefore though brought on strength of title is governed by Art. 11-A and must be brought within one year : 44 *Bom.* 515 ; *A. I. R.* 1927 *Bom.* 184, *Dist.* ; 1 *Lah.* 57, *Rel. on*; (1889) *P. J.* 101, *Foll.* [P 380 C 2, P 381 C 2]

K. N. Koyajee—for Appellant.

P. V. Kane and *V. D. Limaye* — for Respondents.

Patkar, J.—In this case the property in suit originally belonged to Bala Bapu and Krishna Mahadu. By their deeds on 3rd April 1864, 7th June 1864 and 23rd June 1867, they mortgaged the property to one Bhiku Sonar. On 1st March 1921, the plaintiff purchased from the heirs of the mortgagors their equity of redemption, and brought suit No. 1060 of 1921 for redemption against the mortgagees to which defendants 1 and 4 were made parties. They contended that they were the inamdars of the village, and had also the mirasi right, but as the title which they set up was paramount both to the mortgagor and the mortgagee, their names were struck off in the redemption suit. The plaintiff, however, obtained a redemption decree on 15th July 1922, and got possession on 30th November 1922. Defendants 1 and 4 made two applications, Exs. 111 and 120, under O. 21, R. 100, and were successful in their applications, and possession was handed over to them on 11th April 1923. The present suit was brought by the plaintiff on the strength of his title more than a year after the order in the miscellaneous proceedings. Both the Courts held that the suit was barred under Art. 11-A, Lim. Act.

It is urged on behalf of the appellant that the view of both the Courts that the suit is barred by limitation under Art. 11-A is erroneous. Under R. 103, O. 21 a party who is unsuccessful in the miscellaneous proceedings is entitled to bring a suit to establish the right which he claims to the present possession of the property, but subject to the result of such suit the order shall be conclusive. It is urged on behalf of the appellant that the present suit is not based on the right to present possession of the property, but is based upon his title, and, therefore Art. 11-A, Lim. Act, does not apply. It is further urged that there is difference in the wording of R. 63, O. 21, and R. 103, O. 21. The former refers to a suit to establish a right to the property in dispute, whereas under the latter the suit contemplated relates to the right which he claims to the present possession of the property. In support of this contention reliance is placed on the cases of *Laxmishankar Devshankar* v. *Hamjabhai Usufally* (1); *Rukmabai* v. *Fakirsa* (2); and *Rango Vithal* v. *Rikhivadas* (3)

Rules 58 to 63 corresponding to Ss. 278 to 283, old Civil P. C., and Rr. 97 to 103 corresponding to Ss. 328 to 335, old Civil P. C, run on parallel lines The former sections relate to the objections with regard to the attachment of the property at the instance of a claimant having some interest in or possession of the property, while the latter relate to the objections respecting the possession of the property in execution of a decree by a purchaser of the property or by the decree-holder or some person other than the judgment-debtor. As the former set of rules relates to attachment of the property, R. 63 refers to a suit to establish the right which the plaintiff claims to the property in dispute. As the latter set of rules refers to possession, R. 103 refers to a suit to establish the right which the plaintiff claims to the present possession of the property. Though the two sets of rules relate to different matters, the principles applying to one set of rules equally apply to the other according to the decisions in *Minguel Antone Lopes* v *Waman Lakshman Lohar* (4) and *Karsan* v. *Ganpatram* (5). The suit contemplated by R 103, O. 21 is not confined, in our opinion to a suit for possession of the property It is a suit to establish a right which the plaintiff claims to the present possession of the property. And this right may be established either on account of his right to possession or on account of his title. According to the view of the Privy Council in *Sardhari Lal* v. *Ambika Pershad* (6), the policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought. Their Lordships observed (p. 526):

"But besides that, the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to

(1) [1919] 44 Bom. 515=57 I.C. 426=22 Bom. L.R. 735.

(2) A.I.R. 1927 Bom. 184=51 Bom. 158.
(3) [1874] 11 B.H.C. 174.
(4) [1889] P.J. 17.
(5) [1897] 22 Bom. 875.
(6) [1888] 15 Cal. 521=15 I.A. 123=5 Sar. 172 (P.C.).

bring the suit which the law allows to him. However that may be,...in this case the order was made ; and it was an order within the jurisdiction of the Court which made it. It is not conclusive ; a suit may be brought to claim the property, notwithstanding the order ; but the law of limitation says that the plaintiff must be prompt in bringing his suit."

In *Bhau Bala* v. *Bapaji Bapuji* (7), under similar circumstances, the claim was held to be barred on the ground that it was brought more than a year after the order in the execution proceedings. It was held that the prayer in the plaint was exactly the same as the prayer in the application; that defendant's obstruction should be removed and possession given. In that case, just as in the present, the plaintiff did not attempt to put forward any title consistent with the defendant's present possession or to admit that defendant had a right to present possession though for a limited period. On the contrary the plaint was based on the assertion that plaintiff had by virtue of the purchase the right to present possession and that defendant had no right to possession at all. To the same effect is the decision in the case in *Mahadev* v. *Babli* (8). In *Unni Moidin* v. *Pecker* (9), it was held that the scope of a suit under R. 103, O. 21, Civil P. C., filed to contest an order made under either R. 98 or R. 99, or R. 101, is not the determination of the mere question of possession of the parties concerned, but the establishment of the right or title by which the plaintiff claims the present possession of the property. It was observed after referring to the difference in the wording of Rr. 63 and 103 that (p. 229 *of* 44 *Mad.*) :

"This does not show that a suit under R. 103 is concerned only with the question of actual possession at the date of the summary order. The suit is to establish the right which the plaintiff claims to the present possession of the property, and this right may be established without showing that the plaintiff was in actual possession at the date of the summary order against him."

In *Chail Behari Lal* v. *Kidar Nath* (10), it was held that the effect of the order under O. 21, R. 99, was to hold the person who succeeded in the miscellaneous proceedings as entitled to possession as against the decree holder unless and until a regular suit was brought against him, and the plaintiff had to establish by that suit his own right to present possession as well as his own title and he could not succeed merely by showing that the finding under R 99 was erroneous. Decree-holders or auction-purchasers are never in possession at the time of the order under R. 99 and are still bound to bring a suit within one year under R. 103 and Art. 11-A, Lim. Act. We think, therefore, that even if the subsequent suit contemplated by R. 103 is brought on the strength of title, it must be brought within one year under Art. 11-A, Lim. Act and R. 103, O. 21, Civil P. C.

The case of *Laxmishankar Devshankar* v. *Hamjabhai Usufally* (1), relied on on behalf of the appellant, has no application to the facts of the present case, for in that case there was no investigation in the execution proceedings, and no order necessary to be set aside. On the other hand in the execution proceedings, the plaintiff who subsequently brought the suit was specially authorized to bring a regular suit. It is observed at p. 523 :

"In this case as the Subordinate Judge had made no inquiry into the validity of Shivnath's mortgage, but merely directed the decree-holder to bring a regular suit, and that order was confirmed by the High Court, it follows that no conclusive order had been made, and the decree-holder was entitled to his ordinary remedies to establish his right to the property claimed by Shivnath, and he could only do that by getting the mortgage set aside."

Similarly, the case of *Rukmabai* v. *Fakirsa* (2) is distinguishable on the ground that it was a suit to set aside an award decree, and though the plaintiff sought to recover possession of the property, he could not urge the claim with regard to the nature of the award decree in the execution proceedings. In the execution proceedings the plaintiff claimed that possession should not be allowed to be transferred until he took steps to set aside the award decree, which he said was obtained by fraud, and the subsequent suit brought by him could not therefore be treated as a suit to establish his right to the present possession of the property which he claimed in those proceedings, and the order in the execution proceedings was based on the view of the Court that so long as the award decree stood, the plaintiff, who subsequently

(7) [1889] P.J. 101.
(8) [1902] 26 Bom. 730=4 Bom. L. R. 513.
(9) A. I. R. 1921 Mad. 317=44 Mad. 227.
(10) [1920] 1 Lah. 57=51 I. C. 787=1 L. L. J. 14.

brought the suit was bound by it, and there was no reason to justify his obstructing the delivery of possession to the defendant in the case. Besides, there was no investigation in the execution proceedings, and the question with regard to the validity of the award decree was not in fact, and could not be, gone into in the previous proceedings. The case of *Rango Vithal* v. *Rikhivadas bin Rayachand* (3) does not support the appellant's contention. It was held as the result of all the considerations set forth in the judgment that where there is a subsisting right which is contradicted by the summary order and the possession obtained or confirmed under it, and such right continues to subsist during twelve months so as to ground a suit for possession, and to be properly asserted by such a suit, the suit by the person dispossessed or refused possession to establish his right must be brought within one year, failing which he cannot sue afterwards on any portion of such right, but that in other cases, as his right is consistent with the order and the possession, he is not forced to any action until some present relief becomes legally claimable. At p. 177 it is observed :

"If the order has been made against the purchaser in execution of the title of the judgment-debtor, it amounts to a denial that that title embraces a right to present possession. If the title does embrace such a right, the order ought to have been different, and the purchaser suing "to establish his right" must succeed if he establish this right to present possession, no matter what other rights over the same land may be vested in his opponent. But the words, it is plain, are intended to have but a single sense, whether they are applied to the execution-purchaser or his antagonist: if they mean the right to present possession for the former, they must mean it also for the latter."

In the present case the right to the present possession of the plaintiff is contradicted by the order in the previous execution proceedings, and the relief asked by the present plaintiff is not consistent with the order obtained by the defendants for possession in the previous miscellaneous proceedings. The right, therefore, to the present possession on the strength of title would be a right which it was necessary to enforce by a suit within one year under Art. 11-A and O. 21, R. 103. We think, therefore, that the view of the lower Court that the plaintiff's claim is barred by limitation is correct. The appeal must therefore be dismissed with costs. The appellant will pay two sets of costs.

P.R./B.K. *Appeal dismissed.*

A. I. R. 1929 Bombay 382

MADGAVKAR, J.

Murlidhar Laxman and *others*—Appellants.

v.

Shivram Sadashiv Patil—Respondent.

Second Appeal No 728 of 1927, Decided on 26th June 1929, from decision of Dist. Judge, Nasik, in Appeal No. 210 of 1926.

Limitation Act, S. 7—Whether having regard to O. 32, R. 6, discharge valid can be given by manager of joint family acting as guardian depends upon construction of decree—Where discharge can be given minor is not entitled to benefit of S. 7.

Whether a valid discharge for payments made by the judgment-debtors can be given by a manager of joint Hindu family acting as guardian having regard to O. 32, R. 6, depends upon the construction of the decree. [P 384 C 2]

When the decree dispenses with the separate application and sanction which might otherwise be necessary and allows manager to receive the amount so long as he furnishes security, the manager is competent to grant discharge in favour of the minor and he is not entitled to benefit of S. 7 : *A. I. R.* 1929 *Bom.* 13; *A. I. R.* 1921 *Bom.* 289; 41 *All.* 435; 31 *All.* 156; 36 *Mad.* 295 (*P.C.*); *A. I. R.* 1926 *P.C.* 16; *A. I. R.* 1928 *Mad.* 42 and 38 *Mad.* 118, *Ref.*; *A. I. R.* 1925 *Mad.* 78, *Dist.* [P 384 C2]

S. V. Abyankar—for Appellants.

W. B. Pradhan—for Respondent.

Madgavkar, J.—The question in this appeal is, whether the present darkhast is barred by limitation. The trial Court held that it was barred. The lower appellate Court took the view that in law it was not barred but by an error which is not easily explicable, dismissed the appeal with costs. The decree-holder appeals.

Laxman and Vithal were brothers constituting a joint Hindu family. On their death the family consisted of Laxman's minor sons Dattatraya and Murlidhar and Vithal's son Vaman a major and apparently the manager of the joint family consisting of himself and his two cousins. In suit No. 35 of 1911 an award decree was made allowing the plaintiff-respondent to redeem the land on making certain payments payable by instalments. The decree concluded as follows:

"The guardian of the minor defendants will not be allowed to receive the amount due under this decree unless he furnishes security for the same."

The last payment certified was in 1917. For the defendants-appellants a certain payment in 1922 within three years of the darkhast was set up and was not held to have been proved in either Court. In 1919 Dattatraya attained majority. While the darkhast was pending, Vaman died and his heirs, his two sons were brought on the record. In order to save limitation the appellants rely on the fact that the younger brother Murlidhar attained majority within three years of the darkhast.

The trial Court held on these facts that though Murlidhar had attained majority within three years, Vaman and after his death Dattatraya could have given a valid discharge and Murlidhar was not therefore entitled to the benefit of S. 7, Lim. Act. In appeal the learned District Judge, while holding the alleged payment in 1922 not proved, held, chiefly on the authority of *Lakshman Chetty* v. *Subbiah Chetty* (1), that Vaman could not have given a valid discharge and that therefore Murlidhar could claim the benefit of S. 7, Lim. Act. In other words, the darkhast was not barred by limitation. But he proceeded: "however owing to the finding of fact, the decision will remain unaltered," referring, presumably, to the finding of fact as to the alleged payment in 1922, and dismissed the appeal with costs.

The learned District Judge was labouring under an obvious error. In the view of the law that he took and notwithstanding the finding of fact, the District Judge ought to have allowed the appeal and held that the darkhast was within time. There is nothing on the record to show why the appellants' pleader did not invite the attention of the learned District Judge to this obvious error and have it set right by an application for review or otherwise.

On the finding of the lower Court that no payment till 1922 is proved, the only question in appeal is, whether by reason of Murlidhar's minority the appellants are entitled to the benefit of S. 7, Lim. Act. That question depends in turn on the question whether a discharge could be given by Vaman without the concurrence of Dattatraya on attaining majority in which case time would begin to run against them all.

It is argued for the appellants that as Vaman was not merely the manager but was appointed guardian of the minors under O. 32, R. 6, Civil P. C., he could not, without the leave of the Court, receive any moneys or give a discharge. Nor could Dattatraya even on attaining majority do so as Vaman was the manager. Reliance is placed for this proposition on the observations of their Lordships of the Privy Council in *Ganesha Row* v. *Tuljaram* (2) and the decision of the Madras High Court in *Lakshmanan Chetty* v. *Subbiah Chetty* (1). The respondent relies on the concluding words in the decree as showing that it was not necessary for Vaman to apply for the sanction of the Court on each occasion that he received the instalment. Therefore, he could give a valid discharge even before the majority of Dattatraya. It is argued that in any case when Dattatraya attained majority he was competent to give a valid discharge, and the darkhast was barred within three years of the attaining of majority by Dattatraya: *Supdu* v. *Sakharam* (3).

As far as the decisions of this Court go, they are in favour of the contention of the respondent and it is difficult for me, sitting singly, to differ from the view enunciated by Fawcett and Mirza, JJ., in *Supdu* v. *Sakharam* (3) that (*p.* 539 *of* 30 *B. L. R.*):

"the manager of a joint Hindu family can give a valid discharge without the concurrence of the minor members of the family in the case of an aplication to execute a decree, just as he can in the case of a suit . . . and the mere fact that one of the members is a minor will not prevent time running against all the members of the family."

This case purports to follow *Bapu Tatya* v. *Bala Ravji* (4) where it was held that in the case of three brothers when the eldest was a major and manager of the joint family on the date of the suit the eldest was competent to give a valid discharge without the concurrence of his minor brothers the suit was barred. To the same effect is the decision of the Allahabad High Court in *Rati Ram* v. *Niadar* (5). The great difficulty in the

(1) A. I. R. 1925 Mad. 78=47 Mad. 920.

(2) [1913] 36 Mad. 295=19 I. C. 515=40 I. A. 132 (P.C.).

(3) A. I. R. 1923 Bom. 13=52 Bom. 441.

(4) A. I. R. 1921 Bom. 289=45 Bom. 446.

(5) [1919] 41 All. 435=49 I. C. 990=17 A. L. J. 649.

way of the respondent lies in the observations of their Lordships of the Privy Council in *Ganesha Row* v. *Tuljaram* (2). In that case the father and manager of the joint Hindu family who had also been appointed guardian entered into a compromise without the leave of the Court necessary under O. 32, R. 7, Civil P. C.

It was held by their Lordships of the Privy Council that his capacity as father and manager of the joint family and his general powers thereunder would not except him from the special provisions of O. 32, R. 7, Civil P. C, as soon as he was appointed next friend or guardian in the suit, and the compromise was therefore not binding on the minor. Purporting to follow this decision the Madras High Court in *Lakshmanan Chetty* v. *Subbiah Chetty* (1) held that in the case of a father who was appointed guardian of his minor sons in a suit, an application by the eldest son more than three years after the decree but within three years of his majority was not barred because the father could not give a valid discharge without the leave of the Court obtained under O. 32, R. 6, Civil P. C., any more than he could have compromised the suit without such leave. As pointed out by Ramesam, J. this decision really went counter to the previous current of decisions of the Madras High Court, for instance, *Vigneswara* v. *Bapayya* (6), *Doraisami Serumadan* v. *Nandisami Saluvan* (7), and *Krishna Hande* v. *Padmanabha Hande* (8) decided after the Privy Council decision in *Ganesh Row* v. *Tuljaram* (2). It is true that the decison of the Allahabad High Court in *Ganga Dayal* v. *Mani Ram* (9) that the majority of the elder brother would not bar a suit of the younger brother appears to have been implicitly approved by their Lordships of the Privy Council in *Jawahir Singh* v. *Udai Parkash* (10), in which the finding of limitation of the Allahabad High Court was confirmed by their Lordships. The head-note of that case goes, however, beyond the judgment, and although their Lordships have referred to the two Madras decisions of *Vigneswara* v. *Bapayya* (6) and *Doraisami Serumadan* v. *Nandisami Saluvan* (7) there is no explicit disapproval of that view. In the latest decision of the Madras High Court, *Surayya* v. *Subbamma* (11) which follows *Doraisami Serumadan* v. *Nandisami Saluvan* (7) the head-note runs thus :

"In the case of an alienation made by the guardian of minor brothers, if the eldest brother on attaining majority does not institute a suit to set aside the alienation within the time limited by law, any suit by the younger brothers is barred by limitation."

As a result of these authorities, I am of opinion, whatever the case as regards a compromise without the leave of the Court under O. 32, R. 7, Civil P. C., as regards a valid discharge, that is to say, authority to receive moneys under R. 6, the question must be one of construction of the decree in each case, as to whether the manager has or has not power. In the present case, it appears to me, on a perusal of the whole decree, that by reason of the long period of the instalments, and in order to obviate the necessity of a separate application on the part of the decree-holder to receive each separate instalment which would be necessary under O. 32, R. 7, Civil P. C., the Court made the provision once for all in the last sentence that in respect of each instalment he was to furnish security and then to receive the amount. The present decree itself dispenses with the separate application and sanction which might otherwise be necessary and allowed the manager Vaman to receive the amount so long as he furnished the security. Vaman was, therefore, competent, without the sanction of the Court to receive payment and grant the discharge in favour of the minors and Murlidhar is not entitled to the benefit of S. 7, Limitation Act. The application is, therefore, barred by limitation quite apart from the attainment of majority by Dattatraya as well. This view is in accordance with the current of authorities of this Court quoted in *Supdu* v. *Sakharam* (3).

The appeal fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(6) [1893] 16 Mad. 436=3 M. L. J. 216.
(7) [1915] 38 Mad. 118=25 M. L. J. 405=21 I. C. 410=14 M. L. T. 401.
(8) [1913] 25 M L. J. 442=21 I. C. 177=(1913) M. W. N. 802.
(9) [1908] 31 All. 156=1 I. C. 824=6 A. L. J. 62.
(10) A. I. R. 1926 P. C. 16=48 All. 152=53 I. A. 36 (P.C.).
(11) A. I. R. 1928 Mad. 42.

A. I. R. 1929 Bombay 385

PATKAR AND BAKER, JJ.

Limba Tatya Kasid—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 49 of 1929, Decided on 12th April 1929, against decision of 2nd Class Magistrate, Barsi, in Case No. 184 of 1928.

Penal Code, S. 186—Obstruction offered to a person acting under the orders of a public servant while fixing the boundaries under Cl. 2, S. 119, Bombay Land Revenue Code, is equal to an obstruction offered to the public servant.

After a cadastral surveyor had measured the necessary land and fixed the boundaries and while his servant was digging a hole for fixing a stone boundary the accused snatched the crowbar from his hands and prevented him.

Held : that the accused was guilty of the offence charged, for the surveyor was performing his legitimate duties under Bombay Land Revenue Code and obstruction offered to his servant was equal to an obstruction offered to the public servant himself : 13 *Bom.* 160 and *A. I. R.* 1927 *Bom.* 483, *Dist.* ; *A.I.R.* 1928 *Bom.* 135, *Rel. on.* [P 386 C 1]

V D. Limaye—for Applicant.

P. B. Shingne—for the Crown.

Patkar, J.—In this case the complainant, a cadastral surveyor, received an application from the District Inspector of Land Records for measuring and demarcating the boundaries of survey No. 111 on 1st April 1927. On 4th May, while he was measuring the land and fixing the boundaries the accused snatched the crowbar from the hands of one Ishwara Mahar who was digging a hole for fixing a stone at the place fixed by the complainant after the measurements were taken. The complainant made a Panchnama, Ex. 2C, and a report, and in consequence of the report a complaint was filed against the accused under S. 186, I. P. C. The accused was convicted by the Second Class Magistrate, Barsi, and on appeal the District Magistrate has confirmed the conviction.

It is urged on behalf of the applicant that the complainant was not discharging public functions, and, therefore, the accused is not guilty under S. 186, I. P. C. Under S. 119, Cl. 2, Land Revenue Code, when a dispute arises concerning the boundary of any survey number at any time after the completion of a survey, it shall be determined by the Collector, who shall be guided by the land records if they afford satisfactory evidence of the boundary previously fixed, and if not, by such other evidence as he may be able to procure. The powers of the Collector under this section are delegated to the Mamlatdar under Nos. 60 and 61 of Revenue Department No. 5295 dated 1st June 1911, and under R. 9(a) of the Standing Orders of the Land Record establishments, the District Inspector is required to send measurement cases for measurement to the Circle Inspector. The Circle Inspector in this case is represented by the complainant who is a cadastral surveyor. Under R. 15, Land Revenue Rules, 1921, for all lands which shall be hereafter surveyed, it shall be the duty of the Director of Land Records to cause to be corrected any arithmetical or clerical error whenever discovered, and to cause to be incorporated punctually in the land records all changes in the boundaries ; and R. 21, Cl. (2), says :

" Where there is any dispute, the boundary to which the dispute relates shall be measured and mapped in accordance with the claims of both disputants, and the dispute entered in the register of disputed cases. After the dispute has been settled under S. 37 and Rr. 119-120, or R. 108, as the case may be, the map shall be corrected accordingly and the areas finally entered into the land records."

It is clear, therefore, that the Mamlatdar had the power to determine the boundary under S. 119, Cl. 2, and the complainant had jurisdiction to measure the land and map it in accordance with the claims of both the disputants. In R. 25 roughly dressed long stones are prescribed to be boundary marks for the purpose of demarcating the boundaries of survey numbers. It is clear, therefore, that the complainant was performing his legitimate functions under the rules under the Land Revenue Code, and the obstruction caused by the accused would fall within S. 186, I. P. C.

It is urged that the obstruction was not made to the complainant but to Ishwara who was acting not under the orders of the complainant surveyor but was acting under the instructions of one Bodhala who was the adversary of the accused and had complained to the Mamlatdar. It appears from the evidence that Ishwara was acting not under the instructions of Bodhala the accused's adversary, but was acting under the orders of the surveyor. In *Emperor* v. *Bhaga Mana* (1), where a Circle Inspector, act-

(1) A. I. R. 1923 Bom. 135=51 Bom. 286.

ing under the orders of the District Deputy Collector, went to the compound of the accused, with a Panch and the son of a village servant, to remove a portion of the hedge which was an encroachment, and the accused obstructed the servant and caught hold of his scythe and threatened him, it was held that the accused had committed an offence punishable under S. 186, I. P. C. since the act of the accused in laying hold of the scythe was an act of physical obstruction, and the obstruction offered to the servant was tantamount to obstruction to the Circle Inspector under whose orders he was acting. The cases of *Queen-Empress* v. *Tulsiram* (2) and *Emperor* v. *Kadarbhai* (3), relied on behalf of the applicant, have no application to the present case. In *Queen-Empress* v. *Tulsiram* (2) the decree passed by the Mamlatdar was outside the jurisdiction of the Mamlatdar, and the execution of his order was sought to be effected not by the Mamlatdar but under the orders of the Collector who had no power under the Mamlatdars Courts Act to execute the decree of the Mamlatdar. In *Emperor* v. *Kadarbhai* (3) it is clear that the officer had no jurisdiction to impose the duty which was levied on the accused in respect of the timber which was imported from the Indore State. The action, therefore, of the officer was outside his legitimate functions. In the present case it is clear that the complainant was performing his legal and legitimately authorized public functions, and the obstruction offered to Ishwara was clearly an obstruction to the complainant, and the accused was rightly convicted under S. 186. We would, therefore, confirm the conviction and the sentence of the accused and discharge the rule.

P.R./R K. *Rule discharged.*

(2) [1888] 13 Bom. 168.
(3) A. I. R. 1927 Bom. 483=51 Bom. 896.

A. I. R. 1929 Bombay 386

RANGNEKAR, J.

Kanji Shivji—Plaintiff.

v.

Vasanji Shivji & Co.—Defendant.

Original Civil Jurisdiction Suit No. 1267 of 1927, Decided on 20th December 1928.

Civil P.C., O. 21, R. 50 (2)—Order permitting execution of decree against partner under O. 21, R. 50 (2), is not decree within meaning of Lim. Act, Art. 164.

An order granting leave to execute a decree against any person on the ground that he is a partner, made under O. 21, R. 50, sub-Cls. (2) and (3), is not a decree and, therefore, Art. 164 cannot apply to it. [P 388 C 1]

Jinnah—for Plaintiff.

B. J. Desai—for Defendant.

Judgment. — This summons raises the question as to whether an order made under O. 21, R. 50, sub-Cls. (2) and (3), Civil P C., granting leave to the decree-holder to execute the decree against a person other than such a person as is referred to in sub-R (1), Cls. (b) and (c), as being a partner, is a decree within the meaning of S. 2, sub-Cl. (2), Civil P. C.

The plaintiff obtained a decree for Rs. 33,628-11-0 against the defendant firm on 27th July 1927. The writ of summons was served on Shivji Sejpal, one of the partners in the defendant firm. Being desirous of executing a decree against the other partners including the applicant Doongersi Shivji, the plaintiff took out a chamber summons under O. 21, R. 50, Civil P. C., and, on 16th September 1927, obtained an order granting leave to execute the decree against them. A copy of the chamber summons was sent by registered post to Doongersi Shivji at his address in Cutch who, as appears from the affidavit of service, refused to accept it. Thereafter the plaintiff obtained a warrant of arrest against Doongersi Shivji who, it was alleged, had come down to Bombay. The order for the issue of a warrant of arrest against Doongersi was made on 10th November 1927.

The summons before me is taken out by Doongersi Shivji for vacating the two orders made on 16th September and 10th November 1927, respectively. The applicant swears that a copy of the chamber summons was not tendered to him and it is conceded that the ex parte order of September 1927 must be vacated if the application is not barred by limitation. The most important point urged on behalf of the plaintiff in answer to the summons is that the application is barred by the law of limitation under Art. 164, Sch. 1, Lim. Act. Art. 164 runs as follows:

"By a defendant, for an order to set aside a decree passed ex parte, the period of limitation provided is 30 days which begins to run from the date of the decree or, where the summons was not duly served, when the applicant has acknowledge of the decree."

The question then is whether the order under O. 21, R. 50, granting leave to the decree-holder to execute a decree against any person other than a person as is referred to in sub-R. (1), Cls. (b) and (c), as being a partner in the firm is a decree. Doongersi was not served with a summons nor did he appear in the suit and the order complained of was made ex parte under sub-Cl. (2), O. 21, R. 50, Civil P. C. If such an order is a decree then undoubtedly Art. 164 would apply and there is no doubt on the affidavits before me that the present application would be barred by limitation as it is made long after the expiration of the period of limitation provided in Art. 164, Lim. Act.

Under S. 2, sub-Cl. (2), Civil P. C., a "decree" is defined as follows:

"Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

The definition further goes on to say:

"It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include:

(a) any adjudication from which an appeal lies as an appeal from an order, or;

(b) any order of dismissal for default."

Therefore, to constitute a decision a "decree" the following conditions must be present:

(1) the decision must have been expressed in a suit;

(2) the decision must have been expressed on the rights of the parties with regard to all or any of the matters in controversy in the suit; and

(3) the decision must be one which conclusively determines those rights.

The term "suit" has not been defined for the purposes of the Code. Under the last Code, S. 647 (now S. 141) was held to show that applications for execution were not suits, but only proceedings in a suit and appeals from orders on applications were dealt with in S. 588 (now S. 104 and O. 43, R. 1). Orders passed in execution were expressly provided for under Cl. 2 of the section, Cl. 1 of which referred to suits or appeals only. Under S. 48 (now S. 26) of the Code a suit must commence with a plaint and, therefore, a proceeding under S. 244 (now S. 47) though it is a proceeding in a suit is not a suit: see *Venkata Chandrappa* v. *Venkatarama Reddi* (1). The corresponding words in the Code of 1877 were "suit or other judicial proceeding" which last expression was held to include proceedings in execution. But now execution proceedings are not suits and an order thereon is not a decree unless it determines a question within S. 47, Civil P. C. Therefore, Mr Jinnah is right in contending that the present order is not a decree as it is not made in a suit but was made in the course of the execution proceedings. But it is to be remembered that the definition of a decree includes an order made within S. 47, Civil P. C, and orders under that section are decrees and are appealable under S. 100 of the Code. Is this then an order under S. 47, Civil P. C.? It is important to note that all orders in execution proceedings are not appealable. As regards appeals, orders in execution proceedings may be divided into two classes: (1) orders under S. 47, and (2) others in execution proceedings; these again may be sub-divided into two classes: (i) those which are declared to be appealable under S. 104, Civil P. C,, and (ii) those which are not so declared and, therefore, non-appealable:

Order 21, R 50, sub-Cl. (3), runs as follows:

"Where the liability of any person has been tried and determined under sub-R. (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

But for the words "be subject to the same conditions as to appeal or otherwise as if it were a decree" in this subclause I should have had no difficulty in holding that an order under this rule giving leave to a decree-holder to issue execution against a person on the ground that he is a partner is an order under S. 47 of the Code inasmuch as it is an order which determines the liability of that person to satisfy the decree on the ground of his being a partner within the meaning of S. 47 of the Code. But my duty is to consider the plain meaning of the words used in the rule itself. If it was the intention of the legislature to make an order made under O. 21, R 50, sub-Cl.(2) to be an order within S. 47, Civil P. C., it was not necessary at all to use the words which are used in sub-Cl. (3) of

(1) [1893] 22 Mad. 256.

that rule to which I have already referred. These words give no power to turn the order into a decree. They give to the order the status as a decree for the purpose of appeal and of enforcement but leave it what it was before, namely, an order. I, therefore, hold that an order granting leave to execute a decree against any person on the ground that he is a partner, made under O. 21, R. 50, sub-Cls. (2) and (3), is not a decree; and therefore Art. 164 would not apply and the present application is not barred by the law of limitation. I have come to this conclusion not without considerable hesitation, and, as similar questions are likely to arise in future particularly in a city like Bombay, I would be glad if an attempt is made to obtain an opinion of the appeal Court on the point.

It is agreed between the parties that if my judgment went against the plaintiff on the question of limitation the orders should be vacated and an issue as to the liability of Doongersi as a partner in the defendant firm should be tried. Costs in the issue. Counsel certified.

V.B./R.K. *Order accordingly.*

A. I. R. 1929 Bombay 388

PATKAR AND BAKER, JJ.

Bhimaji Vasudev — Plaintiff—Appellant.

v.

Yeshvant Changagouda—Defendant—Respondent.

Appeal No. 70 of 1927, Decided on 19th March 1929, from an order of Asst. Judge, Belgaum, in Appeal No. 367 of 1923.

(a) Easements—Ancient light—Substantial privation rendering occupation discomfortable is necessary to constitute obstruction.

To constitute an actionable obstruction of ancient light entitling a person to obtain mandatory injunction substantial privation rendering the occupation discomfortable and not merely sensible obstruction is necessary : 18 *Bom.* 474 ; 23 *Bom.* 786 ; 30 *Bom.* 319 and (1904), *A. C.* 179, *Foll.* [P 389 C 1 ; P 390 C 1]

(b) Specific Relief Act, S. 55—Acquiescence.

Where delay amounts to acquiescence the case is not fit for mandatory injunction but for pecuniary compensation : 16 *Cal.* 69 and 18 *Bom.* 474, *Foll.* [P 390 C 2]

A. G. Desai—for Appellant.

G. S. Rao—for Respondent.

Patkar, J.—This was a suit brought by the plaintiff for a mandatory injunction against the defendant with reference to an encroachment of the plaintiff's easement by the defendant. The plaintiff was the owner of a house in Belgaum which had four windows, two on the ground-floor and two on the first floor in the northern wall. He alleged that those windows were ancient windows, that he had acquired an easement in respect of them by prescription for nearly forty or fifty years' user, and that the defendant purchased an open site and began building his house at a distance of six feet from the northern wall of the plaintiff's house. The learned Subordinate Judge held that the plaintiff proved that he had acquired the right of easement of light and air to all the four windows, and that the erection of the building by the defendant materially interfered with the comfort and the health of the plaintiff, and that the defendant did not prove that the plaintiff acquiesced in the erection of his building, and, therefore, granted a mandatory injunction ordering the defendant to pull down his house to such an extent that there might be no obstruction to the free passage of light and air to the windows in the northern wall of the plaintiff's house under the rule of 45 degrees. On appeal the plaintiff's right of easement as regards the two upper windows was negatived on the evidence. The learned Judge held that the plaintiff proved his right of easement with regard to the lower two windows, and found on the evidence that though the building caused diminution of light and air to the lower two windows the diminution was not such as to make the residence in the house uncomfortable and that the plaintiff had acquiesced in the building of the defendant, and therefore came to the conclusion that the plaintiff was not entitled to the mandatory injunction, but was entitled to damages, and reversed the decree of the lower Court, and remanded the case for a finding on the issue as to the amount of damages.

It is urged in this appeal, first that the finding recorded by the learned Assistant Judge on appeal is not sufficient to deprive the plaintiff of his right to a mandatory injunction, and, secondly, that the finding with regard to the acquiescence of the plaintiff is erroneous.

On the first point the learned Judge found that there was a galli between the house of the plaintiff and that of the

defendant to the extent of about six feet, and that the tenant in the house continued to occupy the house notwithstanding the diminution of light without any diminution of rent, and, taking into consideration these two circumstances and the other evidence in the case, has recorded a finding to the following effect :

" This clearly shows that the residence has not become discomfortable or useless."

The effect of the appreciation of evidence by the lower Court amounts to a finding that though there was a sensible diminution of light and air which the plaintiff was accustomed to receive through the lower two windows, the occupation of the house has not become uncomfortable. In *Jamnadas Shankarlal* v. *Atmaram Harjivan* (1) it was held that the re-erection of his house by the defendant notwithstanding notice from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light, is an injury which cannot be adequately redressed by an award of damages, and against which the Court will grant relief by issuing a mandatory injunction directing the defendant to pull down so much of the house as is necessary to stop the injury. In *Ghanasham Nilkant* v. *Moroba Ramchandra* (2) it was held that though the plaintiff's light had been sensibly diminished by the defendant's new building, there had not been such a large, material and substantial damage as to require interference by injunction, or that the plaintiff's room had been rendered unfit for the purpose for which it might reasonably be expected to be used. To the same effect are the decisions in the cases of *Kalliandas* v. *Tulsidas* (3) and *Framji Shapurji* v. *Framji Edulji* (4). In *Colls* v. *Home and Colonial Stores, Ltd.* (5) it was held that to constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and in the case of of business premises, to prevent the plaintiff from carrying on his business as beneficially as before. At p. 204 Lord Davey observes :

" According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement does not affect the question. The actual user will neither increase nor diminish the right."

In *Jolly* v. *Kine* (6) Lord Loreburn observed (p. 2) :

" The law on this subject has been laid down in this house in the case of *Colls* v. *Home and Colonial Stores, Ltd.* (5) and I understand it to be as follows . . . . . He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, having regard to the locality and surroundings. That is the basis on which the decision of this house proceeded."

Both the cases were fully discussed by the Privy Council in a later decision in *Paul* v. *Robson* (7), where it was held that the decision in *Jolly's* case (6) is an authoritative exposition of the decision in *Coll's* case (5) and that the law formulated by Lord Davey is the law laid down by that decision, viz., that the owner of a dominant tenement does not obtain by his easement a right to all the light he has enjoyed during the period of prescription but obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to to the locality and surroundings, and that there is no infringement acquired by ancient lights unless that which is done amounts to a nuisance. Peacock on Easements at p. 633 states that the test of under what conditions adequate relief can be afforded by pecuniary compensation is difficult of precise definition, as every case of actionable disturbance must depend on its own circumstances and vary in degree, but so far as it is possible to deduce any principle of general application from the decisions, it seems that where the damage caused

(1) [1877] 2 Bom. 133.
(2) [1894] 18 Bom. 474.
(3) [1899] 23 Bom. 786=1 Bom. L. R. 459.
(4) [1905] 30 Bom. 319=7 Bom. L. R. 825.
(5) [1904] A. C. 179=73 L. J. Ch. 484=20 T. L. R. 475=53 W. R. 30=90 L. T. 697.
(6) [1907] A. C. 1=76 L. J. Ch. 1=23 T.L.R 1=51 S. J. 11=95 L. T. 656.
(7) A. I. R. 1914 P. C. 45=42 Cal. 46=41 I.A. 180 (P.C.).

by the disturbance is not irremediable, or where the comfort or utility of the dominant tenement has not been destroyed or very substantially diminished, the Court will usually award damages instead of granting an injunction, but where the case is one of irreparable or very substantial injury, a mandatory injunction and not damages will be granted. Having regard to the finding in this case that though the light and air has been sensibly diminished, the occupation of the house has not become uncomfortable, we think this is not a case for granting a mandatory injunction, and that the view of the lower Court that pecuniary compensation is an adequate relief is, in our opinion, correct.

It is not, therefore, necessary to go into the question whether there was acquiescence on the part of the plaintiff which would disentitle him to a relief by way of mandatory injunction. But the finding of the lower Court is clear on this point The defendant's house was commenced in 1921 and completed in May 1922, and it was not till 19th June 1922, that the plaintiff gave notice. It appears from the evidence that the plaintiff used to visit his house during the vacations when his college was closed, and that the plaintiff's uncle and the tenant knew that the building of the defendant was under construction, and must in all probability have informed the plaintiff of the construction of the defendant's building which caused an invasion of the plaintiff's right. In *Benode Coomaree Dossee* v. *Soudamıney Dossee* (8) it was held that where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building complained of by him has been completed, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, although there might be cases where it would be granted, and that mere notice not to continue building so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings, a sufficiently special circumstance for granting such relief. Peacock on Easements, p. 634, observes :

"If the plaintiff neglects to seek the assistance of the Court until after the obstruction complained of has been completed, as in the case of a building obstructing ancient lights, the Court will, as a general rule, withhold the mandatory injunction and grant compensation in damages, except in cases where extreme or very serious injury would be caused to the plaintiff by the refusal of the injunction, or where other special circumstances call for mandatory relief."

We think, therefore, that the view of the lower Court is correct, and that the order of remand must be confirmed, and this appeal must be dismissed with costs.

Baker, J.—I agree. In view of the finding of the learned Judge of the lower appellate Court that there is material diminution of the light which the plaintiff formerly received through the two windows, no doubt the plaintiff is entitled to some relief, but it will appear from the findings of ths lower appellate Court that the building of the defendant's house went on for about a year, and was finished in May 1922. Apart from the plaintiff's residence in Belgaum at the time of vacations, it has been pointed out by the lower appellate Court that his uncle, Ex. 31, was living there, and his tenant was living in the house itself. No action was, however, taken by the plaintiff until he gave a notice in June 1922 after the defendant's house was completed. It has been frequently held that where there has been acquiescence, the proper remedy would be by way of damages, and not by mandatory injunction : see *Binode Coomaree Dossee* v. *Soudamıney Dossee* (8), *Abdul Rahman* v. *D. Emile* (9), *Ghanasham Nılkant* v. *Moroba Ramchandra* (2), and I may here quote certain observations of Mr. Justice Farran in *Ghanasham Nılkant* v. *Moroba Ramchandra* (2) where he states (p. 488) :

"(1) that Courts ought not to interfere by way of injunction when obstruction of light is very slight and where the injury sustained is trifling, except in rare and exceptional cases . . . . . (2) that where the defendant is doing an act which will render the plaintiff's property absolutely useless to him unless it is stopped, in such a case, inasmuch as the only compensation, which could be given to the plaintiff, would be to compel the defendant to purchase his property out and out, the Court will not, in the exercise of its discretion, compel the plaintiff to sell his property to the defendants by refusing to grant him an injunction and awarding him damages on that basis . see *Holland* v. *Worely* (10). Between these two extremes, where the injury to the plaintiff would be less serious, where the Court considers the property may still remain

(8) [1889] 16 Cal. 252.

(9) [1893] 16 All. 69=(1893) A. W. N. 217.

(10) [1884] 26 Ch. D. 578=54 L. J. Ch. 268=49 J. P. 7=32 W. R. 749=50 L. T. 526.

with the plaintiff and be substantially useful to him as it was before, and where the injury is one of a nature that can be compensated by money, the Courts are vested with a discretion to withhold or grant an injunction, having regard to all the circumstances of the particular case before them."

The present case appears to be one in which though there is material diminution of the amount of light as formerly enjoyed by the plaintiff's house through the two windows the house is, in spite of this diminution, still of substantial use, it is still occupied by the tenant paying the same rent, and the case is one which falls under the latter paragraph of the quotation from *Ghanasham* v. *Moroba* (2). Moreover, in the present case the grant of a mandatory injunction would, if I am correct, result in somewhat serious consequences. It is in evidence that the lane between the plaintiff's house and the defendant's house is only six feet wide, and according to the definition of the 45 degrees rule in Ratanlal's Law of Torts, at p. 265, it appears that the wall opposite to the ancient lights should not be built higher than the distance between that wall and the ancient lights. But if the wall of the defendant's house is to be reduced to a height not greater than the distance between that wall and the ancient lights, the height of the defendant's house would be reduced to six feet or thereabouts, which would result in rendering it useless for all purposes. In these circumstances I agree that the case is one not for a mandatory injunction but for compensation by way of damages, that the view of the lower appellate Court is right, and that the appeal should be dismissed with costs.

P.R./R.K. *Appeal dismissed.*

A. I. R. 1929 Bombay 391

MADGAVKAR, J.

Malkarjunappa Sidramappa Deshmukh—Defendant 1—Appellant.

v.

Anandrao Annarao Deshmukh and *others*—Plaintiffs—Respondents.

Second Appeal No. 170 of 1927, Decided on 20th June 1929, from decision of Asst. Judge, Sholapur, in Appeal No. 77 of 1929.

Bombay Land Revenue Code, S. 119—Word "dispute" means dispute between two neighbouring owners and not dispute between Collector and owner—Determination of dispute between Collector and owner does not oust jurisdiction of civil Court.

The word "dispute" in the second part of the S. 119 means a dispute between two neighbouring owners and not a dispute between the Collector and the owner. The jurisdiction of the civil Court is not ousted in case of dispute between the Collector and the owner. It is only when a boundary dispute arises between the owners of adjoining lands and the Collector is called upon to determine the dispute, that his determination becomes final under S. 121, so as to oust the jurisdiction of the civil Court : *A. I. R.* 1927 *Bom.* 140 ; 10 *Bom.* 456 , 25 *Bom* 312, *Ref.* [P 393 C 1, 2]

A. G. Desai—for Appellant.

P. V. Kane—for Respondents.

Judgment — The dispute between the parties relates to a strip of land, two acres and thirty-three gunthas, shown in the map Ex. 66. Defendant 1-appellant was the owner of survey No. 527, pot 3, and the plaintiff-respondent, the owner of Survey No. 527, pot 1. Both these pot numbers adjoin a public road. When the Government Surveyor witness Hari (Ex. 69) thought that respondent 1 cut off the trees on this road, he commenced an inquiry and incidentally in the course of that inquiry he was of opinion that the boundary marks between pots 1 and 3 have been wrongly placed during all these years and that it was actually an old water course in which case the strip now in dispute falling to the south of the water course would belong to the appellant and not, as it was so far thought, to respondent 1. In September 1921, the Deputy Collector held the respondent guilty of encroachment on the public road. In October 1921 the respondent asked for a review of this order and that his land might be measured. That order on the part of the Deputy Collector remained. The appellant came to hear of it and hence this suit by respondent 1 for a declaration that the strip was of his ownership and not, as the authorities have now held, of the appellant's.

There is no question that in all the revenue records from 1869 to 1920 this strip had been included in the respondent's pot 1 which was shown as measuring eleven acres and four gunthas and the assessment levied from him accordingly, while the appellant's land was shown as measuring two acres an

thirty-three gunthas. Both the parties in suit had let their lands out for over twenty years to one and the same tenant. The boundary marks and the stones between them had not been very carefully preserved and only one such stone remained when the learned Subordinate Judge visited the scene. The tenant himself deposes that he had obtained possession of the strip in suit from the respondent and paid him rent on it. The respondent, therefore, relied both on title and on possession.

The appellant denied the respondent's title and possession and set up the order of the Collector as barring the jurisdiction of the civil Court.

The issues framed were not as definite and explicit as they might have been. There was no express issue recorded as to how far the action of the Collector was taken in a dispute within the meaning of S. 119, Bombay Land Revenue Code. The third issue was :

" What is the area of the suit property ? Is the plaintiff entitled to have the area amended in this Court ?"

After the issues were framed and before the evidence was led, the respondent made an application Ex. 19 asking to be allowed to add the words "adverse possession" after " entitled " in issue 3. That application was, in my opinion wrongly, refused. In the result, the evidence was led both on title and possession. Both the lower Courts held that there had been no dispute within the meaning of Chapter 9, Bombay Land Revenue Code, the order of the Collector was not determinative, both title and possession were with the respondent, and allowed the claim. Defendant 1 appeals.

With defendant 2, the owner of pot 2, survey No. 527, we are not now concerned.

It is argued for defendant 1-appellant that the word "dispute" in the second part of S. 119, Bombay Land Revenue Code, is not confined to a dispute between the parties to a litigation but includes a dispute between the Collector and one of the parties as in the present suit and that the Collector's order was, therefore, conclusive. If the respondent had relied on adverse possession, an express issue should have been framed and should at least have been remanded before the respondent's claim was decreed. In any case, the suit is barred by limitation as not having been brought within a year of the Collector's order.

It is contended for the respondent that the word "dispute" necessarily means a dispute between the parties to a litigation. Both the lower Courts have held as a matter of fact that there was no dispute. The order is not, therefore, "determinative" and the title and possession having been with the respondent the appeal must fail. It is further argued that as the jurisdiction of the civil Court, is not expressly barred, the word "determinative" should not be held to oust the jurisdiction of the civil Court.

In *Kanhailal* v. *Ismailbhai* (1) I had occasion to refer to the unsatisfactory wording of S. 121, Bombay Land Revenue Code and the difficulty caused by its wording in general and by the word "determinative" in particular. The present litigation is a fresh instance, if it were needed, of the advisablity of the legislature making its intentions clearer than they are at present. In the present case, for instance, on the actual facts of the dispute in so far as they appear from the evidence of the surveyor, Ex. 69, it is clear that he was actually only concerned on behalf of Government as to whether the respondent had cut down a few trees on the adjoining road. but without any obvious necessity and on the simple assumption that the water-course must have been the correct boundary succeeded in altering the revenue record which had stood uninterruptedly from 1869 to 1920 and in fact purported to transfer the ownership of two acres and eleven gunthas from one party to another. It is, to my mind, very doubtful, whether the legislature could intend to give the surveyor, even after the checking by the District Inspector, the authority to transfer titles to the lands by the simple process of holding that the old boundary marks were erroneous. This difficulty was in fact anticipated by me in *Kanhailal* v. *Ismailbhai* (1). Taking the Bombay Land Revenue Code, an enactment of the Provincial Legislature, and Ss. 119 and 121, Chap. 9 now in question, I adhere to the opinion that all that the legislature probably meant was that the revenue authorities who are responsible for demarcating and numbering the survey and pot numbers, and for the maintenance of roads

(1) A. I. R. 1927 Bom. 140.

and boundary marks, should be the persons to decide on these boundaries, but it could hardly have intended that they should have powers to transfer lands by the simple process as in this suit. As the learned Chief Justice and I held, it is doubtful if the Provincial Legislature could have power to invest, in theory, the Collector, in practice not a highly paid surveyor, with such authority as to oust the jurisdiction of the Court. There is a certain amount of weight in the argument for the respondent that the jurisdiction of the civil Courts is not expressly taken away by Acts such as the Revenue Jurisdiction Act, and therefore the word "determinative" need not be meant to imply such ouster. The point is, however, covered by the authoritative view of Sir Charles Sargent, C. J. in *Bai Ujam* v. *Valiji Rasulbhai* (2).

As to whether there is a dispute within the meaning of the second part of S. 119, Bombay Land Revenue Code, it has been held that

"Section 121 must be read along with Ss. 119 and 120 of the Code. It is only when a boundary dispute arises between the owners of adjoining lands, and the Collector is called upon to determine the dispute, that his determination becomes final under S. 121 of the Code so as to oust the jurisdiction of the civil Court. *Laxshman* v. *Antaji* (3)."

This case to a certain extent goes somewhat against the contention for the appellant. As to the wider meaning of the word "dispute" such as the present dispute between Government and a private owner, S 37, Bombay Land Revenue Code would rather apply and not S. 119. I agree, therefore, following the decision of *Lakshman* v. *Antaji* (3), that the word "dispute" in the second part of S. 119, means a dispute between two neighbouring owners and not as in the present case a dispute between the Collector and the owner. It is plain from the evidence of defendant 1, Ex. 65, and that of the surveyor, Ex. 69, that there was no dispute between the appellant and the respondent and no reference of such a dispute to the Collector but that it was a dispute between the Collector and the respondent as regards trees in which incidentally the surveyor thought fit suo motu to correct the boundary between the lands of the present parties. I agree, therefore, with the view of the lower Courts that there was no such dispute as is necessary for the application of S. 119, Bombay Land Revenue Code, in favour of the appellant.

On the merits as regards the boundary, I entirely agree with the lower Courts. The surveyor in fact thought it simple to hold that the old water-course must have been the boundary, and, on this assumption, corrected the boundary which has stood there for over half a century.

As regards title and possession, it was stated by the appellant's own pleader that his title deeds showed a similar area consistent with the old boundary. A similar area is also stated in the more recent rent notes taken by the appellant such as in 1896 and 1903. It is clearly proved that the title throughout has been with the respondent. Although both the parties had been letting out the lands to the same tenant, the rent notes in respect of the lands in suit have been passed in favour of the respondent and the rent has been enjoyed by him and not by the appellant, so that possession has been also throughout with the respondent.

On the question of limitation the issue now sought to be raised for the appellant found no place in the lower Courts. It is impossible to decide it without the facts on which there was no direct issue framed. Nor is it on the face of it clear that there was any order by the Collector in favour of the appellant necessitating a suit within a year by the respondent. It is not necessary, therefore, to remand the issue.

The appeal fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(2) [1886] 10 Bom. 456.
(3) [1900] 25 Bom. 312=2 Bom L. R. 1083.

A. I. R. 1929 Bombay 393

MARTEN, C. J. AND MURPHY, J.

Bijuboo—Applicant.

v.

Rajaballi Tayaballi and *others* — Opponents.

Civil Appln. No. 880 of 1928, Decided on 26th March 1929.

Limitation Act, S. 5—Appeal presented to Court without jurisdiction on advice of pleader; on rejection appeal presented to proper Court—Pleader's negligence—Appeal was barred.

A woman advised by her pleader filed a suit valuing her claim for jurisdiction and plea-

der's fee at an amount bringing it within the category of special jurisdiction cases, appeal from which lay to High Court. The case was admitted and registered as special jurisdiction case and was treated as such throughout the proceedings. From the decree in that suit the woman acting on the advice of the same pleader preferred an appeal to the district Court. The appeal was returned for want of jurisdiction and was subsequently presented to High Court. On the day when it was presented to High Court, it was out of time. The woman claimed extension under S. 5.

Held: that there was no likelihood of any reasonable or bona fide belief that the suit was not a special jurisdiction case and the appeal lay to the District Court, that the advice given by the pleader was result of negligence and not of any bona fide or considered belief and the woman was not entitled to extension of time and the appeal was barred. *A. I. R.* 1924 *Rang.* 118; 34 *Cal.* 216, *Foll.* [P 394 C 2, P 395 C 1]

M H. Mehta—for Applicant.

H. V. Divatia—for Opponents.

Judgment.—This is an application to excuse the delay in filing an appeal. The original suit, which was filed by the applicant as plaintiff, was decided by the Joint First Class Subordinate Judge on 23rd January 1923 From that decree, it is said, under advice from the local pleaders at Ahmedabad, an appeal No. 106 of 1928 was filed within time in the Court of the District Judge of that place. The appeal appears to have been admitted and an interim injunction was granted against the defendants, but a preliminary point was raised on behalf of the opponents, and it was held by the learned District Judge, that the appeal did not lie to his Court, but to the High Court, and that he had no jurisdiction to hear it. This decision was given on 20th July 1928, and the memorandum of appeal was returned to the applicant on 28th July 1928. It was presented to this Court on 30th July 1928. The appeal in question is obviously out of time, and we have been asked to excuse the delay under S. 5, Lim. Act on the ground of sufficient cause.

The only reason given by the applicant in the application is that the presentation of the appeal to the District Court was under advice from the local pleaders at Ahmedabad. This is stated in para. 2 of the application. On the other hand, the opponents have urged that no affidavit of any pleader or pleaders said to have given any such advice, has been filed by the applicant, and that the applicant herself in her plaint in the original suit specifically valued the claim for jurisdiction as well as for pleaders' fee at Rs. 6,000 and that therefore, her suit was rightly treated and registered as a special jurisdiction one throughout; that the petitioner's pleader in the suit and in the appeal to the District Court was the same gentleman, and that there was therefore no likelihood of any reasonable or bona fide belief that the suit was not a special jurisdiction one and that the appeal lay to the District Court. It has also been urged that the point as to where the appeal lay did not involve any complicated question of law or fact, on which there may be difference of opinion or mistake of law, that the petitioner's own plaint and the proceedings in the suit throughout made it clear that her legal adviser must have known that it was a special jurisdiction suit and that if, however, in spite of this, the petitioner was advised by her pleader that the appeal should be filed in the District Court, such advice was the result of negligence and not of any bona fide and considered belief, and that the opponents should not be made to suffer for it

The main difficulty in the applicant's position is that no reasonable explanation of what happened has been furnished to us in the course of the hearing of the application. It does not seem to be a matter in which there could be a mistake, as is alleged by the opponents and not denied by the applicant's learned pleader. The pleader employed by the applicant in the lower Courts was the same in each of them, and his action is unintelligible for the suit having been tried as a special jurisdiction one throughout, he must have been well aware that the appeal from that decision was not to the District Court. Mr. Mehta has suggested that, in the nature of the suit, it was within the plaintiff's power to value it as she chose, and that even in the original Court it could have been valued as, in fact, the appeal was valued ultimately in the District Court. But this argument seems to me to be beside the point, for as I have already said, the suit was throughout treated as a special jurisdiction one and what has actually happened could only have been done intentionally, for what reason it is not now possible to say, or if it was unintent-

tional, it must have been the result of very great carelessness in the Court below.

Section 5, Lim. Act, within which the application falls, enacts that an appeal may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal, or making the application, within such period. We have been referred by the opponent's learned pleader to two reported cases on the point. The first of these is to be found in *Tin Tin Nyo* v. *Maung Ba Saing* (1). In that case it was held on the facts that where there was a mistake that can only be accounted for by the fact that no care at all was taken, that no consideration was given to the question as to the forum in which the appeal lay, and that the very obvious necessity for considering the value of the lands, the subject of that appeal, for purposes of jurisdiction was entirely neglected, and that accordingly there was no sufficient cause for admitting the appeal after due date, and the ruling is, that the fact that the mistake has not been observed by other people may be considered in extenuation only in cases where there is a real doubt as to the forum, or the question of the proper forum is for some reason difficult to decide.

Then, in another case relied on for the opponent, *Sarat Chander Bose* v. *Saraswati Debi* (2), it was held that where it was not established that the belief of the appellant that the appeal lay to the District Court, was formed with due care and attention and that there was consequently sufficient cause for not presenting the appeal within time, the appellant was not entitled to an extension of time by virtue of S. 5, Lim. Act, and that it was so barred.

As I have already observed, in the present case no rational explanation of what was done in the Courts below has been offered to us in this Court. We think, therefore, that the facts are covered by the authorities I have quoted, and that this is not a fit case in which the delay should be excused.

The application must be dismissed with costs.

V.B./R.K. *Application dismissed.*

(1) A. I. R. 1924 Rang. 148=1 Rang. 584.
(2) [1907] 34 Cal. 216=5 C. L. J. 380.

A. I. R. 1929 Bombay 395

MADGAVKAR, J.

Galab Bhai Lallu Bhai—Appellant.

v.

Kika Jivan—Respondent.

Second Appeal No 197 of 1927, Decided on 4th July 1929, against decision of Dist. Judge, Surat, in Appeal No. 77 of 1925.

Civil P. C., S. 64—Attachment is not complete before prohibition and proclamation under O. 21, R. 54—Sale by judgment-debtor after order of attachment but before completion under O. 21, R. 54 is not within S. 64—Civil P. C., O. 21, R. 54

Attachment is not complete until prohibition and proclamation under O.21, R. 54 is effected. It can hardly be said that immovable property is attached on the mere order of attachment until that order is followed up in the manner laid down in O. 21, R. 54. Mere information by attaching creditor to a purchaser from judgment-debtor by letter before the date of the sale and after order of attachment was passed but before the actual prohibition and proclamation does not suffice to complete and convert the order for attachment into a legal attachment. In the absence of a legal attachment S. 64 has no application 42 *Mad.* 844 (*F. B.*); *A. I. R.* 1928 *P. C.* 130; *A. I. R.* 1923 *Lah.* 423, *Rel. on.* [P 396 C 1, 2]

H. V. Divatia—for Appellant.

G. N. Thakor and *R. J. Thakor*—for Respondent.

Judgment.— The plaintiff-appellant obtained a decree against one Pema Parbhu on 21st September 1920. The plaintiff applied in execution on 16th January 1923, obtained an order of attachment with notice under O. 21, R. 54, returnable on 29th June. On 19th June 1923, the judgment-debtor sold the property to the defendant-respondent Kika, and the actual prohibition upon the judgment-debtor and proclamation were effected on 22nd June 1923. The question in this appeal is whether the sale to the respondent by the judgment-debtor on 19th June 1920, after the order of attachment but before the actual prohibition and proclamation under O. 21, R. 54, is voidable at the option of the appellant under S. 64, Civil P. C.; secondly, if not, whether it can be set aside under S. 53, T. P. Act.

Both the lower Courts held that the respondent had been negotiating for the purchase of the land some time prior to the application for execution, and had paid a proper purchase price in good faith, although the appellant decree-holder informed him by letter on 17th June of the order for attachment. They

upheld the sale and dismissed the application for execution chiefly on the strength of *Sinnappan* v. *Arunachalam Pillai* (1).

It is argued for the appellant that in the *Madras* case knowledge of the order for attachment on the part of the purchaser was not proved as it has been held proved in the present case, and the object of prohibition and promulgation under O. 21, R. 54, being notice, and that object being served in the present case by the letter of the appellant, the latter is entitled to set aside the sale under S. 64, Civil P. C or at least under S. 53, T. P. Act. It is contended for the respondent that an order for attachment is only the beginning and not the end of the attachment and the attachment is not complete until prohibition and proclamation under O. 21, R. 54. S 64, therefore, has no application . on the facts as held by the lower Courts, the plaintiff-respondent is a bona fide purchaser for value, and the sale cannot be set aside under S. 53, T. P. Act. In any case as the notice under O. 21, R. 22, on the judgment-debtor was not returnable till 29th June 1923, no attachment should have issued until he appeared on this date and showed cause and as in the case of a sale without notice, such attachment is held to be invalid by *Parashram* v. *Balmukund* (2) and *Gopal Chunder Chatterjee* v. *Gunamoni Dasi* (3).

Attachment, in my opinion, is not complete until prohibition and proclamation under O. 21, R. 54. It can hardly be said that immovable property is attached on the mere order of attachment until that order is followed up in the the manner laid down in O. 21, R. 54. The view of the Full Bench of the Madras High Court in *Sinnappan* v. *Arunachalam Pillai* (1) is followed in *Mula Ram* v. *Jiwanda Ram* (4) and derives support from the observations of their Lordships of the Privy Council in *Muthiah Chetti* v. *Palaniappa Chetti* (5). Their Lordships observed (p. 135) *of* 30 *Bom. L. R.*

"... under the Civil Procedure Code in India the most anxious provisions are enacted in order to prevent a mere order of a Court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere order, and is something which is to be done and effected before attachment can be declared to have been accomplished ... No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Code have been done."

Though the question before their Lordships was in regard to the application of S. 11, Lim. Act, their observations apply in the present case.

In regard to the contention for the appellant that he informed the respondent by letter before the date of the sale after order that fact does dot suffice to complete and convert the order for attachment into a legal attachment. In the absence of a legal attachment S. 64 has no application. It is not, therefore, necessary to consider the argumentum ab inconvenienti. But if the Courts have to go into the knowledge, actual or probable, of the parties instead of the prohibition and the proclamation by themselves laid down by O. 21, R. 54, the proceedings in execution, sufficiently protracted and difficult under the law, would become almost impossible. In my opinion, the appellant, therefore, is not entitled to the benefit of S. 64 merely by reason of his letter to the respondent prior to the sale being taken by the latter from the judgment-debtor. In this view, it is not necessary to consider the alternative argument for the respondent attacking the validity of the attachment before the date fixed for the return of the notice under O. 21, R. 22. The authorities cited by him are both cases of sale in the absence of notice, and it does not follow that an order for attachment is equally voidable.

With regard to S. 53, on the finding of the lower Courts that the respondent had been negotiating for the purchase of the land for some considerable time before, and that he paid an adequate price, he must be taken to be a transferee in good faith. There is no sufficient reason to differ from the view of the lower Courts that the appellant has failed to prove the necessary ingredients under S. 53 to avoid the sale in favour of the respondent. The appeal fails, and is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

(1) [1919] 42 Mad. 844=37 M. L. J. 375=10 M. L. W. 391=53 I. C. 207=(1919) M. W. N. 678 (F. B.).
(2) [1908] 32 Bom. 572=10 Bom L. R. 752.
(3) [1892] 20 Cal. 370.
(4) A. I. R. 1923 Lah. 423=4 Lah. 211.
(5) A. I. R. 1928 P. C. 139=51 Mad. 349=55 I. A. 256 (P. C.).

* A. I. R. 1929 Bombay 397

RANGNEKAR, J.

Yeshvantibai Eknath Vijaykar, In re.

Appln. for Letters of Administration Decided on 21st January 1929.

***(a) Succession Act (1925), S. 218 (2)—Court has discretion to grant administration to any one or more of persons entitled to any part of deceased's estate—Court should grant joint grant only when circumstances are sufficiently strong.**

Under sub-Cl. (2) the Court has a discretion to grant administration, to any one or more of the persons entitled to any part of the deceased's estate. The Court at all times prefers a sole administrator to a joint administrator and it is only when the circumstances are sufficiently strong that it will be induced to exercise its discretion in favour of joint grant. When such circumstances do not exist, joint grant should not be made. *In the Goods of Richardson*, (1871) 2 *P. & D.* 244, *Ref.* [P 397 C 2]

(b) Succession Act (1925), S. 246—Application for grant of administration for benefit of minors can be made only under S. 246—It must be shown that minors are solely entitled to estate of intestate.

An application for grant of administration for the use of benefit of minors can be made only under S. 246. It must be shown that the minors are solely entitled to the estate of the intestate. Where they are not solely entitled, the application cannot be granted. Practice in England cannot be followed when there are clear provisions of law in the Succession Act to the contrary. [P 398 C 1, 2]

Blunt of Craigie, Blunt & Caroe—for Petitioner.

Judgment.—This is an application by the widow of one Eknath Dwarkanath Vijayakar, on behalf of the minor sons of the deceased, for being appointed as guardian for the purpose of applying jointly with another son of the deceased, namely, Motiram, and for letters of administration of the property and credits of the deceased for the use and benefit of the said minors and limited during the period of the minority of the elder of them.

The deceased died leaving behind him the petitioner as his widow, Motiram, a son by his pre-deceased wife and who is of age, and two sons, Madhav and Vishnu, being the sons of the petitioner both of whom are minors, and two minor daughters.

There are two objections raised to the petition. The first is that the petitioner is applying for a joint grant.

Section 218 (1), Succession Act, 1925 runs as follows :

"If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate."

Sub-Cl. (2) states :

"When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them."

This section shows that in the first instance the grant is to be made to one person who is entitled to some part of the deceased's estate. Under sub-Cl. (2) it is undoubtedly true that the Court has a discretion to grant administration to any one or more of the persons entitled to any part of the deceased's estate. The Court at all times prefers a sole administrator to a joint administrator, and it is only when the circumstances are sufficiently strong that it will be induced to exercise its discretion in favour of a joint grant.

It is argued that in England joint administration may be granted with the consent of all the parties. No doubt, that is true as appears from some of the old decisions, but in *In the Goods of Richardson* (1) it was held that in the case of next of-kin and a person interested in distribution of the estate the consent of all persons interested is not a sufficient ground for departing from the general rules as to grants of administration. The rule that as far as possible joint grants should not be made has been acted upon by the Courts for centuries. It is a sound rule, and a departure from it would introduce laxity which might lead to dangerous consequences.

In *In the Goods of Richardson* (1) the deceased died intestate leaving a widow and several minor children by a former wife. During his lifetime he had been assisted in his business by his brother. On the other hand, his widow to whom he had been married but a short time was entirely unacquainted with its management. These circumstances were held not sufficient to authorize the Court to grant joint administration to the widow and to the brother as guardian of the minor children.

The position here seems to me to be much the same. The ground on which administration is sought in this case is set out in para. 8 of the petition. In

(1) [1871] 2 P. & D. 244=40 L. J. P. 36=19 W. R. 979=25 L. T. 884.

that paragraph the petitioner says that immediately after the death of the deceased the said Motiram Eknath removed and took charge of all the papers belonging to the deceased, and that she has no knowledge as to what the estate consisted of. The fact that Motiram has consented to the joint administration sought by the petitioner shows that Motiram is not in any way acting adversely to the petitioner or the minors or the estate. The older decisions in England show that unless special circumstances are shown to exist necessitating a joint grant the Court would always follow the practice and refuse to make a joint grant. I do not think, therefore, that I would be justified in departing from the usual practice followed by this Court as to joint grants.

The second objection seems to me to be more fatal. S. 217, Succession Act of 1925, lays down :

"Save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of this Part" (9 of the Act.)"

Section 236 states :

"Letters of administration cannot be granted to any person who is a minor or is of unsound mind."

Therefore, under the Succession Act, a person who is a minor is not entitled to a grant of administration. The present application is for an administration *durante minore aetate* by the petitioner as guardian for the use and benefit of the minors until the elder of them attains majority. This application can only be made under S. 246, Succession Act. Under that section, before such a grant can be made it must be shown that the minor or minors for whose benefit the grant is to be sought are solely entitled to the estate of the intestate. In this case, the two minors on whose behalf and for whose benefit the present application is made are not solely entitled to the estate of the deceased. They as well as the said Motiram who is of age are entitled to the estate in equal shares subject of course to the maintenance of the petitioner and provisions for marriage of the petitioner's two minor daughters. This section is quite clear and is binding on me. I am unable, therefore, to see how the present application can be granted having regard to the clear and unambiguous provisions of S. 246. It is undoubtedly true that in England :

"where there are several next-of-kin, some of whom are minors and some of full age, although it is the practice to grant administration to those of full age in preference to the guardian of the minors, yet the guardian of the minors may be preferred, if the interest of the minor preponderates over that of the major next-of-kin. Mortimer on Probate Practice, p. 369, citing *Cartright's* case (2)."

Where there is a clear provision made by the Succession Act, I am not at liberty to follow the practice or the rules in force in England. Under R. 609 of the rules on the Original Side, I can only refer to the English practice and follow it if there is no rule laid down in the Succession Act. There being a clear provision of law binding on me I am unable to follow the English practice.

There is no question in this case as as to any danger to the minor's interest as according to the practice of this Court, a justifying surety would be taken from the person who applies for letters of administration to the estate of the deceased person in which the minors are interested.

In the result, the application must be rejected.

R.M./R.K. *Application rejected.*

(2) 1 Freem 258.

A. I. R. 1929 Bombay 398

FAWCETT, J.

Bheraji Samrathji & Co.—Plaintiffs.

v.

Vasantrao Govindrao Prabhakar—Defendant.

Original Civil Jurisdiction Suit No. 533 of 1928, Decided on 20th September 1928.

Presidency Towns Insolvency Act (3 of 1909), Ss. 17 and 18—Suit against insolvent after order of adjudication — Suit is not to be dismissed but is only to be stayed.

Where a suit is filed by a creditor against an insolvent after the order of adjudication and without leave of the Court to file the suit under S. 17, it is not obligatory on the Court to dismiss the suit as being barred but it has merely the option of staying it under sub-S. (3), S. 18 : *Cases Referred.* [P 400-C 2]

Lalji—for Plaintiffs.

Munshi—for Official Assignee.

Judgment.—In this suit the Official Assignee has appeared by counsel and has objected that the suit is barred by S. 17, Presidency Towns Insolvency Act, 1909. That section provides that :

"On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose."

In the present case the suit was brought without any such leave and, in fact, the plaint does not mention that the defendant was insolvent. It was stated by Mr. Lalji that at the time of the filing of the suit the Official Assignee was not aware of that fact Mr. Munshi cited the ruling in *In re, Dwarkadas Tejbandas* (1) to the effect that bringing a suit, without getting the leave mentioned in S. 17 in a case to which that section applies, is an absolute bar to the suit and that leave cannot be granted after its institution. On the other hand, Mr. Lalji for the plaintiffs relied upon *Mahomed Haji Essack* v. *Abdul Rahiman* (2), where it was held that the wording of sub-S (3), S. 18, Presidency Towns Insolvency Act of 1909 is wide enough to justify a stay of proceedings in an action, which was not pending on the date of the order of adjudication. In that particular case the suit was filed after the order of adjudication and without leave to file the suit, but subsequently such leave was obtained under S. 17. When the suit came on for hearing Macleod, J., stayed the proceedings in the suit until further orders.

On appeal from that order, one of the questions argued was that sub-S. (3), S. 18 was the only provision which could apply as justifying the stay order, and that it only covered a case where a suit had been instituted before the adjudication order was made. The learned Chief Justice Sir Basil Scott and Heaton, J., however, overruled this objection, following the observations of the Division Court in England in *Brownscombe* v. *Fair* (3), where the opinion was expressed that the corresponding words of S. 10, English Bankruptcy Act, which are practically identical with those of S 18 (3), Presidency Town Insolvency Act, were wide enough to justify a stay of proceedings in an action which was not pending at the time of the order of adjudication. Mr. Munshi asked me to distinguish this ruling on the ground that in that case leave to file a suit had been actually obtained under S. 17. It is to be remarked that if the decision in *In re Dwarkadas Tejbhandas* (1) is correct, the leave that was granted after the suit was filed was ultra vires and of no effect. But, even apart from that, it is clear that their Lordships did not, in any way, base their ruling upon the fact of leave having been granted, but upon the opinion as to S. 10, Bankruptcy Act, which had been expressed in *Brownscombe* v. *Fair* (3). In that case an objection was taken to an action against the bankrupt on the ground that the bankruptcy petition had been presented by the defendant and that the action being in respect of a debt provable in the bankruptcy, had been commenced without the leave of the Court. Both the Master and the Judge-in Chambers refused to make a stay order as prayed, and the defendant appealed The Court held that the appeal ought to be allowed, and the action restrained, as there were no special or exceptional circumstances which would entitle the Court to allow it to continue. In his judgment Whiles, J., remarked (p. 85) :

"Mr. Rose Innes says that the jurisdiction of the Court is limited to actions commenced before bankruptcy proceedings are initiated ; but I do not think so, for the words, are 'perfectly general.' "

In those remarks he was referring to the provisions of sub-S. (2), S. 10, Bankruptcy Act, which are practically idential with those in sub-S. (3), S. 18. I think that is perfectly clear from the report, although I notice that in Halsbury's Laws of England, Vol. 2, Art. 96, p. 63, foot-note (b), it is said that stay orders in the case of actions commenced after the receiving orders are passed under S. 9, Bankruptcy Act of 1883, which has now been superseded by S. 7, Bankruptcy Act of 1914. Possibly, it was considered safer to pass such orders under S. 9, rather than S. 10. And this

(1) [1915] 40 Bom. 235=31 I.C. 948=17 Bom. L.R. 925.
(2) [1916] 41 Bom. 312=33 I.C. 694=18 Bom. L.R. 198.
(3) [1887] 58 L.T. N.S. 85.

view seems to be still accepted because the case of *Brownscombe* v. *Fair* (3) is cited in William's Bankruptcy Practice, 12th Edn., at p. 65, in regard to S. 7, Bankruptcy Act of 1914.

Mr. Munshi has cited some other cases, but none of them seems to me to afford any ground for holding that the ruling in *Mahomed Haji Essack* v. *Abdul Rahiman* (2) does not govern the present suit. In *Ramaswami Pillai* v. *Govindasami Naicker* (4) it was held that, as the section of the Provincial Insolvency Act, corresponding to S 17, Presidency Towns Insolvency Act, does not affect an absolute stay of suits against the insolvent, but only makes it necessary that leave to sue should be obtained from a Court before a suit could be filed against him while the adjudication was in force, it could not be said that the suit was "stayed" within the meaning of S. 15, Lim. Act. That does not affect the question before me, but merely points out that leave can be given by a Court to file a suit, although the suit is in regard to a debt provable in insolvency. The same remarks apply to *Sidhraj* v. *Alli Haji* (5), which follows *Ramaswami Pillai* v. *Govindasami Naicker* (4). *In re Maneckchand* (6) was also referred to, but that is a case dealing with sub-S. (1), S. 18 and not sub-S. (3) of that section. No doubt the learned Judge in that case said that sub-S. (1) applied to the familiar case where the insolvency Court has power to stay some ordinary civil suit which may be pending at the date of the insolvency against the insolvent, and the same remark might be applied to sub-S. (3).

I quite agree that, if the matter was res integra, there would be grounds on which it might be held that sub-S. (3), S. 18, was only intended to apply either to a case where the suit had been filed prior to the order of adjudication, or possibly to a case where it was filed after that order, if leave to sue had been given. In fact, the Lahore High Court in *Panna Lal-Tassaduq Hussain* v. *Hira Nand-Jiwan Ram* (7), in regard to the corresponding provisions in sub-S. (2), S. 28 and S. 29, Provincial Insolvency Act 5 of 1920, have held that the provisions of S. 29, which correspond to sub-S. (3), S. 18, Presidency Towns Insolvency Act, only extended to suits that were pending at the time of the adjudication order

I think, however, I am bound by the ruling of the appeal Court in *Mahomed Haji Essack* v. *Abdul Rahiman* (8), so that I am not obliged to dismiss the suit as being barred by S. 17, but have the option of merely staying it under sub-S. (3), S. 18. I might, of course, refer the question to a Full Bench. But, in the present case, I do not think that the difference between dismissing the suit and merely staying it is such as to necessitate putting the parties to the expense of a further hearing. Therefore, I give the plaintiffs the benefit of the ruling in *Mahomed Haji Essack* v. *Abdul Rahiman* (2), and I direct the suit to be stayed pending further orders. Each party to bear his own costs.

V B./R.K *Suit stayed.*

(4) [1919] 42 Mad. 319=36 M.L.J. 104=49 I. C. 625=(1919) M.W.N. 698.
(5) A I.R. 1923 Bom 33=47 Bom. 244.
(6) A.I R. 1922 Bom. 390.
(7) A.I.R. 1928 Lah. 28=8 Lah. 593.
(8) [1916] 41 Bom. 312=33 I.C. 694=18 Bom. L.R. 198.

A. I. R. 1929 Bombay 400

MARTEN, C. J., AND MURPHY, J.

Fibre Aloes Factory—Appellants.

v.

Jaffer Rasool—Respondent.

First Appeal No. 510 of 1927, Decided on 3rd April 1929, from decision of Workmen's Compensation Commissioner, Bombay, in Appln. No 264/C-56 of 1927.

(a) Workmen's Compensation Act, S. 10 (3)—Workman receiving serious injury—Registered notice to factory proprietors received back undelivered—Notice held to have complied with S. 10 (3).

A workman was employed as a cooly in a factory where he met with a serious accident which resulted in the loss of his right hand. During the period of his stay in a hospital as an indoor patient, he sent a notice to the Proprietors of the factory by registered post which subsequently came back with the endorsement " left " on it.

Held: that the notice complied with S. 10 (3) for it was sent by registered post addressed to any office or place of business of the person on whom it was to be served.

[P 403 C 2]

(b) Workmen's Compensation Act, S. 10 (3)—Workman receiving serious injury on 23rd February—Notice to Solicitors of Factory Proprietor on 28th March—Notice held to have been given as soon as practicable.

A workman employed as a cooly in a factory met with an accident on 23rd February

1927. On 28th March 1927, while he was admitted in a hospital as an indoor patient, he sent a notice addressed to the solicitors of th eproprietors of the factory. This letter was received by them on 21st April 1927.

Held, that having regard to the ignorance of, and serious nature of the injury received by, the workman, the notice of the accident was given as soon as practicable after the happening thereof within the meaning of S. 10 (1). [P 404 C 2]

* (c) **Workmen's Compensation Act, S. 10, Proviso—Proviso applies even where no notice is given** (*Obiter*).

Proviso would apply even where no notice has been given. The expression 'no ice has not been given in due time' covers a case where no notice at all has been given. [P 404 C 1]

Y. V. Bhandarkar—for Appellants.

Kirtikar and *P. S. Bakhale*—for Respondent.

Marten, C. J.—This is an appeal under S. 30, Workmen's Compensation Act, 1923, against the judgment of the Commissioner dated 22nd September 1927, awarding compensation to the respondent. There are two grounds urged before us. One is that the appellant, the Fibre Aloes Factory by the proprietor Amritlal Amarchand had not contracted under S. 12 (1) :

" for the execution by ... the contractor of ... work which is ordinarily part of the trade or business of the principal,"

and that the Commissioner wrongly construed the agreement Ex. 11 as creating the relationship of principal and contractor between the appellants and one Ahmed Ismail. As regards that point we are satisfied that the learned Commissioner was correct in thinking that the agreement comes within S. 12 (1). Whether as regards the land in suit the agreement also amounted to a lease as argued by the appellants is in our opinion immaterial. That being so, the appellants are liable to pay compensation under S 12 (1) to any workman employed by their contractor Ahmed Ismail. The respondent Jaffer Rasool was a workman, and accordingly so far as that part of the case is concerned the decision in his favour is correct.

The other point is that the respondent never gave notice as required by S. 10 of the Act. The Commissioner found that his failure to give notice was due to " sufficient cause," but as to that a question of some importance in principle arises. To determine that point we must first have the facts clear. What the Commissioner found is that after the accident the engineer in charge of the factory arranged to send the applicant to J. J. Hospital. Then later on he says :

" So far as the contractor is concerned he had ample notice as it was he who arranged to send him to the Hospital. No doubt he had no written notice but under S. 19 (Proviso 2) the failure to give notice is due to sufficient cause, viz., that the contractor (the immediateemployer) hadfull knowledge of it,"

Now the engineer in charge was not the contractor, and consequently to that extent these two statements are contradictory. I appreciate that under S. 10 (2) the notice in question is to be served on the employer :

" or upon any person directly responsible to the employer for management of any branch of the trade or business in which the injured workman was employed,"

But the engineer did not go into the witness-box, and so far as the evidence before us goes, there is nothing to show that the contractor himself was aware of this accident though possibly one may infer it from the knowledge of the engineer in charge. But on this point we want specific findings.

Another matter is that in the petition of the applicant to the Commissioner dated 4th July 1927, he specifically states in para. 6 that :

" the opposite party was requested either to deposit compensation or to settle the matter by agreement, but it has proved impossible to settle the question in dispute, because they have denied liability to pay any compensation."

We think that the learned Commissioner should have found whether that allegation was correct, and if so, whether that request was oral or in writing and what was its date and what were its contents. Mr. Kirtikar who appears for the workman has tendered to us what purports to be a formal written letter of 28th March 1927, addressed to the present appellants which contains an endorsement :

" copy forwarded with compliments to the Commissioner for Workmen's Compensation, Bombay, for information."

There is a registered envelope attached to the same file which has a certain endorsement on it. Then there is what purports to be a letter from the solicitors for the appellants dated 9th May 1927, in which they say that the above letter of 28th March was delivered in their office on 21st April. We appreciate that it may not always be practicable in proceedings before the Commissioner to carry out the same exact procedure

which would be followed in the High Court. And we do not know if this alleged letter of 28th March was actually on the file, as it appears it ought to have been. But we do not think it satisfactory to dispose of this case on the hypothesis that this letter never existed, and was never sent to the Commissioner, or to the present appellants. We say nothing as to whether this letter and its purported reply are genuine or not. But on the face of them they purport to be genuine. Of course, on another occasion it will be for the workman to have those letters properly proved and for the appellants to contest them if they are in a position so to do.

The question then on this part of the case is whether we should attempt to decide in the unsatisfactory condition of the findings of fact at present before us. In our opinion, we ought not to do so, and we think that the proper course is to request the Commissioner to record further findings of fact on the matters I have mentioned, and to remit to us those findings at as early a date as practicable.

We will accordingly ask him to find :

(1) Whether the contractor himself arranged to send the workman to the Hospital or whether it was only the engineer in charge ?

(2) Whether at or about the time of the accident the contractor received any oral notice of the accident ?

(3) Whether the allegations in para. 6 of the petition are established, and if so, was the request in question of the applicant made orally or in writing and what was its date and what were its terms ?

(4) Whether any written notice dated on or about 28th March 1927, was sent or attempted to be sent to the appellants and to the Commissioner, and on what dates were the same received by or served on the appellants and the Commissioner respectively, and further whether any reply in writing whether by a letter of 9th May 1927, or otherwise was sent by the solicitors for the appellants ?

Our final decision of the appeal will stand over pending the further findings of fact by the Commissioner.

As regards the question of jurisdiction, as this High Court is the Court of Appeal from the Commissioner's decisions on certain questions under the Workmen's Compensation Act, I think that we must have the ordinary powers to enable us to see that proper justice is done between the parties, and that accordingly whether or no O. 41, R. 25, Civil P. C., applies to an appeal of this nature as to which I say nothing, we yet have the power to require proper findings of fact to be recorded before we are bound to give any decision on an alleged point of law.

Murphy, J.—I agree.

The Commissioner then returned the following finding on the issues sent :

(1) It was the engineer in charge who arranged to send the workman to the hospital and not the contractor : vide Ex. 6.

(2) The contractor did not, at or about the time of the accident, receive any oral notice of the accident but the engineer in charge Mr. Husen did receive notice of the accident inasmuch as he was informed by the applicant that the accident had happened and in fact attended to the applicant and sent him to hospital : vide Ex. 6.

(3) The allegations in para. 6 of the petition are established because the Bombay Claims and General Agency acting on behalf of the applicant addressed to the proprietors of the Fibre Aloes Factory, Powai Estate, c/o Messrs. Bhimji & Co., Solicitors, Fort, Bombay, a letter (Ex. 17) asking for compensation for personal injury by accident arising out of and in the course of his employment with the proprietors to the Fibre Aloes Factory in their factory, and to this Messrs. Bhimji & Co., Solicitors, replied (Ex. 19) on behalf of the proprietors, Fibre Aloes Factoey, stating that the applicant Jaffer Rasool was not in their client's employ.

(4) The applicant through his representatives, the Bombay Claims and General Agency, did send a letter dated 28th March 1927 (Ex. 20), to the opposite party by registered post addressed to the proprietors, Fibre Aloes Factory, Powai Estate, Kurla, which was returned undelivered by the post office. On 21st April a copy of this letter (Ex. 17) was addressed to the proprietors, the Fibre Aloes Factory, Powai Estate, c/o. Messrs. Bhimji & Co., Solicitors, Fort, Bombay, which was received by Messrs. Bhimji & Co., on 21st April 1927, (Ex. 18), and was acknowledged by them in their letter of 9th May (Ex. 19) No. 485-27 referred to above. A letter dated 28th March being a copy of the letter of 28th March was sent to the Commissioner of Workmen's Compensation, Bombay, and was received by him on 28th March 1927, being No. 38-1351 in the Inward Register of that office (Ex. 21).

(On receiving the findings their Lordships delivered the following judgments.)

Marten, C. J.—In our interim judgment of 1st October 1928, we held that the learned Commissioner had rightly held that the agreement Ex. 11 created the relationship of principal and contractor between the appellants and one Ahmed Ismail, and that, accordingly, the appellants were liable to pay compensation under S. 12 (1) to any workman employed by their contractor Ahmed Ismail, and that the respondent Jaffer Rasool was such a workman. We, however, re-

manded the case for further evidence on the point taken by the appellants that no notice, as required by S. 10 of the Act, had been given. We have now the findings recorded by Mr. Gennings, the present Commissioner and the successor of Mr. Patwardhan, who heard the case originally.

The more material facts appear to be as follows :—The accident was on 23rd February 1927. It was a serious one and ultimately resulted in the workman losing his right hand. He was sent to hospital by the engineer in charge of the factory, and was in the hospital as an indoor patient for some 40 days and as an out-patient for some further three months. His occupation is that of a cooly, and his standard of intelligence may be taken to be that of an ordinary cooly in default of evidence to the contrary. Then on 28th March 1927, which was within the 40 days or so during which the workman was an inpatient, he sent three letters by his agents, the Bombay Claims and General Agency. The first letter, Ex. 20, was sent to the

"Proprietors of the Fibre Aloes Factory, Powai Estate, Kurla,"

by registered post. That letter subsequently came back with the endorsement "Left" on it. One can see from the post-marks, that it was sent from Bombay on 28th March, and that it reached Kurla originally on the 29th. The appellants' complaint is that they were not living in this factory, and that they had let it out to their contractors. Be that as it may, they in the agreement, Ex. 11, described the factory as belonging to the Powai Estate, accordingly the normal place to send a notice would be to the factory of that estate. Therefore, in my opinion, this notice complied with S. 10 (3) of the Act for it was sent

"by registered post addressed to,...any office or place of business of the person."

on whom it was to be served. The proprietors of the Powai Estate could and should have made arrangements for correspondence to be forwarded to them, supposing they were living elsewhere.

In addition to this notice, the respondents' agents sent a copy of it, Ex. 21, to the Commissioner for Workmen's Compensation. That was duly received. They also sent another letter in similar terms, Ex. 17, addressed to

"the Proprietors, the Fibre Aloes Factory, Powai Estate, c/o. Messrs. Bhimji & Co., Solicitors, Bombay."

It is alleged by the appellants' solicitors that they did not receive the letter till 21st April. Why they did not, does not appear. At any rate, they waited till 9th May, before they replied by their letter, Ex. 19, saying that this letter had been delivered at their office on 21st April, and they repudiated the claim of the workman and stated that he was not in their client's employ. We have not got the envelope of the letter sent to c/o. Messrs. Bhimji & Co., and it is conceivable that that letter found its way in due course to the Proprietors, the Fibre Aloes Factory, Powai Estate, and was handed over to Messrs. Bhimji & Co. later on. But that is guess work.

Now, that being the position, it is contended first of all, that notice of the accident was not given "as soon as practicable after the happening thereof" within the meaning of S. 10(1). In our opinion, on all the facts of this particular case, notice was given as soon as practicable after the accident happened. The man here was a cooly, and presumably entirely ignorant of the Act, and he had this terrible injury to his person for which he was detained for more than 40 days in hospital. Notwithstanding this he gave a notice at or about the time he left the hospital. Having regard then to all the facts of the case, and bearing in mind that this is a new Act, we think that this notice complied with S. 10 (1). In saying this we appreciate that the agents who acted on behalf of this workman have made blunders which have prejudiced his case. For instance, in the plaint that was put in it was stated originally in para. 4 that notice of the accident was given as soon as practicable but the word " not " was afterwards inserted in ink, and one must presume that it was there when the workman put his thumb-impression on the document. On the other hand, he does say in para. 6:

" The applicant took the following steps to secure settlement by agreement, viz., the opposite party was requested either to deposit compensation or to settle the matter by agreement but it has proved impossible to settle the question in dispute, because they have denied liability to pay any compensation."

I think that para. 4 should be read along with para. 6 and the rest of this document and that the question whether notice was sent as soon as practicable is

really one for a lawyer to decide, and that under all the circumstances of this particular case the appellants have not been damnified or misled by this wording in para. 4 taken by itself.

But let me suppose for the sake of argument that notice as soon as practicable under S 10 (1) was not given. Then the next point is whether it was open to the Commissioner under the next proviso to excuse the delay, if he thought that the failure to give notice was due to sufficient cause. In fact, Mr. Patwardhan thought there was sufficient cause, but unfortunately for the workman, he has given as a reason one which it is difficult to substantiate, viz , that the engineer in charge had notice and that the failure to give notice was due to the fact that the contractor had thus full knowledge of it. But all that is proved is that the engineer in charge had full notice. The further findings of Mr. Gennings are that the contractor did not receive any oral notice of the accident at or about the time of the accident, although the engineer in charge did receive notice of the accident It may here be observed that according to the evidence of the workman he looked upon Husein, the engineer in charge as the owner, but knew that the contractor was living at Surat. In fact, he had only been working there for two days. He also said in cross-examination:

" When the accident happened the engineer was there. I requested him as proprietor."

Assuming then that the actual cause put forward by Mr. Patwardhan cannot itself be supported, is there anything else in the case which would enable the failure to be excused under this proviso. It has been, first of all, argued as a point of law that if no notice at all had been given, then the proviso could not apply as it contemplated a case where some notice is given, although not in time. As far as this point is concerned we hold that, in fact, notice was given here and in due time, and that even if it was not given in due time, yet it was given. And speaking for myself I am prepared to go one step further, and to say that the proviso would apply even supposing no notice whatever had been given. In other words, if no notice at all has been given " notice has not " I think " been given in due time " within the meaning of the proviso.

The next point is whether the failure to give notice within due time was due to sufficient " cause." We have already held that, in our view, it was given as soon as practicable. It follows therefore that in our view even if notice was not given as soon as practicable, there was at any rate sufficient cause for not giving it in due time within the meaning of the relevant proviso One must here bear in mind the circumstances of this serious injury to the workman; the length of time he was in the hospital; that he gave formal notice as soon as he was out; and that the engineer in charge of the factory had at this time full notice of this injury. Under all those circumstances, we do not think it necessary to send this case back again to the Commissioner in order to have what I may call, " the *i's* dotted and the *t's* crossed," particularly as the original Commissioner who heard the case is not now available We recognize that these workmen's compensation cases cannot be conducted with the same precision and the same form of pleadings and so on as one would expect in the High Court. Taking then a general view of the case and looking at all the facts including the fact now established that written notices were given within the meaning of the Act on 28th March 1927, we think that the workman did all that he could fairly be required to do, and that justice does not require us to remand the matter a second time to the Commissioner on the ground that he is the person who has to be satisfied and not this appellate Court.

Under all the circumstances of the case, then, we think the fair order will be to dismiss the appeal with costs.

Murphy, J.—I agree

V.S./R K. *Appeal dismissed.*

A. I. R. 1929 Bombay 404

PATKER AND WILD, JJ.

P. D. Shamdasani, In re.

Criminal Appln for transfer No. 176 of 1926, Decided on 24th June 1929

(a) Criminal P. C., S. 556 — Pecuniary interest even to small extent is disqualification independently of b as

Pecuniary interest even to small extent is a sufficient disqualification independently of the question whether the Magistrate is really biassed or likely to be biassed . 20 *Bom.* 502, *Foll.* ; *Queen* v. *Farrent*, 20 *Q. B. D* 58; *Allinson* v. *General Council of Medical Edu-*

cation and Registration, 1 Q. B. 750; *Leeson* v. *General Council of Medical Education and Registration*, 43 Ch. D 366, *Ref.*; 8 Bom. L. R. 947 and 15 *All.* 192, *Dist.* [P 406 C 1]

(b) Criminal P. C., S. 556—Consent or acquiescence cannot give jurisdiction nor can want of bona fides in objector affect question of disqualification.

Where a Magistrate is disqualified to try a case under S. 556, the disqualification is not cured by consent or acquiescence of parties, nor can want of bona fides on the part of the objector to the jurisdiction, affect the question of disqualification: 32 *All.* 635 and 2 *Cal.* 23, *Appr.* [P 406 C 2; P 407 C 1]

(c) Criminal P. C., S. 556 — Prosecution under S. 282, Companies Act — Magistrate shareholder of Company—Magistrate is disqualified to try case.

A Magistrate who is himself a shareholder in the company against whose auditors a prosecution is started under S. 282, Companies Act, must be deemed to be personally interested within the meaning of S. 556, and is not qualified to try the case without the permission of the Court to which appeal lies from his Court. [P 407 C 1]

Velinker—for Opponents.

Patkar, J.—This is an application for transfer of a case filed by the petitioner under S. 282, Companies Act, against the auditors of the Central Bank from the Court of the Third Presidency Magistrate to the Court of the Chief Presidency Magistrate. The application is based on two grounds: first, that the Third Presidency Magistrate is disqualified from trying the case under S. 556, Criminal P C., on the ground that he is a shareholder in the Central Bank of India, Limited, and, secondly, that on account of certain events that have happened, the applicant has reason to apprehend that he will not have a fair and impartial trial before the learned Magistrate.

It is urged on behalf of the applicant that the learned Magistrate is personally interested as he is a shareholder of the Central Bank. It appears that the learned Magistrate holds two or two and a half shares in the said bank. The personal interest of the Magistrate alleged by the petitioner is so insignificant that ordinarily no presumption would be drawn that the learned Magistrate would, in any event be biassed in favour of or against the accused.

In *In re, P. A. Rodrigues* (1), where a compounder in the employ of Treacher & Co. was convicted by the Presidency Magistrate of criminal breach of trust and it appeared that the Magistrate was a shareholder in the company, it was held that the Magistrate was disqualified from trying the case, and that as a shareholder of the company he had a pecuniary interest, however small, in the result of the accusation and was therefore personally interested in the case. The decision in that case is based on an amplification of the principle that no man is allowed to be a Judge in his own cause, and rests on the decisions in the cases of *Queen* v. *Farrant* (2), *Allinson* v. *General Council of Medical Education and Registration* (3) and *Leeson* v. *General Council of Medical Education and Registration* (4). It was held in *Allinson's* case (3), (p. 758):

"Where a person who has taken part in the judicial proceedings, or, you might say, has sat in judgment on the case, has any pecuniary interest in the result, however small, the Court will not inquire whether he was really biassed or likely to be biassed. The Court will say at once, it is against public policy that a person who has any monetary interest, however small, in the result of judicial proceedings should take part in them as a Judge. The Court will inquire no further, but will say at once that he is disqualified."

In *Serjeant* v. *Dale* (5), it was held (p. 567):

"The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

The decision in the case of *Emperor* v. *Cholappa* (6), relied on on behalf of the opponents, has no application to the facts of the present case. It was held in that case that the mere fact that the inquiry was made by the Magistrate is not to be regarded as a disqualifying ground, and that the phrase "interested" does not imply mere intelectual interest but something of the nature of an ex-

(1) [1895] 20 Bom. 502.

(2) [1887] 20 Q. B D. 58=57 L. J. M. C. 17=52 J. P. 116=36 W. R. 184=57 L. T. 880.

(3) [1894] 1 Q B 750=63 L. J. Q. B. 534=58 J. P 542=42 W. R. 289=70 L. T. 471.

(4) [1889] 43 Ch. D. 366=59 L. J. Ch. 233=38 W. R 303=61 L T. 849.

(5) [1877] 2 Q. B. D. 558=46 L. J. Q. B. 781=37 L. T. 153.

(6) [1906] 8 Bom. L. R. 947.

pectation of advantage to be gained or of a loss, or of some disadvantage to be avoided, by the person who is said to be interested in the case. The decision in *In the matter of the petition of Ganeshi* (7), also relied on on behalf of the opponents, does not apply to the present case as the Magistrate there in charge of the excise and opium administration of the district was held to be not personally interested merely by reason of its being his duty as an officer under Government to see that the law relating to the sale of opium is enforced and maintained. The present case falls under the class of cases of which the case of *In re, P. A. Rodrigues* (1) is a type.

In Halsbury's Laws of England, Vol. 19, p. 552, para. 1156, it is laid down :

"A distinction must be drawn between pecuniary interest and prejudice. The smallest pecuniary interest is, subject to any statutory authority to the contrary, a bar to the Justice acting, but where the interest is not pecuniary the question arises whether the interest is of such a substantial character as to make it likely that he has a real bias in the matter."

The interest, if pecuniary, need not be confined to the Justice himself to preclude his acting. Membership of a company or association which is interested is a bar, as also is a bare liability to costs, where the decision itself would involve no pecuniary loss."

As the accused in this case are the auditors of the company and in their capacity as such signed the balance-sheet, the shareholder may not be considered to be personally interested in them or in their case. But it cannot be said that the success or failure of the prosecution would have no effect upon the value of the shares of a shareholder. According to the authorities pecuniary interest even to a small extent is a sufficient disqualification independently of the question whether the Magistrate is really biassed or likely to be biassed.

It is urged on behalf of the opponents that the petitioner has waived the objection as regards the disqualification of the Magistrate. It is urged that at the initial stage of the case the complainant raised the same objection and the learned Magistrate overruled it, and by consent the case was postponed to several dates and no objection was taken by the complainant to the trial of the case by the Magistrate, and the petitioner must be considered to have waived the objection. The decision in the case of *Queen* v. *Justices of Antrim* (8) would to a certain extent support the contention raised on behalf of the opponents. It appears from the judgment of Sir P. O'Brien, C. J., at p. 639 in that case that not only was there mere consent but there was pressure on the eminent Justice to continue when he manifested a desire to leave the Bench. The consent or acquiescence of any party would not, in my opinion, supply the defect or want of jurisdiction in a Magistrate. I agree with the view in *Emperor* v. *Bisheshar Bhattacharya* (9), where a Magistrate as the president of the octroi sub-committee of a Municipal Board ordered the prosecution of the accused and with the consent of the accused tried the case himself, it was held that the Magistrate must be deemed to have been personally interested within the meaning of S. 556, Criminal P. C., and was not qualified to try the case of the applicant, whose consent could not confer jurisdiction upon him. I may refer to the case of *Queen* v. *Bholanath Sen* (10), where it was held that criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner. We think, therefore, that the disqualification of the Magistrate is not cured by any consent or acquiescence of the complainant in this case.

It is further urged on behalf of the opponents that the present application is not a bona fide one, and reference has been made to the report made by the learned Presidency Magistrate, third Court, to the Chief Presidency Magistrate in an application for transfer of the case. It appears from the report that the applicant interrupted the Magistrate in the course of his work, and refused to listen and went on talking in a loud tone, and though warned by the Magistrate he went on in a still louder tone, and when he was warned that if he did not cease to talk he would have to call a Police Sergeant to remove him from the Court room, the applicant, finding, that the Magistrate's order would be carried out to his humiliation, remained silent and walked away, and on the next day presented an application for

(7) [1893] 15 All. 192=(1893) A. W. N. 79 (F.B.).

(8) [1895] 2 I. R. 603.

(9) [1910] 32 All. 635=7 I. C. 291=7 A. L. J. 749.

(10) [1876] 2 Cal. 23.

transfer to the Chief Presidency Magistrate. As suggested by the opponents the present application may not be a bona fide one. The absence of bona fides, however, on the applicant's part does not affect the question of the disqualification of the Magistrate in trying this case.

We think, therefore, that the Presidency Magistrate, 3rd Court, is disqualified under S. 556, Criminal P. C. from trying the case. Under S. 556, Criminal P. C, a Magistrate who is personally interested can try a case with the permission of the Court to which an appeal lies from his Court. In the present case if the learned Magistrate at the initial stage of the case when both the parties agreed to go on with the case before him, had made a report to this Court and requested permission of this Court to try the case, this Court would, no doubt, have given the required permission. Even at this stage if both the parties consented, we would have given the required permission. We think, therefore, that the case must be transferred from the Court of the Third Presidency Magistrate. We must, however, make it clear that we have come to the conclusion that the transfer is necessary on account of the disqualification under S. 556. We have no doubt that the learned Magistrate would have dealt with the case impartially, and that there was not the slightest chance of his being biassed one way or the other on account of the small personal interest alleged on behalf of the petitioner.

The next question is to which Court the case should be transferred. We think that Mr. Dastur, the Chief Presidency Magistrate, having tried similar cases would have been the proper Magistrate to deal with the present case. The learned counsel on behalf of the opponents has drawn our attention to two considerations against the transfer to the Court of the learned Chief Presidency Magistrate. The first circumstance to which he has referred is that if the case is transferred to the Court of the Chief Presidency Magistrate, the present case is not likely to be heard for a long time; and, secondly, the learned Chief Presidency Magistrate, Mr. Dastur, has expressed an opinion with regard to the balance-sheets in question. Under these circumstances we think that this case must be transferred to some Magistrate other than the Third Presidency Magistrate and the Chief Presidency Magistrate. We would, therefore, direct that the case should be transferred to the Court of some Presidency Magistrate other than the Third Presidency Magistrate whom the Chief Presidency Magistrate may appoint. We find that some evidence has already been gone into before the Presidency Magistrate, 3rd Court, and we order this transfer on condition agreed to by both the parties before us that the Magistrate whom the Chief Presidency Magistrate may appoint in this behalf should try this case from the stage at present reached in the Court of the Presidency Magistrate, 3rd Court.

We, therefore, make the rule absolute and order that the case should be transferred to the Court of some Presidency Magistrate whom the Chief Presidency Magistrate may appoint.

Wild, J.—Petitioner Parshram Dattaram Shamdasani has applied for transfer of proceedings instituted by him in the Court of the Third Presidency Magistrate, Bombay, against the auditors of the Central Bank of India to the Court of the Chief Presidency Magistrate, Bombay. There are some allegations that the learned Magistrate has shown bias in favour of the accused but there appears to be no ground for thinking so in this case. The more important point, however, is that it is alleged that the learned Magistrate has a personal interest in the case and that therefore under S. 556, Criminal P. C. he is not empowered to try it. The alleged interest is this. The prosecution is against the auditors of a certain bank of which the learned Magistrate is a shareholder. As a shareholder he is a person who has in theory appointed the auditors and in that sense he is said to be interested. Moreover it is argued that if the prosecution is successful and it is shown that the auditors wrongfully passed the accounts then the credit of the bank would be impaired and the value of the shares will go down. In this way it is said that the learned Magistrate has a monetary interest in the case.

In view of the ruling in *In re, P. A. Rodriques* (1) it is impossible to say that the Magistrate is not personally inter-

ested. That was a case where the accused was a compounder in the employ of a company and was tried for criminal breach of trust as a servant in respect of certain goods belonging to that company. The Magistrate who tried the case was a shareholder in the company and it was held that he was personally interested in the prosecution. In *Emperor* v. *Cholappa* (6) it was said that the phrase "interested" as used in S. 556, Criminal P. C., means something of the nature of an expectation of advantage to be gained or of a loss, or of some disadvantage to be avoided, by the person who is said to be interested in the case. That test would also apply in this case on the assumption that the shares would go down in value if the prosecution were successful.

It is true that this Court could give permission to the learned Magistrate to try the case. Properly speaking that permission should have been given before the proceedings were begun. But in view of the fact that the proceedings can go on without any inconvenience in the Court of another Presidency Magistrate and that all the parties agree that the case shall so go on from the point which it has now reached, I agree with my learned brother in the order of transfer.

V.B./R.K. *Rule made absolute.*

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* A. I. R. 1929 Bombay 408

PATKAR AND BAKER, JJ.

Shankar Dattatraya Vaze — Applicant.

v.

Dattatraya Sadashiv Tendulkar — Non-Applicant.

Criminal Revn. Appln. No. 40 of 1929, Decided on 10th April 1929, from order of Presy. Magistrate, Bombay.

*** Criminal P., C. Ss. 403 and 247—Order of acquittal can be passed where complainant is absent even though summons is not served on accused and acquittal bars fresh trial.**

Under S. 247 it is not necessary that the summons should be served on the accused or that he should be present in the Court before an order of acquittal can be passed in his favour on account of the absence of the complainant. The word "tried" in S. 403 does not necessarily mean tried on merits and such acquittal bars fresh trial : 10 *Bom. L. R.* 628 ; 40 *Mad.* 976 ; 34 *Mad.* 253 ; *A. I. R.* 1924 *Pat.* 140 ; *A. I. R.* 1924 *Cal.* 96 ; *A. I. R.* 1923 *All.* 200 ; *A. I. R.* 1921 *Pat.* 311, *Ref.* ; 36 *Mad.* 315 and 40 *Mad.* 977*n*, *Dist.* [P 409 C 1]

G. A. Phadnis—for Applicant.

P. B Shingne—for Non-Applicant.

Patkar, J.— In this case the complainant filed a complaint on 11th April 1927, against the accused under S. 102, Presidency Towns Ins. Act alleging that the accused being an undischarged insolvent had obtained credit from the complainant. Summons was issued but was not served and on 28th April 1927, the complainant was absent in Court. The accused was also not present. Under S. 247, Criminal P. C., the learned Magistrate acquitted the accused. On 29th April the complainant appeared before the Court and requested the Court to set aside the order on the ground that he was unable to be present in Court on 28th April. The application of the complainant was rejected. On 2nd May 1928, after nearly a year after the order of acquittal, the complainant filed a fresh complaint before another Magistrate. The learned Magistrate held that the accused having been acquitted under S. 247, Criminal P. C., a fresh trial of the accused was barred under S. 403, Criminal P. C.

On behalf of the complainant it is urged that the order of acquittal passed on 28th April is not a legal order and that the order of acquittal does not bar the trial of the accused under the fresh complaint. It is urged that though summons was issued, it was not served upon the accused and the trial of the accused had not commenced in the previous proceedings. The wording of S. 247 is against the contention of the applicant S 247, Criminal P C. says :

"If the summons has been issued on complaint and upon the day appointed for the appearance of the accused or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused unless for some reasons he thinks proper to adjourn the hearing of the case to some other day."

In *In re, S. E. Dubash* (1) where in the absence of the complainant the Magistrate struck off the complaint, it was held that the proper order under S 247 was an order of acquittal. Under S. 403, Criminal P. C. :

"a person who has once been tried by a Court of competent jurisdiction for an offence

(1) [1908] 10 Bom. L. R. 628.

and convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be 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."

It is clear that the previous order of acquittal has remained in force and has not been set aside by any order of a superior Court. The word "tried" in S. 403 does not necessarily mean tried on the merits. The composition of an offence under S. 345, Criminal P. C., or a withdrawal of the complaint by the Public Prosecutor under S. 494, Criminal P. C., would result in an acquittal of the accused even though the accused is not tried on the merits. Such an acquittal would bar the trial of the accused on the same facts on a subsequent complaint. Under the explanation to S. 403 :

"the dismissal of a complaint, the stopping of proceedings under S. 249, the discharge of the accused or any entry made upon a charge under S. 273, is not an acquittal for the purposes of this section."

The composition of an offence under S. 345, the withdrawal under S. 494, or an acquittal under S. 247, Criminal P. C., is not included in the explanation to S. 403, Criminal P. C. It is urged, however, on behalf of the applicant that though the word, "tried" may not mean trial on the merits, yet the trial must commence before an order of acquittal is passed, and that unless a summons is served in a summons case against the accused the trial cannot be said to have commenced against the accused. We are of opinion that as soon as a Magistrate takes cognizance of an offence and an order for summons is issued the proceedings have commenced against the accused, and under S. 247 it is not necessary that the summons should be served, or that the accused should be present in Court before an order of acquittal might be passed in his favour on account of the absence of the complainant. Reliance is placed on the decision in *In re, Muthia Moopan* (2), which was a case under S. 107, Criminal P. C., and was not a case of an offence in which the accused could be acquitted under S. 247, Criminal P C. In *Kotayya* v. *Venkayya* (3), on which reliance was placed on behalf of the applicant, it was held that the trial of an accused in a summons case cannot be said to begin until the particulars of the offence are stated to the accused under S. 242, Criminal P. C The view in *Kotayya* v. *Venkayya* (3) has been dissented from by the Madras High Court in *Re Dudekula Lal Sahib* (4), where it was held that the withdrawal of a case by the Public Prosecutor under S. 494 followed by the acquittal of the accused was sufficient to bar the further trial of the accused for the same offence, and that though the accused was not tried on the merits the withdrawal of the prosecution by the Public Prosecutor after the summons was issued but before it was served on the accused was sufficient to bar the subsequent trial of the accused.

In *Guggilapu Peddaya, In re* (5) it was held that when a case was disposed of under S. 247, Criminal P C., the complainant and accused, both being absent the order under S. 247 operated as a bar to further proceedings. The accused who was, however, served with process in that case was held entitled to the benefit of an acquittal under S. 247. In *Kiran Sarkar* v. *Emperor* (6) it was held by the Patna High Court that the important matter for an order under S. 247, Criminal P. C., is the presence or absence of the complainant, that it is not necessary that the accused must be present or must have been summoned to the Court, and that the order under S. 247 is a final order of the acquittal which operates as a bar under S. 403 of the Code to the trial of the accused for the same offence. To the same effect is the decision of the Calcutta High Court in *Nityananda Koer* v. *Rakhahari Misra* (7), where it was held that an order of acquittal passed under S. 247, Criminal P. C., so long as it is not set aside by a competent Court is a bar to the fresh proceedings in respect of the same offence. To the same effect is the decision of the Allahabad High Court in *Emperor* v. *Dulla* (8). In *Ram Mahato*

(2) [1911] 36 Mad. 315=21 I. C. 159=14 Cr. L. J. 559.

(3) [1917] 40 Mad. 977*n*.
(4) [1917] 40 Mad. 976=6 M. L. W. 175=45 I. C 261=33 M. L. J 121.
(5) [1910] 34 Mad. 253=9 I. C. 253=12 Cr. L. J. 41.
(6) A. I. R. 1924 Pat. 140.
(7) A. I. R. 1924 Cal. 96.
(8) A. I. R. 1923 All. 360=45 All. 58.

v. *Emperor* (9) it was held that the provision contained in S. 403, Criminal P. C., is imperative and bars a second trial of a person who has once been acquitted on the same charge, that the section does not make any distinction between acquittals after trial and acquittals under Ss. 247, 345 and 494 of the Code, and that so long as an order of acquittal under S. 247 stands, S. 403 bars a second trial on the same charge, no matter whether the order of acquittal is good or bad, legal or illegal. The intention of the legislature is quite clear for it appears from S. 205, Act 10 of 1872, that the Magistrate could only dismiss the complaint under the Criminal Procedure Code of 1872 whereas under the Code of 1882 and the subsequent Codes the Magistrate was empowered to acquit the accused. The statutory acquittal was intended to operate as a final bar to further proceedings. The order of acquittal in this case has remained in force and has not been set aside. On these grounds we think that the order of acquittal passed by the Magistrate on 28th April bars a fresh trial of the accused on the same facts under S. 403.

On these grounds we discharge the rule.

Baker, J.—I agree. The balance of authorities is in favour of the view we have taken. The Madras High Court had at one time expressed a different view, but ultimately the view taken by Abdur Rahim, J., in *Guggilapu Peddaya, In re* (5) has been accepted *In re, Dudekula Lal Sahib* (4). The learned Chief Justice in dealing with the question has pointed out that the English rule of recording decisions on the merits has not been adopted by the Indian legislature which has provided for certain statutory acquittals. It is obvious in view of these particular sections, namely, Ss. 247, 345 and 494, that the word "trial" or "tried" in S. 403 cannot mean a trial in the ordinary sense of the word, that is, a decision on the merits, because each of these sections provides for an acquittal even when no evidence whatever has been recorded against the accused. I can find no reason why and how if the definition of "tried" does not exist in the section we should insert it in the Code. S. 247 says :

"If the summons has been issued on complaint and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused."

It is to be noticed that it does not say "upon the day on which the accused appears" but only "the day appointed for the appearance of the accused," and if it had been intended that the appearance of the accused to answer the charge was necessary, there is no reason why the legislature should not have said so. I would, therefore, with respect agree with the view taken by the Madras High Court in *Re, Dudekula Lal Sahib* (4).

There is another point in this case. This order of acquittal was passed long ago and no proceedings by way of revision were taken by the complainant in order to get it set aside, and any such application for revision of that order would now be rejected as out of time. But the complainant tried to do by a sideway what he could not do directly and filed a fresh complaint on the same facts. I do not think that this should be encouraged and that is an additional reason for rejecting the application. But on the law as it stands I am quite clear in my mind that the order of acquittal passed by the Magistrate under S. 247, although the accused had not been served with a summons, is a good order and such an acquittal operates as a bar to any such trial on the same facts.

I agree, therefore, that the rule should be discharged.

R.M./R.K. *Rule discharged.*

(9) A. I. R. 1921 Pat. 311.

A. I. R. 1929 Bombay 410

PATKAR AND WILD, JJ.

Khairunnissa, In re.

Criminal Revn. Appln. No. 133 of 1929, Decided on 8th July 1929, from an order of 6th Presidency Magistrate, Bombay.

Criminal P. C., S. 488 (8)—Forum—Casual residence in place in absence of settled abode or permanent place of residence gives jurisdiction to Court situate at that place.

Where the husband and wife have a fixed place of abode or permanent place of residence

a casual or temporary residence at any other place will not confer jurisdiction on the Court situate at that place. But where the husband and wife have no fixed place or abode or permanent place of residence, and both are going about from place to place, a casual or temporary residence at any particular time is sufficient to give that Court jurisdiction under sub-S. (8), S. 488 : 36 *Cal.* 964 ; *A. I. R.* 1921 *Bom.* 211 ; 21 *C. W. N.* 872, *Ref.* ; *A. I. R.* 1926 *Oudh* 268, *Dist.* [P 412 C 1]

J. C. Tarapore—for Applicant.

P. B. Shingne—for the Crown.

Patkar, J.—In this case the complainant filed an application under S. 488, Criminal P. C., for maintenance against her husband. The learned Presidency Magistrate, 6th Court, held that he had no jurisdiction to entertain the application as the stay of the respondent of about eight days in Bombay with the applicant could not be said to constitute "residence" within the meaning of sub-S. (8), S. 488, Criminal P. C. In support of his view he relied on the case of *Ramdei* v. *Jhunni Lal* (1), where it was held that the words "last resided" in S. 488, Criminal P. C., did not contemplate a mere casual residence in a place for a temporary purpose, and that where the husband is employed as a carpenter in the railway workshops in Lahore and has been residing there continuously for 11 years, a temporary sojourn to Lucknow by him with his wife would not confer on Lucknow Court jurisdiction to entertain an application by the wife for maintenance under that section.

It is urged on behalf of the applicant that the view taken by the lower Court is erroneous and reliance is placed on the decision in *Mrs. E. H. Jolly* v. *St. J. W. Jolly* (2), where the husband ordinarily resided outside Calcutta but was temporarily in Calcutta on the date of the application, and it was held that the temporary residence was sufficient to give the Calcutta Court jurisdiction under sub-S. (8), S. 488, Criminal P. C.

The husband did not appear in the lower Court to contest the application. The applicant stated on oath that she was married to the opponent at Ambarakpur in the United Provinces about two and a half years ago. Then they went to Surat and lived there for six or seven months, and on account of ill-treatment she came to her father in Bombay from Surat. The respondent then came a day later and stayed with her father for about eight days and told her father that he would try and find employment but left afterwards, and after she learnt that he was at Karachi, she sent him a notice through a pleader to provide for her maintenance and subsequently filed the present application. The question, therefore, in this case is whether the opponent last resided with his wife in Bombay.

According to Stroud's Judicial Dictionary "residence" has a variety of meanings according to the statute in which it is used : per Erle, C. J., in *Naef* v. *Mutter* (3). It is an "ambiguous word" and may receive a different meaning according to the position in which it is found : per Cotton, L. J., in *Ex parte Breull In re, Bowie* (4). In *Fernandez* v. *Wray* (5), it was held that temporary residence gives the Court jurisdiction under Cl. 12, Letters Patent, and that for the purpose of jurisdiction a man may be said prima facie to dwell where he is staying at any particular time, but it is open to him to show that he is not dwelling there, but at some other place. If a person has no permanent residence, he may be said to dwell where he may be found.

In *Arthur Flowers* v. *Minnie Flowers* (6), it was held that a mere temporary sojourn in a place, there being no intention of remaining there, would not amount to residence in that place within the meaning of S. 3, Divorce Act, 1869, so as to give jurisdiction under the Act to the Court within the local limits of whose jurisdiction such place is situated. In that case the husband and wife resided in Hyderabad and paid a flying visit to Meerut for a temporary purpose and not with any intention of remaining there, and it was held that the mere casual residence in a place for a temporary purpose with no intention of remaining is not dwelling, and that where a party has a fixed residence outside the jurisdiction, an occasional visit within the jurisdiction will not suffice to confer jurisdiction

(1) A. I. R. 1926 Oudh 268.
(2) [1917] 21 C. W. N. 872=40 I. C. 706=18 Cr. L. J. 706.
(3) [1862] 31 L. J. C. P. 357=12 C. B. (n. s.) 816=10 W. R. 758=9 Jur. (n. s.) 384.
(4) [1880] 16 Ch. D. 484=50 L. J. Ch. 384=29 W. R. 299=43 L. T. 580.
(5) [1900] 25 Bom. 176=3 Bom. L. R. 291.
(6) [1910] 32 All. 203=5 I. C. 871=7 A. L. J. 193 (F.B.).

by reason of residence within the meaning of S. 3, Divorce Act.

In *Bright* v. *Bright* (7) the husband and wife, who had no permanent residence, were held to have last resided at a Calcutta hotel where they had stayed for about a fortnight In *Murphy* v. *Murphy* (8), where the husband and wife had no permanent residence they having lived at several places since their marriage and last resided together in a hotel in Bombay, it was held that there was a sufficient residence within the meaning of the Indian Divorce Act to give the Court jurisdiction to entertain the petition.

It would follow from these decisions that where the husband and wife had a fixed place of abode or a permanent place of residence, a casual or temporary residence in any other place would not confer jurisdiction on the Court situate at that place In the present case it appears that the husband and wife had no fixed place of abode and no permanent residence, and the husband came to Bombay and stayed with the complainant and her father for about eight days, and had the intention of re naining there as he told the complainant's father that he would try and find employment in Bombay but left after eight days. The husband did not appear before the Magistrate and has not given any evidence as to his usual place of residence. On the evidence before us we hold that the husband has no fixed place of abode or permanent residence.

I think, therefore, that there was sufficient "residence together" of the husband and wife in Bombay so as to give jurisdiction to the Magistrate under sub S. (8), S. 488, Criminal P. C.

In the case relied on by the learned Magistrate the husband had a fixed place of residence in Lahore, and it was held that a mere temporary sojourn to Lucknow with his wife did not confer on the Lucknow Court jurisdiction to entertain the application.

We would, therefore, reverse the order of the lower Court dismissing the application, and direct the Magistrate to issue notice to the husband, and decide the application on the merits.

Wild, J.—This is an application by the petitioner Khairunnissa residing in Madanpura, Bombay, to set aside the order of the learned Presidency Magistrate, 6th Court, Bombay, dismissing for want of jurisdiction the application made by her under S. 488, Criminal P. C., for maintenance against her husband.

The case of the petitioner is that she was married to the respondent at Ambarakpur, that she and her husband went to Surat where they lived for six or seven months, that owing to ill-treatment by her husband she was taken to her father's house in Bombay, that her husband joined her there and stayed with her for eight days and that thereafter he left her and was not heard of for sometime. Finally, however, he was found to be at Karachi and it appears that he is now at Mubarakpur in the United Provinces.

The learned Presidency Magistrate dismissed the application following the ruling in *Ramdei* v. *Jhunni Lal* (1), on the ground that the words "last resided" in S 488, Criminal P. C., do not contemplate a mere casual residence in a place for a temporary purpose.

It is true that, according to the petitioner's statement, the residence of her husband at Bombay was merely a temporary one. The meaning of the words "last resided" in S. 488 have apparently not been construed by this Court and I would prefer to follow the ruling in *Mrs. E. H. Jolly* v. *St. J. W. Jolly* (2), where it was held that temporary residence was sufficient to give the Court jurisdiction under sub-S (8), S. 488. It is difficult enough for a wife to recover maintenance from her husband who refuses to maintain her and to give a strict interpretation to the words "last resided" in S. 488 would render the difficulty even greater. Moreover, in this case it would appear that the respondent has no settled place of residence and that this is not a case like that of *Ramdei* v. *Jhunni Lal* (1) where the parties had a fixed place of residence. I would, therefore, set aside the order of the learned Presidency Magistrate dismissing the application and would direct him to proceed with it according to law.

V.B./R K. *Order set aside.*

(7) [1909] 36 Cal. 964=4 I. C. 419.
(8) A. I. R. 1921 Bom. 211=45 Bom. 547.

A. I. R. 1929 Bombay 413

MADGAVKAR, J.

Chimawa Rachaya—Plaintiff—Appellant.

v.

Gangawa Gangadharaya and *others*—Defendants—Respondents.

Appeal No. 30 of 1926, Decided on 8th July 1929, from an order of 1st Class Sub-Judge, Belgaum, in Suit No. 178 of 1918.

Civil P. C., O. 8, R. 10—Dismissal under O. 8, R. 10 is not justified except in cases of written statements and set off—Proper procedure to clear up any ground is under Civil P. C., O. 10, R. 1.

In a suit for possession the defendants raised various defences, whereupon the trial Court ordered the plaintiff to put in a counter written statement which was not so put in. After giving further opportunities to comply with the order, the Court, remarking that the plaintiff had shown utter laches and negligence, dismissed the suit under O. 8, R. 10.

Held . that as O. 8 in terms applies only to a written statement and a set off, the plaintiff could not be called upon to put in the counter written statement and the dismissal was wrong

Held further : that where a Court thinks it necessary to clear up the ground further, the proper procedure to be followed is that laid down under O 10, R. 1. [P 413 C 2]

A. G Desai—for Appellant.

Y. N. Nadkarni, K V. Joshi for *D. S. Mandlik*—for Respondents.

Judgment.—This is a suit of 1918. The issues are not yet framed. The plaintiff sued for possession of certain survey numbers on the ground that she was the nearest heir of her father, the last male holder. The twenty-one defendants raised various defences. Among these defences were that there had been a partition, that many of the lands had fallen in partition to a person other than the father, and that the plaintiff was born before the father was adopted into the family to whom the lands belonged. However that might be, after all the defendants had filed their written statements by 2nd June 1921, the First Class Subordinate Judge ordered the plaintiff to put in what he called a counter written statement on 17th June, which was not so put in. Her pleader was given four adjournments to put it in and it was still not put in The lower Court pointed out the fact that the suit was more than three years old, having been filed on 26th June 1918, and on the ground that "the plaintiff had shown utter laches and negligence" dismissed the suit with costs under O. 8, R. 10, Civil P. C., on 9th July 1921. During the appeal the plaintiff died. There was a delay in the service of the summons and it has taken exactly eight years for this appeal to come on for hearing.

It is argued for the appellant that there was no counter claim and therefore the plaintiff could not be called upon to put in a counter written statement : O. 8 had no application and the suit should not have been dismissed under O. 8, R. 10, Civil P C It is contended for the respondents that on the various defences put forward in the written statements, it was necessary for the Court to obtain a clear admission or denial to the various grounds taken for the defendants, and the order of 2nd June 1921, to the plaintiff to put in her counter written statement was justified under O 8, R 9, and if so, the dismissal under R. 10 was proper.

Order 8, Civil P. C., in terms applies only to a written statement and a set-off This is not a case of a set-off or a counter-claim so that the plaintiff could be called upon to put in her counter written statement If a Court thinks it necessary to clear up the ground further before issues, the proper procedure is that laid down under O 10, R 1, Civil P C., to call upon the pleader or party by examination to admit or deny the allegations This method the lower Court did not follow in the present case.

I am aware that what I am constrained to call a vicious practice of putting in counter written statements as a matter of course has grown up in many subordinate Courts including the First Class Subordinate Judge's Court of Belgaum. A wrong practice cannot make O 8, R 9, Civil P. C , applicable nor confer power under O. 8, R. 10. As the present case shows, the sooner this indiscriminate practice ceases, the better. The appeal is allowed, the order of the trial Court is set aside, and the suit remanded for framing issues and early disposal on the merits according to law. As regards costs, the respondents, having opposed, must pay the appellant's costs in this Court. The costs in the trial Court should be costs in the cause. The question which of the parties, if any, should be given separate costs according to the order of 9th July

1921, is a question which will better be decided at the and of the trial.

M.N./R.K. *Appeal allowed.*

A. I. R. 1929 Bombay 414

MARTEN, C. J., AND MURPHY, J.

Bai Kanta—Opponent—Appellant.

v.

Bhailal-Ghelabhai Amin and *others*—Applicants—Respondents.

First Appeal No. 531 of 1927, Decided on 12th March 1929, from decision of Dist. Judge, Kaira, in Misc. Appln. No. 43 of 1926.

Evidence Act, S. 126—Pleaders engaged for obtaining succession certificate examined as to contents of testator's will—He was privileged from disclosing its terms.

S as the widow of *D* applied through her pleader for a succession certificate to the estate of *D*. The succession certificate was granted without the production of the will. Subsequently *B* applied for the grant of letters of administration to the estate of *D*. The pleader who appeared in the succession certificate proceedings was examined but he declined to disclose the contents of the will.

Held: that as the pleader became acquainted with the will in the course and for the purpose of his professional employment, he was privileged under S. 126: 5 *Bom. L. R.* 122, *Dist.*; *A. I. R.* 1925 *Bom.* 1 (*F. B.*), *Ref.* [P 415 1, C 2]

M. P. Amin, *U. L. Shah*—for Appellant.

G. N. Thakor, *K. V. Patel*, *N. P. Desai* and *U. L. Shah*—for Respondents.

Marten, C. J.—A preliminary point of evidence arises on this appeal. It is raised in grounds 4 and 5 of the cross-objections of the petitioner Bhailal, respondent 1 to this appeal, and it is to the effect that:

"the lower Court erred in ruling that Messrs. Mavalankar and Baldevprasad were precluded from deposing to the contents of the will."

As to that the learned Judge in para. 22 of his judgment says:

"There are four witnesses who have read the will after the death of the testator, and who have been examined as to the contents thereof. Of these two Messrs. Mavalankar, Ex. 50, and Baldevprasad, Ex. 103, are pleaders. The will came in their hands in the course of their professional employment in connexion with the succession certificate and they were held precluded from deposing to the contents."

So far as the notes of evidence are concerned, we cannot see that there was any argument on this point, or any formal objection taken. None of the counsel appearing before us were counsel in the Court below, but it is alleged by counsel for the petitioner on instructions that his opponent 1, the present appellant, objected in the Court below to the pleaders being asked as to the contents of the will, and that the Judge ruled that no such question should be asked. On the other hand counsel for the present appellant says he has no instructions as to whether his client did or did not object in the Court below. It will, however, be seen from p. 25 that the Judge disallowed the question as to whether this will was taken back by Suraj. Now these two pleaders acted for Bai Suraj, the widow of the testator Dahyabhai, for the purpose of getting a succession certificate. The first proceedings were conducted by Mr. Mavlankar in the Ahmedabad Court, and eventually the Judge held that the Ahmedabad Court had no jurisdiction, and that the parties must go to Nadiad. Consequently it was Mr. Baldevprasad, who presented the petition in the Nadiad Court asking for a certificate. There the opposition being eventually withdrawn, a succession certificate was granted. Now in both those petitions, viz., the one in the Ahmedabad Court and the one in the Nadiad Court, the petitioner Bai Suraj stated as follows:

"As the widow of the deceased Dahyabhai, and under and by virtue of the will dated 20th October 1918, made by the deceased I am entitled to succession certificate as an heir to the property of the deceased. I will produce the will when necessary."

Subsequently in the Nadiad Court there was an application by Jethabhai, dated 30th October 1922, Ex. 121, in which acting for the minor Chandulal, who is opponent 2, he asked that the will should be produced. It appears, however, from Ex. 122 of 24th November 1922, that later on the parties agreed that the will need not be produced, and that the succession certificate should go, as asked, provided the widow Suraj gave security. Accordingly an order to that effect was made on 24th November 1922, by the learned Judge.

I may now turn to the relevant section of the Evidence Act, viz., S. 126, which says:

"No ... vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him

in the course and for the purpose of his employment as such ... vakil, by or on behalf of his client or to state the contents or condition of any document with which he has become acquainted in the course of and for the purpose of his professional employment, ..."

There are certain exceptions there which do not apply and the Explanation states :

"The obligation stated in this section continues after the employment has ceased."

It is clear that the will in question was one with which the pleader became acquainted "in the course of and for the purpose of his professional employment," viz., as a pleader for Bai Suraj. Therefore, prima facie the case falls within that section. It is, however, contended that inasmuch as the petitioner Bai Suraj offered to produce the document when necessary, and inasmuch as under the provisions of the Code the petitioner could be forced to produce the document, (it having been referred to in the pleadings), on penalty of its being inadmissible at the trial without the leave of the Court that, therefore, the document was no longer confidential, and that consequently the section did not apply.

But it seems to me that there is a broad distinction between "offering to produce" and "producing." Supposing for instance, that the lady had altered her instructions to her pleader and had said : "Do not produce that document whatever the consequences may be," I do not think myself that the pleader would have been entitled to state what the contents of that document were. He might have withdrawn from the case. That is something totally different. But in my view he could not have been called by any of the other parties and required to state in the witness-box what the contents of the document were. In the view I take, if any such exceptions are to be established, they must be inserted clearly in the section itself. The general principle is a salutary one, and it ought not to be whittled away by what seem to me to be rather fanciful or ambiguous distinctions.

It has been laid down in this Court in *Emperor* v. *Rodrigues* (1) that having regard to S. 129, the present S. 126 does not apply, if the statement is made to the solicitor not confidentially but for the purposes of communication. Now that particular case was widely different from the present. There the client instructed his solicitor to write a particular letter, and the solicitor did so. The letter was defamatory. The client was sued upon it, and he then set up the claim of privilege. The Court very naturally said that the letter being sent by his instructions for communication, it could not be said to be privileged. Therefore, the observations there made by Chandavarkar, J., must be read in connexion with the facts of the case. He says, for instance (p. 123) :

"Here the statements complained of as defamatory were obviously made not under the condition of secrecy and as a matter of fact they were communicated to the complainant by the solicitor because the solicitor had instructions to make them to the complainant. There was, therefore, nothing of the character of confidential communications in them to bring them within the rule in S. 126, Evidence Act."

Here the will was never sent in a covering letter to anybody. At the most it can be said that the client was willing to produce the will when necessary. In my opinion, therefore, S. 126, Evidence Act applied here.

The next point is whether the express consent of the client was obtained under S. 126. There is nothing whatever in the evidence before us to show that any such express consent was ever obtained at or prior to the trial, or even that the point was ever considered in the Court below. In fact Bai Suraj, the client, is dead. She has left three wills executed at comparatively short intervals before her death. In will 2 she complains apparently that will 1 was executed by improper means. Will 3 is in favour of one of the persons who is alleged to have influenced her in making will 1. But even if one takes will 3 as the final and sole will appointing an executor, there are various persons interested as beneficaries under that will, who are on the opposite side of the record in the present case. The petitioner Bhailal gets certain property, and other property goes to other beneficiaries. But no authority has been cited to us as to whether in a case like that an executor of a deceased person is the proper individual to waive privilege. It may be that where the instructions of his beneficiaries are conflicting, he would decline to do so without the sanction of the Court in the administration

(1) [1903] 5 Bom. L. R. 122.

of his own estate. But, however that may be, the fact here is that no such application was ever made to the Court, and no such consent was ever given in the Court below.

As regards the contention that as Hathibhai had deposed to the contents of the will, that, therefore, he must be presumed to have given his consent to the pleaders stating the contents of it, that to my mind is not a compliance with the section If he had said :

"I as executor of Bai Suraj agree to the pleaders stating the contents of the will, and I expressly waive all privilege on behalf of Bai Suraj,"

then conditions would have been different. In that event it might have been open to the petitioner to have recalled those pleaders, after the consent of the executor had been obtained. If, however, any such attempt had been made, we should no doubt have had arguments as to whether under all these circumstances Hathibhai was the proper person to give that consent. It is not even suggested in the memorandum of appeal, and I have no doubt that the present contention is an entire afterthought raised for the first time practically in answer to a question from the Bench.

Under these circumstances it seems to me that the learned Judge's view expressed in his judgment that these pleaders were precluded from deposing to the contents of the will, is correct. I may here refer to the recent Full Bench case of *In re, An Attorney* (2), as showing that it is the duty of an attorney to claim privilege, and that if he does not do so and improperly discloses documents without his client's consent, he may be guilty of breach of his duty which in the case I am citing, resulted in his being suspended from practice It is, therefore, a serious matter for the pleader and it would be, therefore, vital to him in the present case to see that the consent, if any, given, was given by the right parties

Under these circumstances it is not a question of this Court merely sending down the case for the further evidence of this pleader. In the view we take of S 126, the question will still remain whether the express consent of the client to disclose the contents of this document was obtained

Grounds 4 and 5 of the cross-objections will be dismissed.

Murphy, J —Mr. Thakor has argued that the facts of the present case take it outside the condition of S. 126, Evidence Act, on three grounds. The first is that, since Bai Suraj had offered to produce the will when required, she was by such offer bound to produce it, and that the privilege is not waived as to documents which have been offered in this way, but is only confined to documents which have not been referred to in the pleadings. The second argument is that since in this case there was a joint interest in favour of two persons, either of those two persons might have given authority to disclose the will. And his last argument was, that the privilege only extends to the case of private and confidential documents, because S 129 of the same Act refers to confidential communications.

I do not think that any of these arguments affects the point in issue. S. 126 specifically enacts that no pleader shall disclose the contents of a document confided to him in his professional capacity, without the express sanction of his client. That section, I think, covers the present case, and the two pleaders concerned could not have been required to give evidence on these points without such consent There is a further difficulty here, in that Bai Suraj the client is dead, and has left three documents which she seems to have executed as purporting to be wills. In the latest of these she appoints the witness Hathibhai as her executor, but none of these documents has been proved. I think that in the circumstances of the case the evidence as to the contents of the will to be given by the two pleaders concerned was properly excluded.

After the above judgment was delivered, the parties arrived at a compromise, and a consent decree in terms of the compromise was passed by the High Court.

V.S /R.K. *Order accordingly.*

(2) A. I. R. 1925 Bom. 1 (F.B.).

* A. I. R. 1929 Bombay 417

MADGAVKAR, J.

Bai Mani and *others*—Appellants.

v.

Bhailal Chunilal and *others* — Respondents.

Appeal No. 21 of 1928, Decided on 12th July 1929, from order of Dist. Judge, Nadiad, in Misc. Appln. No. 26 of 1927.

*** Guardians and Wards Act (8 of 1890), S. 43—Marriage of ward of Court without consent of Court in spite of undertaking not to do so—Only personal guardian is liable for contempt.**

In the case of a minor, for whom a personal guardian has been appointed and who undertook not to marry the minor without the Court's permission, the marriage or connivance at marriage with the ward of the Court without the consent of the Court is contempt of the Court liable to be severely punished. These powers of the District Judge are, however, limited to the actual guardian in respect of whom the order is made and cannot be exercised against those indirectly committing the breach : 42 *Cal.* 351, *Rel. on.*; 22 *Bom.* 503 and 22 *Bom.L.R* 399, *Ref.* [P 417 C 2]

H. V. Divatia—for Appellants.

Judgment. — These are proceedings under the Guardians and Wards Act in respect of two minor girls Shanta and Girja. The respondents-petitioners cousins applied to be appointed guardians of the persons of these girls and of their brother Sevaklal on the ground that the minors' mother Bai Mani had been leading an immoral life after her husband's death. During the pendency of the proceedings, petitioners 1 and 2 alleged that there was danger of Bai Mani's marrying the two minor girls unsuitably. Bai Mani undertook in Court not to marry the minor girls without the Court's permission and was allowed to retain their custody. She broke the undertaking and married them to opponents 2 and 3. Proceedings in contempt were taken against Bai Mani and the sons-in-law, and the District Judge directed Bai Mani to undergo imprisonment in the civil jail for two months and each of the sons-in-law to undergo imprisonment for one month.

All three appealed. The appeal of Bai Mani was not admitted. The appeal of the two sons-in-law was admitted. One of the sons-in-law Himatlal is dead and the appeal of Maneklal alone survives. The respondents are absent.

It is argued for the appellant Maneklal that he had not given an undertaking and no injunction had been served against him and he could not be punished for contempt, even though he might have known of the undertaking given by Bai Mani. That Bai Mani has been guilty of contempt there is no question. The further question whether a party such as the appellant in this case, who abets Bai Mani's contempt with the full knowledge of the undertaking, can or cannot be punished, has not been decided in any reported case. The only section under which the Court could take an undertaking from Bai Mani is S. 43, Guardians and Wards Act and the penalty for contempt is that laid down under O. 39, Rr. 1 and 2, Civil P. C. These provisions prima facie would only apply to a guardian whose conduct has been regulated by the Court under S. 43, Cl. 1, and the District Court, unlike the High Court, appears to have no other power to punish contempts. It has been held by this Court in *Bai Diwali* v. *Moti Karson* (1) that a marriage in disobedience of such an order was legally valid, and it was even doubted whether S. 43 applied and should not be read along with Ss. 24 to 26 of the Act and be confined to matters relating to the support, health, education, and advancement of a minor. With this doubt the Calcutta High Court did not agree : *Monijan Bibi* v. *District Judge, Birbhum* (2) The Calcutta view derives a certain amount of support from the observations of this Court in the subsequent case of *Laxminarayan* v. *Parvatibai* (3). As far as I know, the practice of the District Courts has been in accordance with the view of the Calcutta High Court in *Monijan Bibi* v. *District Judge, Birbhum* (2).

Speaking for myself, there would appear to be a serious lacuna in the law, if in a country of infant marriages the District Judge is helpless to punish parties guilty of abetting such contempt and responsible for unsuitable marriages But in the present state of the law I am of opinion that the District Judge's powers are limited to the actual guardian in respect of whom the order is made and it appears that the law, as at present

(1) [1836] 22 Bom. 503.
(2) [1914] 42 Cal. 351=10 C. L. J. 91=2[illegible] I. C. 229=19 C. W. N. 290.
(3) [1919] 22 Bom. L. R. 399.

framed, leaves a loophole for indirect breach and disobedience of such orders on the part of other persons who are at least as responsible as the guardian, such as, in the present case, the sons-in-law. In fact, the guardian, who simply abstained from taking any public part in the ceremony, might exempt herself or himself even from contempt and yet cause gross disobedience of the order of the Court and grave injury to the minor. That, however, must be a matter for the legislature and not for the Courts. Under the law as it stands, I am of opinion that the District Judge had no jurisdiction to punish Maneklal for contempt.

The appeal must be allowed and the order of imprisonment in respect of Maneklal set aside The rule for stay is made absolute.

There will be no order as to the costs of this appeal.

V.B./R.K. *Appeal allowed*

A. I. R. 1929 Bombay 418

MADGAVKAR, J.

Fatechand Rampratap and *others*—Appellants.

v.

Jitmal Rupchand—Respondent.

Second Appeal No. 1046 of 1927, Decided on 1st July 1929, from decree of Asst. Judge, Satara, in Appeal No. 112 of 1927.

(a) Civil P. C., S. 39—Simultaneous execution of decree can be allowed.

In execution proceedings more than one Court can have jurisdiction at a time in regard to a darkhast whatever the case might be in regard to a suit. A decree may be executed in more than one Court simultaneously, 14 *M.I.A.* 529 and 8 *Cal.* 687, *Foll.* [P 419 C 1]

(b) Civil P. C., Ss. 38 to 43—Transfer of darkhast—Jurisdiction of executing Court is not deprived.

Because a decreeing Court may not be a proper Court in which a certain step-in-aid of execution may be taken, it does not follow that it is therefore a Court entirely without jurisdiction in respect of the decree which it itself has made and of a darkhast which it itself has transferred wholly or in part to another Court. Ss. 38 to 43 nowhere lay down that a decreeing Court is deprived of its jurisdiction by the mere act of transfer of the darkhast : 25 *Bom.* 337 (*P. C.*) : *A. I. R.* 1928 *P. C.* 162, *Foll. A. I. R.* 1916 *P. C.* 16 ; *A. I. R.* 1922 *Bom.* 359 and *A. I. R.* 1924 *Bom.* 359, *Expl.* [P 419 C 2]

(c) Limitation Act Art. 182—Step-in-aid—Application to Court of Native State having agreement with British Government to execute each other's decrees is a step-in-aid.

An application to the Court of a Native State, between whom and the British Government there exists an agreement to execute each other's decrees, to return the decree to a British Indian Court is a step-in-aid of execution sufficient to save limitation in respect of the darkhast ; 42 *Bom.* 420, *Rel. on* ; 12 *Bom.* 230, *Ref.* ; 40 *Mad.* 1069 (*F.B.*), *not Foll.* [P 420 C 2]

A. G. Desai—for Appellants.

Jayakar and *Y. V. Dixit*—for Respondent.

Judgment.—The questions in this appeal are jurisdiction and limitation

The respondents obtained a decree for money in the Court of Tasgaon in the Satara district on 29th October 1921, and had it transferred for execution to the Court of the Native State of Kolhapur. They were unable to obtain satisfaction there, and on 8th December 1923, they applied to have the execution there stopped and the decree to be returned to the Tasgaon Court. As the proceedings in execution were infructuous in Tasgaon, they had execution transferred from Tasgaon to Nasik on 9th March 1924, and withdrew it for non-satisfaction on 18th March 1924. The darkhast they filed in the Tasgaon Court on 25th January 1924, had been dismissed similarly on their own application. In 1925 the decree-holder applied to the Tasgaon Court again to transfer the execution proceedings to the Court of Kolhapur. It was thus transferred accordingly on 16th February 1925. On 6th April 1926, the decree-holder asked the Tasgaon Court to recall the darkhast and that application was granted on the same date. The proceedings were not, however, returned from Kolhapur till 30th August 1926. On 15th April 1926, the respondent filed the present darkhast at Tasgaon and applied for execution by arrest of one of the judgment-debtors. He was arrested, and on 16th May 1926 he paid the decretal debt into Court. On 8th June 1926, the appellants appeared in the Tasgaon Court under O. 21, R. 22, Civil P. C. and resisted the darkhast, firstly, on the ground that the Tasgaon Court had no jurisdiction before the return from Kolhapur of the proceedings with the certificate of non-satisfaction under S. 41, Civil P. C. and, secondly, on the ground of limitation

and applied for a refund of the amount paid by the judgment-debtor arrested.

The trial Court upheld the objection on the ground of jurisdiction but did not record a finding on the question of limitation. In appeal the District Court held that there was no bar of jurisdiction or limitation and set aside the order of the trial Court. The judgment-debtors appeal.

It will be convenient to take each ground separately. On the question of jurisdiction, it is argued for the appellants, firstly, that under Ss. 38 to 43, Civil P. C. only one Court has jurisdiction at a time in execution. Secondly, and in any case, a decreeing Court, which has transferred execution proceedings to another Court, has no jurisdiction left until the return of the decree from the second Court with a certificate under S. 41, Civil P. C. and reliance is placed for this proposition on the observations of their Lordships of the Privy Council in *Maharajah of Bobbili* v. *Narasaraju Peda* (1) and the decisions and the observations of Macleod, C. J. in *Rangaswami* v. *Sheshappa* (2) and *Shivlingappa* v. *Shidmallappa* (3). For the respondent it is contended that neither proposition is correct, and that the Tasgaon Court continued to have jurisdiction in respect of the present darkhast.

The first proposition that in execution one Court alone can have jurisdiction at a time is not maintainable in regard to a darkhast, whatever the case might be in regard to a suit. It has been held that a decree may be executed in more than one Court simultaneously; *Saroda Prosad* v. *Luchmeeput Sing* (4) and *Krishtokishore Dutt* v. *Rooplall Dass* (5) In *Maharaja of Bobbili* v. *Narasaraju Peda* (1) relied upon for the appellants, it appears from p. 239 that the Madras High Court in that case held that although concurrent execution of a decree was possible, it could be carried out only under an order permitting it. There remains, therefore, to consider only the second proposition, namely, that a decreeing Court which transfers execution is deprived of all its jurisdiction until the Court to which it has transferred the decree has returned it with a certificate under S. 41, Civil P. C.

The difference between an order which is wrong and an order without jurisdiction has been pointed out by their Lordships of the Privy Council in *Malkarjun* v. *Narhari* (6). Similarly, because a decreeing Court may not be a proper Court in which a certain step-in-aid of execution may be taken, it does not follow that it is therefore a Court entirely without Jurisdiction in respect of the decree which it itself has made and of a darkhast which it itself has transferred wholly or in part to another Court. Ss. 38 to 43, Civil P. C. nowhere lay down that a decreeing Court is deprived of its jurisdiction by the mere act of transfer of the darkhast. In *Maharajah of Bobbili* v. *Nagasaraju Peda* (1) it is to be noticed that the decree-holder wished to attach and sell certain land which was in the jurisdiction, not of the decreeing District Court but of the Court of the Munsif to which the decree was transferred on his application, and the application relied upon to save limitation and which was made again to sell the land was made not to the Court of the Munsif but to the District Court. It was on these facts that their Lordships of the Privy Council observed (*p* 242 *of* 43 *I. A*):

"Their Lordships, having regard particularly to Ss. 223, 224, 228 and 230, Civil P. C., 1882, are satisfied that when that petition of 13th December 1907, was presented to the Court of the District Judge that Court was not the proper Court to which the application to execute the decree by sale of the immovable property which had been attached by the Court of the Munsif should have been made, and that the proper Court to which that application should have been made was the Court of the Munsif of Parvatipur."

and therefore limitation was held not to be saved by the application in the District Court. On the other hand, in a more recent case, *Jang Bahadur* v. *Bank of Upper India Ltd.* (7), their Lordships observed on the question of jurisdiction before them that even though the Court to which the decree was transferred was

(1) A. I. R. 1916 P. C. 16=39 Mad. 640=43 I. A. 238 (P. C.).
(2) A. I. R. 1922 Bom. 359=47 Bom. 56.
(3) A. I. R. 1924 Bom. 359.
(4) [1872] 14 M. I. A. 529=17 W. R. 289=10 B. L. R. 214 (P. C).
(5) [1882] 8 Cal. 687=10 C. L. R. 609.
(6) [1900] 25 Bom. 337=27 I. A. 216=7 Sar. 739 (P.C.).
(7) A.I.R. 1928 P.C. 162=3 Luck. 314=55 I.A. 227 (P.C).

not the proper Court to make an application under S. 50, Civil P. C., to bring the legal representatives on the record, the decreeing Court had not exclusive jurisdiction and the order under S. 50 made by the Court to which execution had been transferred was merely an irregularity in procedure which could be waived.

Section 38 merely specifies not two Courts but two classes of Courts in which decrees can be executed, namely, the Court decreeing and the Court or Courts to which the decree is sent for execution. S. 39 specifies the conditions necessary before decrees can be transferred. S. 40 relates to execution in another province and S. 41 specifies the procedure for the Courts to which decrees are sent for execution to follow when it has either executed or failed to execute the decree. Under S. 42 the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. None of these sections suffices for the basis of the argument for the appellants that a decreeing Court not merely delegates but also deprives itself of jurisdiction by the mere act of transferring the decree ; and the provisions as to certification are meant to safeguard the judgment-debtor against unnecessary harassment and not to deprive the decreeing Court of its jurisdiction—a view in consonance with the Circular R. 34 of this Court in the Manual of Civil Circulars at p. 90. A certification of non-satisfaction is a matter of procedure, and does not necessarily affect jurisdiction.

In *Rangasuami* v. *Seshappa* (2), the question was whether an application to transfer a decree to third Court could be made to the decreeing Court or to the Court to which the decree was still under transfer for execution, and it was held by Macleod, C. J., that the latter Court was the proper Court. On the other hand, the judgment of Shah, J., shows that it was with considerable hesitation that the learned Judge agreed with this view ; and the argument that the decreeing Court has no jurisdiction derives no support from his judgment. That hesitation, if I may say so with respect, I share.

In *Shivlingappa* v. *Shidmallappa* (3) the actual decision was merely that the Court to which execution was transferred retained jurisdiction until it had certified under S. 41, Civil P. C. If the decreeing Court retains jurisdiction to make a transfer to a second Court even while the first transfer is pending, there appears no reason why, if the decree-holder desires to proceed in execution by arrest as here in the decreeing Court itself, the mere fact that execution by attachment or sale of the property had been pending in another Court and the papers had not been returned, should deprive the decreeing Court of its jurisdiction to order the arrest if so advised, and if it is satisfied that the decree has not been fully executed in the transferring Court. On the question of jurisdiction, therefore, I differ from the trial Court and agree with the lower appellate Court that at least as soon as the Kolhapur Court granted the application of the decree-holder to dismiss the darkhast in Kolhapur, it was open to the decree holder to apply again to the Tasgaon Court for arrest of the judgment-debtor as in this case even before the proceedings were actually received from Kolhapur certifying non-satisfaction on 30th August 1926. The first objection of jurisdiction, therefore, fails, even when the Court to which the decree is transferred is a British Court, and a fortiori when, as here, it is a foreign Court.

On the second question of limitation, the lower appellate Court was, in my opinion, right in holding that the respondent's application Ex. 14 filed on 8th December 1923, to return the decree to Tasgaon was a step-in-aid of execution sufficient to save limitation in respect of the present darkhast. Kolhapur was a foreign Court and though it was held in *Kasturchand Gujar* v. *Phrsha Mahar* (8) that the Courts of British India have no authority to send their decrees for execution to Courts not in British India, it was laid down in *Janardan Govind* v. *Narayan Krishnaji* (9) that an application made to a British Indian Court to transfer its decrees for execution to the Court of a Native State between whom and the British Government there existed an agreement to execute each other's decrees, was a step-in-aid of execution within the meaning of Art. 182, Lim. Act of 1908, differing from the view of the Madras Full Bench in *Pierce Leslie*

(8) [1887] 12 Bom. 280.
(9) [1918] 42 Bom. 420=46 I.C. 56=20 Bom. L. R. 421

Co., *Ltd.* v. *Perumal* (10): Accordingly, I am of opinion that both the objections of the appellants fail.

The appeal fails and is dismissed with costs.

V.S /R.K. *Appeal dismissed.*

(10) [1917] 40 Mad. 1059=33 M.L.J. 130=6 M.L.W. 203=42 I.C. 294=(1917) M.W.N. 712 (F.B.).

A. I. R. 1929 Bombay 421

MARTEN, C. J., AND MURPHY, J.

B. B. and C. I. Ry.—Defendants—Appellants.

v.

Ganu Daji Mirmahamad and *another*—Plaintiffs—Respondents.

Civil Revn. Appl. No. 34 of 1928, Decided on 28th January 1929, from a decree of Sm. C C. Judge, Ahmedabad, in Suit No. 2584 of 1926.

Railways Act S 72—Suit for damages on account of deterioration by overcarriage of goods—Railway Company is not protected by risk-notes.

Railway Company is not protected by either the risk-note *A* or *B* and is liable for damages when there is overcarriage of goods, the over-carriage being not within the terms of the contract embodied in risk-notes, beyond the station of destination involving a delay of three days resulting in deterioration of the goods consigned : *Foster* v. *G. W. Ry.*, (1904) 2 *K. B.* 306; *Mallet* v. *G. E. Ry.*, (1899) 1 *Q. B.* 309; *Gunnon* v. *South Eastern and Chattam Ry.*, (1916) 2 *K. B.* 370, *Discussed*. *Nilson* v. *L. and N.W. Ry.*, (1921) 3 *K.B.* 218, *Foll*: 33 *Mad.* 120, *Expl.* [P 423 C 1]

J. G. Mody—for Applicant.

H. V. Divatia—for Opponent 1.

Marten, C. J.—In this case the defendants, the B. B. & C. I. Rv., apply in revision from the order of the learned Judge of the Court of Small Causes at Ahmedabad awarding a sum of Rs. 866-4-0 and costs against them in respect of a consignment of mangoes which were booked from Timarni station on the G. I. P. Ry. to Ahmedabad station on the B. B. & C. I. Ry. The claim against defendants 1, the G. I. P. Ry., was dismissed by the learned Judge, and on the last hearing on 14th December we directed that the present appeal by the B. B. & C. I. Ry should also be dismissed as against the G I P. Ry. But at that date the appellants had not served the plaintiff and consequently the case had to stand over.

It is clear here that the contract with the railway company was to take these mangoes from Timarni in Madras to Ahmedabad station in Gujarat. What the railway company in fact did was that they took the goods from Timarni to Ahmedabad, but that then they carried them further to Viramgam station, a long way from Ahmedabad, and next sent them back to Ahmedabad where they were delivered. The learned Judge's finding is that this despatch from Ahmedabad to Viramgam and back was contrary to the terms of the contract, and that this over-carriage caused a delay of some three days whereby the mangoes were damaged, and he assessed the damages as nine sixteenths of the consignment. The ground on which the learned Judge held against the railway company was that although the latter had risk-notes A and B in their favour, yet this carriage of the goods beyond the destination and back again was not within the terms of the contract, and accordingly the railway company were not protected by these risk-notes.

The main question before us is whether the learned Judge was correct in this. But alternatively, if the risk-notes did apply here, it is argued that he did not find specifically whether there was wilful neglect by the railway company so as to exclude them from the benefit of risk-note B.

Now it will be noticed in the first place that in both these risk-notes the goods are to be carried in transit from Timarni station to Ahmedabad station. It is true that the exception is worded "for the loss" and so on

"before, during and after transit over the said railway company."

But that is the wording of the exception. The main contract is the transit of the goods from the one station to the other. Prima facie then one would have thought that if the goods having first been carried from the station of despatch to the station of delivery are next carried on quite a different place not within the contemplation of the contract, then prima facie the original contract has been broken by the railway company, and that the risk-notes would not apply, for they were only intended to cover a transit to, say, a place *B* and not to some other place beyond *B*.

But the applicants have strongly relied on *Foster* v. *G. W. Ry.* (1). There the goods in transit were sent from Brixham to Jersey via Southampton, and should have been taken out at Exeter but were carried on to Taunton before the mistake was discovered. There the Court thought that the railway company were protected. They accordingly distinguished another case of *Mallet* v. *G. E. Ry.* (2). In that case the contract was to send the goods from Lowestoft to Jersey by the Great Western Railway and Weymouth, but by a mistake the railway company sent them by another route to Jersey, viz., the Southampton route. There it was held that the company without the consent of the consignor had altered the contract and sent the goods by a different route. Consequently there was a delay in delivery, and the company was not protected because the delay referred to in the consignment note was a delay in the performance of the contract, which was not the case there, for the delay arose in consequence of the defendants doing something which was wholly at variance with the contract.

There is another case of *Gunyon* v. *South Eastern and Chatham Ry.* (3). That was a case of cherries. They had to be sent by passenger train from Sittingbourne station, on the defendants' railway, to Glasgow. For that purpose they had to pass through London, and there the goooods were sent forward by a goods train instead of a passenger train. On that it was held that the carriage of the fruit by passenger train was of the essence of the contract, and after the fruit had been transferred to a goods train the contract was no longer being performed and the fruit was not being c rried at owner's risk. The defendants were, therefore, not relieved from liability by the conditions in the consignment note. A later case of *Neilson* v. *L. & N. W. Ry.* (4) is rather nearer the present one. There certain packages had to be carried from Llandundo to Bolton via Manchester. At Manchester the tie-on labels on the van had apparently got detached. At any rate the local inspector, although he had been advised of these goods, had apparently forgotten about them. He accordingly took the goods out of the van, and then sent them to various destinations shown on old labels which were on the packages. There it was held (p. 914):

> "that as the defendant's servant intentionally sent the goods to places which were in fact not upon the contract route, the delay did not occur "during any portion of the transit" within the meaning of the consignment note, and that it made no difference in that respect that his intention in so sending them was the result of an honest mistake; the defendants were consequently not relieved from liability by the terms of the contract."

There Mr. Justice Greer, as he then was, says (p. 225):

> "In these circumstances, apart from authority, I should have no difficulty in holding that the defendants are not protected against the consequences of a delay which was caused by the intentional despatch of the goods to towns to which they were never meant to go, and I think it makes no difference that that intentional despatch was due to a careless mistake made by an official of the company. They were in fact intentionally despatched on a journey which was not the agreed journey or anything like the agreed journey."

It will be observed that the goods were deflected from their proper route before they had reached their correct destination. In the present case we have goods deflected after they had arrived at their proper destination. To that extent possibly, therefore, the present case is the stronger of the two. On the other hand in *Arunachellam Chettiar* v *Madras Ry. Co.* (5) the goods were consigned from station *E* to station *K*, but the ordinary practice was to send goods beyond station *K* to station *C* and then back again from *C* to *K*. In fact the goods were damaged while at station *C*. There it was held that the condition in the risk-note included the usual transit according to the practice of the railway company, and that the consignor must be taken to have known it or ought to have known it, and that as the railway company were merely carrying out their usual practice, they were protected under the risk-note. The judgment proceeded to add (pp. 121, 122):

(1) [1904] 2 K. B. 306=73 L. J. K. B. 811=20 T. L. R. 472=52 W. R. 685=90 L. T. 779.
(2) [1899] 1 Q. B. 309=68 L. J. Q. B. 256=15 T. L. R. 137=47 W. R. 334=80 L. T. 53.
(3) [1915] 2 K. B. 370=84 L. J. K. B. 1212=31 T. L. R. 344=113 L. T. 282.
(4) [1921] 3 K. B. 218.
(5) [1909] 33 Mad. 120=3 I. C. 931=6 M. L. T. 292.

"Even if it could be held that, as the damage occurred after the waggon first reached Kallai and had been carried beyond that station to Calicut, the damage did not occur 'during' transit to Kallai, it would not be possible to hold that it did not in that view occur 'after' transit to Kallai. The words 'before, during and after transit' seem to cover the whole period from the time the goods were delivered to the defendants at Erode up to the time they were re-delivered to the plaintiffs at Kallai."

But so far as the actual decision was concerned, there the Court held that the railway company was protected by the terms of the risk-note as the transit was within the contract.

The point we have to consider here is whether the company in carrying the goods from Ahmedabad to Viramgam was acting within the terms of the contract. The above are the more material authorities that have been cited to us, and we have to decide what is the right decision to come to on the particular contract which we have here. In my judgment the view that the learned trial Judge took was correct, viz, that in carrying the goods from Ahmedabad to Viramgam the company was not acting within the terms of the contract. In my judgment this was never within the contemplation of the parties, and accordingly the company is not protected by either the risk-note A or B.

Under these circumstances it is unnecessary to consider whether there was here wilful neglect within the meaning of the proviso. Here it must be remembered that the corresponding clause in the English risk-notes appears to be a wider one, viz., wilful misconduct. Nor need we consider the further point that was taken that as these goods were carried loose, there was no loss of the complete consignment, because some of the goods arrived in good condition; nor was there a loss of any of the complete packages, because there were no packages. Nor need we consider the further point that there was here no "loss" within the meaning of the proviso, when it is contracted with the words "loss, destruction, or deterioration of, or damages to, the said consignment." I need not, therefore, refer to the two decisions of *Secy. of State* v *Jiwan* (6) and *E. I Ry. Co.* v. *Gopi Krishna, Kashi Prasad* (7), which were cited to us.

(6) A. I. R. 1923 All. 426=45 All. 380.
(7) A. I. R. 1924 All. 8=45 All. 534.

Then another point altogether was raised about the quantum of damages, and it was stated that the learned Judge was wrong in awarding damages on the proportion, viz., nine-sixteenths of the goods as weighed at the starting place, viz., 200 maunds, and that he ought to have calculated the damages on the weight taken at Ahmedabad on arrival of 136 maunds, Bengal, and that there was here no claim for absolute loss of goods as opposed to deterioration. Here the view of the learned Judge was that we ought not to go behind the consignment note, which showed the weight of the mangoes as 200 maunds, Bengal, and that the damages assessed by the plaintiff on that basis were not incorrect.

We agree with the learned Judge on this point also. The result will be that this application must be dismissed with costs. Separate sets of costs.

Murphy, J.—The facts are that a waggon loaded with mangoes, which was in transit from Timarni in Madras to Ahmedabad, was overcarried to Viramgam, and had to be returned from that place back to Ahmedabad, a mistake which involved three days' delay in its arriving at Ahmedabad. A large proportion of the mangoes had meanwhile deteriorated, and the suit was for damages for this loss. The learned Judge of the Court of Small Causes at Ahmedabad held that the railway administration were liable for the damage, and that they were not protected by the risk-notes in forms A and B under which the mangoes had been despatched by the consignor, his reason being that the journey from Ahmedabad to Viramgam and back was not within the terms of the contract A risk-note in form A is used in cases where the goods intended for carriage are defectively packed, as in this case they were, being placed loose in the waggon, and it protects the railway company from all responsibility for the condition in which the goods may be delivered at their destination. A risk-note in form B is taken when the consignor wishes to send his goods at a reduced rate, and protects the railway company from all claims :

"Except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the railway administration, or to theft by, or the wilful neglect of,

its servants, transport agents or carriers employed by them before, during and after transit over the said Railway."

Both the risk-notes are intended to have effect as between the station from which the goods are sent and that of destination. I think it is clear that had the delay which resulted in the deterioration of these mangoes occurred between Timarni and Ahmedabad, the risk-notes in question would have saved the railway administration concerned from all liability. But here there was overcarriage of goods by about 200 miles beyond the station of destination involving a delay of three days and it seems to me that this overcarriage was not within the terms of the contract embodied in the risk-notes.

I also agree that the calculation of damages made by the Small Cause Court Judge is correct. I think his decree must be confirmed and that this application must be dismissed with costs.

V.S./R.K. *Application dismissed.*

A. I. R. 1929 Bombay 424

MARTEN, C. J., AND MURPHY, J.

Mulji Narotam and *others*—Defendants—Appellants.

v.

Hiralal Ramchandra and *others*—Plaintiffs—Respondents.

First Appeal No. 148 of 1925, Decided on 5th September 1928, from decision of 1st Class Joint Sub-Judge, Dhulia, in Civil Suit No. 539 of 1921.

(a) Hindu Law—Partition—Intention to separate is the test of partition—Division in shares of income of undivided property evinces partition.

To prove whether a joint Hindu family is separated the test is whether there has been an unambiguous and definite intimation of intention on the part of one member of the family to separate himself or to enjoy his share in severalty. If so, that has the effect of creating a division in interest. That expression of intention may be by the institution of a suit or by some express intimation, or may be inferred from a consistent long course of conduct. [P 426 C 1]

The members of a joint Hindu family lived separately and had their properties divided excepting a particular property which was left undivided and for a large number of years the income of this property was divided in equal shares.

Held that the joint Hindu family separated as regards the interest in the property although no actual partition took place: *A. I. R.* 1924 *Bom.* 31; *A. I. R.* 1922 *P. C.* 201; *A. I. R.* 1916 *P. C.* 104, *Foll.*; 18 *Bom.* 611, *not Foll.* [P 426 C 1]

(b) Hindu Law—Joint family—Exclusion—Adverse possession—Receipt of income for series of years—Ouster not proved.

Where for a long series of years the income payable to the tenants-in-common of a Hindu family is in fact enjoyed by them in shares contrary to those to which they are entitled originally by law, the members acting on that view not by an agreement with each other but by way of admission in certain documents or proceedings, neither an ouster of co-tenants resulting in adverse possession of properties, nor some conveyance or agreement regarding the same can be presumed: *A. I. R.* 1928 *Bom.* 287, *Rel. on.*; 29 *Bom.* 300; 20 *Bom. L. R.* 967; *A. I. R.* 1922 *Bom.* 150; 18 *Cal.* 10 (*P.C.*); 47 *Cal.* 274 and 8 *B. H. C.* (*A.C.*) 166, *Ref.*; *Fisher and Taylor* v. *Prosser*, (1774) 1 *Cowp* 217, *Dist.* [P 429 C 1]

(c) Partition—All disputes should be decided in one suit—Parties should not be driven to separate suits.

Courts (in Bombay Presidency) should settle all disputes arising out of a partition suit in one litigation and should not leave the parties to have their rights determined piecemeal at different times, by different suits and perhaps by different Courts. [P 429 C 2]

G. N. Thakur and *M. K. Thakur*—for Appellants.

M. B. Dave, *N. N. Majumdar*, *H. C. Coyajee* and *R. J. Thakur*—for Respondents.

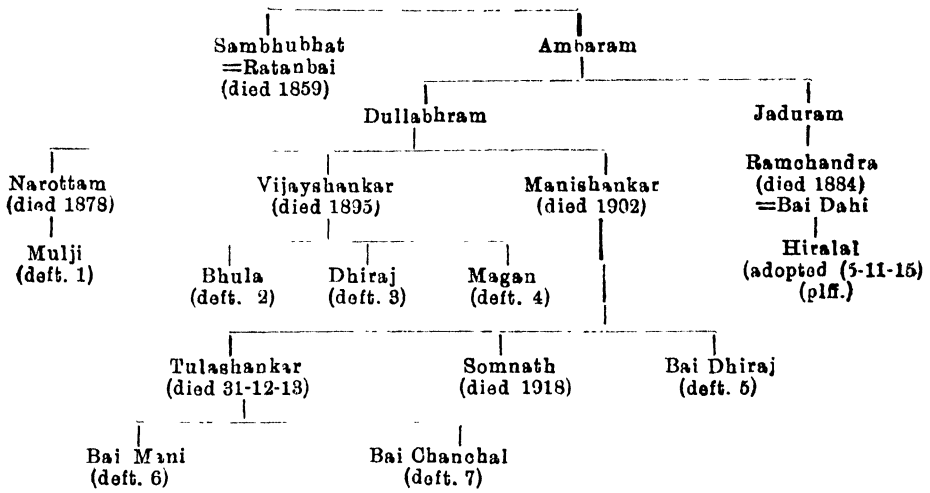
Marten, C. J.—This is an appeal by defendants 1 to 4 against the judgment of the learned Joint 1st Class Subordinate Judge at Dhulia, finding that the plaintiff as the adopted son of one Ramchandra was entitled inter alia to one half share in the suit lands, and directing a partition on that basis, and other consequential relief.

To understand the position, one must look at the pedigree given in the learned

(For pedigree see page 425).

Judge's judgment, but for the purpose of my judgment, it must be supplemented by intserting the dates of the deaths of certain material persons. It is common ground that with regard to the suit lands, they belonged to one Sambhubhat. His widow was Ratanbai who died in 1859. This property unlike certain other property, was not joint ancestral property, but passed on Ratanbai's death by way of collateral descent to the descendants of Ambaram the brother of Sambhubhat. It may be taken also as admitted or proved that Ambaram's two sons, namely, Dullabhram and Jaduram both died in the lifetime of Ratanbhai, as also did Ambaram himself. Then following down the two branches of Dul-

labhram and Jaduram, we find that Dullabhram had three sons. Narottam, the first son, died in 1878 and he has a son, Mulji, who is defendant 1. Vijayshankar, the next son, died in 1895, leaving three children, defendants 2 to 4. Manishankar, the third son, died in 1902, leaving two sons, Tulshankar who died on 31st December 1913, leaving two daughters defendants 6 and 7, and Somnath who died in 1918 having by his will purported to leave his share to his sister Bai Dhiraj, defendant 5. Next coming to Jaduram's branch, we find that he had a son Ramchandra who died in 1884 leaving a widow Bai Dahi. She is living but is not a party to the suit. On 5th November 1915, she purported to adopt Hiralal the plaintiff as the adopted



son to her deceased husband Ramchandra.

The questions that arose in the suit included a dispute as to whether this adoption by Bai Dahi was proved and inter alia whether, if it took place, the proper ceremonies were performed, the parties being Brahmins. Apart from that, other questions that arose were, first, whether the family was divided (a) at Ratanbai's death in 1859, and (b) at the date of this adoption in 1915; secondly, whether the alleged authority to adopt is proved, and if so, whether the adoption was proved to have been carried out with full ceremonies and is valid; and, thirdly, if the adoption was proved, whether the plaintiff's share was a half or was it a quarter, and incidentally did the lower Court erroneously decide the question of limitation and adverse possession in favour of the plaintiff. And there was a subsidiary question about mesne profits.

There appear to have been three classes of property, namely, certain immovable property at Nandod; secondly, certain customary rights to receive emoluments as Brahmin priests; and, thirdly, certain properties in Khandesh. It is conceded that as far, as the first two properties are concerned, namely, the immovable property at Nandod and the priest's emoluments, they have been divided; further the parties themselves have all lived separate for a large number of years On the other hand, the property in Khandesh has been left undivided, but the income from it as and when received was for many years divided between various persons including a division in equal moities between Ramchandra's branch on the one hand and Narottam's branch on the other. Accordingly, one main point that arises is this: Having regard to the fact that this particular property in Khandesh has in fact been left undivided ought the parties still to be regarded as a joint Hindu family with respect to it? There is a case decided by Sir Charles Sargent and Bayley, J., namely, *Gavrishankar Parabhuram* v. *Atmaram Rajaram* (1), which indicates that in the absence of any special agreement a division or partition of certain property between the members of a joint Hindu family does not affect the undivided property, and that with

(1) [1893] 18 Bom. 611.

regard to that undivided property they still stand to each other in the usual relation of members of a joint Hindu family. But as has been pointed out in *Dagadu* v *Sakubai* (2) by Sir Norman Macleod and Crump, J. it would seem that the effect of that decision has been seriously challenged by subsequent decisions of the Privy Council such as *Ramalinga* v. *Narayana* (3) and *Girja Bai* v. *Sadashiv Dhundiraj* (4). Indeed Crump. J. went so far as to say (p. 809 *of* 25 *Bom L. R.*)

"Once it is held that there has been partition, I should myself be inclined to hold that the presumption must be that as regards that portion of estate which remained undivided, the members of the family would hold as tenants in-common unless and until a special agreement to hold as joint tenants is proved."

According to the principles laid down by their Lordships of the Privy Council themselves, the test is whether there has been an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty. If so, that has the effect of creating a division in interest. That expression of intention may be, for instance, by the institution of a suit, or it may be some express intimation, or it may be inferred from a consistent long course of conduct. Here it is clear that not only were the parties living separately, but the whole of the ancestral property had been divided, and the question before us is what is the proper inference to be drawn as regards this particular property which came by way of collateral succession. We think that the learned Judge arrived at the correct conclusion in holding that the parties here must be taken to have separated as regards interest in the suit property although no actual partition by metes and bounds was arrived at, and that this conclusion is assisted by the fact that for a large number of years the income of the property was divided in shares that may not be correct shares in law but which at any rate indicate that they were separate shares in interest.

Turning to the next point as to the validity of the adoption, the position is that the plaintiff set up an express authority to adopt. This is rather courageous seeing that Bai Dahi was adopting in 1915 to her husband who died in 1884. On the other hand, the defendants were equally courageous in setting up a story of an express order of prohibition. Whether in fact, there was an express authority does not matter having regard to the law by which the parties are governed. So it is unnecessary to say whether there was any special authority, however sceptical one may be as to that story after this length of time. Then as regards the alleged express prohibition, the learned Judge points out clearly that it is not established, and we see no reason to interfere with his decision on that point. We think then that the fact of the adoption must be held proved, and as regards its alleged invalidity because certain ceremonies appropriate to Brahmins were not performed, the evidence in this respect is unsatisfactory. Therefore, we agree with the learned Judge that the validity of the adoption is also proved.

That brings one to the real crux of the case, and that is what is the proper share of the plaintiff. I have already pointed out that the suit property we have to deal with is not ancestral property but came by collateral succession. The result was that in law the shares were different from those taken in the ancestral property. As far as the ancestral property was concerned, the division would be first in equal shares per stirpes between Jaduram's branch and Dullabhram's branch. In other words, Narottam and his two brothers would take one moiety and Jaduram or his son Ramchandra would take the other moiety. But as regards the suit property the division in law would be per capita namely between the three sons of Dullabhram and one son of Jaduram, each taking a quarter. In fact, however, the evidence clearly shows that for a long series of years all parties have divided the income on the same basis as if the suit property was ancestral property. That particular division has benefited the plaintiff's branch because they have received a half instead of a quarter. In other words, they have been receiving year after year double of their rightful amount. Accordingly, it is now contended that that has crystallized by adverse possession into a

(2) A. I. R. 1924 Bom. 31=47 Bom. 773.
(3) A. I. R. 1922 P. C. 201=45 Mad. 489=49 I. A. 168 (P. C.).
(4) A. I. R. 1916 P. C. 104=43 Cal. 1031=43 I. A. 151 (P. C.).

right to a moiety of the corpus, and that they have successfully ousted their co-tenant-in common by adverse possession under the Limitation Act, or alternatively that we must presume a legal origin for these admitted payments and accordingly presume a conveyance or an agreement.

In the first place, one may observe that no such case of ouster or adverse possession is set up in the plaint. An issue, however, appears to have been raised upon it, and eventually the learned Judge decided the point in favour of the plaintiff, but he states that no authorities directly bearing on this point were cited at the time of the arguments. In this respect we have an advantage over the learned Judge because a considerable number of authorities has been cited to us, and moreover there is a very recent decision of this Court on the very point, namely, *Keshav* v. *Govid* (5).

But first let me amplify the statement of facts which have been clearly set out in the careful judgment of the learned Judge. Undoubtedly, what took place is that the rents of this undivided property were collected by a Mukhtyar, who was appointed—for at any rate certain years —by a power of attorney. Then these rents were paid over to Narottam and Ramchandra and after their death to their respective representatives-in-interest. As some later date, which seems to be about 1904 or thereabouts, the money was divided by the Mukhtyar into equal shares and one moiety sent to each branch. It would also appear that at any rate in the beginning of the present century, some of the parties took their shares on the basis that the property was divisible in moieties amongst each branch. There is one document which the learned Judge refers to and which requires particular attention. I refer to Ex. 196 which is a document of 24th April 1194 given by defendant 1 Mulji in favour of Bai Dahi the widow of Ramchandra. That document recites:

"The suit lands "stand in your and our names. These lands are common to us. Also the dilapidated Gabhan of two rooms ancestral and non-partitioned in Sahada also common and you have a half to half portion on it. Since last two or three years the kararnamas of the common lands stated above and the rent-notes of the two rooms are made in our names. You have a half to half right in it...For the next year i. e., in the year 1972 we shall get the kararnamas for collecting money made in the names of us both in common and you may keep with you the rent note and the collecting kararnamas of the year 1971 and you may give us their copies. The kararnamas of the year after that is of 1973 will be kept by us and you will be given copies."

The document thus provided that the rent notes given by the tenants-in common should be kept by them in alternate years. The recitals make it clear that the parties considered that they were entitled to the corpus and the income in equal moieties. Mulji for that purpose would be representing his particular branch, namely, Dullabhram's branch. Further, in 1919 a suit No. 665 was brought in the Court of the Second Class Subordinate Judge at Nandurbar by Bai Dhiraj, the present defendant 5' claiming a one-sixth share in the suit property and in the income thereof and her share of the rents. In that suit all the material present parties were parties, although the Judge appears to have held that the present plaintiff was not a necessary party. Be that as it may, the claim of defendant 5, was based on the view that the property went in moieties and that she was accordingly entitled to a third of a half making one-sixth. In fact she was awarded one-twelfth, but that depended on certain matters of controversy between her and her deceased brothers or the representatives of one of them. An appeal brought from that decision was dismissed by the District Judge.

I may say at once that the plea of res judicata could not, I think, be established, because it is common ground that the Second Class Subordinate Judge had no jurisdiction to award partition of the entirety of this property. So at most this must be regarded as evidence of what the parties themselves considered at the time they were entitled to. In the present suit, the same defendant 5 has pleaded that her claim in the former suit to one-sixth share was based on an error of law and that her proper share is not one-twelfth, but that on a proper division of the property into quarters, she is entitled to a moiety of that quarter which goes to the representatives of Manishankar's branch.

I do not propose to go into any further details on this branch of the case. One may take it, as I have already indicated

(5) A. I. R. 1928 Bom. 287.

that it is established that for a long series of years the income payable to the tenants-in-common was in fact enjoyed by them in shares contrary to those to which they were entitled originally by law, and that the parties have to some degree acted on that view, not I think by agreement with each other but by way of admission in certain documents or proceedings. What then is the proper inference that we should draw from those circumstances? I have already mentioned the recent case of *Keshav* v. *Govind* (5). There this curious circumstance had arisen. There was an adoption, and the person adopted had a son born before the adoption and another one born after the adoption. Now, under the decisions of our Court, a child born before the adoption would remain in his natural family, and a child born after the adoption would go into the new family. But in fact, in that particular case, both the child born before the adoption and the child born after the adoption were treated as being sons in the new family. Accordingly, for a long series of years the sons lived together and enjoyed the property in the manner in which they would have enjoyed it if they had been legal sons in the new family. The question that arose there was whether the possession of the son born before the adoption was adverse to the other son by reason of that enjoyment? The Court there held that it was not adverse, that the parties were labouring under a misapprehension of law, and that the possession of the elder son was not forcible but was by consent and acquiescence, and, therefore, no title was acquired by the elder son as against the son born after the adoption. I may add that Baker, J., remarked in that case that the point was one which had never apparently arisen before and was not likely to arise again. But my experience is that unsual cases often run in pairs. This at any rate appears to be an instance.

The difference between the two cases is that here the parties have not been living together, and that it is not a question of one of them having no right whatever. Both of them were entitled to some aliquot share in the property, and the only difficulty is that they have not each received their rightful shares. The one has had too much, the other has had too little. However, I should feel much difficulty in distinguishing the case of *Keshav* v. *Govind* (5) from the present case even if I felt myself at liberty to do so. And with due respect to counsel's arguments which have been most useful to us and to the authorities that have been cited, I think one may go a little further in this matter on general principles. When once you get tenants-in-common the law seems to be reasonably clear that you are not to find ouster unless there has been a clear and definite exclusion of one tenant-in-common by the other under a claim of right and to the knowledge of his co-tenant. On the other hand, there may, over a long series of years, be such a course of conduct that the proper inference to draw from all the facts is that there has been such an ouster. This is put, I think, very clearly by Sir Lawrence Jenkins and Batty, J., in *Gangadhar* v. *Parashram* (6), where the headnote is :

"To constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster.

Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed,"

An old English case, *Fisher and Taylor* v. *Prosser* (7), was cited where Ashhurst, J., said (p. 219) :

"Here is a possession of near 40 years, without any claim by the lessors of the plaintiff to a share of the rents and profits, and without any acknowledgment of his right, by the other tenant-in common.

"After so long an acquiescence I think the jury were well warranted to presume any thing in support of the defendant's title, and they might presume, either an actual ouster or a conveyance,"

That of course is not the case here. We have not got one co-tenant enjoying the entirety of the rent, but merely an excessive share. On the other hand, in *Shivalingappa* v. *Satyava* (8), a decision of Sir Norman Macleod and Shah, J., it is stated (p. 970 *of* 23 *Bom. L. R.*) :

"It does not follow that because he [a tenant-in common] is out of possession, time immediately begins to run against him ; in other words, it does not follow that because one of two tenants-in-common is in possession he is holding adversely to the other tenant in-common. There must be evidence of ouster, that is to say, the evidence of a

(6) [1905] 29 Bom. 300 =7 Bom. L. R. 252.
(7) [1774] 1 Cowp. 217.
(8) A. I. R. 1921 Bom. 77.

denial by the tenant-in-possession of the right of the tenant who is out of possession to share in the profits of the property."

There is another decision in the same volume, *Chandbhai* v. *Hasanbhai* (9), to the same effect. Then, in *Robert Watson & Co.* v *Ram Chand Dutt* (10) it is pointed out that where you have two or more tenants-in-common in India, there is nothing necessarily inconsistent with the rights of the parties to the corpus that one co-owner of property may be getting a larger share of the property than the others, at any rate, if it arises from his own efforts or his own particular risks. So, too, in *Gobinda Chandra Bhattacharjee* v. *Upendra Chandra Bhattacharjee* (11), a decision of Chatterjee and Duval, JJ), yet another judgment of Sir Lawrence Jenkins is cited where he said (p. 278) :

"The law on the subject I take to be well settled. In order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that exclution or ouster must be for the statutory period. What is sufficient evidence of exclusion ··· must depend upon the circumstances of each case ··· mere non participation in rents and profits would not necessarily of itself amount to an adverse possession, but such non-participation or non possession may in the circumstances of a particular case amount to an adverse possession. Regard must be had to all the circumstances, and a most important element is the length of time : *Ayenenussa Bibi* v. *Sheikh Isuf* (12)."

In the present case one has to bear in mind the admission in the agreement, Ex. 196, I have alluded to and such other admissions as may appear from the accounts and otherwise. Having done that and after giving full weight to what has been placed before us on behalf of the respective parties I have arrived at the conclusion that the plaintiff has not satisfied the onus of proof that lies on him to establish that there was either an ouster of his co-tenants, or on the other hand, some conveyance or agreement which has been lost or destroyed. Therefore, on this part of the case I am unable to agree with the decision of the learned Judge. I would accordingly hold that the decree should be varied by declaring that the plaintiff is entitled to a quarter and not to a half share of the suit property, and that the consequential relief must be amended accordingly.

That leads us to the subsidiary point about the mesne profits. Now, here it is urged that inasmuch as upon this finding the plaintiff's branch has been receiving an excesssive income for a large number of years, it would be only equitable that mesne profits should not be awarded prior to the date of the suit. But, in fact, it appears that from about 1914 or thereabouts, the appellants' branch has been in exclusive possession of these rents. Moreover it is clear that their branch is time barred from claiming any repayment of rents prior to that date. Consequently, although they had no right to receive these profits in the way they did, they are now in effect claiming a set-off in respect of a claim which is barred by limitation. That seems to me to be a contention which we cannot allow. Accordingly, it seems to me that the learned Judge's award with regard to mesne profits prior to suit was correct.

Then there are cross-objections urged by Mr. Coyajee's clients, namely, defendants 5, 6, and 7. He objects in the first place to the passage in the learned Judge's judgment that his clients should be left to recover profits prior to the date of the suit by separate suits. It is urged that the aim of this Court is to have all disputes settled in one litigation and not to have the parties' rights determined piecemeal at different times by different suits and perhaps by different Courts. We think that this contention is sound and that if these defendants are entitled to the profits prior to the suit, they should not be put to separate suits to recover them. Then as to the question whether they should get any profits prior to the suit, we think that they should be given those profits, but it would appear that the period for which they can properly claim must be limited. As to that minor detail, I would propose to hear counsel before deciding.

We will also hear the parties on the question of costs after my brother Murphy has given his judgment. I should have explained that the position taken by Mr. Coyajee's clients is that they have all along admitted the adoption of the plaintiff but that they support the appellants with regard to the

(9) A. I. R 1922 Bom. 150=46 Bom. 213.
(10) [1890] 18 Cal. 10=17 I. A. 110=5 Sar. 535 (P.C.).
(11) [1920] 47 Cal. 274=30 C. L. J. 512=56 I. C. 141=23 C. W. N. 977.
(12) [1912] 16 C. W. N. 89=14 I. C. 722.

amount of the share which the plaintiff is properly entitled to.

Murphy, J.—The parties to this suit and appeal are members of a Brahmin family living at Nandod in the Rajpipla State, and owning some land in the Shahada Taluka of the West Khandesh District and the suit relates only to the family property in Khandesh, the ancestral property elsewhere, including the movable and immovable property at Nandod in the Rajpipla State, having admittedly long since been partitioned. The Khandesh property originally belonged to one Sambhubhat, who died many years ago, leaving a widow Ratanbai, who is said to have died in 1859. When the succession opened, the shares would depend on the number of reversioners who were living at the time. In this case, if Sambhubhat's two nephews, Dullabhram and Jaduram, were living, each would take a half, while if they had predeceased Ratanbai, their sons, of whom Dullabhram had three and Jaduram one, would take a quarter share in each case. On the evidence given in the course of this suit it appears that, as a matter of fact, Dullabhram and Jaduram had died before Ratanbai, and that there were actually four reversioners, each taking a quarter share. But what really happened was, probably, as now appears, owing to a mistake in law, and on the analogy of the inheritance of ancestral property, that the Khandesh property was divided into two shares. Dullabhram's three sons taking a half, and Ramchandra, the son of Jaduram, taking the other half. Ramchandra died in 1884, and was succeeded by his widow Bai Dahi, who was in enjoyment of the property until 5th November, 1915 when she adopted the plaintiff, who is her brother's son. On Bai Dahi's adopting, the rest of the family resented her action and refused any longer to allow her to have any of the income of the property in question. The plaintiff filed this suit in 1921, praying for a declaration that he was the owner of a half share in the whole of the Khandesh property, and for partition and possession of his share, and mesne profits for the six years prior to the suit, at the rate of Rs. 300 a year. The defendants, who are the descendants of the three brothers, Narottam, Vijayshankar and Manishankar, all of whom have since died, deny the plaintiff's claim. The plaintiff's case was that Ramchandra had given authority to his widow Bai Dahi to adopt, while the defendants alleged that he had in fact prohibited any adoption by her. The learned Subordinate Judge has disbelived all the evidence as to prohibition, and since the family is a Brahmin one residing in Western India, the presumption is that it is governed by the Bombay school of law, in which case the widow needs no authority to make a valid adoption. It was also pleaded that the proper adoption ceremonies were not carried out, but the evidence is, I think, sufficient to show that the homa ceremony was duly performed; and the witnesses who speak to the contrary are probably not telling the truth. I agree with the learned Subordinate Judge in thinking that the adoption has been proved and that it was valid.

On his adoption, the plaintiff would take Ramchandra's share in the ancestral property, and also in the property in Khandesh. The facts as to this last are, that though it was never actually partitioned, its income was enjoyed through a mukhtyar who managed it on behalf of Bai Dahi and of the eldest son of the other branch, namely, one Narottam, the income being remitted by means of hundis to the owners of the property. As already stated, it has been found by the learned Subordinate Judge that on the opening of the inheritance, on Bai Ratanbai's death, the reversioners then alive were four in number, and were each entitled to a quarter share. The facts, however, are that since that date the income has been taken half and half, Ramchandra and after him his widow, getting one half and the other three reversioners, or their representatives, each getting a third in the remaining half.

One of the main questions in the appeal is whether the plaintiff is entitled to a half or to a quarter share in the whole property. The learned Subordinate Judge has decided in favour of the plaintiff taking a half share, and his main reason is that Ramchandra was allowed a moiety in the property under a mistake of law, that Narottam, Vijayshankar and Manishankar all wrongly believed that their share in the suit property was only one half, and that the other half belonged to Ramchandra; and that Ramchandra also mistakenly be-

lieved that his share was one half. On these facts he has formulated the principle, that possession and enjoyment under such wrong belief has the same effect for the purpose of limitation, as possession and enjoyment by a wrong doer. But he has quoted no authority for this view. The general principle is, that where the land is in the enjoyment of joint owners, and on the facts of this case I think it must be assumed that this property being inherited from a collateral of the family, did not form part of the ancestral property and the resulting title of all these people was that of owners in-common ; before adverse possession can be held to run against a co-owner, it must be shown that he was deliberately excluded to his knowledge from any share in the property. The authorities have been discussed by the learned Chief Justice in his judgment, and I need not repeat them in this one. I think it is quite clear, on the facts of this case, that defendants 1 to 4 and their predecessors-in-interest were not excluded to their knowledge, and that the mistake of law, under which Ramchandra and his widow were allowed a larger share in the property than they were entitled to, would not cause limitation to run against the defendants so as to give Bai Dahi and the plaintiff a good title to a half, instead of to the quarter share which the plaintiff is really entitled to. I agree, therefore, that the learned Subordinate Judge's judgment must be varied in this respect. I also agree in the further order proposed by the learned Chief Justice in his judgment.

Marten, C. J. —I had intended to refer to the case of *Collector of Surat* v. *Daji Jogi* (13). That was a case where Government for a long series of years continued to make certain payments to chirda Hakdars who were employed by the girasias. Notwithstanding that, the collection of giras haks by the claimants themselves and their retainers having ceased, the duty of the chirdadars ceased with it. There West, J. in his judgment says (p. 170) :

"But it cannot be said that by the mere payment any right, much less the right alleged by the plaintiffs, has been admitted, further than as to the payments actually made. It cannot be said of an individual payment without more that it involves an admission of any right beyond that to the payment itself. To make it evidence of a further right, it must be taken with other extrinsic circumstances constituting, by logical inference or by some rule of law, proof of the right asserted."

Then he ends up his judgment by saying (p. 174) :

"The mere fact of payment to a man of that to which he is not entitled is never in itself an injury, so as to afford him a just ground of complaint when the payment afterwards ceases. It is only as raising in certain cases a presumption of the existence of a right, of which other evidence through the lapse of time, is not forthcoming, that the frequent repetition of acts such as payments, when unexplained, becomes in effect, though incidentally, the foundation of rights."

As regards the mesne profits claimed by defendants 5, 6 and 7, they will be allowed for three years before suit and will be payable by the appellants. As regards defendant 5, her share is to be varied notwithstanding the declaration in the decree in the previous suit No. 665. As already stated the decree in this present suit is to be varied as regards the amount of the plaintiff's share, and the consequential relief. The rest of the appeal is dismissed.

Having regard to the complications in this case and to what has taken place in the Court below and before us, we order as regards the costs of the appeal that each party should bear his own costs As regards the costs in the Court below the order made there will stand. As regards the costs of the cross-objections, each party is to bear his own costs.

V.S./R.K. *Decree varied.*

(13) [1871] 8 B. H. C. (A.C.) 166.

A. I. R. 1929 Bombay 431

KEMP, J.

Narsey Tokersey & Co.—Plaintiff.

v.

Sachindranath Gajanan Gidh and *another*—Defendants.

Original Civil Jurisdiction Suit No. 199 of 1929, Decided on 25th February 1929.

Practice—Notice of motion cannot be taken out where plaintiffs know that there is dispute as to whether defendant is or is not minor—Proper course is to have issue of minority determined.

Notice of motion cannot be taken out where the plaintiffs know that there is a dispute whether the defendant is or is not a minor. The proper course in such case is to have the issue of minority determined. Notice

of motion should be discharged being a vexatious proceeding. [P432 C 1, 2]

Makanji Mehta—for Plaintiff.

B. J. Desai and *Kania*—for Defendants.

Judgment.—This is a notice of motion taken out by the plaintiffs for an injunction against defendants 1 and 2 from dealing with their interest in the joint family properties or receiving the sale-proceeds of the Picket Road property. There was a partition suit No 2773 of 1927 in which defendant 2 in this suit sued defendants 1, 3 and 4 in this suit and also the mortgagee In that suit the present defendant 1 was described as a minor on the ground that a guardian of his property had been appointed under the inherent jurisdiction of this Court. That, it was considered, extended the period of minority to twenty-one years. The present plaintiffs who claim to be creditors of the estate were ordered to be given notice during the trial of that partition suit and whilst it was before the commissioner to take the accounts so that they might have an opportunity to safeguard their interests before the commissioner. They attended and cannot now deny having notice of everything that took place in that suit. It is clear therefore, that they had notice that defendant 1 was alleged to be a minor.

The plaintiffs have, therefore, rushed into this notice of motion knowing that there is a dispute as to whether defendant 1 is or is not a minor. They have sued him as a major and they claim to do so on the contention that the period of minority is only extended to twenty-one years in the event of a guardian of the property being appointed under the Guardians and Wards Act. But what I mark of importance, so far as this notice of motion is concerned, is that although the plaintiffs had notice that defendant 1, it was claimed rightly or wrongly, was a minor they have not asked for the trial of any issue on that point which would be the correct procedure to adopt before they took this notice of motion and certainly before they brought it on. If they first had knowledge of the contention that defendant 1 was a minor, after the notice of motion had been taken out, the proper course for them to have taken was to have stopped further proceedings on the notice of motion and immediately arrived at a consent order with defendant 1's attorneys to have the issue of minority determined and a guardian appointed ad litem purely for the purpose of deciding that issue. This they did not do but have added to the costs by bringing on this notice of motion. Now that it has been brought on, counsel for the plaintiffs says that he does not wish to press it until the issue is determined. It might well be asked why then it was necessary to bring it on and increase the costs? I therefore, pass the following order: That the issues be tried, (1) whether by reason of the appointment of a guardian of the property of defendant 1 under the inherent jurisdiction of this Court defendant 1 is a minor and (2) what was the date of defendant 1's birth.

With regard to the second issue I may state that when asked by the Court counsel for the plaintiffs stated that whilst he did not admit that 7th February 1909 was the date of defendant 1's birth he was unable to say on what date his client alleged that defendant 1 was born: in other words he merely denies the date of birth and cannot put forward any other date. It appears to me that the whole of this proceeding up to the present has been unnecessary and taken only for the purpose of increasing costs and harassing the minor. I think it a vexatious proceeding, at any rate so far as the bringing on of this notice of motion is concerned.

Notice of motion is discharged. Plaintiffs to pay two separate sets of costs of this notice of motion as between attorney and client. The question as to the liability of the defendants, if any, should it be determined that defendant 1 is a minor, will be left over till the disposal of the two issues. Trial of these issues tomorrow. Mr Fahey appointed guardian ad litem for the purpose of the trial of these issues.

R.M./R.K. *Motion discharged.*

A. I. R. 1929 Bombay 433

PATKAR AND WILD, JJ.

Bhalchandra Trimbak Ranadive—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 250 of 1929, Decided on 5th August 1929, from judgment of 5th Presy. Magistrate, Bombay.

(a) Bombay City Police Act (1902), S. 23 (3)—Scope—"Any assembly or procession" includes assembly in open space between chawls.

The words "any assembly or procession" in S. 23 (3) are very wide and are not restricted to an assembly or procession in a public place or street but include an assembly convened in an open space between the chawls. [P 435 C 1]

(b) Bombay City Police Act, S. 23 (3)—Power given to Police Commissioner can be used so as to interfere with rights of subjects as little as possible—Order issued by Police Commissioner prohibiting assembly to be convened even in private place is valid if necessary for public safety.

The power given to the Commissioner of Police under S. 23 (3) is subject to safeguards to ensure that rights of subjects should be interfered with as little as possible. Public authorities even acting within the defined limits of the power must not conduct themselves arbitrarily or tyrannically. But an order passed by the Commissioner of Police prohibiting an assembly even in a private place under S. 23 (3) is perfectly valid provided that he considers the order to be necessary for the preservation of Public peace or public safety: 12 *Bom.* 490, *Relon*; *Duke of Bedford* v. *Dawson*, (1875) 20 *Eq.* 353, *Ref.* [P 435 C 2, P 441 C 2]

(c) Bombay City Police Act, S. 23 (3)—Order misdescribed as notification is not vitiated—Meeting convened against order of Police Commissioner—Order held duly promulgated under Penal Code, S. 188.

On 19th July 1920, the Commissioner of Police issued an order, styling it a "notification" under S. 23 (3) prohibiting the President, the Secretary, the members of the managing Committee and the members of the Girni Kamgar Union from holding, convening, or calling together any assembly of mill hands or employers of the textile mills of Bombay for one week from the date of the order. The notification was duly promulgated in the mill area. On 13th July 1929, a circular was issued purporting to be signed by six persons including the accused inviting the strikers to attend the meeting. The meeting was held in the evening and in consequence the accused were placed before a Magistrate who convicted them under I. P. C. S. 143.

Held: that in issuing the order under S. 23 (3) the Commissioner of Police properly exercised his discretion for the preservation of the public peace and safety and that it was lawfully promulgated within the meaning of Penal Code, S. 188. [P 435 C 2; P 436 C 1]

Held further: that the order in writing was not vitiated by the misdescription as a notification: *Sharp* v. *Wakefield*, (1891) *A. C.* 17; *A.I.R.* 1924 *Bom.* 1, *Ref.* [P 436 C 1]

(d) Bombay City Police Act, Ss. 89 (3) and 134 (2)—Service of order on the Presidents Secretary and members of Committee or Union is sufficient in view of Ss. 89 (3) and 134 (2) and Criminal P. C., S. 69 (3)—Knowledge of service of notice may be proved by circumstances.

Having regard to the provisions of S. 134, Cl. (2), S. 89 (3), and Criminal P. C., S. 69, Cl. (3), the service on the President, the Secretary, the members of the Managing Committee and the members of Union, of the order issued by Commissioner of police and duly promulgated is not irregular. Though the order was not personally served on the accused, yet the knowledge of the order by the accused may be proved by circumstances which would clearly show or give rise to an inference that the accused had such knowledge: *Rat. Un. Cr. C.* 3rd and *A. I. R.* 1927 *Cal.* 28, *Ref.* [P 436 C 2; P 437 C 1]

(e) Bombay City Police Act, S. 23 (3)—Accused knowing that disobedience will result in conflict with police — Disobedience of order under S. 23 (3) constitutes offence under S. 188, I. P. C.

Where having regard to the circular issued by the accused and his admissions that he convened the meeting, there is adequate ground for drawing the inference that the accused knew that the disobedience of the order of the Commissioner of Police would at least result in a conflict with police and the disobedience of the order under S. 23 (3) in such a case fulfills all the conditions necessary to constitute an offence under Penal Code, S. 188: *A. I. R.* 1923 *All.* 606, *Ref.* [P 437 C 2, P 438 C 1]

(f) Penal Code, S. 141, Cl. (3) — Offence under S 188 comes within S. 40 and as such falls under S. 141, Cl. (3).

Where the offence which is alleged to be the common object of an assembly is an offence under S. 188 comes within Cl. 1, S. 40, and as such falls under S. 141, Cl. (3): *A. I. R.* 1923 *Pat.* 1 (*S. B*), *Ref.* [P 438 C 1]

(g) Bombay City Police Act, S. 23 (3)—S. 23 (3) enlarges ambit of offence under Penal Code, S. 188—Disobedience of order under S. 23 (3) is punishable under S. 127 and equally under Penal Code, S. 188.

The offence of disobedience of an order duly promulgated by a public servant under certain prescribed conditions is an offence under S. 188, I. P. C., and S. 23 (3) enlarges the ambit of the existing offence under S. 188, I. P. C. by including an act prohibited by S. 23 (3) within it. Though the disobedience of the order of the Police Commissioner under S. 23 (3) is an offence punishable under S. 127, yet it would be equally punishable under S. 188, I. P. C. if all the conditions laid down by that section are fulfilled: *Lowe* v. *Dorling & Son*, (1906) 2 *K. B.* 772 and *Rex.* v. *Wright*, (1758). 1 *Burr.* 543, *Ref.* [P 439 C 2]

(h) Bombay City Police Act, S. 127— No special procedure is prescribed for offence under S. 127.

All the offences under a special law are tried in accordance with the Criminal P. C., and there is no special procedure prescribed for an offence under S. 127 for disobedience of an order under S. 23 (3): *Institute of Patent Agents* v. *Lockwood*, (1894) *A.C.* 347 and *Queen* v. *Hall*. (1891) 1 *Q. B.* 747, *Ref.* [P 438 C 2]

G. N. Thakor, *A. R. Gadkari* and *V. B. Karnik*—for Accused.

Patkar, J.—In this case the two accused are members of the managing committee of the Girni Kamgar Union. Accused 2 is also a Secretary of the Union and the editor of the newspaper Kranti, which is the organ of the Girni Kamgar Union. On 12th July 1929 the Commissioner of Police issued a notification, Ex. A, under sub-S. (3), S. 23, City of Bombay Police Act 4 of 1902, prohibiting the president, the secretary, the members of the Managing Committee, and the members of the Girni Kamgar Union, from holding convening or calling together any assembly of mill hands or employees of the textile mills of Bombay for one week from the date of the order The notification was duly published in the mill area in the evening of 12th. On 13th July in the morning Superintendent Mr. Spiers got a copy of the hand-bill, Ex. C, purporting to be signed by six persons including the accused inviting the strikers to attend the meeting for women at 3 p. m. and for men at 5 p. m. and directing that the meeting should not be stopped even if the police or anybody else made any illegal attempts to break the meeting, and the work of the meeting should be carried on even if any arrests were made Mr. Spiers went to the Kumbhar Chawl at about 3-30 p. m. with the Chief Presidency Magistrate and the Commissioner of Police. A number of people were collected in the open space between the Chawls. The Commissioner of Police, Mr. Kelly, asked both the accused whether they had convened the meeting and both of them admitted that they had convened the meeting. The Commissioner then told them that the meeting was illegal and in contravention of the order issued by him. They said that they had taken the best legal advice as regards the order and considered it illegal. Mr. Dastur, the Chief Presidency Magistrate, then intervened and informed them that as long as they did not get a decision from the Court they were defying the order by holding the meeting, and that the police were determined to disperse the meeting if they did not disperse themselves. The Chief Presidency Magistrate suggested that the proper course for them would be to get themselves arrested and get the case decided in Court. The accused after some hesitation agreed to the suggestion of Mr. Dastur. They were then arrested under the orders of the Chief Presidency Magistrate. Accused 1 then addressed the meeting and informed the Commissioner that he had advised the members to disperse and not to hold any meeting till the case was decided. The audience dispersed and both the accused were released on their own recognizances. The accused were placed before the Presidency Magistrate, Fifth Court, Mr. Jungalwala, and tried for an offence under S. 143, I. P. C, of being members of an unlawful assembly. The learned Magistrate, after considering the whole evidence, convicted the accused under S. 143 I. P. C., and sentenced them to six weeks' rigorous imprisonment and a fine of Rs. 200 each.

It is urged on behalf of the accused that assuming that the common object of the assembly was unlawful on the ground that it was to commit an offence under S. 127, Bombay Act 4 of 1902 of breach or disobedience of an order of the Commissioner, under S. 23, sub-S. (3), the offence under S. 188 was not referred to in the charge. The present is a summons case and under S. 242, Criminal P. C., it is not necessary to frame a charge. The trend of the examination and cross-examination of the witnesses on behalf of the prosecution clearly shows that the common object of the assembly alleged against the accused was an offence under S. 188, I. P. C. Mr. Spiers in his evidence stated that he had attended meetings held by the strikers and the burden of the speeches was : "Don't go to work, don't let others go to work;" and the result was obstruction, annoyance, and serious injury to workmen going to work in the mill area as well as on other work, and this resulted in danger to life and human safety, e. g., the safety of the shop-keepers and others.

It is urged on behalf of the accused that the order passed by the Commis-

sioner of Police under S. 23, sub-S. (3), was not an order promulgated by a public servant lawfully empowered to promulgate such order within the meaning of S. 188, and that any assembly or procession referred to in sub-S. (3), S. 23, referred to an assembly in a public street or place where the public have a right to go, and reliance is placed on sub-S. (1), S. 23 where the processions and assemblies in public streets are referred to.

The words "any assembly or procession" are very wide and are not restricted to an assembly or procession in a public place or street. Though processions and assemblies in streets are referred to in Cl. (a), sub-S. (1), S. 23, there is no limitation placed on "any assembly or procession" in sub. S. (3), S 23 S 23, sub-S. (1), Cl. (f), refers to a nuisance in any place including a private place and gives the Commissioner power to summarily stop the nuisance caused by the continuance of music or other such sounds on account of the serious illness of, or because it seriously interferes with the reasonable occupation of, any person resident or lawfully engaged in the neighbourhood. Similarly, S. 23, sub-S (2), Cl. (e), would include anything prohibited by the clause, being done in private place. S. 24, sub-S. (1), gives the Commissioner of Police power to temporarily close or take possession of any building or place and to exclude all or any persons therefrom in certain contingencies S. 26, sub-S. (1), may also in certain cases refer to the exercise of the power of the Commissioner in a private place. The special orders prescribed by Chap. 3 of the Police Act are not confined to public streets or places. It is urged on behalf of the Crown that the place where the meeting was held was an open space between two chawls and fell within the definition of a "street" in S. 9, Cl. (1), Bombay Act 4 of 1902. But Mr. Spiers has admitted in cross-examination that the place where the meeting was held was a private place. It is urged on behalf of the accused that S. 23 was taken from the Madras Act which referred to an assembly in a public place. We have to construe the words as they appear in the section, and think that the words used in sub-S (3), S 23, are wide enough to include an assembly at the place where the meeting was held on 13th July 1929. It is a question for the legislature to consider whether the Commissioner of Police should have the power to prohibit any assembly or procession, whether in a public or a private place

It is further urged on behalf of the accused that the condition prescribed by sub-S. (3), S 23, was not fulfilled and that the prohibition was not necessary for the preservation of the public peace or public safety, and that the order was passed by the Commissioner of Police as the accused objected to the presence of the police reporters at the meetings of the Girni Kamgar Union. It is urged on behalf of the Crown and it has also been held by the Magistrate that the sole discretion to be exercised in such cases is that of the Commissioner of Police and that the only condition precedent to the valid issue of such an order is that it shall appear, not to the Magistrate but to the Commissioner of Police, that such prohibition is necessary for the preservation of the public peace or public safety, and reliance is placed on the decision in *Emperor* v. *Shivlal Motilal* (1). Public authorities even acting within the defined limits of their powers must not conduct themselves arbitrarily or tyrannically: *Nagar Valab Narsi* v. *Municipality of Dhandhuka* (2). In the case of *Duke of Bedford* v *Dawson* (3), Sir George Jessel, M.R., held that the public body are to be the Judges subject to this that if they are manifestly abusing their powers, the Court will say that it is not a fair and honest judgment and will not allow it. In *Sharp* v. *Wakefield* (4), it was held that (p. 179):

". . 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion . . .; according to law, and not humour. It is to be, not arbitary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself. see *Bhaychand* v. *Secy. of State* (5)."

In the present case on the evidence I think the discretion was excercised by the Commissioner of Police not merely

(1) [1910] 34 Bom. 316=5 I. C. 860=12 Bom L. R. 126.
(2) [1887] 12 Bom. 490.
(3) [1875] 20 Eq. 353.
(4) [1891] A. C. 173=60 L. J. M. C. 73=55 J. P. 197=39 L. R. 551=64 L. T. 180.
(5) A. I. R. 1924 Bom. 1=48 Bom 87.

on the ground of the objection to the presence of the police reporters at the Girni Kamgar Union meetings, but for the preservation of the public peace and public safety. I think, therefore, that the order passed by the Commissioner of Police under S 23, sub S. (3), Bombay City Police Act 4 of 1902, was lawfully promulgated within the meaning of S. 188, I. P. C.

It is further urged that the order promulgated under S. 23, sub-S. (3), ought to have been individually served on the accused, and reliance is placed on the decisions in the cases of *Reg.* v. *Sukar Budhia* (6) and *Queen-Empress* v. *Anant Shitaram Kulkarni* (7). The learned Magistrate held that the manner in which such orders should be promulgated is laid down in S. 137 of the Act. It appears that S 23 refers in sub-S. (1) to orders either orally or in writing, in sub-(2), to a notification publicly promulgated or addressed to individuals, in sub-S. (3) to an order in writing prohibiting any assembly or procession, and in sub-S. (4) to a public notice. The distinction between a notification, an order in writing, and a public notice has been emphasized in S. 38 of the Act. S. 137 refers only to a public notice mentioned in sub-S. (4), S. 23 It is conceded on behalf of the Crown that S. 137 would not apply to an order in writing under sub-S (3), S. 23. Ex. A is described as a notification but it is really an order in writing within the meaning of sub-S. (3), S. 23, City of Bombay Police Act. There is no provision in the Act as to the mode of serving such an order in writing. Under S. 134 no order shall be deemed illegal, void, invalid or insufficient by reason of any defect of form or publication or any irregularity of procedure. The order in writing is not, therefore, vitiated by the description as a notification. The order in writing has been proved under S. 133 of the Act by the Commissioner of Police who proved that he drafted the order and sent it to the Times Press to be printed, and that order was Ex. A, and that the original was signed by him. The learned Magistrate observed in his judgment that both Mr. Kelly and Mr. Spiers proved that the accused discussed the order Ex. A, with the Chief Presidency Magistrate, Mr. Dastur, and admitted that they were aware of the order.

The evidence on this point is not free from doubt, and the admission referred to by the learned Magistrate may be with reference to the order Ex. 1 which was intended to be, but was not in fact, issued. It appears, however, that the accused were in possession of Ex. 1, which was intended to be, but was not in fact, issued by the Police Commissioner. Accused 1 stated that Ex. 1 was obtained by him from a man on the Fergusson Road. The Commissioner of Police is of opinion that as Ex. 1 was not circulated, the copy of the order reached the accused in a manner in which it ought not to have reached. Ex. A, on the other hand, was notified in a public manner. The police constable, Gangaram Bhawoo, proves that it was promulgated by beating the bataki from Dadar to Kalachowki from 8 p. m to 8-45 p m. on the 12th, and while beating the bataki he read out the order Ex. A in Marathi. The bataki was beaten at the foot of the Curry Road Bridge about 200 yards from the Kumbhar Chawl where the meeting was held, and also at the offices of the Girni Kamgar Union at Naigaum and Poibawdi. Mr. Cooper proves that the English and Vernacular copies of Ex. A were pasted at conspicuous places in Laxmi Cinema, Lalwadi, Sewree and Poibawdi, and on the morning of the 13th he accompanied Mr. Spiers to the Girni Kamgar Union office at Poibawdi where Mr. Spiers served Ex. A on the general secretary of the Union who signed Ex. B, a copy of Ex A, on the reverse. The copies of the order were pasted on the doors of the office of the Girni Kamgar Union and also on either side of the entrance. There is, therefore, considerable force in the remark of the learned Magistrate that accused 1 who had managed to obtain a copy of the order, Ex. 1, of which no one in Bombay was aware, could not be ignorant about the order, Ex. A, which had been widely broadcasted on the 12th and the 13th.

Having regard to the provisions of S. 134, Cl. (2), and S. 69, Cl. (3), Criminal P. C., and S. 89, Cl. (3), City of Bombay Police Act, the service on the president, the secretary, the members of the Managing Committee and the members of the Girni Kamgar Union, of the order, Ex. A, in the way in which it was

(6) Rat. Un. Cr. C. 30.
(7) [1899] 1 Bom. L. R. 524.

done in the present case was not irregular. In *Reg.* v. *Sukar Budhia* (6) the place where the order was stuck up was a burial place. If the order was actually served on the accused, there would be conclusive evidence of the knowledge of the order. But the knowledge can be brought home to the accused either by actual service of the notice or may be proved by circumstances which would clearly show or give rise to an inference that the accused had such knowledge. It is permissible for a Court of fact to draw an inference as to knowledge from the proved circumstances in the case including the fact of the accused's residence at the place where the order was published, or the accused being members of an incorporated body on which such an order was served : see *Ramdas Singh* v. *Emperor* (8). Having regard to the facts and circumstances proved in this case, I think that there are no adequate grounds to differ from the view of the learned Magistrate that the accused had knowledge of the order, Ex. A.

It is further urged that it is not proved in the case that the disobedience of the order of the Commissioner of Police would cause or tend to cause danger to human life, health or safety, or cause or tend to cause a riot or an affray. The statement in the judgment of the learned Magistrate with reference to the incident of 12th July that both the accused were arrested, and brickbats, stones and all sorts of missiles were thrown from Kumbhar Chawl is not supported by any evidence on the record of this case. It appears that in the morning of 13th July 1929, Superintendent Spiers received a copy of a hand bill, Ex. C, purporting to be signed by both the accused and other persons, inviting the strikers to attend the meetings at Kumbhar Chawl, Currey Road, and directing that the meeting should not be stopped even if the police or anybody else made any illegal attempts to break the meeting, and that the work of the meeting should be carried on even if arrests were made. There is no evidence that the accused got Ex. C printed, but it is clear from the evidence of the Commissioner of Police, Mr. Kelly, that both the accused admitted that they had convened the meeting It would not, therefore, be unreasonable, to assume that the accused were some of the persons who issued the circular, Ex. C. There was sufficient time since the morning for the accused, if they intended, to stop the meeting.

It appears from the evidence of the Commissioner of Police that the meeting was dispersed after the accused addressed the meeting Mr. Spiers in his evidence stated that since the advent of the private meetings of the Girni Kamgar Union there had been an increase in crime and and produced a list, Ex. H, showing the number of cases as they stood at the Bhoiwada Police Station 17 days before 26th June 1929, from which date the Girni Kamgar Union held private meetings, and another list, Ex. 1, which showed the number of cases at the same police-station for 17 days since the advent of the private meetings, in order to invite the Court to draw an inference that there was an increase of cases of assault, intimidation, stone throwing and other cognizable cases during the latter period. The prosecution also put in Ex D, a list of cognizable cases in the mill area from 1st May till 11th July, and another list, Ex. F, showing the complaints recorded in the non-cognizable register in the mill area during the same period, and according to the view of the Magistrate, crime had considerably increased since the advent of the private meetings. There is some force in the contention on behalf of the accused that it may be coincidence that the crime increased after the holding of private meetings by the Girni Kamgar Union, and the learned Magistrate has not gone into the question as to whether the charges were real or false and resulted in acquittals. Having regard to the circular Ex. C, and the admission of the accused that they convened the meetings there is adequate ground for drawing the inference that the accused knew that the disobedience of the order of the Commissioner of Police would at least result in a conflict with the police : see *Emperor* v. *Bhure Mal* (9).

The explanation to S. 188 says that it is not necessary that the offender should intend to produce harm or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys and that his disobedience produces or is

(8) A.I.R. 1927 Cal. 28=54 Cal. 152.

(9) A. I. R. 1923 All. 606=45 All. 526.

likely to produce harm. We think, therefore, that the disobedience of the Police Commissioner's order under S. 23, sub S. (3), City of Bombay Police Act, in this case fulfilled all the conditions necessary to constitute an offence under S. 188, I P. C.

It is further urged on behalf of the accused that the offence created by the disobedience of the order under S. 23, sub-S. (3), constituted a new offence, and should have been dealt with as an offence under S. 127, Police Act, and not as an offence under the Indian Penal Code, and reliance is placed on the decision of Das, J. in *Emperor* v. *Abdul Hamid* (10). The common object of the assembly in this case was to commit an offence within the meaning of Cl. (3), S. 141, I. P. C. Under S. 40, I. P. C. the word " offence " in S 141 means the thing punishable under the special or local law if it is punishable under such law with imprisonment for a term of six months or upwards whether with or without fine. The offence of disobedience of an order under S. 23, sub-S. (3), Police Act, is punishable under S. 127 with imprisonment which may extend to one month or with fine and would not, therefore, be included in the word " offence " in Cl 3, S 141. The offence which is alleged to be the common object of the assembly in the present case to commit is an offence under S. 188, I. P. C., and would come within Cl. 1, S. 40 In *Emperor* v. *Abdul Hamid* (10) Mullick and Coutts, JJ. declined to interfere with the order of acquittal of the lower Court on the ground that there was no evidence on which it could be held that the common object of the unlawful assembly was to disobey a lawful order as contemplated by S. 188, I. P. C. Das, J., however, on a consideration of the authorities came to the conclusion that the accused could not be convicted under the Indian Penal Code for an offence committed under the Police Act.

In *Institute of Patent Agents* v. *Lockwood* (11) it was held that the offence of practising as a Patent Agent without being on the register was a new offence and punishable with a liability to £ 20 penalty, and that the mode of procedure and the amount of penalty are often regarded by the legislature as of the utmost importance when they are creating new offences and the law would, contrary to their intention, be most seriously modified if it were held that the party committing a breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of the description which might result in committal to prison.

In the present case the offence of disobedience of the order of the Commissioner of Police under S 23, sub-S. (3), is made an offence under S. 127, Police Act, and is punishable with imprisonment. S. 131, City of Bombay Police Act says that :

" Nothing in this Act shall be construed to prevent any person from being prosecuted and punished under any other enactment for any offence made punishable by this Act, or from being prosecuted and punished under this Act, for an offence punishable under any other enactment provided that all such cases shall be subject to the provisions of S. 403, Criminal P. C."

Under the General Clauses Act 10 of 1897, S. 26 :

" where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence,"

In *Queen* v. *Hall* (12) Charles, J observed (p. 754) :

" The inquiry to which I have to address myself is—first, whether the offence charged is a statutory offence simply ; secondly, whether, if it be so, the statute creating the offence has prescribed a particular remedy in such terms as to exclude either expressly or by implication the remedy by indictment."

All the offences under a special law or under the Indian Penal Code are tried in accordance with the Criminal Procedure Code, and there is no special procedure prescribed for an offence under S. 127, Police Act for disobedience of an order under S. 23, sub S. (3) If the Act had provided a special procedure for recovery of the penalty by a special tribunal set up under the Act, the matter would have been different.

In Craies on Statute Law, Edn. 3, (1923), it is laid down as follows (p. 205) :

" Also where a statute makes a new offence which was in no way prohibited by the common law, and appoints a peculiar manner of proceeding against the offender, as by commitment, or action of debt, or information,

(10) A. I. R. 1923 Pat. 1=2 Pat. 134 (S. B.).
(11) [1894] A. C. 347.
(12) [1891] 1 Q. B. 747.

etc., without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because the mentioning the other methods of proceeding seems impliedly to exclude that of indictment. Yet it hath been adjudged that if such statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorizes a proceeding by way of indictment. Also, where a statute adds a further penalty for an offence prohibited by the common law, there can be no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law."

Reference is then made to S. 33, Interpretation Act of 1889 which corresponds to S 131, Police Act, and S. 26, General Clauses Act 10 of 1897, and it is observed (p. 206) :

" Where new created offences are only prohibited by the general prohibitory clause of an Act of Parliament, an indictment will be, but where there is a prohibitory particular clause specifying only particular remedies then such particular remedy must be pursued, for otherwise the defendant would be liable to a double prosecution, one upon the general prohibition, and the other upon the particular specific remedy."

The law on this point is enunciated in Halsbury's Laws of England, Vol. 27, pp 188 to 190, paras 370 to 373.

The disobedience of an order under S. 23, sub-S. (3), is an offence under S. 127, Police Act. It is not an offence under the Penal Code. It would be an offence under S. 188, I. P. C., only if it satisfied the conditions laid down in S 188.

The distinction between a statute creating a new offence with a particular penalty and a statute enlarging the ambit of an existing offence by including new acts within it with a particular penalty, is well settled. In the former case the new offence is punishable by the new penalty only; in the latter it is punishable also by all such penalties as were applicable before the Act to the offence in which it is included: see Bonnerjee's Interpretation of Deeds, Wills and Statutes in British India, Tagore Law Lectures 1901, (p. 919.)

In *Liwe* v. *Dorling & Son* (13) Farwell, L. J., observed (p. 784) :

" Now, the distinction between a statute creating a new offence with a particular penalty and a statute enlarging the ambit of an existing offence by including new acts within it with a particular penalty is well settled. In the former case the new offence is punishable by the new penalty only, in the latter it is punishable also by all such penalties as were applicable before the Act to the offence in which it is included. The rule was recognized by Lord Mansfied in *Rex* v. *Wright* (14), and in a note to 2 Hawkins Pleas of the Crown (Edn. 1824), p. 290, is thus stated :

" The true rule seems to be this : Where the offence was punishable before the statute prescribing a particular method of punishing it, then such particular remedy is cumulative ..., and does not take away the former remedy, but where the statute only enacts, " that the doing an act, not punishable before, shall for the future be punishable in such and such a particular manner," there it is necessary to pursue such particular method and not the common law method of indictment."

In the present case, the offence of disobedience of an order duly promulgated by a public servant under certain prescribed conditions was an offence under S 188, I. P C.; and S. 23, sub-S. (3), enlarged the ambit of the existing offence under S. 188, I. P. C., by including an act prohibited by S. 23, sub-S (3), Bombay City Police Act, within it. I think, therefore, that though the disobedience of the order of the Police Commissioner under S. 23, sub-S. (3), is an offence punishable under S. 127 Police Act, it would be equally punishable under S. 188, I. P. C., if all the conditions laid down by that section are fulfilled, and it is the commission of the latter offence which is proved to be the common object of the assembly in the present case.

Lastly, it is urged that a complaint by the Commissioner of Police would be necessary under S. 195, Criminal P. C., for an offence under S. 188, I. P. C , and. therefore, the conviction under S. 143 cannot be sustained in the absence of a complaint by the Commissioner of Police. The offence of which the Magistrate has taken cognizance is an offence under S. 143, I. P. C., which does not require a complaint under S. 195, Criminal P. C.,

I think, therefore, that the conviction of the accused is correct.

With regard to the sentence it appears that the accused on being told by the Chief Presidency Magistrate to desist from holding the meeting and get the question of the validity of the order decided by a Court of law, went and addressed the meeting and asked the audience to disperse. This is the first offence of the accused. The question whether the Commissioner of Police has the

(13) [1906] 2 K. B. 772=75 L. J. K. B. 1019 =22 T. L. R. 773=95 L. T. 243.

(14) [1758] 1 Burr. 543.

power to prohibit an assembly in a private place under S. 23, sub-S. (3) of the Police Act has not been so far adjudicated in a Court of law. We think that the punishment to be inflicted on the accused in the first case of its kind under S. 143, I. P. C., ought not to have exceeded the punishment prescribed by S. 127, Bombay Act 4 of 1902. We would, therefore, reduce the sentence in the case of each of the accused to rigorous imprisonment for one month and a fine of Rs. 100 in default one week's rigorous imprisonment. The excess of the fine, if paid, should be refunded.

Wild, J. — The applicants, who are members of the Managing Committee of the Girni Kamgar Union, were convicted by the Presidency Magistrate, Fifth Court, Bombay, under S. 143, I. P. C., for being members of an unlawful assembly the common object of which was to disobey the order passed by the Commissioner of Police, Bombay. They were sentenced to six weeks' rigorous imprisonment and a fine of Rs. 200 each, in default they were directed to suffer further rigorous imprisonment for six weeks.

The prosecution case is that on 12th July a written order which is styled "Notification," Ex. A, under S. 23 (3), City of Bombay Police Act, Bombay 4 of 1902, was made by the Commissioner of Police, Bombay. The notification is to the following effect :

"Whereas rioting of a very serious nature had recently occurred in several parts of the City of Bombay resulting in murder, grievous hurt and injuries to the citizens lawfully employed and whereas there have been serious disputes and dissensions among the mill hands and employees of the textile mills of Bombay resulting in grievous hurt and other injuries to the mill hands and other employees of the textile mills of Bombay, I. P. A. Kelly, Commissioner of Police, Bombay, under sub-S. 3, S. 23, Act 4 of 1902, prohibit for one week from the date of this order the President, the Secretary, the Members of the Managing Committee and the members of the Girni Kamgar Union from holding, convening or calling together any assembly of mill hands or employees of the textile mills of Bombay."

This notification was published by beat of drum in the evening of 12th July and also by pasting copies of the notification in various places in the mill area. The following morning a copy of the notification, Ex. B, was given to one Tawde, the Secretary of the Girni Kamgar Union, and copies were pasted on the walls of the office of the Union. That day, that is to say, 13th July at 10 a. m. Superintendent Spiers received a copy of a hand-bill Ex. C, headed "A Private Meeting of the Textile Labourers on Strike in Bombay." The contents of the hand-bill were as follows :

"To consider the question of strike we have decided to hold a private meeting of the mill-employees on strike at Kumbhar Chawl, Currey Road, to-day, Saturday 13th July at 3 in the afternoon for women and at 5 in the evening for men. No one excepting a striker should attend the meeting. Mrs. Ushabai Dange will preside over the meeting. The meeting should not be stopped even if the police or anybody else make any illegal attempts to break the meeting and the work of the meeting should be carried on even if any arrests are made."

This hand-bill bore the names of the two accused, of Tawde and of three others. At 3-30 p. m on that day, that is to say, on the day of the meeting, the Commissioner of Police with the Chief Presidency Magistrate and Superintendent Spiers went to the place mentioned in the hand-bill. They found a meeting of three or four hundred people was being held at a place between two chawls by the accused who are members of the Managing Committee of the Girni Kamgar Union and who admitted that they had convened the meeting. The accused at first announced their intention of going on with the meeting as the order of the Commissioner of Police prohibiting it was illegal Then the Chief Presidency Magistrate suggested that as the accused were advised that the order was illegal and the Commissioner of Police was advised that it was legal they should submit to the order and have the legality of the order tested in Court. The accused agreed to this course and told the members of the meeting to disperse and at the order of the Chief Presidency Magistrate they were arrested for contravening the order of the Commissioner of Police.

The accused have been convicted under S 143, I. P. C., for being members of an unlawful assembly the common object of which was to commit an offence and the offence in question is the offence under S. 188, I. P. C., of disobeying the order of the Commissioner of Police. The first question for consideration is, therefore, whether the order of the Commissioner of Police under S. 23 (3), City of Bombay Police Act is a legal order.

The argument on that point is that as there can be no procession in a house or other private place S 23 (3) cannot apply to an order to prohibit an assembly or procession in a private place. But obviously the members of a procession may assemble in a private house and the procession may be marshalled in the compound of such a house and may start out from there and cause disturbance outside. It is further pointed out that under S. 23 (1) (a) and (b) the Commissioner of Police is given power to direct the conduct of and behaviour or action of persons constituting processions and assemblies in streets and to prescribe the routes by which and the times at which any such procession may, or may not pass. And it is argued that if the Commissioner of Police has power to regulate processions and assemblies in private places it would have been so stated in S. 23 (1) (a) and (b) The difference between these two parts of S. 23 is that S. 23 (1) (a) and (b) are concerned with the conduct of processions and assemblies in streets at all times, and orders with reference to them may be given by a police officer not inferior in rank to an Inspector; but an order under S. 23, sub-S. 3, may only be made by the Commissioner of Police when he considers such order to be necessary for the preservation of public peace or public safety. The order also has to be in writing and is not to remain in force for more than seven days.

It is obvious that it may be necessary for the legislature to encroach on the liberty of the subject when this is necessary for the preservation of public peace or public safety and this is in accordance with the maxim *salus populi suprema lex*. The power given to the Commissioner of Police under S. 24 (1) of the Act is an instance of this kind. For, in accordance with that he may temporarily close or take possession of any building or place which obviouly includes private houses. Sub-S. (3), S. 23, does not confine the order of the Commissioner of Police to public streets or places, and this omission is not due to inadvertence because in other parts of S. 23 the words "streets" and public places" are to be found. The omission is clearly intentional and founded on reason. For instance, in S. 23 (2) (a) the Commissioner of Police is given power to prohibit the carrying of swords, spears, etc, in any public place, but in S. 23 (2) (b) there is no restriction as to place. Cl. (b), S. 23 (2) refers to the carrying, collection, and preparation of stones or other missiles or instruments or means of casting or impelling missiles and it is obvious that this refers to stones which may be collected on the roof of a house or at an open door or window. If there was no prohibition of the collection of these missiles in a private place such as a house, they could be thrown from there on to the streets, and no object would be served by merely prohibiting the carrying of weapons in a street or public place. It may be noted that the power given to the Commissioner of Police under S. 23 (3) is subject to safeguards to ensure that the rights of subjects should be interfered with as little as possible. The order has to be passed personally by the Commissioner of Police and must be in writing. It can only be made if he considers such order to be necessary for the preservation of public peace or public safety and the order can only remain in force for seven days. I have no doubt then that an order passed by the Commissioner of Police prohibiting an assembly even in a private place under S. 23 (3) is perfectly valid provided that he considers the order to be necessary for the preservation of public peace or public safety.

It has been suggested that the condition of affairs on July 12, was not such that it was necessary for the preservation of public peace that the order Ex. A should be made. But on this point the Commissioner of Police has not been cross-examined and he was the person who was best able to judge what were the necessities of the case. It was also hinted that the Commissioner of Police issued this order because the Girni Kamgar Union had begun to hold private meetings and did not admit police reporters to them. I decline, however, to believe that an officer of the standing of the Commissioner of Police, Bombay would use his powers out of pique.

It is next argued that a copy of the order should have been served on the accused and reliance is placed on *Reg.* v. *Sukar Budhia* (6); *Queen Empress* v. *Anant Shitaram Kulkarni* (7) and

Ramdas Singh v. *Emperor* (8). The last two, however, merely lay down that there must be evidence that the accused had knowledge of the order in order to sustain a conviction under S. 188, I.P.C. It is true that in the first case the head note states that it was held that the order not having been served individually upon the accused, the conviction was illegal But though the Court annulled the conviction it did not state that individual service was in every case necessary. In this case it is not clear from the evidence whether the accused admitted at the time when the Commissioner of Police intervened at the meeting that they had knowledge of the order Ex. A, but in the circumstances of the case that they had knowledge can be inferred. A copy of the order had been that morning given to Tawde the general secretary of the Union and copies of the order had been pasted both at the office of the union and in the whole of the mill area The previous evening also the order had been proclaimed by beat of drum. At the meeting it is in evidence that accused 1 discussed a notice Ex. 1 of 10th July which the Commissioner of Police had intended to issue. This notice was nearly to the same effect as the order Ex A but as a matter of fact it was never issued. If accused 1 had obtaind in some unauthorised way a copy of this notice a notice which was never issued it is clear that the accused must have known of the order which was not only issued but was publicly promulgated in the mill area. The order Ex. A was promulgated in the manner described in S 137, City of Bombay Police Act, and it is argued that that section does not apply to an order in writing passed under S. 23 (3). It is correct to say that in terms S 137 does not apply to an order under S. 23 (3) because S. 137 refers to a public notice. If that be so, no manner for the promulgation of an order in writing under S. 23 (3) is provided in the City of Bombay Police Act. But the method adopted was one which in my opinion was suitable considering that it had to be addressed to a large number of people and it is sufficiently clear that the accused must have known of it.

It is urged that the object of accused in holding the meeting was, as stated in the hand-bill Ex. C, to consider the question of the strike and that therefore their object was not to disobey the order of the Commissioner of Police. The contents of the hand-bill Ex C, however, show the frame of mind of the accused as it advises that the meeting should be carried on even if illegal attempts to break it up are made by the police. As the accused were admittedly the conveners of the meeting it is reasonable to suppose that they authorized the publication of the hand-bill Ex. C, of which they are the signatories. If the accused knew that the meeting was prohibited, one of their objects in holding the meeting was obviously to disobey the order. That must also have been the object of the other members of the meeting who equally had knowledge of the order. Superintendent Spiers states that at first the accused announced their intention to go on with the meeting. It is, therefore, obvious that at first their intention was to disobey the order. Their subsequent conduct in telling the members of the meeting to disperse might go in mitigation of the offence but does not show that they had no intention of disobeying the police order. The common object of the assembly was clearly then to disobey the order of the Commissioner of Police prohibiting the meeting.

It is next argued that it is not proved that the disobedience of the accused caused or tended to cause obstruction, annoyance or injury etc., or danger to human life, health or safety, etc. On this point Superintendent Spiers says that private meetings were held by the Girni Kamgar Union from 26th June and there was an increase of crime from that date. He further states that the slogan at these private meetings was that the strikers should not go to work themselves nor allow others to go to work. Obviously the result of such meetings with such doctrines would be that there would be obstruction to those who wanted to work by the strikers. Superintendent Spiers says that since the advent of the private meetings there has been an increase of crime such as rioting, criminal intimidation, unlawful assembly, obstruction, etc., in his division. These meetings, and necessarily disobedience of the prohibition of them, he states, cause obstruction, annoyance and serious injury to workmen going to work in the mill area and also danger to life and human safety.

This no doubt is his opinion but as he is a police officer in charge of the division, he is the person who is best qualified to know what will be the result of these private meetings of the Girni Kamgar Union. The learned Presidency Magistrate has accepted the view of Superintendent Spiers and has held that the disobedience of the accused had the tendencies mentioned in S. 188. This is a finding of fact and one which cannot be lightly disregarded in revision. The ingredients of the offence under S. 143, I. P. C., are therefore all to be found in the case of the accused.

It was argued that the Court was not empowered to take cognizance of the offence by reason of S 195, Criminal P. C. It is no doubt the case that if the accused had been charged for an offence under S. 188, I. P. C., the Court could not have taken cognizance of it except on the complaint of the public servant whose order was disobeyed. But the offence in this case is not an offence under S. 188 but an offence under S. 143. S. 195, Criminal P.C., has, therefore, no application.

Lastly, it is contended that the accused cannot be convicted under the Penal Code for an offence committed under the Police Act as the offence was really one of disobeying the order under S. 23 (3), City of Bombay Police Act, which is punishable under S. 127 of that Act. Reliance is placed on the case of *Emperor* v. *Abdul Hamid* (10). In that case the facts are somewhat similar to those of the present case and one of the three Judges who decided the appeal held that the respondent could not be convicted under the Indian Penal Code for an offence committed under the Police Act. He based that opinion on the principle enunciated in 2 Hawkins' Pleas of the Crown, which is as follows (p. 289):

"Also, where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, &c., without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment, because the mentioning of the other methods of proceeding only seems impliedly to exclude that of indictment."

It is argued that S. 23 (3) read with S. 127, City of Bombay Police Act, makes a new offence and that therefore there can be no conviction under the Penal Code as the penalty is provided by the statute which makes the new offence. What, however, is the real nature of the principle enunciated in Hawkins' Pleas of the Crown is obvious from the cases quoted in *Emperor* v. *Abdul Hamid* (10), and particularly from the first two cases. In the first case the offence was created by the Parliamentary Registration Act of 1843 which provided as penalty a fine by the revising barrister or an action of debt by the party aggrieved. It was held, therefore, that there was no remedy by indictment and the indictment was quashed. In the second case the offender was brought before the Sessions Court whereas the penalty provided was a fine to be recovered by summary conviction in a summary Court. The principle then is that where a new offence is created and the particular manner in which proceedings should be taken is laid down, then proceedings cannot be taken in any other way. In this case, however, the procedure is the same whether the accused are prosecuted for an offence under S. 127, City of Bombay Police Act, or under S. 188, I. P. C., and no special procedure is laid down in the Police Act in connexion with the new offence The principle, therefore, enunciated in Hawkins' Pleas of the Crown does not apply to the present case. It seems anomalous that the accused should be convicted under the general law rather than under S. 127, City of Bombay Police Act which applies more particularly to the case. But this is allowable under S. 131, City of Bombay Police Act as also under S. 27, Bombay General Clauses Act, Bombay 1 of 1904.

For the above reasons I am of opinion that the accused were rightly convicted of offences under S. 143, I. P. C.

V.S /R.K. *Conviction confirmed.*

A. I. R. 1929 Bombay 443

MARTEN, C. J. AND MURPHY, J.

P. D. Shamdasani, In re.

Criminal Revn. Appln. No. 387 of 1927, Decided on 8th April 1929, from an order of Acting Chief. Presy. Magistrate, Bombay.

(a) Criminal P. C., S. 440—High Court has power in revision to hear complainant in order to see what his case is about.

Section 440 applies to an accused and therefore still more strongly does it apply to a com-

plainant. The High Court has power to hear the complainant to see what his case is about. If the case on investigation should tend to show that there has been any denial of natural justice, or that some gross and palpable error has been committed in the Court below, then the High Court should direct a rule to issue in order to hear what is to be said on the other side. [P 444 C 1, 2]

(b) Companies Act, S. 282—False statements in balance-sheet—Where there is no dishonesty or motive for dishonesty no offence under S. 282 is committed.

Section 282 requires that false statements in a balance sheet should be made wilfully knowing them to be false. Where the points involved are really technical matters, they do not normally fall within this section at any rate where no dishonesty or motive for dishonesty is shown and where the directors acted on the advice of counsel. [P 445 C 1]

Marten, C. J.—This is an application in revision by the complainant, Mr. Shamdasani, against the order of the Acting Chief Presidency Magistrate of 12th October 1927, dismissing his complaint against six respondents for an alleged offence under S. 282, Companies Act. That section provides that:

"whoever in any···balance-sheet or other document required by or for the purposes of··· the provisions of this Act wilfully makes a statement false, in any material particular, knowing it to be false."

shall be punishable in a particular way.

Now, this application to us, it is important to observe, is in revision, and not in appeal. Indeed, if this was an appealable case, there would be no right at all for the complainant to be heard. The right of appeal would be in the Crown. Then, as regards revision, although we have wide powers under Ss. 435 and 439, Criminal P. C., under which the present application is made to us, yet S. 440 provides as follows:

"No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision: Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect S. 439, sub S. (2)."

Section 440 applies to an accused, and therefore still more strongly does it apply to a complainant. We have, however, thought it right to hear the complainant on the subject of his complaint, but to this limited extent, viz., in order to see, in effect, what his case is about. If for instance, that case on investigation should tend to show that there has been any denial of natural justice, or that some gross and palpable error has been committed in the Court below, then it might be, that we should have required, at any rate, fuller arguments, or if prima facie grounds were made out, then we should direct a rule to issue an order to hear what is to be said on the other side.

Taking, then, the petition of the petitioner, which, I think, sets out quite clearly his various contentions and which, as I personally acknowledge, I have found easy to grasp notwithstanding the large and complicated figures involved, one finds that there are three main points, viz., (1) the question of contingent liabilities, (2) the question of bounties and (3) the question of works profit.

Taking first the question of contingent liabilties, the complaint of the complainant is that in the balance-sheet for the year ending 31st March 1926, there were entered certain arrears of cumulative preference dividends as required by S. 132, Companies Act and form F in Schedule 3, but that when one comes to the balance-sheet for the year 1927, this item is omitted. Consequently, he says, a very large sum, which ought to have been entered in the 1927 balance-sheet in respect of these arrears, is omitted.

Now, the answer is this, that in November 1926 a scheme was approved by the Court under the Indian Companies Act, on one construction of which the rights of the original preference shares were extinguished and rights of a different character established. The clause which the learned Magistrate relies on runs as follows:

"the said second preference shareholders having waived and abandoned all right to be paid the said arrears as originally provided."

And undoubtedly, for one thing these preference shareholders were only to be paid in the future a particular sum out of fifty per cent of the surplus profits instead of out of the whole. There was, in short, an agreement of compromise as between them and the ordinary shareholders, under which their original rights were substantially altered.

Mr. Shamdasani's argument is that notwithstanding this scheme and the agreement thereby arrived at, these arrears still remained payable as such, and he states that he himself was subsequently paid as a small shareholder

certain sums for interest and so on. It, however, appears from the judgment of the learned Magistrate that the company took the advice of eminent counsel on this point, and he advised that if the scheme was adopted the company's contingent liability in respect of arrears of preference dividend would be deemed to be cancelled and the amounts would be omitted from the balance-sheet as such. It is true that this opinion was given before the scheme was actually passed by the Court, but that,in no way, vitiates the opinion. Nor can I see that the company was obliged to consult the eminent counsel again after the scheme was passed and ask him, "Do you agree with what you said a few months ago"?

The learned Magistrate points out that S. 282, Companies Act under which the respondents are charged requires that they should wilfully make a false statement knowing it to be false. Even assuming then that a different view may be taken of the effect of the scheme why should these directors be regarded as dishonest, because they acted on the opinion of eminent counsel in this matter. If that is so it really comes to this, that supposing that they had taken the other course and decided that these alleged arrears should be included as arrears under the heading "contingent liabilities," Mr. Shamdasani could then have taken out a summons saying that that view was the wrong one, and that dishonesty was shown because they had acted contrary to the advice of counsel.

Here, it is important to observe that we are dealing with an alleged criminal offence Speaking generally, it is essential for a criminal offence that what is known in English law as mens rea 'a guilty mind' should be established. I am aware that that precise expression is not in the Code, but the provisions of the Code amount in effect to this. Accordingly on a question like this, I entirely agree with the learned Magistrate in thinking that no prima facie case has been made out here for thinking that any false statement was wilfully made knowing it to be false.

I wish to add this. In a criminal Court one often wants to test the alleged guilty mind by seeing what was the motive of the alleged criminal in doing the particular act. I quite agree that under the Code it is not essential for the prosecution to establish a motive. But as a matter of common sense this is usually of importance, because an average man does not commit a criminal offence unless he has a strong motive for doing it. I have accordingly asked Mr Shamdasani on every one of the points here what motive he suggests the respondents had in making these alleged false statements Substantially, he can point to no motive. Then I asked him:

"Supposing the balance-sheet was drawn up in the way you say it ought to be drawn up, then how would you as a shareholder be damnified by the way in which the balance-sheet and the profit and loss account were, in fact, drawn up"?

Apart from the question of the amount of contingent liability which I will deal with later on Mr. Shamdasani was unable to point out to us how he would be pecuniarily affected, except that it is material for the public to know the exact position of a company so that the market can appraise the shares of a company at their proper value, and that accordingly the ten second preference shares and the two preference shares which the complainant says is his sole holding, should maintain their proper market value. I am not impressed with that last suggestion.

I may also say that if, for instance, as regards the agent's commission, it could be established that it was calculated on a wrong basis and that they had received too much, then I take it it would be open to the petitioner as a shareholder to test the matter in the civil Court and thereby establish his view of the rights of the parties and thus prevent the assets of the company from being improperly distributed. In fact, no such proceedings have been taken by him or anybody else. On the contrary, the company in general meeting, so we are informed, have passed and adopted this very balance-sheet, notwithstanding the protests that Mr. Shamdasani made at the meeting or meetings at which it was passed.

Further, speaking for myself, I think, that the Police Courts are not the proper place to fight out disputed questions of finance in big companies or banks. That can be more properly done in the civil Courts, more especially as the decision of the civil Courts is binding. For if a wrong is done it can order a refund of the improper receipts, whereas the Court

of a Police Magistrate, with all respect, can only decide that an accused shall be fined, imprisoned or acquitted The Magistrate's judgment then does not substantially affect the civil rights of the parties and it is open to the civil Courts entirely to disregard the finding of the criminal Courts in that respect. That is partly because criminal cases are decided on entirely different basis from civil suits. In the criminal Courts the sole question is whether the accused has committed a criminal offence, and in this country he cannot even give evidence. In the civil Courts the test is breach of contract and so on. The evidence of all parties is available, and damages or restitution may be ordered.

I fully recognize that in the case of dishonest men it may be very proper to resort to this criminal remedy under the Indian Companies Act But when it is a bona fide dispute on which people may take different views, that is not, in my opinion, a case which is best fitted for a police Court.

I will now pass to the next point, which again illustrates what I have just been saying. That is the question of bounties. Now, it appears that Government had granted a bounty to this particular company, and the question is how should that bounty be dealt with in the profit and loss account, and whether, in particular, the agents should be entitled to charge commission on the bounties so paid. In fact, the bounty is disclosed in the balance-sheet. The Magistrate takes the view that it is income and that the company would be justified in treating it as such. Whether the agents were entitled to charge commission on that bounty depends primarily on the true construction of their agreement with the company. The auditors, the directors and the company in general meeting have apparently adopted the view contrary to what Mr. Shamdasani says is the true one. If Mr. Shamdasani wishes to challenge the matter I should have thought it better for the civil Court to decide once and for all what is the true construction of this agreement. It would indeed be a very undesirable state of affairs if the Magistrate took one view on the true construction and the civil Court which has the final word on it, took the other view. Here again, I am satisfied that this is not a case which comes within S. 282, even if it should be held that the bounty ought not to be included for the purposes of calculating the commission.

Lastly, I take the question of what is described in the petition as "works profit." That depends on some lengthy paragraphs in the petition and a considerable number of figures. But here the complaint which Mr. Shamdasani makes is that the works profit is really a larger sum than that shown in the balance-sheet, and that it should roughly be Rs. 1,54,33,047-14-10 and not rupees 1,46,30,277 5-0, with the result that approximately some eight lacs less is disclosed in the balance-sheet as works profit than there should be.

But the learned Magistrate has gone carefully into this, and he has shown what in his opinion are the fallacies of the argnments put forward by Mr. Shamdasani and the errors of what I may call the counter-balance-sheet which Mr. Shamdasani has exhibited as being, in his opinion, tho true balance-sheet of the company. We have read what the learned Magistrate has said on this point, and without going into any further details we substantially agree with what he has said and that here again no case for intervention under S. 282 is made out. It has indeed to be borne in mind that this is the company's balance-sheet and not Mr. Shamdasani's, and further that it has been adopted by the company in general meeting. Here again, if there was anything involving practical loss to Mr. Shamdasani as a share-holder, it is open to him to pursue his remedy in the civil Courts.

For these reasons, then, I would hold that the learned Mrgistrate rightly dismissed this complaint, and that no adequate ground is shown to us for hearing this case more fully either in this Court or in the Court below.

I wish to add, speaking for myself that I think it might be considered whether S. 282, Companies Act, should be amended by requiring the sanction of the Advocate-General before any prosecution is launched under that section. The present company happens to be an iron and steel company, but one can imagine cases of banking companies, for instance, where their credit is a more tender plant than that of an iron and steel company.

There are certain provisions in England which impose a check on persons desirfng to put the criminal law in motion in certain respects and it may be that a similar check might be usefully imposed as regards S. 282, at any rate as regards banking companies in India.

Murphy, J.—The charge made by the applicant before the Chief Presidency Magistrate related to certain items to be found in the balance-sheets of the Tata Iron and Steel Company for 1925-1926 and 1926-1927. The allegation was, that in respect of three matters shown in these balance-sheets, the directors and other accused had made wilfully false statements, in contravention of S. 282, Companies Act All the three points have been discussed at considerable length in the learned Presidency Magistrate's judgment, and have also been considered in the judgment just delivered by the learned Chief Justice, and I think it is unnecessary for me, in a concurring judgment, further to discuss them. But I think, the general effect of the three charges really is, that they amount to a difference of opinion, between the applicant and the company, on points of accounting. It may be that the manner in which these items have been dealt with in the balance-sheets is technically incorrect, or what has happened may even amount to a civil wrong. If this is so, the applicant has clear remedies in another Court, but it seems to me that by no possibility can it be inferred, on the allegations made in the complaint, and from the arguments before us, that what was done by the directors and agents was in any way dishonest. As I have just said, the points involved are really technical matters of correct or incorrect accounting, and cannot be included within the scope of a criminal charge. I agree, therefore, that the application must be dismissed.

Marten, C. J.—I wish to add this as to the apparent delay in hearing this application This is partly due to the fact that shortly after it was lodged it was adjourned at Mr. Shamdasani's request as he had to go to England in connexion with his case in the Privy Council now reported as *Parasharam Detaram* v. *Tata Industrial Bank, Limited* (1). The other case of his which was referred to by him is *Shamdasani* v. *Pochkhanavala* (2).

V.S /R.K. *Application dismissed.*

(1) A. I. R. 1928 P. C. 180=52 Bom. 571=55 I.A. 274 (P.C.).

(2) A. I. R. 1927 Bom. 414.

A. I. R. 1929 Bombay 447

PATKAR AND WILD, JJ.

Emperor

v.

Genu Gopal—Accused.

Criminal Ref. No. 33 of 1929, Decided on 8th July 1929, made by Sess. Judge, Poona, against judgment of 1st Class Magistrate, Poona.

Criminal P. C., S. 342—Prosecution witnesses examined and cross-examined—Accused questioned under S. 342—Charge framed—Plea of not guilty—On subsequent hearing applicants expressing desire to further cross-examine prosecution witnesses—On date of hearing witnesses were not cross-examined but list of defence witnesses given—Examination of defence witnesses and judgment given—Failure to examine under latter portion of S. 342 vitiated the trial.

The stage for calling upon the accused to explain the circumstances appearing in the evidence against him under the latter part of S. 342 is reached when after the charge is framed the accused either declines to cross-examine the prosecution witnesses or when he expresses a wish to cross-examine and the cross-examination and re-examination is finished and the evidence of the remaining witnesses for the prosecution has been taken. Omission to question the accused to explain the circumstances under the latter part of S. 342 is not an irregularity which can be condoned under S. 537 but is an illegality which vitiates the trial: *A. I. R.* 1928 *Bom.* 140, *A. I. R.* 1926 *Bom.* 57, *Rel. on. A. I. R.* 1923 *Mad.* 609, (*F. B*), *not Foll.*

On 1st November the prosecution witnesses were examined, cross-examined and re examined. On the same day the accused were under S 342 questioned, the charge was framed and they were asked if they pleaded guilty. They replied in the negative. On 9th November the accused were asked if they wished to cross-examine the prosecution witnesses. They replied in the affirmative, but on 27th November they declined to do so and said that they would give a list of the defence witnesses. These defence witnesses were examined on 4th December and judgment was given on 14th December.

Held: that even assuming that the question put to the accused before the framing of the charge, satisfied the requirements of S. 342, the question was put under the first part of S. 342. But the Court failed to perform the obligatory function under the latter part of S. 342 after the stage for questioning the accused generally on the case under the latter

part of S. 342 had been reached : *A. I. R.* 1921 *Bom.* 374 ; *A. I. R.* 1925 *Bom.* 170 ; *A. I. R* 1927 *P. C.* 44 and *A. I. R.* 1922 *Bom.* 290, *Ref.* [P 450 C 1]

P. B. Shingne—for the Crown.

K. H. Kelkar—for Accused.

S. G. Patwardhan—for Complainant.

Patkar, J.—In this case the three accused were tried on a charge under S. 323, Penal Code, and convicted and sentenced each to pay a fine of Rs. 25 by the Special Magistrate, First Class, Poona. The learned Sessions Judge of Poona has made a reference to this Court recommending that the conviction and sentence passed by the Magistrate should be quashed as the trial was vitiated by failure to examine the applicants under S. 342, Criminal P. C.

It appears that the witness, Ex. 1, was examined on 25th October, and three other witnesses on behalf of the prosecution, Exs. 2, 3 and 4, were examined on 1st November 1928. On that day the learned Magistrate asked the accused whether they beat the complainant on Sunday 30th September 1928, at 11 a. m. The accused replied in the negative. After the statements of the accused were taken a charge under S. 323 was framed against the accused and they were asked whether they pleaded guilty to the charge. The accused having replied in the negative, the case was adjourned to 9th November 1928. On 9th November the accused were asked whether they wished to further cross-examine the witnesses and they answered in the affirmative, and the case was adjourned to 27th November 1928. On that day they were asked whether they wished to further cross-examine the witnesses. They replied in the negative and said that they were going to give a list of their witnesses. On 4th December 1928, three of the witnesses on behalf of the defence were examined and two more were examined on 13th December. Before the learned Sessions Judge the Public Prosecutor admitted that it was clear from the record that after the charge was framed the Magistrate had not examined the accused under S. 342, Criminal P. C.

Under S. 342, Criminal P. C., for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary. This is a discretionary power which the Court may exercise at any time during the trial or inquiry even before the framing of the charge, but under the latter part of S. 342 it is obligatory on the Court for the purpose aforesaid to question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. Under S. 255, Criminal P. C., the charge shall be read and explained to the accused and he shall be asked whether he is guilty or has any defence to make. The question put to the accused on 1st November 1928, was under the first part of S. 342 before the charge was framed. After the charge was framed they were asked whether they pleaded guilty under S. 255, and having replied in the negative, at the next hearing they were asked under S. 256, Criminal P. C., whether they wished to cross-examine any, and if so, which of the prosecution witnesses. The accused said that they wished to cross-examine the witnesses on behalf of the prosecution and the case was adjourned to 27th November. On 27th November, they stated that they did not wish to cross-examine the prosecution witnesses. Then the stage was reached under S. 256 when the accused would be called upon to enter on his defence and produce his evidence, and " before he is called upon to enter upon his defence " which means the same thing as " before he is called on for his defence, " it is obligatory on the Court under the latter part of S. 342 to question the accused generally on the case after the witnesses for the prosecution have been examined.

The stage then for calling upon the accused to explain the circumstances appearing in the evidence against him under the latter part of S. 342 would be reached when after the charge is framed the accused either declines to cross-examine the prosecution witnesses, or when he expresses a wish to cross-examine and the cross-examination and re-examination is finished, and the evidence of the remaining witnesses for the prosecution has been taken. In the present case there were no further prosecution witnesses to be examined and though the accused on 9th November 1928, stated that they wished to further cross-examine the

prosecution witnesses, they declined to do so on 27th November 1928. In my opinion the stage of questioning the accused under S. 342 generally on the case was not reached till 27th November 1928, when the accused declined to further cross-examine the prosecution witnesses and before they were called on to enter upon their defence. The examination and cross-examination of the prosecution witnesses was no doubt complete on 1st November 1928, and the accused were asked the question whether they assaulted the complainant, and after that examination no further prosecution witnesses were either examined or cross-examined, and it may be said that the accused are not prejudiced by the failure of the Court to question them generally on the case under the latter part of S. 342.

In *Emperor* v. *Fernandez* (1) it was held that under S. 342, Criminal P. C., a Magistrate is bound in a summons case to examine the accused before convicting him. In a summons case under S. 242, Criminal P. C., when an accused appears or is brought before a Magistrate he shall be asked why he should not be convicted. Notwithstanding the examination under S. 242, it is obligatory to examine the accused again under S. 342, Criminal P. C. It was held that the omission to comply with the section must necessarily attract the same consequence even in a summons case as in other trials and that the illegality vitiates the proceedings. In *Emperor* v. *Nathur Kasturchand* (2) it was held that in a warrant case the stage in the trial prescribed by S. 342, Criminal P. C., when the accused has to be questioned generally on the case for the prosecution is after the prosecution evidence is complete, that is to say, after the accused against whom a charge has been framed has cross-examined the witnesses for the prosecution. Macleod, J., held (p. 46 *of* 50 *Bom.*):

"The Code intends that the accused shall be given an opportunity of explaining any circumstances appearing in the evidence against him. That must mean the whole of the evidence against him, and any examination under S. 342 before that evidence is closed cannot possibly fulfil the conditions of the section."

In that case after the prosecution witnesses had been examined, a charge was framed against the accused, and the witnesses who were previously examined were cross-examined, but the accused was not questioned further and he entered on his defence. The present case differs from *Nathu Kasturchand's* case (2), in this respect that after the charge was framed the prosecution witnesses were not further examined or cross-examined. In that case Crump, J., observed as follows (p. 47 *of* 50 *Bom.*):

"Now the section says that such examination shall for the purpose aforesaid be made after the witnesses for the prosecution have been examined and before the accused is called on for his defence. That examination must, therefore, come immediately between the two stages so indicated. It seems, therefore, to me that up to the stage indicated by the words 'before the accused is called on for his defence,' it is obligatory on the Magistrate to question the accused as regards any circumstances appearing against him, and, therefore, as regards any evidence which may have been recorded up to that point. Therefore, we have to determine when that stage is reached, and if reference is made to S. 256, I think, no doubt can be felt that that stage is not reached until all which is prescribed by that section has been completed."

That stage in the present case cannot be said to have been reached till 27th November 1928, when the accused said that they did not wish to further cross-examine the witnesses. The Court, in my opinion, has not, therefore discharged the obligatory function under S. 342, Criminal P. C., to question the accused generally before the accused is called on for his defence. Though on 1st November, before the charge was framed, the accused may have been asked a question as to whether they assaulted the complainant, it is doubtful whether that question would satisfy the requirements of an examination under S. 342, Criminal P. C., for the purpose of enabling the accused to explain any circumstances appearing in the evidence against them. Even assuming that the question put to the accused before the framing of the charge satisfied the requirements of S. 342, I think the question was put under the first part of S. 342 when the Court was performing a discretionary function, and in my opinion the Court has failed to perform the obligatory function under the latter part of S. 342 after the stage for questioning the accused generally on the case under the latter part of S. 342 had been reached on 27th November 1928.

(1) A. I. R. 1921 Bom. 374=45 Bom. 672.
(2) A. I. R. 1925 Bom. 170=50 Bom. 42.

It may be that in this particular case there may be no real prejudice to the accused by the omission to question him generally on the case under the latter part of S. 342, but this Court has consistently taken the view that the omission to ask the question is not an irregularity which can be condoned under S. 537, Criminal P. C., but is an illegality which vitiates the trial. In *Emperor* v. *Bhau Dharma* (3), it was held that where after the examination of the accused under S. 342, Criminal P. C., new prosecution witnesses are examined, it is obligatory on the Magistrate to further examine the accused under the section, and that the omission to do so is an illegality which vitiates the trial. To the same effect is the decision in *Emperor* v. *Gamadia* (4). In *Varisai Rowther* v. *Emperor* (5) it was held that if the accused has once been examined under S. 342, it is not obligatory on the Court to question him again after the cross-examination and re-examination of the prosecution witnesses recalled at the instance of the accused under S. 256, Criminal P. C, unless some new matter was brought out in the cross-examination or re-examination. This view was dissented from in *Emperor* v. *Nathu Kasturchand* (2).

The question in such a case is not whether the accused is prejudiced by the omission of the Court to question the accused but whether there is a disregard of the imperative provisions of S. 342. According to Sir Charles Fawcett in *Emperor* v. *Bhau Dharma* (3), the point may possibly need further examination by the Full Bench in view of the decision of other High Courts and the Privy Council decision in *Abdul Rahman* v. *Emperor* (6). Until the point is authoritatively decided by a Full Bench that the omission to examine the accused under the latter part of S. 342, Criminal P. C., can be treated as an irregularity which can be cured under S. 537, Criminal P. C., I feel that I am bound by the decisions of this Court that the omission to examine the accused under the latter part of S. 342 is an illegality which vitiates the trial, and that the examination of the accused before the framing of the charge would not be sufficient to dispense with the examination of the accused after the charge is framed, and after he has either declined to examine the prosecution witnesses under S. 256 or has further cross-examined them.

I would, therefore, accept the reference of the learned Sessions Judge, set aside the conviction and sentence passed by the Magistrate and order a retrial of the accused from the point at which the illegality occurred.

Wild, J.—The applicants in this case were convicted of simple hurt under S. 323, I. P. C., and were sentenced to pay a fine of Rs. 25 each. The learned Sessions Judge of Poona has reported this case to us on the ground that the Magistrate failed to question the applicants after the charge was framed and on their intimating that they did not wish to cross-examine the prosecution witnesses after the charge and that the Magistrate therefore failed to comply with the provisions of S. 342, Criminal P. C.

The facts of the case are that on 1st November 1928, the prosecution witnesses were examined, cross-examined and re-examined. On the same day the applicants were under S. 342 questioned, the charge was framed, and they were asked if they pleaded guilty. They replied in the negative. At the subsequent hearing, on 9th November, the applicants were asked if they wished to cross-examine the prosecution witnesses. They replied in the affirmative, but on 27th November, they declined to do so and said that they would give a list of defence witnesses. These defence witnesses were examined on 4th December and 13th December and judgment was given on 14th December.

In his letter of reference the learned Sessions Judge has cited the case of *Emperor* v. *Fernandez* (1); *Emperor* v. *Gulabjan* (7); and *Emperor* v. *Nathu Kasturchand* (2); but in my opinion these cases have little bearing on the matter in hand as the facts were not the same. In the above cases the prosecution witnesses were cross-examined after the accused was questioned under S. 342 or the accused was not questioned under that section. Here, however, the applicants were questioned under S. 342 after all

(3) A.I.R. 1928 Bom. 140.
(4) A.I.R. 1926 Bom. 57=50 Bom. 34.
(5) A.I.R. 1923 Mad. 609=46 Mad. 449 (F.B.).
(6) A.I.R. 1927 P.C. 44=5 Rang. 53=54 I.A. 96 (P.C.).
(7) A.I.R. 1922 Bom. 290=46 Bom. 441.

the prosecution witnesses were examined and cross-examined, and as the applicants declined to cross-examine them again after the charge was framed there was in fact no further prosecution evidence about which the applicants could have been questioned.

In my opinion the provisions of S. 342 would have been complied with both according to the spirit and letter of the law if the questions put to the applicants had been such as to enable them to explain the circumstances appearing in the evidence against them. As pointed out in *Emperor* v. *Nathu Kasturchand* (2) (at p. 46 *of* 50 *Bom.*) the intention of the Code is that the accused should be given an opportunity of explaining any circumstances appearing in the evidence against him and this must mean the whole of the evidence. Here the whole of the evidence against the applicants had been recorded when they were questioned. The letter of the law is complied with when, as here, the accused is questioned after the witnesses for the prosecution have been examined and before he is called on for his defence. The learned Sessions Judge appears to rely on a remark on p. 46 of the case of *Emperor* v. *Nathu Kasturchand* (2), to the effect that any examination of the accused under S. 342 before the prosecution evidence is closed cannot possibly fulfil the conditions of the section but that remark was made with reference to the case then under consideration and can be considered as an obiter dictum in respect of the present case where the facts are entirely different. I would hold then that if the learned Magistrate had questioned the applicants generally on the case on 1st November, for the purpose of enabling them to explain the circumstances appearing in the evidence against them, his failure to question them again after their refusal to cross-examine the prosecution witnesses would not have been contrary to the provisions of S. 342.

As a matter of fact only one question was put to each of the applicants and they were merely asked if on a certain date they had beaten the complainant. It can, therefore, hardly be considered that they were questioned generally on the case nor were they asked their explanation though no doubt they could have volunteered one if they had wished to do so. S. 342 (1), Criminal P. C., makes it incumbent on the Court to question the accused generally on the the case for the purpose of enabling him to explain any circumstances appearing in the evidence against him. Even if the question put to each of the applicants may be considered as a general questioning on the case, the applicants were not given any intimation that it was open to them to give an explanation. They were not asked their explanation nor were they asked if they had anything to say. In view of this omission the applicants had practically no opportunity of explaining the circumstances against them, and, in my opinion, they were never questioned as required by the latter part of S. 342 (1). I, therefore, agree with my learned brother that the trial is vitiated by an illegality and concur in the order proposed.

V.S./R.K. *Conviction set aside.*

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* A. I. R. 1929 Bombay 451

PATKAR AND WILD, JJ.

Dodbu Kalu Mahar, In re.

Criminal Revn. Appln. No. 119 of 1929, Decided on 20th June 1929, from an order of 1st Class Magistrate, Erandol.

*** Criminal P. C., S. 403 (2)—Complainant and accused tried and convicted under Penal Code S. 160—Subsequent prosecution of accused by complainant under Penal Code Ss. 323 and 147—Offences committed having been committed in same transaction second trial is permitted.**

Conviction of an accused for an offence under S. 160, Penal Code, on prosecution initiated by the police against both the accused and the complainant in which both were sentenced to varying fines, does not bar the subsequent prosecution of the accused for offences under Ss. 323 and 147, Penal Code, on complaint laid by the complainant. For in the previous prosecution the charges under Ss. 323 and 147, could have been joined against the present accused under S. 235 (1): *A. I. R.* 1925 *All.* 299, *Rel. on.*; *A. I. R.* 1927 *Bom.* 629, *Dist.* [P 452 C 1]

H. B. Gumaste—for Applicant.

P. S. Bakhale—for Opponents.

Judgment.—On 5th November 1928, there was a fight between the complainant and the accused in connexion with the carcass of a cow. The complainant and the accused were all tried on a charge under S. 160, I. P. C., and convicted and sentenced to varying fines. The complainant then filed the present complaint on 27 November 1928, charging the accused with rioting and hurt. The

learned Magistrate dismissed the complaint under S. 203 on the ground that there was no proof of rioting, that the offence fell under S. 323, I. P. C., and that the present prosecution was barred under S. 403, Criminal P. C. Under sub-S. (2), S. 403, a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, sub-S. (1).

The charges under Ss. 147 and 323, I. P. C., could have been joined against the present accused in the previous prosecution under S. 235, sub-S. (1), Criminal P. C., as the offences were committed in the course of the same transaction. The offences would not fall within S. 236, Criminal P. C., and, therefore, sub- S. 1, S. 403, would not apply.

In *Emperor* v. *Ram Sukh* (1) it was held that the offences provided for by Ss. 160 and 323 respectively of the Penal Code are distinct and separate offences, and a conviction under S. 160 on a prosecution initiated by the police would be no bar to a subsequent trial under S. 323 on a complaint laid by the party injured.

The case of *Emperor* v. *Kallasani* (2) stands on a different footing. There it was held that an acquittal on a charge under S. 160, I. P. C., bars subsequent trial on the same facts for an offence under S. 61 (o), Bombay District Police Act, 1890. The offence under S. 61 (o), Bombay District Police Act, relates to the behaviour in a disorderly manner in a street or place of public resort. The affray under S. 160, I. P. C., is defined by S. 159 :

" Where two or more persons, by fighting in a public place, disturb the public peace, they are said to commit an affray."

The question, therefore, whether the public peace was disturbed or not would be a matter of doubt from the very beginning and alternative charges under S. 160, I. P. C., and S. 61 (o), Bombay District Police Act, of 1890, could be framed under S. 236, Criminal P. C. On a charge under S. 160, I. P. C., an accused can be convicted under S. 61 (o), Bombay District Police Act, under S. 237, Criminal P. C., if it was found that the public peace was not disturbed. In the present case the offences of rioting and hurt were committed in the same transaction together with the offence under S. 160, I. P. C., and were distinct offences and could have been joined in the same trial with the charge under S. 160, I. P. C., under S. 235, Criminal P. C., and not under S. 236, Criminal P.C. Therefore, under S. 403 (2), Criminal P. C., the conviction under S. 160 would not bar the prosecution under Ss. 147 and 323, I. P. C. We would, therefore, set aside the order of the Magistrate and direct the Magistrate to investigate the case on the merits.

V.B./R.K. *Order set aside.*

(1) A. I. R. 1925 All. 299=47 All. 284.
(2) A. I. R. 1927 Bom. 629.

A. I. R. 1929 Bombay 452

MARTEN, C. J., AND PATKAR, J.

Charandas Vassonji Thakar and *others* —Defendants—Appellants.

v.

Nagubai Manglorekar and *others* — Plaintiffs—Respondents.

Original Civil Jurisdiction Appeal No. 13 of 1927, Decided on 7th January 1929, from decree in Suit No. 229 of 1920.

(a) Hindu Law — Maintenance—Subsistence includes residence — For determining amount ancient texts should be adopted to particular circumstances.

An appropriate test for what a Hindu woman should be allowed as subsistence is to be found under the ancient Hindu texts as adapted to modern circumstances. Subsistence or maintenance must include residence and should not be confined to food and raiment : *A. I. R.* 1926 *P. C.* 73, *Ref.* [P 454 C 1]

(b) Hindu Law—Maintenance—Concubine in continuous keeping—Amount of maintenance how to be calculated laid down.

The amount of maintenance to be awarded to a concubine in continuous keeping covers the expenses for her establishment and clothing. The value of the property is not the sole criterion, but regard must be had to the extent of property, to the manner of the woman's life and the way in which she was treated by her paramour. [P 454 C 1]

Jayakar and *Munshi*—for Appellants.

Mulla and *Shavakshaw*—for Respondents.

Marten, C. J.—This is a bitter litigation which has already gone to the Privy Council twice*.

Today we are only concerned with the quantum of maintenance that has to be paid to the plaintiff as the permanent concubine of the deceased testator. There are other points raised in the

* P. C. Appeal No. 112 of 1923, decided on 22nd May 1925 and 28 *Bom. L. R.* 1143.

present memorandum of appeal, but they have been abandoned.

As regards the question of quantum, a sum of Rs. 300 per month was awarded by the Commissioner, and his finding has been affirmed by Crump, J., in a judgment dealing fully with the case. Now I must go back one step in the history, and read the exact order of reference that was originally made by Kanga, J., as he then was, on 25th November 1921. That order directed the suit to be referred to the Commissioner for taking accounts for ascertaining the value and income of the ancestral as well as the self-acquired estate of the said deceased Vasanji Madhavji Thakar and for reporting what in the opinion of the said Commissioner would be suitable maintenance for the plaintiff out of the said estate having regard to its value and income and the plaintiff's status and manner of life. I draw particular attention to the form of that inquiry.

Kanga, J's. order was appealed from. In the appellate Court a new point was taken that the lady was not entitled to maintenance because although she was a concubine of the deceased testator, yet she did not live with him in his house, which under the ancient Hindu text law was an essential condition. Accordingly, the appeal was allowed and Kanga, J's., order was discharged. The lady in her turn appealed to the Privy Council, and their Lordships of the Privy Council reversed the decision of the appellate Court and restored the order of Kanga, J. In the course of the judgment they pointed out that those Hindu texts as to the alleged necessity for the concubine to be a resident of the man's house dated from days when the concubine was a slave. Obviously, therefore, the text could not in its entirety be applied in modern days in this country when slavery is not permitted. The effect of the Privy Council judgment is really stated in *Bai Nagubai* v. *Bai Monghibai* (1), where their Lordships say (p. 162 *of* 53 *I. A.*) :

"Their Lordships agree with the trial Judge in this view of the matter. And so the real question would appear to be whether to be of the family the concubine, otherwise entitled to maintenance, must reside in the same house with the deceased, together with his wife and the regular members of his family. Their Lordships are of opinion that such common residence is now unnecessary, whatever may have been the case when the concubine was a slave of the household."

(1) A.I.R. 1926 P.C. 78=50 Bom. 604=53 I.A. 158 (P.C.).

Now, that brings me to the first point that has been taken by counsel for the appellants, which is that under the ancient Hindu Law just as a concubine had to be a resident of the household, so on the death of her lord, she was only entitled to food and raiment. Accordingly, it was contended in the lower Court and in the memorandum of appeal that the lady was at the most entitled to food and raiment, and on that basis a sum of Rs. 50 per month was put forward as an appropriate amount for the Court to allow. That argument is based, so far as the Hindu text is concerned, on the Mitakshara passage from Stokes' Hindu Law, p. 435, para. 27, part of which runs :

"'Heirless property,' or wealth which is without an heir to succeed to it, 'goes to the king,' becomes the property of the sovereign ; 'deducting, however, a subsistence for the females as well as the funeral charges' : that is, excluding or setting apart a sufficiency for the food and raiment of the women, and as much as may be requisite for the funeral repasts and other obsequies in honour of the late owner, the residue goes to the king. Such is the construction of the text."

Then the next clause says :

"This relates to women kept in concubinage : for the term employed is "females" (yoshid). The text of Narada likewise relates to concubines ; since the word there used is "woman" (stri.)."

Now stopping there, it will be observed that the main word used is "subsistence." Subsistence, I take it, would include not merely food and raiment, but also what would be necessary in order for the woman to subsist. She must for instance have a roof over her head and other necessary requirements. Consequently, the explanation of the word "subsistence" there given namely :

"that is, excluding or setting apart a sufficiency for the food and raiment of the women,"

must be construed according to the then state of affairs, for in those days as slaves they would already be the members of the household, and they would remain members of the household. Speaking therefore for myself, I am entirely unable to agree with the contention put forward to us that the relief in this suit is to be confined to food and raiment. And if one turns to the text of Narada which is given at p. 429, it is stated :

"Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a

maintenance to his women for life, provided these preserve unsullied the bed of their lord."

So there at any rate the word used is "maintenance," which would not be confined to food and raiment. I think then that to meet this case, we must take a common sense view of the matter, and as slavery is not now permitted, we must adapt the old text to modern circumstances. Accordingly I think it fair to take, and I propose to take "subsistence" under the ancient Hindu text as the appropriate test for what this lady should be allowed. But this subsistence or maintenance must in my judgment include residence in the present case, and should not be confined to food and raiment. That disposes of the point of law that has been raised.

Next on the question of quantum, the Commissioner and the learned Judge agree that Rs. 300 per month is the appropriate amount. Personally then I am opposed to altering this sum unless a clear case for interference is made out. It is urged that the lady in her evidence stated that her expenses came to Rs. 325 to Rs. 350 a month which included the cost of maintaining a child by the first marriage and also her child by the deceased, but that those items could not be allowed, and therefore Rs. 300 was excessive. But one answer to this is that the lady was speaking of a time when practically all supplies had been cut off by the people in charge of the deceased's estate and so she was living on bare necessities, and we are even told that she was compelled by necessity to borrow money. Further, her actual charges at that time hardly seem to me to be a fair test having regard to the frame of the inquiry directed by Kanga, J. The reference there to the value of the testator's estate and what would be suitable maintenance out of that estate having regard to its value and income and the plaintiff's status and manner of life really to my mind points to this that the lady must be maintained in a fair and decent manner having regard to the way in which she had been maintained in the lifetime of the testator. The evidence is that he was a rich man worth some seven and a half lacs. It is clear that he was constantly with her for a large number of years and that she got many of the material benefits which go with a rich man. The evidence, for instance, shows that there was a motor car given in her charge, and she had a governess. And even if the actual allowance that was given by the testator himself in his lifetime was only Rs. 400 per month, that would not cover all the pecuniary benefits she obtained by her connexion with this rich man. But this sum of Rs. 400 would, I think, afford some indication of what the testator thought a fair amount to allow having regard to the mode of life to which she was then accustomed. The Commissioner has given Rs. 100 less, and the learned Judge agrees. Under all the circumstances of this case, I am not prepared to alter that amount. As regards the amount of Rs. 50 put forward in the memorandum of appeal, that to my mind is an absurd sum to put forward.

I would accordingly dismiss this appeal with costs.

Patkar, J.—I agree. The question in this case is as to the amount of maintenance to be awarded to the plaintiff. The plaintiff is seeking to recover maintenance from the estate of her deceased paramour. Kanga, J., in the original suit ordered the maintenance to be determined by the Commissioner having regard to the value and income of the estate and the plaintiff's status and manner of life. Their Lordships of the Privy Council in *Bai Nagubai* v. *Bai Monghibai* (1) have restored the decree of Kanga, J., and the argument on behalf of the appellants that the plaintiff should be allowed bare maintenance cannot be accepted having regard to the decision of the Privy Council which has resulted in the restoration of the decree of Kanga, J.

The amount of maintenance to be awarded to the concubine in this case would, in my opinion, cover the expenses for the establishment and the expenses for the food and clothing of the plaintiff. Having regard to the extent of the property, which in this case yields an income of Rs. 3,550 per month, I do not think that the amount of Rs. 300 is excessive. The value of the property is not the sole criterion, but having regard to the manner of the plaintiff's life, the way in which she was treated by the deceased, and the opinion of the Commissioner which has been acquiesced in by the learned Judge, I do not think that it would be proper to interfere with the

conclusion arrived at by the Commissioner and the learned Judge.

On these grounds I agree with the judgment just pronounced.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1929 Bombay 455

MADGAVKAR, J.

Ardeshir Nusserwanji Dossabhoy—Appellant.

v.

Usman Gani Memon and *others*—Respondents.

Second Appeal No. 925 of 1927, Decided on 27th June 1929, from decision of Dist. Judge, Satara, in Appeal No. 495 of 1926.

(a) Civil P. C., O. 38. R. 11—Attachment before judgment—Re-attachment in execution unnecessary.

An attachment before judgment enures even after the decree. Where the property is under attachment before judgment under O. 38, R. 11, it is not necessary upon an application for execution to apply for a re-attachment. The property can be sold without such an attachment: 12 *Bom*, 400 and 33 *Cal*, 639, *Rel. on.* [P 455 C 2]

(b) Civil P. C., O. 21, R. 57—Attachment before judgment ceases after decree-holder's darkhast is dismissed for failure to give security.

On the dismissal of the darkhast by reason of the decree-holder's failure to give security the attachment before judgment where it is the only attachment under which the property could be sold, must be held to have ceased under O. 21, R. 57: *A. I. R.* 1924 *Mad.* 494 (*F.B.*), *Foll.*; 16 *C. W. N.* 1097; *A. I. R.* 1924 *All.* 860 and 42 *Mad.* 1, *not Foll.* [P 456 C 1, 2]

G. S. Mulgaokar—for Appellant.

Judgment.—The question in this appeal is whether O 21, R 57, Civil P. C., applies to property attached before judgment under O. 38, Civil P. C. The trial Court held that it did; the lower appellate Court, that it did not. The purchaser from the original judgment-debtors appeals.

The property in suit consists of a house at Panchganj, which was attached before judgment by the plaintiff in Suit No. 343 of 1916 in the Court of the First Class Subordinate Judge, Poona. This suit was decreed on 6th March 1917. On 31st October 1918, an application was made by the decree-holder to the decreeing Court for transfer of the decree to the Court of Wai, in the Satara District, for execution, and was granted. On 3rd October 1922, the decree-holder filed a darkhast in the Court of the Subordinate Judge of Wai for sale of the attached property. All the decree-holders were minors, and the Court of Wai ordered the darkhastdar guardian to give security. He failed to do so, and the darkhast was struck off on 22nd November 1923.

On 7th February 1924, the decree-holders filed the present darkhast, originally for attachment and sale of moveable property, and amended on 12th April 1924, for attachment of the property now in question. The property was not attached till 10th January 1925. The appellant who had purchased the property on 19th August 1924, applied to raise the attachment and obtained an order in his favour on 21st February 1925. The decree-holder now seeks to sell the property without further attachment on the strength of the attachment before judgment in 1917.

The contest as between the decree-holder respondent, absent in this Court, and the purchaser appellant obviously turns on the question whether the attachment before judgment was or was not subsisting on the date of the purchase, that is, on 19th August 1924. That question in its turn depends upon whether the provisions of O. 21, R. 57, Civil P. C., applied to the darkhast of 1922, in which case the attachment before judgment has ceased and the appellant must succeed.

An attachment before judgment enures even after the decree: *Pallonji Shapurji* v. *Edward Vaughan* (1) and *Sewdut Roy* v. *Sree Canto Maity* (2). Where the property is under attachment before judgment, under O. 38, R. 11, Civil P. C., it is not necessary upon an application for execution to apply for a re-attachment. The property can be sold without such an attachment. That was in fact what the decree-holder sought to do in the darkhast of 1922 when he did not apply for a fresh attachment. Where a plaintiff who has obtained an attachment before judgment obtains a decree, he will presumably wish and apply immediately to execute it. The Court by a second attachment after judgment would do nothing more than it has done by the previous attachment before judgment. That

(1) [1883] 12 Bom. 400.
(2) [1906] 33 Cal, 639=10 C. W. N. 634.

presumably is the raison d'etre of O. 38, R. 11, Civil P. C. The Wai Court imposed a condition upon the attaching decree-holder for security with which he failed to comply. It is difficult to hold that the same Court which imposes a condition in one breath upon a subsequent order, would maintain the attachment without security after default of such a condition and dismissal of the darkhast for default.

The words " has been attached in execution of a decree " in O. 21, R. 57, Civil P. C., have been interpreted by the Courts in two ways. The narrower construction is that the attachment must have been after and expressly in execution of the decree. The wider construction is that by virtue of O. 38, R, 11, Civil P. C., it has become attached in execution of a decree, even though the date of the actual attachment might have been before judgment. I agree with the latter and not with the former construction. There appears no reason why the legislature should prefer a decree-holder who has been in default merely because he has obtained attachment before judgment to a decree-holder who is in default who has obtained an attachment after the decree. The narrower construction adopted by the Calcutta High Court in *Ganesh Chandra* v. *Banwari Lal* (3), followed by the Allahabad High Court in *Bohra Akhey Ram* v. *Basant Lal* (4), and previously by the Madras High Court in *Venkatasubbiah* v. *Venkata Seshaiya* (5), has now been given up in favour of the wider construction by the Madras High Court by a majority of the Full Bench in *Meyyappa Chettiar* v. *Chidambaram Chettiar* (6). The judgment of Ramesam, J., is exhaustive on the point, and agreeing as I do with the reasoning of Ramesam, J., at p. 502 and Coutts-Trotter., J., at p. 498, I am of opinion that on the dismissal of the darkhast by reason of the decree-holder's failure to give security, the attachment before judgment which was then the only attachment under which the property could be sold, must be held to have ceased under O. 21. R. 57, Civil P. C.

In this view the appeal is allowed, the order of the lower appellate Court is set aside and the order of the Subordinate Judge is restored with costs throughout on the respondents.

V.S./R.K. *Appeal allowed.*

(3) [1912] 16 C. W. N. 1097=14 I. C. 845=16 C. L. J. 86.
(4) A. I. R. 1924 All. 860=46 All. 894.
(5) [1918] 42 Mad. 1=35 M. L. J. 387=8 M. L. W. 369=48 I. C. 232=(1918) M. W. N. 606.
(6) A. I. R. 1924 Mad. 494=47 Mad. 483 (F.B.).

* A. I. R. 1929 Bombay 456

MARTEN, C. J., AND MURPHY, J.

Abdul Gafur Mahmadsaheb Maniyar —Applicants.

v.

Jayarabi Ibrahim and *others*—Opponents.

Civil Revn. Appln. No. 359 of 1928, Decided on 4th April 1929, from order of Dist. Judge, Sholapur, in Misc. Appln. No. 35 of 1927.

(a) Succession Act (39 of 1925), S. 373 (3) —Probate Judge cannot construe will so as to decide finally persons beneficially interested.

A probate Judge has no jurisdiction to construe the will in order to decide finally who were the persons beneficially interested in the estate. All he has jurisdiction to decide is who are the proper persons to be granted the certificate in an application for succession certificate or supposing it was a case of probate, to whom the grant of probate or letters of administration should issue. In determining that point he might have to consider who, for instance, were the persons best entitled to call for administration and who were the heirs, but apart from that he has no jurisdiction to go into the question of heirs. [P 458 C 1]

*** (b) Succession Act (39 of 1925), S. 373 —Beneficial interest in property which executors, administrators or holders of certifcates may have, cannot form part of order granting them administration.**

Executors or administrators or holders of certificates are all in the nature of quasi trustees in a fiduciary position, and what the beneficial interest of any of them may be in the property or estate ought to form no operative part of the order granting them administration. [P 458 C 1]

*** (c) Succession Act (39 of 1925), S. 373 —Probate or succession certificate cannot be granted in fractions.**

The main idea of probate or administration is that the grant should be of all the property to one individual or to two or more jointly and so it is not permissible to grant certificate or letters of adminstration in fraction to two or more persons. [P 459 C 1]

(d) Succession Act (39 of 1925), S. 373— Applicants more than one—It is discretionary for the Court to grant certificate to one having regard to fitness and interest of applicants

Where there are more than one applicant for a certificate, it is in the discretion of

the Court to grant certificate to one having regard to the extent of interest and the fitness of the applicants. If a party is aggrieved by the order of the Court, his remedy is by challenging the order in civil Court.

[P 460 C 1]

G. P. Murdeshwar—for Applicants.

G. B. Chitale—for Opponents 1 and 2.

Marten, C. J.—The civil revisional application relates to a succession certificate granted to the estate of one Abdul Nabi. The learned trial Judge granted two certificates. As regards certain properties described in the present proceedings as property *A*, he granted a certificate to the son Ahmadsaheb and the widow Sharifabi of Abdul Nabi, but he left out the daughters Jairabi and Ghuduma, who were opponents 3 and 4 in the trial Court. Then as regards the property *B*, he granted a certificate to Abdul Gafur the son and Rasulbi the widow of Mahamad Husein. In doing so, the learned Judge left out the daughter Jaytumbi who was opponent 5 in the trial Court.

The property *A* and the property *B* in question had been the subject of litigation in which there had been a compromise decree as between the respective branches of Abdul Nabi and his brother Mahamad Husein. This compromise decree dated 2nd August 1926, is in cross-appeals to this Court Nos. 308 and 320 of 1925, and is at p. 9 of our paper book.

The learned trial Judge granted these separate certificates because he took the view that under this compromise decree the property *A* went to the branch of Abdul Nabi, and the property *B* to the branch of Mahamad Husein. He also took the view that under this compromise decree the two daughters of Abdul Nabi, viz., Jairabi and Ghuduma, and Mahamad Husein's daughter Jaytumbi were excluded, their rights having been bought up.

So far there does not appear to be any substantial dispute in the case. But what was disputed before the trial Judge by all the daughters, or at any rate by two of them, was that under the compromise decree the shares in certain mills no doubt were allotted to either the one branch or the other, but that those shares did not carry the dividends. The learned Judge, however, on looking at the decree itself thought that that contention was erroneous. And no doubt he relied on the fact that the body of the decree provides that the property mentioned in Division A of the schedule is assigned to one of the parties, and the property mentioned in Division B of the schedule is assigned to other of the parties. Then when one turns to the schedule, one finds that Division A is headed " shares with dividends," and when one turns to Division B, that also is headed " shares with dividends." Accordingly the learned Judge granted a certificate not only in relation to the corpus of the shares, but also as regards the dividends. The certificate expressly empowers the holders to receive interest and dividends existing and future.

There was an appeal to the District Court against this decision. We understand that in fact there were two appeals, but at any rate we have one before us. There the learned District Judge in his judgment of 29th September 1928, arrived at a conclusion which is challenged by the present applicants, viz., Abdul Gafur and Rasulbi, the son and widow of Mahamad Husein, who had been granted by the trial Court a succession certificate as regards the property *B*. The view that the learned Judge took was that the compromise decree, which I have referred to, did not include certain accumulated dividends between 1916 and 1926. He, therefore, held that that property went to the ordinary heirs of the parties, and that they were the proper persons to be granted a succession certificate.

He next proceeded to say in what shares they would beneficially take these accumulated dividends, and he ended :

" I, therefore, direct that succession certificates in respect of the dividends accumulated up to 2nd August 1926, be granted as follows."

Then he sets out the shares, viz., to Rasulbi 1/16th and so on to seven persons in all.

There is nothing in the judgment before us to show what the learned District Judge proposed to do as regards the other property mentioned in the succession certificate granted by the trial Judge, except that according to his judgment in the middle of p. 5 he set aside the order of the lower Court. I say this because I do not understand his judgment. Nobody has contended before us

that the two original certificates granted by the trial Judge were to remain with the exception of the accumulated dividends, and that a third certificate was to be granted in respect of the accumulated dividends.

There appear to be many objections to the course that the learned District Judge took. In the first place he was exercising in effect the jurisdiction of a probate Judge. He was not sitting as an ordinary civil Judge to dispose of a suit for the administration of a particular estate. Consequently he would have had no jurisdiction, say, to construe the will in order to decide finally who were the persons beneficially interested in the estate. All he had the jurisdiction to decide was who were the proper persons to be granted the certificate, or supposing it was a case of probate, to whom the grant of probate or letters of administration should issue. In determining that point, he might have to consider who, for instance, were the persons best entitled to call for the administration, and who were the heirs.

In the present case, he would have to look at the compromise decree to see who were the persons claiming to be entitled to the property. But it was not for the learned District Judge to go and say that that particular property, when received, should be paid as to a certain fraction to *A* and as to another fraction to *B*. Nor do I think ought one to grant a certificate in fractions. Personally I have never seen such an order. For instance I have never heard that probate should be granted to two executors to the extent of half to each, or letters of administration to the extent of a quarter to each of four persons. That to my mind is entirely wrong. Executors or administrators or holders of certificates are all in the nature of quasi trustees in a fiduciary position, and what the beneficial interests of any of them may be in the property or estate, ought to form no operative part of the order granting them administration.

But that after all is a matter of form. The question of substance is, to whom ought the Court to grant a certificate, and whether there are any adequate grounds for upsetting the discretion which the learned trial Judge exercised in holding that, under certain circumstances, the proper persons to be granted a certificate should be certain beneficiaries other than the daughters?

Under S. 373, Succession Act 1925, sub-S. (3), it is provided that :

"If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having prima facie the best title thereto."

Then under sub-S. (1) the Judge should proceed to decide in a summary manner the right to the certificate. Then under sub-S. (4) where there are more applicants than one for a certificate, he may :

"in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants."

Now here it was clearly open to the learned trial Judge to arrive at the conclusion which he did, as to what he thought prima facie was the true construction of this particular compromise decree. There were clearly grounds on which he could come to the conclusion prima facie that the shares carried all dividends accrued and to accrue. That decision of course would only be for the sole purpose of deciding to whom the certificate should be granted. It would in no way prevent the daughters from challenging the matter in a subsequent suit.

Now here I wish to be particularly careful, and to explain that in giving our decision we in no way intend to prejudice the rights of the daughters Jairabi and Ghuduma and Jaytumbi in challenging in an ordinary civil suit the claim of their opponents that the shares in question carried all unpaid dividends. For that very reason I do not express my opinion on the true construction of this compromise decree. I only go so far as to say, as I have already intimated, that it was a discretion which, in my opinion, the trial Judge could properly exercise.

I may also say that I do not think that it was correct under the circumstances for the learned District Judge to have overruled the discretion of the trial Judge on this question as to whom the certificate should be granted. I repeat that the question as to who is really entitled to the past dividends can be determined in proper proceedings in the ordinary way.

Therefore on the substance of the matter I would hold that the learned District Judge should not have introduced the names of these three daughters amongst the persons entitled to the certificate, and that he should not have held that these daughters were entitled beneficially to the particular shares and the accumulated dividends in question.

The result is that in my opinion the order of the learned District Judge should be set aside.

Now what would be the proper order for us to make if this matter was res integra. I should view with disfavour the granting of separate certificates to one man as regards property *A*, and to another as regards property *B*. Speaking generally the main idea of probate or administration is that the grant should be of all the property to one individual or to two or more jointly. But here there are curious circumstances. In fact the order of the trial Judge has been acted on : the shares in question have been transferred to the holders of the certificates, and the disputed dividends have been paid over to them. That being so, we think that we should not set aside the order of the trial Judge and direct that one certificate should be granted instead of two.

Some time was occupied by a statement of counsel which fortunately turns out to be incorrect viz., that Abdul Gafur is a minor. On calling, however, for the original certificate we find that Abdul Gafur is described as aged about 26, so that the suggestion that the learned Judge wrongly granted the certificate to a minor does not in fact arise. We have called for the other certificate that was granted, but that is not before the Court. We understand that it is the subject of another appeal pending before the District Court. Why the parties could not have brought all their proceedings before one Court we do not know. But at any rate we have all the three daughters before us in these proceedings, and the order that we propose to make will not affect the son Ahmad and the widow Sharifabi of Abdul Nabi, who are not before us.

We propose, therefore, to direct that the order of the trial Judge granting separate certificates as regards the properties *A* and *B* should be restored.

As regards the question of costs, we do not see from the copy extract of the order of the trial Court before us that any order as to costs was made there. But if there was, we propose to leave it undisturbed. We notice, however, that in the judgment of the District Court the present applicants were directed to pay their opponents' costs. That being so, the order as to costs we will make is that the present respondents (the original opponents 3, 4 and 5) do pay the applicants' costs of this application, and also of the appeal to the District Court.

Our order restoring the order of the trial Judge will be without prejudice to any suit which the three daughters Jairabi, Ghuduma and Jaytumbi, or any of them, may be advised to bring in relation to their claim to be entitled to the accumulated dividends, or any part thereof.

A question of security is raised by the learned counsel for the respondents, but I rather fancy this arose out of some question put to him by the Bench. However, nobody seems to have raised any objection to the security, although the certificate in question was granted as long ago as October 1927. Further, under S. 375, Succession Act, the learned Judge has to consider whether security should be obtained in certain cases, and in some cases it is imperative on him to require security. At any rate we do not propose to go into that question. An application should first be made to the Court of first instance. But probably it will be found that the remedy, if any, of these daughters is to bring a civil suit and to ask for the appointment of a receiver or otherwise. Then their rights will be decided in that suit, and the point inter alia of limitation will no doubt be considered. Speaking for ourselves, we refuse to give any direction about security at this late stage of the proceedings.

Murphy, J.—The petitioners were the original applicants in Miscellaneous Application No. 22 of 1927 in the Court of the First Class Subordinate Judge, for a certificate under Act 39 of 1925, in respect of certain shares of some mills at Sholapur standing in the name of Abdul Nabi. Applicant 1 Abdul Gafur is Abdul Nabi's nephew, and applicant 2 Rasulbi was his brother's wife. Opponents 1 and 2, Ahmad and Sharifabi, pleaded that according to a partition decree made

by the High Court in connexion with cross appeals Nos. 308 and 320 of 1925, they were entitled to a certain proportion of these shares. Opponents 3, 4 and 5 opposed the application on the ground that the accumulated dividends to August 1926, the date of the compromise decree in the High Court, had never been, and still remained to be, divided.

The learned Subordinate Judge disallowed this last contention and granted a certificate to the applicants in respect of what he considered had been allotted to their share in the compromise decree. He granted a similar certificate to opponents 1 and 2 for their so allotted share by the same decree. There was an appeal from this order to the learned District Judge of Sholapur, and contentions were made by opponents 3 and 5 similar to those they had raised in the original Court.

The learned District Judge in coming to a different conclusion considered that the accumulated dividends had not been dealt with by the decree and that he was entitled to go into the question of the rights of these opponents and the heirs of Abdul Nabi. He made an order specifying what the right of each such person was according to his share, and set aside the original Court's order.

The original applicants are the petitioners in this Court. I agree that the learned District Judge's order cannot be supported. S. 373, Succession Act, contemplates that a succession certificate may be granted to a person having the best title to it. And sub-S. (3) of that section is to the effect that :

" If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having prima facie the best title thereto."

The provision as to a case where there are more applicants than one for a certificate, and where more than one of such applicants is interested, is, (sub-S. 4) :

" the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants."

I think it was this subsection which led the learned Subordinate Judge to grant the certificates to two of the parties before him. But it does not seem to me that the section authorized the learned District Judge to go into the question of the rights of the parties under the compromise decree of 1925, and definitely to decide what their respective shares were.

In these circumstances I agree that amending the order made by the District Court would probably only lead to further complication in the matter, and that the District Judge's order must be set aside, and that made by the original Court restored, as proposed in the judgement just pronounced by the learned Chief Justice.

V.B./R.K. *Order set aside.*

A. I. R. 1929 Bombay 460

PATKAR AND WILD, JJ.

Shankar Vasudeo Thite—Defendant 2 —Appellant.

v.

Dattatraya Vishnu Sardeshmukh — Plaintiff—Respondent.

Second Appeal No. 430 of 1927, Decided on 12th July 1929, from decision of Dist. Judge, Sholapur, in Appeal No. 10 of 1926.

Civil P. C., O. 2, R. 2—Separate causes of action—Fresh suit—No bar.

Where the immediate cause of action in a previous suit is the order of the Magistrate to establish a right to certain stolen ornaments and the immediate cause of action in the subsequent suit is the wrongful withholding and destruction by the defendants, the causes of action in the two suits are different and the subsequent suit is not barred under O. 2, R. 2 : 8 *Mad.* 520 (*P.C.*) and *A. I. R.* 1922 *P. C.* 23, *Foll.*; *A. I. R.* 1923 *All.* 311: 16 *All.* 365 *F.B.*; 40 *Bom.* 351 and 16 *Cal.* 98 (*P.C.*); 1 *M. H. C.* 384, *Ref.* [P 462 C 1]

V. D. Limaye—for Appellant.

P. V. Kane—for Respondent.

Patkar, J.—In this case the plaintiff sued to recover from defendants possession of the plaint property with mesne profits and costs of suit. The properties involved in the suit are : (a) one house No. 1469 ; (b) Shirdhon lands, four in number ; and (c) Gursala lands, five in number.

The only point argued in this appeal is whether the present suit is barred under O. 2, R. 2. In December 1915 Narayan the maternal grandfather of the present plaintiff filed a complaint with regard to the theft of some ornaments. Narayan died on 31st March 1916, and on 9th November 1916 the Magistrate

passed an order requiring the person entitled to the property to establish his claim in a civil Court before 21st November 1916. On 13th November 1916, the present plaintiff brought a suit against the present defendants to establish his right with regard to four ornaments which were alleged to have been stolen and which formed the subject matter of the order of the Magistrate. The plaintiff succeeded. It is argued that the plaintiff having omitted to sue for the house and the lands situated at Shirdhon and Gurusala in the previous suit, he is barred by O. 2, R. 2, from bringing the present suit. Both the lower Courts held that the suit was not barred under O. 2, R. 2.

It is argued on behalf of the appellant that the cause of action in both the suits is the same and reliance is placed on the cases of *Kashinath Ramchandra* v. *Nathoo Keshav* (1) and *Sonu* v. *Bahinibai* (2), and it is urged that the cause of action means every fact which the plaintiff has to prove in order to succeed, and that the test is whether the evidence in the two suits is the same, in order to determine whether the cause of action is the same in both the suits. The question of title, it is said, would have to be proved in both the suits and the evidence would be the same. According to the decision in *Muhammad Umar Khan* v. *Ummatul Rahim Bibi* (3) and the Full Bench decision in *Murti* v. *Bhola Ram* (4), the cause of action is defined as consisting of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. One valuable test laid down in the case of *Sonu* v. *Bahinibai* (2) in considering whether the causes of action are indentical is whether the evidence which would suffice to enable the plaintiff to obtain a decree in both the suits is the same. In *Mt. Chand Kuar* v. *Partab Singh* (5) it was held that the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff and refers entirely to the grounds set forth in the plaint as the cause of action or in other words to the media upon which the plaintiff asks the Court to arrive at a conclusion. In *De Souza* v. *Coles* (6) Holloway, J., held that the cause of action may have either the restricted sense of immediate occasion of the action or the wider sense of necessary condition of its maintenance and that the right resident in the plaintiff and the infraction of it by the defendant is the cause of action. It was held in *Rajah of Pittapur* v. *Venkata Mahipati Surya* (7) that S. 7, Act 7 of 1859, which corresponds to O. 2, R. 2, does not say that every suit shall include every cause of action or every claim which the party has, but every suit shall include the whole of the claim arising out of the cause of action—meaning the cause of action for which the suit is brought. In that case, the plaintiff first sued to recover immovable property in consequence of having been improperly turned out of possession and afterwards brought a suit to recover from the same defendant moveable property in consequence of its wrongful detention.

It was held that the claim in respect of the personality was not a claim arising out of the cause of action which existed in consequence of the defendants having improperly turned the plaintiffs out of possession. It was a distinct cause of action altogether, and did not arise at all out of the other. In the case of *Muhammad Hafiz* v. *Muhammad Zakariya* (8), their Lordships of the Privy Council held that the cause of action is the cause of action which gives occasion for and forms the foundation of the suit. In the present case the Magistrate ordered, on 9th November 1916, that the person who was entitled to the four ornaments should bring a suit before 21st November 1916. The plaintiff, therefore, in the previous case had to establish, first, that the property belonged to Narayan, and that during his lifetime there was a theft of the ornaments in December 1915. After the death of Narayan on 31st March 1916, the Magistrate ordered that the person

(1) [1914] 38 Bom. 444=25 I. C. 73=16 Bom. L. R. 454.
(2) [1915] 40 Bom. 351=33 I. C. 950=18 Bom. L. R. 45.
(3) A. I. R. 1923 All. 311=45 All. 376.
(4) [1894] 16 All. 165=(1894) A. W. N. 65.
(5) [1888] 16 Cal. 98=15 I. A. 156=5 Sar. 243 (P.C.).
(6) [1868] 3 M. H. C. 384.
(7) [1885] 8 Mad. 520=12 I. A. 116 (P.C.).
(8) A. I. R. 1922 P. C. 23=44 All. 121=49 I. A. 9 (P.C.).

who was entitled to the property should establish his right to the ornaments and in pursuance of that order the plaintiff claimed under the will of Narayan and brought a suit to establish his right. The evidence regarding the alleged theft and the criminal proceedings culminating in the order of the Magistrate would be irrelevant in the present case. In the previous suit the property was in possession of the Magistrate and it was the denial of the right of the plaintiff coupled with the order of the Magistrate that furnished the cause of action for the suit. In the present case the cause of action is quite different. It was not merely the denial of title but the obstruction of the defendants which necessitated the bringing of the present suit. The immediate cause of action in the previous suit was the order of the Magistrate and the immediate cause of action in the present suit is the wrongful withholding and obstruction by the defendants. We think that the causes of action in the two suits are different and the view taken by both the Courts is correct. It is unnecessary to go into the other question argued before us as to whether in case the suit is barred under O. 2, R. 2, defendant 2 is entitled to the whole property involved in the suit or only to a portion of the property. We must, therefore, dismiss the appeal with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1929 Bombay 462

MARTEN, C. J. AND KEMP, J.

Narayan Manjanna Shanbhog and *others*—Plaintiffs—Appellants.

v.

Secretary of State—Defendant—Respondent.

Letters Patent Appeal No. 39 of 1928, Decided on 22nd March 1929, from decision of Murphy, J., in Second Appeal No. 704 of 1928.

(a) Sea Customs Act, (1878), S. 167, Cl. 70—Appeals do not lie to High Court from decisions of Customs authorities—But High Court is entitled to see application of principles of natural justice—Tindal of Machwa with false manifest prosecuted under S. 167, Cl. 70 and given fair trial—High Court's jurisdiction is ousted.

Appeals do not lie to the High Court from the decision of the Customs authorities. The High Court speaking generally has no jurisdiction in revenue matter. But the High Court is entitled to see that the principles of natural justice have been carried out. [P 462 C 2]

A Machwa left Bombay for another port with a manifest showing that it had loaded twelve boxes of matches at Bombay. Actually it had taken no such cargo. On its voyage it touched a Portuguese port and took the said cargo there. The Tindal of the Machwa was prosecuted under S. 167, Cl. 70, the goods respecting which the offence took place were liable to confiscation. During the inquiry the Superintendent of Salt Revenue required him to give an answer with reasons as to why a sentence should not be passed against him under S. 167, Cl. 70.

Held: that the Tindal was given before the Superintendent a fair notice of the charge made against him and that he had a fair opportunity of making his answer. Therefore, the customs authorities and not the High Court had jurisdiction: *A. I. R.* 1922 *Bom.* 30, *Ref.* [P 464 C 2]

(b) Sea Customs Act (1878), S. 168—Machwa carrying goods from one port to another is conveyance used in removal of goods.

Section 168 does not apply only to some lighter or other boat which actually lands goods from a Machwa, but also applies to a Machwa used in the removal of goods loaded under a false manifest and carried from one port to another. [P 464 C 1]

Y. N. Nadkarni and *D. R. Manerikar*—for Appellants.

B. G. Rao—for the Crown.

Marten, C. J.—This is a Letters Patent appeal from the judgment of Murphy, J., dismissing summarily an appeal from Mr. Sen, the District Judge, of Kanara, confirming the decision of the First Class Subordinate Judge at Karwar. The question arises about a Machwa which was confiscated by the customs authorities under the Sea Customs Act. Appeals do not lie to the High Court from the decision of the customs authorities This Court, speaking generally, has no jurisdiction in revenue matters having regard to the Government of India Act. But what we are entitled to see is that the principles of natural justice have been carried out and provided that is done by the revenue authorities, then this Court is no longer concerned with the actual decision arrived at by the authorities as to whether it is right or wrong

This is a limited jurisdiction which is well known in certain branches of the civil law. For instance, as regards the expulsion of members of a club, where the decision rests under the rules with the members of the club, speaking generally the Court is only concerned to see that the principles of natural justice have been observed, including in particular

that the member is given notice of the charge and given an opportunity of meeting it. One recent instance of this is the Salvation Army case in the Chancery Division where Eve, J., directed that the Council of the Salvation Army should give an opportunity to General Booth of being heard in support of his case before the Council actually passed a particular resolution depriving the General of his position as head of the Army.

Naturally then when one comes to criminal or quasi-criminal cases involving penalties, that applies all the more strictly. Here the appellant was found guilty by the Collector of Salt Revenue and on his appeal to the Central Board of Revenue they held that the confiscation was valid, and that moreover the appellant had been given a fair opportunity of putting forward his case. Sen, the learned District Judge, arrived at the same conclusion in the subsequent civil suit which the appellant brought to set aside the order of confiscation and for damages for illegal confiscation of the Machwa.

Now the actual offence in question is that the appellant, who is an importer of matches, was a party to the following fraudulent scheme to defeat the customs. The Machwa was loaded in Bombay, and there a false manifest was prepared purporting to show inter alia that twelve boxes of matches were taken on board. In fact they were not, and they did not exist. On the voyage to Shirali the Machwa, according to the findings of the revenue authorities, put into some Portuguese port presumably Goa and there took on board the twelve boxes of matches. Then when the Machwa arrived at her port of destination, viz., Shirali, she unloaded these matches as forming part of the false manifest that had been prepared in Bombay. She had no right to call at any foreign port coast-wise between Bombay and Shirali. That would be one offence. Still less had she any right to commit this fraud as regards her manifest and to take on board this cargo at a foreign port. The object was this. Bombay matches have to pay duty, Portuguese matches have not. Consequently, if a trader can buy matches in Goa for say Rs. 10 and sell them in British India for Rs. 10 + Y, Y representing the value of the duty, naturally he benefits to the extent of Rs. Y. This is the fraud that the customs authorities have found proved.

Now we come to the principles of natural justice. It is true in the first place that Kantappa, the importer and the part owner of the Machwa, was never given an opportunity of knowing the charges brought against him. But he made two statements and if one turns to the second statement which he made on 2nd June 1924, (Ex 13), it will be found there that the Superintendent of Salt Revenue put this question clearly to him:

"There is evidence against you as regards importing into Shirali twelve cases of matches in the month of March. It is as follows: The said cases were not exported from Bombay. But they have been loaded at some place in Goa territory when the country craft was coming from Bombay. Therefore give your answer with reasons as to why a sentence should not be passed against you under S. 167, Cl. 3 (70), and S. 168, Sea Customs Act."

Kantappa thereupon gave his reasons which are recorded. But the charge against him was perfectly definite, and if one turns to S. 167, Art. 70, Sea Customs Act, it will be found that it is an offence if any goods are found on board of any coasting vessel without being entered in the manifest or cargo-book or both as the case may be of such vessel. In that case such goods are liable to confiscation and the Master of such vessel is liable to a penalty.

Now in this case, in the view we take, these particular goods, viz, the matches in fact loaded at Goa were found on board the coasting vessel without being entered in the manifest. What was entered in the manifest was a non-existent box of matches alleged to have been loaded in Bombay. It is contended that the goods were never found within the meaning of this section because the authorities gave permission for them to be unloaded. But that we think is really on the facts of the present case in the nature of a quibble.

Turning then to S. 168, Sea Customs Act, we find that the confiscation of goods includes any package in which they are found and then there is this material clause:

"Every vessel, cart or other means of conveyance, and every horse or other animal, used in the removal of any goods liable to confiscation under this Act shall in like manner be liable to confiscation."

It was accordingly urged here that the Machwa herself was not used in the removal of the goods but the offence only began when the vessel came into the port of Shirali and the goods were actually

removed from the ship. But we think that this Machwa was used in the removal of the goods within the meaning of this particular clause. On the facts of this particular case one cannot say that the clause would only apply to some lighter or other boat which actually landed the matches from the Machwa herself at the port of Shirali.

That brings me to the next point that when the Collector of Salt Revenue made his formal order, he unfortunately tried to put it into legal form, and proceeded in the middle of his judgment to frame certain charges. So far as we can understand, though the facts are not quite fully before us, there never were any proceedings before the Collector himself at which the parties were present or at which they were told that he would then frame certain charges. As far as we are concerned the actual hearing, so to speak, at which the charges were made was before the Superintendent. Consequently, from a technical point of view the Collector could not frame charges in the middle of his judgment. Framing charges is a matter which has to be done before you proceed to hear the parties, and not when you are delivering judgment.

Further in framing those charges the Collector framed a charge against the Tindal under S. 159, Sea Customs Act, punishable under S. 167 (63) and 70 ; and he also charged Kantappa with aiding and abetting this and thereby making himself liable to penalty under S. 167 (3). Turning to these sections it will be found that S. 159 relates to touching at a foreign port, and as the Machwa touched at a foreign port the Tindal ought to have appended to the manifest a declaration to that effect and ought to have subjoined thereto a true specification of the goods shipped at that port. As regards Art. 63, that is an offence of touching at a foreign port or alternatively failing to declare the same in writing to the Customs Collector at the Customs port at which such vessel afterwards first arrives. Art. 63 also provides that if any goods liable to export duty have been landed from or any goods liable to import duty have been shipped in such vessel at such foreign port, the Master is liable to a further special penalty. But as is pointed out to us, Art. 63 does not provide for the confiscation of goods.

However, when the matter came before the Central Board of Revenue they considered the matter further. They had a formal appeal in writing from Kantappa and they found that the goods were liable to confiscation under S. 167 (70) and that consequently the Machwa became liable to confiscation under S. 168. They accordingly confirmed the order of confiscation.

Now it is urged that as in other proceedings the order against the Tindal has been found to be open to objection on the ground that he was not given a fair opportunity of defending himself, therefore the charge against the present appellant should ipso facto fall to the ground. As already pointed out this so-called charge was a charge inserted in the judgment and not a charge which was made against the appellant in the proper way, viz., at the hearing before the judgment. Therefore that objection seems to us to fall to the ground. Further, as pointed out in *Mahadev Ganesh* v. *Secretary of State* (1) :

"A Customs Officer acting under S. 182, Sea Customs Act, 1878, should proceed according to general principles, which are not necessarily legal principles, and is not bound to adjudicate on confiscation and penalty as if the matter was proceeding in a Court of law according to the provisions of the Civil or Criminal Procedure Code."

Here we think that Kantappa was given before the Superintendent a fair notice of the charge made against him and that he had a fair opportunity of making his answer, which in point of fact he did. That being so, the customs authorities had jurisdiction to determine whether that charge was true or not and to arrive at a certain conclusion on it. That being so, so far as at any rate Kantappa is concerned, jurisdiction of this Court is ousted.

Now we come to the last point raised before us and it is this; that the Machwa belonged to the joint Hindu family, and that the adjudication against Kantappa could not affect the interests of the remaining members of the family in the Machwa. But Kantappa, the importer, was a member of that family, he imported what I may call these fraudulent matches as a member of the Hindu joint family and he made use of the Hindu joint family Machwa for the purpose of his fraudulent scheme. Further it is conceded that the Collector was not obliged to

(1) A. I. R. 1922 Bom. 80=46 Bom. 732.

have all the members of the Hindu joint family before him. They number apparently fifteen.

It is further urged that the Collector should not have made any order of confiscation without having the registered owner of the Machwa, viz., Pandurang before him who was also the manager of the family. But this Machwa apparently is not registered under the Merchant Shipping Act but only registered under a Local Bombay Act. Further Pandurang knew at any rate that something was in the air because he was called upon to make certain statements before the customs authorities along with the Tindal. The Tindal was examined on 2nd April 1924, Pandurang on 1st April and Kantappa who was the actual importer on the 26th. There is no suggestion that Pandurang ever wanted the customs authorities to hear him any further. It is urged that this particular charge was not put to Pandurang the registered owner. Under the circumstances of the case, and having regard to the fact that this is a Hindu joint family importing these matches presumably for the benefit of the Hindu joint family and using the family vessel for the purpose of this fraudulent scheme, we think that it was not essential that Pandurang the nominal registered owner of the Machwa should be formally charged before the authorities before they could confiscate the vessel.

I wish to add this word of warning that we are not laying it down that perfectly innocent shipowners may suddenly find their vessel confiscated because some shipper of cargo has been defrauding the customs authorities. We have a case here where the fraudulent importer is also the part-owner of the vessel used for the purposes of the fraud. On the facts as found here by the customs authorities, we think they had jurisdiction to make the order of confiscation which they did and that accordingly the suit was rightly dismissed by the learned Judge. Consequently this appeal will be dismissed with costs.

Kemp, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1929 Bombay 465

MADGAVKAR, J.

Ramchandra Anant Desai and *others* —Appellants.

v.

Bhagwant Gopal Thakur—Respondent.

Second Appeal No. 890 of 1927, Decided on 5th July 1929.

(a) Civil P. C., O. 21, R. 66 (2) (e)—Application to include share of minor sons in Hindu joint family in proclamation is competent.

While it is preferable that the minor sons of a joint Hindu family should be impleaded in the suit itself, with the father as manager of the joint family an application in an execution proceeding to include their interests in the proclamation of sale is not incompetent. [P 466 C 2]

(b) Hindu Law—Father of joint Hindu family incurring debt—Immorality not proved — Share of sons may be proceeded against.

Where the father of a joint Hindu family incurred a debt for a shop and not separately for himself, and the sons failed to prove immorality regarding this debt :

Held : that joint family property including the share of the sons may be proceeded against on a decree on the debt ; 15 *Cal.* 717 (*P.C.*) ; *A. I. R.* 1924 *P.C.* 50, *Foll.* [P 467 C 1]

A. G. Desai—for Appellants.

P. V. Kane—for Respondent.

Judgment.—The plaintiff-respondent brought a suit on a ruzu-khata against Anant, father of the defendants-appellants, minors, and his brother Hari, the latter being impleaded on the ground that he was a member of a joint Hindu family along with Anant. Subsequently, on Hari's special oath, the claim against Hari was given up and a decree was passed against Anant alone. After the decree the respondent applied for execution by attachment and sale of certain property, and put in an application that in the sale proclamation not only the right, title and interest of Anant should be included as being put up for sale, but also the interest of Anant's two minor sons, the appellants Ramchandra and Dattatraya. Notice was issued to the minors and their grandfather appointed guardian ad litem. After framing issues and recording evidence, the executing Court held that the debt in dispute was not immoral as the appellants alleged, and granted the application of the decree-holder respondent. The appeal of the minors to the District Court failed, and they now appeal here.

Three points are taken by the appellants, firstly, that the respondent having

failed to implead the minors in the suit, could not proceed against them in the darkhast under O. 21, R. 66, Cl. (e), as he purported to do. The executing Court had no jurisdiction to inquire. Secondly, that the debt was tainted by immorality. Thirdly, that the judgment of the lower appellate Court on this question is too summary, and gives no grounds, and cannot, therefore, be accepted in second appeal.

The first point, as far as I know, is novel. It has not come up previously before the Courts. At the same time it is of some importance. There are a large number of cases in which the sons have failed to be impleaded in the suit or their names included in the proclamation of sale, and they have subsequently filed suits years after the event for a declaration that their interest had not passed. It suffices to refer to the cases, such as *Timmappa* v. *Narasinha Timaya* (1); *Dayanand* v. *Daji* (2); and *Sripat Singh* v. *Tagore* (3). Except O. 21, R. 66, no other section is shown under which an application such as the present can be made. That rule refers to the proclamation of sale, and sub-R. (2), Cl. (e), directs the Court to specify every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. In the present case, for instance, the value of the property is intimately connected with the question whether the right, title and interest sold includes or not the interest of the sons. Once the decree-holder makes an application such as Ex. 31 to include the sons' interest in the proclamation, it is difficult for the Court to dispose of it except upon notice and inquiry such as the present. Can it then be said that such an application itself is such that either the decree-holder is not in law entitled to make it or the Court to dispose of it? Confining myself to the case of a Hindu father alleged to be a member of a joint Hindu family with his sons, it is, in my opinion, difficult to hold that such an application is incompetent, and that if once the plaintiff, because perhaps of ignorance, has failed to implead minor sons expressly in the suit, he cannot make an application such as the present in the darkhast, but that the matter must be left to be agitated, in all probability, many years afterwards on the sons attaining their majority, when much of the materials and evidence on which the Courts can come to a conclusion will disappear. The balance of convenience is very heavily in favour of an early inquiry and an enquiry in the darkhast, and before the proclamation and sale rather than after, when an innocent third party purchaser would be exposed to harassment. On the whole therefore, and in the absence of express enactment or authority to the contrary, I am inclined to hold that while it is preferable that these minor sons should be impleaded in the suit itself, with the father as manager of the joint family, an application such as the present to include their interests in the proclamation of sale in darkhast is not incompetent.

The evidence for the respondents is that the debt was incurred for a shop to be carried on by the father and not separately for himself, in other words, presumably for the joint family. On the other hand, there is evidence that he kept a mistress, and that at least after he got into pecuniary difficulties, he had sent his wife and children to their grandfather's house, whether because of the distress, or mistress or both combined, it is difficult to say. If I may be permitted to draw upon my own knowledge of certain parts of the Ratnagiri District, and subject to changes in the last ten or fifteen years, I am under the impression that the keeping of a mistress is not considered to be a particularly scandalous or immoral act. There is no connexion shown between the ruzu-khata and the mistress. The evidence, as far as it goes, does not show that it was borrowed for the expenses of the mistress, but rather for the starting of the shop. Although I am in sympathy with the argument for the appellant that the District Judge should not have dealt with the matter as summarily as he has, the view of both the lower Courts, in my opinion, is correct, that in point of fact the debt was incurred not on account of the mistress, was not tainted with immorality, but was taken to start a shop for the benefit of the family.

(1) [1913] 37 Bom. 631=21 I. C. 123=15 Bom. L. R. 794.
(2) A. I. R. 1926 Bom. 548=50 Bom. 793.
(3) A. I. R. 1916 P. C. 220=14 Cal. 524=14 I. A. 1 (P.C.).

If so, there is abundant authority for the proposition that joint family property including the share of the sons may be proceeded against on a decree on such a debt. The onus in such case would be upon the sons: *Bhagbut Pershad* v. *Mt. Girja Koer* (4), and that they would be bound by the decree, *Brij Narain* v. *Mangla Prasad* (5). In this view the order of the lower Court was, in my opinion, correct. The appeal is dismissed with costs.

M N./R.K. *Appeal dismissed.*

(4) [1889] 15 Cal. 717=15 I. A. 99=5 Sar. 186 (P.C.).

(5) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P.C.).

A. I. R. 1929 Bombay 467

KEMP, Ag. C. J. AND MURPHY, J.

Ratanlal Ghelabhai — Plaintiff—Applicant.

v.

Amarsing Rupsing and *others*—Defendants—Opponents.

Civil Revn. Appln. No. 129 of 1928, Decided on 25th June 1929.

(a) Civil P. C., S. 115 (b)—Denial of available right to sue—Revision lies.

Denial of right to sue where such right to sue is available to the plaintiff is a matter which comes under S. 115 (b), and revision lies against a finding to that effect. [P 467 C 2]

(b) Specific Relief Act, S. 9—"Possession" need not be actual.

Possession contemplated by S. 9 is not confined to actual physical possession. [P 467 C 2]

(c) Specific Relief Act, S. 9—Tenant in possession dispossessed—Tenant or landlord in name of tenant can bring possessory suit—If tenant refuses to be joined or there is injury to reversion landlord can sue in his own name.

Where a tenant in exclusive possession is dispossessed, proper remedy for the tenant is to file a suit for possession and for the landlord if he desires to sue immediately on the possessory right to sue in the name of the tenant but if the tenant refuses to join or there is an injury to reversion the landlord is entitled to sue in his own name: 5 *Bom.* 203, *Foll.* [P 467 C 2]

(d) Landlord and Tenant—Possession.

In the case of landlord and tenant, landlord is in possession through the tenant. [P 467 C 2]

(e) Specific Relief Act, S. 9—"Immovable property."

The right of a landlord to recover rent from his tenant is "immovable property": 19 *Cal.* 544 (*F.B.*), *Dist.* [P 468 C 1]

H. D. Thakor—for Applicant.

K. H. Kelkar—for Opponent 1.

Kemp, Ag. C. J.—The plaintiff-petitioner alleges that he and his predecessors-in-title were the owners of survey No. 102 in the village of Nandorda, West Khandesh District, that he leased the property to defendant 2, and that defendant 2 was forcibly and unlawfully dispossessed by defendant 1 and that he only came to know of this on 7th July 1926. He then called upon defendant 2 to join him in filing a suit for possession under S. 9, Specific Relief Act, but defendant 2 refused to join. The plaintiff thereupon filed suit No. 1609 of 1927 in the Court of the Second Class Subordinate Judge of Nandurbar under S. 9 of the Act and made defendants 1 and 2 defendants to that suit. The learned Subordinate Judge framed an issue in these terms: "Is the plaintiff entitled to bring this suit?" He came to the conclusion that the question for determination was whether a landlord can sue for possession under S. 9, Specific Relief Act, when, as a matter of fact, the property is let to a tenant who was and is entitled to present possession. Shortly put, therefore, the question which he tried was whether the landlord could sue under S. 9 when he had a tenant in possession who was dispossessed.

The learned Subordinate Judge came to the conclusion that the plaintiff could not bring such a suit and dismissed it. Against that order the plaintiff has filed the present civil revision application.

Clearly, if the plaintiff is entitled to file such a suit under S. 9 the finding of the learned Subordinate Judge to the contrary is a matter which can be entertained in revision for the effect of the finding is to deprive the plaintiff of his right to redress under S. 9, and the learned Subordinate Judge has failed to exercise a jurisdiction which he ought to have exercised.

Section 9, Specific Relief Act is in these terms:

"If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit."

There is nothing in this section to show that possession is confined to actual physical possession In the case of a landlord and tenant the landlord is in possession through his tenant and, as pointed out in *Nirjivandas Madhavda* v. *Mahomed Ali Khan Ibrahim Khan* (1) the proper remedy where exclusive occu

(1) [1880] 5 Bom. 208.

pation of immovable property is given to a tenant is for the tenant to file a suit for possession but the landlord, if he desires to sue immediately on the possessory right, can sue in the name of the tenant and further, for an injury to the reversion, the landlord can sue in his own name. The injury in the present instance consists in a denial of the plaintiff's title to the land for defendant 1 has taken possession of it claiming it to be his. I think, therefore, that there is an injury to the reversion in respect of which the plaintiff can sue in his own name. The plaintiff as landlord is entitled to recover rent from his tenant and this right is one which comes under the definition of " immovable property " in S. 3, Cl. (25), General Clauses Act. In the case of *Fadu Jhala* v. *Gour Mohun Jhala* (2), the majority of the Judges held that a suit for the possession of a right to fish in a khal the soil of which does not belong to the plaintiff does not come within the provisions of S. 9, Specific Relief Act. It was an incorporeal right which was not intended to be included within the provisions of the section. Here the case is different and there is, I think, no objection to the plaintiff suing under S. 9 for the injury to the reversion.

If the landlord were unable to file a suit under S. 9, Specific Relief Act, and the tenant were, as has been pointed out in one of the cases, disinclined to take any action under S. 9 the landlord to obtain redress would then be in the difficult position of having to file a regular suit for a declaration of his title against the person in possession of the land and, possession being evidence of title, the " onus " would be on the plaintiff; whereas if the suit can be filed under S. 9 it will lie on defendant 1 to establish by a regular suit his title to the land. But even if the plaintiff cannot sue alone we have the fact that he has joined his tenant as defendant 2 in the suit and all the parties who are interested in the land are, therefore, before the Court and the Court can pronounce a decree which will bind them all. The plaintiff attempted to persuade defendant 2 when he filed the suit to join him as a co-plaintiff but defendant 2 refused. The suit was filed on 1st December 1926. Thereafter, an application was made on 12th December 1927, by defendant 2 for an adjournment to enable him to be joined as a plaintiff. That application was refused but it shows that defendant 2 consented later to participate as a plaintiff in the suit. Under these circumstances, there seems to be no objection to the suit.

It is impossible to leave this case without a very unfavourable comment on the time that it has taken to dispose of it. The case took more than a year to decide in the lower Court and much of the summary nature of the remedy under S. 9, Specific Relief Act has been lost.

We make the rule absolute and remand the suit for trial under O. 41, R. 23. The lower Court's order discharged. Opponent 1 to pay the costs of this application.

V.B./R.K. *Rule made absolute.*

(2) [1892] 19 Cal. 544 (F.B.).

A. I. R. 1929 Bombay 468

MADGAVKAR, J.

Shamchandra Rampratap and *others* Plaintiffs.

v.

Bhikamchand Ganeshlal and *others*— Defendants.

Original Civil Jurisdiction Suit No. 101 of 1927, Decided on 21st Feb. 1929.

(a) Letters Patent (Bombay), Cl. 12—Bombay High Court has jurisdiction to try suit between mortgagor and prior and puisne mortgagees even though property is situate outside Bombay.

According to provisions laid down in Cl. 12, and Civil P. C., O. 34, R. 1 the Bombay High Court has jurisdiction to try suit between the mortgagor and prior and puisne mortgagees even though the property is situate outside Bombay. The suit remains a suit for recovery of debts in certain order, the land being liable to sale in default of payment : *A. I. R.* 1923 *Bom.* 333, *Diss from.*; 21 *Bom.* 701 and *A.I.R.* 1927 *Bom.* 278, (*F.B.*), *Ref.*; *A.I.R.* 1925 *Bom.* 333, *Dist*: [P 470 C 2]

(b) Letters Patent (Bombay), Cl. 12—Fresh leave should be obtained in respect of sons of defendant who was dead when leave was obtained.

Leave is a necessary and a preliminary condition of jurisdiction. Where the defendant was already dead before leave was obtained under Cl 12, fresh leave should be obtained in respect of his sons when they are sought to be joined. Leave obtained against a dead person is against no person at all : 15 *Bom.* 93 ; *A. I. R.* 1924 *Bom.* 109 and 20 *Bom.* 767, *Ref.* [P 470 C 2, P 471 C 1]

(c) Letters Patent (Bombay), Cl. 12—Plea of leave under Cl. 12 if not taken at earliest opportunity is deemed to have been waived.

Where plea of jurisdiction or of leave under

Cl. 12 is not raised by the defendants at their earliest opportunity i. e., in the original written statement, they are deemed to have waived the objection : *Moore* v. *Gamgee*, (1890) 25. *Q. B. D.* 244 ; 35 *Cal.*394, *Rel. on.*[P471 C 1]

Manekshah and *Taraporevala*—for Plaintiffs.

Somaji and *Engineer*—for Defendants.

Facts.—Plaintiffs, a firm of Shroffs and Commission Agents in Bombay, filed a suit in the High Court on an equitable mortgage created in their favour by deposit of title deed relating to property of Bhikamchand and another (defendants 1 and 2). Defendant 3 who claimed to be the legal mortgagee of the same property contended that the equitable mortgage was antedated. The plaintiffs obtained leave to sue under Cl, 12, Letters Patent, against all the defendants but defendant 3 was dead on the date. The leave was granted. The plaintiff added the son of defendant 3 but obtaind no fresh leave to sue as sgainst them (defendants 3-a and 3-b). The following were some of the issues raised :

1. Whether this Court has jurisdiction to try this suit against defendants 3-a and 3-b.

2. Whether the suit is maintainable as no leave under Cl. 12 to sue defendants 3-a and 3-b is obtained.

Judgment.—(After stating facts, the judgment proceeded). The first two issues raise somewhat important questions of law, and it will be convenient to dispose of them at the outset.

On the question of jurisdiction reliance is placed for defendants 3-a and 3-b on the decision of Pratt, J. in *Pranlal* v. *Gokuldas* (1). in which he has held that the High Court of Bombay has no original jurisdiction to grant a declaration as to which out of two or more competing mortgagees is a prior mortgagee, when the property is situated, as here, outside Bombay. For the plaintiffs it is pointed out that in a suit by a puisne mortgagee, a prior mortgagee of property outside the jurisdiction was added as a party by Strachey, J., in *Sorabji* v. *Rattonji* (2) and the decision of Pratt, J., above was referred to with disapproval by Marten, C. J., in the course of the Full Bench decision in *Hatimbhai* v. *Framroz Eduljee Dinshaw* (3).

It is, therefore, necessary for me either to follow the view of Pratt, J., above and hold that I have no jurisdiction in respect of defendant 3-a and 3-b, or to give reasons for differing from him, as I am not bound by the decision of a single Judge sitting on the original side. It is a matter of surprise that a point of this importance has not been authoritively decided in Bombay and the practice settled once for all.

The decision of Pratt, J., analysed proceeds on four grounds. He begins by expressing his disagreement with the decision in *Yashvantrav Holkar* v. *Dadabhai Cursetji* (4), which, after being overruled by a Bench of three Judges in *India Spinning & Weaving Co. Ltd.*, v. *Climax Industrial Syndicate* (5), has now been re-affirmed as good law by a Full Bench of seven Judges in *Hatimbhai* v. *Framroz Eduljee Dinshaw* (3) referred to above.

Ground 2 is that a declaration as between parties between whom no privity of contract exists, has been held, as in the case of *Norris* v. *Chambres* (6), to be outside the ordinary equitable jurisdiction of the Courts of Chancery in England, and the same view is confirmed in this Court by Jenkins, C. J., in *Vaghoji* v. *Camaji* (7).

Ground 3 of Pratt, J.. is that O. 34, R. 1, under which defendants 3-a and 3-b are joined, is a rule of procedure "and not a rule that can be invoked in order to extend jurisdiction." Pratt, J., finally observes that (p. 573) :

"The effect of my decision will lead to an anomaly, for whereas according to *Holkar* v. *Dadabhai* (4) each of the mortgagees may file a suit against the mortgagor and have their rights as between each of them and the mortgagor determined in a suit in this Court, while the respective interests of the mortgagees inter se cannot be so determined."

This, he thinks, is the necessary effect of the decision in *Holkar* v. *Dadabhai* (4) and until that decision is reversed by the decision of a Full Bench, that anomaly must persist. In other words the decision of Pratt, J., is not really reconcilable with the rule of law laid down in O. 34, R, 1 and with the decision in *Holkar* v. *Dadabhai* (4).

On the judgment generally, if I may say so with respect, it is difficult to resist the conclusion that Pratt, J.'s

(1) A. I. R. 1923 Bom. 333.
(2) [1898] 22 Bom. 701.
(3) A. I. R. 1927 Bom.278=51 Bom.516(F.B.).
(4) [1890] 14 Bom. 353.
(5) A. I. R. 1926 Bom. 1=50 Bom. 1 (F. B.).
(6) [1861] 29 Beav. 246.
(7) [1904] 29 Bom. 249=6 Bom. L. R. 958.

judgment is throughout coloured by his view that *Holkar* v. *Dadabhai* (4) is not good law. It is not, however, open to me to consider this view, as I am bound by the Full Bench decision in *Hatimbhai* v. *Framroz* (3) where it was held that a suit on a mortgage by a mortgagee, whether prior or puisne, is not primarily a suit for land under Cl. 12, Letters Patent, but is a suit for the recovery of a debt secured on land, which is only subject to sale for default of payment. Again, under O. 34, R. 1, all persons having an interest in the mortgage are necessary parties. The section directs that they "shall be joined". Speaking for myself, if a suit between a mortgagor and mortgagee singly is not a suit for land within the meaning of Cl. 12, Letters Patent, it is difficult to see why a suit between a mortgagor and different mortgagees, not separately but all together, should thereby become a suit for land. Prima facie, it would still remain a suit for the recovery of debts in a certain order, the land being only liable to sale in default of payment.

Ground 2 of Pratt, J., is with regard to declaration. The case of *Vaghoji* v. *Camaji* (7) as Jenkins, C. J., clearly pointed out, was a suit for a declaration of title to land outside the jurisdiction, and it was, therefore, held to be a suit for land and outside Cl. 12, Letters Patent. Similarly, the case of *Norris* v. *Chambers* (6), referred to by Pratt, J., was a case of a claim through the heirs of a deceased John Sadleir, one of the founders of the Anglo-Prussian Mining Co., against a Prussian subject for Prussian mines on a contract made outside the jurisdiction. It was held by the Master of the Rolls that the dispute must be governed by Prussian Law and decided by Prussian Courts and not according to English Law by the Courts of Chancery, which might thereby also pass a decree not executable by the English Courts with regard to Chancery practice, I may be permitted respectfully to prefer the opinion of Marten, C. J., at p. 545 of the Full Bench decision in *Hatimbhai* v. *Framroz Dinshaw* (3), referred to above, to the opinion of Pratt, J. In any case Cl. 12 does not itself except declarations between parties between whom there is no privity of contract. As for ground 3, if a rule of procedure, such as O. 34, R. 1, Civil P.C., cannot be invoked to extend the jurisdiction, neither, it appears to me, can it be set aside to limit jurisdiction. And if separate suits as between a mortgagor on the one hand and a prior or puisne mortgagee on the other are within the jurisdiction, and the rule of procedure under O. 34, R. 1, enjoins that they should be amalgamated, it is difficult to perceive how jurisdiction is thereby extended. On the contrary, it appears to me that Pratt, J.'s view would limit, whereas the opposite view does not really extend jurisdiction.

On the general canons of interpretation and construction also, the interpretation of one law should not contravene the interpretation laid down of another. The interpretation of Cl. 12, Letters Patent, must not be such as to contravene but, as far as possible should be consistent with O. 34, R. 1. Pratt, J., himself admits that his interpretation leads to a clear anomaly and inconsistency. For myself, for the reasons stated above, there appears no difficulty in giving effect both to O. 34, R. 1, and to Cl. 12, Letters Patent, as interpreted by the Full Bench decision in *Hatimbhai* v *Framroz* (3).

For these reasons, with the utmost respect, I must differ from the view enunciated by Pratt, J. in *Pranlal* v. *Gokuldas* (1), and hold that a single suit between a mortgagor and prior and puisne mortgagees under Cl. 12 as laid down under O. 34, R. 1, is as competent as separate suits would be. And I agree, therefore, with the view implied by Strachey, J., in *Sorabji* v. *Rattonji* (2), and with the opinion of Marten, C. J., in *Hatimbhai* v. *Framroz* (3) rather than the decision of Pratt, J., and hold on issue 1 that this Court has jurisdiction to try this suit as against defendant 3-a and 3-b. The finding on issue 1 is, therefore, in the affirmative.

On the second issue, viz., whether separate leave as against defendants 3a and 3b was necessary, leave was obtained in January 1927 against defendant 2, who had admittedly died in October 1926. As observed by Telang, J., in *Rampartab Samruthroy* v. *Premsukh Chandamal* (8), leave is a necessary and preliminary condition of jurisdiction and must be obtained at the time the suit is filed. Defendant 3 was

(8) [1892] 15 Bom. 93.

already dead before leave was obtained. Leave obtained in his regard was, therefore, agrinst no person at all, to use the expression of Mulla, J., in *Rampratab* v. *Gavrishankar* (9). Agreeing with this decision and the view of Candy, J., in *Rampartab Samrathrai* v. *Foolibai* (10) I am of opinion that the plaintiff should have obtained leave in respect of defendants 3-a and 3-b, when they were sought to be joined in February 1927.

That leave has not been obtained. The only further question is whether there has been a waiver on the part of defendants 3-a and 3-b. It is to be noticed that the plea of jurisdiction or of leave was not raised by these defendants in their original written statement. At the most, they can only point to para. 2 of their counter-claim:

"in the event of it being held that this Court has no jurisdiction to entertain the dispute as to the priority of the mortgage."

The objection, therefore, to the place of suing has not been taken at the earliest possible opportunity, as was necessary under S. 21, Civil P. C., but only before the settlement of issues. On the other hand, the counter-claim only mentions a somewhat vague condition foreshadowing a possible objection. On the whole, therefore, I hold, following the view in *Moore* v. *Gamgee* (11) and of Fletcher, J. in *King* v. *Secy. of State* (12), that defendants 3-a and 3-b have by their omission to take the express plea in their written statement and by their contention waived the objection which would otherwise have been sustainable as to the absence of such leave under Cl. 12 in their regard.

My finding on issue 2, therefore, is that the plaintiff ought to have obtained leave under Cl. 12, Letters Patent to sue defendants 3-a and 3-b, but that these two defendants have waived their objection to the place of suing, and therefore the finding on issue 2 is in the affirmative. (His Lordship then dealt with matter not material to the report).

R M./R K. *Order accordingly.*

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(9) A. I. R. 1924 Bom. 109.
(10) [1896] 20 Bom. 767.
(11) [1890] 25 Q. B. D. 244=59 L. J. Q. B. 505=38 W. R. 669.
(12) [1908] 35 Cal. 391=7 C. L. J. 441=12 C. W. N. 705.

* A. I. R. 1929 Bombay 471

RANGNEKAR, J.

Gulamhusain Lalji Sajan—Plaintiff.

v.

Clara D'Souza—Defendant.

Original Civil Jurisdiction Suit No. 1526 of 1928, D/- on 11th October 1928.

*** (a) Transfer of Property Act, S. 8—Holder in due course of promissory note is entitled to charge on property which his transferrer possesses.**

The legal incidents mentioned in S. 8 include inter alia, where the property is a debt or actionable claim, the securities therefor. A holder in due course of a promissory note is therefore entitled to the charge on any property which the transferrer of the pro-note may possess. [P 473 C 1]

(b) Jurisdiction—Presumption is in favour of giving jurisdiction to highest Court.

In questions of jurisdiction the presumtion is in favour of giving jurisdiction to the highest Court: 8 *All.* 438; 4 *Bom.* 624; 26 *Cal.* 381 and 8 *Bom.* 348, *Ref.* [P 473 C 2]

(c) Interpretation of Statues—Statute encroaching on ordinary jurisdiction of Court must be construed strictly.

The usual rule of interpretation of statute encroaching on the ordinary jurisdiction of a Court is that it must be construed strictly. [P 473 C 2]

(d) Contract Act, S. 176 — Pledge—Creditor has distinct right to proceed against property.

In cases of a pledge the creditor has two rights which are concurrent and the right to proceed aginst the property is not merely accessory to the right to proceed against the debtor personally. For the pledgee may have a right to sue for the sale of property even in the absence of right to sue for a personal decree. The same principles apply to the case of hypothecation or mortgages of moveable property: 22 *Cal.* 21 and 27 *Mad.* 528 (*F.B.*), *Ref.* [P 474 C 2]

(e) Dekkhan Agriculturists's Relief Act S. 11—Suit to enforce charge on property pledged does not fall under Cl. (w), S. 3, but under Cl. (x) and Court has jurisdiction even though defendant is agriculturist not residing in its jurisdiction.

A suit to enforce a charge on property pledged does not fall under Cl. (w), S. 3, but falls within the description of suits mentioned in Cl. (x) of that section and even if the defendant is an agriculturist, staying outside the jurisdictiou of the Court, the Court has jurisdiction to try the suit: 15 *Bom.* 30, *Ref.* [P 475 C 2]

Manekshaw for *Wadia*—for Plaintiffs.

Makanji—for Defendant.

Judgment.—The plaintiff is the holder is due course of a promissory note dated 1st September 1927, executed by the defendant in favour of one Laduck. It appears that there were monetary dealings between Laduck and the defendant, an account in respect of which was made up on 1st September 1927,

and a sum of Rs. 1,784 was found due by the defendant to Laduck. The defendant is the owner of Buick Car No. Bom. Z 6391, and at the time of the first loan to her she agreed to mortgage the said car and execute a regular indenture of mortgage in favour of Laduck to whom she handed over the car also at the same time as security for the loan. At the time the promissory note in suit was executed Laduck handed back the said car to the defendant, to ply the same as her agent till repayment of the amount for which the car had been handed over to him as security. The defendant at that time acknowledged in writing that the car continued to be mortgaged to Laduck and also agreed to execute a formal mortgage deed in respect thereof, and to keep and ply the car in Bombay and transfer the same to Laduck whenever called upon by him to do so. She further agreed not to sell or assign the car before paying off the debt. Since the assignment of the promissory note to the plaintiff, the plaintiff has paid Rs. 216 on 16th March 1928, as premium for the renewal of the insurance of the car.

The first defence to the suit is that the defendant is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act and that this Court has no jurisdiction to try the suit.

The defence on the merits is that the plaintiff is not a holder in due course. The defendant admits the dealings between herself and Laduck, and admits that she agreed to hypothecate the car to Laduck to secure the money due to him. She alleges that when she handed over the car to Laduck the latter agreed to pay her Rs. 4 every day and agreed to credit the balance of the net income in her account with him. She further alleges that Laduck failed to carry out the agreement and pressed for payment, and therefore, as a result of great pressure brought on her by Laduck and as a result of representations made to her by Laduck's agent, she passed the promissory note in suit on 1st September 1927, in favour of Laduck. She alleges that she passed the said promissory note only on the condition that a statement of accounts in detail would be given to her, and that Laduck and plaintiff have failed and neglected to give an account of the income of and disbursements on the car in spite of repeated demands made by her. She further alleges that the car was in good condition when she handed it over to Laduck, and when Laduck returned it to her, she found the car to be damaged and had to take it to a garage for repairs, and she, therefore, charges Laduck with negligence, and reserves her right to sue him for damages. She does not deny that the car was insured, but states that the plaintiff was not entitled to insure the car. Finally, she states that on proper accounts being taken a much smaller sum, if at all, would be found due by the defendant to the plaintiff, and she prays for accounts being taken of the transactions between herself and Laduck, and states that she is ready and willing to pay any sum that may be found lawfully due by her as the result of taking such accounts.

The suit came on before me as a short cause. In answer to the defendant's plea of being an agriculturist, the learned counsel who then appeared on behalf of the plaintiff contended that even if the defendant was an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, the suit can lie in this Court as admittedly the cause of action has arisen within the jurisdiction. This contention was based on S. 3, Dekkhan Agriculturists' Relief Act, and it was argued that the suit fell under Cl. (x) of that section. On behalf of the defendant it was argued that the suit fell under Cl. (w), S. 3, Dekkhan Agriculturists' Relief Act. I adjourned the suit for further arguments as the point raised was not free from doubt. It was agreed that the point should be treated as a preliminary point. At the adjourned hearing I had the benefit of a further argument from the learned counsel appearing for the parties.

The precise question which I have to decide is not covered by authority.

The following facts appear from the pleadings. The plaintiff's claim is in respect of moneys under a promissory note passed by the defendant and to enforce his charge on the car pledged to Laduck. He prays for a declaration that there is a valid charge in his favour on the car to the extent of the amount due to him. The plaintiff further prays for the appointment of a receiver, and that the car may be sold by and under

the directions of the Court, and the sale proceeds applied towards the payment of the plaintiff's claim. In para. 4 of the written statement the defendant admits what she calls an agreement of hypothecation in favour of Laduck but in para. 5 she admits that the car was hypothecated to him. In her writing of 1st September, she states the car continued to be mortgaged to Laduck. It seems to me on the correspondence, the promissory note and the pleadings that the transaction between the plaintiff and the defendant was one of pledge. If then the plaintiff is a holder in due course, he is undoubtedly entitled to a charge on the said car and to enforce the same against the defendant. Under S. 8, Transfer of Property Act, a transfer of property passes forthwith to the transferee all the interest which the transferrer is then capable of passing in the property, and in the legal incidents thereof. Such incidents include inter alia, where the property is a debt or other actionable claim, the securities therefor but not arrears of interest accrued before the transfer. Therefore, the suit in substance is to recover moneys due under a promissory note and to enforce the charge which undoubtedly the plaintiff has, if his allegations are true, on the car by sale thereof.

The difficulties of a logical construction of some of the provisions of the Dekkhan Agriculturists' Relief Act have now almost become proverbial, added to which the point I have to decide is not specifically covered by authority. The precise question which arises for determination is, whether the suit falls within the descriptions of suits referred to in Cl. (w) or Cl. (x), S. 3, Dekkhan Agriculturists' Relief Act. The descriptions of suits referred to in Cl. (w) are the following :

"(a) suits for the recovery of money alleged to be due to the plaintiff;

(b) on account of money lent or advanced to, or paid for, the defendant; or

(c) as the price of goods sold; or

(d) on an account stated between the plaintiff and defendant; or

(e) on a written or unwritten engagement for the payment of money not hereinbefore provided for."

Then comes Cl. (x) which runs as follows :

"Suits for recovery of money due on contracts other than the above and suits for rent or for moveable property, or for the value of such property, or for damages....."

Section 11, Dekkhan Agriculturists' Relief Act, states that every suit of the description mentioned in S. 3, Cl (w), may, if the defendant, or when there are several defendants, one only of such defendants is an agriculturist, be instituted and tried in a Court within the local limits of whose jurisdiction such defendant resides, and not elsewhere.

But for the provisions of the Dekkhan Agriculturists' Relief Act, there can be no doubt that this Court has jurisdiction to try the suit. In questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court: see *Amanant Begam* v. *Bhajan Lal* (1). In *Tulsiram Dhunjee* v. *Virbussapa* (2), West, J., observed (p. 629) :

"The jurisdiction of a superior Court cannot be taken away, except by express words or necessary implication."

In *Brohmo Dutt* v. *Dharmo Das Ghose* (3) Sir Francis W. Maclean, C. J., observed (p. 388) :

"We must read the language of the legislature if we can, so as to make it harmonize, and not conflict, with the general law, though remembering at the same time that the office of the legislature by its legislative acts is to define, and even alter, the law."

In *Shiaram Udaram* v. *Kondiba Muktaji* (4), West, J., observed as follows (p. 346) :

"In construing Act 1 of 1868 (General Clauses Act), and Act 22 of 1882 (an Act to amend the Dekkhan Agriculturists' Relief Act) together with the Code of Civil Procedure we must ascribe to the legislature, as far as possible, the congruity of thought necessary for making its enactment work harmoniously together as a system.'

It is clear that the usual rule of interpretation of statutes is that a statute encroaching on the ordinary jurisdiction of a Court must be construed strictly.

Now a careful consideration of the apparent scheme of the Act would show that suits mentioned in Cl. (w) are of a pecuniary character arising out of contracts whether written or unwritten. Then Cl. (x) refers to certain other suits and thereafter suits with regard to mortgages of immovable property and redemption etc., are mentioned in Cls. (y) and (z). The scheme seems to me to be, first, pecuniary claims in respect of which a decree for the payment of money only can

(1) [1886] 8 All. 438=(1886) A. W. N. 146.
(2) [1880] 4 Bom. 624.
(3) [1898] 26 Cal. 381=3 C. W. N. 468.
(4) [1884] 8 Bom. 340.

be passed (Cl. w); secondly, claims in which, in addition to a decree for payment of money, some other relief, e.g., sale or declaration, may be granted (Cl. x); and, thirdly, claims arising under mortgages of immovable property (Cls. y and z).

It will be observed that suits mentioned in Cl. (x) are suits for the recovery of money due on contracts other than the above, that is to say, other than those mentioned in Cl. (w). These words "other than the above" are to my mind very important.

Looking to the frame of the plaint in this case, in my opinion, it is not within Cl (w), the words of which contemplate a suit for money either simpliciter or primarily and substantially. The present suit is something far more than that and very different from it. It is a suit not only to recover money but to enforce a charge on property pledged or hypothecated and is respect of which the defendant agreed to execute a regular deed of mortgage. I am led to this conclusion by the scheme to be found from the provisions of S. 3 and by the expression "contracts other than the above" to be found in Cl. (x). In Chap 3, in which S 11 occurs there is some indication as to the intention of the legislature on this question. S. 16 runs as follows :

"Any agriculturist may sue for an account of money lent or advanced to or paid for him by a creditor, or due by him to the creditor as the price of goods sold, or on a written or unwritten engagement for the payment of money and of money paid by him to the creditor, and for a decree declaring the amount, if any, still payable by him to the creditor. . . . . "

Section 17 says :

"A decree passed under S. 16 may, besides declaring the amount due, direct that such amount shall be paid by instalments, with or without interest ; and when any such decree so directs, the plaintiff may pay the amount of such decree, or the amount of each instalment fixed by such decree, as it falls due, into the Court, in default whereof execution of the decree may be enforced by the defendant in the same manner as if he had obtained a decree, in a suit to recover the debt."

It is clear that the transactions mentioned in these sections are the same as those mentioned in S. 3, Cl. (w). A comparison of the words in S. 16 with those in Cl. (w) shows clearly that the debts in respect of which an account may be sued for are those not secured by mortgage, and it is only in respect of such debts that S. 17 authorizes an order for payment by instalments. In *Shankarappa* v. *Danappa* (5) the question arose whether in the case of a mortgage decree instalments could be granted under S. 20, Dekkhan Agriculturists' Relief Act. The Court observed as follows :

"Comparing the words of S. 16 with the words of S. 3, Cl. (w), it is clear that the debts in respect of which an account may be sued for, are debts not secured by mortgage, and that it is only in respect of such debts that S. 17 authorizes an order for payment by instalments." "The words, 'decree passed against an agriculturist in S. 20, Act 17 of 1879, mean a decree passed against an agriculturist personally, and do not include a decree for the recovery of money by the sale of mortgaged property."

Reference was made to the provisions of S. 210 of the old Civil P. C., correspondig to O. 20, R. 11, of the present Code, the words being "decree for the payment of money. '

It seems me to that suits falling within Cl. (w) are suits where decrees for payment of money or what are ordinarily known as money decrees only can be passed, and not suits in which one of the reliefs would be by sale of property. If it had been intended that in cases of pledge or hypothecation or mortgage of moveable property an agriculturist should have the benefit of instalments or an account, it may reasonably be supposed that Ss. 16 and 17 would have been made applicable to suits under Cl. (x) but the wording of S. 16 shows it is not so. This distinction is pointed out by Melvill, J , in the case I have referred to.

Under S. 176, Contract Act, the pledgee has a right to bring a suit against the pledgor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged in giving the pledgor reasonable notice of the sale.

It is clear under the law applicable to cases of a pledge that the creditor ha two rights which are concurrent, and th right to proceed against the property pledged is not merely accessory to th right to proceed against the debtor personally. For the pledgee may have a right to sue for sale of the property ever in the absence of a right to sue a for personal decree.

The same principles would apply to the case of hypothecation or mortgages o moveable property.

(5) [1881] 5 Bom. 604.

In *Nim Chand Babu* v. *Jagabandhu Ghose* (6), the same principles were laid down. This was a suit on a pledge of certain moveable property made in respect of a loan of money on 10th February 1887. The suit was instituted on 14th December 1891. The plaintiffs prayed for a decree for the money lent against the defendant personally and also that the charge might be enforced against the article pledged. It was held that so far as the prayer for a personal decree was concerned the suit was governed by Art. 57, Sch. 2, Lim. Act, and was barred but so far as the plaintiff sought to enforce his charge against the property pledged the suit fell not within that article but within Act. 120 of the same schedule and was therefore not barred. In the judgment the following observations occur (p. 23) :

"There can be no doubt that when moveable property is pledged to a person for money lent he acquires a special property therein : he has a charge upon it for the satisfaction of the loan advanced, and he is entitled, under S. 176, Contract Act, either to bring a suit against the owner upon the debt or promise, retaining the goods pledged as collateral security, or he may sell the things pledged upon giving reasonable notice of the sale. And when he brings a suit for the purpose of a declaration of his right to sell the article pledged for the satisfaction of his claim, the suit is one to enforce his charge upon the said articles.

The same principles were laid down, and the Calcutta case followed, in *Mahalinga Nadar* v. *Ganapathi Subbien* (7). It was further pointed out in this case that in the case of hypothecation or mortgage of moveable property the same principles would apply.

Therefore, the claim of a pawnee to recover moneys advanced by him by sale of property pledged is a claim to enforce his charge upon the property.

In *Kashiram Mulchand* v. *Hiranand Suratram* (8) it was held by Mr. Birdwood, J., that a suit for redemption of a chattel is one falling under Cl (x), S. 3, Dekkhan Agriculturists' Relief Act. If then a suit for redemption of a chattel does not fall under Cl. (w), S. 3, but falls under Cl. (x), it is difficult to see why in the converse case where the mortgagee or pledgee files a suit to enforce his charge upon the property mortgaged or pledged it should not fall under the same clause.

I think, therefore, the suit does not fall within Cl. (w), S. 3, Dekkhan Agriculturists' Relief Act, but falls within the description of suits mentioned in Cl. (x) of that section, and even if the defendant is an agriculturist this Court has jurisdiction to try the suit. I am led to this conclusion by the apparent scheme to be inferred from the provisions of the section and particularly by the expression "contracts other than the above" to be found in Cl. (x).

As pointed out by Lord Macnaughten in *Mt. Bachi* v. *Bichchand* (9), the Dekkhan Agriculturists' Relief Act gives extraordinary relief in certain particular cases specified in the Act, and there is no reason for extending the same.

R.M./R.K. *Order accordingly.*

(6) [1894] 22 Cal. 21.
(7) [1902] 27 Mad. 528 (F.B.).
(8) [1890] 15 Bom. 38.
(9) [1911] 8 A. L. J. 105=9 I. C. 393=21 M. L. J. 89 (P.C.).

A. I. R. 1929 Bombay 475

KEMP, J.

Narsi Tokersey & Co.—Plaintiffs.

v.

Sachindranath Gajanan Gidh (No. 2) and *another*—Defendants.

Original Civil Jurisdiction Suit No. 199 of 1929, Decided on 5th March 1929.

(a) Guardians and Wards Act (1890), S. 3—High Court has inherent jurisdiction to appoint guardian of person and property of minor even though he is member of joint Hindu family.

Section 3 of the Act provides that nothing in that Act shall derogate in any way from the jurisdiction of the High Court. The High Court therefore has the inherent jurisdiction in a proper case to appoint guardian of person and property of the member of a joint Hindu family so as to prolong his period of minority notwithstanding the provision in the Guardians and Wards Act forbidding appointment of guardian of a minor in a joint family where there is any adult coparcener alive : 32 *Mad.* 130; 30 *Bom.* 152; 25 *All.* 407 (*P.C.*); 19 *Bom.* 96 and 25 *Bom.* 353, *Ref.* [P 477 C 1]

(b) Majority Act (9 of 1875), S. 3— Section does not state that minor must have separate property before guardian can be appointed—Section if construed as it stands extends minority where guardian of property is appointed.

There is nothing in S. 3 which states that the minor must have separate property before a guardian of it can be appointed. The section is to be construed as it stands and it clearly states that the minority is extended to the completion of twenty-first year when

the guardian of property of the minor has been appointed : 25 *All.* 407; (*P.C.*), *Ref.*
[P 477 C 1, 2]

Makanji Mehta and *Mulla*—for Plff.
Kania and *Bhagvati*—for Defendant 1.

Facts.—Defendant 1's father and his brother were members of a joint Hindu family owning two immovable properties at Girgaum Road and Picket Road. Defendant 1 was sued as a major.

On a petition from the father for his appointment as guardian of property of his minor sons, the Chamber Judge passed the order and appointed him the guardian of the property of the minors.

The following issues were put down for trial : (i) Whether defendant 1 by reason of the appointment of guardian of his property under the inherent jurisdiction of this Court is a minor? and (2) what is the date of defendant 1's birth?

Judgment.—(After stating facts and issues, the judgment proceeded). The date of birth of defendant 1 shows that at the date of the institution of this suit defendant 1 was over the age of eighteen years and under the age of twenty-one years and the position is the same today. The plaintiffs contend that the appointment of the father as guardian of the property of these minor sons under the inherent jurisdiction of this Court is not the appointment of a guardian of the property of the minor under S. 3, Majority Act (9 of 1875), because no appointment of the guardian of the property of a minor coparcener can be made, where there are adult coparceners, as the minor has only an undivided interest in the joint family property. In other words, they say that S. 3, Act 9 of 1875, contemplates the existence of separate property of the minor to which the guardian must be appointed.

I will first deal with the case law on the point. There can be no doubt that under the Guardians and Wards Act 8 of 1890 no guardian can be appointed of a minor coparcener's interest in the joint family property where there is any adult coparcener alive. This has been laid down in the cases of *Kajikar Lakshmi* v. *Maru Devi* (1), *Bindaji* v. *Mathurabai* (2) and the Privy Council case of *Gharib-ul-lah* v. *Khalak Singh* (3). In the Privy Council case a certificate of guardianship which was throughout the case assumed to be of the property was granted under S. 8, Act 40 of 1858, to the mother as guardian of a minor coparcener and the judgment of their Lordships which was delivered by Sir Arthur Wilson states as follows (p. 170 *of* 30 *I. A.*) :

"It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property."

Now the certificate in that case was granted under Act 40 of 1858 which was succeeded by the Guardians and Wards Act 8 of 1890. But it is to be noted that later on in their judgment at the same page of the report their Lordships, in dealing with the question of the certificate granted to another of the respondents who was also a coparcener but concerning whose age there was some doubt, state (p. 170 *of* 30 *I. A.*) :

"If it be true that the respondent's mother was appointed guardian of respondent 2 as well as of the third (as seems to have been assumed in India), that appointment might under Act 9 of 1875, S. 3, have the effect of prolonging the minority of that respondent until he attained twenty-one."

Therefore their Lordships expressed the opinion that although the certificate of guardianship was granted under Act 40 of 1858 the construction of S. 3, Majority Act 9 of 1875, might have the effect of prolonging the period of minority notwithstanding that in fact a guardian could not properly be appointed under Act 40 of 1858 of a minor coparcener's interest in the joint family property.

Further, the cases show that where the guardian is appointed under the inherent jurisdiction of the High Court such an appointment is valid. *In re, Jagannath Ramji* (4) Starling, J., held that the High Court had power to appoint guardian of the person and property of minor coparceners whether such minors possessed property or not. He states (p. 98) :

"There is no doubt that the Court of Chancery has always had the power of appointing guardians to infants on a proper case being

(1) [1908] 32 Mad. 139=1 I. C. 999=4 M. L. T. 462.
(2) [1905] 30 Bom. 152=7 Bom. L. R. 809.
(3) [1903] 25 All. 407=30 I. A. 165=8 Sar. 483 (P.C.).
(4) [1893] 19 Bom. 96.

made out, whether such infants have property or not: see *In re, Spence* (5), *In re, Fynn*,(6)—though it is ordinarily not necessary for a Court to interfere in cases where there is no property: *Wellesley* v. *Duke of Beaufort* (7). This power was possessed by the Supreme Court of Bombay under its charter, and was, amongst other powers, preserved to the High Court by the 24 and 25 Vict., c. 134, S. 9; and the Guardians and Wards Act 8 of 1890 also reserves the same power to the High Court."

Indeed, S. 3, Guardian and Wards Act provides that nothing in that Act shall derogate in any way from the jurisdiction of the High Court. The High Court, therefore, has in a proper case the jurisdiction which the Court of Chancery possessed to appoint guardians of the person or property of minors. Then, in the case of *In re, Manilal Hurgavan* (8) our own Appeal Court held that under its general jurisdiction the High Court had power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property. In that case the inherent jurisdiction was exercised in order to effect a sale of the family property and the Court considered it a proper case for the appointment for the reasons given by Sir Lawrence Jenkins, C. J., at p. 357 of the report. I, therefore, hold that the High Court has jurisdiction to appoint a guardian of the undivided share of a minor coparcener where there are no adult coparceners in a joint Hindu family.

Turning to S. 3, Majority Act, the words of the section merely exclude from the definition of a guardian one who is appointed as guardian for a suit within the meaning of Chap. 31, Civil P. C. There is nothing in the section which states that the minor must have separate property before a guardian of it can be appointed. It is my duty to construe the section as it stands and it clearly states that the minority is extended to the completion of the twenty-first year when a guardian of the property of the minor has been appointed. Nor would it be expedient for the Court to hold an inquiry in every case where a guardian of the property of a minor was appointed whether in fact the minor had separate property. I, therefore, hold that the period of minority, so far as defendant 1 in this suit is concerned, was extended to the completion of his twenty-first year.

Finally, it has been pointed out now that in Suit No. 2773 of 1926 which was a partition suit filed on 29th November 1926, by the present defendant 1's brother against his father and the present defendant 1, the plaintiff in that suit was under the ruling which I have now given also a minor at the date of the institution of that suit. But the answer to that appears to me to be that the plaintiff in that suit, who is now defendant 2 in this suit, completed his twenty-first year in January 1927 and adopted the proceedings in that suit and continued them. And here I may refer to the Privy Council case of *Gharib-ul-lah* v. *Khalak Singh* (3), which I have already referred to, where the point in the passage that I last cited from the judgment of their Lordships is met by them in the following terms (p. 171 *of* 30 *I. A.*):

"As to this it seems sufficient to say that respondent 2 is now of full age and able to bring his case before the Court; that at the time of the mortgages in question he was of full age according to the general Hindu law; that he executed the mortgages himself as a person of full age; and that if there were any grounds for exempting him from liability, it was for him to shew them, which he has failed to do so."

This is a very similar position to the position of the plaintiff in suit No. 2773 of 1926. Nor would the plaintiff's position in that case have been different if a next friend had been appointed for him in his place because the questions in that suit were questions of law and were fully argued for him. I may state that in his reasons for his order dated 19th March 1928, the learned Chief Justice also adopted the view that the plaintiff in Suit No. 2773 of 1926 had adopted and continued the proceedings in that suit after completing his twenty-first year. I, therefore, answer issue 1 in the affirmative.

I appoint Mr. Fahey guardian of defendant 1 for the suit. Liberty to the plaintiffs to amend the plaint by describing defendant 1 as a minor and bringing on record Mr. Fahey as his guardian ad litem. Mr. Fahey appointed guardian ad litem for defendants 3 and 4. The defendants waive service of the service of summons. Written statement to be filed by 26th March 1929, affidavit of

(5) [1847] 2 Phil. 247=11 Jur. 399=16 L. J. Ch. 309.
(6) [1848] 2 De G. & Sm. 457=13 Jur. 483.
(7) [1827] 2 Russ. 1.
(8) [1900] 25 Bom. 353=3 Bom. L. R. 411.

documents by the second proximo, inspection forthwith thereafter and hearing on 11th April 1929, subject to part heard

The plaintiffs to pay the costs of the trial of these two issues.

R.M./R.K. *Order accordingly.*

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* A. I R. 1929 Bombay 478

MARTEN, C. J. AND PATKAR, J.

Kershaji Dhanjibhai—Defendant 1—Appellant.

v.

Kaikhushru Kolhabhai and *others*—Respondents.

First Appeal No. 98 of 1926, Decided on 18th January 1929.

(a) Succession Act (39 of 1925), S. 59—Land in British India is governed by lex loci.

Land in British India is governed by the law of British India as lex loci and not by the law of the domcile of the temporary owner. [P 479 C 1]

(b) Civil P. C, O. 40—Receiver is not judicial officer and cannot also act as such.

Receiver appointed by Court is not a judicial officer. He is merely a custodian of properties by order of the Court. In that capacity it may be his duty to institute suit on behalf of the estate but it cannot be that any such officer can act as a Judge in the Court in which the suits are instituted. [P 479 C 2]

(c) Bombay High Court Rules (Original Side)—Commissioner and Master of Equity are judicial officers.

In Bombay, Commissioner and Master of Equity on the original side are judicial officers taking the place of a Judge. [P 479 C 2]

*** (d) Civil P. C., O. 26—Commissioner cannot be authorized to investigate as to heirs and properties of deceased in administration suits.**

There are certain limited powers in the Civil P. C., under which the Judge can delegate to the Commissioner or otherwise certain investigations but they do not include enquiries as to the heirs and the properties of the deceased in an administration suit. [P 479 C 2]

Jayakar and *R. J. Thakor*—for Appellant.

H. C. Coyajee and *H. V. Divatia*—for Respondents.

Marten, C. J.—This is a most unhappy example of the possibilities of litigation in India. The suit began 17 years ago in 1911, and we are yet at an appeal from a preliminary decree The suit was one for the administration and division of the estate of one Dhanjibhai who died in 1901. The parties are all Parsis. The voluminous pedigree shown in para. 2 of the plaint examplifies that the parties alleged to be interested are very numerous. Defendant 1 contends that even that list is not enough, and that there ought to be 10 or 11 parties added, and he has accordingly set up a rival pedigree. Naturally with such a large number of parties the litigation is delayed. But apart from that the parties spent the first two years of litigation in raising technical points as to parties and so on, and in that way they succeeded in litigating for many years without the slightest practical result.

The real contest in the case is as to the position of defendant 1. If the plaintiff's pedigree be looked at he will be found as the son of Pestonji, a brother of the deceased Dhanjibhai. Accordingly as a coheir he would in any event claim some share. But his real claim is in effect adverse to the estate. He claimed to be the adopted son of Dhanjibhai and to have acquired by adverse possession or otherwise the whole of the property either before the death of Dhanjibhai or at any rate by the date of the suit in 1911. Consequently, in this administration suit, there is, so to speak, a double action going on viz, one. as between the beneficiaries of Dhanjibhai including defendant 1, and another between Dhanjibhai's estate and defendant 1, who is claiming adversely. If only Dhanjibhai had left a will, the difficulties would have been solved, and defendant 1 would at once have been put to his election either to claim under the will or against it. But for the moment it seems to me that he cannot be put to his election. At any rate, that point has not so far been raised in the case.

Now I come to a most curious circumstance, and it is this that though defendant 1 put forward his plea of adverse possession under two branches, namely, (1) at Dhanjibhai's death, and (2) at the date of the suit, yet the lower Court only decided against him on the first branch, and did not hear the second branch notwithstanding that defendant 1 put in a formal purshis asking for that issue to be determined. As regards the first branch the issue was in a wide form. Defendant 1 does not now contend that at Dhanjibhai's death in 1901, defendant 1 had acquired a prescriptive right. That claim is now specifically abandoned at the Bar.

But what defendant 1 does claim before us is that he had a right by adverse possession at the date of the suit in 1911. For that purpose he relies on Arts. 142 and 144, Lim. Act. Further, he contends

that in order to take advantage of the requisite period, namely, 12 years, he will contend that his adverse possession began prior to the date of Dhanjibhai's death although it did not crystallize into an absolute right at his death. For the respondents it is frankly and fairly conceded that the learned Judge has left this point open. That being so, we are forced to take steps to see that the point is properly adjudicated on. This involves, I think, a special inquiry.

This brings me to the next important part of the case, namely, the order the Judge actually made. I say this, because although the memorandum of appeal raises some 31 objections to the preliminary decree, counsel for the appellant has not pressed a large number of them as they are really unarguable. I accordingly appreciate counsel's statement that although the lower Court found in his favour that in the Baroda State where the parties were domiciled, the custom of adoption did prevail among the Parsis, yet it also held that this custom would not prevail in British India as regards immovable property situate there. It is elementary international law that the law which governs the land of a particular nation is the law of that nation. Consequently, land in British India is governed by the law of British India as the lex loci and not by the law of the domicile of the temporary owner. It follows, therefore, that, having regard to the law of Britisn India and the statutory provisions which govern succession amongst Parsis, it is abundantly clear that there is no room in the law of British India for such a custom amongst the Parsis as is now put forward. Accordingly, the bulk of the points taken in appeal by the appellant must fail.

But as regards the order which the learned Judge made, two mistakes have been pointed out. For some reason, which I do not altogether understand, the learned Judge, notwithstanding his experience, has appprently classed the receiver with the Commissioner. Further, he has overlooked the fact that there is no jurisdiction to delegate to any commissioner certain matters like an inquiry as to heirs, because there is no power in that respect in the Code. His order directed certain inquiries to be made and certain accounts taken, and it proceeded·

"It is further ordered that Mr. Gulabbhai M. Desai be and is hereby appointed receiver in the suit for the purpose of the above inquiries who shall take all the necessary steps in the said behalf, and certify the result to this Court on or before 15th January 1925."

Now there are certain limited powers in the Civil Procedure Code under which the Judge can delegate to the Commissioner or otherwise certain investigations, but they do not include any of enquiries Nos. (1), (2) and (3). Still less has a receiver got anything to do with inquiries of that sort. In England a Master in the Chancery Division, and in Bombay the Commissioner and Master in Equity on the original side, are judicial officers taking the place of the Judge. A receiver on the other hand is not a judicial officer. He is merely a custodian of properties by order of the Court. In that capacity it may be his duty to institute suits on behalf of the estate in the Court of the Judge. It is unthinkable that any such officer should also be the Judge in the Court in which the suits are instituted.

Nor on the other hand has there been any prior order appointing a receiver in this suit. As to whether a receiver should now be appointed, it was faintly argued that he should. But this litigation has been going on for some 17 years. If a receiver in the ordinary sense of the word, namely, a receiver of the property, has not been found necessary for 17 years, I do not think that the present moment is one for appointing a receiver either on the ground of equity or otherwise. If we did so, what would at once happen would be a contest as to whether certain properties claimed by the receiver were the property of defendant 1 by adverse possession or otherwise. Therefore, no useful object could be gained by our now proceeding to appoint a receiver of the estate.

Further the learned Judge only appointed what he called a receiver for the purpose of the inquiries. I do not read this order as having appointed anybody a receiver in the ordinary proper meaning of that word. What the learned Judge seems to have done is, by a slip of the pen, to have written the word "receiver" instead of the word "Commissioner." But unfortunately even if that is the explanation, he had no power to appoint a Commissioner to make these inquiries

It follows, therefore, that the order must be varied, and it must be varied in this way : Inquiry No. (1) is to stand, but it will be limited to the properties in British India. Admittedly as regards property in the Baroda State, different considerations altogether apply. Then as regards inquiry No. (3) that will be an inquiry as to the heirs of the deceased entitled to a share in his immovable property in British India and the share payable to each. Then there must be a supplementary inquiry. I think, it should be inquiry No. (1A). An inquiry as to whether defendant 1 acquired a title by adverse possession at the date of this suit in 1911 to the said immovable properties or any part thereof. Next the direction about Mr. Gulabbhai M. Desai being appointed a receiver and so on must be struck out entirely. The learned Judge is to hold these inquiries himself. It may be urged that alterations should be made in the law so as to give similar facilities to the mofussil Courts for delegating inquiries as exist in the Superior Courts in England and in India. But that is not a matter for us to deal with to-day.

Then I come to this point : Although the parties have been litigating for seventeen years there is still some uncertainty as to what the alleged immovable property in British India of the deceased consisted of. One would have thought that after this lapse of time this single point might at any rate have been cleared up. But as it has not been there will be a direction following inquiry No. (1A) that the plaintiff and defendant 1 do each furnish particulars of what he claims that the estate of the deceased Dhanjibhai consisted of at the latter's death in 1901. With regard to the particulars to be furnished by defendant 1, he is further to state what portions of the immovable property of Dhanjibhai he claims to have acquired by adverse possession as at the date of the suit in 1911. There is also some question as to whether the plaintiff claims any land alleged to have been purchased by defendant 1 out of the income or otherwise of Dhanjibhai's estate. But if any such claim is put forward, particulars are to be given to defendant 1. I would add I recognize that in some cases it would be impracticable in a suit of this nature to decide an adverse claim to the land of a third party particularly if any eviction was sought for. But here, as I have already pointed out defendant 1 has two claims : (1) as beneficiary and (2) adversely to the estate. The litigation is already decided in part against him as regards one of these adverse claims and it may be that the other branch of his adverse claim can also be decided in this suit. Therefore, we need not, I think, contemplate the possibility of the learned Judge having to direct a suit to be brought by some receiver to be appointed of the estate of Dhanjibhai against defendant 1, as a hostile party.

Next with regard to costs we do not disturb the order as to costs in the lower Court but as regards the costs of the appeal the position is this : We appreciate that much time has been saved by the course the appellant's counsel has taken but that does not alter the fact that up to the last moment his client was putting forward a large number of points which if successful would have resulted in the suit being dismissed. He has failed in that. His only success is as to the modification of the terms of the actual order the learned Judge made. In those circumstances, we think the right order will be that the appeal must be dismissed save as to the variation in the preliminary decree which I have already indicated and that with regard to the costs of the appeal the appellant should pay three-fourths of the costs of the respondents represented by Mr. Coyajee. The remaining one-fourth of their costs will come out of the estate of the deceased. Mr. Coyajee's clients to get one set of costs between them. As regards the other respondents represented by Mr. H. D. Thakor they support the appellant. Accordingly, they will bear their own costs of the appeal.

Cross-objections must be dismissed with costs.

Patkar, J.—I agree.

V.B./R.K. *Order accordingly.*

END